NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Sweet*, 2007 NSCA 31

Date: 20070321
Docket: CAC 275198
Registry: Halifax

Between:

Peter Allen Sweet

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.
Appeal Heard:	Friday, February 9, 2007 in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Brian V. Vardigans, for the appellant Daniel A. MacRury, Q.C., for the respondent

Reasons for judgment:

BACKGROUND

[1] The appellant was sentenced to the equivalent of twelve months incarceration, followed by two years probation, for assaulting his wife, carelessly using a firearm and, on an earlier occasion, threatening her life. He presents only one issue on appeal; namely, that the sentencing judge erred by ordering him to serve this sentence in jail as opposed to in the community.

[2] Here is how the sentencing judge described the incidents:

> ... Mr. Sweet while under the influence of alcohol and significantly intoxicated, assaulted his wife. The assault involved him putting his arms around her throat. He also threatened to kill her and her family if she were to leave him and then not only that but during this incident Mr. Sweet grabbed the railings off a bannister, as I understand it, he was waving those around, there was some damage to property that was committed as well, although he wasn't charged with that, is not being sentenced for that, but as part of the overall circumstances of the offences that's what took place. How this came to an end was by Mr. Sweet getting a high-powered rifle, locking himself in a garage and it ended with the firearm being discharged into the ceiling.

[3] The appellant asserts that by this and other passages, the sentencing judge misapprehended the facts as presented by counsel, thereby prompting her to view the incidents as being much more serious than they actually were. This, says the appellant, constitutes an error in principle in that she mishandled her duty to consider all mitigating factors. In post-hearing submissions, he explains:

> If one accepts that the trial judge misapprehended, as did the Crown, the extent of the gravity of the assault and further that she confused the timeframe of the threat as being on the same date as the other two charges then one can infer that the sentence handed down was done so on a misapprehension of the facts which in turn resulted in a misapplication of the applicable principles and particularly the non-application of those factors mitigating against a jail sentence.

[4] The appellant also asserts that in any event, the sentence was clearly excessive.

[5] For the reasons that follow, I would grant leave but dismiss the appeal. The sentencing judge did misapprehend some of the representations but this did not constitute an error in principle. In any event, the sentence was not clearly excessive.

STANDARD OF REVIEW

[6] It is not for this court to impose our views as to a fit and proper sentence. We must respect the sentencing judge's conclusion unless she applied some wrong principle of law or the sentence is clearly excessive. As Iacobucci, J. ruled in **R. v. Shropshire**, [1995] 4 S.C.R. 227:

> [46] An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.
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> [47] I would adopt the approach taken by the Nova Scotia Court of Appeal in the cases of **R. v. Pepin** (1990), 98 N.S.R. (2d) 238, and **R. v. Muise** (1994), 94 C.C.C. (3d) 119. In **Pepin,** at p. 251, it was held that:
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> > ... in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.

[7] Specifically, in this case, whether a period of incarceration should be served in the community fell squarely within the sentencing judge's discretion. The Supreme Court of Canada in **R. v. Proulx**, 2000 SCC 5, confirmed this:

> [125] Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to [page 500] do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit.

[126] As explained in *M. (C.A.), supra*, at para. 91:

> This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire*, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.
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> This last justification is particularly relevant in the case of conditional sentences. Crafting appropriate conditions requires knowledge of both the needs and resources of the community.

[Emphasis added.]

[8] In this case the appellant suggests that the judge misinterpreted some of counsels' representations. As I will discuss later in my judgment, the appellant is correct in this assertion. However, this does not automatically constitute reversible error. Instead, we must ask ourselves the following question. Based on an accurate interpretation of the facts, was the sentence clearly excessive? In other words, in such circumstances, the fundamental issue remains whether the sentence was clearly excessive. See *Criminal Pleadings & Practice in Canada*, by Mr. Justice E. G. Ewaschuck (Aurora: Canada Law Book 2007, at para. 25:0200), where the author observes at pp. 25-26:

> A sentence is unfit where (a) it is clearly excessive or inadequate, (b) an error in principle resulted in an excessive or inadequate sentence, or (c) *the trial judge misinterpreted the facts with the result that the sentence is excessive or inadequate.*
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> *R. v. Boudreau (*1978), 39 C.C.C. (2d) 75 (N.S.C.A)
>
> *R. v. Curtis* (1992), 69 C.C.C. (3d) 385 (N.B.C.A.), at pp. 394-5
>
> [Emphasis added.]

