Date: 2013 03 20
Docket: S-1-CR-2012000094

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTOPHER TED BUGGHINS

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant appeals from a global sentence of 14 months less 83 days in jail and one year probation imposed for a number of offences to which he pled guilty.

[2] The offences are as follows: one count of common assault and one count of causing a disturbance by being drunk, committed on March 3, 2012; one count of breaching the condition of an undertaking to abstain from consumption of alcohol and non-prescription drugs, committed on March 9; one count of being unlawfully in a dwelling house, one count of resisting arrest and one count of breaching the condition of a recognizance to abstain from the consumption of alcohol and non-prescription drugs, all committed on May 4.

[3] The facts admitted by the Appellant on the assault, the sentence for which is the main issue on this appeal, may be summarized as follows. The Appellant, while outside an arena, was drunk and argued with his spouse. The Appellant's niece, B., was concerned about the Appellant's behaviour and went over to help his spouse, at the same time calling the police on her cell phone. Noticing that B. was on her cell phone with the police, the Appellant began to approach her aggressively and yell at her. His spouse and another woman, K., tried to hold him back but when he got to within a foot or two of B., he spat a large amount of saliva directly

into her face. Unable to believe what he had done and angry about it, B. dared him to do it again, and he did.

[4] When K. pushed the Appellant a couple of times to get him away from B., the Appellant spat again, hitting K. in the head. The Appellant's spouse got B. and K. into her vehicle. The Appellant circled the vehicle and punched at its side; he also kicked the grill of the vehicle. He was yelling at the vehicle and walking to the back entrance of the arena when arrested by the police.

[5] The assaults by spitting on both B. and K. were included in the single conviction for assault.

[6] At the time of sentencing, the Appellant, then 33 years of age, had a criminal record dating back to 1999 which includes convictions for assault causing bodily harm in 1999, uttering threats in 1999, sexual assault and assault in 2000, assault in 2002, sexual assault and assault causing bodily harm in 2006 and sexual assault in 2008. He also had a number of previous convictions for breaching release conditions.

[7] The Crown sought a global jail sentence of approximately 10 months, less one for one credit for the two months and three weeks that the Appellant had been in remand, plus probation. Crown counsel at the sentencing described the Crown's position as a global sentence of three months for the assault and causing a disturbance, one month consecutive for the breach of undertaking, three months consecutive for being unlawfully in a dwelling house, two months consecutive for resisting arrest and one month consecutive for the breach of recognizance.

[8] Defence counsel did not take issue with three months for the assault and causing a disturbance, but asked the sentencing judge to consider something closer to eight months globally for all the offences, less credit for the pre-trial custody. Defence counsel submitted that something less than three months might be appropriate for the conviction for unlawfully in a dwelling house and that two months might be a little high for the resisting arrest.

[9] The sentencing judge imposed a sentence of six months in jail on the assault, to be followed by a year of probation, and one month jail concurrent for causing a disturbance. He imposed two months consecutive for the breach of undertaking, three months consecutive for unlawfully in a dwelling house, one month consecutive for resisting arrest and two months consecutive for breaching the recognizance. From the total 14 months imprisonment, he deducted 83 days.

[10] The Appellant appeals the global sentence, but in submissions focused his challenge on the six months imposed for the assault. He argues that the sentence should be reduced to the three months proposed by the Crown at the sentencing hearing.

[11] In their submissions, the Appellant and Crown counsel both agreed that the sentencing judge erred by not giving counsel notice of his intention to impose a jail sentence greater than the Crown was seeking, thus not giving them an opportunity to make submissions on that issue. I agree that the sentencing judge had a duty to alert counsel to his concerns about the range of sentence proposed, to advise them that he was inclined to sentence outside that range, and to give them an opportunity to make additional submissions: *R. v. Abel*, 2011 NWTCA 04; *R. v. Burback*, 2012 ABCA 30; *R. v. Vegso*, 2012 NWTSC 77 and cases cited therein. I also agree that the sentencing judge did not fulfill that duty in this case.

