R. v. Lefebvre, 1999 ABQB 523

Date: 19990630
Action No. 9803-0131S50101

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

BLAINE ARTHUR LEFEBVRE

Respondent

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE D. A. SULYMA

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[1] This is an appeal from the sentence of the Honourable Provincial Court Judge Chrumka. The Respondent, as president of Kanata Environmental Services Inc., became involved in off-loading canisters containing potassium superoxide. The canisters are classified as dangerous goods under Federal legislation and as hazardous waste under the ***Environmental Protection and Enhancement Act***, S.A. 1992, c. E-13.3. He pled guilty to a charge under s. 97(1) of the ***Environmental Protection and Enhancement Act*** which prohibits any release other than that specifically authorized by an approval or under the Regulations. This is in relation to an incident which occurred on December 5, 1995. He also pled guilty to further charges under the Act dealing with the misuse of a personal identification number and, a third count of operating a hazardous waste treatment facility without being the holder of an approval. These last two charges related to an April 3, 1995 incident.

[2] As a result of the guilty pleas, the facts of the offences were presented by a Crown Statement of Facts entered as Exhibit #1 and a Defence Statement of Facts entered as Exhibit 2.

Some admissions were made on the record, and the learned Provincial Court Judge also put some questions directly to the accused. Although the possibility of calling ***viva voce*** evidence in the sentencing proceedings was at one point contemplated by the Crown, this did not occur and the evidence in the sentencing remained as I have stated.

[3] This resulted in conflicts between the respective Statements of Facts and, as a result, Crown and defence counsel before me re-argued the significance of facts as they related to the offences and the sentence of the trial judge. The trial judge himself made statements characterizing some of the accused's actions but, did not make specific findings on the two sometimes conflicting versions of the facts.

[4] For the purpose of this appeal, therefore, the facts of the offences have to be stated. I find the relevant facts on the evidence that was before the trial judge and now contained in the transcripts to be as follows:

1. The Respondent was the president of Kanata Environmental Services Inc.

2. Kanata Environmental Services Inc. had a mission statement, which read:

   > To establish an Aboriginal-initiated manual sorting and recycling venture near Villeneuve encouraging the participation of Aboriginal people in the growth industry of the future, to provide Aboriginals an opportunity to share in a profitable venture, become gainfully employed and enhance a special relationship in the protection of the environment.

3. Kanata became a successful bidder to recycle breathing apparatus canisters that had previously been utilized by sailors. The bid was received by the Department of National Defence. Initially, Kanata proposed to complete the process at the Department of National Defence facility in Victoria, B.C. After the project was awarded, Kanata discovered that that would not be allowed. Consequently, Kanata decided to bring the canisters to Alberta where it had access to facilities to process them.

4. The Department of National Defence approved the transport of canisters to Alberta. According to Exhibit 2, the Respondent requested Mr. Preston Chalifoux, who was another Kanata employee, find out what was needed in Alberta to transport the canisters and to process them and dispose of them in Alberta.

5. In April of 1995 the first load of canisters was shipped from Victoria to a site west of Edmonton owned by Impala Auto Wreckers. The canisters were partially treated by Kanata employees, who emptied them prior to disposal in the landfill. Neither the Respondent nor the company held an approval or a personal

identification number for this operation of treatment and disposal as is required by the environmental legislation.

5. Indeed, the receiver number quoted by the transport company retained by Kanata to the Department of National Defence was R1047, which is the receiver number for the Swan Hills Hazardous Waste Treatment Facility.

6. The Respondent in his statement entered as Exhibit #2 stated he had been told by Preston Chalifoux that Hazmat Transport was licensed to haul the canisters to Alberta and that the number R1047 was the carrier number needed to allow transport from Victoria to Alberta. He states at the time he did so he merely relayed this number to Hazmat Transport and he did not know of the requirement of having a receiver number for Alberta. He only became aware of the need for a receiver number in Alberta through subsequent investigation by the Alberta Environment Department in approximately January of 1996.

7. Kanata used the services of Hazmat Transport again on November 30, 1995 to pick up more canisters. These arrived in Edmonton on December 5, 1995. This shipment had been a delayed shipment, and because of the cold weather the canisters could not be emptied. Kanata planned to unload the canisters at the site, according to the Respondent's Exhibit #2, just inside the enclosure and thereafter plan the best method of decommissioning them according to the contract with the Department of National Defence.

8. The Respondent in Exhibit #2 takes the position that thereafter matters were directed by the Impala Auto Wreckers' site supervisor, and other Impala employees, who decided to prepare a place at the back of the landfill site, unload the canisters, and bury them. It is at this point that there were differences between the Crown and the accused as to the significance of this incident. I find that the accused was at the site at some point during the unloading and was in a position to see that the Impala Auto Wreckers' cat operator was pushing material over the palates which contained the canisters and to see that some canisters at least were being buried.

