Date: 2014 04 14
Docket: S 1 CR 2012 000092

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRIAN ABBOTT

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant, Brian Abbott, appeals from sentences imposed by the Territorial Court of the Northwest Territories. He also asks that the guilty pleas he entered, and the consequent convictions, be set aside.

BACKGROUND

[2] Mr. Abbott is a commercial fisher. He appeared with his counsel in Territorial Court on July 9, 2012 and entered guilty pleas to 4 of 8 offences with which he was charged under the *Fisheries Act*, RSC 1985, c. F-14. Specifically, these were:

1. Failing to comply with the requirement that commercial harvest logbooks be filled out accurately and completely on a daily basis;

2. Operating for the purpose of commercial fishing an unregistered vessel;

3. Fishing in areas closed to commercial fishing; and

4. Setting, operating or leaving unattended a gill net, not marked in accordance with the regulations

[3] As part of this, the Crown read facts into the record. Mr. Abbott's lawyer indicated the defence was in agreement with these facts, except for the value of the fish.

[4] The remaining charges were withdrawn after the Court accepted the guilty pleas.

[5] Crown and defence made a joint submission on sentencing. They proposed a global fine of $3,000.00 ($750.00 for each offence) and probation for one year. The probation carried with it certain conditions, specifically: that Mr. Abbott would complete 40 hours of community service work; he would present completed log books to the Department of Fisheries and Oceans on the first day of each month; and that Mr. Abbott would publish a public apology in the local newspaper. The contents of the proposed apology was reduced to writing and read into the record.

[6] During the hearing the Sentencing Judge expressed some concerns respecting the proposed sentence, in particular, how it would meet the goals of denunciation and deterrence and how it would satisfy the principle of parity. She noted that in the cases submitted in support of the joint submission, the fishers received higher fines for similar – and fewer – offences.

[7] The Crown, in response, explained the joint submission was an agreement between Crown and defence, which the parties believed would balance Mr. Abbott's commercial interests with the need for denunciation and deterrence through the combination of the fine, the probation and the published apology.

[8] The Sentencing Judge then heard submissions from defence counsel and from Mr. Abbott himself. She reserved her decision on sentencing. The Trial Judge did not at any time during the sentencing hearing state directly that she would not accept the joint submission.

[9] In making submissions on his own behalf, Mr. Abbott stated " . . . I know I made a mistake, that's why I pled guilty to it, because I did in fact do these." (*Transcript of Sentencing Hearing, page 46, lines 20-22).*

[10] Reasons for sentence were delivered orally on August 8, 2012. The Sentencing Judge rejected the joint submission entirely and instead imposed fines of $1,500.00 for each of the convictions of failing to fill out accurately and

completely the log books and operating an unregistered fishing vessel. She imposed a fine of $2000.00 for fishing in a closed area and a $1000.00 fine for fishing with improperly marked nets. This amounts to twice the total of the fines proposed in the joint submission.

[11] The Sentencing Judge did not impose probation and she found that the *Fisheries Act* did not permit her to direct Mr. Abbott to publish an apology.

ISSUES

[12] The issues are first, whether Mr. Abbott should be permitted to withdraw his guilty pleas and second, whether the Sentencing Judge erred in rejecting the joint submission.

ANALYSIS

Can Mr. Abbott withdraw the guilty pleas?

[13] An accused may withdraw a guilty plea on appeal if the appellate court is satisfied that there are valid grounds to do so. "Valid grounds" include, but are not limited to, a failure to understand the nature of the charge, an unintended admission of guilt or where the facts are insufficient to support conviction. *Adgey v. The Queen*, [1975] 2 SCR 426 at 430-31.

[14] Mr. Abbott claims that he did not have sufficient time to meet with his lawyer prior to the hearing and that in any event, the advice he received was incorrect. He also says that he understood neither the process nor the potential penalties for the charges. Finally, during oral submissions at the appeal hearing he stated that he was unaware of the joint submission.

[15] Not understanding the nature of the charges or the potential punishment, or receiving erroneous or incomplete legal advice, may well constitute a valid basis to permit an accused to withdraw a guilty plea; however, the record in this case does not support Mr. Abbott's position that any of these things happened.

[16] Mr. Abbott was present in at the sentencing hearing with his lawyer. From time to time it appears he interrupted his lawyer to correct what may have been gaps in information and/or errors. He was also provided with an opportunity to address the court himself and he did so. He did not dispute the facts underpinning the convictions and at no time did he appear surprised by the joint submission. He never provided any indication that it he did not agree with what was proposed.

[17] Mr. Abbott contends he did not understand the potential punishment for the charges. In his written submissions he states:

> . . .I believe that [his lawyer] should have informed me of what the potential penalties were, prior to entering guilty pleas to all of these charges.
>
> I found out from the newspaper after the fact that I could have been sentenced to a year in jail and subject to a $100,000.00 find per count and at sentencing that the crown could order a public shaming in the news paper [sic] . . .

