Her Majesty the Queen v. Lindsay

Her Majesty the Queen v. Bonner

[Indexed as: R. v. Lindsay]

97 O.R. (3d) 567

Court of Appeal for Ontario,
MacPherson, Cronk and MacFarland JJ.A.
June 30, 2009

2009 ONCA 532 (CanLII)

Charter of Rights and Freedoms -- Fundamental justice -- Overbreadth -- Criminal organizations -- Sections 467.1 and 467.12 of Criminal Code not unconstitutionally overbroad nor vague -- Charter of Rights and Freedoms, s. 7 -- Criminal Code, R.S.C. 1985, c. C-46, ss. 467.1, 467.12. [page568]

Criminal law -- Criminal organization -- Whether accused committing offence "in association with" criminal organization when not making explicit reference to membership in organization -- Accused attempting to extort money from victim while wearing Hells Angels clothing and symbols and threatening that five other guys who were "the same kind of mother fuck as I am" would come to victim's house if he did not pay up -- Accused not required to have made explicit references to Hells Angels in order to be convicted of extortion in association with criminal organization -- Accused deliberately invoking their membership in Hells Angels with intent to inspire fear in victim.

Criminal law -- Sentencing -- Accused attempting to extort $75,000 from victim -- Accused threatening victim with violence and deliberately invoking his membership in Hells Angels with intent to inspire fear in victim -- Victim and his family

suffering devastating consequences -- Trial judge not erring in sentencing accused to four years and four months' imprisonment in addition to credit of 20 months for pre-trial custody.

The accused were members of the Hells Angels Motorcycle Club. They approached the victim while wearing jackets with the Hells Angels logo, demanded that he pay them $75,000 to cover an alleged debt and threatened him with bodily harm. The victim went to the police and, at their direction, arranged to meet the accused L while wearing a body pack. B drove to the restaurant with L, but waited outside. L was wearing Hells Angels clothing at the meeting. L told the victim that if he did not pay up, he would send "five other guys that are fucking the same kind of mother fuck as I am" to his house. The accused were charged with extortion and extortion for the benefit of, or at the direction of, or in association with, a criminal organization. They challenged the constitutionality of ss. 461.1 and 467.12 of the Criminal Code, alleging that those provisions, and in particular the words "the facilitation" in s. 467.1 and "in association with" in s. 467.12, are unconstitutionally overbroad and vague. The trial judge dismissed the constitutional challenge and convicted the accused. They appealed their conviction. L also appealed his sentence of four years and five months in jail, in addition to a credit of 20 months for pre-trial custody, arguing that the trial judge placed undue emphasis on the fact that the extortion was committed in association with a criminal organization.

Held, the appeal should be dismissed.

The trial judge did not err in finding that ss. 461.1 and 467.12 of the Code are not impermissibly vague and/or overbroad. The role of vagueness and overbreadth must not be overstated in constitutional analysis. Both concepts have been interpreted narrowly and carefully and have rarely resulted in legislation being invalidated.

The word "facilitation" and the phrase "in association with" are common and well-understood, both in ordinary parlance and in a legal context. These phrases are used elsewhere in the

2009 ONCA 532 (CanLII)

Code. Several other courts across Canada have examined these sections and found that they were constitutional. "Facilitation" means the act of aiding or helping, and in a criminal context, the act of making it easier for another person to commit a crime. "In association with" requires that the accused commit a criminal offence in connection with the criminal organization.

The trial judge did not err in finding that in order to be convicted of the criminal organization offence, the accused were not required to do something active to associate themselves with the Hells Angels beyond wearing its symbols, nor were [page569] they required to explicitly state that they were acting on behalf of the Hells Angels. The accused deliberately presented themselves as members of Hells Angels by their attire, and by L's words, knowing that the group had a well-known reputation for violence and intimidation. It was a reasonable inference that L intended to communicate that he would send other members of the Hells Angels to the victim's home unless he paid. The accused deliberately invoked their membership in the Hells Angels with the intent to inspire fear in the victim.

