HMTQ v. Shortt, 2002 NWTSC 47

Date: 2002 07 04
Docket: CR 2002 000038

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

ALLAN SHORTT

Respondent

Crown sentence appeal; appeal allowed and sentence varied.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on June 27, 2002

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Counsel for the Appellant: Noel Sinclair

Counsel for the Crown: Paul N.K. Smith

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REASONS FOR JUDGMENT

[1] This is a Crown appeal of a sentence imposed in the Territorial Court upon the respondent's conviction on four offences. The issue is the fitness of a conditional discharge for crimes of domestic violence.

[2] The respondent was charged with five offences:

(a) assault on T.S. (the respondent's estranged spouse);
(b) uttering a threat to T.S. to cause the death of T.S.;
(c) uttering a threat to T.S. to cause the death of K.K.;
(d) breach of recognizance (being a peace bond entered into by the respondent); and,
(e) criminal harassment.

[3] The Crown proceeded summarily and the respondent pleaded not guilty on all charges. A trial was held before a Territorial Court judge and the respondent was found guilty on the first four charges. The charge of harassment was dismissed. On February 22, 2002, he was sentenced and given a conditional discharge with probation for one year. The probation order contains numerous conditions respecting non-contact with

T.S. and K.K. and a requirement for supervision and community service work. I was told that since sentencing the respondent has complied with all directions of his probation officer and has completed the community service work.

[4] The evidence at trial revealed a history of domestic conflict. The respondent and the victim T.S. were married with two children. They separated in late 1999. The children remained with T.S. There were numerous incidents between the two spouses and in August, 2000, each entered into a recognizance pursuant to s. 810 of the Criminal Code. These required each to keep the peace and the respondent was prohibited from direct contact with T.S. for the first 8 months. Subsequent to this, and at the time of these offences, T.S. was in a relationship with K.K.

[5] With respect to the offences in question, T.S. testified that the respondent came to her home around midnight on August 1, 2001 (while the recognizance was still in effect). T.S. went outside and the respondent yelled at her calling her various derogatory names. He started grabbing at her clothing at which point T.S. slapped him. The respondent then punched T.S. in the mouth, knocking her to the ground. The respondent left when a neighbour yelled at him. The respondent testified that he went to the home to check on the well-being of his children. He said that T.S. started yelling at him and hitting him and, in an effort to block her blows, he accidentally struck her on the chin.

[6] The victim T.S. further testified that on the following evening the respondent telephoned her twice and said that he was going to kill both her and K.K. The victim called the police and when the respondent called a third time the telephone was answered by a police officer. The respondent testified that his sole purpose in calling was to speak to the children and he denied making any threats whatsoever.

[7] In convicting the respondent, the Territorial Court judge rejected his evidence in preference to the evidence of T.S. The trial judge further stated that the respondent's evidence did not raise a reasonable doubt and he was convinced of guilt on the totality of the evidence. He characterized the respondent's actions and emotions as being driven by jealousy, fixation, attempts to control T.S.'s life, and an overall inability to cope with the separation.

[8] At the sentencing hearing the Crown sought a short term of incarceration. It was pointed out that the respondent was a first offender, and someone of otherwise good character, but, in Crown counsel's submission, incarceration was warranted in furtherance of the principles of deterrence and denunciation. In response to an inquiry

from the trial judge as to whether imprisonment was necessary, Crown counsel replied that actual imprisonment would not be necessary provided that safeguards could be put in place to protect the victim T.S. It was also noted that the respondent had spent three days in custody between the time of his arrest and his release on bail.

[9] Defence counsel cited the respondent's exemplary work record and provided various character references in support. With respect to an appropriate sentence, counsel started by suggesting a conditional sentence or, alternatively, a suspended sentence and probation. At that point the trial judge interjected to inquire why he should begin by thinking of imprisonment. In his view he should "begin by thinking about the most lenient ways of sentencing... and if none of them is fit and proper then I (meaning the trial judge) reach imprisonment". It was then that defence counsel rephrased his submission by asking for a conditional discharge.

[10] The conditional discharge option is found in s.730(1) of the Criminal Code:

> 730.(1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[11] The trial judge, in his reasons on sentence, recognized the two essential criteria for a discharge: (i) that it be in the best interests of the respondent; and (ii) that it not be contrary to the public interest.

