SUPREME COURT OF YUKON

Citation: *R. v. Murphy*, 2017 YKSC 64

Date: 20171031
S.C. No. 17-AP002
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT

AND

DARREN MURPHY

RESPONDENT

Before Madam Justice M.B. Bielby

Appearances:
Amy Porteous — Counsel for the Crown
Vincent Larochelle — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Crown appeals from the imposition of a conditional sentence, with a nine-month period of probation, globally, on the respondent upon conviction after trial of one count of assault with a weapon, pepper spray, and of mischief, the breaking of windows in the Tessier residence.

[2] In written reasons for conviction, the trial judge found that he had no reasonable doubt that it was the respondent who had: broken a bedroom window above the bed in which Trevor Tessier and Rebecca Carlberg were sleeping, sprayed Mr. Tessier with pepper spray, and fled first on foot and then as a passenger in a waiting vehicle. That vehicle threw Mr. Tessier unto the side of the road. He had pursued his attacker and

had jumped onto the hood of the moving car. Mr. Tessier received a road rash on his chest, many bruises and an injured knee. He was unable to return to work for several months.

[3] Mr. Tessier and Ms. Carlberg were evicted from their rental home as a result, and lost furniture and clothing in the incident.

[4] The Crown sought a six-month conditional sentence to be followed by probation from the trial judge. It did not resile from that position on appeal. Defence sought the conditional discharge that was ultimately imposed.

[5] The standard of review to be applied on a sentence appeal is one of deference. An appellate judge may vary a sentence only where it results from an error of law or principle made by the sentencing judge, or produces an unfit sentence. The Crown argues both occurred here: the sentencing judge failed to address the prerequisites to the imposition of a conditional discharge set out in s. 730.(1) of the Criminal Code of Canada which reads:

> s. 730(1) Where an accused, other than an organization, pleads guilty 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 proscribed in a probation order made under subsection 731(2). (my emphasis)

[6] The Crown argues that the trial judge made an error of law or in principle in failing to expressly address whether or why it would be in the best interest of the accused to be subject to a conditional discharge and why it would not be contrary to the

public interest to impose such a discharge. It also argues that the sentence imposed is demonstrably unfit, given the very serious risk of harm he caused Trevor Tessier, and the very real impact it created on him. Ms. Carlberg was not named as a complainant in the information upon which Mr. Murphy was tried.

[7] It is not necessary to determine whether the trial judge failed to address the prerequisites to imposing a conditional discharge or whether those prerequisites were adequately, albeit implicitly, covered in the reasons for judgment. That is because, absent other considerations, the sentence imposed was unfit. That error alone would justify adjusting the sentence if it were not for the very reasonable position taken by the Crown on appeal.

[8] She sought to replace the conditional discharge with a six-month conditional sentence subject to the same probationary terms as the discharge that was imposed. She did not protest applying credit for the five months of the conditional discharge already served by the respondent to the six-month conditional sentence sought, leaving only one month of that sentence to serve, along with the balance of the period of probation. She did not seek the imposition of any additional probationary terms or conditions.

[9] Therefore, there would be no direct effect on the respondent of allowing the appeal in terms of impeding his liberty or providing additional consequences for his action. He would remain at liberty, subject to the terms of the probation order. While his sentence would then become one of conviction on his criminal record rather than one of discharge, that difference would not be so significant as to justify interfering with the discretion of the trial judge in his imposition of sentence.

[10] Otherwise, a sentence for the conduct for which the respondent was convicted, albeit that he had no prior criminal record, was 23 years of age at the time of the offence and has been continually gainfully employed throughout would have called for a period of significant incarceration as a means of denouncing the premeditated conduct that created such a high level of risk, particularly to vulnerable sleeping victims. While his crimes falls well short of the home invasion type of conduct to which the Crown alluded on appeal, the failure to cause serious harm to the life and wellbeing of the two people sleeping in the home was the result of good fortune alone.

[11] The appeal is dismissed.

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BIELBY J.