COURT OF APPEAL FOR THE YUKON

Citation: ***R. v. Nehass***,
2004 YKCA 0014

Date: 20041012
Docket: YU514

Between:

Regina

Respondent

And

Michael David Nehass

Appellant

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Oppal

Oral Reasons for Judgment

J.A. Van Wart	Counsel for the Appellant
M.W. Cozens	Counsel for the Respondent
Place and Date:	Vancouver, British Columbia 12 October 2004

[1] **OPPAL J.A.:** The appellant, Michael David Nehass, entered a plea of guilty to one count of aggravated assault pursuant to s. 268, and one count of breach of recognizance contrary to s. 145(3) of the ***Criminal Code*** and was sentenced to a term of imprisonment of three years for the aggravated assault and three months for the breach of recognizance. The sentences were to be served concurrently. However, because the appellant had spent approximately six weeks in pre-trial custody, the actual sentence imposed was 33 months. He appeals the sentence on the grounds that "having regard to the nature of the offence, the circumstances of its commission, and the circumstances of the appellant, the sentence disposition was excessive".

[2] The background of this matter is as follows. On June 12, 2003, according to the reasons of the sentencing judge, Danny Jordan led a gang of enforcers who invaded a residence in Whitehorse and viciously attacked one Frederick Martin otherwise known as "mad dog". The appellant was a member of that gang. The motive for the attack was an unpaid drug debt. It is not in dispute that Martin was a cocaine trafficker but the evidence was not clear as to whom the money was owed. It is apparent that it was not owed to the appellant.

[3] It is beyond question that the attack was vicious. Jordan had in his possession a meat cleaver and a hammer while the appellant had a baseball bat. The attack was well planned in that Jordan, the appellant, and four or five others met at a convenience store which was situated near the residence of one Desiree Wagerer. Martin was at that residence. It appears that the parties forced their way into the residence, pushed Ms. Wagerer aside, and pursued Martin to the rear of the house. While some of the party remained near the door of the residence, Jordan and the appellant approached Martin who was beaten with a hammer and baseball bat. His face was also slashed with a meat cleaver. Jordan ordered Martin to place his hand on a table so that one of his fingers could be chopped off. The appellant assisted in holding his hand on the table. Martin was told that if he did not place his hand on the table, his whole hand would be chopped off. While Martin was telling the parties that "he was sorry", Jordan chopped off the small finger of Martin's left hand with the meat cleaver. The appellant then extinguished a cigarette on Martin's shoulder. After Jordan threatened to kill Martin if he "ratted him out", the parties left. Martin's finger had been left dangling by a piece of skin and was reattached by surgeons after a lengthy operation. He has not regained the use of that finger and, not surprisingly, continues to suffer

pain and discomfort. There is no evidence that he actually suffered psychological harm.

[4] The background of the appellant is as follows. He is 19 years old. He is an aboriginal person. He has an extensive criminal record. However, much of that record relates to offences committed as a young offender. In his reasons the sentencing judge made the following comments:

> [15] Mr. Nehass presents a somewhat more complex picture. He is an aboriginal youth, only 19 years of age. Despite his youth, however, Mr. Nehass has managed to amass a significant record including entries for breaking and entering, assaults, assault with a weapon, possession of a weapon and uttering threats. Mr. Nehass has had a very troubled upbringing involving many upheavals including the death of his mother. He has had multiple caregivers and placements over the years, most recently living on the streets of Whitehorse. Mr. Nehass has severe alcohol and drug abuse problems. His downward spiral into addiction intensified when, only a few weeks before the attack on Mr. Martin, Mr. Nehass turned 19 years old and received $47,000 from his mother's estate. There is reason to believe that he suffers from conduct disorder and attention deficit hyperactivity disorder. Since his incarceration, Mr. Nehass has been involved in serious and continuous incidents including assaults on other inmates, self-mutilation, repeated damage to gaol property and attempts at suicide.
>
> [16] In short, Mr. Nehass is a seriously disturbed youth in desperate need of treatment. I am very sympathetic to the pleas of his family and friends that Mr. Nehass needs treatment and not punishment. However, at this point Mr. Nehass presents such a danger to himself and others that the only option is to provide the required treatment in a secure setting.

. . .

