*Minoza* v. *HMTQ*, 2009 NWTSC 07

Date: 2009 02 11
Docket: S-0001-CR-2008000066

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TRAVIS RAYMOND MINOZA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Appeal from sentence.

Heard at Yellowknife, NT on January 19, 2009.

Reasons filed: February 11, 2009

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REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent: Glen Boyd

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REASONS FOR JUDGMENT

## A) INTRODUCTION AND BACKGROUND

[1] The Appellant, Travis Minoza, was tried in the Territorial Court of the Northwest Territories on a charge of assault causing bodily harm and was found guilty on July 8, 2008. He was sentenced the same day to eighteen months' imprisonment for this offence. He appeals from that sentence.

[2] The findings made at trial were that on the day of the incident, the victim, Noel Hardisty, went to the Minoza residence, uninvited and in a highly intoxicated state. Mr. Hardisty was being a nuisance and was acting in a disrespectful manner. The Appellant told Mr. Hardisty to leave but Mr. Hardisty would not comply. The Appellant then forcibly removed Mr. Hardisty from the residence. He got him out of the house, threw him down the front steps, and then kicked him at least once in the face while Mr. Hardisty was on the ground. Mr. Hardisty suffered a broken nose and a loosened tooth.

[3] At the sentencing hearing, the Crown entered into evidence the Appellant's record of criminal convictions. This record includes several convictions for crimes of violence, some of which resulted in the imposition of significant jail terms.

[4] For the assault on Mr. Hardisty, the Crown sought a sentence of fifteen months in jail. The Appellant's counsel agreed that this was within the range. The Sentencing Judge disagreed. She said that a jail term of fifteen months was not appropriate under the circumstances. She expressed the view that a jail term in the penitentiary range would be appropriate, but acknowledged that such a sentence was not available to the Court given the Crown's election to proceed summarily on the charge. She imposed a sentence of eighteen months imprisonment, the maximum jail term permitted by the *Criminal Code* for the offence of assault causing bodily harm when the Crown has proceeded summarily.

[5] The Appellant argues that the sentence was excessive. In the alternative, he argues that it should be varied in light of evidence about the progress he has made towards his rehabilitation since he started serving his sentence.

B) WHETHER THE SENTENCE WAS EXCESSIVE

[6] The standard of review on a sentence appeal is a very high one. This has been reaffirmed time and time again by the Supreme Court of Canada for over a decade. Unless a Sentencing Judge has made an error in principle, the appellate Court must not interfere with the sentence imposed except if that sentence is demonstrably unfit. *R.* v. *Shropshire*, [1995] 4 S.C.R. 227; *R.* v. *M. (C.A.)*, [1996] 1 S.C.R. 500; *R.* v. *McDonnell*, [1997] 1 S.C.R. 948; *R.* v. *Proulx*, [2000] 1 S.C.R. 61; *R.* v. *L.M.*, [2008] 2 S.C.R. 163.

[7] The Appellant argues that the Sentencing Judge committed a number of errors that warrant this Court's intervention. He argues that the Sentencing Judge placed undue emphasis on certain aggravating factors; that she placed insufficient emphasis on the mitigating effect of the victim's behaviour; that she failed to take into consideration that he is an aboriginal offender; and that she did not give adequate weight to the fact that the Crown elected to proceed summarily.

a) Overemphasis of aggravating factors

[8] The first aggravating factor that the Appellant alleges was given too much weight by the Sentencing Judge was the extent of the injuries suffered by the victim.

[9] Mr. Hardisty testified that he got a broken nose as a result of this assault. He explained that he saw a doctor the day after the incident, and a specialist a few weeks later. At the time of trial, over four months after the incident, he was still having trouble breathing through one of his nostrils and was awaiting further treatment. In addition to the injury to his nose, he testified that he suffered damage to a tooth. The tooth was loose before the incident, but the problem was aggravated by the assault and the tooth had to be pulled out. Mr. Hardisty's evidence about the extent of his injuries was not shaken, nor veritably challenged, on cross-examination. It was not contradicted by any other evidence.

[10] The Appellant points to the lack of medical evidence about the injuries. He argues that the extent of the injuries, in particular the fact that the victim's nose was broken, was not conclusively established. He asks this Court to reassess the evidence and conclude that the injuries sustained by Mr. Hardisty were somewhat less serious than what the Sentencing Judge found.

[11] There is no legal requirement for a person's evidence about their injuries to be corroborated by other evidence. Of course, there may well be circumstances where the absence of medical evidence leaves the trier of fact with a reasonable doubt about the extent of the injuries sustained by the victim of a crime. But that is for the trier of fact to decide. Unless a factual finding made at trial is clearly unreasonable and not supported by the evidence, it is not for the appellate court to interfere with it.

