Case Name:
R. v. Ratt

Between
Her Majesty the Queen, and
Tracy Ida Ratt

[2012] S.J. No. 590

2012 SKPC 154

Saskatchewan Provincial Court
La Ronge, Saskatchewan

F.M. Daunt Prov. Ct. J.

September 24, 2012.

(57 paras.)

Counsel:

Robert Lane, Q.C., for the Crown.

Alice Robert, for the Accused.

JUDGMENT

1 F.M. DAUNT PROV. CT. J.:-- Tracy Ida Ratt entered guilty pleas to charges of impaired driving, assaulting peace officers, and breach of undertaking. At issue is what sentence she should receive for the offence contrary to section 270(1) of the *Criminal Code*. This case is primarily about the risk of transmitting disease through spitting, and whether that should be considered an aggravating factor in sentencing. It also discusses the purpose, objectives, and principles of sentencing to be applied in arriving at a fit sentence in this particular case.

I. FACTS

2 On May 8, 2012, Ms. Ratt had consumed a quantity of alcohol and possibly some unknown drug. At around 10:40 p.m., Constable Hawkins observed her red SUV take an extremely wide turn while exiting the Motor Inn. The vehicle swerved, sped up and slowed down, and almost went off the road. The vehicle stopped at Eddie's parking lot. Constable Hawkins observed the accused exit

the driver's side of the vehicle and stumble into the vehicle parked next to hers. Constable Hawkins approached the accused and asked her for her name. The accused replied she was driving her friends so they were safe. The accused showed several signs of impairment. Constable Hawkins informed the accused she was under arrest for impaired operation of a motor vehicle.

3 The accused was not cooperative. She had to be forced into handcuffs behind her back. She was placed in the back seat of the police vehicle, where she began kicking and screaming. She refused to provide her name. Bystanders identified her for the police officer. She refused to answer questions about whether she understood her rights and warning. She began banging her head on the "silent patrolman" - the barrier between the front and back seats - saying she was going to knock herself out. She banged her head and kicked and screamed all the way back to the detachment.

4 In the cell block she kicked Constable Halstead in the leg and had to be taken to the floor. She cried uncontrollably, paced, sat on the floor, and otherwise acted bizarrely. She began spitting at members. The police put a mask over her face to prevent this. She continued this behaviour for some time.

5 In the breathalyzer room, she seemed to cooperate and put her mouth on the mouthpiece. Constable Hawkins let her guard down. Ms. Ratt looked at her and spit in her right eye. She was then controlled and had her handcuffs removed and was placed in a cell.

6 Constable Hawkins "had to attend the hospital to speak with a doctor on the risk of receiving a communicable disease" (PSR, p. 7). According to Crown submissions, she had to wait two weeks to find out if she had contracted a disease. As for Constable Halstead, although he suffered no long-term effects from the assault on him, he was very concerned for the health of his partner because of the perceived risk of communicable diseases.

7 For her part, the accused volunteered a blood sample to assist in determining the risk of infection. She also wrote a letter of apology to the officers, which was delivered in Court on August 30th. She sold her vehicle as a result of the impaired driving incident.

8 The accused was released on an undertaking pending sentencing, with the condition that she not consume alcohol. On June 6, 2012, she breached that undertaking by consuming alcohol. She was arrested without incident.

9 As for her history and personal circumstances, the accused is 36 years old and has no previous criminal record.

10 In her younger years, she was raised at her family's trap line, living a traditional Cree lifestyle.

11 She is a residential school survivor, having suffered both physical and sexual abuse. This has resulted in an anger that, although kept below the surface, has never gone away or been treated. Understandably, she seems to have an issue with authority figures, especially female authority figures. Because of this, she has only a grade 9 education.

12 She had her first child when she was fifteen years old. This child is now employed at the McArthur Mine. Her fourteen year old son lives with his father, and she shares custody of the four year old. Her children have never been apprehended, and her sister says that she is "an excellent mother".

13 She has four living siblings. Her younger sister Melissa passed away in 2005. Her four year old is also called Melissa.

