SUPREME COURT OF YUKON

Citation: *R. v. Sas*, 2018 YKSC 38

Date: 20180808
S.C. No. 17-AP018
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT

AND

CAMERON SAS

RESPONDENT

Before Mr. Justice P. Kane

Appearances:
Amy Porteous — Counsel for the Crown
Jennifer Cunningham — Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Crown appeals the January 31, 2018 sentencing decision of his Honour Judge Digby who granted the respondent a conditional discharge of the four offences, an 18-month order of probation and a victim fine surcharge of $400 with respect to these summary offences.

Offences

[2] Mr. Sas was charged and pled guilty to:

1. assault on August 27, 2017, namely throwing a shoe which struck Ms. Clarke, his partner, in their residence when small children were present;

2. breach on September 2, 2017, of a condition of release restricting his contact with Ms. Clarke by entering into their home and speaking to her;
3. breach of a condition of release on September 5, 2017, in following Ms. Clarke in a vehicle and speaking to her; and
4. breach of a term of reconnaissance on September 14, 2017, by entering into their residence while Ms. Clarke slept and speaking to her.

[3] Mr. Sas and Ms. Clarke lived together with their 1-year-old son and Ms. Clarke's three year-old daughter. They had a verbal argument on August 27, 2017, during which Mr. Sas threw a shoe at Ms. Clarke, which struck her. Mr. Sas was charged with assault and released on an undertaking to police that he not have contact with Ms. Clarke or attend their home.

[4] The second charge of breaching a condition of release on September 2, 2017 in contacting Ms. Clarke, was as a result of the accused entering into their home, stating that he wished to talk, proceeding to use the washroom and then leaving the residence.

[5] The third charge on September 5, 2017, involved Mr. Sas following the complainant in his car, then stopping the complainant in her car, begging her to lower her window and he then departing. Mr. Sas was thereupon arrested on September 5, 2017, and released on September 6, 2017, on a recognizance requiring him to not attend their residence where Ms. Clarke was living and to not have contact with her.

[6] The fourth charge on September 14, 2017, involved Mr. Sas entering their residence where Ms. Clarke was asleep at the time. He woke the complainant up and repeatedly told her he wanted to be a part of their family and asked her to drop the no contact conditions. The complainant repeatedly asked him to leave the residence.

Mr. Sas eventually complied and left the home. Mr. Sas was then arrested and detained in custody.

[7] Mr. Sas was remanded into custody for 30 days whereupon he entered a plea of guilty to the four charges and was thereupon released.

Positions on Sentencing

[8] Submissions as to sentence occurred on January 31, 2018.

[9] In her victim impact statement, Ms. Clarke expressed past emotional suffering, anxiety and the negative financial impact on herself and the children due to the absence of Mr. Sas during his pretrial custody. She requested full contact with Mr. Sas so they could work on putting their family back together as she wanted to resume cohabitation with him. She expressed hope that Mr. Sas had learned to respect women and that he can find a healthy way to deal with his anger.

[10] The Crown on sentencing pursuant to s. 606 of the *Criminal Code* (the "*Code*"), also relied upon other conduct of the accused for which he was not charged, namely:

a. that Mr. Sas, on September 18, 2017, had followed the complainant in her vehicle; and

b. he had sent her numerous electronic messages between August 29 and mid-September 2017 expressing his love for her, seeking their reconciliation, expressing his concern for and messages for their son, requesting she drop the peace bond and asking why she was doing this to him.

[11] The Crown requested that Mr. Sas:

a. be convicted of the four counts;

b. receive a suspended sentence as to the first charge;

c. attribution of the 30 days of custody prior to pleading guilty as time served as to counts to 2, 3 and 4; and

d. 11 months of probation, including the requirement that he continue counselling beyond the 7 counselling sessions he had already participated in.

[12] Judge Digby was advised that the accused had no criminal record but had been previously conditionally discharged in 2013 for domestic assault of his previous partner.

[13] Crown counsel as to sentence submitted that a discharge was not an appropriate sentence as the accused should be convicted:

a. given his repeated misconduct;

b. in order to deter potential future similar misconduct;

c. given the absence of evidence how a conviction would impair the accused; and

d. a discharge would send the wrong message to the local community as to the importance of complying with court imposed conditions in domestic relationships and thereby deter such conduct.

[14] The defence sought a conditional discharge on conditions to be prescribed in a six-month probation order pursuant to s. 730 of the *Code*.

[15] The defence stressed that the misconduct in these four charges occurred over a period of two weeks during a very emotional time in this couple's relationship.

