CANADA / JUDGMENT

R. v. Loring

2009 BCCA 166

COURT
British Columbia Court of Appeal

DECIDED
16 April 2009

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2009 BCCA 166 R. v. Loring

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Loring,

2009 BCCA 166

Date: 20090416

Docket: CA036608

Between:

Regina

Respondent

And

Ben Daniel Loring

Appellant

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

K.M. Bradley

Counsel for the Appellant

B.H. Johnstone, Q.C.

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

March 31, 2009

Place and Date of Judgment:

Vancouver, British Columbia

April 16, 2009

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] The appellant, Ben Daniel Loring, was convicted in Provincial Court in New Hazelton on June 20, 2007 of three Criminal Code offences - s. 348(1)(b), breaking and entering and committing an assault; s. 86(1), careless use of a firearm; and s. 88(1), possession of a weapon for a purpose dangerous to the public peace.

[2] On October 9, 2008 Mr. Loring was sentenced to two years less a day for the breaking and entering, one year concurrent for the careless use of a firearm, and eight months concurrent for the possession of a weapon for a purpose dangerous to the public peace. The sentencing judge also imposed a term of probation of one year to commence on Mr. Loring's release from prison. The probationary terms were designed to address his alcohol problems.

[3] Mr. Loring seeks leave to appeal his sentence on the basis that the sentencing judge erred in principle in failing to properly take into account his circumstances as an aboriginal offender pursuant to s. 718.2(e) of the Criminal Code, and, that the sentence is unfit because it is outside the range imposed on like offenders for like offences. Mr. Loring sought to file, as fresh evidence, material which addressed his circumstances as an aboriginal offender.

Factual Background

[4] The offences took place on the reserve of the Gitxsan First Nations in the village of Kitwanga (also "Gitwangak"), on February 21, 2006. Mr. Loring was 21 years old at the time. While Mr. Loring was socializing at the home of Joanne Brackenbury, Renee Williams, Mr. Loring's

girlfriend, kicked in Ms. Brackenbury's door, entered the home and attacked her. Ms. Williams was accompanied by two others. Mr. Loring and Ms. Williams became entangled in a scuffle. A young man who had accompanied Ms. Williams interceded in the row and while Mr. Loring was holding the young man down, someone kicked Mr. Loring in the back of the head. Mr. Loring believed it to be Trevor Reese, who was at the Brackenbury home at the time. The RCMP were called by Ms. Brackenbury and the altercation came to an end with the Williams' party leaving the residence.

[5] Not long afterward Mr. Loring began a search for Trevor Reese. The trial judge found that Mr. Loring was angry and intoxicated. Mr. Loring went to the home of Stephen Williams. Mr. Loring called for Trevor Reese and was told by Mr. Williams, through a closed door that Reese was not there. Mr. Loring picked up a six-foot long muffler pipe and pounded on the door with it until he broke the door down. Stephen Williams attempted to prevent Mr. Loring from entering the house and the two began to fight. The fight ended with Mr. Loring leaving the residence for the home of his mother. There he picked up a .30-06 rifle registered to his cousin and walked back toward the Williams' house intending to confront Trevor Reese with it. As he approached the Williams' house he fired the rifle into the air toward a non-residential hill. The occupants of the Williams house turned out the lights and hid inside while someone called the police. On their arrival, the RCMP found Mr. Loring in some brush behind a neighbouring house. Mr. Loring had one spent cartridge and an unspent bullet in his pocket. The rifle along with its scope lay at his feet, four bullets in the magazine.

The Sentencing Proceedings

[6] The sentencing hearing did not take place for over a year after conviction. A pre-sentence report ("PSR") had been prepared for Mr. Loring. In that report, the probation officer who we are told is of First Nations heritage (the importance of this will soon be apparent), noted that Mr. Loring had grown up and spent most of his life in Gitwangak. He was close to his father, a recovered alcoholic, who "brought his children out on the land" and taught his son such skills as fishing, hunting and trapping. In his mid-teens Mr. Loring and his father began to experience friction. Mr. Loring said that it was because he found it hard to live up to his father's expectations. The appellant moved to Victoria for about eight months where he experimented with drugs but soon returned home and went back to school. The PSR noted two incidents of racial taunts reported by Mr. Loring. The first occurred when he was in secondary school; the second while on a bus in Victoria.

