COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fraser, 2016 ONCA 745
DATE: 20161013
DOCKET: C60274

MacPherson, Pepall and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Thomas Allan Fraser

Appellant

Thomas Allan Fraser, in person

Erin Dann, duty counsel

Hannah Freeman, for the respondent

Heard: September 8, 2016

On appeal from the conviction entered on February 11, 2015 and the sentence imposed on March 25, 2015 by Justice James A.S. Wilcox of the Superior Court of Justice.

Pepall J.A.:

[1] The appellant viciously and violently assaulted his domestic partner between June 1, 2009 and October 31, 2010. He was convicted of aggravated assault, assault with a weapon, assault, and uttering a threat to cause death. He received a global sentence of seven years.[1] He appeals from his conviction and seeks leave to appeal his sentence.

A. BACKGROUND

[2] The appellant met the complainant when she was in her teens and in high school, and he was about 30 years old. They cohabited and separated and then

would cohabit again. The relationship was characterized by his physical attacks and verbal abuse. The complainant is five-feet, five inches tall and in 2009 and 2010 weighed about 100 to 110 pounds. In contrast, the appellant is five-feet, eight or nine inches tall and in those years weighed about 215 pounds.

[3] The facts on which the convictions were based include the following:

- the appellant held the complainant down and applied a hot cigarette lighter to her bare legs three times. He then pulled down her underwear and applied the heated lighter twice to her vaginal area;

- the appellant choked the complainant five or more times. He put her in a headlock and squeezed until she could not breathe. On one of these occasions, she was rendered unconscious;

- the complainant had been sleeping in bed and awoke with the appellant sitting on her and suffocating her with a pillow. He pressed the pillow against her face four or five times and in between times elbowed her in the ribs so she would keep quiet;

- on another occasion, the appellant held the complainant down and poured a glass of his urine on her face and in her mouth;

- the appellant barged into the bathroom where the complainant was having a bath, forced her head under the water and held it there repeatedly. He pulled her up by the neck and swung her around quickly such that her head hit the walls. He then pulled her from the tub and hit her head against the cabinet, drawing blood. He continued to whip her around and put her on the floor and punched her;

- the appellant threatened to kill the complainant if she did not climb over a porch railing, which had a drop of six to eight feet to the ground, which she proceeded to do; and

- the appellant would slap, punch or knee the complainant more or less every day and threatened her almost every day. He said he would kill her or

> her family if she said anything about what was going on.

[4] At the trial, which took close to two weeks, both the appellant and the complainant testified, as did nine other witnesses including many of their friends, acquaintances and at least one family member. The evidence against the appellant was overwhelming, and the trial judge was satisfied beyond a reasonable doubt of the appellant's guilt.

B. CONVICTION APPEAL

[5] In reaching his decision, the trial judge noted, among other things, the appellant's failure to deny the allegations when given the opportunity. Assisted by duty counsel, the appellant submits that reliance on this failure was an error of law.

[6] I do not accept this submission.

[7] The trial judge's comments must be placed in context. At trial, a close friend of the appellant testified about an occasion when the complainant asked the appellant: "What about the time you burnt me with the lighter?" and motioned to the area of her groin and vagina. The appellant responded: "Do you know about the punch in the face game?" The witness concluded from this and a subsequent exchange that the appellant had no defence for himself. Another witness drew a similar conclusion.

[8] When a statement is made in an accused's presence, in circumstances where the accused could reasonably have been expected to reply, silence may lead to an inference of adoption: *R. v. Robinson*, 2014 ONCA 63 (CanLII), 118 O.R. (3d) 581, at para. 51. Here, however, the trial judge did not make a finding that there was any adoption of any evidence by the appellant. The trial judge also cautioned himself that a failure to respond is not proof of guilt. His comments on the appellant's failure to deny the allegations were referable to the reactions of the witnesses who testified on their own reasonable expectations. He was not making a finding that the appellant never rejected the complainant's assertions. Indeed, at page 14 of his reasons, the trial judge noted that when asked about the allegations, the appellant described the complainant as a "lying bitch".

[9] In addition to the argument advanced by duty counsel, the appellant made six submissions in support of his conviction appeal. In essence, they amounted to an invitation to retry the case. Credibility findings and findings of fact fall within the province of a trial judge. I also reject the contention that the trial judge applied a different level or standard of scrutiny to the evidence of the Crown and defence witnesses.

[10] I see no basis on which to overturn the convictions and would dismiss the conviction appeal.

