NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Rhyno, 2009 NSCA 108

Date: 20091023
Docket: CAC 297872
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Victor William Rhyno

Respondent

Judges:	Roscoe, Oland, Hamilton, JJ.A.
Appeal Heard:	October 9, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal against sentence is dismissed per reasons for judgment of Oland, J.A.; Roscoe and Hamilton, JJ.A. concurring
Counsel:	Jeffrey L. Mockler, Q.C., for the appellant Michael S. Taylor, for the respondent

Reasons for judgment:

[1] The appellant, Victor Rhyno, plead guilty to resisting a police officer engaged in the execution of his duty, by physically fighting (s. 129(a) of the *Criminal Code)*, and to assault (s. 266). The assault was of a Crown Prosecutor during a hearing in a courtroom. In an oral decision which is unreported, Beveridge, J. (as he then was) sentenced him to imprisonment for a total of two years less a day, to be served in the community. The Crown appeals the conditional sentence.

[2] For the reasons which follow, I would dismiss the appeal.

Background

[3] The events which gave rise to the two counts took place on consecutive days. On April 10, 2006, in response to complaints that the appellant was not complying with the terms of a conditional sentence order, the police went to his home. He resisted arrest by fighting and was taken into custody.

[4] The next day, the appellant appeared in Provincial Court in Sheet Harbour. According to the transcript of the hearing, when his matter was called, the appellant yelled and banged to such an extent that court had to recess for several minutes. When it resumed, the judge was told that the appellant's lawyer was not available for a show cause hearing on the conditional sentence breach allegation for several days. He was also told of the appellant's concerns regarding custody - when previously incarcerated, he had not been provided with necessary medication, resulting in three suicide attempts as his mental health deteriorated in the correctional centre. The judge set the hearing down for nine days hence and remanded the appellant in custody.

[5] The Provincial Court judge then dealt with a traffic ticket issued to the appellant for speeding. The appellant plead guilty. He then began to insist that if he were placed in jail until the hearing of the alleged breach of the conditional sentence, he was going to die. Without warning, and although he was handcuffed in front and also wearing leg shackles, the appellant jumped up and, from behind and with both hands, grabbed the Crown Prosecutor, Ronald MacDonald, by his suit jacket. Mr. MacDonald fell down with the appellant on top of him. His jacket

was torn. He received some minor bruising and soreness which lasted several days. His left knee was twisted and he had to give up running for some six months.

The Sentencing Decision

[6] At the sentencing hearing, both the Crown and defence counsel suggested a sentence of less than two years. The Crown recommended 18 months' imprisonment; defence counsel sought a range of three to six months served in the community.

[7] The sentencing judge had before him a transcript of the hearing in Provincial Court. He also had a pre-sentence report dated July 24, 2007 and a letter update dated April 17, 2008, both of which mentioned Dr. Hans Asche, a clinical psychologist who has provided the appellant with psychotherapy since April of 2003. In the update, the assistant probation officer wrote:

> The subject indicated to this writer that he is now receiving a new anti-depressant from his family physician and that this medication has stabilized his mood and improved his sleep patterns. The offender continues to see Dr. Hans Asche, a clinical psychologist. This writer spoke to Dr. Asche who confirmed that he continues to see the subject once or twice a month depending on the weather and if the defender is not able to travel to his office then they will have a telephone conversation. This cognitive behavioural therapy has continued for seven years and Dr. Asche feels strongly that the subject's behaviour with regard to this offence stems from his lack of medication commencing the day before the events.

[8] The sentencing judge was also aware of the appellant's criminal record. In 1995 the appellant was fined for theft under, and for uttering threats to cause death. In 2002 he was fined for assaulting and resisting or obstructing a peace officer and uttering threats. Later that same year, he received a 12 month conditional sentence and 18 months' probation for assault causing bodily harm, and one day's incarceration concurrent for assault. In 2006 the appellant received a five month conditional sentence for uttering threats. He breached that order when, although he attended at the detachment as required, he failed to sign in because no officer was there to take his signature. The Crown did not seek to revoke his bail and he was fined $200.

[9] In his decision, the sentencing judge noted that he had little information regarding the charge of resisting arrest by physically fighting. Why the appellant fought, the duration of the fight, whether the officer was in any way injured, harmed or impacted by the altercation, were all unknown.

[10] The sentencing judge described the assault as an attack from behind with the appellant grabbing and pushing down the Crown Prosecutor. There were no allegations of kicking or punching. He reviewed the injuries suffered by the victim, and accepted that the appellant was truly remorseful for his actions in the courtroom.

[11] The sentencing judge continued:

> I do accept that medication did have an impact on your behaviour. I accept it because a probation officer who spoke with a clinical psychologist, Dr. Hans Asche, expressed his opinion, which there has been no contest to, that your behaviour for this offence stems from your lack of medication commencing the day before the offence.
>
> Now I realize that Mr. Mockler has indicated that you did get some medication that morning, but medication is not like a switch you turn on or off. There is a whole host of things that impact the effectiveness of medication ...
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> The other reason that I do accept that explanation that medication had a large measure in what happened that morning is in reading the transcript of the proceedings, it is obvious from there, starting at about 10:20 that you were highly agitated to say the least, and that Mr. Greer thought that he had things under control and permitted you to come back to the court.
>
> ... So I do accept, sir, that your mental condition at that time had a significant impact to play in the commission of this offence.