L's sentence of four years and for months of imprisonment, in addition to his 20 months of pre-trial custody, was not unfit. By virtue of s. 718.2(a)(iv) of the Code, the fact that the offence was committed in association with a criminal organization was an aggravating factor. The family had to obtain secure identity changes, requiring them to permanently sever ties with their friends and other family members. The victim's wife had to leave her job and her career prospects. They still live in fear. In light of evidence of the devastating effects of the extortion by members of the Hells Angels on the victim's family, the trial judge did not overemphasize the statutory aggravating factor. The trial judge did not err in refusing to give L credit for time spent on bail subject to strict conditions. Stringent pre-trial bail conditions must be considered when formulating a sentence, but they do not necessarily require that a shorter sentence be imposed.

2009 ONCA 532 (CanLII)

Cases referred to

Cochrane v. Ontario (Attorney General) (2008), 92 O.R. (3d) 321, [2008] O.J. No. 4165, 2008 ONCA 718, 179 C.R.R. (2d) 310, 242 O.A.C. 192, 170 A.C.W.S. (3d) 508, 61 C.R. (6th) 374, 301 D.L.R. (4th) 414; Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, [1995] S.C.J. No. 62, 125 D.L.R. (4th) 385, 183 N.R. 325, J.E. 95-1497, 82 O.A.C. 243, 99 C.C.C. (3d) 97, 17 C.E.L.R. (N.S.) 129, 41 C.R. (4th) 147, 30 C.R.R. (2d) 252, 27 W.C.B. (2d) 485; R. v. Couture, [2007] J.Q. no 13091, 2007 QCCA 1609, J.E. 2007-2324, EYB 2007-126227, [2007] R.J.Q. 2566 [Leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 58]; R. v. Downes (2006), 79 O.R. (3d) 321, [2006] O.J. No. 555, 208 O.A.C. 324, 205 C.C.C. (3d) 488, 37 C.R. (6th) 46, 69 W.C.B. (2d) 12 (C.A.); R. v. Heywood, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101, 120 D.L.R. (4th) 348, 174 N.R. 81, J.E. 94-1938, 50 B.C.A.C. 161, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133, 24 C.R.R. (2d) 189, 25 W.C.B. (2d) 438; R. v. Joseph, December 18, 2006, Montreal, Doc. No. 500-01-004704-059 (Que. S.C.); R. v. Lindsay (2004), 70 O.R. (3d) 131, [2004] O.J. No. 845, [2004] O.T.C. 224, 182 C.C.C. (3d) 301, 20 C.R. (6th) 376, 117 C.R.R. (2d) 41, 61 W.C.B. (2d) 64 (S.C.J.); R. v. Malmo-Levine, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, 2003 SCC 74, 233 D.L.R. (4th) 415, 314 N.R. 1, [2004] 4 W.W.R. 407, J.E. 2004-131, 191 B.C.A.C. 1, 23 B.C.L.R. (4th) 1, 179 C.C.C. (3d) 417, 16 C.R. (6th) 1, 114 C.R.R. (2d) 189, 59 W.C.B. (2d) 116; R. v. Panday (2007), 87 O.R. (3d) 1, [2007] O.J. No. 3377, 2007 ONCA 598, 228 O.A.C. 160, 226 C.C.C. (3d) 349, 51 C.R. (6th) 126, 76 W.C.B. (2d) 148, 163 C.R.R. (2d) 152; R. v. Smith, [2006] S.J. No. 184, 2006 SKQB 132, 280 Sask. R. 128, 69 W.C.B. (2d) 744; R. v. Terezakis, [2007] B.C.J. No. 1592, 2007 BCCA 384, 245 B.C.A.C. 74, 223 C.C.C. (3d) 344, 51 C.R. (6th) 165, 75 W.C.B. (2d) 20 (C.A.) [Leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 487]; R. v. Ward, [2008] O.J. No. 5743, [2008] C.L.B. 15134 (S.C.J.); Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, 175 D.L.R. (4th) 193, 241 N.R. 1, J.E. 99-1277, 124 B.C.A.C. 1, 135 C.C.C. (3d) 129, 25 C.R. (5th) 1, 63 C.R.R. (2d) 189, 42 W.C.B. (2d) 381

2009 ONCA 532 (CanLII)

Statutes referred to
Canadian Charter of Rights and Freedoms, s. 7 [page570]
Criminal Code, R.S.C. 1985, c. C-46, ss. 83.03 [as am.], 83.04(a) [as am.], 83.18(2) [as am.], 83.19 [as am.], 83.21 [as am.], 83.23 [as am.], 186(1.1) [as am.], 186.1 [as am.], 230(a), 231(6.1) [as am.], 244(2)(a) [as am.], 346 [as am.], 467.1 [as am.], 467.11 [as am.], 467.12 [as am.], 467.13 [as am.], 467.14 [as am.], 718.2(a)(iv) [as am.]

