R. v. Rolfe, 2008 NWTSC 08 S-1-CR-2007-000033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

JASON ROBERT ROLFE

Transcript of the Reasons for Sentence delivered by The Honourable Justice J. Z. Vertes, in Yellowknife, in the Northwest Territories, on the 4th day of February, 2008.

APPEARANCES:

Mr. J. MacFarlane: Counsel on behalf of the Crown

Mr. D. Rideout: Counsel on behalf of the Accused

Charge under s. 344(b) C.C.

THE COURT: Jason Robert Rolfe has pleaded guilty to a charge of armed robbery, contrary to s. 344(b) of the Criminal Code.

I will only briefly review the facts since they were set out in an agreed statement of facts filed on this hearing.

At approximately 1 a.m. on October 12th, 2006, the accused walked into a local gas station convenience store and used the ATM machine located in the store. He came back a few minutes later and walked to the counter. He then produced a knife and demanded money. The store clerk turned over between $200 and $300 in cash and then the accused left. It should be noted that, while the accused brandished a knife, no actual physical violence was caused and no explicit threats were uttered by the accused.

Neither the store clerk nor the manager of the store, who was present at the time, could identify the accused (even after being shown a photo array). The police reviewed the video store's security camera footage and made inquiries of the ATM operator. The accused was arrested on October 17th when a police officer spotted him on the street.

At the time of this offence, the accused was on bail awaiting trial on an earlier robbery

charge arising out of the robbery and assault of a taxi driver in November of 2005. This is a highly aggravating factor. That charge went to trial and, in January of 2007, the accused was convicted and sentenced to an effective sentence of four years' imprisonment (the actual sentence being 37 months after taking into account pre-trial custody). An appeal from that conviction was dismissed by the Court of Appeal two weeks ago. I have been told that there is no pending or further appeal from sentence.

The present charge was scheduled to be a jury trial last December. A few weeks before the anticipated start of his trial, the accused re-elected and entered his plea of guilty. Thus, a jury trial was avoided.

The accused is 25 years old. He was born in British Columbia and comes from a stable background. He has worked in the mining industry as a heavy equipment operator. I was told that at the time of this offence he was between jobs and may also have had some problems with drugs. The accused himself, however, when given an opportunity to speak, said simply that he was sorry for his actions and that at times he does stupid and impulsive things. Of that there can be no doubt.

Besides the conviction for robbery in January of 2007, the accused has eight other criminal convictions dating back to when he was a young offender in 1998. Prior to January, 2007, however, the harshest sentence he received was 90 days in jail for a break and enter and a theft committed in 2001 in Ontario. As my colleague, Justice Schuler, said last year when sentencing this accused, it is difficult to understand why someone of this accused's background is heading down a path of crime (see R. v. Rolfe 2007 NWTSC 5). I can only echo those sentiments and say to this young man that time is running out for him to turn his life around. It is not too late to put stupid and impulsive things behind him.

Counsel presented to me a joint submission for a sentence of two years' imprisonment to run consecutively to the sentence the accused is currently serving. At first I expressed to counsel my serious reservation that the sentence did not sufficiently address the principle of deterrence, particularly in light of this accused's history.

I had in mind the highly influential pronouncements of the Alberta Court of Appeal in the 1982 case of R. v. Johnas (1982), 2 C.C.C. (3d) 490. There, the court held that a

starting-point of three years should be applied in a case of an unsophisticated armed robbery of an unprotected commercial outlet in the absence of physical harm to the victim and with modest success. Armed robbery of a vulnerable store clerk, such as the present case, requires strongly deterrent sentences of imprisonment.

In support of the joint submission, however, counsel made a number of arguments.

First, the joint submission is the result of a true negotiated plea bargain. While it did not come early, it did come about after extensive discussions between Crown counsel and defence counsel who I should note took on the case only after the preliminary hearing.

This case was one where there were triable issues, such as identification, the lawfulness of the accused's arrest, and the admissibility of a statement that figured prominently as circumstantial evidence of identification.

The trial was expected to last eight days with ten witnesses scheduled to testify (three of them from outside of the jurisdiction). So the guilty plea in this case, besides being a mitigating factor in and of itself, saved the prosecution and the court a great deal of time and money.

Second, counsel submitted that I should consider this sentence as part of the totality of the sentence this accused will serve when combined with the sentence he is already serving. The reason for that is that he had not yet been convicted of the earlier offence, and sentenced for it, when he committed the present offence.