[12] During his submissions at the sentencing hearing, the lawyer for the Crown had advised the judge that the appellant had been given medication at ten o'clock the morning he appeared in Provincial Court. This would be shortly before the hearing there commenced and within a half-hour of when, after its recess, it resumed.

[13] The sentencing judge noted the appellant's significant periods of employment until placed on Workers' Compensation, his commitment to his

family, and his difficult upbringing. He described the offences in his criminal record as, for the most part, fairly minor and stated that what concerned him were the number of offences of violence. He was encouraged that, in the past two years, the appellant had complied with strict bail conditions except that failure to sign in at the detachment.

[14] Both the Crown and defence counsel having sought a sentence of less than two years, the sentencing judge proceeded to consider s. 742.1 of the Criminal Code and whether the sentence could be served in the community. Counsel had not found any case that came close to the assault before him. After considering the case law that had been brought to his attention, mitigating factors such as the brief duration of the offence, no pre-meditation, guilty plea, remorse and compliance with very significant bail conditions for over a lengthy period, and aggravating factors such as the circumstances of the offence, the deplorable and cowardly attack on a Crown Prosecutor, and the consequences for the victim which were beyond the minimum range, the sentencing judge continued:

> In light of your commitment to medication and treatment, I am satisfied that the [sic] serving the sentence in the community would not endanger the safety of the community. But that is not sufficient, Mr. Rhyno. I must also be satisfied that such a sentence would be consistent with the fundamental purpose and principles of sentencing set out in s. 718-718.2. ...
>
> Mr. Mockler quite rightly stresses that the Court must take into account the need to denounce your conduct. In the circumstances, I do not think there is a need to deter you from committing such a further offence nor do I accept that there is a need to incarcerate you in a prison in order to deter others from committing this kind of offence.
>
> If I thought for a moment, Mr. Rhyno, that your conduct was in any way motivated by any personal malice towards Mr. MacDonald or if you were not suffering from mental illness that you need medication for and were off that, you would be in jail in a heartbeat. (Emphasis added)

[15] For the assault on the Crown Prosecutor, the judge sentenced the appellant to 18 months' incarceration served by way of a conditional sentence order, the first 12 months under strict house arrest and the balance under curfew and, for resisting arrest by fighting, six months less one day consecutive, for a total sentence of two years less a day under a conditional sentence order.

Issues

[16] The Crown does not appeal the duration of the sentence. Rather, its concern and its focus in applying for leave to appeal is the conditional sentence. The Crown argued that a conditional sentence inadequately reflects the objectives of denunciation and deterrence, that it is inadequate having regard to the nature of the offences committed and the circumstances of the offences and the offender, and that the sentencing judge erred in the application of the principles in respect to the imposition of such a sentence under s. 742.1 of the *Criminal Code*.

Standard of Review

[17] On appeal, a sentence determined by a sentencing judge is to be accorded great deference. In *R. v. L.M.*, 2008 SCC 31, LeBel, J. for the Court stated:

> [14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that…the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > …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.
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> (See also *R. v. W.(G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359;
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). . . .

[18] In *R. v. Muise* (1995), 135 N.S.R. (2d) 81 (N.S.C.A.) Hallett, J.A. described what constitutes a fit sentence:

> [81] The law on sentence appeals is not complex. If a sentence is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts…My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which courts of appeal review sentences when the only issue is whether the sentence is inadequate or excessive.

This passage was quoted with approval in *R. v. Shropshire*, [1995] 4 S.C.R. 227. See also *R. v. Henry*, 2002 NSCA 33 at ¶ 11.

Analysis

[19] In its submissions, the Crown argued that the sentencing judge had given undue emphasis to the matter of the appellant's medication, and failed to appropriately consider the risk of re-offending and the need for general and specific deterrence. These failures, it argued, led the judge to fall into error which resulted in a conditional sentence which was a demonstrably unfit sentence.

[20] According to the Crown, Dr. Asche's comment that he felt "strongly" that the appellant's behaviour with regard to "this offence stems from his lack of medication commencing the day before the events" could be read as applying to the resisting arrest charge rather than, or in addition to, the assault charge. Since the fight took place when the police went to the appellant's home, the Crown says that there could have been no outside intervening factor preventing medication before then. Thus, delay in the appellant taking medication could not have affected the resisting arrest charge.

[21] Moreover, the Crown emphasizes that at the Provincial Court hearing, the appellant was given medication before the assault happened. It submits as well that since he received medication while in custody, his concern and agitation in that regard was not warranted.

