COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Joe,***
2005 YKCA 9

Date: 20051021
Docket: 04-YU526

Between:

Regina

Appellant

And

Philip Joe

Respondent

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

D.A. McWhinnie — Counsel for the Appellant

G.R. Coffin — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
September 12, 2005

Place and Date of Judgment: Vancouver, British Columbia
October 21, 2005

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

Introduction

[1] The Crown appeals the sentence imposed on the respondent on 29 November 2004 following a trial by judge alone at which the respondent was convicted of:

1. Assault while carrying a weapon;
2. Unlawful confinement; and
3. Uttering a threat to cause bodily harm.

[2] All charges arose from the same set of circumstances in August 2002.

[3] Mr. Justice Gower sentenced the respondent to six months in custody on Count 1, to be followed by a six month conditional sentence on Count 2. The judge suspended passing sentence on Count 3, but ordered a period of 18 months probation to follow completion of both the custodial and conditional sentences.

[4] The Crown maintains that it was an error in principle to impose a custodial sentence on one count, and a consecutive conditional sentence on a second count, where both charges arose from the same factual circumstances.

[5] On the hearing of this appeal, we were informed by counsel that Mr. Joe had been released from custody on 4 March 2005, and that accordingly the six month conditional sentencing order terminated on 4 September 2005. He is now under the probation order.

[6] The Crown says the conditional sentence should be replaced by a six month custodial sentence consecutive to the sentence on Count 1.

II.

Summary of Facts

[7] The trial judge set out the facts in considerable detail in both his reasons for conviction and for sentence, which I will not repeat. The offences occurred at Pelly Crossing in August 2002, at the respondent's home. The complainant and others were staying there, following an evening of drinking.

[8] The respondent's conduct giving rise to the convictions began when he interfered with the complainant's person and attempted to remove her pants on two occasions. She kicked and yelled at him to get out both times. After that, he uttered a series of threats to the complainant while holding various weapons, which included a bow, a rifle-styled air-gun and, on one occasion, a knife. He also threatened to rape, kill, and cut up the complainant. About 15 such incidents occurred over the course of 30 to 60 minutes.

[9] When the complainant challenged the respondent and attempted to leave the bedroom, he blocked her exit from his house while holding a knife. He later stuck the point of the knife in the kitchen table between the complainant's thumb and forefinger. Ultimately, the complainant was able to escape the residence and to obtain assistance.

[10] The next day the respondent apologized to the complainant and to her boyfriend. At sentencing, the judge noted that at trial the respondent denied having made such an apology.

[11] The respondent is 33 years old, of aboriginal descent, and a life-long resident of Pelly Crossing. He has a grade nine education, and has completed two courses in carpentry, as well as an elementary plumbing course. He has never had full-time permanent employment. At the time of sentencing he had a serious addiction to alcohol. He attended alcohol treatment in 1994 and again in 1999. He said he believed he would benefit from further treatment.

[12] The respondent took no responsibility for the offences, and has shown no degree of remorse. There was evidence that the respondent was in what was said to be “a low/moderate” risk category, which suggested a 31.1 per cent likelihood of re-offending within one year.

III.

Reasons of Sentencing Judge

[13] The learned sentencing judge directed his attention to the risk of the respondent re-offending, the need to provide for specific and general deterrence, and the need to denounce the respondent’s conduct. He noted that the respondent had not accepted responsibility for his conduct, and did not show remorse. He doubted the respondent’s ability to abide by the terms of a conditional sentence order if he did not first serve a period of incarceration.

