NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Markie, 2009 NSCA 119

Date: 20091201
Docket: CAC 308818
Registry: Halifax

Between:

Brett Jason Markie

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Restriction on publication pursuant to s. 486.4 of the **Criminal Code**

Judges:	Roscoe, Bateman, Hamilton, JJ.A.
Appeal Heard:	November 13, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal granted and the appeal is dismissed, per reasons for judgment of Hamilton, J.A.; Roscoe and Bateman, JJ.A. concurring.
Counsel:	Alfred A. Seaman, for the appellant Mark Scott, for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

[1] The appellant, Brett Jason Markie, applies for leave to appeal and, if granted, appeals from the sentence imposed on him by Provincial Court Judge Alanna Murphy on March 4, 2009, for breaking and entering into a dwelling-house (s. 348(1)(b)) and committing sexual assault with a weapon (s. 272(1)(a)), that he pled guilty to committing on or about April 1, 2005. The judge imposed a sentence of ten years consecutive to time being served, rather than the four-year consecutive sentence that was jointly recommended.

[2] The sentence Mr. Markie received on November 10, 2005, and was still serving when the sentence under appeal was imposed, was central to the joint recommendation and is relevant to his arguments on appeal. In November 2005 he was sentenced by a different judge to a term of imprisonment of nine years and eight months, less remand time, for twelve robberies and other property related offences that he pled guilty to committing in March and April of 2005. This was the same period of time in which he committed the two offences for which Judge Murphy was sentencing him.

[3] In her oral, unreported decision, the judge set out the facts relating to the two offences before her:

> The nature of the charge before the Court is one which is very serious and very violent. And on the date in question, Mr. Markie entered the apartment located [in Dartmouth, Nova Scotia] where the 18-year-old complainant was sleeping on a couch. The apartment belonged to her boyfriend who was not present at the time.
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> Mr. Markie accosted the woman who was sleeping, covered her head with a blanket. The door to the apartment had been locked. The door jamb was broken. At the time, [the victim] was wearing a top, jeans, as well as underwear. She had fallen asleep, she believed, around 12:30 in the morning with the TV on. And when she woke up, it was approximately 5 o'clock in the morning and the TV was off.
>
> She woke up with the blanket over her head, her face area, and her mouth. The accused was there in the apartment with a knife or a weapon with some type of point to it. And the accused placed this weapon on [the victim] and demanded money of her. She told him she did not have any money.

The accused then told her to stand up and walk to the bathroom. Once inside the bathroom, she closed the door. The accused ordered her to take down her pants. Initially she refused, but then she lowered her pants to her knees, and he ordered her to bend over. She said no, at which time she felt the cold blade of the weapon.

Ultimately, a pry bar had been found at the apartment, and it's not known whether or not that pry bar was in fact the weapon that had been used or if in fact there was a knife that had been used during the commission of this offence.

When [the victim] felt the cold blade against her leg, she then cooperated and bent over the tub. There was vaginal intercourse from behind. And during the intercourse, the ... accused had said to her, "I know you haven't had sex in a while."

He then tried to force her to perform fellatio. She refused. And then he told her that he wanted her to take her pants off all the way, and once again had forced sexual vaginal intercourse from behind.

When the intercourse was finished the victim, ...did not know whether or not the accused had ejaculated. She was told by him to stay in the bathroom, that he wanted to go look around the apartment and look for stuff. And it was later determined that a Play Station 2 and a number of Play Station 2 games had been taken from the apartment.

The victim at the time never saw the accused's face, and was unable to identify him. She later went to a local hospital where she met with a sexual assault nurse-evaluation team. Swabs were taken from her and her clothing was seized.

Biological material from her underwear was taken which was examined, and found to have two contributors. One was her, the known female. The other sample, the contributor of biological material was an unknown male. And that exhibit material was deemed to be Exhibit 1.

Ultimately a sample of Mr. Markie's DNA was retrieved from the DNA data bank. And during the course of the police investigation, it was matched to the biological material which was Exhibit 1. A comparison of the two samples provided a match which statistically identified Mr. Markie as the donor of the biological material.

Mr. Markie has been in custody since a few weeks after the commission of this offence as a result of being charged with 12 robberies and another

> break-and-enter charge. And those are essentially the facts of the matter before the Court.

