NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ogden*, 2004 NSCA 86

Date: 20040623
Docket: CAC 214603
Registry: Halifax

Between:

Victoria May Ogden

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Cromwell and Saunders, JJ.A.
Appeal Heard:	June 14, 2004, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed per reasons for judgment of Bateman, J.A.; Cromwell and Saunders, JJ.A. concurring.
Counsel:	Tanya R. Jones, for the appellant James A. Gumpert, Q.C., for the respondent

Reasons for judgment:

[1] Victoria May Ogden applies for leave and, if granted, appeals her sentence on 13 convictions. On January 13, 2004, she appeared before Judge Robert Prince of the Provincial Court and received a 5 year federal sentence on a robbery conviction (s. 344(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46) as well as concurrent sentences of between one to six months on the additional 12 offences which ranged from breach of recognizance to extortion.

[2] The victim of the robbery was 68 year old Helen Fournier. On April 21, 2003, two women, one of them Ms. Ogden, appeared at Ms. Fournier's home in Yarmouth, Nova Scotia. Ms. Ogden told Ms. Fournier that Ms. Fournier's grandson had solicited her for sex and owed her $50.00. She needed the $50.00 to get the grandson out of jail. Ms. Fournier agreed to take Ms. Ogden, in her vehicle, to give her grandson the money.

[3] While driving on Regent Street Ms. Ogden told Ms. Fournier to stop the car. She said that she had a gun and demanded Ms. Fournier's purse or she would kill her. She had something inside her jacket which she passed off as a gun. Additionally, she grabbed the snow scraper from the floor and threatened to hit Ms. Fournier with it. Ms. Ogden took about $50.00 from Ms. Fournier's purse before exiting the vehicle.

[4] On January 6, 2004, at about 9:00 p.m. Ms. Ogden entered 76 year old Phyllis Ford's house uninvited and unannounced. Ms. Ford, hearing a noise, found her standing in the hallway outside the bedroom. Ms. Ogden told her that Ms. Ford's nephew, Ed Walsh, was stranded in a nearby community, Carleton, his truck having broken down. He needed $60 for a tow truck. Ms. Ogden further demanded $20 for a cab to take her and the money to Mr. Walsh. Ms. Ford, although doubting Ms. Ogden's story, handed over the money. At the time of this offence Ms. Ogden was on house arrest awaiting sentence on charges of breach of a recognizance and extortion and awaiting trial on the robbery.

[5] Earlier that same day Lindsay Jeffery reported to the Yarmouth Rural RCMP Detachment that a female had attempted to steal $50 from his residence at 24 Mood's Road. After leaving the Detachment, Mr. Jeffrey called to say that the same female (who turned out to be Ms. Ogden) had broken into his house and stolen $100 from a purse in his bedroom.

[6] In April of 2003 Ms. Ogden, who had had a friendship with Curtis Ross Little, stole a blank cheque from Mr. Little's vehicle, forged his name and negotiated the cheque in the amount of $300. When Mr. Little attempted to end their association Ms. Ogden threatened to accuse him of assaulting her.

[7] The additional offences for which Ms. Ogden was sentenced that day included four counts of failure to comply with the terms of a recognizance (s.145(3)); and other charges arising from additional offences against the above victims.

[8] The appellant says that the judge erred in that he did not invite her to speak on her own behalf prior to passing sentence as is required by s. 726 of the **Criminal Code**. In that regard, Ms. Ogden asks that this Court remedy that oversight by receiving a written version of the comments she would have made at that time. The Crown does not object to our consideration of that material.

[9] The appellant further says that the sentences, in total, are harsh and excessive and that the judge erred in failing to give credit for the onerous bail conditions (effectively house arrest) to which Ms. Ogden was subject during her release while awaiting sentencing. Finally, she says that the judge gave inappropriate weight to Ms. Fournier's victim impact statement, which overwhelmed other relevant, mitigating factors, contributing to a harsh and excessive sentence.

[10] In the affidavit filed by Ms. Ogden she expresses remorse for her crimes and states her wish to apologize to Ms. Fournier for her actions. Attached to the affidavit is a letter dated September 25, 2003 from Ms. Ogden's addictions counsellor, attesting to her sobriety to that point. Ms. Ogden intended to provide that letter to the judge at the sentencing hearing. Additionally, she speaks of the active role she plays in the lives of her two young children. Counsel for Ms. Ogden has presented this Court with two letters from persons in authority attesting to Ms. Ogden's positive progress while incarcerated at the Nova Institution and, in particular, the steps she has taken to address her addiction.

[11] I have considered the additional information provided by Ms. Ogden. I am not persuaded, however, that the failure of the trial judge to comply with s. 726 of the **Criminal Code** operated to Ms. Ogden's prejudice (**R. v. MacMillan** (2003),

184 B.C.A.C. 239; B.C.J. No. 1479 (Q.L.)(B.C.C.A.)). Nor am I of the view that, had he heard her remarks, it would have resulted in a lesser or different sentence.