APPEAL from the convictions entered by Fuerst J., [2005] O.J. No. 2870, 2005 CanLII 24240 (S.C.J.) for extortion and extortion in association with a criminal organization, and from a sentence.

Philip Campbell, Steven Skurka and Jonathan Dawe, for appellant Lindsay.

James Lockyer, for appellant Bonner.

Jennifer Woollcombe and Howard Leibovich, for respondent.

The judgment of the court was delivered by

MACPHERSON J.A.: --

A. Introduction

[1] The appellants, Steven Lindsay and Raymond Bonner, appeal their convictions for extortion and extortion for the benefit of, or at the direction of, or in association with, a criminal organization, namely, the Hells Angels. The main focus of the appeals is a constitutional challenge to ss. 467.1 and 467.12 of the Criminal Code, R.S.C. 1985, c. C-46, which provide:

467.1(1) The following definitions apply in this Act.

"criminal organization" means a group, however organized, that

(a) is composed of three or more persons in or outside

2009 ONCA 532 (CanLII)

Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

. . . . .

467.12(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, or at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(Emphasis added)

[2] The appellants contend that these provisions, and in particular the words "the facilitation" in s. 467.1 and "in association with" in s. 467.12, violate s. 7 of the Canadian Charter of Rights and Freedoms because they are both vague and overbroad. [page571]

B. Facts

(1) The parties and events

[3] The appellants are members of the North Toronto chapter of the Hells Angels Motorcycle Club.

[4] On January 23, 2002, they went to the Barrie home of M.M., a dealer in black-market satellite television equipment, and demanded that he pay them $75,000 to cover an alleged debt arising from an earlier sale. The appellants threatened M.M. with bodily harm. Both men were wearing jackets bearing the Hells Angels logo, though M.M. only realized this when they turned their backs and walked away from his house.

[5] M.M. reported the encounter to police. At their direction, M.M. arranged through an intermediary to meet Lindsay at a local restaurant on January 31, 2002. He agreed to wear a body pack to record the encounter. Bonner came to the restaurant with Lindsay, but waited in the truck while Lindsay

2009 ONCA 532 (CanLII)

went inside. Lindsay wore boots with the words "Hells Angels North Toronto" and the death head logo, a belt bearing the words "Hells Angels" embroidered on it and a death head on its buckle, a t-shirt bearing the death head logo and the words "Hells Angels Singen", and a necklace with a pendant of the Hells Angels death head logo. Bonner wore a jacket bearing the Hells Angels death head logo and the words "Hells Angels East End" and a black t-shirt bearing two death heads and the words "Hells Angels First Anniversary".

2009 ONCA 532 (CanLII)

[6] Inside the restaurant, Lindsay threatened M.M. He reminded him that if he did not get his money back, his days were numbered, that he was in trouble, that he was lucky to be standing there, that Lindsay would send people to his house and that the money belonged to Lindsay and "five other guys that are fucking the same kind of mother fuck as I am".

[7] The appellants were arrested in the parking lot outside the restaurant. A variety of other items related to the Hells Angels, including telephone lists for various club chapters, were found on Lindsay's person and in the truck.

[8] The appellants were each charged with one count of extortion (s. 346 of the Code) and one count of extortion for the benefit of, or at the direction of, or in association with, a criminal organization (s. 467.12 of the Code). Bonner was also charged with breaching a recognizance.

(2) The trial

[9] The trial proceeded before Fuerst J., sitting without a jury.

[10] The appellants brought a pre-trial motion challenging the constitutionality of s. 467.1 (definition of a "criminal organization") [page572] and s. 467.12 (committing an offence "in association with" a criminal organization), arguing that these provisions violate Charter s. 7 principles against overbreadth and vagueness. [See Note 1 below]

[11] The trial judge dismissed the motion: R. v. Lindsay (2004), 70 O.R. (3d) 131, [2004] O.J. No. 845, 182 C.C.C.

(3d) 301 (S.C.J.). She held that the legislation was not overbroad and that the phrases "criminal organization" and "in association with" were not impermissibly vague, whether taken individually or in combination.

