R v Jacobson, 2019 NWTSC 9

Date: 2019 03 06
Docket: S-1-CR-2018-000 112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

ALLAN JACOBSON

MEMORANDUM OF JUDGMENT

[1] This is an appeal from a sentence imposed at the conclusion of a sentencing hearing held in Territorial Court in Yellowknife on August 3, 2018.

I) BACKGROUND

1. The Offences

[2] The events giving rise to the charges occurred in Tuktoyaktuk. In the early morning hours on June 17, 2018, M.J., the Appellant's aunt, had been sleeping in her bedroom, in her house. The Appellant attacked her.

[3] M.J. was in the habit of sleeping with her phone under her pillow. The Appellant, who had apparently passed out in the house at some point that evening, woke, still intoxicated. He made his way upstairs to M.J.'s bedroom. He took the phone out from under the pillow. He choked M.J., twice. He also pinned her down, with his knees on her chest, to the point that she could no longer talk or breathe. He then dragged her along the floor, causing rug burns on her arm. He threw her down the stairs to the middle landing.

[4] At this point M.J. was able to get away. She went to another residence and called the police from there.

[5] Police responded to the call and attended M.J.'s residence. There, they arrested the Appellant. The officers noted him to be highly intoxicated.

[6] The Appellant was placed in the back of the police truck. While in the truck he made threats to harm the police officers and members of their families.

[7] At the time, the Appellant was bound by two Probation Orders. These orders included conditions that the Appellant not have any contact with M.J.

2. The Sentencing Hearing

[8] The Appellant was charged with a number of offenses arising from this incident. He had two appearances in Justice of the Peace Court on June 17 and June 22, 2018 and consented to remaining in custody. On July 17, 2018 he appeared in the Territorial Court in Yellowknife and entered guilty pleas to three charges: assault causing bodily harm on M.J., uttering threats to the police officers, and breach of Probation. His sentencing hearing was adjourned to August 3, 2018.

[9] At the sentencing hearing, the Appellant admitted the facts outlined above. The Crown filed photographs showing bruising on M.J.'s neck and the rug burn on her arm. The Crown also filed the Appellant's criminal record. That criminal record includes a number of convictions for crimes of violence. The Appellant acknowledged that the convictions dated May 17, 2017 for assault and uttering threats were for offenses committed against M.J.

[10] The Crown sought a sentence of ten months imprisonment followed by a period of Probation in the range of eighteen months. The Crown also sought a

Firearms Prohibition Order and a DNA Order. During the Crown's submissions, the Sentencing Judge expressed skepticism about the wisdom of having Probation be a part of the sentence. He did not express any concern about the range of jail term that the Crown was seeking.

[11] In his submissions, the Appellant's counsel underscored the very prompt guilty pleas. He also provided detailed information to the Sentencing Judge about the Appellant's personal circumstances, including difficult and tragic circumstances he had faced during his childhood and upbringing. He noted that both the Appellant's parents were residential school survivors; that the Appellant grew up in an environment where there was violence and alcohol abuse; that his parents fought with each other and with other people; that he vividly recalls feeling scared when he was growing up; that he was bullied in school and quit school in grade 9; that his parents eventually separated and he felt responsible for that; that he has a long-standing alcohol problem; that a brother he was very close to died in a motor vehicle accident in 2014.

[12] The Appellant's counsel also told the Sentencing Judge about positive things: that he had maintained steady employment over the years; that he spent time on the land with his parents as a youth, and enjoyed those activities; that he wanted to address his alcohol problem and had started taking some steps to enroll in a treatment program at the time these events occurred.

[13] The Appellant's counsel noted that the Appellant was already on Probation. He suggested that a sentence in the range of eight to ten months imprisonment would be appropriate.

[14] The Sentencing Judge imposed sentence immediately after counsel's submissions. He noted that the guilty pleas were mitigating and that the Appellant should receive credit for the time he spent in pre-trial custody. Having noted the aggravating features of the case, he said that a ten month sentence would be "woefully inadequate". He noted that there were numerous convictions for breach of Probation on the Appellant's record and that this sentencing tool was not proving effective in managing his behavior.

