
CANADA / JUDGMENT

R. v. Elliott

2015 BCCA 295

COURT

British Columbia Court of Appeal

DECIDED

22 June 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCCA 295 R. v. Elliott

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Elliott,

2015 BCCA 295

Date: 20150622

Docket: CA41854

Between:

Regina

Respondent

And

Jerry Elliott

Appellant

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Savage

On appeal from: An order of the Provincial Court of British Columbia,
dated April 23, 2014 (R. v. Elliott, Chilliwack Registry Docket 58600).

Oral Reasons for Judgment

Counsel for the Appellant:

R.P. Thirkell

K.R. Beatch

Counsel for the Respondent:

M.K. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 22, 2015

Place and Date of Judgment:

Vancouver, British Columbia

June 22, 2015

Summary:

Appeal from a four year sentence for aggravated assault on the ground that the judge did not deal appropriately with his aboriginal heritage. Appeal dismissed. The principles in Gladue and Ipeelee were applied properly by the sentencing judge. The beating was vicious; the aboriginal heritage was entitled to little weight given the appellant's tenuous connection. The sentence was at the low end of the range in recognition of the aboriginal factor.

- [1] DONALD J.A.: The appellant appeals from his sentence of four years for aggravated assault and knowingly uttering threats to cause death or bodily harm. He argues that the sentencing judge did not give appropriate consideration to his Aboriginal background when crafting a fit sentence and did not correctly apply the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433. The appellant submits that, if the Gladue principles pertaining to his Aboriginal heritage are correctly applied, a sentence of 16 to 24 months of incarceration followed by a period of probation would be a fit sentence.

Background

- [2] The sentencing judge described the aggravated assault for which the appellant was convicted as follows:
- [4] The complainant and Mr. Elliott were acquaintances. As a result of what appears to have been jealousy on the part of Mr. Elliott, he and another person accosted the complainant, pulled him from his car and badly beat him in the early morning hours of October 29, 2010. The injuries that [the complainant] sustained were very grave. These included numerous abrasions and contusions to his upper torso, head and legs, a skull fracture and bone fragments in his cheek, back and chest. His injuries required hospitalization and left him with seizures and daily headaches that persist. As well he suffered disfigurement to his face

and head. [The complainant] was still experiencing these consequences at the time of trial and faced further surgery.

- [3] The appellant had a largely dysfunctional upbringing and has used alcohol and various drugs since the age of 11. He has suffered from depression and anxiety. He often drinks to intoxication and has admitted to being an alcoholic and in need of treatment. The sentencing judge described his background as follows:
- [7] Mr. Elliott is now 30 years old. He is of Métis heritage. He was born and raised in the Chilliwack area in poverty. His upbringing was very difficult - his parents separated when he was 12 years old. Both boys remained living with the father, although Mr. Elliott left home at age 14 and entered the labour force. His mother, who was of aboriginal heritage, was a severe alcoholic and inflicted physical and mental abuse on both boys. She made unsuccessful suicide attempts and threatened to kill herself on other occasions. She now lives in Alberta but does not have much contact with Mr. Elliott. He is currently in touch with both his father and brother and now has a good relationship with them. In the case of his father, this was not always so, as his father was selfish and cruel when Mr. Elliott was a child.
- [4] A Gladue report was prepared for the sentencing judge by defence counsel. The report went into some additional detail on the Aboriginal background of the appellant on his mother's side. It suggests that the appellant's grandfather "may" have attended residential school, but the family is not certain of this. The appellant's uncle is the only member of his family to have applied for and received status as a Métis. The appellant's aunt is currently researching the family history to better understand their Aboriginal heritage.
- [5] The Gladue report also discusses the effect his Aboriginal heritage has had on the appellant. The report contains the following:

[The appellant] said he has not had a lot of exposure to Aboriginal culture. [The appellant] said he has always felt like an outcast. He said "I feel like I got the worst of everything." He said "I got to have the skin colour and look native to get made fun of but I never got the benefits of it." [The appellant] said his mother never talked about their Aboriginal ancestry when he was growing up. [The appellant's mother] said "I never really got into that because what good would it do my anyway and I work and I'm not looking for handouts."

[The appellant] said "I felt ashamed of having Aboriginal blood until I was about 19 years old." He explained that he met a friend in Chilliwack who was Native and started talking to him about "cultural stuff." [The appellant] said "that is the first time I actually recall telling someone I was Aboriginal."

[The appellant] said "I still have mixed feelings about my Aboriginal bloodlines because I really don't know anything about it" explaining "when people ask me I feel dumb and put on the spot because I don't know anything about where I come from because I have never been taught." He said "I grew up with my dad who wasn't native and I felt like he might have resented me because my mom was Aboriginal and such a drunk." He said "because of my experience of alcoholics in my family I have always felt as other [sic] look down on me."