[12] On the question of the respondent's best interests, the trial judge said:

> I concur with the Crown and the defence that it would in the circumstances of this offender, for having committed these offences in these circumstances, be in his best interest to grant a discharge.

[13] The reference to the Crown position on this point requires some clarification. Crown counsel at the sentencing said as follows on the issue of a discharge being in an accused's best interests:

> I wouldn't say that the imposition of a conditional discharge would be against the accused's best interests. It would I think be a surprising case where it was not in the accused's best interests not to receive a conditional discharge.

This was, I think, more in the nature of a general comment as opposed to some specific, considered opinion as to the respondent's interests particularly.

[14] On the question of the public interest, the trial judge commenced by a recognition that, while a discharge is available for any type of offence, it would be rare to grant one in a case of domestic violence:

> Even though a person who assaults a spouse may receive a discharge, even though somebody who threatens to kill somebody may receive a discharge, it is not common at all and probably unusual, if not rare, for discharges to be given for these offences when combined as they are in this case. Why are they unusual? They are unusual because of the need to send a message to the public that the conduct of assaulting one's spouse - which involves a breach of trust even if separated - and conduct of threatening to kill people will not be treated unreasonably leniently by the courts. All of this is designed to give the public confidence that the courts are treating public protection as the single most important goal of the sentencing process, there being a number of principles and objectives to apply in attaining that goal.

[15] The trial judge then went on to elucidate why, in his opinion, a discharge was not contrary to the public interest in this case:

> If there were a conditional discharge that could protect the public, protect Mrs. Shortt, affect rehabilitation, address denunciation and that could meet the other objectives and principles of sentencing, then it could be said that it is not contrary to the public interest to grant one. If all of those factors could be met, the answer to the issue of the public interest would be addressed in the accused's favour.
>
> Defence counsel says that there is no demonstrable reason not to grant a discharge. The defence says it is not contrary to the public interest to grant one. I agree with defence counsel. I am in agreement because in addressing all of those factors that I mentioned a few moments ago, I am unable to conclude that it would harm the public interest to grant a conditional discharge. If I cannot conclude that it would harm the public interest to grant one, it follows that I conclude it is not contrary to the public interest to grant one.

[16] The Crown now appeals from this disposition on several grounds. These are expressed as the following issues in the Crown's written brief:

1) Did the learned trial judge err in principle in reaching the following conclusions:

   a) That on the evidence before the court a conditional discharge is in the best interest of the accused; and
   b) That on the evidence before the court a conditional discharge is not contrary to the public interest.

2) Is a conditional discharge with probation a demonstrably unfit sentence having regard to the number and gravity of offences as well as the principle that general deterrence and denunciation must be the primary considerations on sentencing in cases of domestic assault?

3) Is a conditional discharge with probation a demonstrably unfit sentence having regard to the principle that it is inappropriate to grant a discharge where an accused fabricates evidence in an attempt to escape liability?

Standard of Review:

[17] The standard for appellate review of a sentence is by now well-known. The sentence imposed by a trial court is entitled to considerable deference from an appellate court. There is no basis for interference simply because an appellate court thinks that a different sentence ought to have been imposed. The grounds for appellate intervention were succinctly put by Lamer C.J.C. in *R.* v. *C.A.M.*, [1996] 1 S.C.R. 500, at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.

[18] In *C.A.M.*, Lamer C.J.C. also went on to discuss the implications of the deferential standard of review (at para. 91):

> ... where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing

> submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of an in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

Defence counsel argued that these comments are particularly apt in this case considering the extent to which the trial judge went in crafting specific conditions appropriate to the circumstances of this case.