[7] The PSR indicated that the appellant had developed his relationship with Ms. Williams when he was 13 years of age. They had their first child after Mr. Loring returned from Victoria when Ms. Williams was 16 and they were both in grade 10. After Ms. Williams became pregnant, Mr. Loring left school and took up seasonal employment in fishing, mushrooming, trapping, and as a hunting guide. Mr. Loring told the probation officer that he wanted to take a heavy duty mechanic's course and would also like to become a guide

outfitter.

[8] The PSR did not explore any restorative justice programs sponsored in Mr. Loring's community. The probation officer noted that if sentenced to incarceration, Mr. Loring would likely be placed in the Prince George Regional Correctional Centre, where programs addressing alcohol and drug abuse, and anger management were available. The probation officer proposed certain terms of probation should Mr. Loring receive a term of community supervision. The terms were generic in that they required Mr. Loring's consent to "counselling and/or residential treatment programs" if recommended by the Community Corrections office.

[9] At the time of sentencing, three years after the offence occurred, Mr. Loring had stopped drinking, was back together with Ms. Williams and said that he was prepared to be a responsible father. He told the probation officer that the offences occurred because he was worried about the welfare of his family and thought that there might be someone looking for him who might pose a threat to his family.

[10] At the sentence hearing, the judge was advised that Mr. Loring had a "relatively minor record" as a youth consisting of careless use of a firearm and that he had also committed several breaches of his bail conditions subsequent to his convictions for the offences at issue. Counsel for the Crown likened the break and enter of Mr. Williams' house to a home invasion. Relying on s. 348.1(a)[1] of the Criminal Code as an aggravating feature, he sought a sentence of four to six years.

[11] Counsel for Mr. Loring pointed out that the offences committed by Mr. Loring had been provoked by the break into Ms. Brackenbury's house by Ms. Williams. Counsel noted that Ms. Williams, who is the mother of the appellant's three children, were back together at the time of sentencing. Counsel for Mr. Loring reminded the trial judge that Kitwanga was a small community that had existed "for millennia". He said that ostracism was the ultimate punishment in the community and that working things out, making peace and reconciliation, was an integral part of community life. As I understand it, this submission, followed up on the evidence that Mr. Loring had given at trial, that he was looking for Mr. Reese to attempt to reconcile. The difficulty with the submission is that the trial judge had said in his reasons for judgment that he disbelieved that this was Mr. Loring's motive on the night in question. In the end counsel accepted that Mr. Loring required a denunciatory sentence but urged that it also be rehabilitative. After he learned that the sentence would be under two years, counsel for Mr. Loring suggested that the sentence be served conditionally. This was refused by the trial judge.

[12] In sentencing Mr. Loring, the trial judge rejected the Crown's suggestion that the break and enter amounted to something of a home invasion. The sentencing judge also said that he recollected, because he had been the trial judge, Mr. Loring's conviction for careless use of a firearm when he was a youth. He said that the facts of the conviction were that one evening while driving on Highway 16 and Round Lake, Mr. Loring saw some deer in a field, got out of

his car, and shot at them with a high-powered rifle. This was a careless act given that it was late at night, difficult to see, and there were people who lived in that area. He said that Mr. Loring had impressed him then as someone who would learn from his experience. The trial judge also discounted the breaches of probation committed by Mr. Loring while on bail. He was in the process of making up with Ms. Williams and had gone to see her, in breach of the order, before the order had been changed.

[13] The trial judge was not provided with any cases by defence counsel that set out a range of cases for like offences and like offenders. The trial judge had before him three cases of home invasion produced by the Crown. He distinguished all of those cases, said that denunciation and rehabilitation were the goals of sentencing that applied in this case, and arrived at a sentence of two years less one day for the breaking and entering, one year concurrent for the careless use of a firearm and eight months concurrent for the possession of a weapon for a purpose dangerous to the public peace. The sentencing judge rejected the notion of a conditional sentence on the basis that it in the circumstances it would not further the goal of denunciation.

The First Ground of Appeal

[14] In this Court Ms. Bradley (who was not counsel at trial) submitted that the sentencing judge erred in failing to consider s. 718.2(e) of the Criminal Code which provides:

A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[15] In R. v. Gladue, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, the Supreme Court of Canada said this at para. 66 of its reasons:

[66] The words of s. 718.2(e) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

[16] Gladue specifically addressed how a trial judge should go about examining these factors in the daily functioning of the courts. The Court said this at paras. 83 and 84:

[83] How then is the consideration of s. 718(2)(e) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

[84] However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre, the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

[17] The requirements of Gladue were further explained in the subsequent case of R. v. Wells, 2000 SCC 10, [2001] S.C.R. 207, where Iacobucci J. said this at paras. 38-42:

[38] In order to provide guidance to sentencing judges as to the manner in which the remedial purpose of s. 718.2(e) could be given effect, the reasons in Gladue set out a framework of analysis for the sentencing judge. In considering the circumstances of aboriginal offenders, the sentencing judge must take into account, at the very least, both the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct, and the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection (Gladue, at para. 66). In particular, given that most traditional aboriginal approaches place a primary emphasis on the goal of restorative justice, the alternative of community-based sanctions must be explored.