14 She admitted having a cocaine addiction up until four years ago, but did not think she had a problem with alcohol until the events of May 8th. She denies voluntarily taking any illicit drugs on that date.

15 She was immediately and genuinely remorseful. In all of her Court appearances, she has presented as penitent, with her head bowed. It would appear that the events of May 8th were completely out of character for her. It may be that she was suffering from a drug or alcohol-induced psychotic breakdown at the time.

16 It appears that the events of May 8th and June 6th have been a turning point for the accused. She is now staying away from her "party friends". She is beginning to open up to her sister, who has been a strong, sober support for her. She has begun dealing with her addictions issues as well as her personal issues. She attended La Ronge Detox of her own volition.

17 According to the Pre-Sentence Report, the accused is a low risk to re-offend; 87% of offenders in Saskatchewan have more risk factors than the accused. This risk can be reduced by services targeting the factors of employment, academic and vocational skills, alcohol use, and peers and companions. These services are, for the most part, available in La Ronge.

18 As of June 11th, when the Pre-Sentence Report was submitted, Pinegrove Correctional Centre was at capacity for all their programming.

II. PROCEDURAL HISTORY

19 On May 10, 2012, at her first appearance in custody, Tracy Ida Ratt entered guilty pleas to the following summary conviction offences:

> On or about the 8th day of May A.D. 2012 at La Ronge in the Province of Saskatchewan did:
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> Count 1:
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> While her ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to section 253(1)(a) of the *Criminal Code*.
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> Count 4:
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> Did assault Constable Matthew Halstead and Constable Christina Hawkins, peace officers engaged in the execution of their duty contrary to section 270(1) of the *Criminal Code*.

20 The Crown withdrew counts 2, 3, and 5 in Information 24462361.

21 Crown took the position that on the impaired driving, the accused should receive the minimum fine and driving prohibition. On the charge of assaulting peace officers, though, Crown took the position that Ms. Ratt should be given three months custody, in part because of the perceived risk of serious disease inherent in spitting in someone's eye. The Court inquired as to what that risk actually was, i.e., was there one single documented case of a police officer contracting a serious communicable disease from being spit on by a suspect. Sentencing was adjourned to allow counsel to research this issue, and for receipt of a Pre-Sentence Report.

22 As Ms. Ratt posed no danger to the public, the Crown immediately agreed to her release pending sentencing. Sentencing was adjourned to June 14, 2012.

23 On June 6, 2012, Ms. Ratt breached the condition of her undertaking that she not possess or consume alcohol. Again she was held in custody. The next morning she entered a guilty plea to the summary conviction offence under section 145(3). Again the Crown agreed to her release pending sentencing.

24 On June 14th, the Pre-Sentence Report was ready, but counsel needed more time to research the risk issue. Sentencing was again adjourned to August 30th. On that date counsel made further submissions. Crown now takes the position that Ms. Ratt should receive six months in custody. Defence maintains its position that Ms. Ratt should be given a non-custodial sentence.

25 The case was adjourned for decision to September 24, 2012. Neither counsel referred to the SKCA case of *R. v. Charlette*, 2010 SKCA 78, which is very similar to this case. The Court invited further submissions regarding the application of that case to the present one, to be filed in writing before September 13th. Defence counsel filed a written response on September 13th. Crown counsel did not file further material by the deadline.

III. ISSUES

26 Essentially, the Crown argues as follows: Ms. Ratt should be given the maximum sentence of six months because other offenders have recently been given six months for spitting on officers in this and one other northern jurisdiction. The Crown relies on the written decision of Judge Morin in *R. v. McLeod*, 2009 SKPC 85 and the cases cited therein as establishing a range of six months or greater for the offence of spitting on a peace officer. The Crown points out that, even though Ms. Ratt seemed to be suffering from some kind of psychotic episode, the act of spitting in Constable Hawkins' eye was calculated and deliberate. The Crown concedes that the risk of transmitting HIV or Hepatitis C is negligible to zero through saliva. However, they proffer the anecdotal evidence of Corporal Morgan Steel about an incident that happened in 2001 in Whitehorse, Yukon to show that the dangers of spitting are real. Crown also relies on section 718.02, especially on the principle of general deterrence. Crown says there is an "epidemic" of spitting on police officers, and we need to make an example of this accused to deter others from also spitting on police officers.

