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Blind Justice? Accommodating Offenders with Disabilities

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Case commented on: *R v Myette*, 2013 ABCA 371

To what degree should courts accommodate the circumstances of persons with disabilities whose crimes attract jail sentences? The Alberta Court of Appeal recently divided on this issue in *R v Myette*, 2013 ABCA 371. At the original sentencing hearing, Judge Heather Lamoureux found that a jail sentence would be "unduly harsh" in light of Myette's visual impairment, and ordered a suspended sentence of 18 months for sexual assault and common assault (2013 ABPC 89 at para 16). A majority of the Court of Appeal (Justices Constance Hunt and Jack Watson) found her approach to be erroneous, and substituted a sentence of 90 days in jail, to be served intermittently on weekends. Justice Peter Martin, writing in dissent, would have dismissed the Crown's appeal. This post will review the various decisions in this case with a focus on whether sentencing decisions are the proper forum for accommodating the circumstances of offenders with disabilities.

Myette was convicted after trial for offences involving digital penetration of his sleeping roommate, followed by pushing her into a dresser when she woke up and attempted to resist him. The Crown sought a jail sentence of 18 to 24 months followed by a period of probation. Defence counsel argued that because Myette was legally blind, the normal sentencing range for his offences would be too harsh. He sought a suspended sentence with probation for 2 years, or alternatively, a 90 day intermittent jail sentence.

Judge Lamoureux heard evidence about the extent of Myette's disability, including the fact that he used a guide dog, which had allowed him to live independently since he was 17. She also heard from federal and provincial authorities regarding their policies on accommodation for inmates with visual impairments. A representative from the Calgary Correctional Centre testified that the Centre had a policy for inmates with disabilities, but no specific policy for inmates who were blind. Staff (including caseworkers) had no training for dealing with blind inmates, and prison rules, regulations and computers were not accessible to blind inmates, although reading materials in Braille could be brought in. As a sex offender, Myette would likely be incarcerated in protective custody, which would entail living in a dormitory with 7 other offenders. The court heard that Myette would have to rely on other inmates to help him make his bed and obtain his food. His guide dog would not be permitted into the facility, but Myette would be allowed to use his cane. In terms of physical activity, Myette could use an exercise bike or treadmill along with others in protective custody, all of whom were given limited access to the outdoors. Myette would have access to some programs, but not work programs.

In its sentencing submissions, the defence relied on the United Nations *Convention on the Rights of Persons with Disabilities*, Article 14, which guarantees persons with disabilities the equal

right to liberty and security of the person, and provides that persons with disabilities who are deprived of liberty must be treated in accordance with the objectives of the Convention, including the provision of reasonable accommodation. Judge Lamoureux considered this provision in her interpretation of section 718.2 of the *Criminal Code*, RSC 1985, c C-36, which sets out a number of principles that courts must take into account during sentencing. These include the principles that (d) "an offender shall not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and (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." Judge Lamoureux concluded that "there is nothing even approaching reasonable accommodation in Alberta for Mr. Myette as a blind, accused convicted of sexual assault. If Mr. Myette were to be incarcerated he would be suffering a significant punishment beyond that suffered by other individuals incarcerated in the Corrections system in Alberta" (2013 ABPC 89, at para 15). She ordered "house arrest" and probation for 18 months, which she later clarified to mean a suspended sentence (2013 ABCA 371 at paras 20-22).

The majority decision of the Court of Appeal noted several errors made by the sentencing judge, including her failure to consider the "fundamental principle" of sentencing found in section 718.1, which provides that "a sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender." The majority indicated that consideration of this principle required attention to the Court of Appeal's "many pronouncements on the gravity of a sexual assault involving digital vaginal penetration" (at para 26). The judge also neglected to assess the offender's degree of responsibility, which the majority stated to be "extremely high" (at para 27). While she did review aggravating factors such as the breach of trust and the complainant's unconsciousness during the sexual assault, the judge placed too much emphasis on the offender's personal circumstances, "to the near exclusion of everything else" (at para 28). The sentence was also lacking in reasonable intelligibility given Judge Lamoureux's initial order of "house arrest", apparently an attempt to grant a conditional sentence, which is no longer an option for sexual offences.