[39] In the search for a fit sentence, therefore, the role of the sentencing judge is to conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community. As was noted in Gladue, it is often the case that imposing a custodial sentence on an aboriginal offender does not advance the remedial purpose of s. 718.2(e), neither for the offender nor for his community. This is particularly true for less serious or non-violent offences, where the goal of restorative justice will no doubt be given

greater weight than principles of denunciation or deterrence.

[40] However, the scope of s. 718(2)(e), as it applies to all offenders, restricts the adoption of alternatives to incarceration to those sanctions that are "reasonable in the circumstances". Again, as was expressly stated in Gladue, the Court in no way intended to suggest that as a general rule, the greatest weight is to be given to principles of restorative justice, and less weight accorded to goals such as denunciation and deterrence. Indeed, such a general rule would contradict the individual or case-by-case nature of the sentencing process, which proceeds on the basis of inquiring whether, given the particular facts of the offence, the offender, the victim and the community, the sentence is fit in the circumstances.

[41] I should take this opportunity to stress that the guidelines as set out in Gladue, and reiterated in the present appeal, are not intended to provide a single test for a sentencing judge to apply in determining a reasonable sentence in the circumstances. Section 718.2(e) imposes an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victims and the community.

[42] Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As held in Gladue, at para. 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.

[Emphasis added.]

[18] I am of the view that the background factors of the appellant were adequately addressed in the sentencing proceedings in the case at bar. It must be remembered that the trial and sentencing in this case took place near to where Mr. Loring was raised in Gitwangak. The courthouse in New Hazelton, when it sits, deals with many cases from the neighbouring First Nations lands. The trial judge sat in the area for many years, as noted by his recollection of Mr. Loring's youth court conviction. He obviously understood that the appellant is of aboriginal heritage and the judge must also be assumed to be familiar with the background factors of the First Nations people he dealt with in that area. In addition, the PSR was prepared by a First Nations probation officer who alluded to Mr. Loring's heritage and upbringing in the area. Finally, defence counsel addressed Mr. Loring's heritage at sentence and spoke of the cultural sensitivity to ostracism by the community.

[19] It is clear, however, that the second part of the circumstances - the approach by Mr. Loring's community to sentencing - was not clearly addressed by anyone. The record is silent with respect to what restorative justice practices and programs are available in the area. The

probation officer did refer to treatment programs but did not set out their availability or whether they would specifically address Mr. Loring as an aboriginal offender. That said, it may be the case that given the location of the courthouse and the familiarity of the judge and counsel with the area, the local programs were understood to all and needed no mention. As well it may be that no reference was made to restorative programs because it was accepted by all in the courtroom that this crime of violence required a custodial sentence and that restorative programs as an alternative were considered not to be reasonable in the circumstances. In Gladue the Court said this at para. 79:

[79] Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of a sentence of an aboriginal offender may be less and in others the same as that of any other offender. 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.

[20] In this case the trial judge rejected the notion of a conditional sentence on the basis that it would not serve the goal of denunciation. In other words the sentencing judge ruled out a wholly community based sentence, he concluded that there must be a period of incarceration. The appellant has attempted to address this in an application to adduce fresh evidence which I will deal with presently. However, given the age of the offender and his lack of adult record, and his aboriginal heritage, I am of the view at the very least it was an error on the part of the sentencing judge to fail to give consideration to the rehabilitative aspect of the sentence imposed and to explore more fully the programs available to Mr. Loring in his community once his probationary period began.

The Fresh Evidence

[21] Where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, Gladue directs (para. 85) the Court of Appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. To that end, counsel for the appellant in this Court filed a report prepared by Douglas Ramsfield, who we are told is a retired probation officer with experience with First Nations communities. In his report, Mr. Ramsfield discusses the practices of the Gitxsan people, their traditional approach to justice, and some personal circumstances of the offender. Counsel for the Crown did not take issue with the contents of the report, or the qualifications of Mr. Ramsfield to write on such matters. In the circumstances I have examined the report for assistance on this appeal.