[12] The trial commenced and continued for 49 days. At its conclusion, the trial judge found the appellants guilty of all charges.

[13] On August 24, 2005, the trial judge sentenced Bonner to one year and four months in jail, after giving credit for 20 months in pre-trial custody. On September 9, 2005, she sentenced Lindsay to four years and four months in jail, after giving credit for 20 months of pre-trial custody.

[14] Both appellants appeal their convictions. In addition, Lindsay appeals his sentence.

C. Issues

[15] The issues on the appeal are:

(1) Did the trial judge err by concluding that ss. 467.1 and 467.12 are not impermissibly vague and overbroad?
(2) Was the trial judge's conclusion that the appellants committed the extortion in association with the Hells Angels Motorcycle Club unreasonable?
(3) Did the trial judge err by sentencing Lindsay to a jail term of four years and four months?

D. Analysis

(1) The constitutional issue

[16] There is no doubt that the principles of fundamental justice enshrined in s. 7 of the Charter protect against both vague and overbroad laws. The concepts of vagueness and overbreadth [page573] were well-described by Cory J. in R. v. Heywood, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101, 94 C.C.C. (3d) 481, at p. 792 S.C.R., p. 516 C.C.C.:

> Overbreadth and vagueness are different concepts, but are sometimes related in particular cases . . . . [T]he meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is

2009 ONCA 532 (CanLII)

vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

[17] There is also no doubt that s. 7 of the Charter and the protection embedded in it against vague and overbroad laws are engaged in this appeal. That is because a conviction under s. 467.12 of the Code can result in imprisonment, as it did in this case.

[18] The appellants contend that ss. 467.1 and 467.12 are both vague and overbroad. They single out "the facilitation" in s. 467.1 and "in association with" in s. 467.12 as phrases that trigger vagueness and overbreadth concerns. They submit that the effect of these words is that s. 467.12 of the Code creates "a fundamentally standardless offence".

[19] For several reasons, I do not accept this submission.

[20] First, it is important not to exaggerate the role of the vagueness and overbreadth principles in Canadian constitutional jurisprudence. They exist, they are regularly invoked by litigants unhappy with certain laws, but the reality is that they are rarely applied by the courts to invalidate federal or provincial laws. The reason for this is the careful and narrow way these principles have been defined in the case law.

[21] Thus, overbreadth exists only if the adverse effect of legislation on individuals subject to it is grossly disproportionate to the state interest the legislation seeks to protect or achieve: see R. v. Malmo-Levine, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at para. 143. This test, as Sharpe J.A. noted recently, "clearly incorporates a substantial measure of deference to the legislature's assessment of the risk to public safety and the need for the impugned law": Cochrane v. Ontario (Attorney General) (2008), 92 O.R. (3d) 321, [2008] O.J. No. 4165 (C.A.), at para. 31.

2009 ONCA 532 (CanLII)

[22] Similarly, a law should be declared impermissibly vague only if it does not provide a "basis for legal debate and coherent judicial interpretation . . . . [i]f judicial interpretation is possible, then an impugned law is not vague": Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, [1995] S.C.J. No. 62, 99 C.C.C. (3d) 97, at para. 79. [page574] It follows that there is "a relatively high threshold" for potential application of the vagueness principle to an impugned law: Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, 135 C.C.C. (3d) 129, at para. 68.

[23] Second, the word "facilitation" and the phrase "in association with" are common and well-understood, both in ordinary parlance and in a legal context. This was a central point in the trial judge's ruling on the constitutional issue. In R. v. Lindsay (2004) she wrote, at paras. 58 and 59:

> The word "facilitate" also has a clear meaning. It is defined in The Concise Oxford Dictionary (10th ed.) to mean, "make easy or easier". Black's Law Dictionary (7th ed.) indicates that the word "facilitation" has a recognized meaning in the context of criminal law, as follows: "The act or an instance of aiding or helping; esp., in criminal law, the act of making it easier for another person to commit a crime";
>
> . . . . .
>
> The phrase "in association with" is not impermissibly vague. The phrase is intended to apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group. The Oxford English Dictionary (10th ed.) defines the phrase "associate oneself with" to mean, "allow oneself to be connected with or seen to be supportive of". The phrase "in association with" requires that the accused commit a criminal offence in connection with the criminal organization.