Sentencing Principles & the Discharge Option:

[19] The trial judge's comment to the effect that he should start by considering the most lenient sentencing option available is certainly in accord with the principle of restraint in sentencing embodied by the provisions of Part XXIII of the *Criminal Code.*

[20] The purpose of sentencing, as outlined in s.718 of the *Criminal Code*, is to contribute to a just, peaceful and safe society by the imposition of sanctions that have, among others, the objectives of denunciation, deterrence, rehabilition, reparations to victims, and the promotion of a sense of responsibility in offenders. The fundamental sentencing principle, set out in s.718.1, is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This necessarily requires an individualized approach. Another principle is, as stated in s.718.2(e), that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[21] The Code, however, also stipulates that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. One of these circumstances, identified in s.718.2(a)(ii), is the abuse of a spouse. The significance of this circumstance was discussed in *R.* v. *Brown* (1992), 73 C.C.C. (3d) 242 (Alta. C.A.), at p.249:

> ... When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape. Such women's financial state is frequently one of economic dependence upon the man. Their emotional or psychological state militates against their leaving the relationship because the abuse they suffer causes them to lose their self-esteem and to develop a sense of powerlessness and inability to control events.

It seems to me that these observations are appropriate as well in situations of violence between estranged couples. This is particularly so where children are involved and there are ongoing financial and emotional entanglements.

[22] The principle of restraint animates the discharge option in the overall sentencing regime. As discussed by Prof. Allan Manson in his text, *The Law of Sentencing* (2001), at pages 210-211, the 1969 report of the Ouiment Committee on Corrections expressed concern about the handicaps that accompany a criminal conviction and recommended that courts have the option to not record a conviction after a finding of guilt. What is now s.730 of the Code was introduced in 1972. Its objective was always to enable courts to relieve against both the fact and stigma of a criminal conviction. As Prof. Manson states (at p.213):

> It is easy to understand the rationale for a discharge in the abstract. Situations will arise, especially for young first offenders, where the life-long stigma and potential adverse consequences of a conviction are not warranted by the conduct in question. However, other cases move beyond the abstract and present real and immediate consequences which will flow directly from a criminal conviction.

This is a point also made by Clayton Ruby in his text, *Sentencing* (1999, 5th ed.), at p. 310:

> Implicit in the provision of this alternative disposition is a recognition by Parliament that a criminal conviction as such may be a form of punishment and that punishment is neither appropriate, nor necessary, in some instances. On occasion, very harsh effects upon an accused person's life can result from the acquision of a criminal record and this legislation is one way of relieving this consequence in appropriate cases.

[23] All this convinces me that the fundamental aim of the discharge option is the avoidance of a criminal record. As a general proposition, discharges are granted in circumstances where the nature of the offence, and the age, character and circumstances of the offender, are such that the recording of a criminal record would be disproportionate and unjust in relation to the offence. In this case Crown counsel has candidly conceded that it is the fact of no conviction being recorded, for these crimes, that is the focus of the Crown's appeal. Essentially the Crown says that the use of the discharge provision in these circumstances is wholly inappropriate and therefore the sentence under appeal is demonstrably unfit.

[24] Numerous cases have interpreted the criteria set out in s.730(1) of the Code: *R.* v. *Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (Ont. C.A.); *R.* v. *Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.); *R.* v. *MacFarlane* [1976], A.J. No. 441 (C.A.). They generally agree that the first condition, that a discharge be in the best interests of the accused, pre-supposes that the accused is a person of good character without previous convictions, that it is not necessary to deter the accused from further offences or to rehabilitate him, and that the entry of a conviction may have significant adverse repercussions. The second condition, that the grant of a discharge not be contrary to the public interest, addresses the public interest in the deterrence of others. The cases also note that, while a need for general deterrence is normally inconsistent with the grant of a discharge, it does not preclude the judicious use of the discharge option. This option, however, should not be applied routinely to any particular offence (nor is it precluded from use in respect of any offence other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life). Finally, the discharge option should not be resorted to as an alternative to probation or a suspended sentence.

[25] The cases also emphasize that the power to grant a discharge should be used sparingly. This was the view expressed in *MacFarlane* (*supra*) at para. 13:

> It is to be borne in mind that one of the strongest deterrents to criminal activity, particularly in the case of those who have no records, is the fear of the acquisition of a criminal record.