[16] The defence pointed to the fact that Mr. Sas:

a. was very young;

b. had no prior criminal record;

c. was not struggling with drug or alcohol substance abuse;

d. had been gainfully employed since 2015;

e. had by his early guilty plea, accepted responsibility for his misconduct and avoided the necessity of a trial;

f. that the substantial first offence, although one of violence, was on the lower end of the spectrum;

g. had unilaterally arranged for and attended 7 sessions of counselling after being released from the 30 days custody and the possibility of further counselling if considered appropriate by the probation officer;

h. had expressed remorse and willingness to continue with counselling;

i. had already undergone "punishment" in the form of his 30 days in custody and the fact that as a result of these charges and resulting conditions imposed, he had been separated from his children and his family for a period of 5 months; and

j. had already suffered financially as a consequence of these charges and conditions in having to live and pay for accommodation elsewhere, while trying at the same time to pay the ongoing family home expenses where Ms. Clarke and the children resided.

[17] The defence submitted that:

a. the 30 days custody prior to pleading guilty and the financial impact of these charges are a much better deterrent in this case as opposed to a conviction; and

b. a conviction may well impair the ability of the accused to work in certain fields and would prevent his admissibility into the United States.

[18] The Crown replied that there was no evidence that a conviction would bar the entry of Mr. Sas into the United States. That submission ignores the wide spread reports of increased surveillance and restriction being exercised as to entry into that country.

Sentence Appealed

[19] His Honour Digby announced the sentence on January 31, 2018, and granted a conditional discharge on each of the four offences together with 18 months of probation.

[20] The 18-month period of probation exceeded the eleven and six months of probation proposed by the Crown and the defence respectively.

[21] The conditions of probation were to report to a probation officer, keep the peace, appear in court as required to give prior notice in the event of any change of name, address, employment or occupation and to:

a. abstaining from consumption of alcohol to intoxication and non-medically prescribed drugs under the *Controlled Drugs and Substance Act*;

b. the requirement to participate in a domestic violence and spousal/partner anger management program as directed by the probation officer;

c. non-possession of a firearm; and

d. to cease any communication with Ms. Clarke and to remove himself from their home if requested by her.

Leave to Introduce New Evidence on Appeal

[22] Mr. Sas by preliminary application sought leave to file his affidavit in evidence on this appeal by the Crown. The Crown consented to the introduction of Mr. Sas' new affidavit on this appeal, except for paragraphs 9 and 10 therein which state that:

> 9. Mr. Sas in the past had attended a First Nation gathering in Alaska and wishes to attend such gatherings in Alaska in the future; and
>
> 10. he presently has completed a total of 10 sessions of counselling which permitted him to address a number of issues as to his past and regarding his family in a way to help him move forward. He is also set to take a domestic violence program currently being set up by his probation officer.

[23] The Crown's objection as to paragraphs 9 and 10 of this new affidavit lacks merit. The subject of those paragraphs was commented upon during submissions on sentence, in the sentencing decision and are now particularize with more detail in these two paragraphs. The subject thereof is not central to the merits of this appeal which is whether the sentencing judge erred in not convicting Mr. Sas rather than granting a conditional sentence as occurred.

[24] Leave accordingly is granted permitting Mr. Sas to introduce his affidavit as new evidence to be considered on this appeal as to sentence, including paragraphs 9 and 10 therein.

Appeal Submissions as to Sentence

[25] The Crown's above arguments made on sentencing were repeated in argument of this appeal.

[26] The Crown submits that the sentence of a conditional discharge of the 4 counts together with 18 months of probation on the facts in this case constitutes:

a. an error in principle; and

b. is a demonstrably unfit sentence in this case.

[27] The Crown submits the sentencing judge erred in principle in finding that the circumstance in this case meets the test for a conditional discharge.

[28] Section 730 (1) of the *Code* permits the sentencing judge to impose an absolute or conditional discharge instead of convicting the accused if that judge considers it:

a. to be in the best interest of the accused; and

b. not contrary to the public interest.

[29] As to the best interests of the accused, the Crown relies upon *R. v. Fallofield*, (1973) 13 C.C.C. (2d) 450 (BCCA), p. 454, which held that in determining whether a discharge is in the interest of the accused, it is presupposed 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 to rehabilitate him and that the entry of a conviction against him may have significant adverse repercussions.

[30] The Crown submits the facts in this case established that this accused was not of good character as he assaulted his partner in front of two children. The Crown states that the accused then, despite being arrested several times, repeatedly breached conditions imposed to ensure the safety of the complainant by entering into their home, by being untruthful with police, by following the complainant around town, by attempting to interfere with the administration of justice, by blaming the complainant for their lack of contact and his purported misery.

[31] The Crown acknowledges the assault in this case was “low-end” but states the above subsequent behaviour should be considered deplorable and may not be brushed off and without “moral turpitude”

[32] Crown counsel acknowledges this accused had no previous conviction but attempts to counter that by relying upon his 2013 discharge, which in counsel’s submission makes it clear the accused has engaged in “somewhat similar” behavior in the past regarding a previous partner.