[22] I am not persuaded by the Crown's arguments relating to medication and the appellant's state of mind. In my view, it is more likely that Dr. Asche was speaking about the assault charge when he spoke of "this offence". His reference to "lack of medication commencing the day before" matches the duration of the appellant's time in custody before the assault in the courtroom. As the sentencing judge stated, the psychologist's evidence that the appellant's behaviour stemmed from that lack of medication was uncontroverted. Before this court, the Crown acknowledged that there was no evidence as to the dosages taken nor how often the medication needed to be taken nor the effect of consumption or non-consumption nor how rapidly the medication would take effect.

[23] In determining sentence, the judge weighed various factors. Having reviewed the entirety of his decision, I do not accept that, because one sentence stated that were the appellant not suffering from a mental illness and was off the medication he needed, the judge would have jailed him "in a heartbeat", the lack of medication was an overriding or deciding factor in his imposing a conditional sentence.

[24] I see no basis for appellate intervention in the judge's determination that the appellant's mental condition that morning, because of medication not provided him earlier, had a large or significant impact in his behaviour and his assault of the Crown Prosecutor. This finding would, of course, be a consideration in the judge's assessment of the appellant's likelihood of re-offending.

[25] The Crown stresses the need for general and specific deterrence in this case. It points out that the appellant attacked a Crown Prosecutor, a participant in the justice system, in open court and that resisting arrest by fighting also involves violence against another participant in that system. Without a term of incarceration, submits the Crown, public confidence in the administration of justice would be lost.

[26] An assault on a Crown prosecutor during a court proceeding, and indeed any act of violence perpetrated upon a participant in the justice system, is undoubtedly an alarming and very serious matter, which cannot be tolerated. The sentencing judge himself described the assault here as "a very significant aggravating factor." However, sentencing is an individualized process. It deals with a particular offender who committed a particular offence in particular circumstances. Here the

sentencing judge accepted that the appellant suffered from mental illness for which he needed medication and which he had not received. It is evident from his review of the pre-sentencing report and its update, and from his questioning of counsel during their submissions, that he was well aware of the appellant's background and of his criminal record which included offences of violence and a breach of a conditional sentence order, but also compliance with strict conditions for a lengthy period before the incidents giving rise to the resisting arrest and assault charges. It is apparent that he was conscious of the fundamental purpose and principles of sentencing which include not only denunciation and deterrence but also rehabilitation. None of the cases presented to him was close to what happened in this circumstance so he had to fashion an appropriate sentence without much guidance from the jurisprudence.

[27] In his decision, the sentencing judge recognized that the Crown had "rightly" stressed the need to denounce the appellant's conduct. However, he decided that:

> In the circumstances, I do not think there is a need to deter you from committing such a further offence nor do I accept that there is a need to incarcerate you in a prison in order to deter others from committing this kind of offence.

In reaching this conclusion and in imposing a conditional sentence rather than a period of incarceration, the judge did not declare open season on participants in the justice system, either inside or outside of the courtroom. Rather, as he is obliged to do in determining sentence, he had considered this offender and this offence and purpose and principles of sentencing, including general and specific deterrence and relevant aggravating and mitigating circumstances. He carefully contained his finding that a conditional sentence was appropriate for this particular assault on a Crown prosecutor by this particular offender with the limiting words "In the circumstances . . ." It cannot be doubted that this referred, among other things, to the appellant's mental state at the time of the assault, the impulsive and short nature of that action, the appellant's genuine remorse, and his compliance with strict conditions for many months. Having considered various factors including the appellant's commitment to medication and treatment, the judge was satisfied that serving the sentence in the community would not endanger the safety of the community and that it was consistent with the fundamental purpose and principles of sentencing as set out in s. 718 to 718.2 of the *Criminal Code*.

[28] I observe that the sentencing judge increased the duration of the sentence he imposed for the assault and resisting arrest by fighting beyond the eighteen months requested by the Crown. He sentenced the appellant to eighteen months for the assault on the Crown Prosecutor alone, and a further six months less one day consecutive for resisting arrest by fighting, for a total period of incarceration of two years less one day served by way of a conditional sentence order. Should the appellant breach a condition of that order, then pursuant to s. 742.6(9), the court may, among other things, suspend the order and direct that he serve a portion of the unexpired term in custody, or may terminate the order and direct that he be committed to custody until the expiration of the sentence.

[29] I am not persuaded that the imposition of a conditional sentence in this particular case inadequately reflects the objectives of denunciation and deterrence, nor that it is inadequate having regard to the nature of the offences committed and the circumstances of the offences and the offender. The sentencing judge applied the correct legal principles and considered all relevant facts. He neither failed to consider a relevant factor, nor did he overemphasize appropriate factors. The Crown has not met the burden of showing that a conditional sentence in this case is clearly inadequate or demonstrably unfit.

[30] In this regard, I would observe that, as explained by Justice Hallett in *Muise, supra* sentencing is not an exact science. Had the sentencing judge, in exercising his judgement after taking into consideration the relevant legal principles and the circumstances of the offence and the offender, selected a period of incarceration rather than a conditional sentence, it is possible that that sentence would also have been upheld. As Justice Hallet stated:

> The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range.

In my view, here a conditional sentence or a term of incarceration fell within that appropriate sentence.

[31] For these reasons, I would grant leave to appeal but would dismiss the appeal against sentence.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.