41/10; [2010] VSCA 192

SUPREME COURT OF VICTORIA — COURT OF APPEAL

SMITH v THE QUEEN

Nettle and Bongiorno JJA and Beach AJA

29 July 2010

CRIMINAL LAW – SENTENCING – DOMESTIC VIOLENCE – ATTITUDE OF THE VICTIM – WHETHER COURT BOUND TO ATTACH ANY WEIGHT TO ASSERTION THAT VICTIM OF DOMESTIC VIOLENCE HAD FORGIVEN ACCUSED – APPEAL DISMISSED.

S. was charged with recklessly causing serious injury to a person with whom he was living and a charge of perverting the course of justice. On the plea, S.'s counsel stated that his instructions were that the victim wished to continue the relationship with S. and that she had forgiven S. for his actions. No evidence was given by the victim at the plea hearing and no letter from or victim impact statement of the victim was produced or tendered. Upon appeal by S. against sentence—

HELD: Appeal dismissed.

1. The sentencing judge was not bound to give any weight to the unsupported assertions that were made concerning the victim's attitude to the prosecution. As was said by Neave JA in *R v Hester* [2007] VSCA 298 even in cases where there is evidence of forgiveness of the victim of domestic violence, this evidence should be treated with extreme caution.

2. Notwithstanding the attempts which S. had made to rehabilitate himself to deal with his drug and violence problems since being remanded in custody, the sentence imposed below was well open. The Judge properly took into account the personal circumstances of S., his bad criminal record, principles of general deterrence, specific deterrence and denunciation. This Court has said on many occasions that domestic violence will not be tolerated and that general deterrence is a very important sentencing principle in the sentencing disposition which must be, and must be seen to be, condemned by the courts.

***R v Jojanovic* [2002] VSCA 467, [31] (Coldrey J);**
***R v Robertson* [2005] VSCA 190, [13] (Chernov JA);**
***DPP v Smeaton* [2007] VSCA 256, [21]–[22] (Dodds-Streeton JA); and**
***R v Hester* [2007] VSCA 298, [19] (Chernov JA), applied.**

NETTLE JA:

1. I will ask Beach AJA to deliver the first judgment.

BEACH AJA:

2. On 22 July 2009, the appellant pleaded guilty to two counts: one of recklessly causing serious injury and the other of attempting to pervert the course of justice. A plea was heard on 8 December 2009, and on that date his Honour Judge Montgomery sentenced the appellant to three years' imprisonment on the count of recklessly causing serious injury and nine months' imprisonment on the count of attempting to pervert the course of justice. His Honour ordered three months of the nine months to be served cumulatively with the first count, making a total of three years and three months, and directed that the appellant serve a non-parole period of two years and three months.

3. The appellant appeals against the sentence he received. The grounds of the appeal are:
(1) The sentencing judge erred in failing to have any regard or any sufficient regard to the attitude of the victim, Maria Rodriguez.
(2) The total effective sentence, non-parole period and the individual sentence imposed on the count of recklessly causing serious injury are each manifestly excessive.

4. The maximum term of imprisonment for recklessly causing serious injury is 15 years. The maximum term of imprisonment for attempting to pervert the course of justice is 25 years.

5. The facts of the appellant's offending may be briefly stated as follows:

(a) On 8 June 2008, the appellant and the complainant, Maria Rodriguez, were at home when the appellant began arguing with Ms Rodriguez about money. The appellant lost control and punched Ms Rodriguez several times on the jaw and struck her with an open hand to the face. He also punched her to the head area. Ms Rodriguez was yelling at the appellant to stop, but he kept punching her. As a result of the punches to the jaw, Ms Rodriguez was taken to hospital, where an X-ray was taken which revealed she had a bilateral fracture of the mandible, which required surgical intervention. She also had bruising to her left arm, right thigh and right knee. This forms the factual basis in respect of the first count.

(b) The appellant was arrested and remanded in custody. Whilst the appellant was in custody, there were a number of telephone conversations between the appellant, his mother and the complainant. In conversations between the appellant and his mother, the appellant made admissions of assaulting the complainant and requested his mother's assistance in contacting the complainant and approaching her to withdraw her allegations. An arrangement was made for the appellant's mother to have the complainant attend at her home at pre-arranged times for the appellant to speak with the complainant. During these conversations, the appellant requested the complainant not to speak to police and to make a statement of no complaint. These events form the factual basis of the second count.