27 Defence, on the other hand, points to Ms. Ratt's immediate and genuine remorse, her full cooperation in relieving Constable Hawkins' health anxiety, her early guilty plea, her voluntary efforts at her own rehabilitation, her low risk to re-offend, and her compelling "*Gladue* factors", in justifying a non-custodial sentence. Defence points out that other offenders in this jurisdiction have received non-custodial sentences, including a conditional discharge for similar offences.

IV. ANALYSIS

a. Risk of Transmitting Disease as an Aggravating Factor

i) Evidence of risk of transmitting HIV or Hepatitis C

28 The Crown tendered the following information from Dr. James Irvine, our local Medical Health Officer. According to him, these are the risks of transmission of blood-borne pathogens, including HIV, Hepatitis C and Hepatitis B:

* Saliva/sputum: unless there is visible blood is considered as negligible risk of transmission

* Saliva exposure to mucous membranes has a negligible risk

* Saliva exposure on intact skin (ears, face, etc.) is negligible risk

* Saliva exposure (without visible blood) on non-intact skin (cut, abrasion, etc.) negligible risk

* Blood spatter directly on mucous membranes (inner nose, mouth) from an individual with HIV has a risk of transmission of about 0.09% (so about 1/1000 risk) though blood exposure on intact skin (ears, face, etc.) is negligible risk.

29 Specifically regarding HIV, defence submitted the article "The Transmission of HIV: Exploring Some Misconceptions Related to Criminal Justice" (CJPR, Vol. 4, No. 4, 12/90 pp. 288-305). Author Mark Blumberg has this to say on the issue [citations omitted]:

> A common misconception regarding HIV transmission is the belief that persons who interact with offenders as part of their occupational duties are at risk of infection. Despite this concern, several national surveys indicate that not a single police officer, prison guard or any other person working in the criminal justice system has become infected as a result of his or her employment.
>
> ...
>
> The Human Immunodeficiency Virus has been isolated in the saliva of some infected persons. Nonetheless, there is strong evidence indicating that transmission of the virus through spitting is highly improbable. For one thing, laboratory tests have revealed that HIV is present in the saliva of very few infected persons. Second, when the virus is present, it is in such minute quantity that transmission to another person would be extremely difficult. It has been estimated that one quart of saliva would have to enter the bloodstream of an individual for infection to occur. Third, HIV does not pass through intact skin. Unless a seropositive person spit directly upon an open sore, transmission could not occur even if the virus were present in sufficient quantity (which it is not) in saliva. Finally, studies of individuals living in households where persons with AIDS reside have reported no cases of viral transmission as a result of casual non-intimate interaction. This is in spite of the fact that many of these family members shared plates, silverware, toothbrushes, and other items likely to have become contaminated with saliva from the infected individual.
>
> ...
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> To date, there are no documented cases of HIV transmission as a result of either a bite or spitting incident. In fact, the risks associated with saliva are so minimal that the Centers for Disease Control no longer recommend that universal body

> fluid precautions be followed when contact with saliva is anticipated. Nonetheless, the courts occasionally treat these incidents as extremely serious matters. Recently, a prison inmate in New Jersey was given a sentence of 25 years for biting a correctional officer. This kind of response by the justice system sends the wrong message to both the public and to persons who must interact with seropositive offenders; it incorrectly implies that assaults of this nature present a serious risk of viral transmission. Offenders who assault correctional officers should be punished. However, it should be made clear that this action is being taken in response to the offender's behaviour and not because there is a danger of HIV transmission.