[15] The Sentencing Judge imposed a global sentence of seventeen months (eight months on the assault causing bodily harm, six months consecutive on the uttering threats, and three months consecutive on the breach of Probation). He declined to impose Probation as part of the sentence, as he found that doing so would be of no

benefit to the Appellant and would simply expose him to additional charges if he committed further substantive offenses.

[16] The Sentencing Judge issued a DNA Order. He inquired about the Appellant's activities on the land, and ultimately issued a Firearms Prohibition Order to be in force for six years after the Appellant's release. However, he made this subject to the caveat that the Appellant could possess a firearm outside the municipal limits of Tuktoyaktuk.

3. Issues on Appeal

[17] The Appellant claims that the Sentencing Judge made a number of errors. He argues that:

> a) the Sentencing Judge erred in not treating counsel's positions as a joint submission as to the length of the jail term;
>
> b) even if this was not a joint submission, the Sentencing Judge erred by not putting counsel on notice that he was considering imposing a sentence longer than what the Crown was seeking;
>
> c) the Sentencing Judge made a number of other errors that warrant this Court's intervention and a reduction of the sentence.

[18] The Respondent argues that this was not a joint submission and it ought not to have been treated as one. Acknowledging that the Sentencing Judge ought to have given notice of his intention to impose a longer sentence than what the Crown was seeking, the Respondent argues that the additional information put before this Court at the hearing of the appeal does not call into question the fitness of the sentence imposed.

[19] The Respondent disputes most of the other errors alleged by the Appellant and argues that to the extent that any were made, they did not result in the imposition of an unfit sentence.

II) ANALYSIS

1. Standard of review

[20] Sentencing involves the delicate balancing of several competing factors. It is a highly fact-specific exercise. Trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by the law.

[21] For this reason, the standard of review on a sentence appeal is ordinarily highly deferential. The Supreme Court of Canada has repeatedly stated that absent an error in principle, the failure to consider a relevant factor or the overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if it is demonstrably unfit. *R v M.(C.A.*), [1996] 1 S.C.R. 500; *R v McDonnell*, [1997] 1 S.C.R. 998; *R v (W.G.)*, [1999] 3 S.C.R. 597; *R v Lacasse*, [2015] 3 S.C.R. 1089.

[22] This standard of review is altered significantly if counsel have presented a joint submission at the sentencing hearing: in that situation, a sentencing judge must follow the joint submission unless it is contrary to the public interest or would otherwise bring the administration of justice into disrepute. This very high standard refers to a sentence that is "so unhinged from the circumstances of the offence and of the offender that its acceptance would lead reasonable and informed persons, aware of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system has broken down". *R v Anthony-Cook*, 2016 SCC 43, paras 32-34.

[23] Therefore, if a sentencing judge declines to follow a joint submission and the sentence is appealed, the focus of the analysis on the appeal is the reasonableness of the joint submission, not the fitness of the sentence imposed.

2. Applicable Legal Framework

[24] The Appellant argues that the joint submission standard applies where Crown and Defence, while not in complete agreement as to what the sentence should be, agree on one of its essential components. Here, he says that because of

the overlap between the positions as to the duration of the jail term, the Sentencing Judge ought to have approached the matter on the basis that there was a joint submission for a ten month jail term. He also argues that even without an overlap in positions, the joint submission standard applies when a sentencing judge is considering exceeding the range sought by the Crown.

[25] The Appellant bases this broad application of the joint submission framework on the following footnoted comment in *Anthony-Cook*:

> These reasons do not address sentencing flowing from plea agreements in which the parties are not in full agreement as to the appropriate sentence. In other instances, the Crown and accused may negotiate sentencing positions that reflect partial agreement or an agreed upon range. Such arrangements may involve a comparable *quid pro quo*. In such circumstances, it may be that similar considerations would apply where a trial judge is, for instance, inclined to exceed the ceiling proposed by the Crown, but we leave that question for another day.