[12] The importance of according deference to findings of facts made at trial was reiterated in *R.* v. *L.M.*, *supra.* In that case, the Québec Court of Appeal had interfered with the trial judge's findings about the level of intrusiveness of the sexual assault committed by the offender. The Court of Appeal was concerned about the strength of the evidence that had led the trial judge to find that penetration had occurred. For that reason, among others, the Court of Appeal reduced the sentence. The Supreme Court of Canada reversed that decision and was critical of the Court of Appeal's interference with findings of facts made at trial:

> [the Court of Appeal's] finding that penetration had not been proven beyond a reasonable doubt constitutes an improper reassessment of the evidence in the absence of a reviewable error in the Court of Québec's assessment of the facts.

*R.* v. *L.M.*, *supra*, at para.33

[13] The Appellant is asking this Court to reassess the quality of the evidence about the extent of Mr. Hardisty's injuries, and to interfere with findings made at trial on that issue. In short, he is asking this Court to do exactly what the Supreme Court of Canada has said appellate courts should *not* do.

[14] The second factor that the Appellant argues was given undue emphasis by the Sentencing Judge was his criminal record.

[15] Sentencing courts must not make the mistake of punishing offenders over and over again for their past transgressions by placing undue emphasis on their criminal records. However, it is beyond dispute that a person's record of convictions is a factor that sentencing courts are entitled to take into account.

[16] When sentencing an offender for a crime of violence, consideration of a record showing a pattern of similar conduct is especially relevant. One of the objectives of the sentencing process is the separation of the offender from society, when necessary *Criminal Code*, s. 718(e). One of the reasons for separating an offender from society is that he or she presents a threat to public safety. If an offender convicted of a crime of violence has committed similar crimes in the past, that is relevant to the question of whether the offender should be separated from the rest of society, and for how long.

[17] Clearly, the Sentencing Judge was concerned about the Appellant's criminal record, and she took it into account in arriving at her decision. But in my view, there is nothing on the record to suggest that she placed undue emphasis on that factor.

b) Sentencing Judge's treatment of mitigating factors

[18] The Sentencing Judge acknowledged that Mr. Hardisty was being a nuisance and was being disrespectful in the Minoza residence on the day of this incident, and that this was what prompted the Appellant to throw him out of the house. She referred to Mr. Hardisty's disruptive and disrespectful conduct twice in the

relatively short Reasons for Sentence she delivered orally, so it cannot be argued that she disregarded that factor in arriving at her decision. It was within her discretion to decide what impact this factor should have on the sentence.

[19] The Sentencing Judge found that the Appellant's actions were motivated by more than simply a desire to remove Mr. Hardisty from the premises. She found that the Appellant wanted to teach Mr. Hardisty a lesson and deter him from behaving in the same manner in the future. In finding the Appellant guilty, she said:

> I also find that Mr. Minoza did, at the very least, kick Mr. Hardisty once. I do accept that he not only threw Mr. Hardisty down the steps but then was, from his evidence, doing something about a drunk being in his house, trying to discourage him, as he had been in that house many times before, and Mr. Minoza likely wanted to somehow deter Mr. Hardisty from coming back into the house in that condition.
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> *Reasons for Judgment*, p.3, line 24 to p.4, line 5.

[20] The Sentencing Judge also made reference to this while delivering her Reasons for Sentence, in an exchange she had with the Appellant. She stated that while she understood that Mr. Hardisty's behaviour was inappropriate and annoying, the Appellant could not take the law into his own hands. *Reasons for Judgment*, p.11, lines 12-17.

[21] This demonstrates that the Sentencing Judge was alive to the fact that Mr. Hardisty had been in the Appellant's home and behaving inappropriately. She balanced that factor against others, such as the need to deter the Appellant and others from taking the law into their own hands. She was also concerned about the amount of force used by the Appellant in circumstances where Mr. Hardisty was rendered more vulnerable by his highly intoxicated state. It bears repeating, perhaps, that as with other findings, the Sentencing Judge's assessment of how these factors interplayed, and how they should impact on the sentence, is entitled to considerable deference:

> Owing to the profoundly contextual nature of the sentencing process, in which a trier of fact has broad discretion, the standard of review to be applied by appellate courts is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms

> of experience and the ability to assess the submissions of the Crown and of the offender.

*R.* v. *L.M.*, *supra*, at para.15.

c) Failure to consider the Appellant's aboriginal descent

[22] The Appellant is aboriginal. He was born in Jean Marie River and spent most of his life there. No information was provided to the Sentencing Judge about the circumstances of his upbringing as an aboriginal person, or about any systemic factors that may have impacted on his life and contributed to his coming into conflict with the law. No submissions were made about any particular factors related to the Appellant's aboriginal heritage and culture that should be taken into account in the determination of his sentence. Hence, there was no information presented in this case, specific to the Appellant's circumstances, that could have served as a basis for the analysis contemplated by section 718.2(e) of the *Criminal Code*. *R.* v. *Gladue*, [1999] 1 S.C.R. 688. The Sentencing Judge did not request further submissions from counsel on this issue.