I agree with this reasoning.

[24] On this point, I also highlight the similar reasoning,

2009 ONCA 532 (CanLII)

with which I also agree, of Ewaschuk J. in another case involving a constitutional challenge to ss. 467.1 and 467.13 of the Code, R. v. Ward, [2008] O.J. No. 5743, [2008] C.L.B. 15134 (S.C.J.), at paras. 6 and 7:

> As for the word "facilitation", I am satisfied that it does not give rise to a "standardless sweep". Instead, it is a common English word which means to aid someone, to make a matter easier for someone to do. In this sense, it constitutes an intelligible standard and is not disproportionate to its legitimate legislative purpose.
>
> As for the expression "in association with", I am satisfied that it means that the offence instructed must be done in connection with the criminal organization and not for the instructor's personal benefit alone unrelated to that of a criminal organization. I find that the expression "in association with" is a limiting expression and constitutes an intelligible standard which is not disproportionate to its legitimate legislative purpose.

[25] Third, there are a variety of sections of the Criminal Code in which the concept of "facilitation" and the phrase "in association with" are utilized: see, for example, ss. 83.03, 83.04(a), 83.18(2), 83.19, 83.2, 83.21 and 83.23 (terrorism offences); 186(1.1) and 186.1 (wiretap authorizations); 230(a) and 231(6.1) [page575] (murder); 244(2)(a) (discharging a firearm); and 718.2(a)(iv) (sentencing).

[26] It might be contended that this is a bootstrap point, that there is no link between the number of times a word is employed in a law and whether the word is vague or overbroad. I do not agree. In my view, the resort by Parliament to the words "facilitation" and "facilitating" and the phrase "in association with" in diverse sections of the Criminal Code underlines the second point above in my analysis, namely, that the words at issue in these appeals truly are common and well-understood.

[27] Fourth, the constitutionality of ss. 467.1, 467.12 and 467.13 has been considered by several courts across the

2009 ONCA 532 (CanLII)

country, including the British Columbia Court of Appeal. In these cases, the courts have held that these provisions are not vague or overbroad: see R. v. Terezakis, [2007] B.C.J. No. 1592, 223 C.C.C. (3d) 344 (C.A.), leave to appeal refused [2007] S.C.C.A. No. 487; R. v. Ward, supra; R. v. Smith, [2006] S.J. No. 184, 280 Sask. R. 128 (Q.B.); and R. v. Joseph, December 18, 2006, Montreal, Doc. No. 500-01-004704-059 (Que. S.C.). Moreover, the predecessor of s. 467.1, which also employed the phrase "in association with", survived many constitutional challenges on vagueness and overbreadth grounds, including one in the Quebec Court of Appeal: see R. v. Couture, [2007] J.Q. no 13091, 2007 QCCA 1609, leave to appeal refused [2008] S.C.C.A. No. 58.

[28] A review of the reasoning in these cases leads to an obvious point: it is not surprising that the Supreme Court of Canada has twice refused leave to appeal to enable it to consider constitutional challenges to s. 467.1 and related subsections of the Criminal Code (both the current version and its predecessor); there is simply no serious vagueness or overbreadth issue with respect to these provisions.

[29] Fifth, I do not accept that the use of the word "facilitation" and the phrase "in association with" in ss. 467.1 and 467.12 will inevitably mean that the innocent actions of some persons may be swept into the net of criminal charges.

[30] In my view, the trial judge responded to this submission in an appropriate fashion in R. v. Lindsay (2004), at para. 59:

> Whether the particular connection is sufficient to satisfy the "in association with" requirement will be for a court to determine, based on the facts of the case. It is not necessary for the legislation to set precise parameters on the relationship between the accused and the criminal organization. There is a risk zone for criminal sanctions delineated.

[31] Precisely the same point was made by McLachlin J. in Winko, supra, at para. 68: [page576]

2009 ONCA 532 (CanLII)

> Laws must of necessity cover a variety of situations. Given the infinite variability of conduct, it is impossible to draft laws that precisely foresee each case that might arise. It is the task of judges, aided by precedent and considerations like the text and purpose of a statute, to interpret laws of general application and decide whether they apply to the facts before the court in a particular case. This process is not in breach of the principles of fundamental justice; rather, it is in the best tradition of our system of justice.