R v Anthony-Cook, para 50, footnote 3.

I disagree that the joint submission framework applies in this case, for a number of reasons.

[26] First, it is clear that counsel did not present their positions as a joint submission, partial or otherwise. In addition, the positions that they advocated were in fact not the same: the Crown sought a jail term of ten months whereas the Defence argued that a sentence "in the range of eight to ten months" was appropriate. In my view, an overlap in positions, without more, does not trigger the joint submission framework.

[27] The second problem with the Appellant's position is that it is contrary to the rule of precedent. There is binding authority in this jurisdiction that sets out the legal framework that applies when sentencing judges are inclined to exceed the range of sentence proposed by counsel. They are entitled to disagree with counsel, so long as they have made counsel aware of their concerns and given them an opportunity to provide further submissions. *R v Abel*, 2011 NWTCA 04, applying *R v Hood*, 2011 ABCA 169.

[28] *Abel* is binding on this Court. The Appellant's contention that the footnote quote above at Paragraph 25 provides a justification for this Court not to follow that precedent is untenable. His interpretation of that passage is misguided. Expressly refraining from dealing with an issue is the exact opposite of altering or

overturning existing law. Until the Supreme Court of Canada addresses those issues, *Abel* remains binding on this Court.

3. Application of the *Abel* framework

[29] The *Abel* framework is focused on procedural fairness and the importance of giving counsel an opportunity to make additional submissions when a sentencing judge is inclined to impose a sentence outside the range put forward by counsel. This is because it may well be that the reasons for counsel taking the positions they did will, in some cases, become much clearer once the sentencing judge has had the benefit of additional submissions.

[30] In this case, the Sentencing Judge did not follow the procedure mandated by *Abel*. He did not tell counsel that he thought a ten month jail term was inadequate and he did not give them an opportunity to provide additional submissions in support of that range. That was an error.

[31] It does not follow, however, that the appeal must be allowed and a ten month sentence imposed. The procedural unfairness arising from a failure to give counsel an opportunity to make further submissions can be cured on appeal. *R v Burback*, 2012 ABCA 30, paras 13-15. *Abel*, para 25. Counsel had a full opportunity at the hearing of this appeal to supplement the record and cure any unfairness arising from the Sentencing Judge's failure to convey his concerns before imposing sentence.

[32] The information put forward by the Appellant at the hearing of this appeal consists of generic things that apply to any situation when an accused pleads guilty, such as: the guilty plea saved court time and resources; it spared witnesses from having to testify; it gave the victims closure; it guaranteed a conviction; it gave the Appellant an opportunity to make amends and the benefit of more lenient treatment than if there had been a trial.

[33] One factor strongly emphasized by the Appellant is that his pleas came in response to a letter from the Crown setting out which counts the Crown was seeking pleas to and what the Crown's sentencing position would be if those pleas were entered before a trial date was set. The Appellant argues that this establishes the very type of *quid pro quo* that justifies a highly deferential approach to the positions put forward by counsel. On that basis alone he argues the appeal should

be allowed and the jail term should be reduced to ten months, as was sought by the Crown.

[34] I disagree. What happened in this case happens routinely. The Crown reviewed the matter, formulated an offer for early resolution, and communicated that offer to the Appellant. Very few accused plead guilty without having at least ascertained what sentence the Crown will seek if they do. As a matter of course, defence counsel find out, or should find out, the Crown's position as part of advising accused persons before pleas are entered. There is no suggestion that the Crown's offer was the result of any discussion, negotiation, or compromise.

[35] If the Appellant's argument prevailed, the discretion that sentencing judges have in imposing sentence would disappear almost entirely. The responsibility to determine a fit sentence would, in effect, shift to the Crown. In my view, even in light of the broad public interest in fostering the resolution of criminal matters discussed in *Anthony-Cook*, that is not how the criminal justice system should operate. Leaving aside my view of the matter, if such a profound shift in the law of sentencing is to take place, it should come from Parliament or the Supreme Court of Canada, not from this Court.