[4] After stating these facts in her decision, the judge noted that the maximum sentences for the offences were life imprisonment for breaking and entering into a dwelling-house and committing an indictable offence and fourteen years for sexual assault with a weapon. She referred to the Crown's reason for supporting the recommended sentence of four years consecutive which was the appellant's guilty plea, sparing the victim and the state from a lengthy and expensive trial. In view of the strong evidence against Mr. Markie she did not accept that it would be a long or expensive trial.

[5] The judge referred to counsel's position as to how the totality principle should be applied to Mr. Markie's sentencing and its effect on the length of his sentence:

> The Crown and the Defence also refer to the principle of totality as having the effect of taking the accused's sentence below what otherwise would have been sought by the Crown at sentencing. In this regard, both counsel, I gather, are asking me to sentence Mr. Markie as if he were being sentenced for this offence with the 12 robberies and the other offences in November of 2005.

[6] After considering Mr. Markie's record in detail, she concluded he was a person who was a real danger to the public:

> Mr. Markie has a significant related record which stretches back from the time of this offence almost 15 years. There has been no real break in the record since his first conviction for sexual assault in 1991 as a youth, for which he received a period of incarceration as well as a period of probation.
>
> . . .
>
> By my calculation as to what has been presented to me, there are a minimum of 35 previous convictions on Mr. Markie's record. And if I attribute a minimum of two offences where the Crown indicates plural offences without number, likely more.
>
> As I say, the record is a serious, lengthy, related, and recent to the time of this offence for which he's being sentenced today. Mr. Markie certainly has had at the least the benefit of shorter periods of incarceration up to 2005, and as well

> certainly periods of probation. Up to 2005, those sentences had not acted in any way as a type of deterrent.
>
> . . .
>
> He has a record for violent offences including sexual assault, threats and assault, and weapon offences, as well as the 12 robberies. The record is spread over different parts of Canada. . . .
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> And his record is clearly indicative of a person who is a real danger to the public in many different ways....

[7] The judge reviewed the aggravating and mitigating factors and considered Mr. Markie's own letter (indicating that since he was sentenced four years earlier in his opinion his situation had improved because of the programs he received in prison) and the effect the crime had on the victim. She quoted from the victim impact statement:

> "I will remember for the rest of my life. I woke up with a blanket over my head, and a man had a knife to my back. He kept telling me he didn't want to have to hurt me or kill me, and told me to not make any noise. I was so scared. I felt powerless. All I could do was listen to him because I didn't want him to stab me or kill me if I didn't.
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> After he did what he did, I ran down the hall to my boyfriend's mother's apartment. She stayed with me, and we called the police. I was very scared and emotional. I had to go to the hospital for a rape kit and stuff. I was worried that I could have AIDS or any kind of sexually-transmitted disease.
>
> Since I had the blanket over my head, I never got to see the person who did this to me. So every time I was out I would wonder if he would see me, and I was very paranoid because I didn't know who he was. I went to Halifax for counselling with a lady named Kathleen Jennings for about a year or so.
>
> I always wanted to see who the person was who did this to me. I'm 22 years old now, and I still want to see who he is. I don't know how a person could do this to someone. I now am still uncomfortable alone at night. I think that I always will be. I am somebody's daughter. I wonder how he would feel if he had an 18-year-old daughter and a man did this to her.

> I hope that in time that I can forgive the person who did this, but right now I can't. I don't know how someone can live with themselves knowing that they've done this to someone. I will never forget that night. I feared for my life. I thought I was going to be killed at the age of 18. I'm very thankful I am still here."

[8] The judge reviewed the law concerning joint recommendations and the appropriate range of sentence for offences of this nature committed by an offender such as Mr. Markie, including **R. v. Harris**, 2000 NSCA 7, **R. v. Cromwell,** 2005 NSCA 137 and **R. v. G.W.C.** (2000), 150 CCC (3d) 513.

