NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Miller, 2009 NSCA 129

Date: 20091215
Docket: CAC 312318
Registry: Halifax

Between:

Lyndon Bradley Luke Miller

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Roscoe, Hamilton, Fichaud, JJ.A.

Appeal Heard: December 4, 2009, in Halifax, Nova Scotia

Held: Leave to appeal is granted and the appeal is allowed by reducing Mr. Miller's term of incarceration from 60 to 49 months and rewording the weapons prohibition, per reasons for judgment of Fichaud J.A.; Roscoe and Hamilton, JJ.A. concurring.

Counsel: Brad Sarson, for the appellant
Mark Scott, for the respondent

Reasons for judgment:

[1] Mr. Miller appeals his sentence. A jury convicted him of robbery. Mr. Miller asks the Court of Appeal to reduce his five year prison term.

Background

[2] The sentencing judge's decision stated the following facts.

[3] Mr. Ring advertised the sale of his 1989 Honda CRX . Mr. Miller answered the ad, test drove the car and they agreed to a purchase price.

[4] Mr. Miller devised a plan to buy the car, then rob Mr. Ring of the $1,420 purchase money, ending up with both car and money. Mr. Miller arranged the assistance of RJ and DE, both young persons, and MJ and AJ. MJ was RJ's older brother, and AJ was their cousin. Mr. Miller organized the robbery. He accessorized MJ, RJ and himself with converted hockey socks as masks and provided AJ with the purchase money and a license plate for the car. DE was to drive them to the scene, AJ would buy the car and drive it away. Then Mr. Miller, MJ and RJ, all masked, would rob Mr. Ring.

[5] Mr. Miller phoned Mr. Ring and told him that another person, AJ, would meet Mr. Ring to purchase the car on Mr. Miller's behalf. Late on September 17, 2007, as planned, AJ went to Mr. Ring's apartment, purchased the car from Mr. Ring, installed the plate and departed in the CRX. He left Mr. Ring in the parking lot outside the apartment building. Mr. Miller, MJ and RJ, masked, were hiding behind another vehicle in the parking lot. As it turned out, Mr. Miller did not then participate in the attack on Mr. Ring. Later (¶ 13) I will quote the evidence on this change of plan. Rather, MJ and RJ beat Mr. Ring in the parking lot. After learning that Mr. Ring had left the purchase money in his apartment, they forced him back into the building. Inside, they met Mr. Ring's girlfriend Ms. Scott in the hallway. Using threats, they forced Mr. Ring and Ms. Scott into the apartment and robbed Mr. Ring of the $1,420 purchase money. MJ wielded a large knife.

[6] The gang left the scene then, shortly afterward, reconvened. Mr. Miller took the keys to the CRX and the bulk of the money, leaving about $400 to be shared by

the others. While Mr. Miller was driving home, the police arrested him in the CRX and found $1,010 under the driver's seat.

[7] Mr. Miller was charged jointly with MJ on an indictment for several offences surrounding the events of September 17, 2007.

[8] On September 11, 2008, MJ pleaded guilty to robbery and being masked with intent to commit an indictable offence contrary to ss. 344 and 351(2) of the *Criminal Code*. On October 23, 2008, after five and one-half months of remand, MJ was sentenced to thirty months on each count, to be served concurrently.

[9] Mr. Miller testified at his trial before a jury in the Supreme Court of Nova Scotia. Chief Justice Kennedy presided. On March 19, 2009, the jury convicted him of robbery under s. 344 and acquitted him of possession of a weapon dangerous to the public peace.

[10] On May 14, 2009, in an oral decision, Chief Justice Kennedy sentenced Mr. Miller to five years incarceration and issued a weapons prohibition. The Chief Justice issued a written decision on May 29, 2009 (2009 NSSC 173).

Issues

[11] Mr. Miller applies for leave to appeal and, if leave is granted, appeals his sentence under s. 675(1)(b) of the *Code*. He says that the sentencing judge erred by **(1)** failing to consider a mitigating factor, Mr. Miller's attempt to abandon the robbery, and **(2)** offending the parity principle respecting the sentence given to the co-accused MJ. The grounds of appeal do not assert a pure fitness challenge. Mr. Miller's factum **(3)** adds a request that ¶ 1(b) of the weapons prohibition should be reworded to cite the 10 year mandatory minimum period.