[33] The Crown submits the accused has now “re-offended” against another partner, thus establishing that this prior discharge disposition did not effectively deter him from “reoffending” and “engaging in violence against women”, despite admitting this was “low end” misconduct.

[34] The Crown submits that the sentencing judge erred in not imposing a more severe sentence despite the “low end” level of misconduct, due to his conduct four years earlier for which he was discharged and for his other post offence conduct for which he was not charged.

[35] Crown counsel submits that the strongest deterrent to criminal activity particularly in the case of those who have no criminal records is the fear of the acquisition of a criminal record, relying upon case law decided over 40 years ago: *R. v. McFarlane*, [1976] A.J. No. 429 (Alta. C. A.), para 13, and relied upon *in R. v. Martin*, 2017 YKSC 61, para 33.

ANALYSIS

[36] Fear of a criminal record relates at least in part to its well-known negative impact on career and employment possibilities as well as travel restrictions. Crown counsel

dismisses these well-known negative impacts of a conviction in submitting this younger accused who had no prior conviction, failed to prove a conviction would negatively affect him in the future beyond the vague suggestions he presented as to how his future may be so impaired.

[37] Sentencing judges are in the best position to determine appropriate sentence based on the circumstances and evidence before them and are to be afforded wide latitude on appeal.

[38] Despite admitting the misconduct being sentenced was “low end”, Crown counsel effectively attempts to reverse that admission by submitting that a conviction for this minor offence was “required here to drive the message home to the respondent that his actions were criminal, have consequences and could not be repeated”.

[39] The fact remains that the sentence rendered was for minor, “low end” misconduct. Having failed to persuade the sentencing judge that a conviction was necessary, Crown counsel using its prerogative and with the extensive resources available, then protracts this prosecution by appealing the sentence for minor, “low end” misconduct.

[40] The Crown’s prosecutorial right of appeal should be exercised when necessary; not stridently in every case regardless of the level of misconduct.

[41] The following principles are considered in contrast to the Crown’s interpretation of the authorities it relies on.

[42] Appellate court intervention and variation of sentence:

a. is not appropriate where the sentencing judge simply deviates from the proper sentencing range, unless that judge made an error of law or an error in principle that has an impact on the sentence; and

b. is only justified as to an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor if it appears such error had an impact on the sentence: *R. v. Lacasse*, [2015] 3 S.C.R. 1089, paras. 11, 43 and 44.

[43] In an earlier 2008 decision, the Supreme Court of Canada, in *R. v. L.M.*, [2008] 2 S.C.R. 163, reviewed the test on an appeal of sentence and an appellate court's scope of review and degree of intervention as to whether it should order a variation of the sentence imposed. The Supreme Court therein cited the applicable principles to be considered by the sentencing judge to arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender as contained in ss. 718, 718.1 and 718.2 of the *Code*, including:

a. the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders and acknowledgement of and reparation of the harm they have done (s. 718);

b. the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1); and

c. the principles that a sentence should be increased or reduced to account for aggravating or mitigating circumstances, that a sentence should be

similar to other sentences imposed in similar circumstance, that the least restrictive sanctions should be identified and that available sanctions other than imprisonment should be considered (s. 718.2).

[44] As to the jurisdiction of an appellate court on an appeal of sentence and whether an appellate court should intervene and vary a sentence, the Supreme Court stated:

a. the trial judge as to sentence enjoys considerable discretion because of the individualized nature of the process;

b. intervention and variation is not appropriate simply because the appellant court would have ordered a different sentence;

c. a variation is not appropriate, unless the appellate court is convinced the sentence awarded is not fit, namely that the sentence is clearly unreasonable;

d. is inappropriate absent an error in principle, failure to consider a relevant factor or an over emphasis of the appropriate factors or the sentence imposed at trial is demonstrably unfit; and

e. the sentencing judge possesses unique qualifications in terms of experience and the ability to assess the submissions of both parties, is therefore in the best position to determine the appropriate sentence and therefore has considerable discretion because of the individualized nature of the sentencing process, which thereby requires the appellate court to show deference to the sentence imposed by the trial judge: *R. v. L.M.*, paras 14, 15 and 17.

[45] There are two conditions precedent to the exercise of granting a conditional or absolute discharge. The first requirement is that:

a. a discharge is in the interest of an accused, which normally would be the case if the accused is a person of good character;

b. the accused has not been previously convicted;

c. a conviction is not necessary to rehabilitate or to deter the accused from committing future offences; and

d. a conviction may have significant adverse repercussions.