[12] In passing sentence a judge is exercising a statutorily authorized discretion under s.718.3 of the **Criminal Code**. Absent some error in principle, the Court is not entitled to intervene unless the sentence is not fit, in the sense that it is clearly unreasonable. (**R. v. Shropshire**, [1995] 4 S.C.R. 227; S.C.J. No. 52 (Q.L.) at ¶ 46 per Iacobucci, J. for the Court and **R. v. C.A.M.**, [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), per Lamer, C.J.C. for the Court, at ¶ 90 - 91.)

[13] For the reasons set out below, I am not persuaded that there is any error in principle or that this sentence is unfit.

[14] Ms. Ogden says that her sentence should have been reduced to give credit for the restrictions on her liberty while awaiting trial. She was charged with robbing Ms. Fournier on April 23, 2003 and was sentenced for these offences, including the robbery, on January 13, 2004. While on bail awaiting sentence Ms. Ogden was on a recognizance wherein she undertook to remain in her residence at all times except for legal, medical or counselling appointments. Additionally she was to attend addictions counselling and to refrain from consumption of drugs or alcohol. The terms of the recognizance were modified several times at Ms. Ogden's request.

[15] The **Criminal Code** (s. 719(3)) permits the sentencing judge to take into account any time spent in custody in reduction of sentence. Where such credit is given it is generally in the range of two months reduction of the final sentence for each month spent in custody awaiting trial. "Custody" in the context of s. 719(3) has generally not included liberty restrictions while on release awaiting trial.

[16] Credit for pre-trial custody is a discretionary matter, although failure to give credit without good reason has been held to be error in principle (**R. v. Rezaie** (1996), 112 C.C.C. (3d) 97 (Ont.C.A.)). It is unnecessary here to consider whether credit can be given for pre-trial restrictions on liberty short of incarceration or to analyze the effect of s. 791(2) of the **Code** on such a request. I am not persuaded that the judge erred in principle by not reducing the sentence to recognize the bail restrictions. Counsel for Ms. Ogden did not, at the sentencing hearing, ask that the sentence be reduced. Not only did Ms. Ogden not abide by the terms of the recognizance, she continued to re-offend while its terms were in effect. Indeed,

three of the offences for which she was sentenced arose from her breach of the recognizance. It would be illogical to reduce her sentence on account of the restrictive bail conditions with which she did not comply

[17] Ms. Ogden was 31years old at the time of sentencing. She had been convicted of several offences running from 1998 to the date of the sentences under appeal. Her record included convictions under the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293; assault, mischief and damage to property; breaches of recognizance; extortion; and fraud. The offences for which she was sentenced by Judge Prince were committed from the 6th April of 2003 to the 6th of January, 2004 and involved three victims. It was the submission of the Crown attorney on sentencing, and one borne out by the record, that Ms. Ogden's criminal behaviour was of increasing seriousness. Additionally, she was targeting one of the more vulnerable members of society, senior citizens. Aggravating, as well, is the fact that she preyed on these people in their own homes and through unauthorized entry. The robbery of Ms. Fournier involved a threat of violence. She continued to offend while on release notwithstanding the terms of her recognizance.

[18] The judge's sentencing remarks reveal that he was particularly concerned with the vulnerability of the victims; the fact that she had a criminal record of some duration; and that her record included at least one conviction for extortion. He observed that past sentences, which had focussed on reformation and rehabilitation, had not been sufficient to motivate Ms. Ogden to address the addiction that was driving her criminal behaviour. The judge concluded that a sentence addressed to both specific and general deterrence was needed. Recognizing Ms. Ogden's need to deal with her substance abuse Judge Prince recommended her earliest possible admission within the institution for intensive rehabilitation. He concluded that a significant investment of resources would be necessary to achieve rehabilitation.

[19] Ms. Ogden says that the judge overemphasized Ms. Fournier's victim impact statement, resulting in a sentence that is manifestly excessive. I am not persuaded that this is so - the judge, in referring to the victim impact statement, was simply acknowledging that the robbery of Ms. Fournier was a crime committed against an aging and vulnerable member of society. The circumstances of the victim is a factor relevant to sentencing. I am not persuaded that it overwhelmed the judge's consideration of the other appropriate sentencing principles.

[20] Contrary to the appellant's submission, the fact that violence was only threatened is not a mitigating factor here - it is the absence of an aggravating factor. The mitigating factors were few. While Ms. Ogden eventually pleaded guilty to the offences, it was not done at an early stage in the proceedings.

[21] In structuring the sentence the judge imposed a period of five years incarceration for the robbery against Helen Fournier (s. 344(b)), with the sentences for all other offences to run concurrently. The judge might have apportioned the time allocated to each offence differently with some running concurrently and others consecutively. This was a global disposition. I am not persuaded that the sentence of 5 years for this collection of offences is unreasonable.

[22] While I would grant leave, I would dismiss the appeal.

Bateman, J.A.

Concurred in:
Cromwell, J.A.
Saunders, J.A.