

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GLORIA ROSE KELLY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

[1] Gloria Kelly appeals from a sentence she received on April 20, 2007 for having committed an assault with a weapon. Ms. Kelly argues that the total number of hours of community service that she was ordered to perform as part of this sentence was excessive. She argues that the relevant provisions of the *Criminal Code* do not permit the imposition of such a large number of hours of community service, nor does it permit ordering an offender to work those hours over as long a period of time as was ordered. She also argues that the sentence is demonstrably unfit.

A) BACKGROUND

[2] The charge Ms. Kelly was sentenced for stems from an incident that occurred on December 15, 2006, at a drinking party in Fort Good Hope. Vincent Manuel, who was drinking with Ms. Kelly, began teasing her about her brother who had recently committed suicide. Ms. Kelly became upset, grabbed a knife and stabbed Mr. Manuel on the upper chest; she also gashed the back of his shoulder. Mr. Manuel suffered a collapsed lung as a result of the stabbing. He had to be medivaced to Yellowknife for treatment, and was discharged from hospital about a week later.

[3] Ms. Kelly entered a guilty plea early on in the proceedings. Sentencing was adjourned so that a Pre-Sentence Report could be prepared. At the sentencing hearing the Crown sought a jail term in the range of six to ten months. Counsel for Ms. Kelly argued that a suspended sentence would be appropriate. The Sentencing Judge sentenced Ms. Kelly to a jail term of 15 months, but decided that Ms. Kelly would serve this jail term in the community under the scope of a Conditional Sentence Order.

One of the conditions of the Order was that Ms. Kelly perform 150 hours of community service work at a rate of at least ten hours per month. The Sentencing Judge also ordered that Ms. Kelly be on Probation for 12 months at the expiration of the conditional sentence. One of the conditions of the Probation Order was that she perform 120 hours of community service work at a rate of at least ten hours per month.

[4] Two issues are raised by Ms. Kelly's appeal. The first is whether the combined effect of the two community service orders contravenes the *Criminal Code*, thereby rendering the sentence illegal. If the sentence is legal, Ms. Kelly argues that appellate intervention is still warranted because the total number of hours of community service she was ordered to perform is excessive and renders the sentence demonstrably unfit.

B) ANALYSIS

1. Whether the community service component of the sentence contravenes the *Criminal Code*.

[5] Ms. Kelly argues that the combined effect of the community service orders is that the total number of hours and the period of time over which the work is to be done contravene limits set by Parliament.

[6] An order for community service is one of the optional conditions that can be included in conditional sentence order. Paragraph 742.3(2)(d) of the *Criminal Code* reads:

742.

(...)

(2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:

(...)

(d) perform up to 240 hours of community service over a period not exceeding eighteen months.

[7] Pursuant to Paragraph 732.1(3)(f) of the *Criminal Code*, an order for community service is also one of the optional conditions that can be included in a Probation Order:

732.1

(...)

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

(...)

(f) perform up to 240 hours of community service over a period not exceeding eighteen months.

[8] Community service orders have been among the optional conditions that could be imposed as part of Probation for many years. In 1995, Parliament enacted *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof* S.C. 1995, c. 22. That legislation reformed the sentencing provisions of the *Criminal Code* in many ways. One of the changes was that it set a limit to the number of hours of community service that could be ordered as part of Probation, and the time frame over which the work could be ordered to be done. Conditional sentencing was created in the same *Act*. It made community service ordered as part of that type of sentence subject to the same limits.

[9] Ms. Kelly argues that the 1995 legislation reflects Parliament's intent to limit the extent to which offenders can be compelled to perform community service work as part of a sentence. She argues that Parliament drew a line of sorts, having determined that passed a certain point, community service orders do not achieve sentencing objectives and become counter-productive. She argues that the limits were created to ensure courts could no longer cross that line.

