

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LAWRENCE BLACKDUCK

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a sentence appeal. A decision granting the appeal was rendered orally on December 14, 2020, with these written reasons to follow.

BACKGROUND

[2] On August 26, 2020, the Appellant, Mr. Blackduck, pleaded guilty in Territorial Court to two counts of uttering threats, occurring at separate times and places.

[3] The first of the two incidents involved two members of the RCMP in Yellowknife while they were arresting Mr. Blackduck in May of 2020. At the time, Mr. Blackduck was subject to a probation order which, among other things, required him to remain a certain distance away from a Yellowknife liquor store. The RCMP officers were conducting a patrol when they saw him near the liquor store. The officers opened the vehicle window and warned Mr. Blackduck to move away. He started walking away, whilst yelling profanities and intimidating other patrons near the store, as well as the RCMP officers. Subsequently, he started yelling aggressively. The officers left their vehicle to arrest him for causing a disturbance.

[4] During the arrest, Mr. Blackduck made a fist and swung at the RCMP officers. A bystander became involved to assist the RCMP officers in gaining control over him. He was then placed in the police vehicle and while being transported to the detachment he made a number of statements, including that he was going to “kill everybody” and “break your head right in the street”. Mr. Blackduck was highly intoxicated at the time.

[5] The second incident happened at the Northern Store in Behchokò on July 31, 2020. A store employee asked Mr. Blackduck to leave because he was banned from being there. He threatened to kill her and said he knew where she lived.

[6] The facts relating to both charges were admitted at the sentencing hearing and convictions were entered.

[7] The Crown sought a global sentence of nine months in custody, to be followed by a year of probation. Crown counsel suggested that a meaningful period of custody was required to meet the sentencing objectives of denunciation and deterrence. He said that the proposed sentence took into account the mitigating effect of the guilty pleas, while recognizing the aggravating effect of Mr. Blackduck’s lengthy and largely uninterrupted criminal record. The record contained 150 convictions, 28 of which were for violent offences and 64 of which were for offences against the administration of justice.

[8] Crown counsel cited three other aggravating factors. First, Mr. Blackduck had just finished serving a five month custodial sentence for uttering threats when he was arrested in May of 2020. Second, he had previously served a number of custodial sentences for similar offences. Third, the arrest happened while Mr. Blackduck was on probation for a conviction sustained in October of 2019.

[9] The Crown suggested a counselling requirement be included in the probationary portion of any sentence in the hope that it would assist Mr. Blackduck in addressing personal issues that might be driving his criminal behaviours.

[10] Mr. Blackduck’s counsel agreed that a considerable period of custody was justified in the circumstances, but that the appropriate range was six to seven months. He asked that the focus be on the principles of proportionality and totality. He then went on to articulate in detail the numerous *Gladue* factors in Mr. Blackduck’s background. Neither counsel on this appeal took any issue with the manner in which these were represented before the Territorial Court. They are summarized below.

[11] Mr. Blackduck is in his early 50s. He is Tłıchq̓. He was raised in a traditional lifestyle and he has a strong connection to his culture. He did not attend residential school and does not know if his parents did. There are many negative things in his background.

[12] Alcohol abuse figured prominently in Mr. Blackduck's home when he was growing up. His father hosted card games, during which Mr. Blackduck witnessed alcohol abuse and violence at a young age. His parents did not physically abuse each other when they were drinking, but the drinking often led to verbal arguments and difficulties in the home.

[13] Mr. Blackduck has a lifelong addiction to alcohol, which his counsel identified as a key driver in his criminal conduct.

[14] At the time of the sentencing hearing, Mr. Blackduck was homeless. His counsel told the sentencing judge that when Mr. Blackduck is in Yellowknife, he stays at the men's shelter and spends considerable time on the streets. When he is in Behchok̓ò, which is where his family is, he stays either at the shelter or with his sister-in-law. His counsel also advised the sentencing judge that Mr. Blackduck's long term plan was to return to Behchok̓ò. His sister-in-law was building a cabin and would potentially be able to offer him longer-term housing. He had also applied for public housing in Yellowknife and was approximately the 25th person on the waiting list.

