COURT OF APPEAL OF YUKON

Citation: *R. v. Cornell*,
2017 YKCA 19

Date: 20171123
Docket: 14-YU748

Between:

Regina

Respondent

And

Christopher Jonathan Dale Cornell

Appellant

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Charbonneau
The Honourable Madam Justice Dickson

On appeal from: an order of the Supreme Court of Yukon, dated November 4, 2014 (*R. v. Cornell*, 2014 YKSC 54, Whitehorse Docket No. 12-01510)

Oral Reasons for Judgment

Counsel for the Appellant:	D.C. Tarnow
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon November 23, 2017
Place and Date of Judgment:	Whitehorse, Yukon November 23, 2017

Summary:

Appeal from 10 year long term supervision order dismissed. The sentencing judge took into account all the evidence adduced at the sentencing hearing, including evidence favourable to the appellant. The circumstances of the offence and the evidence adduced at the sentencing hearing showed that the appellant presented a high risk to public safety. The imposition of the maximum period of supervision was not demonstrably unfit.

[1] **CHARBONNEAU J.A.**: This sentence appeal relates to a single aspect of a sentence imposed on the appellant for a series of offences dating back to September 2011.

[2] The appellant and his accomplice, in the course of a safe attack in Haines Junction, encountered the store's janitor. The appellant struck him in the face and broke his nose. The janitor was also pepper sprayed in the face.

[3] The robbery was reported and the police responded moments later. A police vehicle arrived at the store as the appellant and his accomplice were attempting to load the store's safe in a vehicle. They fled the scene. A high-speed chase ensued on the Alaska Highway. During the chase, the appellant fired at the police vehicle with a rifle. The bullet went through the windshield of the vehicle, seriously wounding the police officer who was driving.

[4] The appellant was charged with several offences following these events, including, among others: assault with a weapon; attempted murder; aggravated assault; robbery; and discharging a firearm at a police vehicle.

[5] At trial, a jury found him guilty.

[6] After the appellant's conviction, the Crown initiated dangerous offender proceedings. A psychiatric assessment was ordered, pursuant to s. 752.1 of the *Criminal Code*. That assessment was done by Dr. Shabreham Lohrasbe, a forensic psychiatrist.

[7] At the start of the sentencing hearing, counsel advised the sentencing judge that they had arrived at a joint submission on several aspects of the sentence to be

imposed. Counsel advised that they were in agreement that the appellant should receive be designated a long-term offender and should receive a global term of imprisonment of 11½ years. Counsel also agreed about the credit that the appellant should receive for his remand time and about ancillary orders that should be made as part of the sentence.

[8] The only matter that counsel did not agree about was the duration of the long-term supervision order that would follow the appellant's jail term.

[9] The Crown's position was that the order should be for a period of ten years; the defence's position was that it should be for a period of five years.

[10] Dr. Lohrasbe testified at the hearing and his report was filed.

[11] The defence called Johnny Brass, who is employed by the Kwanlin Dün First Nation as a counsellor with the Jackson Lake wellness team. Mr. Brass was familiar with the appellant, having provided counselling and support to him over the years.

[12] Other materials were filed at the hearing: the appellant's criminal record; a detailed *Gladue* report; information from the Correctional Services of Canada about the administration of sentences and the process whereby an offender may be detained beyond his or her statutory release date; information about the appellant's time on remand; and a number of letters of support.

[13] The sentencing judge agreed with the joint submission presented by counsel. As for the long-term supervision order, he concluded that it should be in place for a period of 10 years.

[14] The duration of the long-term supervision order is the only issue raised on this appeal.

[15] The standard of review on a sentence appeal is well-established. An appellate court may intervene only if the sentencing judge: erred in principle; failed to consider a relevant factor; overemphasized a relevant factor; or imposed a

sentence that was demonstrably unfit. *R. v. Nasogaluak*, 2010 SCC 6 and *R. v. Joe*, 2017 YKCA 13

[16] The appellant argues that the sentencing judge made errors in principle in making his decision about the length of the long-term supervision order. He claims that the sentencing judge failed to take into consideration the *Gladue* report and community supports available to the appellant. He argues that the sentencing judge did not take into consideration his efforts and the improvements in the months leading up to the sentencing hearing. He also claims that the sentencing judge placed too much emphasis on Dr. Lohrasbe's evidence.

[17] Alternatively, the appellant argues that the imposition of the maximum long-term supervision period is demonstrably unfit under the circumstances.

[18] The appellant's position on the appeal really comes down to two assertions: that the sentencing judge was unduly influenced by Dr. Lohrasbe's evidence about what duration of supervision was desirable; and that this caused him to disregard the rest of the evidence and the importance of restraint.

[19] In my view, these assertions are not supported by the record.

