SUPREME COURT OF YUKON

Citation: *R. v. Martin*, 2017 YKSC 61

Date: 20171026
S.C. No. 17-AP001
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND

TODD ALEXANDER MARTIN

RESPONDENT

Before Mr. Justice L.F. Gower

Appearances:

Amy Porteous — Counsel for the Appellant
Vincent Larochelle — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a Crown appeal from a sentence imposed by a Deputy Judge of the Territorial Court for the offence of assault causing bodily harm contrary to s. 267(b) of the *Criminal Code*. The offender, Todd Alexander Martin, was found guilty following a trial on February 9, 2017. The victim is Sandy Memogana. The offence occurred on August 22, 2016. At that time Ms. Memogana and Mr. Martin were living together. The sentencing was adjourned to April 28, 2017, so that Mr. Martin could obtain a pre-sentence report.

[2] After the adjournment, the offender decided not to pursue the preparation of a pre-sentence report. Accordingly, one was never filed.

[3] The Crown sought a conditional sentence, followed by 12 months' probation. Defence counsel agreed that probation was appropriate, but left it to the sentencing judge to determine what it should be attached to. His suggestion was a suspended sentence. The sentencing judge mistakenly stated in his reasons for sentence that defence counsel had submitted a conditional discharge was appropriate. In fact, no such submission was made by defence counsel. Notwithstanding, the sentencing judge granted a conditional discharge, subject to a period of probation for 12 months.

[4] The first two months of the probation order included a curfew condition, requiring the offender to remain within his residence between 6 p.m. and 9 a.m., unless he obtained the prior written permission of his probation officer. That curfew clause has now expired.

ISSUES

[5] The Crown's appeal is based on two grounds:

1) the sentencing judge erred in principle by imposing a conditional discharge without considering the test for a discharge, i.e. that it be in the best interests of the accused and not contrary to the public interest; and
2) the conditional discharge is a demonstrably unfit sentence.

[6] Further sub-issues were raised by the respondent's counsel in his factum and at the appeal hearing, but I will deal with them later within my analysis.

BACKGROUND

[7] The victim was 26 years old at the time of trial. She had known the offender for about four years. She moved to Whitehorse in July 2016 and moved in with the offender. The offender was 28 years old at the time of trial.

[8] On August 21, 2016, the victim had been out with friends and consumed four beers. She said she was pretty high, but could walk and talk normally, and she could readily remember what happened that evening. She returned to the couple's apartment after midnight.

[9] The sentencing judge found that the offender, who does not drink, was disappointed when the victim arrived home smelling of liquor. This led to an argument between them that escalated to the offender grabbing the victim, throwing her on the bed in the bedroom, straddling her, and hitting her in the face area three or four times. The victim responded by scratching at the offender's face to get him off of her and trying to kick him unsuccessfully with her legs. At one point, she put her fingers into his mouth and the offender bit them, puncturing two of her fingers, causing them to bleed. The victim also received a blackened left eye and red marks on her right cheek and left wrist.

[10] In the course of the struggle, the victim knocked over a table and a laptop computer fell to the floor. The offender stopped his actions, retrieved his cell phone and ultimately left the apartment. He then called the police, who attended and arrested the victim. She provided a statement to the police, and the offender was ultimately charged with the assault.

[11] The victim received medical treatment for the injuries to her fingers. She said the area around her left eye was sore for about a week to a week-and-a-half and took approximately three weeks to heal.

[12] At the trial, the offender testified that the victim was the aggressor, but the trial judge dismissed his evidence and found him guilty on the basis of the victim's evidence.

[13] As stated, the offender was sentenced on April 28, 2017. The notice of appeal was filed on May 23, 2017. There was an appearance on June 20, 2017 to fix the hearing of the appeal. At that time, the offender was self-represented and sought an adjournment to obtain legal aid counsel. The Crown consented. On July 25, 2017, there was another appearance to fix the date for the hearing of this appeal on October 13, 2017. The offender had his current appeal counsel at the July fix-date appearance.