[23] In *Gladue*, the Supreme Court of Canada found that paragraph 718.2(e) of the *Criminal Code* is a remedial provision that requires sentencing courts to approach the sentencing of aboriginal offenders through a different methodology than what is done when dealing with non-aboriginal offenders: in each case involving an aboriginal offender, the sentencing court has a duty to consider the extent to which the offender's circumstances as an aboriginal person should impact on the sentence to be imposed. *R.* v. *Gladue, supra*, at para. 66.

[24] Where counsel fail to provide a sentencing court the information necessary to conduct that analysis, the court has a responsibility to attempt to acquire information regarding the issue. *R.* v. *Gladue, supra*, at paras 83-84.

[25] These broad principles have been the subject of commentary by appellate courts. Some have concluded that failing to engage in a *Gladue* analysis in each and every case involving an aboriginal offender, and failure to cause further inquiries to be made when counsel do not present the information, amounts to an error of law. *R.* v. *Kakeegamik* [2006] O.J. No. 3346, at paras 31 and 38; *R.* v. *Abraham* [2000] A.J. No. 645, at para. 5.

[26] Sentencing is a process that involves the exercise of considerable discretion. That discretion must be exercised within the framework set out in the *Criminal Code*. Section 718(2)(e) is part of that framework, and the principles discussed in *Gladue* are binding on courts across the country. The Supreme Court of Canada has said that these principles apply whether sentencing takes place in a rural or urban setting. *R.* v. *Gladue*, *supra*, at para. 84.

[27] At the same time, sentencing is a highly individualized process, and takes place in a variety of contexts. The reality of circuit work in the Northwest Territories (and in certain other regions and jurisdictions in Canada) is one where the court, and counsel, work on a regular basis in small communities where most of the participants in the criminal justice system, (offenders, victims and witnesses), are aboriginal. How this impacts, if at all, on counsel's and sentencing judges' responsibilities is an issue that, to my knowledge, has yet to be examined in any depth in this jurisdiction.

[28] The Appellant has alluded to this issue, but only peripherally. The only reference to it in his Factum is the following:

> In truth, since the Appellant was Aboriginal, some enquiry was mandated for the Trial Judge under S.718.2(E) R vs. Gladue (1999) 1 SCR 688. This is so particularly because of the in-vain attempts by the Appellant to express himself and fit into the Aboriginal Community of Jean Marie River, or Hay River to which he moved and has an aboriginal section or reserve, and his in-vain claim when he spoke out that he was trying to take responsibility.
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> *Appellant's Factum*, at page 7.

[29] The Respondent has not addressed the issue at all in its Factum. The matter was not addressed in any depth in the oral submissions either.

[30] An analysis about how the principles laid down in *Gladue* ought to be applied in this jurisdiction, and whether the roles and duties of counsel and of the court should be any different here than what is described in cases like *Kakeegamik* and others, should only be undertaken with the benefit of full submissions. Moreover, in my view, such an analysis should only be undertaken if it is potentially determinative of the appeal.

[31] This was a violent offence, committed by an offender who has a significant criminal record for crimes of violence. Crown and Defence recognized that a jail term of some significance was appropriate under the circumstances. *Gladue* itself recognizes that the more serious or violent the offence, the less likely there is to be a difference between the sentence imposed on an aboriginal offender and on a non aboriginal offender. Considering this, and the other sentencing principles that the Sentencing Judge had to take into account, this is not a case where consideration for the Appellant's circumstances as an aboriginal offender could realistically have led to the imposition of a non-custodial sentence or to a reduction of the jail term to be imposed.

[32] Under the circumstances, I do not find that the Sentencing Judge's failure to address the issue warrants intervention by this Court. I leave for another day the consideration of the broader question as to how, if at all, the specificity of this jurisdiction impacts on counsel's responsibilities, and the court's responsibility, in the day to day application and implementation of the principles set out in *Gladue*.

d) Sentencing Judge's consideration of the Crown's election to proceed summarily

[33] The Appellant argues that the Sentencing Judge did not take into sufficient account the Crown's summary election in assessing the length of the jail term to be imposed for this offence.

[34] The Crown's decision to proceed summarily on a hybrid offence has a considerable impact on the range of sentence that can be imposed for the offence. In this case, the maximum jail term that could be imposed was eighteen months imprisonment; had the Crown proceeded by indictment, the maximum would have been ten years.