6. I turn now to ground one. During the course of the plea hearing, counsel for the appellant said:

> These proceedings, I want to stress, so far as my client is aware, are not (sic) her interests. She had wanted, despite these events, to make up with Mr Smith and continue the relationship. She, as I understand it, had the matter proceeded in any event, would have been a reluctant witness if called by the prosecution. The reason for referring to that, Your Honour, is that both Mr Smith and Ms Rodriguez in their own way are lost souls who came together. So far as they are concerned, on this occasion when Mr Smith assaulted Ms Rodriguez in this way and injured her as he did, she understood perhaps better than many that it was not Mr Smith himself who was talking to her, in a way, it was the drugs that he'd had that caused this behaviour.

7. No evidence was given by Ms Rodriguez at the plea hearing. No letter from, or victim impact statement of, Ms Rodriguez was produced or tendered. Counsel for the appellant below merely stated his understanding of his instructions.

8. In my view, the sentencing judge was not bound to give any weight to the unsupported assertions that were made below concerning Ms Rodriguez's attitude to the prosecution. As was said by Neave JA in *R v Hester*,[1] even in cases where there is evidence of forgiveness of the victim of domestic violence, this evidence should be treated with extreme caution.

9. In any event, there is no basis for concluding that the sentencing judge overlooked any part of the appellant's counsel's submissions on the plea. To the contrary, those submissions would have been at the forefront of his Honour's mind at the time he passed sentence – the sentence being passed on the day the plea was heard.

10. However, even if this Court was to conclude that the sentencing judge erred in failing to have regard (or sufficient regard) to the alleged attitude of Ms Rodriguez, that would not be the end of the matter. As s568(4) of the *Crimes Act* 1958 makes clear, it is not enough for the appellant to establish error in the sentence. This Court is bound to dismiss the appeal unless it is also satisfied that 'a different sentence should have been passed'. I am not so satisfied. As the sentencing judge noted, the appellant has many prior convictions for dishonesty and violence, and in particular there are three prior convictions for recklessly causing injury and one for robbery. In total, the appellant has 43 prior convictions arising out of 12 court appearances.

11. Notwithstanding the attempts which the appellant has made to rehabilitate himself to deal with his drug and violence problems since being remanded in custody in relation to the offences the subject of this appeal, in my view, the sentence imposed below was well open. His Honour properly took into account the personal circumstances of the appellant, the appellant's bad criminal record, principles of general deterrence, specific deterrence and denunciation. This Court has said on many occasions that domestic violence will not be tolerated and that general deterrence is a very important sentencing principle in the sentencing disposition which must be, and must be seen to be, condemned by the courts.[2] It follows that ground one must fail.

12. Having concluded that the sentence passed below was well open, it follows that neither the total effective sentence, nor the non-parole period, nor the individual sentence imposed on

the count of recklessly causing serious injury was manifestly excessive. In the result, ground two must also fail.

13. For these reasons, the appeal must be dismissed.

NETTLE JA:

14. I agree in substance with what has fallen from my brother Beach. I wish to add only that this appeal was brought with leave granted by a Judge of Appeal on 18 March this year. His Honour considered that it was reasonably arguable that the sentencing judge failed to consider the significance of evidence that the victim had forgiven the appellant and wished to re-establish her relationship with him.

15. I do not disagree with his Honour that the point was reasonably arguable. But even if the sentencing judge did fail to consider the victim's attitude – and I am not persuaded he did – and it was an error to fail to do so, I agree with my brother Beach, for the reasons he gives, that no different sentence should have been passed.

16. Accordingly I too would dismiss the appeal.

BONGIORNO JA:

17. I agree with Beach AJA.

NETTLE JA:

18. The order of the Court is that the appeal is dismissed.

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[1] [2007] VSCA 298, [27].

[2] See for example *R v Jojanovic* [2002] VSCA 467, [31] (Coldrey J); *R v Robertson* [2005] VSCA 190, [13] (Chernov JA); *DPP v Smeaton* [2007] VSCA 256, [21]–[22] (Dodds-Streeton JA) and *R v Hester* [2007] VSCA 298, [19] (Chernov JA).

APPEARANCES: For the appellant Smith: Mr DA Dann, counsel. C Marshall & Associates, solicitors. For the Crown: Mr S Cooper, counsel. Mr C Hyland, Solicitor for Public Prosecutions.
