

R. v. Mulligan, 2002, NWTSC 34

S-1-CR2001000085

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

KEVIN MICHAEL MULLIGAN



Transcript of the Oral Reasons for Sentence by The Honourable Justice J.Z. Vertes, at Yellowknife in the Northwest Territories, on April 18th A.D., 2002.

APPEARANCES:

Ms. S. Kendall: Counsel for the Crown
Mr. G. Boyd: Counsel for the Accused

Charge under s. 380(1) Criminal Code of Canada

1 THE COURT: The offender, Kevin Michael
2 Mulligan, has pleaded guilty to a charge of fraud
3 contrary to Section 380(1) of the *Criminal Code*.
4 That offence carries a potential maximum penalty of
5 ten years in jail.

6 In this case the Crown suggests, as punishment,
7 a term of actual imprisonment of 18 to 24 months.
8 The defence submits that this is an appropriate case
9 for a conditional sentence, that is to say, no
10 actual imprisonment.

11 The plea of guilty came in the course of the
12 trial on this charge, indeed it came partway through
13 the offender's cross-examination, in front of the
14 jury, by Crown counsel. While all guilty pleas are
15 worthy of some credit, some are obviously worth more
16 than others. Here, I give some credit for the guilty
17 plea but, in all frankness, not very much. It came
18 in the midst of a very effective cross-examination
19 at a point where the offender literally put himself
20 in a box by what appeared to me at least to be some
21 blatant lies. I do not criticize his counsel in any
22 manner. Defence counsel, in my opinion, has done the
23 best that he could with an overwhelming case against
24 his client.

25 The fraud was a business venture proposed by
26 the offender to Jim Maysenholder. The project was to
27 purchase some snowtrac vehicles from government

1 surplus in Ontario, ship them to the Northwest
2 Territories, and resell them for a profit. The
3 offender was to handle all of the details and
4 Mr. Maysenholder was to put up the money.
5 Unfortunately there was no evidence of the existence
6 of these vehicles much less any evidence of any
7 actual attempts to purchase them. The offender
8 forged correspondence from people in Ontario so as
9 to deceive Mr. Maysenholder. Eventually the
10 deception was discovered. Mr. Maysenholder has lost
11 \$9,500 in this scheme.

12 The offender, although he pleaded guilty and
13 although he has said that he is sorry, still shows
14 some signs of a lack of remorse. He still refers to
15 this as a business venture gone bad. It was not. I
16 think the evidence is overwhelming that it was a
17 criminal fraud.

18 The offender is a mature man, 50 years old,
19 responsible for a spouse and a young child. He is
20 experienced in construction engineering. He is
21 evidently well-liked as indicated by letters of
22 support. Unfortunately, however, this is not the
23 first time that he has ever been convicted.

24 In 1993, in Ontario, the offender was convicted
25 of four offences. One was a conviction for fraud
26 for which he was sentenced to six months in jail. He
27 was also convicted of theft for which he was

1 sentenced to nine months in jail (concurrent). He
2 was also convicted of obtaining merchandise by false
3 pretences and breach of undertaking. I recognize
4 that these convictions are almost ten years old but
5 they have an impact on this sentencing, particularly
6 so because of the fact that the past convictions, as
7 the present one, were not the acts of some impulsive
8 youth. They were the acts of a mature man; a man
9 with an education and experience in business.

10 The fundamental principle of sentencing is
11 proportionality. A sentence must be proportionate to
12 the seriousness of the offence and the degree of
13 blameworthiness of the offender. It is by necessity
14 an individualized approach.

15 Counsel have referred me to numerous relevant
16 cases for which I thank them. In some cases of
17 fraud, even ones more apparently serious than this
18 one, conditional sentences were imposed. In other
19 cases, imprisonment was imposed. This just
20 illustrates the individualized approach that I
21 mentioned.

22 There is no doubt that the conditional
23 sentencing provisions of the *Criminal Code* were
24 introduced as a way of expanding the use of
25 sentencing practices other than actual
26 incarceration. I recognize that no type of crime and
27 no type of offender is automatically eliminated from

1 consideration. In this case, I would not have
2 imposed in any event a sentence of more than two
3 years of imprisonment so I have given, as I must,
4 serious consideration to the appropriateness of a
5 conditional sentence.

6 I readily acknowledge that the offender is not
7 a danger to the safety of the community. I also
8 recognize that conditional sentences are
9 particularly well-suited to non-violent offences and
10 offenders. But there is, in my view, a greater
11 concern here.

12 Obviously one of the objectives of sentencing
13 is the deterrence of the offender and others from
14 committing similar crimes. A conditional sentence
15 undoubtedly has deterrent effect but, in all
16 honesty, not as much as imprisonment.

17 Here, we have a mature offender who engaged in
18 a fairly deliberate scheme of deceit for, frankly,
19 not that much money. But it certainly took some
20 planning on his part. He has already in his life
21 been convicted and punished for the same type of
22 conduct. In this situation the degree of personal
23 moral blameworthiness on the part of the offender is
24 obviously and particularly high. Hence the need to
25 satisfy the objective of deterrence is high. And,
26 when punitive objectives such as deterrence and
27 denunciation are particularly pressing, then

1 generally incarceration is the preferable and more
2 appropriate sanction.

3 There is no evidence that the offender engaged
4 in this scheme because of external financial or
5 emotional pressures. There are indeed, with the
6 exception of the guilty plea, even coming as late as
7 it did, no mitigating circumstances.

8 For these reasons, I have concluded that there
9 is no alternative to a term of imprisonment.

10 Stand up, Mr. Mulligan.

11 Mr. Mulligan, you are a mature man and an
12 intelligent one so I am not going to lecture you any
13 further. I am sure that you understand the sentence
14 and why I impose it.

15 The sentence is that you are to serve a term of
16 imprisonment, of actual incarceration, of 12 months.
17 In addition, I place you on probation for a period
18 of 18 months following your release. The terms of
19 that probation will be the usual statutory terms;
20 that is, you are to keep the peace and be of good
21 behaviour. If you commit any further crimes during
22 that period, if you do not follow these conditions,
23 you may be charged for that. You are to report to a
24 probation officer upon your release. You are to
25 make restitution during the period of your probation
26 in the sum of \$9,500 to Jim Maysenholder. Do you
27 understand those terms, sir?

1 THE ACCUSED: Yes, sir.
2 THE COURT: Under the circumstances, I
3 decline to impose a victim of crime fine surcharge.
4 You may have a seat.
5 Is there anything else, counsel, that I have
6 neglected?

7 MS. KENDALL: No, sir.

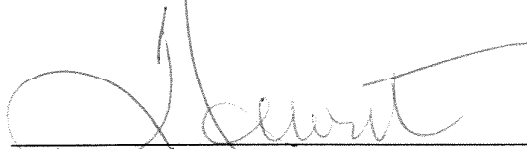
8 MR. BOYD: No, sir.

9 THE COURT: Then thank you for your
10 submissions, counsel, and we will close court.

11 (AT WHICH TIME THE ORAL REASONS FOR SENTENCE CONCLUDED)

12 Certified pursuant to Rule 723
13 of the Supreme Court Rules.

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Lois Hewitt,
Court Reporter

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