[15] Mr. Blackduck is unable to read and write in English. He only got as far as the second grade in the mainstream public school system. He has tried to learn as an adult by attending classes offered through an adult education centre, but his efforts have been frustrated. One of the challenges he faced in this endeavour was tied to his housing instability. According to his counsel, he had no place to shower, wash his clothing or store his school books and supplies. There have been educational programs available to him while he has been in custody in the past, but he found it too embarrassing and did not want other prisoners to know he was illiterate.

[16] Mr. Blackduck's counsel also told the sentencing judge that Mr. Blackduck has struggled with employment and does not have a steady income.

[17] With respect to the threat he made to the store clerk in Behchok̓ò, Mr. Blackduck's counsel acknowledged that his client was banned from the store at the time. As part of his release conditions following the arrest in May, however, Mr. Blackduck was required to live in Behchok̓ò. On the day he made the threat, he

needed money for food and the Northern Store was the only place where he could cash his government cheque. The alternative was to hitchhike to Yellowknife.

[18] Mr. Blackduck's counsel wrapped up his submissions by suggesting that the sentencing goals of denunciation and deterrence were key considerations, but that in light of Mr. Blackduck's circumstances, these goals could be met with a seven to nine month sentence.

[19] When given his own opportunity to address the sentencing court, Mr. Blackduck expressed remorse for his conduct and spoke of his alcohol addiction.

[20] The sentencing judge imposed custodial sentences of four months and five months for the May and July offences respectively, to be served consecutively. These would be followed by probation for two years.

[21] In her reasons for sentence, the judge took into account the circumstances of both offences and the aggravating and mitigating factors. She specifically noted Mr. Blackduck's extensive criminal record, including the proximity of the first offence to the one for which Mr. Blackduck was on probation at the time it was committed; the need to separate Mr. Blackduck from the community for its members' protection; the impact of his actions on the community; the mitigating effect of the guilty pleas; and, lastly, Mr. Blackduck's alcohol addiction and its effect on Mr. Blackduck's conduct.

LEGAL FRAMEWORK

The Standard of Review on Sentence Appeals

[22] It is undisputed that trial courts have wide discretion in the sentences they impose and that the standard of review on sentence appeals is a deferential one. An appellate court should only interfere with the sentence where: (1) the sentence is demonstrably unfit; (2) there is an error in principle; or (3) there is a failure to consider relevant sentencing factors. *R v Shropshire*, [1995] 4 SCR 227 at paras 46-50; *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 at paras 123-125; *R v Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089 at para 41.

[23] Where there is an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor, appellate intervention will only be justified where it appears from the decision that the error had an effect on the sentence. *Lacasse*, at para 44.

Sentencing Principles

[24] There are two interrelated sentencing principles which are key in this appeal namely, proportionality and the application of *Gladue* factors. Both are found in the *Criminal Code*.

[25] Proportionality is set out at s. 718.1:

A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.

[26] Proportionality is the “cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. . . the severity of a sentence depends not only on the seriousness of the crime’s consequences, but also on the moral blameworthiness of the offender.” *Lacasse*, at para 12.

[27] The sentencing principle which requires courts to consider what have come to be known as *Gladue* factors is found at s. 718.2(e). It provides, in part:

[A]ll available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[28] The Supreme Court of Canada first considered the meaning and proper application of s. 718.2(e) in 1999 in *R v Gladue*, [1999] 1 SCR 688. It examined its history and purpose, the latter being a response to the significant overrepresentation of indigenous offenders in the Canadian penal system. It determined that the provision is remedial and that it places a *duty* on sentencing judges to carry out their remedial role by (1) considering the unique systemic factors which may have contributed to bringing the indigenous offender before the court; and (2) considering the types of sanctions that may be appropriate for the particular offender, given their indigenous background. Importantly, the judge has no discretion in deciding whether or not to consider the systemic factors and the role they have played in the offender’s actions. The only discretion is with respect to crafting the appropriate sentence. *Gladue*, at paras 66 and 82.

[29] Section 718.2(e) does not provide an advantage to indigenous offenders. Rather, it is a principle aimed at achieving fairness and proportionality in sentencing. It is worthwhile revisiting what the Supreme Court of Canada said in *Gladue* about

the unique systemic factors affecting indigenous offenders and why indigenous offenders must be treated differently in order to be sentenced fairly:

67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. *Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.* A disturbing account of these factors is set out by Professor Tim Quigley, “Some Issues in Sentencing of Aboriginal Offenders”, in *Continuing Poundmaker and Riel’s Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that “[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail.”