[14] He expressed his conclusions this way:

> [66] In my view, imposing a conditional sentence across the board for all three offences would, to use the words of the British Columbia Court of Appeal in *Morris,* [[2004] B.C.J. No. 1117] at paragraph 62, send a completely wrong message to the victim, to Mr. Morris, and the community. And to paraphrase the balance of that paragraph, an incident of violence such as this in a community like Pelly Crossing, where alcohol abuse and violence is epidemic and victims are intimidated, clearly calls for a sentence that provides some deterrence in a general sense, and, more importantly perhaps, denunciation of the conduct.
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> [67] Count #1, according to the *Criminal Code*, has a maximum jail sentence of ten years. In my view, the need for denunciation and deterrence is paramount in sentencing Mr. Joe for that offence. The appropriate sentence for Count #1 is a term of six months incarceration.
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> [68] As for Count #2, again the maximum jail sentence is 10 years, under the *Criminal Code*. Now, having received, hopefully, the deterrent benefit of the six-month jail sentence, I feel that the risk to the community of Pelly Crossing, with the imposition of appropriate strict conditions, can be reduced to a level where the community would not be endangered by Mr. Joe serving this sentence in his community. I am prepared to impose a consecutive sentence on Count #2 of six months imprisonment to be served conditionally in the community, pursuant to s.742.1. I will go over the conditions of that conditional sentence in a moment.
>
> [69] With respect to Count #3, my intention is to suspend the passing of sentence and place Mr. Joe on probation for a period of 18 months to follow the completion of both his jail term and his conditional sentence term. I will specify the conditions of his probation order shortly.
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> [70] The imposition of a conditional sentence consecutive to a true jail sentence is authorized in the case of *R. v. R.A.R.*, [2001] 1 S.C.R. 163, which is a case out of the Supreme Court of Canada, as well as *R. v. Ploumis*, [2000] O.J. No. 4731, a decision of the Ontario Court of Appeal. While imposing both a true jail term and a conditional sentence for different offences arising out of essentially similar facts may initially appear inconsistent, I wish to emphasize that my intention here is to both denounce and deter the offender by the jail term on Count #1. Then, having had the benefit, hopefully, of that deterrence, I have greater confidence that the offender will be able to abide by the terms

> of a conditional sentence to follow, rather than risk being re-incarcerated for a breach of the sentence.

[15] The judge then set out the conditions attached to both the conditional sentence and probation order, which focused on ensuring the respondent stayed sober and pursued a productive lifestyle.

IV.

Counsel's Submissions

[16] The Crown accepts that where a judge imposes sentences for separate offences based on different facts, and where the pre-conditions for a conditional sentence for one or more of the offences are met, it is not an error of principle to impose a conditional sentence consecutive to a custodial sentence.

[17] The Crown's position here, however, is that since all three offences arose from the same set of circumstances, a conditional and custodial sentence cannot be "blended". The Crown says the sentencing judge decided the respondent presented a risk to the community, and correctly determined that a custodial sentence was necessary in order to address that risk, to denounce the conduct, and to deter the respondent from re-offending. The Crown says that once the judge found there was a risk to the community, it is inherently inconsistent to impose a custodial sentence on Count 1 and a conditional sentence on Count 2. Both of the offences arise from the same circumstances, and therefore, the risk to the community is present at the time of sentencing in both cases. The Crown says the finding of risk on one count is

a bar to a conditional sentence on any of the counts, since the absence of risk is a pre-condition under s. 742.1 of the ***Criminal Code***.

[18] The Crown says the proper global sentence would have been one year in custody with consecutive six month custodial sentences on the first two counts, followed by a period of probation.

[19] The respondent submits that a “blended” custodial and conditional sentence is not contrary to principle and that the global sentence imposed was not demonstrably unfit.

V.

The Case Law

[20] Other Courts of Appeal do not appear to be unanimous on whether blended custodial and conditional sentences can be imposed for offences arising from the same circumstances.

[21] Perhaps the strongest statement against this sentencing practice is ***R. v. Nadolnick*** (2003), 339 A.R. 348, 2003 ABCA 363. There, one of two respondents, Peter Nadolnick, pleaded guilty to aggravated assault and robbery. He was sentenced to one year incarceration on the assault charge, and a conditional sentence of two years less a day for the robbery. The two sentences were ordered to be served concurrently. The Crown appealed the sentence order.

[22] The Alberta Court of Appeal held that a custodial and conditional sentence could not be served concurrently: ***Nadolnick****, supra,* at para. 18. That issue does not arise in this case.