C. SENTENCE APPEAL

[11] On sentencing, duty counsel advances two arguments. First, she submits that the trial judge erred in treating the appellant's absence of remorse as an aggravating factor. Second, she argues that the trial judge erred in failing to apply *Gladue* principles in sentencing the appellant.

(1) Did the trial judge err in considering the appellant's lack of remorse as an aggravating factor?

[12] In his reasons for sentence, the trial judge identified the following aggravating factors:

- the ongoing and repetitive nature of the appellant's misconduct: this was not a brief momentary lapse of judgment;
- the appellant was abusing his domestic partner. Sentencing for domestic violence must emphasize deterrence and denunciation;
- the controlling, cruel and sadistic nature of the incidents, which put the complainant in fear for her life;
- the significant impact the crimes had on the complainant;
- the appellant's lengthy criminal record, which shows multiple convictions from 1990 to 2002 including several counts of robbery; and
- the apparent lack of remorse.

[13] I agree that the trial judge erred in considering this last factor. Absence of remorse is not an aggravating factor. Rather, the presence of remorse may be a mitigating factor: *R. v. Valentini*, 1999 CanLII 1885 (ON CA), 43 O.R. (3d) 178; *R. v. Ling*, 2014 ONCA 808 (CanLII), 328 O.A.C. 210.

(2) Did the trial judge err in not considering *Gladue* principles?

[14] Turning to the second issue, no submissions were made before the trial judge on any need to consider *Gladue* principles. The Crown and the defence agreed to the admission before this court of fresh evidence consisting of a report

that considered the appellant's Aboriginal history and *Gladue* principles. It was prepared after his sentencing but in advance of the hearing of this appeal.

[15] The report describes details of the appellant's status: "Both the offender and his father are non-status although they are in the process of obtaining same. The paternal grandmother obtained her status card when she was 63 years of age. The offender's mother is non-native. The offender has never resided on the reserve, nor have his parents or siblings. He has little knowledge of his heritage and traditions."

[16] In the absence of anything to alert the trial judge to the need to consider *Gladue* principles, it is unfair to say that he erred in that regard. That said, I accept duty counsel's submissions that *Gladue* principles should be considered in the sentencing of the appellant.

(3) Is appellate intervention warranted in this case?

[17] In *R. v. Lacasse*, 2015 SCC 64 (CanLII), [2015] 3 S.C.R. 1089, the Supreme Court addressed appellate intervention on sentence appeals. Writing for the majority, Wagner J. stated, at paras. 43-44:

> I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence, and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. It is therefore necessary to avoid a situation in which [TRANSLATION] "the term 'error in principle' is trivialized";
>
> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence. [Footnotes omitted.]

[18] The record does not disclose what impact the appellant's absence of remorse had on the sentence. Clearly, it had some impact or the trial judge would not have mentioned it as an aggravating factor.

[19] In contrast, consideration of *Gladue* principles could not have had an impact on the sentence given by the trial judge as he was not made aware of any need to address these principles.

[20] In these circumstances, the deference owed to a trial judge's sentencing decision as described in *Lacasse* is inapposite. Rather, given the trial judge's error respecting the absence of remorse and the need to consider *Gladue* principles, it falls to this court to sentence the appellant. That said, for the following reasons, I would not interfere with the sentence imposed by the trial judge.

(4) What is the appropriate sentence in this case?

[21] As pointed out in *R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433, at paras. 68-73, sentencing of all offenders, including Aboriginal offenders, is an individualized process. As stated by the Supreme Court in that case, at para. 83:

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[22] In *R. v. Collins*, 2011 ONCA 182 (CanLII), 104 O.R. (3d) 241, this court stated that an Aboriginal offender does not bear the burden of establishing a direct causal link between the systemic and background factors and the commission of the offence. However, these factors should be considered.

[23] In some cases, the evidence may suggest that the offender's Aboriginal background played a role in shaping the offender's path to committing the offence: *R. v. J.N.*, 2013 ONCA 251 (CanLII), 305 O.A.C. 175. In that case, this court concluded that the evidence that the appellant's Aboriginal ancestry may have played a part in his criminality was weak: para. 47.