ANALYSIS

Delay in disposing of the appeal

[14] In his factum, counsel for the respondent submitted that leave for this appeal should be denied because of the delay between the date of the sentencing and the hearing of the appeal. However, at the appeal hearing, both counsel agreed that leave is not required for this summary conviction appeal, and the respondent's counsel did not argue this issue. In any event, as I just noted, the respondent's counsel was in attendance at the fix-date session when this appeal hearing was scheduled and made no objection when the proposed date of October 13, 2017 was put forward. Further, this is not a case where the offender's entire sentence has already been served and the Crown is seeking to incarcerate the offender. Finally, the overall delay is just under six months and I do not find that to be excessive in the circumstances.

The offender maintains his innocence

[15] At the outset of his submissions, the respondent's counsel stated that his client maintains his innocence and therefore does not take responsibility for the offence or show any remorse. The respondent's counsel went further to explain that because the conditional discharge technically amounts to an acquittal, the offender could not appeal from this finding of guilt, notwithstanding that he continues to be of the view that the sentencing judge erred in making that finding. In any event, the respondent's counsel submitted that the offender's failure to take responsibility or to exhibit remorse should not be held against him in determining whether the conditional discharge is a fit sentence. I agree that it is not an aggravating feature. Nevertheless, I do take into account the offender's post-offence conduct in determining whether the conditional discharge is fit. I am talking here about his telephoning the police and apparently alleging that the victim was the aggressor, resulting in her arrest and detention.

[16] I also note that the respondent's counsel is in error in concluding that there is no mechanism for an appeal from his client's finding of guilt for the assault causing bodily harm. Section 730(3)(a) of the *Criminal Code* states that an offender who has been discharged "shall be deemed not to have been convicted of the offence except that … the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence" (my emphasis).

[17] In any event, this is not a conviction appeal and any dissatisfaction that the offender has with the reasons for the sentencing judge finding him guilty are largely irrelevant.

The mistake by the sentencing judge

[18] As I understood him, the respondent's counsel concedes that the sentencing judge was in error when he stated in his reasons for sentence that the defence counsel at the sentencing had made a submission that a conditional discharge was appropriate in the circumstances.[1] Both counsel on the appeal therefore agree that this was an error in fact. However, the respondent's counsel says that unless it in turn led to an error in principle, then it is largely irrelevant.

[19] This would seem an appropriate point at which to deal with the standard of review on this appeal, as it seems to relate to the above submission. An appeal court may intervene to vary a sentence if the court below has: committed an error in principle; failed to consider a relevant factor; overemphasized appropriate factors; or imposed a sentence that is demonstrably unfit.[2] As clarified in *R. v. Lacasse,* 2015 SCC 64, an error in principle, the failure to consider a relevant factor, or the erroneous consideration of an aggravating or mitigating factor can justify an appellate's court's intervention and inquiry into the fitness of the sentence, but such intervention will only be appropriate when itt appears that the error had an impact on the sentence imposed (paras. 42 and 44).

[20] One of the reasons the respondent's counsel submits that the mistake by the sentencing judge does not lead to an error in principle, is that he was not bound by the submissions of counsel on what the appropriate sentence should be. Therefore, he was free to ignore the submissions of both counsel and go his own way with the imposition of the conditional discharge. I agree with that submission in principle, but the problem

[1] 2017 YKTC 22, at para.11.
[2] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

remains that the sentencing judge did not engage in any consideration of the test for whether a discharge should be granted. The respondent's counsel responds by submitting that the sentencing judge is presumed to know the law and therefore did not have to engage in a particular consideration of the test. My problem with that submission is that it leads this appeal court with virtually no basis to determine whether the conditional discharge was demonstrably fit at the end of the day.

[21] The test for determining whether a discharge is appropriate is in s. 730(1) of the *Criminal Code*, which states:

> Where an accused … pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order … (my emphasis)

[22] As noted above, where the offender has been discharged, s. 730(3) deems that person "not to have been convicted of the offence", i.e. the person does not have a criminal record for the offence.

[23] As for the best interests of the accused, normally that person will be of good character, or at least of such character that the entry of a conviction against him or her may have significant repercussions.[3] The reason for requiring that the accused be of good character is so that the sentencing court can be satisfied that there is little or no need for specific deterrence to prevent the accused from reoffending.

[3] *R. v. Sanchez-Pino* (1973),11 C.C.C. (2d) 53 (Ont. C.A.), at p. 59; *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (BCCA), at para. 21.