[20] The sentencing judge did refer to Dr. Lohrasbe's evidence at some length. However, there is nothing in his Reasons that suggests that he gave this evidence undue weight. Dr. Lohrasbe was careful to say, when giving his view about the duration of the period of long-term supervision, that he was speaking from a therapeutic point of view. This was also how the sentencing judge characterized Dr. Lohrasbe's testimony on that point.

[21] Perhaps more importantly, to suggest that the sentencing judge did not take *Gladue* factors into account in arriving at his decision is to disregard large portions of his Reasons. Paragraphs 20 to 58 of the Reasons deal specifically with the *Gladue* report and *Gladue* factors.

[22] Similarly, there is no basis for suggesting that the sentencing judge did not take into account the appellant's efforts since his conviction and the support that would be available to him from his First Nation after his eventual release.

[23] At Paragraph 57 of his Reasons, the sentencing judge referred to the programs that the appellant took while on remand and specifically noted the improvement in his behaviour:

> In recent months, Mr. Cornell's behaviour at WCC has been improving. He has participated in culturally-related programming such as carving, a totem workshop and a medicine pouch workshop. He has also attended the Yukon College campus, where he took the Heritage and Cultural Essential Skills program, as well as academic upgrading. Kevin Kennedy, one of the instructors at the campus, describes Mr. Cornell as "... constructive and well-behaved... a model student". …

[24] The sentencing judge also referred to Mr. Brass' evidence about his intention to maintain contact with the appellant during the custodial portion of his sentence and about the support that the Kwanlin Dün First Nation could provide the appellant after his release from custody.

[25] Again, to suggest that the sentencing judge did not take those things into account is to disregard what he said in his Reasons.

[26] Interestingly, when Mr. Brass was questioned by the sentencing judge about his view of the usefulness of a supervision order, he answered that he thought it would be helpful to the appellant and that it would give those trying to support him "something to work with".

[27] It is beyond dispute that the sentencing principles set out in the *Criminal Code*, including the fundamental principle of proportionality and the requirement for restraint, apply to long-term offender proceedings. (*R. v. Johnson*, [2003] 2 S.C.R. 357)

[28] The Reasons show that the sentencing judge applied those principles. This was perhaps most obvious when he expressed his agreement with the range of sentence jointly proposed. While noting that this range was below the range of

sentences imposed in cases of attempted murder of police officers, he agreed that it was nonetheless appropriate, given the presence of *Gladue* factors:

> [78] … While some of the cases involving the attempted murder of police officers exceed this range, counsel agreed that the range is fitting once Mr. Cornell's *Gladue* factors are taken into account, as well as the significant amount of time that he has spent in segregated confinement while on remand. I accept that as reasonable in the circumstances. …

[29] I conclude that the sentencing judge did not commit any error that would give rise to appellate intervention in this case.

[30] As for whether imposing the maximum period of supervision was demonstrably unfit, that issue must be assessed in light of considerations that are specific to dangerous offender and long-term offender proceedings. The primary purpose of the dangerous offender and long-term offender legislation is the protection of the public.

[31] In this context,

> (...) a proportionate sentence is one that not only balances the nature of the offence and the circumstances of the offender, but also gives considerable weight to the protection of the public.

R. v. Armstrong, 2014 BCCA 174

[32] A long-term supervision order is not intended to achieve the goals of deterrence and denunciation. Those objectives are reflected in the custodial portion of a sentence. The objective of a long-term supervision order is to prevent the commission of future crimes. *R. v. J.W.R.*, 2010 BCCA 66

[33] The appellant's criminal record shows a steady pattern of criminal activity over a lengthy period of time, including many convictions for serious offences. The sentences that he has received in the past and his exposure to various programs and initiatives, including several culturally-sensitive ones, have not been effective in changing his behaviour.

[34] The offences that the sentencing judge was dealing with in this case were extremely serious. The appellant, through his concession that he should receive a long-term offender designation, acknowledged that he presents a serious risk to public safety.

[35] In this context and on the whole of the evidence before him, there were ample grounds for the sentencing judge to conclude that the maximum period of supervision was necessary to maximize the management of the appellant's risk factors and to protect the public. The sentencing judge concluded that this was also in the appellant's own interests, as far as assisting with his rehabilitation. This was supported not only by Dr. Lohrasbe's evidence but also by Mr. Brass' testimony that a supervision order would assist those trying to support the appellant after his release from custody.

[36] On the whole, the sentencing judge's decision about the duration of the long-term supervision order was not demonstrably unfit. There is no basis for this Court to interfere with it. For those reasons, I would grant leave to appeal sentence but would dismiss the appeal.

[37] **BENNETT J.A.**: I agree.

[38] **DICKSON J.A.**: I agree.

[39] **BENNETT J.A.:** The application for leave to appeal is granted but the appeal is dismissed.

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The Honourable Madam Justice Charbonneau