68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. *However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.* [Emphasis added]

ANALYSIS

[30] I am unable to conclude from the record that the sentencing judge adequately considered Mr. Blackduck’s *Gladue* factors in her sentencing analysis. They were put before her by defence counsel and it may well be that she had them in mind when she imposed sentence. That is not clear from the reasons however. To assume it was factored into the analysis of Mr. Blackduck’s moral culpability would be speculation.

[31] The sentencing judge did not ignore Mr. Blackduck’s *Gladue* factors entirely. She obviously took one of the most problematic of those factors, specifically, his alcohol addiction, into account. She spoke of the need for Mr. Blackduck to address it and she acknowledged that this would be difficult. Where she erred is in considering only the alcohol addiction, rather than taking it into account in relation

to the other systemic disadvantages in Mr. Blackduck's life, specifically homelessness, poverty, unemployment and illiteracy, and their cumulative effect on his moral culpability. Given the Supreme Court of Canada's direction in *Gladue* and more recently, *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, the importance of taking all such factors into account cannot be understated. Failure to consider them is an error in principle which justifies appellate intervention.

[32] This leads to the key question, being whether factoring those items into the proportionality analysis would have made any difference to the sentence. In my view, it would have.

[33] In coming to this conclusion, I considered carefully the Crown's submissions on this appeal that the custodial portion of the sentence imposed in Territorial Court was appropriate, notwithstanding the failure to consider the full breadth of Mr. Blackduck's background factors. The sentence imposed was within the acceptable range for uttering threats in these circumstances. I also appreciate the seriousness of the offence and that Mr. Blackduck's conduct, particularly that directed at the store clerk, disturbs both the community's and the victims' sense of security.

[34] Mr. Blackduck is addicted to alcohol. When he uses alcohol, he often engages in behaviours which lead to criminal charges and convictions. That is abundantly clear from his record. As the sentencing judge noted, Mr. Blackduck has to stop using alcohol or he will continue to cycle through the criminal justice system. Conquering an addiction is no small feat for anyone; however, other systemic factors in Mr. Blackduck's life make that even more difficult.

[35] Mr. Blackduck is unemployed, illiterate and homeless. He lacks resources to meet his basic needs and has nowhere near the support he needs to get a foothold to try and address his alcohol addiction. If he had some basic things in his life – a bed to sleep in, a place to store his school books and to study, a place to shower and launder his clothes, and regular meals - it would be far easier for him to address his drinking. Indeed, if these small comforts that many of us take for granted were available to him, he may have addressed his drinking long ago and perhaps his criminal record would be less significant. But he does not have these things. He does not have them because he has never really had a chance to attain them. He has faced systemic barriers and hardships his entire life, exacerbated by involvement in the criminal justice system. He is busy just surviving. This is a vicious cycle which diminishes his ability to make appropriate decisions about his conduct and to learn from the penal consequences of past conduct. It explains, to a large extent, his lengthy criminal record. All of this, in turn, diminishes his moral culpability. That must be reflected in the sentence.

[36] The custodial portion of the sentence will be reduced to seven months, with three months attributed to the threats against the RCMP officers and four months for the threat made to the employee at the Northern Store in Behchokò. This serves the goals of denunciation and deterrence, and factors in the seriousness of the offences and the consequences. It represents a loss of freedom. At the same time, the reduced custodial sentence appropriately recognizes and takes into account Mr. Blackduck's *Gladue* factors, as the law requires.

[37] The probationary aspect of the sentence should not be disturbed. Being on probation will assist Mr. Blackduck in navigating his way through to the services and supports he needs to assist him in addressing his addiction to alcohol, such as housing, education and, importantly, treatment. Hopefully, that will help him break away from the cycle of criminal conduct that has affected his life so profoundly.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
12th day of February 2021

Counsel for the Appellant:
Counsel for the Respondent:

Mr. Ryan Clements
Mr. Jeffrey Major-Hansford

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**MEMORANDUM OF JUDGMENT OF
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