[6] The sentencing judge noted that the Gladue report suggested that the appellant was willing to rehabilitate himself and was interested in pursuing registration as a Métis and learning more about his ancestry.

[7] After considering the submissions of counsel, similar cases, and the relevant law pertaining to Gladue, the sentencing judge concluded with the following:

[61] The circumstances in this case, when considered as a whole, justify a penitentiary sentence. In saying this, I find that denunciation and deterrence must be emphasized. I find that a sentence of between 4 and 5 years would be appropriate here. Because there are some signs that Mr. Elliott is motivated towards rehabilitation, I am sentencing him at the lowest end of that specific range. There will be a term of imprisonment of 4 years.

The Gladue Principles

[8] Section 718.2(e) of the Criminal Code mandates that a sentencing judge shall take into consideration "all available sanctions other than imprisonment that are reasonable in the circumstances ... with particular attention to the circumstances of aboriginal offenders."

[9] In *R. v. Gladue*, Cory and Iacobucci JJ., writing for the Court, described the purpose of this section as follows:

[33] In our view, s. 718.2(e) is more than simply a re-affirmation of existing sentencing principles. 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. [Emphasis in original.]

[10] An offender's Aboriginal heritage can affect an appropriate sentence in two ways. First, the "unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts" may bear on the "moral blameworthiness" of the offender: *R. v. Ipeelee*, 2012 SCC 13 at paras. 72-73 [emphasis added]. Courts must take judicial notice of the history of colonization and racism that has embedded systemic difficulties and social and economic deprivation within the Aboriginal community: *Gladue* at para. 83.

- [11] The systemic legacy of racism, colonization, and institutional discrimination is an important factor in considering an appropriate sentence, in part, because it bears on the voluntariness of an offender's actions: Ipeelee at para. 73. While every person that commits a crime through intentional actions may be said to do so voluntarily, a fit sentence must acknowledge the effects an offender's circumstances have on their moral blameworthiness. Just as the psychological impact of a troubled upbringing may affect the moral blameworthiness of any offender, so too can the unique circumstances of Aboriginal offenders help explain why the offender now appears before the court.
- [12] The second way in which an Aboriginal offender's background can affect the sentencing decision is in the "effectiveness of the sentence itself": Ipeelee at para. 74. Aboriginal offenders may enter the criminal justice system with a "fundamentally different world view", such that traditional incarceration does not achieve the purpose of assisting in rehabilitation in the same way it would for a non-Aboriginal offender: Ipeelee at para. 74. This must be taken into account when crafting sentences.
- [13] However, assisting in rehabilitation and promoting a sense of responsibility in offenders are only two of the purposes of sentencing set out in s. 718 of the Criminal Code. Even if an incompatible world view may reduce the effectiveness of a prison sentence in rehabilitating some Aboriginal offenders, the necessity of deterrence, denouncement, and the safety of the public may require incarceration for serious or violent crimes.
- [14] Therefore, the application of Gladue principles is required in "every case involving an Aboriginal offender", regardless of the seriousness of the crime: Ipeelee at para. 87. However, as a consequence of applying Gladue and s. 718.2(e) along with the other principles of sentencing, the result is that "the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginal and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing": Gladue at para. 79.
- [15] Although Gladue mandates that a sentencing judge consider the unique circumstances of Aboriginal offenders, this does not presuppose that all Aboriginal offenders will receive an otherwise different sentence. I note the following passage from Ipeelee 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.

[Emphasis added.]

- [16] A sentencing judge must take judicial notice of the systemic and background factors that affect all Aboriginal persons in Canada, including lingering institutional racism and the historical effects of past policies and injustice. But this does not mean that every offence committed by an Aboriginal offender is motivated by or a consequence of these factors to any extent. Nor does every offender with some Aboriginal heritage hold a worldview that reduces the rehabilitative effects of incarceration. In every case, the sentencing judge must create a fit sentence for this particular offender committing this particular crime.
- [17] In summary, a sentencing judge must consider the factors discussed above when determining a fit sentence. To fail to consider these factors is a legal error that may lead to a disproportionate sentence: *Ipeelee* at para. 87. However, once a judge has considered these factors, a fit sentence is still in her or his discretion. Gladue does not impose a particular result; it imposes a particular process. Aboriginal offenders are not expected to receive a diminished sentence in every case. Each sentence is individually made by the sentencing judge and - absent an error in principle, a failure to consider a relevant factor, or an overemphasis of the appropriate factors - is subject to substantial deference by this Court: *R. v. M.* (C.A.), [1996] 1 S.C.R. 500 at para. 90

[18] I note the following passage from Gladue at para. 88:

[Section 718.2(e)] is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case.

