Sabourin v.HMTQ, 2011 NWTSC 53

Date: 2011 10 13
Docket: S-1-CR-2011 0000073

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BROCK SABOURIN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant brings this summary conviction appeal from a global sentence of ten months imprisonment followed by two years probation, imposed for a conviction for assault with a weapon, a conviction for assault and two convictions of breach of recognizance. He entered pleas of guilty to all the charges in the Territorial Court.

[2] The Notice of Appeal was not filed within the 30 days prescribed by Rule 110(1)(a) of the *Criminal Procedure Rules* of the Supreme Court, however counsel for the Respondent did not object in the circumstances and so during the hearing of the appeal I ordered that the time for filing be extended to May 16, 2011 after the fact.

[3] The circumstances of the offences for which the Appellant was sentenced are as follows. On November 6, 2010, T., who was asleep in bed at home awoke to find the Appellant beating him with a golf club. The Appellant stopped the beating on his own and left the house. He was sober at the time of the incident. He later turned himself in to the police and was charged with assault with a weapon. The Appellant said he

committed the offence because he believed the victim had assaulted the Appellant's girlfriend.

[4] The victim suffered cuts, swelling and bruises on his face and a leg. There was no indication that he sought or received medical attention.

[5] The Appellant was released on an undertaking. He was later charged with an unrelated assault on C., after which he was released on a recognizance with conditions that he have no contact with T. and C. and that he not approach within 10 meters of either of them.

[6] On February 23, 2011, the Appellant attended a party. There was drinking and an altercation took place in which the Appellant pushed a woman. Another individual told the Appellant to stop; the Appellant held that individual against a wall and punched him in the face four times with a closed fist. Later, seeing the same individual outside in the street, the Appellant accused him of stealing beer. He punched him and choked him around the neck with two hands, only letting go when the victim said he could not breathe. The victim suffered cuts and a swollen eye; there was no indication that he sought or received medical attention.

[7] The above incident gave rise to the conviction for assault. The Appellant had gone to the party with C., and T. was also at the party. These circumstances gave rise to the convictions for breach of recognizance.

[8] On sentencing, the Crown (not counsel who appeared on this appeal) sought twelve months in custody for the assault with a weapon, and six months globally for the remaining offences, to be served consecutively, for a total sentence of 18 months in jail. Defence counsel did not propose a specific sentence.

[9] The sentencing judge recognized that the Appellant was a youthful offender (21 at the time of the offences) and that he had no prior criminal record. She described the assault with a weapon as "vigilante justice" that could have created a dangerous situation. She expressed concern that the Appellant needs help with anger and self-control. She noted that non-contact clauses in recognizances are meant to protect the administration of justice.

[10] The sentencing judge imposed sentences of six months in jail for the assault with a weapon, three months consecutive for the assault, one month concurrent for the breach involving T. and one month consecutive for the breach involving C, for a total of 10 months in jail. She also ordered a period of probation for two years.

[11] In his submissions on this appeal, the Appellant expressed dissatisfaction with the advice that he received from his counsel at the time his pleas were entered and disagreement with the facts that were admitted. However, this is an appeal from sentence only, and not conviction, so this Court cannot intervene in those issues.

[12] The Appellant submits that the global sentence is excessive and has had and will have an unreasonable effect on him. He argues that the sentencing judge underemphasized his youth and lack of a criminal record and the positive aspects of the pre-sentence report. He argues that she overemphasized other facts and the principle of denunciation and deterrence.

[13] The standard of review on an appeal from sentence has been set out by the Supreme Court of Canada in *R. v. L.M.*, 2008 SCC 31: 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.

[14] The only matter relating to the facts that requires comment arises from the Appellant's submission that the sentencing judge found or assumed that he had hit T. with the golf club hard enough for the head of the club to fly off.