9. This matter was later reported by the Hazmat Transport driver and resulted in an investigation by Alberta Environment. This again is a place where facts are argued between the parties. I find that the accused contacted the investigator and stated that although he wasn't at the site himself, and had a small crew out at the site, the process was very quick and he could obtain pictures. The Crown was prepared to admit that the idea for this deception may not have been Mr. Lefebvre's. I do find that there was, on this evidence, admitted by counsel, some deception during the investigation.

10. Department of Environment investigators excavated the site beginning on December 13th and by Exhibit #1 it was apparent that none of the canisters had been processed and the contents had reacted with the snow. As there was a potential for fire or explosion, the excavation was halted. It was subsequently carried out and all of the canisters were removed at substantial expense to the Department of National Defence.

11. The Respondent's counsel submitted that there was no evidence that the excavated material would have caused any adverse environmental effect. The trial judge recognized the material to be both a hazardous waste and a dangerous good. I also find these to be facts.

[5] The Crown laid an Information in July of 1996. A preliminary inquiry was held in June of 1997. The charges in the Indictment were scheduled to be tried by judge and jury. The trial was to start June 1, 1998 and was expected to last three weeks. After that jury trial in the Court of Queen's Bench, a further Provincial Court trial would be necessary to deal with the regulatory offences. Following a pretrial conference with Mr. Justice Wilson on April 3, 1998 the parties agreed to settle the matters with the guilty pleas now before me. The guilty plea was accepted by Judge Chrumka on June 23, 1998. It saved three weeks of trial time at the Court of Queen's Bench level and possibly another three weeks of trial time at the Provincial Court level. The sentencing proceedings took place before Judge Chrumka and lasted one day.

[6] Crown counsel sought a jail term of six months for the convictions. The learned trial judge imposed fines totaling $7,000.00 against the Respondent.

[7] The Crown appeals and three issues are raised. The first is whether the sentence adequately reflects the seriousness of the offence in the context of environmental offences. The second is that the learned trial judge did not address the precedent established by Justice Lefsrud in ***R. v. Underwood*** (unreported, March 29, 1996). Finally, the effect of the Supreme Court of Canada decision ***R. v. Gladue***, released April 23, 1999, on these and similar sentencing proceedings.

[8] The Supreme Court of Canada has defined the function of an appellate court hearing an appeal from sentence. In ***R. v. C.A.M.*** (1996) 105 C.C.C. (3d) 227 the Court held appellate courts should not intervene in the discretionary exercise of a trial judge in imposing sentence unless the sentence imposed:

(a) fails to consider a relevant factor;

(b) over-emphasizes a relevant factor; or

(c) is demonstrably unfit.

[9] This standard of review was strongly affirmed most recently in ***R. v. McDonnell*** (unreported, 24 April 1997, S.C.C. No. 24817) in which Mr. Justice Sopinka, for the majority, stated at p. 27:

> The rationale for deference with respect to the length of sentence, clearly stated in both ***Shropshire and M.*** (C.A.) applies equally to the decision to order concurrent or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her firsthand knowledge of the case; it is not for an appellate court to intervene absent error in principle unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit.

[10] I note that Justice Sopinka's statement applies equally to the decision to order a custodial sentence as opposed to a non-custodial sentence. That is, in choosing one over the other the sentencing judge exercises his discretion and it is not for an appellate court to intervene absent error in principle.

[11] The Crown submits that it has been recognized that environmental offences are in a special category and require special considerations. The Courts have indeed recognized the importance of environmental protection as a fundamental value in Canadian society and that pollution offences must be approached as crimes and not as merely blameless technical breaches of a regulatory standard:

1. ***Ontario v. Canadian Pacific Ltd.*** [1995] 2 S.C.R. 1031;

2. ***R.v . United Kenyo Hills Mines Limited*** (1980) 10 C.E.L.R. 43 (Whitehorse, Yk).

[12] The Crown further submits that in sentencing of criminal matters generally, the potential for profits from the crime has been considered an extreme aggravating factor. The Crown urges these general principles be kept in mind in considering the issues raised in this appeal as it submits the learned Provincial Court Judge failed to do so.

[13] I must, however, note that to these principles must be added a further statement by the Courts that the range of inherent criminality in pollution offences can be extreme and that the severity of punishment should be directly related to the degree of criminality inherent in the manner of committing the offence: ***R. v. United Kenyo Hills Mines Limited*** (***supra***).