[46] The second condition precedent is:

a. whether a discharge is contrary to the public interest, as to which;

b. a discharge should not be routinely granted or treated as a substitute for probation and a suspension of sentence; and

c. the court must consider the public interest in the deterrence of others, but that does not preclude the judicious grant of a discharge: *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) pp. 452 and 453, and *R. v. Samson*, 2015 YKCA 7, para. 11.

[47] Establishment of specific, disproportionate negative consequences is not a precondition to the grant of a discharge. The test is rather whether a conviction may have consequence, now or in the future: *Samson*, para. 39, *R. v. Rodrigue*, 2015 YKTC 5, *R. v. Malcolm*, [2008] Y.J. no. 59, at paras. 30 – 31 and *R. v. Shortt*, 2002 NWTSC 47, para 32.

[48] The public interest test in the second condition precedent:

a. involves consideration as to whether an ordinary, reasonable, fair-minded member of society, informed as to the circumstances of the case and the relevant sentencing principles, would believe that a conviction is required to maintain public confidence in the administration of justice; and

b. requires consideration of whether there has been acceptance of responsibility, an early guilty plea, remorse by the offender and the victim's outcome of an assault: *Shortt*, para. 34; *R. v. C.J.D.*, 2012 YKTC 17, paras. 28, 33 and 34 and *Rodrigue*, paras. 99-112.

Reasons In Support of Discharge

[49] The reasons of Judge Digby in support of his decision to grant a conditional discharge with 18 months of probation are thorough as to the analysis of the facts, the relevant law and why he concluded in favour of a conditional discharge rather than a conviction.

[50] In his reasons, Judge Digby:

a. notes his jurisdiction pursuant to s. 725(1)(c) of the *Code*, to take into account facts of further contact or attempted contact;

b. cited and reviewed the principles of sentencing contained in s. 718, s. 718.2 (a)(ii) as to the spouse or common-law partner being abused in the offence,

c. determined that s. 718.2 (a)(iii) was not applicable;

d. held that the restrictive principle that a discharge is rarely granted, as stated in *R. v. Sanchez-Pino*, [1973] O.R. 314 (C.A.), and *Fallofield* as relied upon by the Crown, had some 40 years later changed for which he

cites jurisprudence and the amendments to the principles of sentencing as contained in the *Code*;

e. interpreted the facts in this case as a “low end case of domestic partner violence… without bruises or broken bones or black eyes or hair ripped out or scratches” and although not determinative, in which the “2 individuals wish to try and pick up and resume the relationship if possible”;

f. determined that the courts frequently granted discharges without specific evidence as to the harm the conviction will create as accused “do not have to demonstrate that they will lose a career” or “demonstrate that they will be deported”. The court noted the discretion available to border officials and stated it anticipated such officials might well have issues with domestic violence which a conviction for may well be a determining factor as to admission to the United States;

g. the 2013 discharge of Mr. Sas appeared to involve conduct “somewhat similar to this case, an inability or failure to control his emotions, i.e., his anger”, but did not involve the crime of moral turpitude such as theft, breach of trust, lying or fraud;

h. noted the often sobering effective of spending 30 days in jail, as well as the counselling Mr. Sas had participated in;

i. accepted the Crown’s submission as to the high level of domestic violence in the Yukon;

j. stated the importance of denunciation of unlawful conduct involving violence but as to public interest, noted the Crown’s onus to establish that

an informed member of the public looking at the facts of this particular case would lose faith in the administration of justice;

k. held that Mr. Sas had been deterred as a result of the criminal proceedings, including his 30 days in custody awaiting sentence for throwing and hitting someone with a shoe is not and didn't significant loss of liberty;

l. noted the accused's loss in this case included the prospect of losing his partner whom he clearly loves as well as the financial loss for not working during his 30 days custody and the additional expenses of having to maintain two residences because he was barred from living at home with the complainant;

m. noted that all four offences were related and occurred within two-weeks;

n. noted that any future negative impact on employment as a result of a conviction would extend to the complainant and their children given their stated wish to remain together as a family; and

o. differentiated the facts in this case from the factual circumstances in the jurisprudence relied upon by the Crown.

[51] There is no basis to intervene and vary the sentence of Mr. Sas to a conviction based on the facts, law and circumstances of this case. This appeal is merely an invitation that this Court hopefully will substitute its view that a conviction is a more appropriate and grant the appeal accordingly. The Supreme Court of Canada has repeatedly determined that is not the appropriate test.

[52] The Crown has failed on this appeal to establish that:

a. the sentencing judge made an error in principle;

b. the discharge granted was an unfit sentence;

c. a discharge of this young person was not in his interest;

d. a conviction was necessary to rehabilitate or deter Mr. Sas;

e. a conviction may not result in negative consequences to Mr. Sas; or

f. a discharge was not in the public interest.

[53] This appeal is accordingly dismissed.

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KANE J.