January 12th, 2008

Taking Violence Against Women Seriously in Sentencing Decisions

By Jennifer Koshan

Cases Considered:
R. v. Diebel, 2007 ABCA 418,
R. v. Douglas, 2007 ABCA 321

In two recent cases, the Alberta Court of Appeal has considered certain forms of violence against women to be an aggravating factor in sentence appeals. While both are memoranda of judgments and thus of lesser weight than reserved reasons for decision, the cases are nevertheless indicative of the Court's resolve to take violence against women seriously.

In *R. v. Diebel*, the Court heard a Crown sentence appeal of a period of 12 years parole ineligibility for a conviction of second degree murder. The respondent Diebel was in an intimate relationship with the deceased, Kelly Quinn, and beat her to death with a hammer following a dispute over alcohol. In a telephone call intercepted by the police while Diebel was in remand awaiting trial, Diebel told his sister that he "would probably do it over again."

At trial, Justice Peter Clark of the Court of Queen's Bench took into account the fact that Diebel suffered from bipolar disorder as a mitigating factor in sentencing. The Court of Appeal (Justices Peter Martin, Adele Kent and Sheilah Martin) disagreed, noting that the respondent had refused treatment for his disorder even though he was aware that this posed a "significant threat to the safety of others." In this regard, the Court cited a previous instance of violent behaviour by the respondent involving a break, enter and assault of two homeowners for which he was found not criminally responsible by reason of mental disorder. Other aggravating factors, according to the Court, included the fact that the murder entailed "some forethought and planning", the respondent having stolen the hammer and thought about killing Ms. Quinn for several days prior, as well as the nature of the killing, which was said to involve "the ambush of an unarmed, unsuspecting woman." Lack of remorse was also seen as aggravating.

Importantly, the Court of Appeal noted the existence of a domestic relationship between the respondent and victim, calling this a "significant aggravating factor" in the view of the courts and Parliament. The latter is a reference to the fact that in 1995 the Criminal Code, R.S.C. 1985, c. C-46, was amended to include the statement that abuse of a spouse or common law partner during the commission of an offence was to be considered an aggravating factor in sentencing (s. 718.2(a)(ii)). Even before this amendment, the Alberta Court of Appeal had articulated this sentencing principle in the case of *R. v. Brown, Umpherville and Highway* (1992), 125 Alberta Reports 150, where domestic violence was held to involve a breach of trust requiring that offenders be treated more harshly by sentencing courts. As noted in a recent essay, the Alberta Court of Appeal "was on the leading edge of case law across the country in its treatment of sentencing for wife assault."1

Overall, the Court in Diebel held that the killing was "near first degree murder", and increased the period of parole ineligibility to 20 years.

The second case, *R. v. Douglas*, was an appeal by the accused of a 25 year period of parole ineligibility imposed by Justice Jack Watson of the Court of Queen's Bench for a conviction of second degree murder. This is the maximum period of parole ineligibility available, and exceeded the Crown's request at trial for a period of "at least 20 years."

The case involved the murder of an Edmonton area prostitute by Douglas, a 56 year old man with a long criminal record for sexual offences against women, girls and boys dating back to 1971. The victim's body was found in Edmonton's International Hotel approximately 6 weeks after she disappeared, and "bore evidence of her having been savagely beaten with a very serious fracture to her skull."

Before the Court of Appeal, the appellant argued that he should be permitted to present fresh evidence relating to his battle with liver disease as a mitigating factor. Writing for herself, Justice Jean Côté, and Justice Darlene Acton, Justice Myrna Bielby rejected this application, finding that the evidence would not reasonably have had an impact on his sentence if it had been presented at trial.

The appellant further argued that the trial judge had placed too much emphasis on deterrence and denunciation, and insufficient emphasis on his prospects for rehabilitation. The Court rejected this argument, stating as follows:

> Victims such as the deceased are among the most vulnerable members of our community. Prostitutes, often motivated by substance addiction, are trapped in lifestyles which put them at particular risk. This victim was no less worthy of the protection of the law than any other. Denunciation and deterrence are just as important in relation to sentencing for this woman's death as in sentencing for any death.

In addition to "the particular vulnerability of the victim", the Court noted other aggravating factors as well: Douglas's long record of violent offences against women and children, the "extreme gratuitous violence" of the killing itself, the fact that "the victim was trapped in the location in which she died", and "the victim impact statements filed by her family members, made all the more poignant by the loss of another family member to the violence of the sex trade." In the end, the Court upheld the 25 year period of parole ineligibility, finding that the trial judge had not erred in imposing the maximum period in all of the circumstances.

While the Court did not mention it in Douglas, s. 718.2 of the Criminal Code was potentially relevant in that case as well, as it provides that

> evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor

is an aggravating factor for sentencing purposes (s. 718.2(a)(1), emphasis added).

It is difficult not to think about the recent Pickton murder trial in the context of the *Douglas* case in particular. Pickton was convicted of the second degree murder of 6 prostitutes from the Vancouver area, and was also sentenced to life in prison with no parole ineligibility for 25 years.

Although Pickton and the Crown have both filed appeals, and Pickton awaits trial on another 20 counts of murder, the families of the victims in this and other cases of violence against women may take some small comfort in knowing that the courts are taking violence against women seriously. That said, there remains much debate about the extent to which harsh sentences will deter violence against women, and the limited role of the courts in this regard was acknowledged in the *Brown* case as follows (at para. 119):

> The phenomenon of repeated beatings of a wife by a husband is a serious problem in our society. It is not one which may be solved solely by the nature of the sentencing policy applied by the courts where there are convictions for such assaults. It is a broad social problem which should be addressed by society outside the courts in ways which it is not within our power to create, to encourage, or to finance. But when such cases do result in prosecution and conviction, then the courts do have an opportunity, by their sentencing policy, to denounce wifebeating in clear terms and to attempt to deter its recurrence on the part of the accused man and its occurrence on the part of other men.

1 Jennifer Koshan and Elizabeth Whitsett, "The Province of Persons: The Alberta Supreme Court and Women's Equality" in Jonathan Swainger, ed., The Alberta Supreme Court at 100: History and Authority (Edmonton, AB: University of Alberta Press and the Osgoode Society for Canadian Legal History, 2007) 297 at 320.