SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacIsaac, 2011 NSSC 345

Date: 20110914
Docket: CR. Ant. 344819
Registry: Antigonish

Between:

Eric Doyle MacIsaac

Appellant

v.

Her Majesty the Queen

DECISION

Judge: The Honourable Justice A. David MacAdam.

Heard: July 12, 2011, in Antigonish, Nova Scotia

Final Written Submissions: June 28, 2011

Counsel: Brian P. Casey, for the Appellant
Catherine E. Ashley, for the Respondent

By the Court:

Introduction

[1] The appellant, Mr. MacIsaac, pleaded guilty to one count of assault and two counts of assault causing broadly harm. He was sentenced to three months imprisonment in respect to the common assault and, consecutive to that, three months imprisonment, concurrent, on each count of assault causing bodily harm, for a total of six months imprisonment. The sentence was to be served in the community, with a house arrest component for the six months. The court rejected the defence submission for a conditional discharge.

[2] The Notice of Appeal references the inadvertent failure by defence counsel to forward to the trial judge a number of letters of reference on behalf of Mr. MacIsaac. Apparently counsel used the wrong number in faxing the letters to the court, and as a result the sentencing judge did not have the letters of reference. The appellant says that in the circumstances this amounted to a breach of natural justice, and asks the Summary Conviction Appeal Court to allow the appeal and sentence the appellant to "time served, or otherwise impose a more appropriate sentence." In written submissions, the appellant also requests a conditional discharge.

Background

[3] The appellant's written submission summarizes the circumstances that led up to the assaults. Although the Crown takes some exceptions to the appellant's account, there is little substantial disagreement. Mr. MacIsaac was an 18-year-old, first-year university student, living in residence at St. Francis Xavier University. On homecoming weekend in October 2009 he began consuming alcohol at eight o'clock in the morning. By the time of the assaults he had been drinking, on and off, for some 14 hours. He went to a house occupied by some other students, who were hosting a get-together for homecoming. The house had apparently belonged to Mr. MacIsaac's grandfather at one time and he had visited it as a child. He asked if he could enter and view the interior. He was allowed in, but was eventually asked to leave. He left, but returned a few minutes later. He entered and went up the stairs, where he sat down. One of the victims, Mr. Cole Halley followed him up the stairs and asked him to leave. The Crown’s submission then describes the assaults:

> At this time, for reasons unknown, MacIsaac turned around and punched Halley in the face and knocked him down a flight of stairs into the wall at the bottom of the staircase and Mr. Halley had hit the bottom of the wall of the stairs case so hard it damaged the drywall.
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> While at the bottom of the stairs, MacIsaac continued to punch Halley in the head. Another resident of the house, Douglas McNerney tried to pull MacIsaac off of Halley and while doing so, MacIsaac turned and punched McNerney in the mouth and he also hit Carly Savoie, another resident, in the mouth as well. Subsequently McNerney received five stitches to his mouth and Savoie required dental work on her front teeth to repair the damages sustained from the assault. (sic)

[4] The defence submission states that Mr. MacIsaac struck Ms. Savoy by accident while intending to strike one of the male occupants, and notes that the police found that Mr. MacIsaac was immediately remorseful for hitting her. This is acknowledged by the Crown in written submissions, although Crown counsel adds that Mr. MacIsaac did not appear to be sorry about hitting Mr. Halley or Mr. MacNearney.

The Sentencing Decision

[5] In his reasons the Provincial Court judge noted that Mr. MacIsaac had pled guilty and that this was a mitigating factor in sentencing. He also observed that by admitting his guilt, Mr. MacIsaac was accepting responsibility for his actions, a factor to be taken into consideration with respect to individual deterrence, reformation and rehabilitation. This also prevented the necessity of the three victims attending and testifying at trial about what had happened.

[6] The trial judge held that it was an aggravating factor that the assaults occurred in someone else's residence, in circumstances where Mr. MacIsaac was in a position similar to that of a trespasser, having reentered the residence after being asked to leave. The court was, he noted, entitled to consider all of the circumstances of the offences. He observed that crimes of violence are serious offences, and that the Court of Appeal has held that general deterrence is a primary factor in sentencing for violent crimes, although individual deterrence for the offender, reformation and rehabilitation must also be considered and weighed as well. He noted that reformation and rehabilitation are always significant in

sentencing a first-time offender. He cited the purposes and principles of sentencing outlined in s. 718 of the *Criminal Code*.

[7] The sentencing judge made reference to victim impact statements provided by the victims of the assaults. He reviewed Mr. MacIsaac's personal background and noted he had no prior convictions and that the presentence report was "a positive one", and he referred to Mr. MacIsaac's attempts to advance his education, his history of seeking employment, and concluded that he appeared to be, generally speaking, on "a positive path in his life." The sentencing judge referenced the evidence of Mr. MacIsaac's uncle and mother, as well as that of Mr. MacIsaac himself. He stated that it was a positive factor that Mr. MacIsaac had genuine remorse and regret for his actions. However, the sentencing judge noted that Mr. MacIsaac had voluntarily consumed a large volume of alcohol on the day of the assaults, and stated that this was Mr. MacIsaac's responsibility, as was everything that had occurred.