[9] With respect to totality the judge said:

> Totality is a principle which needs to be considered and honoured by the Court, and it will be in this situation. But not to such an extent that it minimizes the offence or devalues what has been done to [the victim] by the accused. And to accept the recommendation I think would devalue the offence, and minimize the offence to an unconscionable degree.
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> While this offence appears to have occurred in and around the time of the other offences for which Mr. Markie was sentenced for in November of 2005 - the 12 robbery offences and the other offences - I don't know in what manner they are connected to this offence, and what the circumstances of those offences were.
>
> It may be true that Mr. Markie was in the midst of a crime spree of sorts at the time of the commission of this offence between March and April 2005. But looking at Mr. Markie's record, it would seem that a large part of the last 14 years prior to his sentencing was a virtual uninterrupted crime spree.

[10] She concluded:

> In sentencing Mr. Markie, I am aware of the purposes and principles of sentencing. And I'm well-aware that the recommendation made to me by counsel in light of all the factors that I have to consider is not reasonable and not fit in light of all the circumstances of this case and this offender.
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> And I'm also satisfied that there [are] no compelling circumstances with either the circumstances of Mr. Markie, the circumstances of this offence - including the brutal, invasive nature of the offence and the strength of the Crown's case, any evidentiary problems with the Prosecution, any systemic pressures, any mitigating circumstances of the matter, or any principles of sentencing including totality -

> which justify in the public interest departing from a fit and proper sentence in imposing the sentence being requested by counsel.
>
> Counsel has suggested that, had Mr. Markie been sentenced for this offence at the same time as the other offences for which he is currently serving a sentence that he would likely have received a sentence in the 15-year range.
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> Where there was no joint recommendation at that time, and there is no way to say what the sentencing judge would have done with the home invasion, with the sexual assault aspect to it, the only conclusion I can draw is that speculating as to what that sentencing judge would have done is not entirely helpful. . . .
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> In assessing a fit a proper sentence of this type, for this type of offender for this type of offence, I'm of the view that the range would be in the 12 to 15-year range consecutive to time being served. Mr. Markie has already received the benefit of remand credit for the time leading up to the sentencing in November 2005.
>
> Taking into account the principle of totality, I'm of the view that a reduction of the sentence by two years would be appropriate. And I consequently will sentence Mr. Markie to ten years to be served consecutive to the time that he is currently serving.

[11] The parties agree the standard of review is one of deference as set out in **R. v. Longaphy**, 2000 NSCA 136:

> 20 A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": R. v. Shropshire (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. 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 if the sentence is "demonstrably unfit": R. v. M.(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in R. v. Proulx (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at [paragraph] 123-126.

[12] Mr. Markie argues that the judge erred in rejecting the joint recommendation, that the sentence she imposed was excessive and that she did not give adequate consideration to the principle of totality.

[13] Despite the forceful and effective arguments of the appellant's counsel, I am satisfied the judge did not err.

[14] The process she followed when faced with the joint recommendation with which she had some concerns was flawless.

[15] The parties initially appeared before Judge Murphy for the appellant's sentencing on December 15, 2008. At that time she indicated her concerns and adjourned the sentencing to December 19, 2008. By letter dated December 17, 2008 the judge clarified her concerns, based on the information before her at that time, about the reasonableness and fitness of the recommended sentence. When Mr. Markie's sentencing resumed on December 19, 2008 the judge reiterated her doubts about the recommended sentence and again adjourned his sentencing seeking additional reasons and law from counsel to address her concerns and support their recommended sentence.

[16] Defence counsel subsequently provided written submissions and both he and the Crown made further oral arguments in support of the recommended sentence when they appeared for the resumption of Mr. Markie's sentencing on March 4, 2009.

[17] This process, together with her reasons, satisfy me she gave serious consideration to the jointly recommended sentence, that she only departed from it when she found it was unfit, unreasonable and contrary to the public interest, that she took into account all the circumstances before her with respect to the joint submission, such as Mr. Markie's guilty plea, the strength of the Crown's case and the length and cost of a trial, that she informed counsel of her concerns with the recommended sentence and gave them ample time to address her concerns and she provided clear reasons for departing from it. She thus met all of the criteria set out in **R. v. Sinclair**, 2004 MBCA 48, approved by this Court in **R. v. Starrett**, 2007 NSCA 21 at para 12.

[18] Her reasons indicate that she understood counsels' argument as to how the principle of totality should be applied in this case. It was their common position that Mr. Markie's sentence for the two offences before her should be determined as if all of the offences he committed in March and April of 2005 were being sentenced together. The judge rejected this as speculative. Instead she determined

the appropriate range of sentence for the two offences which was a total of twelve to fifteen years, and then took the principle of totality into account by considering the unexpired portion of the sentence he was then serving, reducing the sentence to ten years. She did not commit reversible error in doing so.