30 On the facts of this case, it is clear that Ms. Ratt posed no risk to the health of Constable Hawkins. Therefore, the risk of transmission of life-threatening disease is not an aggravating factor for the purposes of sentencing. The real problem is the "health anxiety" of the affected officer.

ii) Evidence of risk of transmitting other infections

31 Crown tendered an email from Corporal Morgan Steel in support of the proposition that spitting can transmit disease. She was involved in an incident in 2001 in Whitehorse, Yukon, in which a female detainee spit in her eye. She went to the hospital and had her eye thoroughly flushed. She worried that there might be a "health crisis" in her future. Two weeks later, she began to develop symptoms in her eye and, after a misdiagnosis, discovered that she had a "herpetic infection, now considered to be chronic in nature". She believes that this condition was caused by the spitting incident. This has affected her life in a fundamental way, and continues to affect her life. Because the female detainee refused to be tested for communicable diseases and refused to divulge any information about her health, there is no way to prove that she caused Corporal Steel's infection.

32 Because I am unfamiliar with this type of eye infection, and because neither counsel provided any information about it, I took the liberty of doing some research on it. The following information is quoted from "Herpes Simplex Virus in the Eye," by Deborah Pavan Langston, M.D., FACS, Massachusetts Eye and Ear Infirmary, Harvard Medical School, September 13, 2012, published in the Digital Journal of Ophthalmology:

> **What is Herpes simplex?**
>
> Herpes simplex (or just "Herpes") is another name for the "cold sore" virus. It commonly causes local blisters and scabbing around the mouth and nose but occasionally infects the eye where, unlike the skin, it may cause scarring or chronic inflammation. The cold sore virus is a different strain of herpes than the one associated with sexually transmitted disease; ocular herpes is not an STD. Cold sores, however, no matter where they occur, may come back. Factors that may cause recurrence are generally stress related such as fever, major dental or surgical procedures, sunburn (ultraviolet light), and trauma.
>
> **How does herpes get INTO the eye?**

> The source of infection is usually a family member or friend who is silently shedding virus in the saliva or nasal secretions, or who has an active cold sore. When the virus first enters the body, usually through the nose or mouth, it travels through the nerves up to the same center which ... sends nerves to the eye. There it goes to sleep in an inactive infection state and may never reawaken. Occasionally, the virus does reactivate (stress!) and, instead of travelling back down the nerves to the mouth or nose, it goes to the eye causing the illness there.

33 The majority of the population carries the cold sore virus. It is impossible to tell whether the spitting incident caused Corporal Steel's illness, whether she caught the virus from a friend or family member, or whether other stresses caused a flare-up of a dormant condition.

34 In short, there is no evidence before this Court of any documented, verifiable transmission of any disease to a police officer in a spitting incident.

35 I want to be clear that I am in no way trivializing the well-being of police officers or minimizing the very real risks they face on a daily basis. They have an extremely stressful job. But I see many victim impact statements from police officers outlining the intense anxiety they and their families feel when they believe they are at risk for contracting a life-threatening illness because of contact with saliva. Evidence shows that this fear is not justified. When we in the justice system perpetuate this myth without question, without evidence of the risk, without any fact-based analysis, we are feeding into this irrational anxiety. This makes the job of the police officer more difficult and more stressful than it needs to be.

b. Section 718.02

36 Section 718 outlines the fundamental purpose of sentencing, which is "to contribute... to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions" that have one or more of several objectives. Section 718 then lists several objectives of sentencing, including denunciation and deterrence. Apart from the objectives, there are several principles of sentencing, beginning with the fundamental principle in section 718.1: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Other principles deal with aggravating and mitigating circumstances, totality, parity, restraint, and especially relevant in this case, the principle that all available sanctions other than jail should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

37 Section 718.02 of the *Criminal Code* states as follows:

> When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

38 Denunciation and deterrence are two of the six listed objectives of sentencing. Although the sentence should be primarily designed to achieve those two objectives, the principles of sentencing, such as the *Gladue* factors, must still be addressed in crafting a fit sentence.

39 Parliament chose the phrase "primary consideration" and not "sole consideration". This is in contrast to the *Divorce Act* (R.S.C., 1985, c. 3 (2nd Supp.)) subsection 16(8), which dictates that the

Court, when dealing with child custody, "shall take into consideration **only** the best interests of the child" [emphasis added]. Thus other sentencing objectives remain relevant.