2009 ONCA 532 (CanLII)

[32] Indeed, the process described by the trial judge and by McLachlin J. has already been employed by Canadian courts with respect to the interpretation of s. 467.12 of the Code. For example, the trial judge interpreted s. 467.12 as a specific intent offence, stating in R. v. Lindsay (2004), at para. 64:

> [T]here is an implicit requirement that the accused committed the predicate offence with the intent to do so for the benefit of, at the direction of, or in association with a group he/she knew had the composition of a criminal organization . . . .

Similarly, in Terezakis, supra, Chaisson J.A. interpreted s. 467.12 as having a knowledge component, stating, at para. 60:

> [I]n a prosecution for an offence under ss. 467.11, 467.12 or 467.13, the Crown would be obliged to establish that the accused had knowledge of the criminal main purpose or activity of the group.

In my view, interpretations like these assist in creating a clear intelligible standard for citizens and law enforcement personnel.

[33] For these reasons, I conclude that ss. 467.1 and 467.12 of the Criminal Code are not impermissibly vague and overbroad. Accordingly, they do not infringe s. 7 of the Charter.

(2) The application of s. 467.12 of the Code

[34] The appellants contend that there were fundamental flaws in the trial judge's reasoning leading to her conclusion that they committed the offence of extortion "in association with"

the Hells Angels. They also submit that her verdict on these charges was unreasonable.

[35] The core of the trial judge's reasons on this issue is contained in paras. 1084-1089 of the trial judgment:

> I am unable to agree with the defence submission that to be convicted on the evidence in this case, the accused must have done something "active" to associate themselves with the organization, beyond wearing its symbols, or that the fact that Mr. M. did not see the HAMC emblem until Mr. Lindsay and Mr. Bonner turned around indicates that they did not intend to invoke the organization's symbols.
>
> The "in association with" element is established by the evidence of the manner in which Mr. Lindsay and Mr. Bonner chose to portray themselves to Mr. M. I have found that on January 23, 2002, both Mr. Lindsay and Mr. Bonner went to Mr. M.'s house wearing jackets bearing the primary symbols of the HAMC, the name "Hells Angels" and the death head logo. In [page577] so doing, they presented themselves not as individuals, but as members of a group with a reputation for violence and intimidation. Only full members of the organization could wear its symbols. It is a reasonable inference and one that I draw, that Mr. Lindsay and Mr. Bonner were each well aware of the implications of their choice of attire.
>
> On January 31, 2002, for their meeting in a public place, Mr. Lindsay chose to wear less overt garb, but nonetheless he was attired in paraphernalia displaying his connection to the HAMC. This included boots with the words "Hells Angels North Toronto" and the death head logo on the foot. Mr. Bonner waited outside in a vehicle, wearing the same jacket as on January 23.
>
> Mr. Lindsay told Mr. M. on January 31 that if he did not receive a sufficient amount of money each month, he would send "people" to Mr. M.'s house, and that the money sought was his and five other "guys" who were "the same kind of mother fuck as I am". It is a reasonable inference and one

2009 ONCA 532 (CanLII)

that I draw, that Mr. Lindsay intended to communicate that he would send other members of the Hells Angels to Mr. M.'s home.

Both Mr. Lindsay and Mr. Bonner were full members of the HAMC at the time. Mr. Lindsay was a particularly committed member, who kept various chapter cards in his possession, used his chapter's clubhouse as his address on his driver's licence, travelled to other HAMC venues and spent time with other members, and wore front rockers bearing the names of other influential Canadian chapters on his colours. Mr. Bonner had graduated from the position of prospect to become a full member. It is a reasonable inference and one that I draw, that both men were well aware of what the organization was about, including its composition and characteristics, globally and specifically as it existed in Canada and in Ontario. In particular, both men knew the HAMC's reputation for violence and intimidation. They deliberately invoked their membership in the HAMC with the intent to inspire fear in their victim. They committed extortion with the intent to do so in association with a criminal organization, the HAMC to which they belonged.

The Crown has established the element of "in association with" beyond a reasonable doubt.

[36] The appellants assert that the following facts belie this analysis: the appellants did not make explicit reference to the Hells Angels in their conversations with M.M., the Hells Angels clothing they wore to the two meetings was simply their ordinary attire and a proper analysis of the circumstances surrounding the two meetings should have cast doubt on their intent to link their criminal activities with the criminal organization to which they belonged.

