August 18, 2017

The Creation of Community "Space" in Sentencing in *R v Saretzky*

By: Lisa Silver

Case Commented On: *R v Saretzky*, 2017 ABQB 496 (CanLII)

The *Saretzky* case will live in infamy as a disturbing crime that defies description and understanding. In this post, I do not intend to engage in a classic case analysis of the sentencing proceeding, which has been the primary subject of media attention and legal commentary. Certainly, the legal issues raised in this case are of concern as we struggle to make sense of a crime so devoid of humanity yet committed by a person who will now spend seventy-five years in custody, essentially to the end of his days. Is it a crushing sentence which fails to recognize the possibility, no matter how faint, of rehabilitation? Or is mere speculation about rehabilitation an inappropriate, unsafe, and frankly impossible standard to apply? Leaving aside the application of recognized principles of retribution and denunciation, are we comfortable with the reality of this decision, the warehousing of an individual who is a legitimate and continuing threat to society? Should the law be a "beacon of hope" or does "hope" go beyond legal expectations? Although we like to believe that hard cases make bad law, in fact, hard cases force us to look squarely at the worst scenario almost as a litmus indicator to test the strength and flexibility of applicable legal principles. In looking at *Saretzky* and Justice W. A. Tilleman's reasons for sentencing, we can properly ask whether our sentencing principles and codified laws are up to the heavy task of assessing the worst case and the worst offender, the twin legal principles supporting the imposition of the maximum sentence.

The answer to all of this may require us to do some navel gazing and philosophizing that takes us outside traditional sentencing principles. It may also require us to explore whether there is a legitimate role in sentencing for the community. When I use the term "community," I am not referring to bald public opinion as reflected on social media – that, as Justice Wagner cautioned in *R v St-Cloud*, 2015 SCC 27 (CanLII) at paras 80-84, is far from the considered and reasoned pronouncements of the law. No, community is not who has the most likes on Twitter and speaks the loudest on Facebook. Community or better yet the "community's sense of justice" can be found in Justice Tilleman's reasons in the *Saretzky* sentencing. Community bonds, communal mourning and healing all have a "space" in the *Saretzky* decision. It is my contention that the community's place in the bounded space of the courtroom is connected to the judge's now enhanced and expanded duty to protect the integrity of the administration of justice and to maintain trust and confidence in the criminal justice system. With this shift to community however, we must be ever mindful of our principles of fundamental justice which protect the individual offender as part of that community. We must rely on the delicate balance of sentencing to calibrate the scales of justice to ensure fair and just sentences.

In the first sentence, Justice Tilleman speaks through the offender to the community – not the community writ large but the community of Crowsnest Pass, a small district in southwestern

Alberta with a population of a little over 5,500 people consisting of a string of even smaller communities, such as Frank, Blairmore, and Coleman, all hugging Highway 3 as it winds through the pass and into the British Columbia Rockies. It is a small community with big history. It is a community with memory of disaster. It was here in 1903 where the tip of Turtle Mountain tumbled into the town of Frank thereby defining a community through devastation and loss. It is here that Canadian opera found a voice in the tragic story of Filumena, a young woman convicted of the murder of an RCMP officer during the prohibition era. This and many other stories create the community, the community which Justice Tilleman addresses nineteen times throughout the sentencing reasons. These are the people of Crowsnest Pass whom Justice Tilleman, before asking Derek Saretzky to stand for the imposition of sentence, encourages to heal and move forward. He encourages them to "rebuild" and recreate another iteration of themselves as community, an image not defined by inexplicable tragedy (para 58).

Community also speaks to the offender in this decision. The jury of peers, charged with the difficult and awesome task of determining guilt or innocence, are representative of the shared community of the offender and the victims. It is through the jury process that community members, utilizing the legally embossed analytical tools given to them by the trial judge, engage in community decision making. In the words of Justice Addy in *R v Lane and Ross*, [1970] 1 OR 681, 1969 CanLII 545 (ON SC) (p 279), juries are the "bulwark of our democratic system and a guarantee of our basic freedoms under the law." They are also part of the sentencing discourse through their parole ineligibility recommendations, and, in the *Saretzky* case, they unanimously urged the imposition of consecutive terms totalling 75 years of parole ineligibility (para 24).