40 Furthermore, unlike the impaired driving offences, Parliament chose not to impose a mandatory minimum sentence for the offences listed in section 718.02. Thus Parliament must have intended some flexibility remain in sentencing for the offence of assaulting a peace officer, in light of the individual circumstances of the offender and the offence.

41 Denunciation and deterrence appear in the objectives of sentencing listed in section 718. The next subsection, 718(c), deals specifically with incarceration of offenders by separating them from society "where necessary". Parliament does not dictate that the only sentence that can denounce unlawful conduct and deter the offender and others from committing offences must necessarily be a sentence of incarceration. The Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61 has said that a conditional sentence served in the community can have a denunciatory and deterrent effect. In other words, denunciation and deterrence are not synonymous with a sentence of incarceration.

42 In Ms. Ratt's case, I find there is no need for any further specific deterrence. Given her remorse and the steps she has taken since the date of the offence, I am confident that she will never do anything like this again.

43 Sentencing is an individualized process, and what deters one from committing crimes may not deter another. Certainly a jail sentence has no guaranteed deterrent effect, either on any particular offender or on the general public. Many studies have shown that the harshness of the penalty has little to no deterrent effect on the general public. The Crown cited several recent cases where an offender has been given jail time for spitting on a police officer. Those sentences have certainly not stopped the "epidemic" of spitting cases. It will certainly not stop or even diminish assaults on peace officers if Ms. Ratt were sentenced to six months in jail.

44 Those who get arrested on a regular basis know the police are terrified of getting spit on. That's why they do it. They use that fear against the officers. A detainee can threaten a police officer, he can try to hit him, and not bother that officer one bit. So if a detainee can put the fear of death into an officer simply by spitting on him or her, he is going to do it. In other words, these spitting incidents are increasing *because of* the fear. If we want to deter suspects from spitting on police officers, we need to educate these officers about the real risks involved, and not perpetuate their anxiety by repeating urban myths.

45 As far as denunciation is concerned, Ms. Ratt has already been thoroughly denounced by sitting in Court and listening to Crown submissions. She has been shamed by the very process that brings her to Court. She has taken full responsibility for her actions. In other words, she knows that she did a bad thing.

c. Other Sentencing Principles

i) Proportionality

46 The fundamental principle of sentencing is proportionality. The sentence must be proportionate to the gravity of the offence. While spitting on a peace officer is a degrading act, it is not life-threatening. The sentence must also be proportionate to the degree of responsibility of the offender. Ms. Ratt was not a rational, thinking being that night, and seemed to be suffering from a

drug or alcohol induced psychosis. This diminishes the degree of responsibility she must bear. If she were sober and rational, and coldly committed the same act, her level of responsibility would be much greater.

ii) Aggravating and Mitigating Factors

47 It is not nice to kick someone; it is vile to spit in their eye. Spitting is designed to humiliate and degrade the victim. Although the amount of force used is minimal, it is a disgusting thing to do. It is not, however, life-threatening. Also aggravating in this case is the deliberate nature of the spitting assault. These are the only aggravating factors.

48 The mitigating factors, however, are many and varied. The whole episode was out of character for her. She was not herself that night. She fully cooperated in alleviating Constable Hawkins' health anxiety by voluntarily giving a blood sample. She was immediately remorseful. She has apologized to the officers. She got rid of her car. She is getting help for the issues that led to the incident. In short, she has done everything in her power to make things right.

49 She is a product of the residential school system, which helps explain some of the events of May 8th. Thus her moral blameworthiness is somewhat diminished, in the sense described in *R. v. Ipeelee*, 2012 SCC 13.