[24] In the fresh evidence filed on this appeal, the appellant identified himself as a non-status Cree. His maternal family is described as being non-native. The appellant's Aboriginal heritage is through his father. He states that his grandmother attended residential school. The appellant was born in Scarborough where he lived until he was 12. He then moved with his family to Aurora and then to Strathroy and lastly, to Bradford. Except for periods of incarceration, he lived with his parents until he was 30. The appellant described his upbringing as positive; he has always enjoyed a close and positive

relationship with his parents and his siblings and was raised in "a supportive home void of any criminal activity or substance abuse." He described his family as non-violent and social people. He denied any difficulties in school during his formative years. He states that when he was 12 and 13, he was sexually abused by an uncle (not identified as being on the maternal or paternal side of the family), who died soon after.

[25] The appellant has a son, age 12, and he has re-established his relationship with the mother of the child. At the time of his arrest, he had been working in a retail bedroom furniture store. He describes himself as an "almost non-existent drinker" and states that he has never experimented with any form of illicit drug except marijuana. There is no indication that he was under the influence of any drugs or intoxicants when committing the index offences.

[26] Although the appellant's Aboriginal background is relevant in determining the appropriate sentence, it is not determinative. Rather, it is one factor that must be considered in the context of the appellant's individual circumstances, along with all of the other relevant factors: *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 88. As stated in that decision at paras. 79-80, "Generally, the more violent and serious the offence, the more likely as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, often taking into account their different concepts of sentencing." See also *R. v. Kakekagamick* (2006), 2006 CanLII 28549 (ON CA), 81 O.R. (3d) 664, leave to appeal dismissed, [2007] S.C.C.A. No. 34, at paras. 34-36.

[27] One such relevant factor is that the appellant is not a first time offender. In spite of the fact that he is stated to have been raised in a supportive home devoid of any criminal activity or substance abuse, the appellant found himself in trouble with the law with such frequency that he was sentenced to a federal penitentiary when he was 19 years old (in 1993).

[28] The appellant is a two-time statutory release violator, having committed new offences while on conditional release. He has numerous other convictions as well, although, as noted by the trial judge, the last was in 2002. While I accept that the appellant's institutional behaviour has been described as "almost exemplary" and that, based on the most recent correctional report, he should be commended for completing certain beneficial Aboriginal programs, significantly, in my view, he has limited insight into his recent offences and does not take any responsibility for them.

[29] The offences for which the appellant was convicted were very serious. They involved domestic violence of a heinous and brutal nature. As noted by the trial judge, they were controlling, cruel and sadistic. Abuse against the offender's common-law partner is specifically enumerated as an aggravating factor under s. 718.2(a)(ii) of the *Criminal Code*.

[30] Domestic violence is an insidious crime, the effects of which endure long after the victim's physical wounds have healed. Here, the complainant provided a victim impact statement. While a victim impact statement should not overwhelm a sentencing decision, it is a factor to consider. The description of the impact of the offences on the complainant in this case can only be described as devastating. This evidence also amounts to a statutory aggravating factor, as set out in s. 718.2(iii.1) of the *Criminal Code*.

[31] This court emphasized the particular principles at issue when imposing a sentence in a case involving domestic abuse, in *R. v. Ibrahim*, 2011 ONCA 611 (CanLII), at para. 15:

> The sentence imposed in cases such as this must also promote a sense of responsibility among spousal abusers and an acknowledgement of the harm done not only to their immediate victims, but equally to the community at large.

[32] The appropriate sentence in this case must reflect these principles, promote denunciation and deterrence, take into account the appellant's individual circumstances, as well as the circumstances of the offences, and assist in his rehabilitation.

[33] Before the trial judge, the Crown sought a sentence of ten years and the defence one of between six months and three years. In *R. v. Young*, [2003] O.J. No. 5124 (C.A.), this court upheld an eleven year sentence given to an offender who had been convicted of domestic assault that had persisted for almost two years. In *R. v. Martin*, 2009 ONCA 62 (CanLII), this court upheld a sentence of eight years and four months for fourteen offences involving domestic abuse. While these sentences are of a higher range, having regard to the relevant sentencing principles, including those in *Gladue*, and the circumstances of the offences and the offender, I am of the view that the seven year global sentence is fit.

D. DISPOSITION

[34] Accordingly, the conviction appeal is dismissed. Leave to appeal sentence is granted but the sentence appeal is dismissed.

Released: October 13, 2016 (JCM)

"S.E. Pepall J.A."
"I agree J.C. MacPherson J.A."
"I agree G. Pardu J.A."

[1] Four years for the aggravated assault counts, two years consecutive for the assault with a weapon, one year consecutive for the assault and one year concurrent for uttering a threat to cause death.