[23] The Alberta Court of Appeal also held that because the robbery and assault charges were so closely connected on the facts, the use of a custodial and conditional sentence resulted in an error of principle:

> [20] The second problem with the conditional sentence is that it is not consistent with the judge's conclusions and the application of proper sentencing principles. A [jail] sentence and a conditional sentence cannot co-exist when they are imposed for two related offences committed at the same time in identical circumstances. See *R. v. Hill* (1999), 140 C.C.C. (3d) 214 (N.S.C.A.); *R. v. Alfred* (1998), 122 C.C.C. (3d) 213 (Ont.C.A.). When multiple counts are based on the same wrongdoing, it is "an unwise and improper mechanical manipulation to attempt to fabricate some sort of a blended sentence based on the fact that there are two counts.": *R. v. R.(K.)*, [2002] O.J. No. 605 (Ont.S.C.J.) at para.3.
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> [21] Here, the offences of aggravated assault and robbery were part of one indivisible transaction. Robbery requires violence with the specific intent of stealing and involves some element of restraint. The violence, a stabbing to the chest with a knife, constituted the aggravated assault. It disabled the victim, preventing him from escaping. The robbery immediately followed the stabbing, with Peter Nadolnick demanding and taking the victim's wallet.
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> [22] Therefore, the offences are intimately connected and are part of one transaction. It cannot be said the seriousness, blameworthiness or sentencing principles relative to one offence do not apply to the other. The trial judge felt the circumstances of the aggravated assault and the need for deterrence and denunciation necessitate a term of incarceration. Because the aggravated assault cannot be separated factually from the robbery, a conditional sentence cannot be imposed for that offence.

[24] A different approach was taken by the Ontario Court of Appeal in ***R. v. Ploumis*** (2000), 150 C.C.C. (3d) 424. In ***Ploumis***, the accused pleaded guilty to possession of cocaine for the purposes of trafficking, and possession of an unregistered hand gun. The police had discovered both the unregistered handgun and the cocaine in the accused's knapsack while they were attending to a distress call regarding the accused. The accused was sentenced for the two offences that arose in those circumstances. The trial judge sentenced Ploumis to eight months custody on the weapons charge, and a consecutive conditional sentence of two years less a day and three years probation on the drug charge.

[25] The Crown appealed and Ploumis cross-appealed.

[26] The Court held that a combined sentence of 32 months resulted in a penitentiary sentence, and it was therefore an error of principle to impose a blended custodial and conditional sentence. The Court cited the decision in ***R. v. Alfred*** (1998), 122 C.C.C. (3d) 213 at 215, where the Ontario Court of Appeal had previously held that such a sentence violated "the spirit if not the express wording of s. 742.1(a) of the ***Criminal Code*** which provides that a conditional sentence can only be made where, *inter alia*, the court 'imposes a sentence of imprisonment of less than two years.'"

[27] The combined sentence in the present case is 12 months, and therefore, that issue does not arise.

[28] The Ontario Court of Appeal next considered whether it was an error of principle to impose custodial and conditional sentences for separate offences, if the

total sentence did not exceed two years less a day. The reasons on this issue are as follows:

> [23] In *R. (R.A.)*, [[2000] 1 S.C.R. 163] the Supreme Court blended a custodial sentence for one offence with conditional sentences for two others where the total sentence did not exceed two years less one day. Had the majority been of the view that blending the two forms of sentence in these circumstances contravened either the spirit or letter of s.742.1 of the *Code*, I believe they would have said so. More to the point, they would not have imposed an illegal sentence.
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> [24] Manifestly, s.742.1(a) posed no impediment to the blended sentences imposed by the majority in *R.(R.A.)* because the total sentence for the three offences did not exceed two years less one day. The problem, if one existed, lay with s.742.1(b) and in particular, whether combining a custodial sentence for one offence with a conditional sentence for another could be justified having regard to the principles and policy considerations that inform that provision. For convenience, s.742.1(b) is reproduced below:
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> > 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
> >
> > …
> >
> > (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.
>
> [25] In *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.), released together with *R. (R.A.)*, Lamer C.J.C., on behalf of the unanimous court, enunciated the principles and policy considerations that govern the interpretation and application of s.742.1(b). It is apparent to me that the majority in *R. (R.A.)* must have concluded that in a proper case, it would be consistent with those principles to impose a custodial sentence for one offence followed by a conditional sentence for another without offending the spirit or the letter of s.742.1(b).
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> [26] It follows in my view, that when an accused is being sentenced for more than one offence, [In *R. v. Fisher* (2000), 47 O.R. (3d) 397, 143 C.C.C. (3d) 413 (C.A.), this court held that it was improper to blend a custodial sentence with a conditional sentence in the context of a single offence.] it is legally permissible to blend a custodial sentence with a conditional sentence so long as the sentences, in total, do not

