NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Willis***, 2013 NSCA 78

Date: 20130627
Docket: CAC 406521
Registry: Halifax

Between:

Gevell Noel Willis

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Fichaud and Beveridge, JJ.A.
Appeal Heard:	April 12, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is allowed, per reasons for judgment of Beveridge, J.A.; Saunders and Fichaud, JJ.A. concurring.
Counsel:	Roger A. Burrill, for the appellant Kenneth W. F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] During a sentence hearing, the trial judge decided an aggravating fact existed. It was one that the Crown did not allege, and for which there was no evidence offered. Defence counsel objected. When pressed, the trial judge said "I've told you my view. If you want further clarification, you go to the Court of Appeal".

[2] The appellant decided to accept this invitation. He argues the trial judge erred in principle in finding present an aggravating fact, and relying on it to impose a longer sentence. The relief sought in this Court is a lesser sentence. The Crown concedes that the trial judge erred in principle, but contends the sentence should nonetheless be upheld.

[3] It is appropriate to set out the facts in more detail.

FACTS

[4] The victim had recently undergone open heart surgery. In an apparent search for crack cocaine, he found himself at the corner of Gottingen and Buddy Daye Streets in the early morning hours April 2, 2012. He there met the appellant. Money ($100) was paid by the victim to the appellant.

[5] The appellant returned with a female known as "Roxie". The three were then said to have driven around downtown Halifax in the victim's car. At 7:00 a.m. the three drove about 70 kilometers outside of the city to the victim's home where he got another $100 cash. They returned to Gottingen Street. "Roxie" was dropped off.

[6] The victim and the appellant drove to Seaview Park. The appellant demanded more money. The victim declined. The appellant punched him in the face. The victim drove to the Fairview area to a convenience store. On arrival, the appellant punched the victim several more times and took his car keys.

[7] The victim then went into the convenience store to use the ATM to try to get more cash. He was unable to do so. The victim returned to his car. The appellant returned the keys. Rather than start the car, the victim took the keys and ran into the convenience store.

[8] The appellant pursued him. When he caught him inside the store, the appellant started hitting the victim in the back of the head repeatedly at various locations in the store. The assault was captured on the store's surveillance system. The storeowner also witnessed the assault and called the police, who responded quickly.

[9] On their arrival, the victim and the appellant were still inside the store. The victim was drenched in blood. One of two main arteries at the back of his head had been severed. Due to the injury and the medications he was taking from his recent surgery, the loss of blood was extensive. Absent quick medical aid, the injury would have been fatal.

[10] The appellant was arrested and charged with attempted murder, aggravated assault, assault with a weapon (a rock), robbery, and breach of a recognizance.

[11] The appellant eventually pled guilty to the charge of aggravated assault on July 4, 2012. The judge was the Honourable Judge William B. Digby. The above facts were given to Judge Digby. He asked the appellant if he agreed with the facts. He said he did. The Crown confirmed its intention to dispose of the remaining counts after sentence was imposed. Sentence was adjourned to July 13, 2012 to give the victim an opportunity to file a Victim Impact Statement.

[12] On July 13, 2012 there was no Victim Impact Statement. The victim declined to participate. The information was that despite the seriousness of the injury, he had not suffered any ongoing physical or psychological effects. The defence sought a further short adjournment to prepare submissions. The hearing was set over to August 22, 2012.

[13] On August 22, 2012 the Crown repeated the factual circumstances of the offence almost verbatim to his earlier representations. He added that the victim, while being struck in the head, was fearful for his life – causing him to protect only his chest while the appellant repeatedly struck him on the head. Judge Digby then asked: "What was the object, if any, in Mr. Willis's hand that he might have used to strike Mr. MacKay on the head?" The Crown replied that the appellant had not pled to using a weapon, but confirmed a rock had been located in the store with blood on it, and the storeowner had "indicated that he had no such rock in his store prior to this incident".

[14] The Crown set out the appellant's previous convictions, and submitted that the range of sentence was three to four years, and even up to seven or nine for this type of offence. He recommended the judge impose a five-year sentence.

[15] Defence counsel observed that the plea was to aggravated assault, and not assault with a weapon. The victim did not know if a weapon had been used, and the video of the incident was inconclusive. Defence counsel suggested that the Crown concedes that it cannot prove beyond a reasonable doubt that a weapon was used. This, she explained, was the reason for there being no plea on the charge of assault with a weapon . The Crown chimed in: "No dispute there, Your Honour".

[16] Submissions were made by the defence outlining the appellant's personal circumstances. The only additional details about the circumstances of the offence were: the appellant and the victim were on a crack cocaine "run"; both consuming the drug along with "Roxie"; and despite the seriousness of the injury, the victim was out of the hospital in a few hours without any ongoing physical or psychological complications.