[14] The first issue of error raised by the Crown is that the sentence imposed does not adequately reflect the seriousness of the offence or address the potential for profit that was a consequence of the offence. A fine at the level imposed, it is submitted, may give the impression that the penalty is the cost of doing business.

[15] The transcript of the sentence proceedings indicates that the Crown made these submissions before the learned Provincial Court Judge. The defence, in response, pointed out that the accused received very little money and therefore this argument of the potential for profit was weak. I must conclude that the learned Provincial Court Judge considered these matters as relevant factors and nevertheless determined the fine he imposed to be the fit sentence.

[16] It is further submitted by the Crown that the learned Provincial Court Judge did not address the precedent established by Mr. Justice Lefsrud in ***R. v. Underwood*** (***supra***). It is the Crown's submission that Justice Lefsrud in that case suggested that a jail term is appropriate in the case of a wilful environmental offence. Further, that this case is similar on its facts to the facts in ***R. v. Underwood***. In particular, that the offences were offences of commission rather than omission and there was here deception and an attempt to conceal as was present in ***R. v. Underwood***.

[17] Again, the transcript shows that the learned Provincial Court Judge canvassed with Crown counsel the words of Justice Lefsrud and, whether Justice Lefsrud went so far as to suggest that only a jail term is appropriate in these cases. Defence counsel also made several submissions with respect to the decision. It must be noted there was agreement between counsel in ***R. v. Underwood*** that a jail term was appropriate. Although Justice Lefsrud made further observations as to the appropriateness of a jail term, they were all made in the context of that concession by the defence and the fact situation before him. I cannot find that he established a general principle that a custodial sentence is appropriate in any and all cases of what can be characterized as a knowing or wilful environmental offence.

[18] I further could not reconcile any such proposition with the proposition, that I have already referred to, that each offence must be sentenced in accord with the specific facts. Judge Chrumka in passing sentence stated he considered the appropriateness of a term of incarceration, including intermittent incarceration, and community service in addition to the fine he eventually imposed. His judgment recognized the greatest factor in sentencing to be one of denunciation and deterrence and he noted the public trust placed on individuals such as the Respondent to ensure that when materials are disposed of that they be disposed of in a manner that will not affect this generation or future generations. He recognized the Respondent breached such trust in committing the offences. He recognized the Respondent was involved in some deceit and had no explanation for not stopping the caterpillar operator from covering canisters. Given that he considered all these relevant facts and factors and cannot be said to have over-emphasized any factor, the Crown has not demonstrated any error in principle and, has not demonstrated that the sentence is demonstrably unfit.

[19] The whole tenor of this appeal is that the only fit sentence for an environmental offence which in turn involves a potential for profit is that of a custodial sentence. In my view, this is an extraordinary submission and, one which must fly in the face of the general principles of sentencing that I have already referred to.

[20] This submission further flies in the face of the mandatory requirement of s. 718(2)(e) of the Criminal Code and the very clear and recent pronouncement of the Supreme Court of Canada

in ***R. v. Gladue*** (***supra***). Although this decision is viewed as a pronouncement of the Supreme Court on the intent and application of the Criminal Code provisions respecting Aboriginal offenders, it confirms that in sentencing, a penal sanction of imprisonment is a last resort. As stated by Justices Cory and Iacobucci at p. 11:

> Section 718.2(e) directs the Court, in imposing a sentence, to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, "with particular attention to the circumstances of Aboriginal offenders". The broad role of the provision is clear. As a general principle, section 718.2(e) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanctions or combination of sanctions is appropriate to the offence and the offender.

[21] The Supreme Court was not dealing with an environmental offence and, there have been other statements by the Courts of the unique regard that environmental protection is held in this society. However, the Court in ***R. v. Gladue*** states the mandatory requirement on a sentencing judge, presumably in any and all circumstances as there is no exception for environmental offences, to consider all available sanctions other than imprisonment as a first consideration in sentencing.

[22] The Respondent argued that the Court's comments in ***R. v. Gladue*** further apply to Mr. Lefebvre specifically as he is of Aboriginal descent. The Crown made several submissions distinguishing the applicability of ***R. v. Gladue*** to this accused as an Aboriginal and indeed argued he was more culpable as he involved other innocent Aboriginal people in his crime. I do not find it necessary to deal with those submissions, which were not made at the original sentencing hearing, as there is no cross-appeal and as I have otherwise found that the sentence imposed at trial is not demonstrably unfit, nor does it proceed from any error of law or principle.

[23] I dismiss the appeal.

DATED at Edmonton, Alberta this 30th day of June 1999.

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J.C.Q.B.A.

APPEARANCES:

S. L. McRory
and L. M. Jenkins
for the Appellant

R. C. Secord
for the Respondent