[24] In *R. v. Shortt*, 2002 NWTSC 47 ("*Shortt*"), Vertes J. dealt with this issue as follows:

> 32 A review of the case law reveals that in many cases a discharge was granted where a conviction would result in an accused losing his or her employment, or becoming disqualified in the pursuit of his or her livelihood, or being faced with deportation or some other significant result. These are examples of highly specific repercussions unique to the specific accused. But, such specific adverse consequences are not a prerequisite. In my opinion, it is sufficient to show that the recording of a conviction **will** have a prejudicial impact on the accused that is disproportionate to the offence he or she has committed. This does not mean that the accused's employment must be endangered; but it does require evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime (unless the particular offence is itself harmless, trivial or otherwise inconsequential): see *R. v. Doane* (1980), 41 N.S.R. (2d) 340 (C.A.), at pages 343-344; and *R. v. Moreau* (1992), 76 C.C.C. (3d) 181 (Que. C.A.). (my emphasis)

[25] The Court of Appeal of Yukon considered *Shortt* in *R. v. Samson*, 2015 YKCA 7, and determined that Vertes J.'s use of the word "will" in the above captioned passage does not mean that the accused must establish definitively, on a balance of probabilities, that he or she will suffer disproportionate consequences from a conviction. Rather, it is sufficient if the accused establishes that the entry of a conviction may have significant repercussions, in the sense that the possibility is sufficiently significant to create a genuine concern.[4]

[26] The requirement for evidence to determine whether an offender is a good character was repeated in *R. v. Rogers*, [1987] Y.J. No. 79 (T.C.), where Lilles J., who

[4] At paras. 39 – 44.

is also the sentencing judge in this case, stated that "one should not speculate that a person is of good character because he or she has no criminal record".[5]

[27] In the case at bar, there is little evidence about the offender's character. All we know is that the sentencing judge was impressed that Mr. Martin did not have any criminal record at the age of 28 years and was able to abide by the terms of his recognizance, which he had been on since August 26, 2016, without any adverse incidents. The judge also recognized that the offender had been previously employed, although he had not been working since March 31, 2017.

[28] Further, there was absolutely no evidence that the offender would suffer disproportionate consequences from a criminal conviction for assault causing bodily harm. While it may be arguable that a discharge, and the consequent absence of a criminal conviction, will always be in the accused's best interest, even defence counsel concedes that is not the test. Rather, there must be some evidence that the offender may suffer significant repercussions from the conviction. There is no such evidence in this case.

[29] The failure of the sentencing judge to consider this relevant factor justifies this Court's intervention to vary the sentence. In my view, a consideration of this factor could well have led to a different result.

[30] As for the second part of the test for a discharge, i.e. whether it would be in the public interest, this deals with whether there is a need for general deterrence, as well as the need to maintain the public's confidence in the administration of justice. Vertes J. dealt with this in *Shortt* as follows:

[5] At para. 24.

> 34 The second criterion requires that a discharge not be contrary to the public interest. Most of the case law identifies the "public interest" with the need for general deterrence. Yet, in my opinion, there is a further aspect to the public interest, one familiar to those who work with the *Criminal Code* bail and bail pending appeal provisions, that being the need to maintain the public's confidence in the justice system. From this perspective the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice. The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice. … (my emphasis)

To my knowledge, these remarks have not received any adverse appellate commentary.

[31] The need for general deterrence and denunciation is particularly pronounced when an offence arises in a context of domestic violence.[6] In *R. v. Mackenzie*, 2013 YKSC 64 ("*Mackenzie*"), Veale J. of this Court accepted this premise and went on to state that when deciding whether general deterrence of others is necessary, courts are to consider:

1) the gravity of the offence;

2) the prevalence of the offence in the community;

3) public attitudes towards the offence; and

4) public confidence in the effective enforcement of the criminal law.[7]

Veale J. then noted that domestic violence is a very serious problem in the Yukon[8] and that public attitudes towards such offences and the public confidence in the effective

[6] *Shortt*, at para. 35.
[7] At para. 44.

enforcement of the criminal law requires that serious offences of this nature be denounced and deterred.[9]