[15] At the sentencing hearing, Crown counsel initially read in as facts that the victim was awakened by the Appellant beating him with a golf club and that almost a week later the victim gave the police the head of a golf club that he claimed to have found in his room. The police believed the head to belong to the club the Appellant beat the victim with.

[16] Defence counsel told the sentencing judge that the Appellant admitted that he hit the victim twice with the golf club, one more time with the handle and then with his hands. Crown counsel accepted those facts. However, even though it was not in the facts read in or agreed to, Crown counsel said in her submissions on sentence that the Appellant swung and hit the victim so hard with the golf club that the head of the club

came off. Although the Appellant's admission that he hit the victim with the golf club and then with the handle might lead to the inference that at some point during the beating the head had come off, to say that the head coming off was caused by the Appellant swinging the club and hitting the victim went well beyond the facts put before the sentencing judge.

[17] The sentencing judge did not, however, take up Crown counsel's suggestion that the Appellant hit the victim so hard that the head of the club came off. She stated that "whether some of the hits were with the golf club, some of the hits were with the handle, some of the hits were with your hands, it really does not make that much difference in the grand scheme of things". There is no indication that the sentencing judge accepted that the Appellant had hit so hard with the club that the head came off or treated that as an aggravating factor.

[18] The sentencing judge found that although the total sentence sought by the Crown was not outside the usual range, that might not be appropriate for a first offender. She considered whether a community based sentence would be appropriate, but ruled it out because absent any indication that the Appellant had brought himself under control, she was of the view that the community would be endangered.

[19] The mitigating factors are the guilty plea, the lack of a criminal record and the Appellant's relative youthfulness.

[20] It is an aggravating factor that the Appellant attacked T. while he was in his own home, asleep. It is also an aggravating factor that after being released on a recognizance for the assault with a weapon and while awaiting trial, less than three months later the Appellant committed the second assault, which in itself involved two separate attacks on one individual. Neither this nor the earlier assault with a weapon was minor; both involved considerable violence. While the breaches of recognizance did not involve violence or threats, the breach involving C. was particularly blatant in that it was not brief contact.

[21] Although there were some positive aspects to the pre-sentence report, the author of the report noted that while the Appellant took responsibility, he expressed no remorse for the assault with a weapon. There is no reference in the report to the second assault so it is unclear whether the author was aware of it.

[22] The sentencing judge considered both the mitigating and the aggravating factors. She did not fail to consider anything relevant, nor did she overemphasize any factor.

[23] Sentences for non-sexual assaults are very fact-specific. In this case, on balancing the seriousness of the offences and the mitigating and aggravating factors, a ten month term of incarceration is not outside the range of sentences for this type of violent behaviour. The term of probation imposed was appropriately intended to assist in the Appellant's rehabilitation by including a clause for counselling and programs to address anger management. The sentence as a whole addresses rehabilitation as well as denunciation and deterrence.

[24] The Appellant says that the sentence has had and will have a negative effect on some other aspects of his life, in particular his plans for a career in the military. It is clear to me from the Appellant's very thorough submissions, that since being sentenced he has given a great deal of thought to his situation and the impact on his life of the offences he committed. That is to his credit. That being said, however, the information provided to the sentencing judge was less definite than the Appellant's assertion on the appeal that he was in the process of entering the armed forces. The pre-sentence report indicates that although he took training in 2009, he declined the position he was offered with the military; his counsel's submissions on sentence referred to a number of different employment options the Appellant was considering. The sentencing judge did not ignore the Appellant's plans, as he submits, in that his plans were uncertain.

[25] Even if the Appellant has decided since then that entering the military is the way to go, that is not a factor that can now affect the sentence that was imposed by the sentencing judge. It does not make the sentence unfit. Nor is the length of time before the Appellant might be granted a pardon an appropriate consideration.

[26] In all the circumstances, the sentences imposed are not unfit and the appeal from sentence is therefore dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
13th day of October 2011.

The Appellant appeared in person
Counsel for the Respondent: Daniel Rideout

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