COURT OF APPEAL OF YUKON

Citation: *R. v. Heathcliff*,
2015 YKCA 15

Date: 20150813
Docket: 14-YU754

Between:

Regina

Respondent

And

Nathaniel J. Heathcliff

Appellant

Corrected Judgment: The text of the judgment was corrected on page one where a change was made on August 17, 2015.

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Mahar

On appeal from: An order of the Territorial Court of Yukon, dated January 23, 2015 (*R. v. Heathcliff*, 2015 YKTC 9, Whitehorse Docket No. 13-00511).

Counsel for the Appellant:	L. Whyte
Counsel for the Respondent:	L. Gouaillier
Place and Date of Hearing:	Whitehorse, Yukon May 26, 2015
Place and Date of Judgment:	Vancouver, British Columbia August 13, 2015

Written Reasons by:
The Honourable Mr. Justice Mahar

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel

Summary:

The appellant pleaded guilty to impaired driving causing bodily harm and was sentenced to five months' imprisonment. The sentencing judge also ordered the appellant to pay restitution of $101,008 and made a three-year probation order which would prevent the appellant from operating a motor vehicle until he had paid at least $15,000 in restitution. The appellant seeks a reduction in the amount of restitution and a cancellation of the probation order. Held: Appeal allowed. The amount of restitution and the probation order are demonstrably unfit. The restitution order is reduced to $9,688 and the probation order is cancelled.

Reasons for Judgment of the Honourable Mr. Justice Mahar:

Introduction

[1] On the morning of October 18, 2013, the appellant was driving his motor vehicle on the Alaska Highway while his blood alcohol level exceeded the legal limit. He drove into the lane occupied by the complainant, Linda Miller, causing a head-on collision. Both vehicles were written off completely. The complainant suffered lingering injuries.

[2] When police arrived on the scene, the appellant took immediate responsibility for both the collision and his consumption of alcohol. Blood alcohol readings of 140 and 130 milligrams percent were obtained.

[3] The appellant was 22 years old at the time of the collision, is Aboriginal, and had no prior criminal record. He entered a guilty plea. Between the time of the collision and his sentencing on January 23, 2015, approximately 15 months, he had been on conditions of bail which prohibited him from driving. At the time of sentencing he was 23 and had a high school education, hopes of being employed seasonally in the fishing industry, and some limited child support obligations. He was obviously not in a financial position to pay restitution in any substantial amount.

[4] In addition to a five month jail term and the minimum one year driving prohibition, which were jointly proposed to the Court and which the Court imposed, the Crown sought a restitution order. Neither the appellant nor the complainant had

vehicle insurance at the time of the collision. The Court was provided with a detailed breakdown of the complainant's losses, by far the largest component of which was lost wages. The complainant did have long term disability coverage, so her actual out of pocket losses were considerably less. Her insurer had a recovery clause so the total amount was claimed in order to ensure that she would be covered for the wages she actually lost. The amount sought was $101,008.

[5] The Court imposed a restitution order in the full amount requested. As well the appellant was placed on probation for a period of three years during which time he is prohibited from driving until at least $15,000 of the outstanding restitution order has been paid.

Standard of Review

[6] The applicable standard of review is one of deference. An appellate court may intervene to vary a sentence only if the trial judge erred in principle, failed to consider a relevant factor, overemphasized or gave inadequate weight to a relevant sentencing factor, or if the sentence is demonstrably unfit: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para 90. Restitution orders are part of the sentence imposed by the court. As such, the decision to impose or not to impose a restitution order, as well as the amount of the restitution ordered, is due the same degree of deference as any other component of a sentence.

Issues and Analysis

[7] In imposing restitution orders in cases of fraud or breach of trust, Canadian courts have held that an inability to pay on the part of the accused is a minor consideration. In these circumstances, courts have imposed heavy restitution orders regardless of the financial circumstances of the accused: see e.g. *R. v. Nanos*, 2013 BCCA 339 at para. 17, where additional authorities are also cited.

[8] This is not that sort of case. In general, while the ability to pay a restitution order is not necessarily determinative of whether it should be imposed, it has consistently been held to be an important consideration in cases which do not

involve fraud or breach of trust: see *R. v. Taylor* (2003), 180 C.C.C. (3d) 495 at para. 9 (O.N.C.A.); *R. v. Siemens* (1999), 136 C.C.C. (3d) 353 at para. 8 (M.C.A.), where reference is also made to the Supreme Court of Canada decision in *R. v. Zelensky*, [1978] 2 S.C.R. 940, and *Nanos* at para. 19.

[9] I am of the view that the appellant's ability to pay the restitution was not adequately considered in this case. The appellant has no hope of paying such a large amount of restitution. He would be crushed financially and this could serve to hamper rather than assist his rehabilitation. The sentence is demonstrably unfit, at least as far as the amount of the restitution order is concerned.

[10] It is entirely appropriate that a reasonable amount of restitution form part of this sentence, for the benefit of the complainant and to assist in the rehabilitation of the appellant. The appellant has suggested $9,688, the quantum of property losses suffered by the complainant. This is a significant amount of money for someone in the circumstances of the appellant and would therefore form a meaningful part of his efforts towards rehabilitation.

[11] I note that a restitution order in the lesser amount of $9,688 would not include any amount for present or future lost wages or any non-pecuniary damages. The complainant would remain free to seek recovery of all her outstanding damages in a civil action if she so wished.

[12] The only function of the probation order was to bolster what I have determined to be an excessive restitution order. The appellant has no previous criminal history and he is subject to a mandatory driving prohibition. There is no need to place him on probation.

Conclusion

[13] I would grant leave to appeal, reduce the restitution amount to $9,688 and cancel the probation order.

"The Honourable Mr. Justice Mahar"

I AGREE:
"The Honourable Chief Justice Bauman"

I AGREE:
"The Honourable Mr. Justice Goepel"