[22] In his report, Mr. Ramsfield says that Gitxsan society is clan based and matrilineal. Marriage within clans is prohibited and clan membership across tribes is recognized. Gitxsan practice the "Feast" which holds great importance and is a means of ritual acknowledgement of events and of defining and sanctioning behaviour. As Mr. Ramsfield says, "Kinship organizes most aspects of life including property ownership, economic activity, residence patterns,

education, marriage, inheritance, political activity and most social relationships". He continues:

Gitxsan members continue to belong to a Wilp or house group. This is the basic unit for social, economic and political purposes. The Wilp continues to deal with wrongs and justice is defined there. For example, members have hereditary connections to two villages, each parent's village. Both Gitxsan communities maintain a role in the guidance of the member.

Gitxsan house groups are a collection of closely related people, numbering from 20 to more than 250 people. Each Wilp has a hereditary chief and several wing chiefs, who look after the different functions for the house groups, each with their own territory. Each of the house groups belongs to four classes: Lax Gibuu (Wolf), Lax Seel or Lax Ganeda (Frog), Gisgaast (Fireweed) and Lax Skiik (Eagle).

The Wilp and the feast are important parts of Gitxsan society. The feast hall or Liligit is the forum where business, social, and political decisions are legitimized in this traditional system. Despite efforts at assimilation beginning in the mid 1800's and the outlawing of the feast and potlatch, the feast remains central to their government, law and justice, societal structure, naming and giving of titles and ownership and use of lands. Due to the close associations of the Gitxsan with their neighbouring nations, the Witsuwit'en, the Babine and the Nutseni such feasts and ceremonies can include witnesses from these neighbouring nations.

[23] Mr. Ramsfield also reports that Mr. Loring's house group plans to contribute to his rehabilitation through the counselling of its elders and chiefs. The group will also endeavour to bring reconciliation between Mr. Loring and his victims. He says this:

Ben's Uncle Harry Daniels, Chief Biiyosxw, reported that in the feast hall they will begin to look at how Ben could become a better person in the community. They will have discussions about "the positive parts of his life that he could reach". The guidance will come in the feast hall, the governing system of the Gitxsan and it will be done in the presence of the community, including the victims. "Those people who were assaulted and their families would be present. Gifts would be given to all attendees especially those who were offended". It is Chief Biiyosxw's view that the victims would be fully supportive of the cleansing feast.

[Emphasis added.]

[24] The plan to rehabilitate Mr. Loring and restore peace between him and those he offended is commendable. In this case however, Mr. Ramsfield's report deals only with how Mr. Loring's kin will attempt to deal with his wrong. It does not address how this will be received by the victims or the larger community.

[25] At para. 71 the Court in Gladue said this:

[71] The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be

> described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.

[Emphasis added.]

[26] Although Mr. Ramsfield's report describes the attitude of the appellant's clan, the attitude of the rest of the community has not been canvassed by anyone.

[27] On this appeal the Crown filed an updated PSR from the probation officer who prepared the PSR for sentencing in this case. The probation officer noted that Mr. Loring has apologized to Mr. Williams and that Mr. Williams not only accepted the apology but considers Mr. Loring to be a friend today. Nothing was said of Trevor Reese, the man that Mr. Loring tried to confront with the loaded rifle.

[28] In their reports both the probation officer and Mr. Ramsfield mentioned the Gitxsan Unlocking Aboriginal Justice Program ("G.U.A.J."). The probation officer said this of the program:

Gitxsan Unlocking Aboriginal Justice (G.U.A.J.) representative Val Simms-Muldoe advised the writer she has received a copy of an agreement to participate from Mr. Loring. Ms. Simms-Muldoe advised the writer that her role as a facilitator with Unlocking Aboriginal Justice is to have Mr. Loring meet in person with the chiefs of his house group. Ms. Simms-Muldoe must also meet with the victim and his house chiefs to see if all are in agreement that the Unlocking Aboriginal Justice process would be in the best interest of all involved. Ms. Simms-Muldoe confirmed the house chiefs George and Harry Daniels from the house of Ben Loring have submitted plan of action recommendations to her office. She added she has not yet met with these chiefs and will likely do so as the referral process requirements are addressed.

G.U.A.J. has been funded in part by the Federal Department of Justice as well as British Columbia Community Corrections since the early 1990s. G.U.A.J. has and continues to submit plans of action that have been incorporated in to community supervision plans by Judges and Justices. The plans can include a cultural component such as "you shall report to your house group representatives on a monthly basis and report on your progress". The plan may also incorporate a wellness focus such as "you shall attend a residential treatment centre".