[32] *Mackenzie* was a case where the offender was found guilty after a summary conviction trial of one charge of a common assault against his former partner and three breaches of undertakings for making prohibited contact with his partner. The trial judge granted the offender a conditional discharge, plus probation for 15 months. The offender had no criminal record and was struggling with alcohol abuse and mental health issues. Similar to the case at bar, the offender continued to deny having committed the assault. Veale J. referred to *Shortt*, where Vertes J. noted that offences involving domestic violence are ordinarily unsuitable for the granting of a discharge:

a) because they engage considerations of general deterrence;

b) because of the prevalence of such crimes in all communities; and

c) because of the vulnerability of the victims of domestic violence.[10]

In the result, Veale J. set aside the conditional discharge, entered convictions on all four offences, and imposed a suspended sentence with probation for 15 months from the date of the original order with the same conditions as the original probation order.[11]

[33] The Alberta Court of Appeal, in *R. v. MacFarlane* (1976), 3 Alta. L.R. (2d) 341, similarly held that it will be the exceptional case where a crime involving violence would be dealt with by an order for a discharge.[12] The Court also commented on the issue of deterrence in the context of its statement that the jurisdiction to order discharges "should be used sparingly":

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[8] At paras. 46 – 48.
[9] At para. 49.
[10] At para. 34.
[11] At para. 54.
[12] At para. 15.

> ... It is to be borne in mind that one of the strongest deterrents to criminal activity, particularly in the case of [those] who have no records, is the fear of the acquisition of a criminal record.[13]

[34] The paramountcy of denunciation and deterrence in the context of domestic assault was also noted in *R. v. Lowe*, 2012 ABPC 247, at para. 57. Interestingly, the case had a number of factual similarities to the case at bar. The offender and the victim had been in a romantic relationship just over a year. On the evening of the offence the victim had seen the offender outside of a bar speaking to a number of women. The offender subsequently attempted to contact the victim by telephone, without success. Later in the evening, the offender was invited to the victim's home. Upon arrival, the couple went into the victim's bedroom and got into a verbal argument about the victim's failure to answer the offender's earlier telephone calls. The verbal argument escalated to a physical confrontation in which the offender got on top the victim and held her down. She tried to push him off and he responded by hitting her on the arms. The offender swung towards the victim's facial area three or more times. One of the blows struck her in the face. The victim eventually escaped to the safety of the bathroom, but the offender broke the door down and approached her, crying and expressing remorse for his actions.

[35] The offender pled guilty to one count of common assault. He was 23 years old, with no dependents and no prior criminal record. He had graduated from high school with honours and subsequently had a very successful career in the military. A criminal record would impact his security clearance for deployment overseas and would cause a

[13] At para. 13.

reassessment of his ability to remain in the Canadian Armed Forces. The offender's superiors and colleagues all described the offence as out of character for the offender.

[36] Notwithstanding that background, the sentencing judge declined to impose a conditional discharge, but rather imposed a suspended sentence plus a period of probation for 12 months, stating:

> 57 In all of the circumstances I conclude that it would be contrary to the public interest to grant a discharge in this case. Domestic assault is a serious and prevalent reality in our society. Denunciation and deterrence of such conduct is paramount. The primacy of these sentencing objectives would not be addressed if a conditional discharge were to be granted in this case. Furthermore, I conclude that granting a discharge would not be proportionate to the gravity of the offence and the degree of responsibility of the Accused. (my emphasis)

In the case at bar, there was absolutely no consideration whatsoever by the sentencing judge of the potential need for general deterrence and denunciation of this domestic assault which caused bodily harm. Nor does an *ex post facto* examination of the evidence and submissions at the sentencing lead to a conclusion that a conditional discharge is justified, notwithstanding the paramountcy of general deterrence and denunciation. In my view, the ordinary, reasonable, fair-minded member of society, informed about the circumstances of this case and the relevant principles of sentencing, would likely believe that the recording of a conviction is required in order to maintain public confidence in the administration of justice.

CONCLUSION

[37] Accordingly, I set aside the conditional discharge, enter a conviction for the assault causing bodily harm, and impose a suspended sentence with a probation order

of 12 months from the date of the original order, with the same conditions as the original probation order.

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GOWER J.