COURT OF APPEAL OF YUKON

Citation: *R. v. Menicoche*,
2016 YKCA 7

Date: 20160616
Docket: 15-YU767

Between:

Regina

Respondent

And

Skylar Jerry Philip Menicoche

Appellant

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Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Sharkey
The Honourable Mr. Justice Harris

On appeal from: An order of the Territorial Court of Yukon, dated September 29, 2015 (*R. v. Menicoche*, 2015 YKTC 34, Whitehorse Docket Nos. 14-00004; 14-00004B; and 14-00004A).

Counsel for the Appellant: V. Larochelle

Counsel for the Respondent: S. Bogle

Place and Date of Hearing: Whitehorse, Yukon
May 17, 2016

Place and Date of Judgment: Vancouver, British Columbia
June 16, 2016

Written Reasons by:
The Honourable Mr. Justice Sharkey

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris

Summary:

The appellant, a relatively young Aboriginal offender, appeals his sentence of 23 months' imprisonment, which was imposed after he pleaded guilty to a sexual assault of a 15 year old girl. He argues that the sentencing judge made several errors in principle that resulted in an unfit sentence. Held: appeal allowed. The judge erred by giving inadequate weight to the appellant's prospects for rehabilitation and by failing to give genuine effect to the relevant Gladue factors. These errors in principle clearly had an impact on the fitness of the sentence. The sentence is reduced to 17 months.

Reasons for Judgment of the Honourable Mr. Justice Sharkey:

A. Overview

[1] Skylar Jerry Philip Menicoche appeals his sentence of 23 months' imprisonment.

[2] The appellant is a relatively young Aboriginal offender who pleaded guilty to one charge of sexual assault contrary to s. 271 of the *Criminal Code*. The offence involved unprotected anal intercourse with a teenage girl who was sleeping at the time. The victim was 15 years old at the time of the offence and the appellant was just a few days short of his 27th birthday. The appellant did not know the victim's age, but he was aware, or at best indifferent, that she was under 18 years of age. He had only one previous conviction. It was for an assault some seven years earlier, where he punched another male.

[3] The pre-sentence report produced in this case suggested that the appellant's prospects for rehabilitation were good and there were compelling *Gladue* factors present as well.

[4] The primary issue on this appeal is whether the sentencing judge made an error in principle by giving inadequate weight to the appellant's prospects for rehabilitation and by failing to absorb *Gladue* considerations into his reasons for judgment.

[5] In my view he did, and these errors had an impact upon the ultimate fitness of the sentence.

[6] Therefore, I am persuaded that the appeal should be allowed. I would reduce the sentence imposed by 6 months, resulting in a period of imprisonment of 17 months.

[7] The appellant also sought to have fresh evidence in the form of a post-sentence report admitted for our consideration on appeal.

[8] I would deny the application. The fresh evidence does not satisfy the overriding principle which allows such evidence only where it is necessary in the interests of justice. Also, as a practical matter, it is redundant in any event.

B. Background

[9] The appellant and the victim were acquainted with each other through Facebook. Early in the evening of October 6, 2013, the appellant invited the victim and some of her friends over to his place to drink alcohol, but this visit was short lived as the appellant's mother told the victim and her friends to leave.

[10] Later, after driving around Whitehorse, the victim responded to a text from the appellant to come over and have some more drinks. And so, at around 3 or 4 in the morning, the victim came back to the appellant's house where she drank and watched television along with the appellant, his mother, and his brother.

[11] Later on, the appellant's mother went to bed, and eventually the victim became quite tired as well and found an empty bedroom to sleep in. She was on the bed facing the wall, and the appellant came into the room and lay beside her. They talked briefly and the appellant made some advances towards her, holding and kissing her. She told him to stop, which he did. Then, fully clothed, she fell asleep, passing out.

[12] The next thing the victim remembered is that her pants were down and the appellant was engaging in unprotected anal intercourse. The victim woke up right away when the appellant assaulted her and she elbowed him away and told him to stop. The appellant immediately stopped and apologized to her. The victim began to cry and the appellant again said he was sorry and left the room.