[17] Counsel sought to distinguish the cases relied upon by the Crown on the bases that in those, weapons were involved, and there were permanent injuries – both serious aggravating factors absent from the appellant's situation. During these submissions, Judge Digby made it clear that he did not accept that a weapon was not involved. Counsel repeated that the appellant did not admit this fact. Despite this, the judge said he believed the injury to the victim was caused by a rock. This led to his invitation for her to appeal.

SENTENCE DECISION

[18] Judge Digby rendered an oral decision (not reported). He accepted that the appellant and the victim were up to no good – pursuing a source of, and consuming, crack cocaine. But at some point, the victim wanted to separate himself from the appellant. The appellant prevented that, and put a beating on the victim that had the potential to be fatal.

[19] The judge noted the mitigating factors of a guilty plea and no lasting injury, and it was not a planned and premeditated offence committed by sober people. He referred to the need for a sentence of signficant denunciation – in other words, a significant period of incarceration. After taking into account the appellant's 140 days in pre-sentence custody, he announced a sentence of four years in a federal penetentiary. Ancillary orders were made with respect to a lifetime ban on possessing firearms and weapons, and for a DNA sample.

[20] The remaining charges against the appellant were then withdrawn.

ISSUES

[21] The issues that need to be addressed are:

1. Did the trial judge err in principle;
2. If so, what are the consequences of that error?

DID THE TRIAL JUDGE ERR IN PRINCIPLE?

[22] The trial judge did not refer to many of the facts in his decision. He made no mention of the appellant having used a weapon during the assault. Nonetheless, the Crown concedes the judge did take into account, in aggravation of sentence, that the appellant used a weapon in his assault of the victim, and in doing so, he erred in principle.

[23] In light of the record, the Crown's concessions are appropriate. Where there is a dispute about the existence of aggravating facts, the onus is on the Crown to prove them on the usual criminal burden of proof. Any doubt about this principle was removed long ago by the Supreme Court of Canada in *R. v. Gardiner*, [1982] 2 S.C.R. 368. Many of the issues surrounding proof of aggravating and mitigating factors are now governed by ss. 723-725 of the *Criminal Code*, but without substantive change to the principles already established by caselaw (see *R. v. Angelillo*, 2006 SCC 55 at para. 21). What then flows from this acknowledged legal error?

WHAT ARE THE CONSEQUENCES?

[24] The parties seem to agree on the immediate consequence: deference is no longer owed to the balancing exercise carried out by the sentencing judge. In other words, this Court is presented with a clean slate to decide what is a fit sentence. This proposition is well accepted (see *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont.C.A.); *R. v. Hawkins* 2011 NSCA 7; *R. v. Bernard*, 2011 NSCA 53, leave to appeal ref'd [2011] S.C.C.A. No. 38).

[25] Nonetheless, the appellant argues that since Judge Digby found the proper sentence to be 52.5 months (four years plus 140 days pre-sentence custody) with the aggravating fact of a weapon, then the sentence must be reduced accordingly.

[26] The Crown says that this approach is an invitation to somehow quantify the impact of the aggravating circumstance and then subtract that from the original sentence to arrive at the appropriate sanction. In effect, it says this is an invitation to pay deference to the sentence tainted by error. It would be the antithesis of a clean slate. I agree.

[27] The proper approach is for this Court to now decide the appropriate sentence with regard to the purpose and principles of sentence, along with the circumstances of the offence and the offender (*R. v. Bernard* at paras. 25, 29 and 30).

[28] The parties each submitted a host of cases to try to assist the court in deciding what is an appropriate quantum, all the while recognizing that sentencing is an inherently individualized process (see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 92). The appellant seeks a sentence of two and one-half to three years. The respondent suggests imprisonment for four years as one that falls within the range and is appropriate.

[29] The circumstances of the offence have already been described. Information about the circumstances of the offender is scant. What is known is that he is a relatively young man, age 25 at the time of sentence, with a common-law spouse, who is the mother to their young child, and another. The appellant has a criminal record dating from 2006, which includes two convictions for violence. Details of the complete record were not provided. In school, he did well in some subjects, but only completed grade 10. He was scheduled to start a welding course in September 2012 and hopes to follow up on this when released. The appellant also expressed remorse for his actions.

[30] Proportionality is central to the sentencing process (see *R. v. Nasogaluak* 2010 SCC 6 at para. 42). The sentence must be proportional to the moral blameworthiness of the offender and the gravity of the offence. There are statutorily mandated aggravating factors. None are applicable here. Courts are also required to adhere to the principles of restraint (s. 718.2(d) and (e)), and that the sentence should be similar to sentences imposed on similar offenders for similar offences committted in similar circumstances (s.718.2(b)).