[12] Counsel had the opportunity to make full submissions before me on the appeal. In *Burback*, the Alberta Court of Appeal indicates that in this situation, the question to be asked is whether the sentence imposed by the sentencing judge is demonstrably unfit: paragraph [19]. The Court held in that case that any prejudice that might have been caused by the sentencing judge's failure to give notice of his intention to exceed the sentence proposed was relieved by the full hearing before the Court of Appeal, the ultimate issue being whether the sentence that had been imposed was demonstrably unfit. This accords with the overriding principle that appellate courts are to show considerable deference in reviewing sentencing decisions.

[13] The Appellant submits that the sentencing judge erred in that he failed to give credit for the guilty pleas; he concluded that the spitting in this case was dangerous without any evidence to support that conclusion; and he imposed a sentence for the assault that is outside the usual range for similar assaults. For these reasons, the Appellant says the sentence is demonstrably unfit.

[14] Crown counsel points out that the sentencing judge, who has many years of experience in this jurisdiction, is presumed to know the law; it should not be concluded that he failed to take into account the guilty plea. It was not unreasonable for the sentencing judge to refer to the possible consequences of spitting and six months for the assault is not demonstrably unfit given that there were two victims, some surrounding behaviour that is aggravating, and the Appellant's last conviction for common assault resulted in a sentence of 3 months.

A. Failure to refer to the guilty plea

[15] Nowhere in his reasons did the sentencing judge refer to the fact that the Appellant pled guilty to the assault and the other offences. The Appellant says that the resulting sentence fails to recognize the guilty plea. He compares this case to *R. v. Gordon*, 2005 NWTSC 49. In that case, the appellant entered guilty pleas on his first appearance before a justice of the peace. A joint submission on sentence was presented. The justice of the peace made no reference at all to the guilty pleas, focused solely on aggravating factors, rejected the joint submission without inviting any further submissions, and imposed a sentence that was three times the joint submission. On appeal, it was found that the justice of the peace failed to give credit for the guilty plea. Due to that and some erroneous comments made by the justice of the peace about the facts, the appeal was allowed and a sentence of time served, which was close to the sentence proposed in the joint submission, was imposed.

[16] In this case, the sentencing judge did not refer to the guilty plea. He did, however, refer to the Appellant's apology presented in court, saying that "It is easy enough to come here and apologize, but it is your actions hereafter that will indicate whether that apology is a heartfelt one or just a smokescreen for today. That is up to you."

[17] Those comments suggest that in all the circumstances, the sentencing judge did not give very much weight to the Appellant's expressions of remorse, including the guilty plea. The weight to be given to a guilty plea is a question for the sentencing judge: *Burback*, paragraph [21]. Just because the judge in this case chose to give the guilty plea little weight does not mean he failed to take it into account at all. A sentencing judge is presumed to know the law and need not refer to all applicable sentencing principles; the fact that a principle is not referred to by the sentencing judge should not lead to the assumption that it was not considered: *H.M.T.Q. v. William*, 2012 NWTSC 53. The ultimate question is still whether, taking into account the principles of sentencing and the aggravating and mitigating factors, the sentence is unfit.

B. The comment about spitting

[18] In sentencing the Appellant for the assaults on B. and K., the judge made the following comments:

> Mr. Bugghins, the assaults here, this spitting ... is not only disgusting behaviour but it can be dangerous behaviour as well. It shows a complete disregard for other

> human beings, and I must say with your record for offences against a person these, although you are under the influence, show when you are under the influence your disregard for other humans, and I take that into consideration.

[19] The Appellant submits that the sentencing judge erred in characterizing the assaults as potentially dangerous in the absence of evidence that there actually was some danger to the victims, or that they were distressed about, or took steps to deal with, the possibility of contracting a disease. The Appellant relies on *R. v. Koppang*, 2002 ABCA 295, where the Alberta Court of Appeal reduced sentences that involved, among other things, spitting at police officers. In that case, the Court said about the sentencing judge, at paragraph [16]:

> Moreover, we are concerned that he may have been affected by the Crown's submission that the possibility of transmission of a deadly disease was an aggravating circumstance. That was not supported by the evidence.

[20] Clearly the Court in *Koppang* was concerned that the sentencing judge had used the possibility of transmission of a deadly disease as an aggravating factor, notwithstanding the absence of any evidence on that point.