[26] The *MacFarlane* judgment also noted that offences involving violence are generally not amenable to the granting of a discharge: see also *R.* v. *Thibeault* (1987), 76 A.R. 380 (C.A.); *R.* v. *Ryback* (1995), 61 B.C.A.C. 239 (C.A.). In particular, cases of domestic violence, since they engage considerations of general deterrence, and because of the prevalence of such crimes in all communities and the vulnerability of its victims, are ordinarily unsuitable for the use of the discharge option: *R.* v. *Thompson*, [1995]

B.C.J. No. 547 (C.A.); *R.* v. *Daley*, [1997] N.S.J. No. 325 (S.C.); and see *R.* v. *MacLean*, [1991] A.J. No. 1150 (Prov. Ct.). This is not meant to create an offence-specific presumption that takes a certain type of offence out of consideration for a discharge (something much criticized by the Supreme Court of Canada in the context of conditional sentences in *R.* v. *Proulx*, [2000] 1 S.C.R. 61); it is simply a recognition that a greater emphasis on the need for general deterrence will usually mean that a discharge is contrary to the public interest.

[27] I will address the grounds of appeal under the headings of the two criteria stipulated by s.730(1) of the Code. All of the grounds come within one or other of these headings.

The Best Interests of the Accused:

[28] On the hearing of this appeal, respondent's counsel argued that the Crown should not be allowed to resile from the position it conceded at the sentencing hearing, that being that a discharge was in the respondent's best interest. This was in reference to Crown counsel's comment at sentencing to the effect that it would be hard to conceive of a situation where a discharge would not be in an accused person's interest. The trial judge took this as a concession on the part of the Crown.

[29] Generally speaking, the Crown will not be entitled on appeal to repudiate the position taken at trial: *R.* v. *Wood* (1988), 43 C.C.C. (3d) 570 (Ont. C.A.). But there is no hard and fast principle that precludes an appellate court from altering a sentence that is unfit notwithstanding the Crown's change in position: *R.* v. *Marks* (1994), 91 C.C.C. (3d) 421 (Nfld. C.A.).

[30] In my opinion, there is no change in the Crown's position here. I interpret the comments of Crown counsel at the sentencing hearing as being a general comment on the benefits of a discharge for any accused person. The Crown's position on appeal, however, is that this criterion is not satisfied by such a general application but requires evidence as to significant adverse repercussions specific to the respondent that are likely to result from a criminal record.

[31] At the sentencing hearing defence counsel pointed out the good background of the respondent and his excellent work record. There were no representations as to any specific adverse repercussion that may flow to the respondent from a conviction. Indeed his employer was aware of the proceedings, was supportive, and had taken steps to accommodate the respondent as a result of his difficulties.

[32] A review of the case law reveals that in many cases a discharge was granted where a conviction would result in an accused losing his or her employment, or becoming disqualified in the pursuit of his or her livelihood, or being faced with deportation or some other significant result. These are examples of highly specific repercussions unique to the specific accused. But, such specific adverse consequences are not a prerequisite. In my opinion, it is sufficient to show that the recording of a conviction will have a prejudicial impact on the accused that is disproportionate to the offence he or she has committed. This does not mean that the accused's employment must be endangered; but it does require evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime (unless the particular offence is itself harmless, trivial or otherwise inconsequential): see *R.* v. *Doane* (1980), 41 N.S.R. (2d) 340 (C.A.), at pages 343-344; and *R.* v. *Moreau* (1992), 76 C.C.C. (3d) 181 (Que. C.A.).

[33] The evidentiary record before the trial judge revealed a mature man who had been obsessed for a long time over his marital difficulties and his wife's chosen way of life. There was a history of difficulties between them. While he had no previous criminal convictions, the respondent had been previously involved with the criminal process by entering into a peace bond (as had his wife). This demonstrates a pattern of behaviour that reflects on the respondent's character and if anything should have indicated a need for specific deterrence, especially in view of his failure to obey the peace bond. The acts of the respondent for which he was found guilty were ones that were not impulsive but ones that occurred over two days and required some deliberation on his part. His actions were intimidating and meant to intimidate. There was no evidence of significant repercussions (other than as would be experienced by any one convicted of a crime). In all of these circumstances, in my respectful opinion, the trial judge erred in his assessment of the first criterion.