[Emphasis added.]

Analysis

The Appellant's Submissions

- [19] The appellant argues that the judge erred in applying the principles from Gladue in the following ways: first, the judge erroneously imposed an evidentiary burden on the appellant, requiring him to prove the effect his Aboriginal heritage has had on his circumstances; second, the judge failed to consider the "unique" circumstances of the appellant as an Aboriginal offender; and third, the judge erroneously failed to apply Gladue entirely due to the fact that this was a violent crime.

Evidentiary Burden

- [20] The appellant argues that the sentencing judge imposed an evidentiary burden on the appellant to provide evidence of a link between his Aboriginal heritage and the offence in order to trigger the application of s. 718.2(e). In support of this argument, the appellant cites substantial portions of the colloquy between counsel and the sentencing judge where the judge probes the strength of the connection.
- [21] The significance of statements made by a judge during a colloquy were discussed by this Court in *R. v. Hehn*, 2008 BCCA 170:
- [35] ... the focus of an appeal cannot be on a colloquy during submissions between the court and counsel, for the reason that judges often put forward a proposition to test counsel's theory of the case, or to suggest an alternative theory. At most, such comments by a trial judge may assist in understanding a trial judge's reasons as they did in [*R. v. Dubois*, [1980] 2 S.C.R. 21]. As Simmons J.A. commented in *R. v. Smith*, (2001), 161 C.C.C. (3d) 1 (Ont. C.A.) at para. 45, "Trial judges routinely probe submissions to test the viability of various avenues of decision. Particularly where comprehensive reasons are given there is no basis for going behind a trial judge's reasons."

[Emphasis added.]

- [22] The appellant cites the following passages from the reasons of the sentencing judge as also supporting the notion that he erroneously imposed an evidentiary burden:

- [53] ... In this case, Mr. Elliott has not participated in nor been raised in accordance with any aboriginal traditions or values. It follows then, that the weight that I can properly attach to his heritage as a factor in sentencing would not be as much. That is not to say that it has no relevance or weight at all.

* * *

- [59] ... I cannot, however, attach much weight to the circumstances of his aboriginal background. His upbringing, while relevant, was one where the connection to the fact of his heritage is largely speculative.
- [23] In my opinion, the reasons of the sentencing judge do not suggest that the judge imposed an evidentiary burden. The judge understood that he is to take judicial notice of the circumstances of Aboriginal offenders generally and does not require evidence establishing a "direct link" between an Aboriginal background and the offence. This is made clear when the entirety of paragraph 53 is examined:
- [53] [Counsel for the appellant] also referred to the Collins decision [*R. v. Collins*, 2011 ONCA 182] to establish the point that it is not necessary to show a direct causal link between systemic background factors and the offence. I accept this point. The Ipeelee decision mandates that judicial notice can properly be taken of the historical circumstances that have been visited upon aboriginal people. I also accept, however, that some cases will demonstrate an obvious

relationship between such past injustices and the circumstances surrounding the offence in question. The Ladue decision, for example, involved a member of a specific band who had lived in that community and had first-hand experience with deprivation—including attendance at a residential school. In this case, Mr. Elliott has not participated in nor been raised in accordance with any aboriginal traditions or values. It follow[s] then, that the weight that I can properly attach to his heritage as a factor in sentencing would not be as much. That is not to say that it has no relevance or weight at all.

[Emphasis added.]

- [24] The appellant's minimal connection to Aboriginal traditions and values suggests that he may not hold the same world view that reduces the effectiveness of incarceration as a method of rehabilitation for many Aboriginal offenders. The trial judge was correct to suggest that this reduces the weight that such heritage will hold in sentencing. At the same time, the legacy of racism and discrimination on Aboriginal communities and families, including those that have little remaining connection to Aboriginal traditions and values, can still be a factor in assessing the moral blameworthiness of a particular offender. The trial judge was therefore also correct to take judicial notice of these historical circumstances and place some weight on it.
- [25] The reasons are comprehensive and appear to have been drawn with care by the sentencing judge. As such, I do not think it is appropriate to deconstruct or question the exact language used by the judge during the colloquy. Regardless, when the transcript of the exchange between counsel and the judge is reviewed along with the reasons, it is apparent that the judge accepted the relevancy of the appellant's Aboriginal background and was probing the appellant's counsel for additional argument as to why the appellant's minimal connection to that background should be given greater weight in this case. In my opinion, there is no error in such an approach.