[8] The Crown sought a sentence of imprisonment for 12 months, to be served in the community under a conditional sentence order, to be followed by six months' probation. Mr. MacIsaac sought a conditional discharge. The sentencing judge reviewed the requirements for a conditional discharge, which require the court to be satisfied that a discharge is in the best interests of the defendant and not contrary to the public interest. He noted that "best interests of the defendant" meant more than not having a criminal record. He also observed that there are a number of factors in the court's consideration of whether granting a discharge would be contrary to the public interest. He stated that the more serious the offences, the more likely that not imposing a conviction would be contrary to the public interest. He added that “the more the offences and the principles applicable to those offences require the court to place primary emphasis on general deterrence, the more likely it is that a discharge would be contrary to the public interest."

[9] The sentencing judge referred to *R. v. Dalton* (1977), 18 N.S.R. (2d) 555, 1977 CarswellNS 245, [1977] N.S.J. No. 444 (S.C.A.D.). In *Dalton*, the appellant was 23 years old at the time of the offence (marijuana possession). He was studying for an MBA. He had no criminal record and was apparently of good character. The sentencing judge held that a discharge would be in the best interests of the appellant, but was not satisfied that it would not be contrary to the public interest. In affirming the sentencing judge's decision not to order a discharge, the

Appeal Division said, at para. 15, "the discharge would undoubtedly be “in the best interests” of the appellant, but not in any peculiarly strong way, and not sufficiently strongly to tip the balance against the interest of the public in deterring the commission of the offence by a mature young man. The offence was indeed minor...It was not, however, committed impulsively or naively by an immature young person."

[10] The sentencing judge noted Mr. MacIsaac's evidence that there could be repercussions in his chosen career path if a conviction was entered. He continued (at pp. 74-75 of the transcript):

> ... the more significant issue here is, would a discharge be contrary to the public interest? It is my conclusion that it would. There are three offences here. Mr. MacIsaac assaulted three different people on this occasion. I take into consideration that this was one chain of ongoing events related. Nevertheless, there were on successive occasions in that ongoing altercation, applications of force by Mr. MacIsaac to three different individuals in the context of he being in that residence without permission. The Court recognizes a potential impact on Mr. MacIsaac in arriving at that conclusion, but as many Courts have pointed out before, this is a balancing process. I have to consider the best interests of the public and whether a discharge would be contrary to those public interests. I have to properly employ the purposes and principles of sentencing in determining what a fit and proper sentence is that appropriately carries the degree of general deterrence necessary.

[11] The sentencing judge indicated that he was satisfied that not much was required for the purpose of specific deterrence, as it appeared that Mr. MacIsaac had remorse for his actions and appreciated the impact of his conduct on the individuals adversely affected. He went on to say that there must be "an appropriate degree of deterrence generally to discourage this kind of behaviour." The offences were "ultimately unprovoked assaults on individuals who were either doing no more than trying to get Mr. MacIsaac to leave in the case of Mr. Halley, and ultimately in the case of Mr. McNerney and Ms. Savoie trying to assist Mr. Halley in the circumstances he found himself in, namely being assaulted by Mr. MacIsaac" (transcript, pp. 75-76) (sic).

[12] The sentencing judge did not consider that a fine would carry the appropriate deterrent message, in view of the aggravating factors. He concluded that the purposes and principles of sentencing required a custodial sentence. He was

satisfied that it could be served in the community under a conditional sentence order, to be followed by a period of probation (transcript, p. 76).

The Law

[13] The *Criminal Code* provides that a defendant may appeal against sentence: s. 813(a)(ii). The Court of Appeal (in this case the Summary Conviction Appeal Court) is required to vary the sentence or dismiss the appeal: s. 687(1). As noted by the Crown, there is considerable authority for the principle that appellate courts should show deference when reviewing decisions of trial judges in appeals against sentence. In *R. v. Metzler*, 2008 NSCA 26, Bateman J.A. said, for the court:

> [24] Sentences are afforded a deferential standard of review on appeal. This has been articulated in a number of ways. In *R. v. C.A.M.*, 1996 CanLII 230 (S.C.C.), [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), Lamer, C.J.C., for a unanimous Court, said:
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> > [90] Put simply, 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. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code ...
> >
> > [91] . . . 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.

[14] More recently, in *R. v. Adams*, 2010 NSCA 42, Bateman J.A. said, for the court:

> [15] In fixing sentence a judge is exercising a statutorily authorized discretion under s.718.3(1) of the *Criminal Code*. As with other discretionary decisions, the standard of review on appeal is a deferential one. This standard has been articulated in a number of ways. As expressed by Macdonald, J.A. of this Court in *R. v. Cormier* (1975), 9 N.S.R. (2d) 687 at p. 694:

> 20 Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.

[15] To a similar effect, in *R. v. L.M.*, [2008] 2 S.C.R. 163, 2008 SCC 31, LeBel J. said, for the majority:

> [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.
>
> ....
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> [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)...