See also **R. v. Domtar Specialty Fine Papers, a Division of Domtar, Inc**., [2001] O.J. No. 1733, para. 88.

ANALYSIS

[9] The appellant submits that the judge misapprehended the facts in two areas. The first involves the gravity of the assault and specifically the extent to which the appellant may have approached his wife's throat with his hands. The second area involves the sequence of events and specifically whether the judge erroneously concluded that all three charges arose from the same incident.

[10] Because of the guilty pleas, the judge relied solely on the representations of counsel for the factual context. At no time did either counsel caution the judge as to any disagreement about the facts. Here is what the record reveals.

[11] As to what extent the appellant approached his victim's throat with his hands, Crown counsel said this:

> At one time he put his hands around his wife’s throat. ... And while he had his hands around his wife’s throat, he was apparently yelling at the two-year old.

[12] Yet, in his submissions, Defence counsel suggested a less incriminating version:

> ... at one point he moved out of the doorway and also at one point she said he put his hands up to her throat I think is the way she expressed it in the statement to the police.

[13] Based on this record, the judge in her reasons made the following two comments:

> ... The assault involved him putting his arms around her throat.
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> ...
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> And when I say the gravity of the offence, what I'm talking about of course are all of the circumstances of what happened, and they include the fact that the assault of putting hands on the, on the throat or on the neck of the victim ...

[14] During our appeal hearing, both counsel acknowledged that their submissions were each based on the same source of information; namely, the police report which purportedly contained the wife's version of events. The judge did not have this document; however, counsel agreed that we should have the relevant excerpt from this report read into the record as fresh evidence. It reads as follows: "He put his hands to my throat."

[15] Turning to the threatening charge, it is common ground that this stems from an incident on a date prior to the assault/weapon incident. Yet the judge suggested all the charges stemmed from the same incident. She said this:

> ... Not only that but there was, the whole pattern of conduct that took place on, on the, on the date when Mr. Sweet was, was picked up for this, the taking the bannisters, of waving them around, of damaging the property, assaulting his wife, threatening to kill her, threatening to kill her family, and, and what have you.

[16] I have carefully considered this new perspective including the judge's slight overestimation of the seriousness of the assault and her obvious error as to when the incident involving the threatening charge occurred. I am still unable to conclude that the sentence imposed was excessive. Considering the appellant's version of the assault at its highest - that he did not touch his victim on her neck or throat - the total circumstances nonetheless justify the sentence imposed. Furthermore, I agree with Crown counsel that it does not help the appellant to highlight the judge's confusion over when the threatening incident occurred. The fact that the appellant threatened his wife's life on an earlier occasion rules out the potential mitigating factor that the appellant's violent behaviour represented an isolated incident and may, in fact, have led to consecutive sentences.

[17] Even with the corrected record, the judge's concerns that the appellant represented a danger to the community and further that a community sentence could not satisfy the combined sentencing principles of deterrence and denunciation were well-founded. This was a very serious spousal assault and the fact that the appellant may not have applied his hands to his victim's throat does not change this.

[18] For example, after earlier threatening his wife's life, the appellant on the day of the assault:

- put his fist through a wall;
- broke some rungs out of the handrail on the stairs and waved them around;
- tore a baby gate off the wall and threw it down some steps;
- restricted his wife from moving around by getting in front of her and blocking her;
- “put his hands to [his wife's] throat”;
- took a rifle into his garage, eventually firing a shot into the ceiling;

As well, some of these acts were carried out in the presence of the appellant's young children.

[19] These incidents constitute the type of spousal abuse that Parliament has identified as an aggravating factor in sentencing:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

...

> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
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> ...
>
> shall be deemed to be aggravating circumstances ...

[20] In conclusion, by rejecting a community sentence, the judge committed no error in principle; nor was the sentence clearly excessive.

[21] While granting leave, we would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Fichaud, J.A.