Community also defines the victims. Justice Tilleman humanizes the deceased (para 48) through the lens of community as he circumscribes their community space and place by describing "Hanne Meketech—a community elder and dear friend," and "Terry Blanchette—a young man and father," and lastly "Hailey Dunbar-Blanchette, an innocent child." Thus, Justice Tilleman monumentally memorializes their lives in relation to what these victims of violence meant to their community.

The approach taken in this sentencing, the bringing in of community to a forum traditionally partitioned off from community, evokes the Indigenous model for restorative justice as envisioned in *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC) at para 74 and as skillfully employed by Justice Nakatsuru throughout *R v Armitage*, 2015 ONCJ 64 (CanLII). This model requires more investigation as we learn from and embrace Indigenous culture, thought, and sense of community. It also brings to mind specialized international courts, such as the traditional Rwandan *gacaca* courts, which empower community as a step to repairing past harms.

These approaches, superficially, differ greatly from the English common law tradition and often sit uneasily within our sentencing principles geared toward the criminal sanction. But on closer examination, all sentencing approaches cause us to investigate the space, place, and boundaries of the judicial function in the larger sense. Hard cases such as *Saretzky* require us to reconcile the role of the trial judge, who is at once the arbiter of the facts and purveyor of the law whilst also the guardian and representative of the community's fundamental values. Difficult cases challenge us to consider how we today in our truly Canadian context should read the roles and responsibilities of judgeship. Conversations over hard cases help us create and define our legal system. In this instance, we are required to pause and consider whether Justice Tilleman was fulfilling a legally recognized juridical role when he permitted community to speak in this

decision or whether on a strict reading of our legal principles he overcompensated for community when he elevated the crime beyond the worst offence and worst offender nomenclature to describe it as a crime against community (paras 32, 45). It is this hard case that causes us to consider holistically the post-conviction regime set down for us in the *Criminal Code* including the long-term offender and dangerous offender regimes, which offer an alternate determination of long term risk and dangerousness of an offender like Saretzky who is deemed "a lethal harm to his community" (para 43).

The delicate balance of sentencing requires a steady hand; a community needs to heal, needs to feel in some way part of the application and presence of justice for matters happening in their living space. Principles of sentencing recognize this role of community. Yet, balance requires linkage and proportionality, and the sentencing court must fulfill the objectives of sentencing in such a manner that this offender is sanctioned for his actions and for his level of moral culpability or blameworthiness. Certainly, Justice Tilleman was aware of this when he emphasized the "deliberate and intentional conduct" of Saretzky in committing the offences (para 34-35). To fulfill these principles then, the court must, through the "judicial lens", know the offender, the offence and the community.

Sentencing is, in my view along with bail, the most important part of the criminal justice system. Release until proven guilty and meaningful, principled and compassionate sanctioning are the bookends of the *Criminal Code.* Without either, our system will fall. Recently, the spot light has rightly been on the frailties of the justice system with bail as an indicator, like the canary in a coal mine, of the level of crisis facing us. Sentencing principles (*R v Lacasse*, 2015 SCC 64 (CanLII)) and plea negotiations (*R v Anthony-Cook*, 2016 SCC 43 (CanLII)) have received jurisprudential scrutiny but without any real integration into the now widespread discussion of what's wrong with our justice system and how to fix it. Certainly, the *Saretzky* decision is not a prime example of "what's wrong" but it reveals to us where the points of legal inquiry intersect and interface with public confidence and trust in the system. Judges, throughout the trial, make decisions based on the rule of law, and jurors too must confine their decision-making to the parameters of legal principle, which involve the application of common sense and reasonable inferences. However, community, in the fullest sense of the term, is, as Jane Jacobs envisioned it in *Death and Life of Great American Cities*, the legal equivalent of "eyes on the street", that idiomatic second pair of eyes, which takes the form of the *alter ego* of the blindfolded goddess embodied as the community conscience or "community sense of justice". In what form this communal sense or community space unfolds within the halls of justice is a matter for further reflection and consideration. Justice Tilleman in the *Saretzky* decision challenges us to do just that.

This post may be cited as: Lisa Silver "The Creation of Community 'Space' in Sentencing in *R v Saretzky*" (18 August, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/08/Blog_AM_Saretzky.pdf