Citation: *R. v. Edmiston,* 2023 YKTC 16

Date: 20230516
Docket: 21-00096
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Gill

REX

v.

DEVIN KYLE PATRICK EDMISTON

Appearances:
Noel Sinclair — Counsel for the Crown
Kevin MacGillivray — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] The accused, Devin Edmiston, is before the Court on Information 21-00096, having pleaded guilty to driving offenses that caused bodily harm and two deaths.

[2] This is a ruling on a *voir dire* to determine the admissibility of certain portions of a victim impact statement sought to be filed by the sister of the deceased, Travis Adams. (the "Statement")

[3] The issue raised is whether portions of the Statement are inadmissible because of passages expressing a lack of confidence in the administration of justice, and setting

out the sentence that ought to be imposed, both as a function of accountability, and the actual impact suffered.

[4] The purpose, permissible content, and use of a victim impact statement is set out in legislation enacted by Parliament. It is the duty of this Court to oversee lawful compliance, in accordance with the applicable statutory provisions and guiding case authorities.

[5] Section 722(1) of the *Criminal Code* (the "*Code*") requires a court to consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offense, and the impact of the offense on the victim.

[6] Section 722(8) of the *Code*, requires the court, when considering the victim impact statement, to take into account the portions of the statement considered relevant to the determination referred to in s.722(1), and to disregard any other portion.

[7] Section 722(9) of the *Code* provides that whether or not a statement has been prepared and filed in accordance with this section, the court may consider any other evidence concerning any victim of the offense for the purpose of determining the sentence to be imposed on the offender.

[8] As regards the form and content of the victim impact statement itself, pursuant to s.722(4), a victim impact statement must be prepared in writing, using Form 34.2. Form 34.2 stipulates that the statement may include a detailed account of the impact

the offenses have had on the life of the person preparing the statement, and then sets out a number of such categories:

- emotional impact;
- physical impact;
- economic impact;
- fears for security; and
- drawing, poem or letter.

[9] It is important to note the aforementioned categories are not described in the form as being exhaustive or all-inclusive, but merely examples of the kind of impact-related information one may wish to include in the statement.

[10] At the outset, the Form stipulates that a victim impact statement must not include:

- any statement about the offense or the offender that is not relevant to the harm or loss suffered;
- any unproven allegations;
- any comments about any offense for which the offender was not convicted;

- any complaint about any individual, other than the offender, who was involved in the investigation or prosecution of the offense; or

- except with the court's approval, an opinion or recommendation about the sentence.

[11] Counsel provided a number of helpful case authorities, which I have read.

[12] In *R. v. Luciano*, 2011 ONCA 89, Watt, J.A. described the concept of “relevancy” in the following passages:

> 204 Relevance is not an inherent characteristic of any item of evidence. Relevance exists as a relation between an item of evidence proposed for admission and a proposition of fact that the proponent seeks to establish by its introduction. Relevance is a matter of everyday experience and common sense. Attaching a label like "evidence of after-the-fact conduct" or "post-offence conduct" to an item of evidence does not establish its relevance. An item of evidence is relevant if it renders the fact it seeks to establish slightly more or less probable than it (the fact) would be without the evidence, through the application of everyday experience and common sense.
>
> 205 We assess the relevance of items of evidence in the context of the entire case and the positions of counsel. Relevance does not exist in the abstract or in the air: *R. v. Cloutier*, [1979] 2 S.C.R. 709, at pp. 730-32. An item of evidence does not cease to be relevant or become irrelevant because it can support more than one inference: *R. v. Underwood* (2002), 170 C.C.C. (3d) 500 (Alta. C.A.), at para. 25.
>
> 206 To be relevant, an item of evidence need not prove conclusively the proposition of fact for which it is offered, or even make that proposition of fact more probable than not. What is essential is that the item of evidence must reasonably show, by the application of everyday experience and common sense that the fact is slightly more probable with the evidence than it would be without it: 1 *McCormick on Evidence* (6th ed.), para. 185, at p. 733.

[13] One aspect of whether the Statement contains inadmissible opinion about the sentence is captured with reference to the use of the word “precedent”, which occurs at two locations:

> p. 11:
>
> While it will be hard for Devin Edmiston, I want this case to set the precedent in the Yukon. I want more for our society, for Yukon and for Canada. I want our roads to be safe for our children…
>
> p. 13:
>
> For that you need to be seriously held accountable and precedent needs to be set in the Yukon for dangerous driving causing death and bodily harm matters…

[14] Each of the above passages are prefaced by comments to the effect that what happened was not an accident, (in terms of an unforeseeable event), but rather the result of behaviour on the part of the offender that was preventable. The “precedent” that is referred to does not appear to reflect a desire for vengeance but rather is articulated with reference to aiding the promotion of road safety. Here, I would note, that a sentence imposed in any case, including one involving a jail sentence as one component thereof, need not be the longest possible duration to be regarded as a legal precedent. Every case, on its own facts, can be seen as a precedent.

[15] To the extent that the author of the Statement intended the word “precedent” as a maximum sentence, the Court will not interpret it in that way, and will instead ascribe that word’s broader meaning.

