R v. Gordon, 2005 NWTSC 49 Date: 2005 05 10
Docket: S-0001-CR2005000016

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LLOYD GORDON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant appeals from a total 12 months' jail sentence imposed on him by a justice of the peace after guilty pleas to two charges of assault with a weapon, contrary to s.267(a) of the *Criminal Code.* At the hearing of the appeal, I allowed the appeal and substituted a sentence of time served , indicating that written reasons would follow. These are the reasons.

[2] Briefly, as to the facts, the first offence involved the Appellant entering the front door of a local residence. He was intoxicated. He was ushered out and the door was locked. He went to a window of the house and waved a pocket knife through the window at the male victim who was in the house.

[3] The second offence occurred three days later. The victim was sleeping on a couch at her aunt's home. The Appellant was then the aunt's boyfriend. The victim woke to find the Appellant lying beside her. She pushed him off the couch and he went into a bedroom, where he began arguing with the aunt. The victim was concerned he might assault the aunt, so she intervened by pushing him and yelling at him. As the victim left the room, the Appellant pushed her twice, hard enough that she fell, and then struck her three times with a kitchen chair, hitting her on the left

arm, the back of her head and her back. She was slightly injured, frightened and crying. The Appellant, who was intoxicated when this occurred, threw the chair at the two women. The victim then left the residence. There was no evidence about what her injuries were or how long they lasted.

[4] The Appellant made his first appearance before a justice of the peace and entered guilty pleas to the two charges. The police prosecutor and the courtworker who represented the Appellant indicated that they were presenting a joint submission for sentences of two months' jail on each charge, to be served consecutively.

[5] Without inviting or hearing any submissions as to how the joint submission was arrived at, the justice of the peace rejected it, and imposed sentences of six months consecutive on each charge, for a total of 12 months.

[6] Sentencing is a matter within the discretion of the sentencing judge. As the then Chief Justice of Canada Lamer said in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, "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."

[7] In my view, the justice of the peace did err in principle in this case by rejecting the joint submission without first giving the police prosecutor and the courtworker the opportunity to explain why they had agreed on it and what was taken into consideration in arriving at it. The cases cited by counsel on this appeal and others from this jurisdiction, for example, *Knutson v. H.M.T.Q.*, 2001 NWTCA 3, make it clear that sentencing judges should follow that procedure. From cases such as *R. v. G.W.C.* (2000), 150 C.C.C. (3d) 513 (Alta. C.A.) and *R. v. Sinclair*, [2004] M.J. No. 144; 2004 MBCA 48, the recommended procedure may be summarized as follows:

(1) the sentencing judge should give the joint submission serious consideration;

(2) the sentencing judge should depart from the joint submission only if there are cogent reasons for doing so, for example, if the sentence is unfit or unreasonable or contrary to the public interest;

(3) to determine whether there are cogent reasons to reject the joint submission, the sentencing judge must take into account all the circumstances underlying the joint submission;

(4) the sentencing judge should inform counsel during the sentencing hearing if he or she is considering rejecting the joint submission and allow counsel to make submissions justifying the joint submission;

(5) if the sentencing judge does reject the joint submission after hearing counsel on the reasons behind it, the sentencing judge must provide clear and cogent reasons for doing so.

[8] There may be many reasons behind a joint submission. Very often, a joint submission is the result of what is commonly called a "plea bargain". The plea bargain may have been arrived at for a number of reasons on the part of either the Crown or the accused or both. For the Crown, it may be the result of evidentiary problems or reluctant or uncooperative witnesses. For the defence it may be a wish on the part of the accused to take his punishment and get the matter dealt with. There may be all sorts of other reasons, but the main point is that it is important that the sentencing judge inform himself or herself before rejecting the joint submission. Plea bargains and joint submissions mean that trials do not have to be held, witnesses are not inconvenienced or embarrassed by having to testify in court and the workload of the courts can be dealt with in a more expedient and orderly fashion than if every matter requires a trial. Therefore, reasonable plea bargains and joint submissions should be encouraged, bearing in mind of course that the sentence is always in the court's discretion.