[21] In the case at bar, the Crown did not ask the sentencing judge to consider the possibility of transmission of disease as an aggravating factor. Nor is there any indication that the judge used that possibility as an aggravating factor. He merely observed that spitting can be dangerous; he did not find that in this particular case it actually was dangerous. His focus was on the disregard shown by the Appellant for other human beings. In the circumstances, the sentencing judge did not commit any error by making that observation.

C. Is the sentence outside the range?

[22] The Appellant referred to a number of cases in which sentences for assaults consisting of or involving spitting are mentioned. In many of those cases, the sentence itself was not under review. In many of them, a number of factors went into the sentence, not all of which are found in the Appellant's case. Sentencing is an individualized procedure, in which the judge must determine the appropriate sentence for the particular offender in the circumstances of the particular offence. As one would expect, none of the cases cited is on all fours with the Appellant's case.

[23] Two of the cases cited refer to the usual range of sentence for assault by spitting. In *Koppang*, referred to above, the Alberta Court of Appeal said that

assault by spitting would attract a sentence of somewhere between probation and three months in jail. *Koppang* was an appeal from a global sentence of 30 months on guilty pleas to two counts of assault, one count of failing to appear and one count of uttering a threat. The assaults were on police officers and the second assault involved spitting more than once on an officer's clothing and near his ear. The appellant, who was in his early 20's, had a lengthy criminal record that included assaults on police officers. After considering all the mitigating and aggravating factors, including a very early guilty plea, the Court of Appeal reduced the global sentence to one year, which included six months for the assault that involved spitting.

[24] In *R. v. Ali*, 2006 ABQB 805, Lee J. was dealing with an appeal in the context of an individual who spat on a constable; the spittle landed on the officer's chest over his clothing. The appellant had a record for assault and other offences. Lee J. concluded after a review of cases that did not include *Koppang*, that the appropriate range of sentence was approximately one to six months, based on generally similar offenders and similar offences. Although he found the four months in jail imposed by the sentencing judge to be at the higher end of that range, he held that it was within the appropriate range and dismissed the appeal.

[25] From the cases submitted, it appears that the fact that the victim of the assault by spitting is a police officer is treated as an aggravating factor. That factor is not present in this case. However, in this case there were two victims who were spat on separately, one of them twice. When the victims took shelter in the vehicle, the Appellant continued to act in a threatening manner by punching and kicking the vehicle. The six month sentence imposed should be viewed in the context of what is really a continuing assault, not an isolated incident of spitting.

[26] It is true that six months is the maximum sentence available on a summary conviction assault. However, the "worst offender, worst offence" principle no longer operates as a constraint on a maximum sentence being imposed where the maximum is otherwise appropriate: *R. v. Solowan*, 2008 SCC 62. On appeal, the court will not intervene unless the trial court applied the wrong principles or the sentence was clearly excessive in the circumstances: paragraph [10], *Solowan*.

[27] Considering that there were two victims of the assault and that the Appellant continued to exhibit threatening behaviour after the spitting, I am not persuaded that the six month sentence imposed was outside the usual range for spitting offences.

D. Is the sentence imposed demonstrably unfit?

[28] The six month sentence should not be considered in isolation from the global sentence or from the other offences for which the Appellant was sentenced at the same time. These include the offence of unlawfully in a dwelling house, the circumstances of which were that the Appellant was in a woman's home, uninvited at 4:42 in the morning; and the offence of resisting arrest, which involved the Appellant taking his jacket off and taking a fighting stance when the police were arresting him for being in the woman's home. When these are viewed against his record for assault, both sexual and non-sexual, it is clear that the Appellant's behaviour is problematic and that protection of the public is a concern, as identified by the sentencing judge. The Appellant's continuing disregard for release conditions is also a concern, an issue also identified by the sentencing judge. Considering the aggravating and mitigating factors and the principles of sentencing, I conclude that neither the six month sentence for spitting on B. and K., nor the global sentence imposed for all the offences, is unfit.

[29] The appeal is therefore dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
20th day of March, 2013.

Counsel for the Appellant: Cherie Jarock
Counsel for the Respondent: Mathew Johnson

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