SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Leblanc, 2012 NSSC 447

Date: 20121115
Docket: Hfx. No. 396439
Registry: Halifax

Between:

Her Majesty the Queen

Plaintiff

v.

Andrew Philip Leblanc

Defendant

Judge: The Honourable Justice A. David MacAdam

Heard: October 10, 2012 and November 15, 2012, in Halifax, Nova Scotia

Final Written Submissions: November 8, 2012

Written Decision: December 21, 2012

Counsel: Alicia Kennedy, for the Crown
D. Brian Newton and Sarah Hebb, for the defendant

By the Court:

[1] The respondent was convicted at trial on a charge of assault. The trial judge granted an absolute discharge. The Crown appeals the sentence.

Standard of review

[2] The role of an appellate court on a sentencing appeal was described by the Supreme Court of Canada in *R. v. Shropshire*, [1995] 4 S.C.R. 227, [1995] S.C.J. No. 52, at para. 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.

[3] The Supreme Court of Canada stated in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28, at para. 90, that "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. C.S.P.*, 2005 NSCA 159, at para. 10. As such, an appeal court must show "great deference" when considering an appeal against sentence: *R. v. Knockwood*, 2009 NSCA 98, at para. 11.

Grounds of appeal

[4] The Crown appeals on several grounds. Crown counsel alleges (1) denial of procedural fairness when the sentencing judge refused to order a pre-sentence report, as requested by the Crown; (2) denial of procedural fairness arising from certain questioning of the respondent by the sentencing judge; (3) denial to the Crown of the ability to test the reliability and credibility of the responses of the respondent; (4) that the sentencing judge ignored aggravating features of the offence; and (5) that the sentencing judge imposed an unfit sentence.

(1) the Crown's request for a pre-sentence report

[5] During the sentencing hearing, defence counsel provided background information respecting his past and current circumstances. Specifically, he indicated that he was almost 60 years old, he had no prior criminal record, he was retired and he lived on his own. He further indicated that he had no history of alcohol abuse and no history of problems with anger management. The Crown characterized the offence occurred as an unprovoked attack by the accused, and alleged that he had been drinking.

[6] After delivery of the verdict, and before submissions of counsel, there was an exchange between counsel and the sentencing judge respecting the Crown's request that a pre-sentence report be ordered. Initially the respondent's counsel appeared to indicate agreement, but then stated, after speaking with his client, that the respondent wished to proceed and would not seek a pre-sentence report.

[7] The Crown appears to suggest that the sentencing judge convinced the defence not to request a pre-sentence report. However, the transcript indicates that the decision was made after counsel spoke with his client. Defence counsel was experienced and if he wanted a pre-sentence report, he could easily have sought one. The only party requesting a report was the Crown.

[8] Simply because one of the parties requests a pre-sentence report does not obligate the sentencing judge to order one. No authority was cited to suggest otherwise. Even where both the Crown and defence agree, I am not aware of any authority that says the trial judge lost discretion. The trial judge is not required to accept a joint recommendation on sentencing and similarly, in my view, is not required to accept a joint recommendation for a pre-sentence report. For Also, on the other hand, even where neither party makes the request, the sentencing judge may still order one.

[9] I have taken note of the comment of Rosenberg J.A. in *R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.), at 294, that "before imposing a sentence of imprisonment upon a first offender, the trial judge should have either a presentence report or some very clear statement with respect to the accused's background and circumstances". This was particularly so in the case of youthful

first-time offenders. The circumstances in *Priest*, *supra.*, were markedly different than the present case; the offender was young, and was sentenced to a term several times longer than that suggested by the Crown, on the basis of little information, in a five-minute proceeding after a guilty plea.

[10] In this case, the respondent was a first-time offender, though not a youthful one. The trial judge had presiding over a trial of the charge, and had the opportunity to form some understanding of the offender and his circumstances. In my view there was no procedural unfairness to the Crown in the manner in which the sentencing judge handled the issue of a pre-sentence report.

(2) and (3): the questioning of the respondent by the trial judge

[11] The next two grounds of appeal appear to be related to the questioning of the offender by the sentencing judge immediately preceding the passing of sentence. The Crown's position appears to be that this resulted in a denial of its ability to test the respondent's responses.

[12] The questions asked by the sentencing judge included inquiries about extracurricular activities and volunteer work, the respondent's social circle, where he had lived, and his future plans. The sentencing judge also asked:

> I'm just wondering about your use of alcohol and how common or how regular it is and if there is a difficulty there. Your use may help me understand whether there is an issue that needs to be addressed or not.

[13] To this question Mr. LeBlanc responded:

> I enjoy a beer or two when I have a steak. I enjoy a nice glass of wine with a homemade spaghetti sauce and garlic bread, and a glass of red wine at Thanksgiving, New Year's, and Christmas. And occasionally, if there's a hockey game on, maybe I'll have a couple.

[14] In respect to the questions about extracurricular activities, volunteer work or how he kept himself busy, the respondent stated that he cares for his mother. He indicated he has always lived in the same area and in respect to the question about his plans for the future he said his sister had been asking whether he would like to move to British Columbia, where she resided. He said that trusting others does not

come easy to him and that he had an ex-wife who had cheated on him, leaving a “bitter taste in my mouth”.

[15] Neither counsel requested an opportunity to ask follow-up questions after the sentencing judge’s questions. Nor did the Crown seek an adjournment for the purpose of considering whether to challenge any of the information provided by the respondent in reply to the sentencing judge’s questions or, for that matter, the information provided by defence counsel in his submission on sentencing. As noted in his brief, it was the respondent’s counsel who first raised the issue of alcohol use. He suggested that the questioning by the sentencing judge was for the purpose of clarifying his submission in that regard.

