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R v LSM and the "Sanctity" of the Joint Submission

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Case Commented On: *R v LSM*, 2016 ABQB 112

In *R v LSM*, 2016 ABQB 112, Associate Chief Justice Rooke of the Court of Queen's Bench of Alberta, sitting as a summary conviction appeal court, considers the "sanctity" of the joint submission and the circumstances in which the subsequent sentence will be varied on appeal. In his view "an appeal of a joint submission should rarely succeed" (at para 20). He supports this position by outlining three very narrow exceptions to this rule. After a thorough analysis of the principles, Associate Chief Justice Rooke reluctantly allows the appeal in part. He does so by finding only one ground of appeal, the ground presented on consent, falls within an exception. The decision, on its face, appears to be a straightforward application of the principles at hand. Yet, on further contemplation, this decision may not be about the "sanctity" of a joint submission but rather about ensuring that, in the end, justice is done.

Associate Chief Justice Rooke immediately frames the issue in sweeping terms in the opening paragraph of the decision: "This case concerns the sanctity of the 'joint submission' on a guilty plea and sentence in the administration of justice." On a review of case law, the descriptor "sanctity" seems overdrawn. Although joint submissions enjoy a "high level of deference" and must be given "serious consideration" by the sentencing judge (See *R v GWC*, 2000 ABCA 333, Berger, JA at para 20), they are not inviolable. A sentencing judge is not bound by the proposed sentence. Indeed, as explained by Justice Berger in *GWC* (at para 19), it is incumbent on the sentencing judge to undertake "a careful and diligent inquiry of counsel as to the circumstances underlying a joint sentencing submission" before exercising the discretion to accept it. This is done to ensure the proposed sentence, in accordance with sentencing principles, is a fit one. Accordingly, sentencing judges should only reject a joint submission where the sentence proposed is unfit or unreasonable (See *R v Gibson*, 2015 ABCA 41 at paras 9 - 10). Indeed, departing from a joint submission, which is fit, should not be done "even if he or she would impose a harsher sentence which would also be fit and reasonable" (See *R v Bullock*, 2013 ABCA 44, Berger, JA for the majority at para 18).

Some appellate jurisdictions have taken the position that a joint submission may also be rejected if the sentence is contrary to the public interest and would bring the administration of justice into disrepute. Currently, the efficacy of this additional more stringent ground for departing from a joint submission will be argued on March 31, 2016 before the Supreme Court of Canada in the *Anthony-Cook* case on appeal from the British Columbia Court of Appeal (*R v Anthony-Cook*, 2015 BCCA 22). In Alberta, this ground has not been consistently adopted. In the *GWC* decision, Justice Berger does refer to this position in paragraph 18 without endorsing it as a viable ground beyond fitness or unreasonableness. In her dissenting opinion in *Shular*, 2014 ABCA 241, Justice Hunt does rely on this ground as providing an additional basis for rejecting a joint submission (at para 106). However, leave to appeal to the Supreme Court of Canada was dismissed in this case (*Robert Shular v Her Majesty the Queen*, 2014 CanLII 76800 (SCC).

Additionally, the joint submission itself is not considered a binding undertaking between the defence and prosecution. In the 2011 *Nixon* case, 2011 SCC 34, the Supreme Court of Canada agreed with the Alberta Court of Appeal's decision that the repudiation of a plea agreement, on the basis it was contrary to the public interest, was not an abuse of process but a proper exercise of prosecutorial discretion. In that instance, the plea negotiation included a joint submission on sentence.