The Public Interest:

[34] The second criterion requires that a discharge not be contrary to the public interest. Most of the case law identifies the "public interest" with the need for general deterrence. Yet, in my opinion, there is a further aspect to the public interest, one familiar to those who work with the *Criminal Code* bail and bail pending appeal provisions, that being the need to maintain the public's confidence in the justice system. From this perspective the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice. The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the

relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice. In my opinion, on both aspects of general deterrence and the need to maintain public confidence, the granting of a conditional discharge in this case is not a fit disposition.

[35] The need for general deterrence is particularly pronounced since these offences arose in a domestic context: see *Brown* (*supra*); *R.* v. *Friginette*, [1994] B.C.J. No. 3087 (C.A.). This also applies to acts of violence or threats of violence to estranged partners: *R.* v. *Eyo*, [1983] A.J. No. 157 (C.A.). The respondent's actions, as noted previously, were not impulsive. They were the culmination of what the trial judge found to be a persistent pattern of behaviour that included aggressive conduct and an overall inability on the part of the respondent to cope with the separation. The fact that the assault was relatively minor is off-set by the repeated threats made over the next day, threats of a most serious kind. The combined effect and nature of these crimes require a sanction, one that sends a message to others and demonstrates that this type of behaviour is not tolerated. The respondent had no excuse; indeed he offered none since his defence was a denial of any criminal act.

[36] This raises a further point argued by Crown counsel: that a discharge is inappropriate where an accused lies to the court in an attempt to escape liability. An express finding that the accused lied under oath at his or her trial has been held to be a relevant consideration in the refusal of a discharge on the public interest ground: *R.* v. *Kucher*, [1994] A.J. No. 365 (Prov. Ct.); *R.* v. *Klijn*, [1997] A.J. No. 182 (Q.B.). In the present case, however, all that can be said is that the trial judge rejected the respondent's testimony. I am not convinced that mere rejection of testimony is the same as concluding that the witness lied. Nevertheless, what the trial proceedings do reveal is a lack of remorse or any acknowledgement of responsibility on the part of the respondent. While his decision to go to trial is not to be held against him, what it means is that the respondent does not have the significant mitigating benefits that come with signs of honest remorse.

[37] I should at this point refer to a case that was not relied on by either counsel at the hearing. This is a judgment of deWeerdt J., formerly of this court, in *R.* v. *Kilukishak*, [1989] N.W.T.J. No. 86. That case was also a Crown appeal against a conditional discharge imposed after a guilty plea to charges of spousal assault and breach of undertaking. Thus it cannot be said that this disposition is never available in such cases. The accused was a young first offender living in Pond Inlet (in what is now Nunavut). The appeal was dismissed primarily because of the significant rehabilitative efforts made by the offender through the aid of his family and community intervention. The case,

however, cannot be viewed as an example of the less-serious nature of domestic violence in this jurisdiction or the lack of a need for general deterrence. On the contrary, deWeerdt J. noted explicitly that spousal assault is "a social problem of grave proportions". Unfortunately there is no cause to think the situation is much better now. The prevalence of crimes of domestic violence is a factor that also militates against the granting of a discharge.

[38] In my respectful opinion, the granting of a conditional discharge is contrary to the public interest and is a demonstrably unfit disposition for these crimes. The principle of deterrence and the need to maintain the public's confidence in the justice system require that there be some lasting consequence for this type of behaviour. I have not ignored the fact that the trial judge went to great lengths to craft conditions for the probation order that would protect the victims and impose some obligations on the respondent. But that in itself, in my opinion, fails to recognize the point about granting a discharge. It is meant to alleviate the disproportionate burdens imposed by a criminal record. In my view there is nothing in the evidence to support such indulgence from the perspective of either the accused's or society's interests.

Disposition:

[39] The focus of the Crown appeal was on the fact that no convictions would be recorded in this case. The Crown, while still maintaining that a short period of imprisonment would have been appropriate, did not seriously press to have the respondent sent to jail now, nor do I think there is any justification in doing so.

[40] For these reasons, leave to appeal is granted and the appeal is allowed. The conditional discharge is set aside, convictions will be recorded on all four charges, and a suspended sentence imposed with probation for one year (from the date of the original probation order). All the conditions on the original probation order will continue.

J.Z. Vertes
J.S.C.

Dated this 4th day of July, 2002.

Counsel for the Appellant: Noel Sinclair

Counsel for the Crown: Paul N.K. Smith

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