> [19] In respect of Mr. Nehass, it must be remembered that he was not the ringleader. He stands convicted of offences which are extremely serious but which are, nevertheless, not as grave as those for which Mr. Jordan was convicted. Mr. Nehass has a serious record but he is a youthful offender who labours under difficulties that are, at least in part, the product of his disadvantaged past. Sentencing precedents suggest a range of sentence of two to four years. Given the offender's prior record and the aggravated circumstances of this case, I am satisfied that a sentence toward the higher end of that range would be fully justified. However, I do take into account the fact that Mr. Nehass has already been in prison for some months serving a sentence for another crime. I take into account that Mr. Nehass is clearly in need of treatment. Just as clearly, the safety and protection of the public requires that he be treated in a closed setting.

[5] The appellant has argued that having regard to the totality of the circumstances, the sentence is excessive. It is argued that a more appropriate sentence would be a global one of two years less one day imprisonment.

[6] The circumstances that are particularly relevant in this case and in this appeal is the age and the aboriginal background of the appellant, and as such, s. 718.2(e) is relevant. That section reads as follows:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:

. . .

> (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.
>
> [Emphasis added.]

[7] The seminal case on that section is ***R. v. Gladue***, [1999] 1 S.C.R. 688. In that case the Supreme Court of Canada stated that its specific reference to aboriginal offenders reflects their uniqueness and difference from non-aboriginal offenders and requires judges to pay particular attention to the circumstances of aboriginal offenders. The court stated that s. 718.2(e) is more than a re-affirmation of a codification of existing sentencing principles and stated at para. 33 that:

> The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(e) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender.
>
> [Emphasis added.]

[8] However, the court went on to state that it was not the intention of parliament to prefer certain categories of

offenders over others. The court further stated at paras. 78-79:

> In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.
>
> Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.
>
> [Emphasis added.]

[9] The Supreme Court of Canada restated those principles in ***R. v. Wells***, [2000] 1 S.C.R. 207.

[10] It must be noted that an appellate court must not vary a sentence merely because it would have imposed a sentence different from that imposed by the sentencing judge. An appellate court ought to interfere with a sentence only if the

court is convinced that the sentence is either unfit or clearly unreasonable. A deferential standard of review must be applied if the sentencing judge has not erred in principle, failed to consider a relevant factor, or overemphasized other factors. These principles were most recently stated by the Supreme Court of Canada in ***R. v. Stone***, [1999] 2 S.C.R. 290, 134 C.C.C. (3d) 353.

[11] The circumstances of the offence are particularly egregious. The appellant took part in a very serious assault that has had lasting effects upon the victim. The crime was carefully planned. It is recognized that the appellant has had a most difficult and an unfortunate background. However, I do not think that the judge erred in principle in concluding that the protection of the public requires he be treated in a closed setting. I make particular reference to the following quote from the sentencing judge:

> Mr. Nehass has a serious record but he is a youthful offender who labours under difficulties that are, at least in part, the product of his disadvantaged past. Sentencing precedents suggest a range of sentence of two to four years. Given the offender's prior record and the aggravated circumstances of this case, I am satisfied that a sentence toward the higher end of that range would be fully justified. However, I do take into account the fact that Mr. Nehass has already been in prison for some months serving a sentence for another crime. I take into account that Mr. Nehass is clearly in need of treatment. Just as clearly, the safety and

> protection of the public requires that he be treated in a closed setting.

[12] I do not disagree with the reasoning of the learned sentencing judge.

[13] I am also in agreement with the sentencing judge that this appellant obviously requires treatment. Unfortunately, this Court has not had the advantage of having before it the pre-sentence report, nor has there been any medical report before this Court.

[14] Counsel for the appellant has argued that the sentence was inappropriate and not within the range because it does not coincide with or is inconsistent with other sentences imposed by the courts in the Yukon Territory. While that argument is of some assistance, it must be pointed out that in this particular case the sentencing judge did not err in principle and the sentencing cannot be said to be unfit or clearly unreasonable.

[15] For those reasons, I would grant leave and would dismiss the appeal.

[16] **RYAN J.A.:** I agree that this appeal should be dismissed.

[17] Counsel for the appellant in this case, Mr. Van Wart, argued that the sentence in this case was on the high end of

the range established for this type of offence. In my view, the range in this case is very difficult to establish in that it involves a degree of premeditation and torture not found in the cases that were placed before us. In my view, the sentence is not only fit but it may well be on the low side for this horrible offence. I would grant leave but dismiss the appeal.

[18] **MACKENZIE J.A.:** I agree that the appeal should be dismissed.

[19] **RYAN J.A.:** The appeal is dismissed.

"The Honourable Madam Justice Ryan"

"The Honourable Mr. Justice Oppal"