Appellant's Written Submissions, p.5

[18] This is simply not borne out by the record. In fact, it is entirely contradicted by Mr. Abbott's own statement at the sentencing hearing:

> If somebody had told me that you buy that fishing business, if your motor breaks down, you'd be throne [sic] *in jail for a year and a hundred-thousand-dollar fine,* or if you're late getting your nets because an employee doesn't show up, you could be *thrown in jail or a hundred-thousand-dollar fine*, all of these, just don't make a mistake or you could go to the dogs. (emphasis mine)

Transcript of Sentencing Hearing, page 47, lines 4-12

[19] Mr. Abbott has not established to this Court's satisfaction that there is a valid reason to permit him to withdraw his guilty pleas and therefore his application to do so is denied.

Did the Sentencing Judge err in rejecting the joint submission?

[20] Judges are not required to accept joint submissions, but they are required to follow certain procedures before rejecting them. Vertes, J., summarized the law respecting a sentencing court's obligations when considering joint submissions in *R. v. Nadli,* 2004 NWTSC 28:

> [22] The principles guiding sentencing judges when presented with a joint submission have been outlined in numerous cases by several courts, particularly by the Alberta Court of Appeal *(R.* v. *G.W.C.* 2000 ABCA 333 (CanLII), (2000), 150 C.C.C. (3d) 513; *R.* v. *Tkachuk* 2001 ABCA 243 (CanLII), (2001), 159 C.C.C. (3d) 434; *R.* v. *Koch,* [2001] A.J. 1169) and, more recently, by the Manitoba Court of Appeal *(R.* v. *Sinclair,* [2004] M.J. No. 104). The basic premise is that, while a joint submission cannot bind the discretion of the sentencing judge, a judge should not deviate from a joint submission unless there are clear and cogent reasons for doing so and preceded by a thorough inquiry as to the circumstances underlying the joint submission. Clear and cogent reasons may be where the sentence is unfit, unreasonable, would bring the administration of

> justice into disrepute, or be contrary to the public interest. Whatever may be the reason, there is the obligation on the judge, during the sentencing hearing, to advise counsel of his or her concerns in order to allow counsel to make further submissions justifying the proposed sentence. Failure to advise counsel or to make the necessary inquiries, as well as the failure to explain why a joint submission is not acceptable, can amount to reversible error.

[21] The rationale for this was set out by the Alberta Court of Appeal in *R. v. G.W.C.*, 2000 ABCA 333:

> [17] The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for a given offence. "The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge." ***R. v. Pashe*** 1995 CanLII 6256 (MB CA), (1995), 100 Man. R. (2d) 61 at para. 11.

[22] The Crown argues that through the questions posed during the hearing, the Sentencing Judge made her concerns known to the parties and made the required inquiry into the circumstances underlying the joint submission. The Crown also says the Sentencing Judge provided clear and cogent reasons for rejecting the joint submission.

[23] I agree that the Sentencing Judge gave clear and cogent reasons for rejecting the joint submission. They were explained in the context of both applicable sentencing principles and relevant case law. She stated why she found the proposed sentence would not meet the goals of denunciation and deterrence, nor satisfy the principle of parity; and she determined that there was no jurisdiction to order Mr. Abbott to publish an apology. It is not, however, the validity of her reasons, as they are presented, that is in issue. Rather, it is the sufficiency of the *information* upon which she based her reasons.

[24] In my view, a sentencing judge must articulate clearly and plainly the intention to reject a joint submission. In other words, it is not something that can be implied solely from questions posed by the sentencing judge. That would require the Crown, defence and accused persons to engage in an unacceptable level of speculation about the sentencing judge's intentions. It would also create an atmosphere of uncertainty and thereby undermine the important role of the plea bargain in the administration of justice.

[25] The Sentencing Judge did not express a clear intention to reject the joint submission. While she asked Crown counsel how the proposed sentence would meet the applicable sentencing goals and principles, she did not indicate the answers she received in response to those inquiries failed to address her concerns. Had both Crown and defence been aware of the depth of the concerns, and had they been provided an opportunity to address them thoroughly, through additional information and/or legal argument, the outcome may well have been different. Though not a certainty, fairness requires Mr. Abbott have the benefit of any doubt on the matter.

[26] Accordingly, I find the Sentencing Judge erred in rejecting the joint submission.

DISPOSITION

[27] Section 687(1)(a) of the *Criminal Code*, RSC 1985, c. C-34, allows this Court to vary the sentence imposed by the Territorial Court. Like the Sentencing Judge, however, I am not bound to accept the terms of the joint sentencing submission. The concerns expressed by the Sentencing Judge about the joint submission are serious questions but have not yet been addressed. It is in the interests of justice that those concerns are addressed in this Court before variation is considered. Therefore, I direct the Crown and Mr. Abbott to provide the Supreme Court Registry with dates that they are available to make submissions to me addressing the concerns expressed by the Sentencing Judge about the joint submission. They are directed to provide those dates in writing, within ten days of the date of this Memorandum of Judgment, failing which a date will be assigned by the Court.

K. Shaner
J.S.C.

Dated in Yellowknife, NT this
14nd day of April, 2014

Appellant: Self-represented
Counsel for the Respondent: Jennifer Bond

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