[36] While the Sentencing Judge committed an error by not advising counsel of his concerns about the range of sentence being sought, I conclude that, as was the case in *Abel*, the information presented at the hearing of the appeal is of no assistance to him in establishing that the sentence imposed was demonstrably unfit. This ground of appeal must fail.

4. Errors raised by the Appellant

[37] In accordance with the highly deferential standard that applies on sentence appeals, mere disagreement by the appellate court with the sentence imposed usually does not suffice to warrant intervention. But as noted above at Paragraph 21, certain errors do open the door for the appellate court to examine the matter anew and decide what the sentence should be.

[38] Not every error in principle, failure to consider a relevant factor or overemphasis of a relevant factor justifies appellate intervention. The error must have had an impact on the sentence. *Lacasse*, paras 42-44. The Appellant alleges that the Sentencing Judge made five such errors.

i) Overemphasis of the seriousness of the death threat

[39] The facts read in by Crown counsel about the threats were as follows:

> In the police truck the accused started making threats to kill members and their families of the RCMP, "I'm going to kill you and your whole fucking family in this town". The accused also threatened to kick the silent patrolman and "kick your face in".

[40] In dealing with the threat the Sentencing Judge said:

> With respect to the uttering threats to the police officers, I cannot think of a sharper knife to attack a member of the police with, or anyone for that matter, than a threat to go after their family. There are threats and there are threats. And people, whether they are probation workers, police officers, lawyers, nurses, doctors who in their profession have to deal with dysfunctional people, having to cope with the threat against their families is beyond the pail [sic].
>
> Tuktoyaktuk is a small community. Everybody knows where the police houses are. If the police officers have kids, they know where they go to school. They are part of the community, and for a policeman to have to look over his shoulder day in and day out and worry about his wife and kids or his wife, that kind of threat of violence has to be deterred.
>
> In the time of terrors in the '30's in Russia, Stalin was able to run his show trials and get guilty pleas from - - over ridiculous charges from powerful men - - generals, admirals, doctors - - by threatening if they did not do so, their families would be incarcerated. I cannot think if a more serious threat that has to be addressed in a meaningful way, in my respectful opinion

[41] There is no doubt the Sentencing Judge found the threats to be very serious. The Appellant argues that the Sentencing Judge overemphasized that factor. He relies on the reference to Stalin and Russia to argue that the Sentencing Judge lost track of important context in his characterization of these threats.

[42] In my view, what the Sentencing Judge said immediately before he referred to Stalin and Russia demonstrates that the actual context of this matter was very much at the center of his concerns, namely, the reality of policing in a small, isolated community, and the effect that having one's family threatened, in that context, would have on a person.

[43] While I agree that the references to Stalin and Russia were hyperbolic, unnecessary and unhelpful, they do not establish an overemphasis of the seriousness of the threats.

ii) Imposition of consecutive sentences

[44] A Sentencing Judge's decision about imposing consecutive or concurrent sentences is owed considerable deference. *McDonnell*, paras 44-46; *R v Keough*, 2012 ABCA 14, para 16. While the uttering threats offence occurred shortly after the Appellant's arrest on the other matter, it was a distinct crime committed against different victims. As for the breach of Probation, it was serious in that the Appellant was, pursuant to two distinct orders, prohibited from having contact with the very person he attacked. It was well within the Sentencing Judge's discretion to make the sentences consecutive.

iii) Finding that the Appellant posed a danger to the community

[45] The Appellant asserts that it was unreasonable for the Sentencing Judge to conclude that he presented a danger to the community as there was no evidence suggesting he was dangerous. I find this argument without merit as well.

[46] At the time of this sentencing hearing the Appellant had a criminal record spanning from 2001 to 2018. That record included, among other things, six convictions for uttering threats, two convictions for assault, one conviction for assault causing bodily harm, two convictions for assault with a weapon, and one conviction for possession of weapon for a purpose dangerous to public peace.