[13] The victim called her cousin and a friend to come pick her up, which they did. The victim then hid or stayed over at her friend's house for a week, and her mother was unable to find her.

[14] During this time the victim sent text messages to the appellant telling him to watch his back and that she would charge him. He again apologized and asked her what he could do for her to forgive him.

[15] The victim asked for money and for the next few months, the appellant transferred to her a total of $1,680 in five separate payments. The last payment was made in December 2013, when the appellant's mother found out what was going on.

[16] In February 2014, the victim made a statement to the police, which resulted in the charges being laid in April 2014.

[17] The appellant had initially pleaded not guilty and only changed his plea to one of guilty in July 2015, on the day of his trial when the Crown was ready to proceed. He also pleaded guilty to one count of breaching a condition of his bail contrary to s. 145(5.1) of the *Criminal Code*.

C. The Sentencing Hearing

[18] The sentencing hearing took place on September 21, 2015 at which time a comprehensive pre-sentence report was before the Court. The Court also considered victim impact statements from the victim as well as her mother.

[19] The appellant was 29 years old when he was interviewed by the author of the pre-sentence report. His only criminal conviction is from October 19, 2007 in Edmonton, AB. He was 19 years old at the time of that offence. He was drunk and punched another male. He was sentenced to 60 days' jail (intermittent) and probation for 1 year. The probation was transferred from Alberta to the NWT and completed successfully.

[20] The pre-sentence report shows that the appellant is a member of the Pehdzeh Ki First Nation from Wrigley, NWT. His father was from Wrigley, and his mother from Ft. Simpson, NWT.

[21] Tragically he lost his father to a boating accident when he was a young boy. He was raised largely by his mother. The appellant had a safe childhood growing up

in Ft. Simpson, and during summers would spend time with his paternal grandparents and uncles in Wrigley.

[22] The appellant's maternal grandparents were, however, residential school survivors, and the appellant's mother struggled with alcohol abuse. Growing up, the appellant witnessed his mother suffer much domestic abuse at the hands of her various partners. In turn, the appellant eventually developed an alcohol dependency of his own.

[23] The appellant is described by his siblings as an intelligent and caring individual with much potential. He only completed grade 10 education, but has had a fairly continuous (albeit sporadic) work history since then. He came to Whitehorse when he was 25 years old and since arriving in the city has worked in construction and at the Minto Mine.

[24] The pre-sentence report notes that since the commission of the offence the appellant has become involved in his first stable adult relationship, and that he and his new partner have a baby (some 9 months old at the time of the appellant's interview). The author of the report notes further that the appellant took a leave of absence from his job at the Minto Mine to be with his new partner and their child before his sentencing date.

[25] The pre-sentence report is clear that despite the fact the appellant has been found guilty of a sexual offence, he would not likely benefit from any sex offender programming. The author of the report was of the view that the appellant does not appear to possess any traits that would warrant such programming, and that he understands what he did was wrong and abhorrent.

[26] The report is clear that the real problem in terms of the appellant's risk to re-offend is his abuse of alcohol, and that the appellant would benefit from programming (including in-residence programming) to address the alcohol issue.

[27] Further, the pre-sentence report is clear that the appellant took full responsibility for the offence and expressed remorse for what he had done. In his

concluding remarks the author of the report stated that "…Skyler [*sic*] has the potential to be a productive and contributing member to his First Nation and to society at large."

[28] At the sentencing hearing, the Crown argued for a custodial sentence in the range of 21 to 23 months. Defence counsel urged the Court to consider a range of 12 to 14 months.

[29] The parties agreed, and the judge accepted, that the decision of Gower J. in *R. v. White*, 2008 YKSC 34 has established a general sentencing range in Yukon of 12 to 30 months' imprisonment for assaults upon sleeping or unconscious victims.

[30] The judge reserved his decision and on September 29, 2015, gave oral reasons for judgment sentencing the appellant to imprisonment for 23 months for the sexual assault (less 12 days of remand credit), and to imprisonment for 14 days consecutive for the breach of bail.