[19] While the total length of these two sentences, nineteen years and eight months (less remand time), results in total imprisonment at the high end of the range, I am satisfied the ten year sentence imposed by Judge Murphy is not so excessive as to be “clearly unreasonable” or “demonstrably unfit” so as to allow our intervention. Appellant’s counsel argued the sentence imposed by judge Murphy was excessive because the total length of sentence for the collection of earlier offences, coupled with the two new offences, should not exceed the sentence for the most serious offence within the entire group of offences. He agreed the appropriate range of sentence for these offences was between 12 and 15 years as the judge found. Hence, he argued that a four or five year sentence was the maximum that Judge Murphy could impose, which would bring the total sentence for all offences to the appropriate range.

[20] In support of this argument he pointed to the quotation from Clayton Ruby’s book, *Sentencing*, set out in **R. v. Jones**, 2008 NSCA 99:

> ¶19 In **R. v. C.A.M.**, [1996] S.C.J. No. 28, [1996] 1 S.C.R. 500, the Supreme Court of Canada stated:
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> 42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate”.

Clayton Ruby [4th ed.] articulates the principle in the following terms in his treatise, *Sentencing*, supra, at pp. 44-45:

> The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". **A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved,** or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects. (Emphasis added)

[21] The respondent addressed this argument in its factum:

60. In the instant matter, the Appellant states that the principal of totality requires that the global sentence not exceed the normal level of sentence for the most serious of the individual offences involved. . . . The Appellant cites **C.A.M.** in support of this approach. This is not the law. While the Supreme Court of Canada considered the principle of totality and the comments of Mr. Clayton Ruby in his text, it is clear that the practical application yields a different result from what the Appellant has argued. In **C.A.M.**, the Appellant was sentenced to a cumulative sentence of twenty-five years' imprisonment arising from a pattern of sexual, physical and emotional abuse inflicted upon his children over a number of years. The British Columbia Court of Appeal reduced that sentence to eighteen years and eight months, indicating that the sentence violated the "rule" that cumulative sentences should not exceed a term of imprisonment of twenty years, absent special circumstances. The Supreme Court of Canada rejected the Court of Appeal's rationale and restored the twenty-five years of imprisonment, commenting that it properly reflected the moral culpability of the offender.

61. **C.A.M.** endorsed this Court's determination in **R. v. Currie**, [1990] N.S.J. No. 177. A 27 year old accused was convicted of three counts of robbery, two counts of use of firearms, two counts of sexual assault, one count to discharge a firearm with intent to wound and unlawful confinement. The total sentence of imprisonment was twenty-five years. He was a drug user with an extensive record. He had pleaded guilty to save the victims from testifying. This Court found that the twenty-five years was a fit sentence; and that the sentencing Judge was correct in concluding that intoxication could not be seen as a mitigating factor.

62. Likewise, in **R. v. Last**, 2008 ONCA 593 (tab 15), the offender appealed a twenty-seven year sentence for convictions of sexual assault with a weapon, aggravated sexual assault, two counts of overcoming resistance by choking, and two counts of breach of undertaking. The issue of totality was argued on appeal.

> The Court of Appeal found that the sentence was not outside the range, and was just and appropriate in light of the callous circumstances of the offences and the lack of remorse by the Appellant. The Court, further, held that the sentence, although lengthy given the Appellant's age, need not be crushing because he may seek early release if found to benefit from treatment. [paras.64, 65, 68-70, 73.]
>
> 63. Totality, as a sentencing principle, is not intended to be a rebate or "get out of jail free" card. . . .

[22] I agree. While the principle urged by Mr. Markie was not discussed in **C.A.M., supra, Currie, supra** or **Last, supra**, the total sentences imposed in each of those cases, for all of the offences for which sentences were imposed, were greater than the sentence that would have been imposed had the court been sentencing for the single most serious of the crimes involved.

[23] I would grant leave to appeal but dismiss the appeal. I am satisfied the judge did not err in imposing a ten year sentence based on the circumstances of the offence and this offender.

Hamilton, J.A.

Concurring:

Roscoe, J.A.

Bateman, J.A.