

-+In the Court of Appeal of Alberta

Citation: R. v. D.J.D., 2010 ABCA 207

Date: 20100629
Docket: 0901-0292-A
Registry: Calgary

Between:

Her Majesty the Queen

Appellant

- and -

D.J.D.

Respondent

Restriction on Publication: By Court Order, information that may identify the person described in this judgment as the victim may not be published, broadcast, or transmitted in any manner. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application. See the *Criminal Code*, s. 486.4.

Corrected judgment: A corrigendum was issued on July 13, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Judge L.B. Hogan
Dated the 14th day of October, 2009
(Docket: 081360596P1; 090057712P1)

Memorandum of Judgment

The Court:

[1] The Crown appeals a global five year sentence imposed on the respondent for a series of violent assaults against his wife which he inflicted, in their home, over a seven hour period. He was convicted of uttering death threats, two counts of assault with a weapon, and one count each of assault causing bodily harm, attempted strangling and sexual assault.

[2] At the appeal hearing, the respondent informed the Court that he had decided to represent himself on the appeal, and he provided his explanation in some detail for his decision. The Court satisfied itself that the respondent had familiarized himself with the materials filed by the Crown in support of the appeal. The Court also satisfied itself that the respondent was fully aware that the Crown was seeking a substantial increase in his sentence, specifically a sentence as high as ten years imprisonment. The respondent's submissions to the Court were oral but, as noted below, were thoughtful, reflective and articulate.

[3] Nevertheless, the severity and degradation of this series of assaults on his wife can hardly be overstated. The respondent assaulted his wife of 20 years in a comprehensively brutish manner. He handcuffed her, whipped her repeatedly with a belt on her buttocks, forced her to insert a candle into her vagina, urinated on her, hung her by her neck with a belt, tied her to her bed, choked her with a belt, punched her in the face, and took pliers to her teeth, trying to pull them out, and then threatened her with further bodily harm if she did not pull one out herself, which she did. Throughout this period he threatened to kill the victim if she told anyone what had happened. As noted above, this callous, humiliating torture took place in the family home over a seven hour period and appears to have been unrelenting. Indeed, each lull in the events appears to have been a relatively short period in which the complainant sought to regain composure after which the abuse would resume in yet another demeaning and mean-spirited fashion. The respondent suggested to us that they were both drinking or consuming drugs during that overall period. The trial judge made no finding to that effect. In any event, the victim finally managed to escape and ran for help.

[4] The victim suffered several physical injuries, including serious bruising on her body and a black eye. She required dental surgery as a result of the damage done to her teeth, including the permanent loss of one. The loss of that tooth resulted in bone loss, aesthetic issues, speech consequences and risk of infection.

[5] The psychological harm to the victim was even more serious. She was terrorized to the point that she will never feel safe around the respondent. She has panic attacks and has to call the RCMP to make sure he is still in gaol so she can breathe. She has been under continuous doctors' care since the incident. She is unable to do any strenuous activities. She cannot sleep for any length of time and has nightmares about the respondent. She has headaches, memory loss, and great difficulty staying focused.

[6] The Crown appeals the five year sentence imposed, arguing it is demonstrably unfit. The Crown argues that the sentencing judge failed to appreciate the gravity of the offences and failed to consider several aggravating factors, including two prior convictions for violent offences and one for threat of violence against this same victim in the family violence context: see s. 718.2(a)(ii) of the *Criminal Code*. At the time of sentencing the respondent was serving time for a separate offence of sexual assault against the victim that had occurred prior to the acts in question here. Properly, the present sentences were to run consecutively to that sentence.

[7] The Crown also argues that the sentencing judge failed to consider the grievous breach of trust inherent in these offences and that they took place within a context of long term domestic abuse. The Crown submits that he failed to give effect to the extended nature of the incident, with its multiple assaults that were deliberate and calculated, using a variety of weapons and restraints, and ending only when the victim fled. Nor did he give effect to the elements of degradation and domination, including forcing the victim to inflict self harm.

[8] The Crown notes that the pre-sentence report indicates that the respondent is a moderate to high risk to re-offend. Against this, in his careful submissions, the respondent contends that because he had been in a blackout phase of his 35 years of drinking and drug use when initially charged with assaults on his wife, he failed to fully appreciate the magnitude of his crimes. He concedes that his remarks to others could have been understood as reflecting lack of remorse, but he submits that this misinterprets his actual state of mind, which at the time did not involve full recall of what happened. He says to us that his awareness of the gravity of what he did only dawned upon him since thinking about it while in custody. He states that he does not now seek to diminish his crimes. We find some credibility in what the respondent now says about recognizing his guilt, but the influence of that current recognition for this case cannot overcome what must necessarily be the dominant considerations in sentencing, namely proportionality and service of the clearly paramount objectives of denunciation, deterrence and protection of the public. At his age and level of life experience, his rehabilitation is in his hands. He appears to be pursuing this goal. But a fit sentence cannot turn on serving that objective.

