

CANADA / JUDGMENT

R. v. Hotomani

2020 BCCA 64

COURT

British Columbia Court of Appeal

DECIDED

18 February 2020

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2020 BCCA 64 R. v. Hotomani

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hotomani,

2020 BCCA 64

Date: 20200218

Docket: CA46401

Between:

Regina

Respondent

And

Lyndon Hotomani

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated August 27, 2019 (R. v. Hotomani, Chilliwack Dockets 69419-1K; 69419-2KC).

Oral Reasons for Judgment

Counsel for the Appellant:

C.R. Terepocki

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

February 18, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 18, 2020

Summary:

The appellant was sentenced to a global sentence 18 months imprisonment followed by two years probation for a number of offences involving intimate partner violence. For reasons that are not clear, no consideration was given to Gladue factors. The appellant applied to introduce fresh evidence of his indigenous background. Appeal allowed, fresh evidence admitted. In light of the fresh evidence and its affect on the assessment of the appellant's moral culpability, some adjustment to the sentence was warranted. A sentence of 6 months on the criminal harassment charge and 4 months each of the assault charges, to be served consecutively, followed by two years probation was substituted.

- [1] HARRIS J.A.: This is an application for leave to appeal sentence and, if leave is granted, to appeal a global sentence of 18 months' jail followed by a two-year probation order arising from a guilty plea to two counts of assault and one of criminal harassment. The offences involved intimate partner violence.
- [2] It is common ground that the judge did not consider any Gladue factors in imposing sentence. This is not fairly described as an error by the judge because the judge was not informed of the potential relevance of Gladue factors bearing on Mr. Hotomani's moral culpability. The judge was not provided with a Gladue report. Indeed, the issue was not raised by either counsel, neither of whom, it would appear, were aware of the possibility that a Gladue report might be relevant.
- [3] Mr. Hotomani now seeks to have us admit a Gladue letter as fresh evidence on this appeal. It is evident that the letter is relevant to Mr. Hotomani's moral culpability, particularly since Mr. Hotomani's history of offending, and the commission of these offences, were influenced by his alcoholism. Although the judge was aware of Mr. Hotomani's addiction to alcohol and gave weight to it as a mitigating factor, the judge did not know that Mr. Hotomani's alcoholism is related to his experiences as a young Indigenous person, including his

attendance at residential school. It is common ground that information regarding the appellant's Indigenous background is material to a consideration of an appropriate sentence.

- [4] Mr. Hotomani did not waive his right to have his Indigenous background considered on sentencing. I am satisfied that we should admit the fresh evidence. The information contained in the Gladue letter is significant in understanding the causes of the Mr. Hotomani's criminal history and his prospects of rehabilitation. The fact that Mr. Hotomani's alcohol addiction (and his difficulty in addressing that addiction) resulted from the extensive personal and intergenerational trauma that he has suffered is relevant and mitigating in a proper understanding of his history of offending: *R. v. Ipeelee*, 2012 SCC 13 at paras. 72-74.
- [5] It falls to us to consider, therefore, the impact the fresh evidence should have on an appropriate sentence. Although the starting point of the analysis remains the judge's reasons, we are not bound to defer to the sentence imposed: *R. v. Isbister*, 2019 BCCA 135 at paras. 19-20.
- [6] Mr. Hotomani was 53 years old at the time of the offences. On August 6, 2019, he assaulted his intimate partner by striking her on the head hard enough to cause bleeding. He had been drinking before the incident. Mr. Hotomani then insisted his partner follow him around and remained close by so that she could not call the police. In the second incident, four days later, Mr. Hotomani threatened to punch his partner in the face and to move her nose over to one side of her face. He then hit her with a back hand motion across her mouth and chin and later backhanded her across her chest. Again, he demanded that she remain close to him so that she could not phone the police. The third incident involved Mr. Hotomani coming to his partner's workplace while intoxicated, and demanding the keys to her car. She called him a cab. Mr. Hotomani grabbed his partner by the back of her neck, threatened to tie her up and drag her along behind the vehicle. He also threatened to kill her and her children and grandchildren unless he could have the car. Finally, he threatened that if she called the police, he would come after her on release from prison.
- [7] Mr. Hotomani's partner was terrified by him and his threats, which also included earlier threatening to kill her and hang her from the rafters.
- [8] The judge quite appropriately described the offences as "outrageous" and recognized that they called for a sentence that would protect both the public and his partner. Accordingly, specific and general deterrence and denunciation were important sentencing principles.
- [9] The sentencing judge considered Mr. Hotomani's lengthy and serious criminal record. His record includes violence, sexual assault and other offences. The judge summarized his record this way at para. 10 before going on to describe his record in some detail:

- [10] Suffice it to say, Mr. Hotomani has an extremely lengthy and serious criminal record. It begins in 1993 in Saskatchewan. It includes weapons charges, property offences and numerous driving while disqualified and impaired driving convictions. He has at least nine previous impaired driving or driving over 08 convictions. For his most recent conviction for impaired driving, he received a four-year sentence, which indicates to me the seriousness of his alcohol problem.
- [10] He has been convicted more than 80 times, including 30 times for breaching court orders while under community supervision. He had twice before been convicted for assaulting his partner, the victim of these offences. On both occasions he pleaded guilty; he received a 21-day jail sentence for the first offence in 2016, and an intermittent sentence of 30 days for the second in 2018.
- [11] The judge recognized the aggravating factors involved in the offences. As she observed:
- [17] This is the third assault on the same victim. Statutorily, assaulting one's intimate partner is an aggravating factor. He was on probation for assaulting the same person. The circumstances of the offences themselves are outrageous and demanding of denunciation in the highest possible way.
- [12] The judge also gave weight to mitigating factors as they were understood at the time. These included the guilty pleas, his expression of remorse, and taking responsibility for his actions. Importantly, the judge recognized that "his unremitting alcoholism is another mitigating circumstance, of sorts. It certainly has caused him to act in a criminogenic manner through most of his adult life" (at para. 16).
- [13] The judge gave primary weight to the principles of deterrence and denunciation, while recognizing Mr. Hotomani's prospects of rehabilitation, his good work ethic and his reestablishment of contact with his supportive adult children.
- [14] Were it not for the lack of any information about potentially relevant Gladue factors, there would be no basis upon which appellate intervention in the sentence could be justified. It is, however, necessary for this Court to consider what impact the fresh evidence has on a fit sentence.
- [15] In brief, Mr. Hotomani is a member of a First Nation community in Saskatchewan. He was raised primarily by his mother alongside seven siblings. He spent time in foster care where he experienced abuse and racism, and at a residential school where he experienced daily sexual, physical and psychological abuse.
- [16] Mr. Hotomani began drinking at 16 as a means to cope with the trauma in his life. He was surrounded by alcoholism in his family. Violence scarred his family life. Although he made some sporadic efforts to address his alcoholism, he now recognizes its effect on his life and wants to seek out treatment to break the cycle of drinking that fuel his criminal activity.

[17] This Court is, of course, required to take judicial notice of the intergenerational trauma suffered in our Indigenous communities. Here, Mr. Hotomani's own experiences play an explanatory role in his commission of these offences and his long criminal record. These circumstances warrant the conclusion that Mr. Hotomani's moral culpability is less than the judge was in a position to appreciate or give effect to. That being the case, some reduction in the sentence is, in my opinion, justified.

[18] Having said that, I agree with para. 33 of the Crown's submission, which I quote:

33. The appellant repeatedly assaulted, threatened, and criminally harassed Ms. Bergen, causing her to fear for her life, after having served two jail sentences for assaulting her in the preceding few years. On one occasion, Ms. Bergen suffered an injury that caused significant bleeding to her head, and on several occasions the appellant prevented her from calling the police. The appellant was still on probation in relation to the previous offence against her when he committed these offences. Subject to the totality principle, consecutive sentences would be warranted. As this Court emphasized in *R. v. Rush*, 2010 BCCA 293, [21]:

Repeated acts of violence toward a spouse, requires a sentence that properly reflects the principles of denunciation and deterrence, and society's abhorrence of such acts.

[19] Mr. Hotomani contends that an appropriate sentence, taking into account the Gladue factors, would be a six-month custodial sentence followed by two years' probation.

[20] In my opinion, a sentence of six months, taking into account the Gladue factors and the prospects for rehabilitation and treatment, does not give sufficient weight to denunciation, deterrence, and the need to protect both the public and the victim. I consider a custodial sentence, which I will set out shortly, followed by two years' probation on the same terms as currently exists to be required properly to weigh and balance all of the sentencing principles engaged in this case.

[21] I would grant leave to appeal sentence, allow the appeal, and substitute a custodial sentence of 6 months on the criminal harassment charge, four months each on each assault to be served consecutively for a total of 14 months which sentence incorporates consideration of the totality principle. I would also endorse the two-year probation on the terms imposed by the sentencing judge.

[22] SAUNDERS J.A.: I agree.

[23] GRAUER J.A.: I agree.

[24] SAUNDERS J.A.: The leave to appeal sentence is granted, the appeal is allowed, and for the custodial sentence of 12 months now in place, the sentence of six months' incarceration on the count of criminal harassment and four months' incarceration on each of the two counts of assault will be substituted. Those sentences to be served consecutively, followed by two years' probation on the terms imposed by the sentencing judge.

"The Honourable Mr. Justice Harris"

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