[37] I disagree. The trial judge carefully and comprehensively reviewed all the relevant evidence. She made factual findings and drew inferences that were well-grounded in the record. I can see no error in her analysis and conclusion in the passage set out above. Put bluntly, the trial judge's reasoning on this issue was impeccable and her conclusion is

2009 ONCA 532 (CanLII)

the antithesis of unreasonableness. [page578]

(3) Lindsay's sentence

[38] The appellant Lindsay appeals his sentence of four years and four months in prison, after giving credit for 20 months (ten months on a 2:1 basis) of pre-trial custody.

[39] Lindsay acknowledges that, by virtue of s. 718.2(a)(iv) of the Code, evidence that the offence was committed in association with a criminal organization is an aggravating factor on sentencing. However, he contends that the trial judge overemphasized this factor.

[40] Again, I disagree. The effects of the extortion by members of the Hells Angels on M.M.'s family have been devastating. As described by the trial judge in her reasons for sentence:

> The wife of Mr. M. provided a victim impact statement, in which she described the devastating impact of the events on the members of the M. family, including the children. They were compelled to leave their home on the sudden, and ultimately to obtain secure identity changes. They were required to relinquish their identities, move away from family and friends, forego all contact with them, and in Mrs. M.'s case, abandon her job and career prospects. In Mrs. M.'s words, "we live in isolation from the rest of society". Fear is their constant companion.

Against the backdrop of this sad description, it would be wrong to say that the trial judge overemphasized the statutory aggravating factor.

[41] Lindsay also takes issue with this passage of the trial judge's reasons for sentence:

> I am unable to agree with defence counsels' submission that Mr. Lindsay and Mr. Bonner should receive credit against any period of incarceration for the time they have been on judicial interim release bound by strict conditions. The offenders are not youthful, nor has there been inordinate delay in the imposition of sentence, as in R. v. P. (L.)

2009 ONCA 532 (CanLII)

(2003), 172 C.C.C. (3d) 195 (Ont. C.A.) and R. v. Ewanchuk (2002), 164 C.C.C. (3d) 193 (Alta. C.A.).

[42] Lindsay contends that this passage is inconsistent with the decision of this court in R. v. Downes (2006), 79 O.R. (3d) 321, [2006] O.J. No. 555, 205 C.C.C. (3d) 488 (C.A.), wherein Rosenberg J.A. stated, at para. 33, "time spent under stringent bail conditions, especially under house arrest, must be taken into account as a relevant mitigating circumstance".

[43] I do not accept this contention. To begin, I observe that Downes was not released until shortly after the sentences were imposed in this case. Moreover, the trial judge did consider Lindsay's bail as a mitigating circumstance:

> There are mitigating factors . . . . I take into account that he has been bound by strict conditions of judicial interim release for 33 months, without incident. [page579]

[44] In addition, I point out that in Downes, in the passage immediately after the words relied on by Lindsay and quoted above, Rosenberg J.A. continued [at para. 33]:

> However, like any potential mitigating circumstance, there will be variations in its potential impact on the sentence and the circumstances may dictate that little or no credit should be given for pre-sentence house arrest.

[45] Finally, it should not be forgotten that bail is the opposite of incarceration. Accused persons almost always seek bail in order to stay out of jail until their trial: see R. v. Panday (2007), 87 O.R. (3d) 1, [2007] O.J. No. 3377, 226 C.C.C. (3d) 349 (C.A.), at para. 31. Accordingly, although judges must consider bail on stringent conditions as a potential mitigating factor, it does not follow that credit in the form of a reduced sentence should always be given.

[46] Taking these factors together, I see no error in the trial judge's treatment of Lindsay's pre-sentence bail circumstances.

E. Disposition

2009 ONCA 532 (CanLII)

[47] I would dismiss the appellants' conviction appeals. I would also dismiss Lindsay's sentence appeal.

Appeal dismissed.

Notes

Note 1: The appellants also challenged the constitutionality of s. 467.14, which provides that sentences for offences under ss. 467.11, 467.12 and 467.13 shall be served consecutive to any other sentence for an offence arising from the same event or series of events. The trial judge reserved her ruling on s. 467.14 to the end of the trial, at which time she dismissed the challenge. The appellants do not appeal this ruling.

2009 ONCA 532 (CanLII)