> exceed two years less one day and the court is also satisfied that the preconditions in 742.1(b) have been met in respect of one or more but not all of the offences. Accordingly, I would answer issue two in the negative.

[29] In ***R. v. R.A.R.***, [2000] 1 S.C.R. 163, 2000 SCC 8, Madam Justice L'Heureux Dubé, writing for the majority, imposed a nine month global sentence blending a six month custodial sentence with two consecutive conditional sentences of two and one month durations. She expressed her conclusions thus:

> [34] For these reasons, I find that a six-month conditional sentence for the sexual assault was unfit in the circumstances of this case. As was the case in *R. v. R.N.S.*, [2000] 1 S.C.R. 149, 2000 SCC 7, the Crown conceded in oral argument that it was not seeking further punishment now that the respondent has served his conditional sentence in full. Thus, I do not have to decide whether a longer conditional sentence with more stringent conditions might also have satisfied the new sentencing principles, as this would have no practical effect for this respondent. With respect to the common assaults, the Crown conceded on appeal that the fines imposed at trial were not appropriate. I would therefore defer to the Court of Appeal's finding that conditional sentences of two months and one month respectively were appropriate for the common assaults.
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> [35] I would therefore allow the appeal, set aside the six-month conditional sentence imposed by the Court of Appeal for the sexual assault, and restore the one-year sentence of incarceration imposed by Schwartz J. for this offence, to be followed by a three-month conditional sentence for the common assaults and three years probation imposed by the trial judge for the sexual assault. I would nevertheless stay the service of the sentences in this case, based on the Crown's concessions in oral argument before this Court.

[30] I am persuaded that it is not an error of principle to order both custodial and conditional sentences for offences arising from the same circumstances, provided that: the global sentence does not exceed two years less a day; the custodial and conditional sentences are not ordered to be served concurrently; and the

requirements of s. 742.1(b) are satisfied in respect of one or more of the offences. In this, I prefer the views expressed by the Ontario Court of Appeal in ***R. v. Ploumis***.

VI.

Appropriateness of Sentence

[31] In the present case, the sentencing judge directed his mind to the four pre-conditions for a conditional sentence. Those conditions were set out in ***R. v. Proulx***, [2000] 1 S.C.R. 61 at para. 46, and are:

> 1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
>
> 2) the court must impose a term of imprisonment of less than two years;
>
> 3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
>
> 4) a conditional sentence of imprisonment would be consistent with the fundamental purpose and principles of sentencing set out in ss.718 to 718.2.

[32] The sentencing order fashioned by Gower J. does not offend the first two provisos. It also satisfies the criteria imposed by s. 742.1(b).

[33] In ***Proulx***, Chief Justice Lamer made it clear that before a conditional sentence can be imposed, the sentencing judge must be satisfied that the community would not be endangered by the offender serving his sentence in the community: ***Proulx****, supra,* at para. 63. The standard of safety is not one of zero risk: see ***R. v. Knoblauch***, [2000] 2 S.C.R. 780, 2000 SCC 58. What the "safety of the community" prerequisite focuses on is "the risk posed by the individual offender

while serving his sentence in the community (emphasis added)": ***Proulx****, supra,* at para. 68. Danger to the community is then evaluated by: (1) the risk of the offender re-offending; and (2) the gravity of the damages in the event of re-offence: ***Proulx****, supra,* at para. 69.