[47] A sentencing Court must always be careful not to re-sentence an offender for crimes he or she has already been punished for. At the same time, a criminal record that shows a pattern of convictions for crimes of violence is relevant in determining the weight that should be given to the sentencing objective of separation from the community. I adopt my comments in *R v Minoza* in this respect:

> 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 convicted of a crime of violence 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.

R v Minoza, 2009 NWTSC 07, para 16.

[48] The criminal record, the seriousness of the assault on M.J. and the fact it was entirely unprovoked, as well as the Appellant's conduct after being arrested, amply supported the Sentencing Judge's assessment that separation of the Appellant from the community was an important sentencing objective.

iv) Misapprehension of the facts

[49] The Respondent acknowledges that the Sentencing Judge misapprehended the facts of the offence against M.J. There was no allegation that the Appellant bit M.J. at any point during the assault. Yet, the Sentencing Judge, describing the offence, said:

> It is astounding - - he threw her down the stairs - - that she did not receive more significant injuries. Biting her. It is awful.

[50] The Sentencing Judge then referred to a case involving the range of sentencing applicable for the offence of assault causing bodily harm and a case from this Court (referred to as "Burke" in the transcript of the Sentencing Hearing), setting the top end of the range for that offence at two years. While the Sentencing Judge did not refer to the citation of the case he had in mind, it appears he was referring to *R v Bourque*, 2013 NWTSC 37. The facts in *Bourque* included biting.

[51] The Respondent argues that this error had no perceptible effect on the sentence imposed. He points out that the Sentencing Judge did not mention that the Appellant choked the victim and suggests that his failure to take that serious aggravating factor into account more or less "cancels out" his factual error about the biting.

[52] I disagree. The fact that the Sentencing Judge did not mention the choking does not mean that he did not take it into account. There were other things from the evidence that he did not mention either. That happens frequently in busy courtrooms. Judges are neither expected nor required to refer to every fact or sentencing principle that they apply. But there is a significant difference between not referring to all the facts and referring to something that is *not* part of the facts.

[53] Having reviewed the Sentencing Judge's comments, and given the apparent reference to a sentencing decision that involved biting, I cannot say that his misapprehension of this fact did not have an impact on the sentence. This error does open the door to this Court's intervention.

v) Failure to apply the principles that govern sentencing of indigenous offenders

[54] The Appellant alleges that the Sentencing Judge failed in his duty to consider his circumstances as an indigenous offender. He notes that the cases of *R v Gladue*, [1999] 1 S.C.R. 688; *R v Ipeelee*, [2012] 1 S.C.R. 433 were not mentioned in his decision and that the Sentencing Judge did not explicitly acknowledge that he was required to apply a different framework because he was sentencing an indigenous offender.

[55] The Appellant's counsel provided detailed submissions about his indigenous background, as noted above at Paragraph 11. The Sentencing Judge was told these events occurred in Tuktoyaktuk. This is a community where the Territorial Court travels on circuit on a regular basis, whose residents are in large majority indigenous. Even though he did not state it explicitly in his decision, it cannot reasonably be argued that the Sentencing Judge was not aware that he was sentencing an indigenous man.

[56] As for whether he properly applied the law in this respect, and even though *Gladue* and *Ipeelee* were not mentioned specifically, I find that the record shows that the Sentencing Judge attempted to address the Appellant's circumstances as an indigenous offender in making his decision.

[57] The clearest indication of this is the exchange that he had with the Appellant's counsel with respect to the Firearms Prohibition Order:

> THE COURT: (...) does your client do anything on the land?

> MR. BOCK: Yes, he does, Sir. It's part of his connection to his culture. He does do some hunting for members of the community for food.
>
> THE COURT: Does he own firearms?
>
> MR. BOCK: May I have a moment. He indicates no, Sir.
>
> THE COURT: Well, I am a little reluctant - - I can prohibit him from owning a firearm, and I will order him not to possess a firearm within the municipal limits of Tuktoyaktuk. If he wants to go hunting, he can go with a buddy and use his buddy's gun, surrender the gun before he gets back into town. That will be for a period of six years.