[16] With respect to the principles applicable to sentencing of first-time offenders, the appellant cites the comment in *Ruby on Sentencing*, 6th ed. at 5.140, that "the general rule for most offences is that a sentence should not be imposed on a youthful offender for the purpose of general deterrence, but should rather be directed at rehabilitation. The transition from statutorily defined young person to

adult should not be marked by an immediate abandonment of rehabilitation as the primary goal in cases where the prospect of successful rehabilitation is real."

[17] The appellant also notes the following comments by Bateman J.A., for the Court of Appeal, in *R. v. Butler*, 2008 NSCA 102:

> [32] Mitigating the length of sentence is the fact that this would be a first incarceration for Mr. Butler. In *R. v. Riley*, [1996] N.S.J. No 183 (Q.L.)(C.A.) at para 26, the Court approved the following statement from *Ruby on Sentencing*, 4th ed at page 204):
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> > The proper sentencing of first offenders requires that the sentencing judge exhaust all other possibilities before concluding that imprisonment is required. . . thus, in examining the possibility of a custodial term, the court should ask whether it is "the only appropriate sentence to be imposed". One may be treated as if one were a first offender, in appropriate circumstances, if a custodial sentence has never been imposed, or even if one has served only a very minor term of imprisonment. The notion that a first offender should be treated leniently in the hope that lesser punishment would be effective has been characterized as 'doubly so' in the case of youthful first offenders. There is a presumption of fact that one who has not offended previously is capable of reform and not to be dealt with accordingly. (Emphasis by Bateman J.A.)
>
> [33] Sentences for youthful offenders should, where appropriate to the circumstances, lean toward rehabilitation rather than general deterrence...

[18] The sentencing judge was cognizant of the discussion of discharges in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450, [1973] B.C.J. No. 559, 1973 CarswellBC 184, where the British Columbia Court of Appeal provided the following summary of principles:

> 21 From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.
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> > (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.

> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
>
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
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> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
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> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or [*455] to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
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> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
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> (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
>
> (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[19] As discussed earlier, this appeal centres on five letters of reference on behalf of Mr. MacIsaac, which both counsel apparently believed had been forwarded to the sentencing judge. As it turned out, they had been erroneously sent to the wrong fax number. Both counsel referred to the letters in their submissions. The letters were provided by friends and relatives of Mr. MacIsaac and his family and were positive as to the background and character of Mr. MacIsaac. Reference was made to the fact that these events were out of character.

[20] In her oral submission, Crown counsel noted that she anticipated that the defence would present reference letters, and stated that if it were not for the

reference letters and the positive presentence report, the Crown had intended to seek actual custody rather than recommending a conditional sentence, as it had.

[21] Although he was not privy to these letters of reference, the sentencing judge had before him information as to the background and character of Mr. MacIsaac. The letters reinforce the positive nature of the presentence report. The sentencing judge acknowledged that Mr. MacIsaac was a first-time offender and that the presentence report was positive. He considered the evidence of Mr. MacIsaac's uncle and his mother, and had the benefit of Mr. MacIsaac's testimony as well. The letters of reference would likely have reinforced the positive aspects of Mr. MacIsaac's background.

[22] However, I am not satisfied they would have materially affected the reasoning and conclusions reached by the sentencing judge. He clearly considered the evidence to the effect that the offences were out of character for Mr. MacIsaac, having regard to his upbringing and background. He held that it would have been in the accused's best interests to receive a discharge, a conclusion that the letters would likely reinforce. However, I am not satisfied that having these letters before him would have affected the sentencing judge's reasoning on whether it would be "not contrary to the public interest" to order a discharge.

[23] The record does not provide a basis to find a denial of natural justice by the sentencing judge. The sentencing judge did not receive the missing letters due to an error by the appellant's then-counsel. The record does not suggest that anyone involved adverted to the error. There was no action or omission by the trial judge that could reasonably have given rise to a denial of natural justice. With respect to the content of the requirements of natural justice, I refer to the following comment from *R. v. Rondeau*, [1974] 5 W.W.R. 664,1973 CarswellBC 258 (B.C.S.C.), at para. 10:

> The cases dealing with the principles of what is called natural justice propound essentially only two fundamental principles, although stated in various ways. The first of these is that no tribunal shall sit in judgment in its own cause and it shall act in good faith. The second of these is encompassed in the Latin phrase *audi alteram partem*. Essentially all other principles of what is called natural justice are variations upon or flow from these two....

[24] Similarly, in *R. v. Holman* (1982), 16 M.V.R. 225, 1982 CarswellBC 461 (B.C. Prov. Ct.), affirmed (1982), 143 D.L.R. (3d) 748, the court said, at para. 23, "[t]he rules of natural justice, which developed in the context of a system of parliamentary sovereignty, are rules of procedure only: the right to a hearing, the right to unbiased adjudication, and (a recent development) the right to a ‘fair' procedure." Essentially, natural justice requires a fair hearing, which I am satisfied the appellant received.

[25] In the circumstances, I am not satisfied that the absence of the reference letters led to any error or to a denial of natural justice by the sentencing judge. This being the sole ground identified in the Notice of Appeal, the appeal is dismissed.

[26] Appeal dismissed.

MacAdam, J.