[16] Counsel referenced a number of authorities in respect to the role of a trial judge in eliciting evidence. However, the authorities referenced are primarily related to intervention during the trial on guilt or innocence rather than on the sentencing aspect of the trial.

[17] Section 726 of the *Criminal Code* mandates the court, before imposing sentence, to “ask whether the offender, if present, has anything to say”. The Crown acknowledges that the practice is that the offender is neither sworn nor affirmed in the event they wish to make a statement.

[18] Pursuant to s. 724(3), if the Crown alleges aggravating circumstances going to sentence, they must be proven beyond a reasonable doubt; however, the accused is only required to establish mitigating circumstances on a balance of probabilities: see *R v. Nur*, 2011 ONSC 4874, at para. 59. The Crown submits that this rule rests on a concern that the trial judge should not elicit prejudicial information against the accused, as well as the recognition that counsel, not the trial judge, are expected to determine the issues and evidence before the court.

[19] In this instance, the trial judge’s question about alcohol apparently followed the submission by defence counsel. Although a better practice would have been to invite counsel to ask any follow-up questions, and perhaps, in such an eventuality, to swear the offender, I am not persuaded that the questions asked by the trial judge were fatal to the sentence, that they amounted to advocacy, or that they provide any foundation to find a denial of procedural fairness or the appearance of one.

(4) and (5) aggravating factors and unfit sentence

[20] These two grounds, in my view, can be considered together. In her decision, the sentencing judge said:

> Bottom line principle of sentencing is protection of the public through a number of means which includes deterrence, both specific and general, and rehabilitation, and depending on the crime there are a variety of sentences that are available.
>
> Mr. LeBlanc strikes me as an individual who, up to this point in his life, has been a productive member of society who has been law-abiding and since this incident has continued on that path. And once again I stress the unfortunate nature of this situation.
>
> From my discussion with Mr. LeBlanc, together with comments of his counsel, it doesn't appear to me that there's an anger management issue. Often that becomes readily apparent from folks we see in the courtroom, either by their words or their actions, and I agree that he appears to be a passive person who, for the most part, keeps to himself. I think that has been a bit of a deterrence for him to have had to stay away from his fishing location at Albro Lake. He accepts the finding of the Court, despite the fact that perhaps his recollection of events is different. I don't see any need, in short, for reporting, anger management, or substance abuse counseling, especially in light of the fact that we have a probation service that is so overwhelmed with caseloads. Adding to that, I see, is just a burden.
>
> In terms of a discharge application, we know that the test is that it must not only be in Mr. LeBlanc's best interest but not contrary to the public interest. Certainly, in his best interest it seems increasingly...folks with a criminal record at any stage in their life run into roadblocks, whether it's with travel or employment opportunities. As to whether I'm satisfied that it's not contrary to the public interest, I can readily come to that conclusion, given everything that I heard today. That's very much fresh in my mind.
>
> Mr. LeBlanc is not a safety concern to society, and in my view, an absolute discharge should be, and will be, granted.

[21] The sentencing judge relied on her recollection of the evidence, as well as the submissions of counsel and the respondents answers to her questions. Having regard to the principles set out in *Shropshire, supra.,* she was mindful of the

evidence at trial and of her observations of the offender and the evidence he gave at that time.

[22] The Crown references the sentencing judge's acknowledgement that the probation service was "overwhelmed with caseloads". Clearly she had already concluded that a pre-sentence report was unnecessary. The statement about the caseload of the probation service does not appear to be the reason for declining to order a pre-sentence report, but simply a consequence of her not doing so. The sentencing judge did not see a need for reporting, anger management or substance abuse counselling. Effectively, regardless of the probation service caseload, she did not see the need for a pre-sentence report.

[23] Referencing Chief Justice Lamer in *R. v. C.A.M.*, *supra.*, at para. 90, I am not satisfied that there was an error in principle, a failure to consider a relevant factor, or an overemphasis of the appropriate factors, such as to warrant an intervention by this court in the sentence imposed. Consequently it remains for me to consider whether the sentence was "demonstrably unfit".

[24] In deciding whether a sentence is "demonstrably unfit", it is not for this court to simply substitute the sentence it may have imposed in the circumstances, as they appear from the transcript. In considering the sentencing proposals of the Crown and the defence, the sentencing judge adopted the sentence sought by the defence. The Crown suggested probation, with anger management and alcohol abuse counselling. The sentencing judge specifically considered whether there was any necessity for either. She concluded that reporting and counselling were not required. There is no basis, on this appeal, for this court to find otherwise.

[25] I recognize that in offences of violence an absolute discharge is not usual. However, the sentencing judge outlined her reasoning for granting an absolute discharge. The question is not whether this court would have imposed an absolute discharge, but whether such a sentence was demonstrably unfit. The *Criminal Code* does not preclude such a sentence for this offence. It was therefore available as a sentencing option to the sentencing judge.

[26] The Crown's suggested sentence, absent the two suggested conditions, was a period of probation. In this regard the sentencing judge noted that Mr. LeBlanc had been, up to the time of the offence, a "productive" and "law abiding" member

of society, who had, since the commission of the offence, “continued on that path”. Clearly, she saw no need for a probation order given these conclusions.

[27] Absent the necessity for imposing either of the proposed conditions, I am not satisfied that the sentence was demonstrably unfit.

[28] The appeal is dismissed.

MacAdam, J.