[31] There can be little doubt the offence was grave. Aggravated assault is one of the most serious offences in the *Criminal Code*. The violence used was sufficient to inflict injuries on the victim that were life threatening. Only timely medical treatment saved the appellant from facing a charge of manslaughter or

worse. Yet the victim was out of the hospital in a matter of a few hours, with no indication of physical or pyschological damage.

[32] The moral blameworthiness of the appellant is high. He assaulted the victim a number of times prior to the cowardly and prolonged assault inside the convenience store on a man who did nothing to provoke or in any way deserve such treatment. The victim did nothing but try to protect his chest.

[33] A period of incarceration in a federal institution is appropriate. But of what duration? An examination of sentences imposed on similar offenders for similar offences in similar circumstances leads me to the conclusion that it should be three years less credit (on a one to one basis) for the 140 days he served in pre-sentence custody. While it is recognized that no two cases will be exactly the same, what are the most germane features in this case? In my opinion, they are: a serious assault with no weapon, resulting in immediate, but not lasting injury; the offender is a relatively young man with a past record for violence.

[34] The cases that particularly influence me in this regard are: *R. v. Coleman*, [1992] N.S.J. No. 84 (C.A.); *R. v. Meltzer*, 2008 NSCA 26; *R. v. Moller*, 2008 NSSC 158; *R. v. MacDonald*, 2010 NSSC 281; and *R. v. Ali*, 2010 MBCA 14.

[35] In *R. v. Coleman*, the offender pled guilty to aggravated assault after hearing the Crown's medical witnesses. The trial judge imposed a 90 day intermittent sentence followed by probation. The Crown appealed. The victim was the offender's girlfriend. He called her a derogatory name. She slapped him. In retaliation he punched her in the face, knocking her out. He continued to beat her about the face. A bystander came to her aid. The offender assaulted him. The victim had a fracture of her left orbit, a broken nose and abrasions. Two operations were required, but no lasting effects were expected. The offender was 21, but with a number of Youth Court convictions including two for assault and assault causing bodily harm. Hallett J.A., for the Court, wrote that he had reviewed 19 decisions of the Court, and agreed with the Crown's position that the cases stand for the proposition that general deterrence required a significant period of incarceration in a provincial institution. Sentence was varied to 12 months' incarceration.

[36] In *R. v. Meltzer*, the 20 year old offender was convicted at trial of having participated in an assault causing bodily harm on a man who had refused to give a cigarette to one of his accomplices. The assault involved three powerful, closed fist punches to the face. One of these blows was by the offender. The injuries were described as severe. His jaw was broken in two places requiring surgery with a permanent scar on his face, and dental reconstruction. The trial judge imposed

22 weeks' incarceration followed by 12 months' probation. The offender appealed, seeking a conditional sentence. The appeal was dismissed.

[37] In *R. v. Moller*, the offender was 23 years old with a long and continuous criminal record for violence and a disdain for the criminal justice system, both before and after the date of the offences of aggravated assault and assault causing bodily harm. Both offences arose out of the same event. The offender was at a party. A dispute arose. He left and returned with the apparent purpose of assaulting the victim. The offender struck the victim in the head with a pool ball, causing a significant gash. The assault causing bodily harm occurred when the offender threw a girl off his back who was trying to assist the first victim. His Pre-sentence Report was not positive. It disclosed that the offender (despite the guilty pleas) did not accept responsibility for the violent acts and expressed no remorse. Coady J. imposed concurrent sentences of two years' federal incarceration.

[38] In *R. v. MacDonald*, the 38 offender was found guilty of aggravated assault. The offender punched a fellow panhandler who had refused to move from a coveted spot on the sidewalk, close to Tim Hortons on Spring Garden Road. The punch knocked her from her seated position onto the street with serious results. Her jaw was fractured in two places requiring plates and screws to be inserted. The offender's criminal record was extensive, including five convictions for assault. The Crown sought a sentence of between 12 and 18 months. Coughlan J. imposed 12 months less credit of four months pre-sentence custody on the basis of two for one.

[39] In *R. v. Ali*, the 19 year old offender was found guilty at trial of aggravated assault, uttering a death threat and breach of a recognizance. The assault was on a 15 year old victim. The offender punched and kicked the victim, resulting in a broken jaw, and a laceration to the cheek. The trial judge described the kick as a brutal kick (soccer style) to the most vulnerable part of the body – the head, on a boy that was no threat to him. He sentenced the offender to one year to be served conditionally. The Crown appealed. Monnin J.A., for the Court, observed that the offender was not a first time offender, having been convicted as a youth of multiple counts of uttering threats and two assaults. There was no remorse. A sentence of nine months incarceration was substituted, less time already served on the conditional sentence.

[40] I would grant leave to appeal, and allow the appeal by substituting a sentence of three years' incarceration in a federal penitentiary, less credit for pre-sentence custody of 140 days.

Beveridge, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.