[35] The Appellant referred to a line of cases suggesting that the Crown's election has a broader impact. These cases suggest that the Crown's election is a reflection of the Crown's view about the seriousness of the offence, and that the penalty imposed must be scaled down accordingly from what it would be, for the same offence, if the Crown had proceeded by indictment. *R.* v. *Lequiere* [2006] B.C.J. No. 937.

[36] Reasoning along those lines, and in particular the notion of "scaling down" sentences when dealing with hybrid offences proceeded summarily, has been rejected recently by the Supreme Court of Canada:

> A fit sentence for a hybrid offence is neither a function or a fraction of the sentence that might have been imposed had the Crown proceeded otherwise than it did. More particularly, the sentence for a hybrid offence proceeded summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment. Likewise, upon indictment, the sentence should not be "scaled up" from the sentence that the accused might well have received if prosecuted by summary conviction.
>
> *R.* v. *Solowan* [2008] S.C.J. No. 55, at para. 15.

[37] The line of reasoning according to which maximum penalties should be reserved for the theoretical "worst crime committed by the worst offender" has also been rejected. The fitness of any sentence, even the maximum sentence, must be assessed in light of all the sentencing principles set out in the *Criminal Code*. *R.* v. *L. M., supra.* In *Solowan*, the Supreme Court made it clear that this is as true for summary conviction offenses as it is for indictable offenses, and that it applies to hybrid offenses for which the Crown has proceeded summarily:

> In short, the sentencing principles set out in Part XXIII of the *Criminal Code* apply to both indictable and summary conviction offenses. Parliament has made that clear in the definition of "court" at s. 716 of the *Code.* And when the Crown elects to prosecute a "hybrid" offence by way of summary conviction, the sentencing court is bound by the Crown's election to determine the appropriate punishment within the limits established by Parliament *for that mode of procedure.* Absent an error in principle, failure to consider a relevant factor, or overemphasis of appropriate factors, any sentence within that range - including the maximum - should not be varied on appeal unless it is demonstrably inadequate or excessive.
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> *R.* v. *Solowan*, *supra,* at para. 16.

[38] The Sentencing Judge recognized that the Crown's election to proceed summarily limited the range of sentences available to her. She respected that limit, even though she thought that a jail term in the penitentiary range would have been fit under the circumstances. The sentence imposed, which was only a few months longer than the one suggested by both counsel, cannot be characterized as

"inadequate or excessive", even though it was the maximum jail term that could be imposed.

C) WHETHER THE SENTENCE SHOULD BE VARIED IN LIGHT OF THE FRESH EVIDENCE ADDUCED ON THE APPEAL

[39] I granted the Appellant's application to adduce fresh evidence on the appeal. The fresh evidence consists of a report prepared by Sharon Caudron, the Traditional Native Liaison Counsellor/Officer at the South MacKenzie Correctional Centre. The report is focused on the Appellant's participation in the Pretreatment healing program offered in that facility.

[40] The Appellant first took the program from December 8 to 19, 2008. He had been doing well in his one on one counselling sessions, but struggled with this program. Ms. Caudron writes that he had difficulty throughout the program, and that his lack of effort was very clear. She also writes that "it became very clear that [the Appellant] has difficulty with self discipline, respect, following rules and demanding better of himself".

[41] The Appellant was given an opportunity to take the program again from January 12 to January 23, 2009. Ms. Caudron states that there was, at that point, a noticeable change in the Appellant's attitude, personal effort and commitment. I note that Ms. Caudron's report was written on January 14, just two days into the program.

[42] The fresh evidence suggests some progress on the Appellant's part since last December. This is encouraging. However, in my view, it falls short of demonstrating that his sentence should be varied. On the contrary, Ms. Caudron's observations about the Appellant's attitude in December 2008 are completely in line with the concerns expressed by the Sentencing Judge five months earlier, that he was not prepared to take responsibility for his behaviour and was not willing to take the steps to make the changes to turn his life around.

[43] The fresh evidence speaks both of the Appellant's progress and of his difficulties in following through with his stated intention to turn his life around. His progress shows, in my view, that he may be starting to benefit from the months he has spent in a structured environment, with access to the resources and supports that are available to him in the correctional facility. In light of that evidence, it

would be a mistake to reduce the period of time during which he will have access to those resources. The fresh evidence, although in some respects encouraging, does not alleviate the public safety concerns that flow from the circumstances of this case.

D) CONCLUSION

[44] I am not persuaded that the Sentencing Judge made any reversible errors in dealing with this case. I am also not persuaded that the sentence imposed was unfit, even though it was the maximum jail term that could be imposed. Finally, the fresh evidence, which I have carefully reviewed, does not persuade me that the sentence should be varied either.

[45] Accordingly, the sentence appeal is dismissed.

L.A. Charbonneau
J.S.C.

Dated this 11th day of February, 2009.

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent: Glen Boyd

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