The logic of this position may elude some observers (particularly when there is present, as here, the aggravating factor of the accused being out on bail at the time of this offence) but it is supported by sentencing principles and theory. The best example is by examining statutory-mandated higher penalties for subsequent offences. As noted in the Ontario Court of Appeal case of R. v. Negridge (1980), 54 C.C.C. (2d) 304, as provided to me by Crown counsel, an offender cannot be convicted for a second or subsequent offence unless that offence is committed after a previous conviction and sentence for a first or earlier offence. The rationale for this rule is that the earlier penalty having failed to deter the offender from having committed a further offence, a more severe penalty is required for a second offence. Where, however, a later offence in time is committed prior to the conviction for an earlier offence,

the offender, at the time of the later offence, does not have the warning of an earlier conviction and penalty.

While the Negridge case dealt with statutory penalties for subsequent offences, the theoretical underpinnings for the rule it describes are the same for any situation such as the present where an offender is sentenced for an offence committed before he is convicted and sentenced for another offence.

Third, there is generally the factor of totality to consider. The recommended sentence would result in a total term of six years for these two offences.

Finally, defence counsel pointed out that the Johnas case was decided before the 1995 amendments to Part XXIII of the Criminal Code which introduced and emphasized a much more individualized approach to sentencing. Therefore, while Johnas is still highly influential, one can see a wide range of sentences for similar offences. A sentence of two years, in counsel's submission, comes within the reasonable range of sentences imposed by this court in this jurisdiction.

I commend counsel for their submissions in light of my reservations regarding the joint

submission. They did exactly what was expected of them in the circumstances; they were ready and able to justify their joint submission. I have therefore decided, despite my earlier reservations, to accept the joint submission.

It is trite law that a sentencing judge is not bound to accept a joint submission. It is well-settled, however, that a judge should not reject a joint submission unless it is contrary to the public interest and is unreasonable and unfit. But where a joint submission has been made by competent counsel which is within an acceptable range and not so unfit as to demand rejection, then the joint submission should not lightly be ignored. A sentencing judge should not deviate from a joint submission, responsibly advanced, unless there are clear and cogent reasons for doing so preceded by a thorough inquiry as to the circumstances underlying it.

In R. v. Cerasualo (2001), 151 C.C.C. (3d) 445, the Ontario Court of Appeal outlined the rationale for the principles governing joint submissions as follows:

> This court has repeatedly held that trial judges should not reject joint submissions unless the joint submission is contrary to the public

interest and the sentence would bring the administration of justice into disrepute. This is a high threshold and is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge.

The Crown and the defence bar have co-operated in fostering an atmosphere where the parties are encouraged to discuss the issues in a criminal trial with a view to shortening the trial process. This includes bringing issues to a final resolution through plea bargaining. This laudable initiative cannot succeed unless the accused has some assurance that the trial judge will in most instances honour agreements entered into by the Crown.

Last year, in the case of R. v. Wong (2007 NWTCA 05), the Northwest Territories Court of Appeal stated the same thing. The effectiveness of plea bargaining is undermined if there is no

certainty in the process, and accordingly joint submissions that are within the appropriate range should be accepted.

Nothing I say here should take away from the underlying principle that crimes of this sort demand deterrent penalties, not just to deter the individual in question but to deter others from this type of conduct. Armed robberies are a serious matter in any community, and the people working in these types of stores are in a particularly vulnerable position. In this case, however, I am satisfied because of the submissions made to me that the joint submission, while I may initially think it is on the lower end of the appropriate scale, is within the range of reasonable sentences.

Stand up, Mr. Rolfe.

Mr. Rolfe, as I said to you before, time is running out. You are still at an age, however, where you can turn your life around and I sincerely hope you do and plan for that when you are eventually released.

The sentence of this court is that you serve a term of imprisonment of two years, to be served consecutively to the sentence now being served.

You may sit down.

In addition, since this conviction brings

certain mandatory provisions of the Criminal Code into play, I make the following additional orders.

First, there will be an order under s. 109 prohibiting the accused from possessing any firearm or ammunition for life.

Second, there will be an order under s. 487.051 authorizing the taking of one or more samples of bodily substances for the purpose of forensic DNA analysis and registration.

The victim fine surcharge is waived.

Counsel, have I neglected anything? Mr. MacFarlane?

MR. MacFARLANE: No, thank you, Your Honour.

THE COURT: Mr. Rideout?

MR. RIDEOUT: Nothing, Your Honour.

THE COURT: Once again, thank you for your submissions. The accused can be taken down.

.....

Certified to be a true and accurate transcript pursuant to Rule 723 and 724 of the Supreme Court Rules of Court.

_____

Annette Wright, RPR, CSR(A)
Court Reporter