[9] There is the policy of appellate deference to the exercise of discretion in sentencing which we must consider here as in all cases. In this case, the sentencing judge provided no useful reasons for the sentence imposed. He mentioned the language of the key *Code* provisions, namely ss. 718 to 718.2 of the *Code*. But he did not offer any explanation how the sentence he chose either (a) met the fundamental principles of sentencing, particularly proportionality, (b) accounted for the aggravating and mitigating factors, or (c) served any of the objectives declared by Parliament. While a trial judge is not obliged to provide overly elaborate reasons in every case, sufficient reasons to meet the requirements of intelligibility, reviewability and accountability are required: s. 726.2 of the *Code*. Absent such reasons, there is little to which appellate deference can attach.

[10] We therefore assess proportionality and consider the gravity of each offence and the degree of culpability of the respondent on them. Even if a total sentence may be justified, such outcome should not distort the picture of what happened. This was not a single offence. This was a protracted series of violent, degrading, humiliating assaults which took place over a prolonged period of time in a domestic context and which resulted in serious physical and psychological harm.

[11] Having regard to the numerous offences committed and the aggravating circumstances of those offences, the global sentence of five years is demonstrably unfit. The trial judge gave no reasons as to how he arrived at that sentence. We agree that he did not give proper effect to the sentencing objectives of denunciation, deterrence or protection of the public, nor did he adequately consider the submissions of counsel on the aggravating and mitigating factors of the offences.

[12] The aggravating circumstances here are obvious. The mitigating circumstances are few. Having regard to the gravity of each of the offences committed, and the degree of culpability of the respondent in relation to each, the individual sentences for each of the six counts would well exceed the various concurrent sentences imposed by the trial judge with the possible exception of the five year sentence imposed on the count of sexual assault. For that count alone, a sentence of five years would be within the range contemplated by *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79.

[13] The respondent was also convicted of two counts of assault with a weapon (a belt used in various ways and pliers), one of assault causing bodily harm, one of attempted strangling, one of uttering death threats. Each of those counts, in its own way, merited significant punishment as family violence under s. 718.2(a)(ii) of the *Code*, and as brutality in its own right. The objectives of deterrence, denunciation and protection of the public would have primary significance for those counts even were there not the sexual assault offence. For all the offences, rehabilitation of the respondent cannot trump those objectives. As noted above, rehabilitation is now in the hands of the respondent at his stage of life. Also if, as he told us, he sincerely accepts responsibility for his crimes, that is also a positive thing but at this stage of his life its relevance can only be with the parole board and with his family members in due course.

[14] The principle of totality must be addressed. This principle set out in s. 718.2(c) of the *Code* is a reflection of the concept of restraint. It must be applied in a reasoned way. A decision as to a total sentence for a group of related offences is not achieved by selecting a number at random, or by an approach involving a general rounding down. The sentencing court is to calculate what the sentences would be individually and then determine a collective result by calculating what the total would be for imprisonment terms which could properly be dealt with consecutively. It is then against that cumulative number that the court takes a final view of the case under s. 718.2(c) of the *Code* to see if that total would be unduly long or harsh. The court then adjusts accordingly. The trial judge conducted no analysis of that sort. Had he done so, he would have seen that a total sentence in excess of 10 years would have been the cumulative tally. We agree with the Crown and the respondent that the trial judge would then have properly chosen a reduced total sentence. At the trial court, the

Crown here proposed a global sentence of nine to ten years. We find that position to have been reasonable. It necessarily affects the specific sentences for each count, so what we select hereafter does not necessarily represent what a fit individual sentence might have been.

[15] We therefore grant leave to appeal and allow the Crown appeal. We confirm the five year sentence for sexual assault. We substitute a sentence of imprisonment of two years consecutive on the strangling count, and one year consecutive on each of the assault with weapon counts, those to run consecutive to each other and consecutive to the five year sentence imposed for sexual assault. The total, therefore, is increased to nine years. Further, the sentences will run consecutively to the remanet of the different sentences being served by the respondent on the date he was sentenced for the present offences. The sentences for the threats and the assault causing bodily harm will remain as concurrent.

[16] Against this total of nine years, the trial judge gave the respondent a credit of two years for pre-sentence custody. We are not asked to adjust that credit so it will apply against the nine years substituted by this judgment. We wish to emphasize that having thus significantly increased the respondent's sentence, we are not suggesting to the corrections authorities that they now re-classify the respondent as an inmate. Rather, we are prepared to accept the respondent's assertions to us that he has been constructively engaged with the corrections system at the Bowden Institution where he is currently located. We do not intend that any constructive engagement by the respondent be disrupted simply by reason of the increase in the quantum of his sentence.

Appeal heard on June 22, 2010

Memorandum filed at Calgary, Alberta
this 29th day of June, 2010

Paperny J.A.

Watson J.A.

Rowbotham J.A.

Appearances:

B.R. Graff
for the Appellant

Respondent on own behalf

Corrigendum of the Memorandum of Judgment

In paragraph [3], line 11, the word “mean-spired” has been corrected to “mean-spirited”.