[9] In this case, the justice of the peace was told that there was a joint submission for two months on each charge consecutive. He then told the Appellant that he would like to hear from him "what's going on here". In my view that cannot be construed as an invitation for an explanation as to the reasons behind the joint submission, as submitted by Crown counsel on this appeal. After the Appellant spoke briefly about his drinking problem, the justice of the peace said the following:

> Well, you have been in trouble since 1997. That's eight years. Seven and a half, I guess. However, you are a danger to the community and yourself. You've done some substantial time here; 14 months, 30 months. I'm sorry, but I can't agree with Crown and Defence on this one. Six months on count one, six months on count two,

> consecutive. I want you off the street. (Inaudible) You decide while you're inside what you're going to do about your temper and your drinking. But that's not up to the people of this community to have to deal with something like that. I really look down in askance upon people who use weapons. It means that there's forethought there. And you have this knife in your hockey bag; you tried to lie your way out of that. You have a prior conviction for sexual assault. It sounds to me like that was coming up there if that young lady hadn't objected. No, it wasn't. That's fine. Well, six months consecutive on each count to be served in whatever jail is decided.

[10] There was no dispute on this appeal that the Appellant's early guilty pleas were an important motivating factor in the joint submission. However the justice of the peace made no reference at all to the guilty pleas and focussed solely on aggravating factors. An early guilty plea, whether as part of a joint submission or not, is almost invariably considered a significant mitigating factor. In this case, the failure by the justice of the peace to make any reference to the guilty pleas and his outright rejection of the joint submission suggest that no credit at all was given for the guilty pleas. This amounts to failure to consider a relevant factor.

[11] Counsel for the Appellant also challenged some of the comments made by the justice of the peace. Although the transcript refers to the justice of the peace saying that the Appellant had been in trouble since 1997, the rest of the context makes it clear, in my view, that he realized that the Appellant had not been in trouble since 1997. A sentencing judge does, however, have to be careful not to draw conclusions about the facts that are generalizations or speculation. For example, the justice's comment that when people use weapons, it means there is forethought, may not have been applicable in this case, where the Appellant was described as intoxicated at the time of the offences. The justice of the peace also seems to have concluded that the Appellant was planning to sexually assault the victim of the second offence or that he would have done so had she not woken up. It appears from the above excerpt that he accepted that was not the case, but by then he had already decided on the sentence. This too constitutes an error in principle.

[12] Crown counsel on this appeal relied on the case of *Camsell v. The Queen*, July 9, 1998, S.C.N.W.T., No. CR 03624 (unreported) for the proposition that a lay justice of the peace should not be expected to follow "technical or legalistic rules of procedure" (quoting from *Camsell*). *Camsell*, however, involved the trial of a charge under the *Liquor Act*, in which the justice of the peace presiding over the trial allowed the police prosecutor to cross-examine a Crown witness after the accused had cross-

examined him. In the end, Richard J. found that the accused in that case still had a fair trial.

[13] In my view, ths case presents very different considerations. The Appellant was sentenced to a substantial term of incarceration for two serious *Criminal Code* charges. The "procedural" issue, and the consequences, are far more serious than what occurred in *Camsell*. The procedures recommended for dealing with a joint submission on sentence cannot be described as technical or legalistic.

[14] Crown counsel on this appeal correctly pointed out that it is the sentence actually imposed by the justice of the peace that must be reviewed, and not the joint submission. While he argued that the total 12 month sentence is not unfit, he also conceded that the total four month sentence in the joint submission would not be unfit.

[15] In my view, the errors in principle referred to justify intervention by this Court. For these reasons, the appeal was allowed. In my view, a 12 month sentence does not reflect adequate credit for the early guilty pleas. In all the circumstances, the sentences of two months on each of the two counts consecutive would have been appropriate. However, as the Appellant has been in custody since January 26, 2005, the sentences were reduced to time served.

V.A. Schuler
J.S.C.

Dated at Yellowknife NT
this 10th day of May, 2005

Heard at Yellowknife, NT
May 5th, 2005.

Counsel for the Appellant: James Brydon
Counsel for the Respondent: Paul Falvo