[29] Again, it must be noted that while Mr. Loring's house chiefs have met and submitted a plan to the G.U.A.J. representative, Ms. Simms-Muldoe, she has not yet met with the chiefs of the houses of the victims - Stephen Williams and Trevor Reese.

[30] Without the community input the feasibility of a community disposition as an alternative to incarceration cannot be properly assessed. The Court expressed its concern about this to counsel and suggested that a post-sentence report be prepared to provide further information about this issue. Counsel for the appellant noted that the utility of such a report may be lost considering the passage of time. In the end, the Court concluded that we should decide the appeal on the basis of the material before us.

The First Ground of Appeal

[31] I would not accede to the first ground of appeal. For reasons that I have earlier discussed, I am of the view that the sentencing judge adequately addressed Mr. Loring's personal circumstances and background as an aboriginal offender. While the second part of the Gladue test was not explored, that is, the possibility of a community sentence based on Aboriginal restorative justice principles, it has not been fully canvassed in the material produced for this Court. We do not know the attitude of the community as a whole, or the individual attitudes of all of the victims of Mr. Loring's offences. This sentence of incarceration cannot be set aside in favour of a community disposition on the basis that the Gladue factors have not been given appropriate consideration.

The Second Ground of Appeal

[32] Counsel for the appellant submitted that the sentence imposed in this case for a first time young adult offender was beyond the range that ought to have been imposed for similar offenders and similar offences. Ms. Bradley pointed out that Crown counsel (who was not counsel on this appeal) had simply missed the mark by categorizing this case as akin to a home invasion. To compound the problem, counsel for the defence provided no case law to assist the sentencing judge. I agree with counsel for the appellant that the case law provided to the sentencing judge was inappropriate to deal with the circumstances of this case.

[33] The disturbing aspect of this case is not only the appellant's smashing into the home of Mr. Williams, but his use of the two weapons, in particular the loaded rifle. Not to be lost in all of this is that Mr. Loring, angry and intoxicated, obtained a rifle and went looking for a man he wanted to confront. The rifle was fired into the bush, hence the careless use of it, but it was also intended to be used to confront Mr. Reese. These are serious offences. However, Mr. Loring was only 21 years of age when he committed this offence. By the time of sentencing he had reconciled with the mother of his children, was working, and was trying to lead a responsible life. He had a similar record, that is careless use of a firearm, when he was a youth, but the circumstances were dissimilar.

[34] We are now told that Mr. Loring has been a good prisoner and has made an effort to enrol in all the rehabilitative programs available to him. He has the full support of his extended family and with the help of his chiefs has formulated a plan for his reintegration into the community, reconciliation with his victims and assistance with his alcohol and anger issues. Given Mr. Loring's age and lack of adult record, it seems to me that rehabilitation ought to play an equal role with that of denunciation.

[35] Our attention has been drawn to a number of cases that deal individually with breaking and entering, careless use of a firearm, and possession of a weapon for a purpose dangerous to the public peace. For each individual offence there are cases ranging from a suspended sentence to a federal term of imprisonment. They do not provide a discernable range for circumstances such as this.

[36] This is a case, then, which requires a focus on the principles of sentence to determine what is fit. The trial judge was of the view that a period of incarceration was required. This Court should pay deference to that view. The trial judge did not have the benefit of knowing the support that Mr. Loring would have from his clan, and that should be taken into account in determining how the principle of denunciation may be tempered by the need and genuine possibility of rehabilitation in this case.

[37] In my view, the global sentence of two years less a day is unfit. I would grant leave and set aside the sentences imposed in this case. I would impose a sentence of nine months concurrent for each of the three offences. In my view, that length of time coupled with an extended probation order would be fit in all the circumstances. I would increase the period of probation to two years. The probation order should contain the additional provisions, that Mr. Loring:

· within two months, enter into a Gitxsan Unlocking Aboriginal Justice Action Plan as recommended by your probation officer to the satisfaction of Gitxsan Unlocking Aboriginal Justice and your probation officer;

· attend and successfully complete a residential program at the Wilp Si'Satxw Society Community Healing Centre as directed by your probation officer.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Madam Justice Saunders"

CORRECTON - April 22, 2009

A correction to paragraph 35 was made on April 22, 2009.

[1] S. 348.1 If a person is convicted of an offence under any of subsection 279(2) or sections 343, 346 and 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,

(a) knew that or was reckless as to whether the dwelling-house was occupied; and

(b) used violence or threats of violence to a person or property.

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