[31] In addition to these periods of imprisonment, the appellant was placed on probation for a period of 2 years. The judge also made several ancillary orders.

[32] The appellant appeals only the 23 months of imprisonment for the sexual assault. He does not take issue with the probation, or the ancillary relief imposed.

D. Grounds of Appeal

[33] The appellant's main ground of appeal is that the judge unduly departed from a fit sentence within the sentencing range involving sleeping or unconscious victims.

[34] The appellant says where custodial sentences of 20 months or more have been imposed in such cases, that significant aggravating factors, most notably lengthy criminal records or violent behavior by the accused were present.

[35] The appellant notes that beyond the violence inherent in the sexual assault there was no additional violent behavior or intimidation on his part, in this case and that he comes before the Court with a minimal criminal past.

[36] The appellant also notes the decision of this Court in *R. v. Rosenthal,* 2015 YKCA 1*,* which has incorporated cases involving the digital penetration of sleeping victims into the 12- to 30-month sentencing range established by *White.* In *Rosenthal* a 14-month jail term was imposed.

[37] Further, the appellant says that by imposing a 23-month jail term despite the appellant's positive prospects for the future, the judge did not give adequate weight to the sentencing objective of rehabilitation. Also, the appellant says that although the judge referred to numerous *Gladue* factors from the pre-sentence report he made no critical or genuine effort to take these factors into account in assessing a fit sentence.

[38] The appellant also alleges that the judge erred in other ways including his discussion of the inflationary floor principle and his failure to consider as a potential mitigating factor that the victim essentially blackmailed the appellant over a period of several months. Given my views on the other grounds of appeal, it is unnecessary to address these issues further.

[39] In response, the Crown contends that the judge properly considered the appropriate sentencing principles and balanced the relevant mitigating and aggravating factors in arriving at the sentence and that Crown submissions at the sentencing hearing had already been moderated by *Gladue* principles. The Crown argues that even if the judge made an error in principle, this Court should not intervene as the sentence was fit and within the established range for serious sexual assaults.

E. Analysis

The standard of review (Criminal Appeals)

[40] It is well settled that deference is owed by the appellate court to the judge who imposed the sentence. This deference is a recognition that sentencing is an inherently individualized process, and that the judge who has seen the offender first hand is in the best position to assess the evidence at the sentencing hearing.

[41] The appellant must show that the sentence imposed is somehow demonstrably unfit and the appellate court may not intervene simply because it would have weighed the relevant sentencing factors differently: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90.

[42] And in assessing the fitness of the sentence the appellate court will generally only interfere where it is clear that the trial judge unduly favoured one sentencing objective over another, or failed to consider a relevant principle or objective inherent in the sentencing process, and where it is clear that such an error of law or principle had an impact upon the sentence.

The fitness of the sentence imposed

[43] This is a case where the judge was faced with a difficult task in arriving at an appropriate sentence.

[44] On the one hand, he was required to consider two important statutory provisions: s. 718.01 of the *Criminal Code* requires that where the victim is under the age of 18 the judge must give primary consideration to deterrence and denunciation; and, pursuant to s. 271(a) of the *Criminal Code*, because the victim was under 16 years of age, the minimum penalty for the offence is a 1-year term of imprisonment.

[45] At the same time, although s. 718.01 relegates the principles of restraint and rehabilitation to secondary status in offences involving young victims, these principles are nonetheless still operative: *R. v. B.C.M.,* 2008 BCCA 365 at para. 35.

[46] Similarly, a minimum sentence does not oust the traditional sentencing principle of s. 718.2(b), which requires that similar offenders receive similar sentences*: B.C.M.* at para. 31*.*

[47] In addition, because the appellant is an Aboriginal person, the judge was required to give consideration to the *Gladue* factors that were particularized in the pre-sentence report: *R. v. Ipeelee,* 2012 SCC 13 at para. 87*.*

[48] Within this balancing framework it is clear the judge felt the 12 to 14 months of imprisonment suggested by the appellant's counsel was simply not sufficiently denunciatory of the offence the appellant had committed.