Even though the original joint submission cannot be considered sacrosanct, is the sentence imposed on the basis of a joint submission essentially "appeal proof?" Associate Chief Justice Rooke finds that it is, except in three very narrow circumstances. In his view, where a joint submission is proffered by competent counsel and accepted by a sentencing judge, the offender should not be permitted to "resile" later on appeal (at para 2). Further, according to Associate Chief Justice Rooke, the appeal court should "support" joint submissions by upholding them on appeal (at para 21). As he explains (at paras 21 and 25), a joint submission is an efficient and effective way to deal with criminal matters in the "busy docket courts." It would therefore be counter intuitive to the realities of the practice of criminal law and the quest for finality to provide a further forum for change. The appellate arena is not, as described by Associate Chief Justice Rooke, an opportunity to express "buyer's remorse" (at para 25). This last comment has some truth to it as there must be articulable grounds for appeal in accordance with sentencing principles and s. 687 of the *Criminal Code*. However, Associate Chief Justice Rooke further contends that a sentence resulting from a joint submission does not exist "until we allege there is an error in the sentencing judge accepting our representations or some other way" (at para 25).This premise comes very close to suggesting an erroneous position: that even an error in principle should not be a ground for appellate intervention. As argued in this post, that is exactly when appellate intervention is not only permitted but also desired.

In any event, Associate Chief Justice Rooke cites three "very narrow" circumstances in which an offender can "resile" from a sentence imposed by way of joint submission (at para 2). The first exception is where the sentence imposed is illegal because it is statutorily unavailable (at para 3). The second instance is where the sentence, "for some unusual reason," is demonstrably unfit (at para 4). Third, which according to Associate Chief Justice Rooke is the situation in *LSM*, is where there is a "change in circumstances" after sentence is imposed (at para 5).

The first exception, illegality of sentence, makes sense. Certainly, there is an obligation on the appellate court to correct an illegal sentence. Even in cases where an appeal has not been filed within the designated appeal period, the court has allowed extensions to file an appeal where an illegal sentence was imposed (see for example *R v MJR*, 2007 NSCA 35). In *R v Hunter*, 2004 ABCA 230, the Alberta Court of Appeal vacated the illegal conditional sentence of 18 months imposed for a summary conviction offence, where the maximum sentence was six months incarceration, in favour of time served.

The second exception permits an appeal where, for "unusual" reasons, the sentence imposed is demonstrably unfit. As an example of this, Associate Chief Justice Rooke refers to the unusual situation in which competence of counsel is raised on appeal (at para 4). Granted, competency of counsel as it relates to the efficacy of a joint submission is a valid ground and, due to the presumption of competency, may be viewed as rarely raised. Leaving that situation aside, there may be other situations, not as rare, where a sentence resulting from a joint submission is demonstrably unfit or unreasonable. Associate Chief Justice Rooke depicts the heightened circumstances in which a joint submission might occur as a "busy docket court" where counsel "deemed to be competent and knowledgeable in the law" proffer a joint submission thereby

"impliedly certifying" the sentence is fit and requesting the sentencing judge to "endorse" it (at para 21). Indeed, as mentioned earlier, it is precisely those heightened circumstances of "busy docket courts" where matters are dealt with summarily, which may provide the perfect environment for an unfit sentence. It is in those scenarios where an accused may too readily accede to a joint submission or where "competent and knowledgeable counsel" may accept a position that upon further reflection may require appellate scrutiny. In the end, it is the ultimate fitness of the sentence imposed by whatever means, which is at issue on appeal. As Mr. Justice Wagner explains *R v Lacasse,* 2015 SCC 64 (at para 3), it is the very credibility of the criminal justice system at risk when an unfit sentence, be it "too harsh or too lenient," is imposed. An unfit sentence does not become fit merely because everyone agrees to it, just as an illegal sentence, imposed on consent, does not then become legal. There are numerous appellate decisions upholding departures from joint submissions to further this contention. Surely, the same reasoning should hold in the converse situation of an offender appealing a sentence he or his counsel agreed to previously, particularly considering it is the offender's liberty interest which is at risk.

It is the third exception, permitting a variation where there is a change in circumstance after imposition of the sentence, which seems an incongruous ground considering Associate Chief Justice Rooke's position. Indeed, a change of circumstance (not even a material change of circumstance is required) is a generous ground for intervention. In paragraph 27 of the decision, Associate Chief Justice Rooke attempts to support this ground for intervention by reference to the 2012 decision of the Alberta Court of Appeal in *R v Gangl,* 2012 ABCA 121. There, the majority of the Court found the sentencing judge made no errors in imposing sentence yet reduced the sentence. In the majority's view, the appellant's circumstances were exceptional and the accused who had "serious health problems" was impacted by the "consequences" of the conviction. As a result, the majority converted the conviction to a conditional discharge. The dissenting justice disagreed as there was no "reviewable error."