The Unique Circumstances of the Appellant's Aboriginal Heritage

- [26] The appellant also argues that the sentencing judge erred by failing to give full consideration to the appellant's Aboriginal heritage. The appellant cites the following passage from the judge's reasons:
- [59] The world Mr. Elliott grew up in seems, with respect, to not be so fundamentally different from many non-aboriginal persons who have had the misfortune to be raised in poverty. Such differences that can be identified do not appear to have been pronounced and have had little effect on producing his criminal behaviour.
- [27] The appellant argues that this passage suggests the judge disregarded the appellant's Aboriginal heritage because his upbringing and personal experiences were similar to those experienced by some non-Aboriginal persons living in poverty. The appellant submits that Aboriginal offenders that experience the same upbringing and antecedents as non-Aboriginal offenders can still receive a different sentence due only to the fact that they are

Aboriginal. The appellant cites Ipeelee at para. 79, which quotes Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders" (Saskatoon: Purich Publishing, 1994) 269 at 286:

It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus there is a constitutional imperative to avoiding excessive concern about sentence disparity.

[28] I agree with the appellant that, in some cases, it may be appropriate for an Aboriginal offender to receive a different sentence than a theoretical non-Aboriginal offender that experienced a substantially similar upbringing and antecedents. The fact that an offender self-identifies as Aboriginal mandates a sentencing judge to consider how the different facets and impacts of identifying as Aboriginal and possessing Aboriginal heritage affect the circumstances of offenders in this country. This may, by itself, lead to a different sentence for some crimes in some circumstances. However, as discussed, this does not mandate a different sentence in every case.

[29] In my opinion, the judge correctly considered the effect the appellant's troubled childhood had on his moral culpability. The judge then correctly also considered what effect the appellant's Aboriginal heritage had on his moral culpability and the appropriateness of the sentence. The judge said:

[59] There is certainly such a tie here - Mr. Elliott is clearly of aboriginal descent and clearly had a dysfunctional upbringing. I cannot, however, attach much weight to the circumstances of his aboriginal background. ... The world Mr. Elliott grew up in seems, with respect, to not be so fundamentally different from many non-aboriginal persons who have had the misfortune to be raised in poverty. Such differences that can be identified do not appear to have been pronounced and have had little effect on producing his criminal behaviour.

[Emphasis added.]

[30] The judge expressly considered the unique circumstances the appellant faced as an Aboriginal offender, and then placed little weight on it in the particular context of this offence. The weight to place on given factors was within the judge's discretion, and this Court should defer to it.

The Application of Gladue to Violent or Serious Crimes

[31] The appellant also argues that the judge erred in failing to apply the Gladue principles in this case because it was a violent offence. As discussed above, Ipeelee makes clear that a judge must consider the unique circumstances of Aboriginal offenders even when sentencing for serious or violent crimes.

- [32] I do not agree with the appellant that the sentencing judge made such an error. The trial judge noted that s. 718.2(e) mandates a consideration of incarceration as a "last resort", and it also mandates particular consideration for the circumstances of Aboriginal offenders. The judge acknowledged that the appellant's Aboriginal heritage has relevance and weight. I do not agree that the judge failed to apply the necessary Gladue principles.
- [33] The appellant takes issue with the judge citing Gladue, quoting at para. 60 of his reasons: "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.": Gladue at para. 79.
- [34] As I have already discussed, this passage from Gladue is a recognition that, in cases of serious or violent crimes, where separation, denunciation, and deterrence are "fundamentally relevant", application of the Gladue principles may not change the result when determining an appropriate sentence. A judge would err if he or she failed to apply the Gladue principles, but no observer should be particularly surprised to find that, in cases of violent and serious crimes, lengthy incarceration may be appropriate and warranted for Aboriginal and non-Aboriginal offenders alike.
- [35] Since the judge applied the Gladue principles to the vicious assault committed by the appellant, I do not see any error in the judge's analysis in this regard.

Conclusion

- [36] The appellant committed a premeditated violent offence that the judge felt required emphasizing the principles of deterrence and denunciation. The sentencing judge correctly applied the Gladue principles and considered how the appellant's Aboriginal background affects the making of an appropriate sentence. The sentencing judge, in his discretion, found that the appellant's Aboriginal heritage and background, while relevant, should not receive substantial weight in the specific context of this case.
- [37] The judge did not err in his application of the Gladue principles, and a four-year sentence is not demonstrably unfit in this case. I would therefore grant leave but dismiss the appeal.
- [38] NEWBURY J.A.: I agree.
- [39] SAVAGE J.A.: I agree.
- [40] DONALD J.A.: Leave is granted but the appeal is dismissed.

"The Honourable Mr. Justice Donald"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/15/02/2015BCCA0295.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-elliott-2015>

Prepared on 26 October 2026 · Esheria