[49] In this regard the judge properly referred to a number of aggravating factors. He noted the age difference between the appellant and the victim, and the fact the appellant supplied alcohol to the victim who was a minor. He said that the offence was a most serious and invasive sexual assault, and one that put the victim at risk of contracting (as well as the fear of contracting) a sexually transmitted disease.

[50] The judge also referenced the victim impact statements and the many difficulties that the victim has had since the offence was committed against her. And I am cognizant of the significance of this violation upon the victim's personal and sexual integrity.

[51] In terms of the appellant's personal circumstances, his lack of any significant criminal past and his prospects for the future, it is obvious from the record that the judge had read the pre-sentence report.

[52] He was aware of and discussed the appellant's upbringing as a child, his family situation, his employment history, and his prospects for the future.

[53] The judge was clear, however, that because of s. 718.01, any mitigating factors in the case, including the appellant's late guilty plea must, in the judge's words, "take a back seat" to the aggravating circumstances of the offence and to the objectives of denunciation and deterrence.

[54] He also said that the increasing frequency of sexual offences involving sleeping or unconscious victims required the courts to respond by imposing sentences which give primary consideration to denunciation and deterrence.

[55] In my view, however, the trial judge fell into error by failing to give proper or adequate weight to the sentencing objective of rehabilitation.

[56] In my view the jail sentence of 23 months' imprisonment does not properly reflect the personal profile of the appellant.

[57] Further in my view, the 23 months' jail handed out to the appellant is not proportionate in any way to sentences handed out to other offenders for similar (or worse) crimes.

[58] In this regard the case of *R. v. M. (R.R.),* 2009 BCCA 578 is instructive: the accused was a 37 year old First Nations male with a dated criminal record for impaired driving and assault; he pleaded guilty to having forced sexual intercourse with his 14 year old stepdaughter despite her pleas that he stop. Further, he was in a positon of trust (*in loco parentis*) to the victim; he received a 2-year prison sentence which was affirmed on appeal.

[59] Regarding the application of *Gladue*, I am persuaded that the judge failed to give genuine effect to the aboriginal status of the appellant.

[60] The judge made reference to specific *Gladue* factors contained in the pre-sentence report, but failed to actually apply *Gladue* principles. He said only:

> Given the record of this offender, with no prior offences of a sexual nature and his realistic prospect of making a good life for himself, and considering the Gladue factors, I am fixing the sentence at a high territorial one as opposed to a federal sentence in the range of three to three and a half years.

[61] It is important to keep in mind that the sentencing range of 12 to 30 months' imprisonment so carefully enunciated in *White* already recognizes the need to emphasize denunciation and deterrence for cases involving unconscious or sleeping victims. Consequently, a sentence in the 3 to 3 1/2 year range is not a genuine option for this offender.

[62] It is clear from the above passage that the trial judge did not consider any alternative to a lengthy territorial jail term despite the fact that he was familiar with what I consider compelling *Gladue* factors set out in the pre-sentence report.

[63] In the case of the appellant, an Aboriginal accused who came before the Court essentially as a first offender, this was clearly an error in principle which had an impact upon the fitness of the sentence.

[64] In my view, however, and because of the errors noted above, the sentence of 23 months' imprisonment should be reduced by 6 months, and the appellant should serve a sentence of 17 months' imprisonment.

[65] The application to have new or fresh evidence on appeal should be denied. The application does not satisfy the overriding principle which allows such evidence only where it is necessary in the interests of justice.

[66] Further, the application is redundant as it merely speaks to a matter – namely, the appellant's prospects for rehabilitation – which was not much in dispute and which the judge felt were on balance, fairly good. Accordingly, the application to have this evidence considered on appeal does not assist us.

Conclusion

[67] For these reasons, I would allow the appeal and reduce the appellant's 23-month sentence by 6 months in relation to the sexual assault, and substitute a sentence of 17 months' incarceration.

[68] I would deny the appellant's application to have new evidence considered on appeal.

"The Honourable Mr. Justice Sharkey"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Harris"