Although Associate Chief Justice Rooke characterizes the *Gangl* decision as authority for an exception to the general rule, this finding is questionable for two reasons. First, this was a case, according to the majority, for a conditional discharge. A discharge under s. 730 of the *Criminal Code*, is a sanction in which a finding of guilt is made but no conviction is entered. A discharge, per s. 730, is granted where it is "in the best interests of the accused and not contrary to the public interest." A consideration in imposing a discharge is whether a conviction would have "serious repercussions" (See *R v Sanchez-Pino,* 1973 CanLII 794 (ON CA)) for the accused, such as employment difficulties or, as suggested by the court in *Gangl*, "a number of consequences flow from this conviction" (at para 2). Admittedly, the Court's analysis in *Gangl* is brief and does not discuss the six factors to consider in granting a discharge as required by the *MacFarlane* decision (1976 ALTASCAD 6 (CanLII)), but, on the face of the record, one could argue that in *Gangl* there was a "reviewable" error.

Second, this exception for a change in circumstances post-sentence is not a ground for appellate intervention according to the newly released decision of the Supreme Court of Canada in *Lacasse* and as quoted by Associate Chief Justice Rooke in paragraph 24. Associate Chief Justice Rooke makes further reference to the Ontario Court of Appeal case in *Wood* (1988), 131

CCC (3d) 250. This is a case decided before the Supreme Court of Canada decision in *Lacasse*, which, as previously discussed, emphasizes the importance of deference to the sentencing judge. Further, Justice Lacourciere, in rendering the *Wood* decision, states that "certainly the accused is given greater latitude than the Crown on an appeal of this kind in that he is generally not bound to the same extent by the submissions of his counsel as to sentence" (at para 9). *Wood* was referred to approvingly in both the *GWC* decision (at para 19) and in the *LRT* decision (2010 ABCA 224 at para 11). As succinctly put by Justice Lacourciere in *Wood* (at para 9), "the ultimate responsibility to determine the fitness of sentence is on the Court of Appeal."

Associate Chief Justice Rooke, applying his rule, ultimately finds only one ground of appeal as a matter properly coming under the third exception. Earlier, in outlining this exception in paragraph 5, he offered s. 161 as an example of when such a change in circumstances may occur. This section provides for a variance of conditions in a prohibition order imposed on an offender convicted of any number of sexual offences involving children. As he notes and as contained in the wording of s. 161(3), an application to vary the sentence is heard before the sentencing judge or "where the court is for any reason unable to act, another court of equivalent jurisdiction." In other words, the proper forum for the change is not on appeal but on application to the originating court. Yet Associate Chief Justice Rooke, despite the matter of jurisdiction, varies sentence on this ground, not because of s. 161 but because the change in circumstance is a new joint submission proffered on appeal by two competent counsel (one can infer, as equally competent as sentencing counsel). Here, Associate Chief Justice Rooke finds himself between the proverbial "rock and a hard place": on one hand, he outlined the difficulties of appealing a joint submission, the rarity of success, the limited circumstances in which it should be done, and the sound policy reasons for not permitting such an appeal. On the other, he accedes to the new joint submission, not based on any principles of sentencing, but rather on a procedural availability not even within his purview on a strict reading of the section.

Perhaps, in the end, this pragmatic and experienced trial judge, sitting as a summary conviction appeal court, recognized that principles and rules do not always produce a just outcome. Perhaps, he agrees with the majority of the Alberta Court of Appeal in *Gangl* that the appellate court "is the last stop on the road to mercy" (see *Gangl*, Watson JA at para 21). Or perhaps, as initially suggested by Associate Chief Justice Rooke, the *LSM* decision may indeed be all about the "sanctity" of the joint submission, in whichever forum it is offered and in whatever circumstances it arises.