[10] Ms. Kelly argues that the limits set out in Paragraphs 742(2)(d) and 732.1(3)(f) (maximum of 240 hours, to be done over a maximum time frame of 18 months) should not be added up so as to give sentencing judges the power to impose up to 480 hours over a maximum time frame of 36 months when conditional sentences and Probation are both imposed. She argues that no matter what specific sentencing tools are used, the total community service ordered in a sentence should never exceed 240 hours to be performed over a maximum period of 18 months. Ms. Kelly concedes that there is nothing in the language of either provision that expressly states this, but she argues that

this interpretation is the only one that can give effect to Parliament's intent in creating the limits in the first place.

[11] Neither counsel could refer me to a case where this issue was examined, and I am not aware of any. The Crown filed some cases where courts have imposed conditional sentences followed by probation, and have imposed a total of community service hours that exceeds 240. These cases show how the provisions were applied, but they are not cases where the issue raised in this appeal was addressed in any way.

[12] I accept the general proposition that the legislative evolution (how a provision has been amended over a period of time) and legislative history (the history of how a particular provision came to be enacted) can be useful in interpreting it. But discerning legislative intent through those methods is not without its difficulties. E.A. Driedger and R. Sullivan, *Construction of Statutes*, 4th edition, (2002) Butterworths, at 471-500.

[13] There is no doubt that the 1995 provisions reflect Parliament's intent to curtail sentencing judges' discretion in making community service orders. What is less clear is whether these limits were intended to have the same effect whether only one sentencing tool (either Probation or a Conditional Sentence Order) is used, or whether the two are combined. I am far from persuaded that a legislative intent to make these limits absolute and all-encompassing can be surmised from the fact that a limit was created.

[14] Sentencing involves the exercise of considerable discretion and the balancing of many factors. The *Criminal Code* provides for a number of options, and the flexibility to combine some of them, so that judges can craft, in each case, a sentence that is appropriate.

[15] Probation is one of these sentencing tool. Paragraph 731(1)(b) of the *Criminal Code* sets out when it can be imposed:

731(1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission

(...)

(b) *in addition to* fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order

(my emphasis)

[16] The wording of Paragraph 731(1)(b) describes Probation conditions as something that can be imposed “in addition” to whatever other sentence is imposed. Parliament must have been cognizant that this other sentence could be a Conditional Sentence Order, and that such an Order could include a condition that community service be performed. There is nothing in Paragraph 732.1(3)(f) that suggests that the maximum number of hours of community service that can be imposed as part of Probation is reduced, limited or affected in any way by community service ordered as part of another sentencing tool. On the contrary, on its face, what Paragraph 731(1)(b) appears to contemplate is adding things on to whatever the other part of the sentence is.

[17] The *Criminal Code* provides that these two sentencing tools can be combined. In the absence of clear language suggesting anything else, I find that when they are both used, the effect is to increase the maximum number of hours of community service that can be ordered as well as the maximum time frame over which the work can be performed.

[18] Ms. Kelly makes some interesting points about why there should be a fixed, global limit to the number of hours of community service that can be ordered and the time frame the work can be ordered for, irrespective of what sentencing tools are combined. I understand those arguments. They may be good arguments for legislative

reform, but be that as it may, I do not find that the current wording of the relevant provisions supports the interpretation that Ms. Kelly advances.

[19] I find, therefore, that the community service order component of this sentence does not offend the statutory limits set out in Paragraphs 742(2)(d) and 732.1(3)(f) of the *Criminal Code*.

2. Fitness of sentence

[20] The sentencing process is one that involves the exercise of considerable discretion, and it is well established that the standard of review on sentence appeals is a very high one. *R. v. M. (C.A.)* [1996] S.C.R. 500.

[21] In her Reasons for Sentence, the Sentencing Judge reviewed the circumstances of the offence, the personal circumstances of Ms. Kelly, and the applicable sentencing principles. She did not misapprehend any fact or make any error in principle in arriving at her decision. She properly identified the aggravating and mitigating factors. She balanced all these considerations in arriving at her decision. While she did impose a significant number of hours of community service as part of the sentence, I cannot say that the sentence was unfit, given the seriousness of the offence and the overall circumstances.

[22] The appeal is dismissed.

L. A. Charbonneau
J.S.C.

Dated at Yellowknife, NWT this
16th day of April, 2008.

Counsel for Appellant: James D. Brydon
Counsel for Respondent: Christine Gagnon

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