[16] The statement also speaks to a degree of skepticism about the effectiveness of victim impact statements being considered on influencing sentencing:

> "…especially being limited in what we can and cannot say…",

and further that:

> "… this court process has reinforced a further lack of faith in our court system - one that I am not proud of that is grounded in facts as we have a long way to go to truly achieve effectiveness in our justice process."

[17] The prosecution urges that the Statement on this *voir dire* is a nuanced communication. Any impugned passages should be viewed, not in isolation, but rather in the context of the entire document, as not purporting to recommend any particular sentence, and that the Court in that light consider not redacting them.

[18] Counsel for Mr. Edmiston submits that his client wishes and expects to be held fully accountable for his conduct and the harm he caused, but that even if the document should go entirely unredacted, care should be taken by the Court to ensure that the Court is not seen as having been improperly influenced or overcome by the remarks or as having adopted an impermissible expression or use of the statement.

[19] In R. v. *J.J.P*., 2018 YKSC 10, Veale, J. provided helpful guidance regarding the appropriate content and use of victim impact statements. At para. 8, quoting *R. v. Berner*, 2013 BCCA 188, he wrote as follows:

> 8. The *Berner* case also gives guidance at para 25, which I adopt:
>
> > … While a sentencing judge must try to understand a victim's experience, he or she must do more than that. He or she must craft a fit sentence by taking into consideration all relevant legal principles, and the circumstances of the offense and the offender. In emotionally charged cases such as this, a sentencing judge must keep in mind his or her position of impartial decision maker. The sentencing judge must be wary of the risk of valuing victims, based on the strength of feelings expressed in the victim impact statement. …

[20] The author of the statement before the Court, having herself previously been a justice system worker, has certain insights from her own experience that she has brought to bear within this document. It is clear that she took time and care in its preparation, and there is within it a great deal of considered reflection.

[21] For example, the author:

- Raises the possibility of forgiveness;
- Recognizes that while the offender's conduct deserves the highest accountability, the harm he caused was not intentional, and
- Expresses a desire that the offender even yet learn from his mistakes.

[22] At another location in the document, the author recognizes, with reference to the offender deserving "the highest accountability", at p.7 that:

> "…the court still [has] a job to do and procedure to follow".

[23] Taking into consideration the applicable *Criminal Code* provisions, and in particular ss. 722(1), (8) and (9), and considering the instructions and guiding parameters of Form 34.2 itself, it is clear there is a very broad scope for relevancy and expression, as well as for interpretation by the Court, in the exercise of its discretion in the enforcement of the legislated boundaries. Within the reasonable confines of any human endeavour, the process must not only be fair, but seen to be fair, as regards the recognition of everyone's constitutional and legislatively protected interests.

[24] I would add, given that words expressed in any document can sometimes have more than one interpretation, the passages in question must be evaluated, not in isolation but contextually, having regard to the content and tenor of the entire statement.

[25] The author of the Statement does not, in the above-cited passages, suggest any particular sentence, but rather that any sentence imposed be seen as a precedent matching the offender's conduct and the resulting impact felt by the community. Urging high accountability in the general sense, while recognizing the Court still has a job to do, is not the equivalent of making a recommendation about sentence and is not materially different than if one were to urge general leniency.

[26] Given the foregoing reasons, I am of the view that no redactions are required regarding any of the above-cited (or similar) passages contained in the Statement.

[27] Having said that, there are, nonetheless, other passages in the Statement that do require redaction.

[28] At para.7 of the Statement, the author writes:

> …The presentence report will no doubt paint a picture of Mr. Edmiston as a product of his upbringing. It may suggest that his life circumstances shaped who he has become, making it seem "understandable" that he arrived in this situation. In my opinion it is all relative, every person has had childhood circumstances that have shaped who they have become and we can't realistically compare one person's upbringing to another's or say one is worse than others…

[29] Two paragraphs earlier on that page, the author writes:

> …But I'm skeptical it will make that big of a difference because our court system errs on leniency towards sentencing the offender, especially those with challenging upbringings and no prior criminal records…

[30] On p. 13 the author, in addressing the offender directly, writes:

> …Whatever the sentencing, and it should be extreme, I know, the consequences of your actions will never be as hard for you as it is for us and you will never understand the pain that we feel as a result of what you did…

[31] The passage on p.13 recommends a severe sentence, thereby purporting to restrict the range of sentence that the Court can even consider. It simply cannot be read in any other way and is therefore outside of the permitted boundaries. The segment, “and it should be extreme”, will be redacted.

[32] The two passages on p. 7, predicting that a pre-sentence report may render Mr. Edmiston's conduct to appear “understandable”, preceded by an earlier passage expressing skepticism based on the author’s view of the court system’s general leniency in certain types of cases, are comments not relevant to the harm or loss suffered. I order them redacted.

[33] In summary, this sentencing shall be conducted according to law, as applied to the circumstances of this offence and of this offender, including proper regard to the impact of the offending conduct on its victims.

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GILL T.C.J.