Standard of Review

[12] The parties agree that the Court of Appeal's standard of review to a sentence is as stated by Justice LeBel for the majority in *R. v. L.M.*, [2008] 2 SCR 163,¶ 14-15:

> [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.
>
> (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; and F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 298.)
>
> [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). In sum, in the case at bar, the Court of Appeal was required – for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. – to show deference to the sentence imposed by the trial judge.

First Issue - Abandonment of the Robbery as Mitigation

[13] Mr. Miller submits that he had abandoned the robbery. He points to his decision not to assist RJ and MJ with the attack in the parking lot. Mr. Miller testified that he

> tried to tell [RJ] and A.J. that I didn't want to do it anymore. And they had said that, “We're here. We might as well do it now.” I said, “No”. And [MJ] and A.J. had...or [MJ] and [RJ] had ran off to grab Dane [Ring] and get the money.

When asked whether Mr. Miller made such a statement, RJ testified "No, I don't remember him saying anything like that". Mr. Miller's factum to the Court of Appeal acknowledges:

> The Jury in this case quite clearly did not accept that Mr. Miller had met the requirements for the defence of abandonment, as a conviction was entered in relation to the robbery charge.

[14] On sentencing, Mr. Miller cites the statement of Justice Wilson (for two justices) in *R. v. Kirkness*, [1990] 3 SCR 74, p. 115.

> attempts to stop or prevent the commission of a crime which are insufficient to exculpate an accused may always be taken into consideration on sentencing: see Wasik, "Abandoning Criminal Intent", [1980] *Crim. L. Rev.* 785.

Mr. Miller submits that, under s. 724(3) of the *Code*, the sentencing judge should have found that Mr. Miller wished to abandon the robbery and then reduced the sentence for this mitigating factor.

[15] I disagree. The judge's sentencing reasons say:

> [25] . . . Mr Miller, who had testified that he had abandoned this scheme, receives the bulk of the stolen money, he pays the co-participants and keeps the rest. . . .
>
> [26] Once at the [MJ and RJ] apartment building back in Dartmouth, Miller, having previously gotten the money, gets the keys to vehicle, and drives it away ...

These findings are inconsistent with the notion of Mr. Miller's abandonment. Rather they support the inference that Mr. Miller just wanted his cohorts to do the dirty work in the parking lot. In the end, the police found Mr. Miller driving homeward in the CRX with the money. No ingenious reasoning can warp this fact into even a tentative abandonment of the robbery.

[16] In *R. v. Ferguson*, [2008] 1 SCR 96, at ¶ 16-18, the Chief Justice, for the Court, said:

> [16] This poses a difficulty in a case such as this, since, unlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual

> determinations necessary for deciding the appropriate sentence in the case at hand.
>
> [17] Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(*a*)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
>
> [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(*b*)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(*d*) and 724(3)(*e*); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

[17] The treatment of the abandonment issue in the sentencing decision under appeal does not offend the *Ferguson* principles or the standard from *L.M.*

Second Issue-
Parity With Co-accused's Sentence

[18] The sentencing decision said:

> [29] . . .[MJ] was sentenced . . . to a term of 30 months incarceration in a federal institution. This was 30 months added to 11 months of pre-trial remand for which he received the times two credit.
>
> . . .

> [48] The sentence in relation to [MJ] has significance and I have considered that sentencing and carefully read the decision of my brother, Justice Beveridge, in that respect and I have taken that sentence into consideration in relation to this matter.

[19] Mr. Miller's sentencing judge assumed that MJ received 30 months plus 22 months, totalling 52 months, before MJ's credit for remand. The Crown acknowledges that, in fact, MJ had served only five and one-half months of remand. So MJ effectively received only 30 months plus up to 11 months, totalling up to 41 months, before credit for remand. Mr. Miller's sentencing judge apparently overstated MJ's sentence, before MJ's credit for remand, by about 11 months. This is relevant because Mr. Miller's sentencing judge applied the parity principle.