[34] The risk of re-offending should be considered in light of the conditions which may be attached to the sentence, and the extent to which they may reduce or minimize the risk. In ***Proulx***, at paras. 72 and 73, Lamer C.J. stated that:

> The risk of re-offence should also be assessed in light of the conditions attached to the sentence. Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence: see *Wismayer, supra*, at p.32; *Brady, supra*, at para.62; *Maheu, supra*, at p.374 C.C.C. Indeed, this is contemplated by s.742.3(2)(f), which allows the court to include as optional conditions "such other reasonable conditions as the court considers desirable ... for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences". For example, a judge may wish to impose a conditional sentence with a treatment order on an offender with a drug addiction, notwithstanding the fact that the offender has a lengthy criminal record linked to this addiction, provided the judge is confident that there is a good chance of rehabilitation and that the level of supervision will be sufficient to ensure that the offender complies with the sentence.

[35] In the present case, the fact that the sentencing judge found the respondent to pose a risk to the community at the time of sentencing is not determinative of whether a conditional sentence is appropriate. The question was whether the accused would pose a risk *while serving the sentence in the community*.

[36] The sentencing judge was well aware that safety of the community was a primary consideration. Although at sentencing the respondent posed some risk of

endangering the community, the judge formed the view that if the accused had first served a period of time in custody, and if appropriate strict conditions were imposed, the risk could be reduced to an acceptable level and the respondent could safely serve a conditional sentence in the community. He imposed strict conditions designed to address the identified areas of risk for the respondent, namely; "his education and employment as well as his alcohol problems". The judge fashioned a sentence designed to serve both the short and long term safety concerns of the community, as well as the obvious need to deter and denounce this conduct.

[37] I am also of the view that the sentence imposed was consistent with the other principles of sentencing, in particular, s. 718.2 (c), (d) and (e):

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[38] As the sentence on Count 2 conforms to the requirements of s. 742.1, and is not inconsistent with any authority binding on the judge, I am of the opinion that Gower J. committed no error of principle in imposing a conditional sentence consecutive to the custodial sentence on Count 1.

[39] This Court's powers of review under s. 687(1) are limited. Absent an error of law or principle, this Court may interfere with the sentence only if it is shown to be

demonstrably unfit: ***R. v. M.(C.A.)***, [1996] 1 S.C.R. 500 at para. 90. The Crown has not persuaded me that the global sentence was unfit.

[40] I wish to add one further comment regarding condition 4 in the probation order. This condition reads as follows:

> (4) You will abstain absolutely from the possession, consumption and purchase of alcohol, and submit to a breathalyzer or urinalysis or bodily fluids or blood test upon demand by a peace officer or probation officer who has reason to believe that you have failed to comply with this condition.
>
> [Emphasis added.]

[41] In light of this Court's decision in ***R. v. Shoker***, [2004] B.C.J. No. 2626, 2004 BCCA 643, leave to appeal to S.C.C. granted, [2005] S.C.C.A. No. 81 (Q.L.), the sentencing judge was in error in imposing the underlined portion in condition 4. Although this condition, unlike the condition considered in ***Shoker***, requires the peace or probation officer to have reasonable grounds to believe that the abstention condition has been breached, this Court held that alone would not cure the constitutional defect: ***Shoker****, supra,* at paras. 56-57. I would therefore strike the underlined portion of condition 4 from the probation order. There may be a similar issue with condition 9 in the conditional sentence order. However, since the conditional sentence has already been successfully served I will not comment further on that condition.

VII.

Conclusion

[42] I would grant leave to appeal, but would dismiss the appeal, and would vary the probation order to delete all the words following “purchase of alcohol” from condition 4.

“The Honourable Chief Justice Finch”

I Agree:

“The Honourable Madam Justice Newbury’

I Agree:

“The Honourable Madam Justice Kirkpatrick”