50 Furthermore, she entered guilty pleas at the first available opportunity and maintained them, even when the Crown doubled her jeopardy by doubling the amount of jail time they sought. She has not missed a Court appearance. She has been respectful. She has been maintaining sobriety. She is not a danger to the public. She is a low risk to re-offend. She spent five days in remand.

iii) Parity

51 The Crown relies mainly on *R. v. McLeod*, 2009 SKPC 85, to justify a sentence of six months in jail. In that case, as in this one, the accused was intoxicated. He spat into the eye of a police officer and struggled to resist arrest. However, Mr. McLeod had a lengthy previous record of offences including seven convictions for violence and two related to violence. Furthermore, he had six breaches of court orders on his record, including breaching a previous conditional sentence order. In that case, the only issue was whether the accused should receive actual jail time or a further conditional sentence order. Also, with great respect to my colleague Judge Morin, the case perpetuates the myth of the life-threatening nature of a spitting assault. Ms. Ratt, on the other hand, comes before this Court with no previous record. She has done all she can to make amends to the affected officers. She personally needs no further deterrence from similar conduct.

52 The cases cited in the *McLeod* decision can also be distinguished on the basis that all of the offenders had lengthy criminal records. The sentence in *R. v. S. (E.)*, 2001 SKCA 38, is not available to this Court, as the Crown proceeded by summary conviction. Again, the accused there had 31 previous convictions. That case involved someone known to have Hepatitis C and involved contact with blood. In *R. v. Pine*, 1998 SKCA 49, the accused, who also had a lengthy criminal record, including violence, received only five months for his spitting assault, one month less than the Crown is seeking in this case. As that case was at the Court of Appeal, again the Court must have been dealing with indictable offences to have jurisdiction to hear a sentence appeal. In *R. v. Playford*, 1992 SKCA 25, the accused had his sentence reduced to six months on appeal. Again he

had a lengthy criminal record including violence. Again, the Crown must have proceeded by indictment.

53 The other unreported cases cited by the Crown all involve accused who are well known to this Court and have lengthy criminal records. There are other unreported cases out of this jurisdiction where accused have received fines, conditional discharges, conditional sentences and shorter terms of incarceration. Many of these charges are dealt with through alternative measures, with the result that the accused are not sentenced at all.

54 The closest case on the facts to this one is the case of *R. v. Charlette*, 2010 SKCA 78. In that case, the accused, who had a minor youth record, pled guilty to one count of assault and six breaches of judicial interim release contrary to section 145 of the *Criminal Code*. As the appeal was heard at the Court of Appeal and not at the Court of Queen's Bench, I assume that the Crown proceeded by indictment on the charges. Ms. Charlette spat twice into a constable's face and once on his clothing while she was being placed in police cells. She continued spitting as police tried to lock the cell door. She told the police she had a "contagious disease" and said "maybe he should go get checked out". She refused to provide access to her medical records. Only after the constable embarked on a series of treatments and tests did she grant access to her medical records. While she was on interim release, Ms. Charlette repeatedly failed to comply with the curfew and alcohol clauses. She did not accept that she had done anything wrong. She acted out at the sentencing hearing. The original sentence was nine days time served and six months probation. She did very poorly while on probation. The Court of Appeal increased her sentence to sixty days to be followed by six months probation.

55 The facts of this assault are similar to the case of Ms. Ratt. In contrast to Ms. Charlette, however, Ms. Ratt has done everything she can to make amends. She has abided by her undertaking since June. She is remorseful. In other words, the Court of Appeal imposed a sentence of 60 days on Ms. Charlette because of her attitude. Ms. Ratt's attitude could not be more different.

V. CONCLUSION

56 I find that the objectives of denunciation and deterrence have been met in Ms. Ratt's case by the five days she has already spent in custody. It is not necessary to separate her from society by sending her to jail. She is not a danger to the public. She is a low risk to re-offend. She has made amends for her crime as best she could. She could, however, use some help in her future rehabilitation.

57 I find a just sanction in this case for the offence of assaulting a peace officer is five days time deemed served in custody followed by six months probation. In addition to the statutory terms, she will be required to report to a probation officer. She will be prohibited from possessing alcohol or drugs. She will take alcohol and drug abuse counselling and treatment, and personal counselling as directed. She will be prohibited from entering bars except for employment purposes, and she will be required to seek and maintain employment or participate in educational programming.

F.M. DAUNT PROV. CT. J.

cp/e/qlcct/qllmr