[20] Section 718.2(b) of the *Code* states that a sentencing court

> shall also take into consideration the following principles: ...(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[21] Parity is just one of several sentencing principles prescribed in the *Code*. In *L.M.*, at ¶ 35-36, Justice LeBel discussed the appeal court's role in applying the parity principle on a sentence appeal:

> [35] This exercise of ensuring that sentences are similar could not be given priority over the principle of deference to the trial judge's exercise of discretion, since the sentence was not vitiated by an error in principle and the trial judge had not imposed a sentence that was clearly unreasonable by failing to give adequate consideration to certain factors or by improperly assessing the evidence (*M. (C.A.)*, at para. 92, quoted in *McDonnell*, at para. 16; *W. (G.)*, at para. 19; see also *Ferris*, at p. 149, and *Manson*, at p. 93). This Court has clearly confirmed the "trial judge's traditionally broad sentencing discretion" *(M. (C.A.)*, at para. 56). Furthermore, this principle has been codified in s. 718.3 *Cr. C.*
>
> [36] Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity *where warranted by the circumstances*, because of the principle of proportionality (see *Dadour*, at p. 18). As this Court noted in *M. (C.A.)*, at para. 92, "there is no such thing as a uniform sentence for a particular crime". From this perspective, an appellate court is justified in intervening only if the sentence imposed by the trial judge "is in

> substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*M. (C.A.)*, at para. 92). [Justice LeBel's italics]

[22] As noted in *L.M.*, disparity may be "warranted by the circumstances", a factor whose assessment by the sentencing judge should attract deference on appeal. In my view, appellate deference, while warranted, is not determinative here. The sentencing judge overstated MJ's assumed sentence before credit for remand, then said that MJ's sentence "has significance" and "I have taken that sentence into consideration". The judge, in the exercise of his sentencing discretion to which I defer, decided to use the parity measure. But then he chose the wrong stripe on the yardstick. Had the sentencing judge known that MJ's remand was five and one half months instead of eleven, then apparently, from his reasons, he would have shortened Mr. Miller's term. This yardsticking error warrants an appellate adjustment of the sentence: eg. *R. v. Cromwell*, 2008 NSCA 60 ¶ 63-66.

[23] The judge overstated MJ's assumed sentence by approximately 11 months. So I would reduce Mr. Miller's sentence from 60 to 49 months.

[24] Mr. Miller then extends his parity argument. He submits that, because he did not engage in the physical robbery of Mr. Ring, and MJ did, his own sentence should be less than MJ's incarceration. He asks this court to substitute a 24 month term.

[25] I disagree with this submission. The judge's sentencing decision states that the determining aggravating factor for Mr. Miller, *vis-à-vis* MJ and his other acolytes, was that Mr. Miller planned the operation. The decision says:

> [42] A further aggravating factor suggested by the Crown was the premeditation. Well, yes, there was premeditation and planning. I agree with Mr. Sarson that it didn't seem to be planning that took place over a long period of time, but it was premeditated. There is no question about that and Miller was central to that. He was the idea, he was the plan, he was the beneficiary. This happened because of Miller. Yes, the other[s] (*sic*) actually did it, but they were Miller's designated goons. This was Miller's idea. On the evidence, it would not have happened had it not been for Miller. Sometimes they refer to somebody being the brains behind the scheme, well brains is not a word that I would use in relation to this situation, but he was the stupidity behind this scheme. He's the guy who came up with the idea - he wanted both the car and the money. At the

> end of the day, he had both. So yes, there was premeditation and planning of a sort. Bad planning, but planning.

[26] There is no error in the asserted principle – that the responsibility of planning and direction may attract accountability. The sentencing judge's assessment of Mr. Miller's planning role as an aggravating factor includes no appealable error under the principles from *L.M.*

Third Issue- Weapons Order

[27] Mr. Miller asks that ¶ 1(b) of the weapons prohibition order be reworded to refer to 10 years from Mr. Miller's release from imprisonment. The Crown does not oppose Mr. Miller's request, and I would agree with it.

Conclusion

[28] I would grant leave to appeal and allow the appeal by reducing Mr. Miller's term of incarceration from 60 to 49 months and rewording ¶ 1(b) of the weapons prohibition to refer to 10 years from Mr. Miller's release from imprisonment.

Fichaud, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.