[58] Both counsel agreed at the hearing of the appeal that section 110 of the *Criminal Code* does not give a judge the power to circumscribe the scope of a Firearm Prohibition Order in the manner that the Sentencing Judge did. But the fact that the Sentencing Judge did this shows that he was mindful of the Appellant's activities on the land, and recognized that those traditional activities should be encouraged with a view to assist him in his rehabilitative efforts, presumably because they were positive and culturally relevant for him. It belies the assertion that the Sentencing Judge did not take into account the Appellant's circumstances as an indigenous offender, and the legal framework that applies in such circumstances. Properly applying the law in this regard does not always mean that the jail term imposed, if one is required, will be shortened.

vi) Conclusion regarding the alleged errors

[59] While I disagree with the Appellant about most of the errors he claims the Sentencing Judge made in disposing of this case, I find that the factual error he made about biting having been a part of the offence had an impact on his assessment of the seriousness of the offence committed against M.J. As such, it falls to this Court to assess what the sentence should be for these offenses.

[60] I share the Sentencing Judge's view that overall, a total sentence of ten months, even giving due allowance to the prompt guilty pleas, the Appellant's remorse, and the requirement for restraint in sentencing indigenous offenders, was inadequate given the seriousness of the offences and the many aggravating factors present.

[61] Taken individually, none of the sentences imposed were excessive given the seriousness of the offenses. However, I have concluded that the global sentence of 17 months was more than what was needed to achieve the goals of sentencing. In my view, to give due effect to the principle of restraint and take into account totality, they should be reduced somewhat, although not as much as the Appellant seeks.

[62] As noted already, the Firearms Prohibition Order does not comply with the *Criminal Code* and cannot stand in its current form. The objectives of the Sentencing Judge, evidently, were to protect the community through the imposition of this Order, while not interfering with the Appellant's ability to carry out productive and culturally relevant activities on the land. These are worthwhile objectives.

[63] Those objectives can be achieved through section 113 of the *Criminal Code*. Under that provision, the court that issues a Firearms Prohibition Order is empowered to also make an order authorizing the chief firearms officer or registrar of firearms to issue, under certain conditions, an authorization, licence or registration certificate that will allow the offender to be in possession of a firearm for sustenance purposes. In addition to the conditions imposed by the court, the chief firearm officer or Registrar can add other conditions.

[64] In this case, I conclude it is appropriate to issue such an order, and to subject it to conditions that the Appellant be permitted to possess firearms only for activities on the land, and only if he has not consumed alcohol in the previous 48 hours.

III) CONCLUSION

[65] For these reasons, the appeal is allowed in part and an Order will issue as follows:

1) The sentences imposed are set aside and replaced by the following:

   - 7 months imprisonment on the charge of assault causing bodily harm;
   - 5 months imprisonment, consecutive, on the charge of uttering death threats;

- 2 months imprisonment, consecutive, on the charge of breach of Probation;

The credit granted for the time the Appellant spent in pre-trial custody will remain the same (72 days credit for the 48 days spent on remand).

Accordingly, the global sentence is 14 months less 72 days.

2) Appendix "A" of the Firearms Prohibition Order is vacated.

3) Pursuant to section 113 of the *Criminal Code*, the chief firearm officer or Registrar is authorized to issue an authorization, a licence, or a registration certificate, as the case may be, to the Appellant for sustenance or employment purposes, subject to the following conditions:

a) the Appellant shall only be permitted to be in possession of a firearm in the Northwest Territories and outside the municipal boundaries of any community in the Northwest Territories;

b) the Appellant shall only be permitted to be in possession of a firearm if he has not consumed any alcohol or other intoxicant during the previous 48 hours.

c) any other condition deemed necessary by the chief firearm officer or Registrar.

I direct counsel to prepare and file a Formal Judgment reflecting this Court's decision.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
6th day of March, 2019

Counsel for the Crown: Jeffrey Major-Hansford
Counsel for: Appellant: Ryan Clements

S-1-CR-2018-000 112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

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MEMORANDUM OF JUDGMENT
OF THE HONOURABLE JUSTICE
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