Of most significance for this post, the majority of the Court of Appeal found that the sentencing judge made errors in her handling of the issue of accommodation. She did not hear from Myette in terms of his how his needs would be met (or not) in prison, nor the extent to which he relied on his guide dog. She also failed to give sufficient weight to the sections of the pre-sentence report which indicated that Myette "embraced his disability, adapted well to it, [was] never held back as a result; and always welcomed challenges and found ways to overcome obstacles" (at para 31). Moreover, the majority found that the sentencing judge misinterpreted the testimony of the witness from the Calgary Correctional Centre, who had indicated that Corrections policy required an individual assessment of the needs of inmates with disabilities and that accommodation could be provided by staff, volunteers, and family members. The majority disputed the sentencing judge's finding that Myette "would essentially be in solitary confinement with severe restrictions on any kind of movement or access to counseling, services or exercise" (at para 32). They also found errors in her approach to international law, noting that the proportionality principle in section 718.1 of the *Criminal Code* could not be "bypass[ed] … by preferring the language of an international instrument" (at para 34).

Turning to the question of what would be a fit sentence in this case, the majority referenced previous case law establishing that the Crown must accommodate the needs of inmates with disabilities, but that these were issues for the prison authorities rather than the courts (at para 35, citing *R v B(TL)*, 2007 ABCA 61). The disproportionate impact that a jail sentence will have on

an offender with disabilities is a factor to be considered in the length of the sentence, but it cannot displace the imposition of a jail sentence where such a sentence is otherwise appropriate. In the circumstances of this case, the majority found that the offence was serious, the offender's degree of responsibility was high, and there were some aggravating factors present, all of which warranted a jail sentence. They indicated that it was appropriate to start with a sentence of 18 months imprisonment for the sexual assault with 1 month concurrent for the common assault, which would be lowered in recognition of the "greater challenges" that Myette would have in prison because of his disabilities (at para 39). They also gave credit for the time that Myette had already spent under house arrest as a condition of his suspended sentence, which was 7 months. Taking all of these factors into account, the majority substituted a sentence of 90 days imprisonment, to be served intermittently over weekends, along with 12 months of probation with several conditions.

In a brief dissenting judgment, Justice Martin indicated that this was a "truly exceptional case, deserving of an individualized sentence outside of the established range" (at para 44). He agreed with the majority that the sentencing judge had made several errors, but in spite of that, would have dismissed the Crown's appeal. He disagreed with the majority that further evidence of the impact of jail on the offender was required, noting that:

> [48] A totally blind man such as the respondent would be unable to make his way around his new surroundings, read signs, or see another prisoner approaching him. He would be completely defenseless and at the mercy of other prisoners and his keepers to help him perform even the most basic of daily functions. That is particularly so as the respondent would not have the assistance of his guide dog on whom he has come to depend for the past 10 years.

Justice Martin also distinguished *R v B(TL)*, a case relied on by the majority, as it involved an inmate in a wheelchair, for whom incarceration would not have the same adverse impact as a blind person (at para 49).

Commentary

This case reflects one of the challenges of sentencing, namely that once a sentence is pronounced the matter is generally out of the hands of the court and into the hands of corrections. In that context, I agree with the gist of the decision of the majority. In cases involving offenders with disabilities where imprisonment is an appropriate sentence, the primary duty to accommodate is held by corrections officials. To find otherwise would be to relieve the Solicitor General, who is responsible for corrections, from the duty to ensure that prison facilities adequately accommodate the needs of inmates with disabilities. Although sentencing judges cannot order corrections officials to accommodate particular offenders at the time of sentencing, this duty exists independently of such an order by virtue of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), and in the case of federal prisons, the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*). The *AHRA* and CHRA bind governments, and provide that services such as corrections facilities must not discriminate on the basis of disability. Section 15 of the *Charter* is another source of governments' duty to accommodate inmates with disabilities.

This is not to say that judges should disregard disabilities at the stage of sentencing. If a

sentencing judge believes that a custodial sentence will have a disproportionate impact on an offender with disabilities regardless of accommodation by corrections, that impact should be considered as a factor during sentencing. In this sense, the duty to accommodate offenders with disabilities may extend to sentencing judges as well. The majority and dissenting justices seem to agree with this approach generally, but differed on the degree of weight they accorded to the impact of incarceration on Myette and the evidence they required to establish that impact (as well as what the impact might actually be).

There may be other cases where the offender's disability is not just an issue related to the disproportionate impact of incarceration, but was also a factor in the commission of the offence – for example, if the offence was influenced by an addiction-related disability. In those cases, it may be appropriate to consider the offender's disability in crafting an appropriate sentence. This approach would be consistent with section 718.1 of the *Criminal Code*, which requires assessment of proportionality in terms of the gravity of the offence and degree of responsibility of the offender.

While sentencing judges cannot make binding orders with respect to how offenders will serve their custodial sentences, they can make recommendations relating to appropriate accommodations by corrections facilities. Corrections would be well advised to follow those sorts of recommendations to avoid complaints under human rights legislation or the *Charter*.