IN THE SUPREME COURT OF BRITISH COLUMBIA HER MAJESTY THE QUEEN AGAINST JULIO CASTRO ANDINO

Counsel for the Crown: D.L. Fitzsimmons

Counsel for the Defence: D.S. Schofield

Place and Date of Hearing: Campbell River, B.C. May 8, 1998

[1] In reasons dated March 27, 1998, I found Mr. Castro-Andino guilty of arson pursuant to s. 434 of the Criminal Code of Canada. That section provides for a maximum term of imprisonment of fourteen years. The arson, which occurred on August 29, 1997, was of the bighouse at Alert Bay, British Columbia.

[2] At the sentence hearing, victim impact statements were tendered, Chief William T. Cranmer spoke about the bighouse, Mr. Castro-Andino addressed the Court and counsel made their submissions.

[3] The Crown referred to *R. v. Johnson* (D.K) (1996), 84 B.C.A.C. 261 for the principles to be applied in sentencing and to support its position that retribution, as distinguished from vengeance, is still an integral element. Madam Justice Ryan adopted the reasoning from *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at 557 that:

> Retribution in a criminal context, by contrast, [to vengeance], represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender and the normative character of the offender's conduct.
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> ... the meaning of retribution must be considered in conjunction with the other legitimate objectives of sentencing, which include (but are not limited to) deterrence, denunciation, rehabilitation and the protection of society. Indeed, it is difficult to perfectly separate these interrelated principles.

[4] Crown counsel referred to *R. v. Petropoulos* (W.) (1995), 61 B.C.A.C. 79 to illustrate that the range of sentence for "insurance fires is something of the order of two to three years." He suggested that this branch of arson is less demanding of a lengthy sentence than is an offence in the nature of the case at bar.

[5] The Crown cited *R. v. Deen* (R.A.) (1997), 99 B.C.A.C. 46 wherein Mr. Deen torched the Ward Music store in Victoria. The fire caused the unemployment of staff, destroyed cherished and rare instruments and caused loss of business and profits to the company. The trial judge imposed a sentence of four years.

[6] On appeal Southin J.A. said (p. 55) that the sentence would have been appropriate before the enactment of s. 718 of the Criminal Code of Canada but not after. That section articulates the "fundamental purpose of sentencing" and the objectives thereof. She concluded that the objective of having the offender back in society as a contributing member outweighed the fact that it was a "most serious property crime." The sentence was reduced from four years to two years.

[7] Crown counsel submitted that the nature of the loss to the native community should be taken into account as an aggravating factor. He supplied the Court with 24 victim impact statements and called Chief Cranmer to give oral evidence. All of these testified as to the cultural and personal losses suffered by the community and by the individuals. Mr. Fitzsimmons emphasized the "great cultural significance" of the loss, that the bighouse was "not just a building, not just a gathering place, but rather a cultural icon." He said that the "offence was designed to destroy a cultural heritage."

[8] Crown counsel, by reference to *R. v. Johnson (D.K.)*, adopted the principle that "sanctions must be strictly proportionate to the culpability of a person and the seriousness of the offence for which the person has been convicted." He acknowledged the paramountcy of s. 718 of the Criminal Code that says that the purpose of sentencing is to attain "just sanctions" and that certain principles, including the following, are to be taken into consideration:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion ...

shall be deemed to be aggravating circumstances.

[9] Defence counsel said that these provisions were designed to govern hate crimes and submitted that where, as here, the bias was directed not by the offender but at him, that this section should apply to make the aggravating circumstances mitigate in his favour. Crown counsel disagreed. He contended that using racially prejudiced actions by the Band to mitigate the sentence would be applying the civil concept of contributory negligence.

[10] Defence counsel cited several cases wherein the sentences were of about eighteen months. *R. v. Ahrens*, June 4, 1991, B.C.C.A. Victoria Registry No. V01397, involved the arson of a motor vehicle. The charge was under s. 436 carrying a maximum five year sentence. Mr. Justice Lambert noted that it was "a lesser offence than the offenses under ss. 433 and 434 in the usual case."

[11] In the case at bar, Crown counsel submitted that the appropriate range of sentence is four to five years, to be reduced to take into account time already served. This would make for a sentence of between thirty and forty months. Defence counsel said that an appropriate range of sentence, after taking into account time served, would be "time served" up to a maximum of eight months.

CONCLUSIONS

[12] I am of the opinion that Mr. Castro-Andino's actions were motivated by the worst of intentions, that is revenge. He deliberately punished the whole of the native community for the actions of some of its members.

[13] It was a planned event. Whether or not it was the container from the Rowell premises that was used by Mr. Castro-Andino is of no importance. What is significant is that he was carrying a container, that he was in the vicinity of the bighouse and that he had no good reason to be in that area or to have a red plastic container. Consequently, I do not accept the contention of defence counsel that Petropoulos (W.) is distinguishable because it is a case involving "a lot of planning."

[14] Furthermore, as noted by Crown counsel, Mr. Castro-Andino started the fire between a wall and a 500 pound propane tank, the place most likely to result in total destruction of the bighouse. It was an unconscionable act for which he has shown no remorse. He still asserts his innocence but the judgment of this Court is not in accord with those assertions. His remarks to the Court suggest that he has not yet been deterred from resorting to illegal means to satisfy his ends. Specific deterrence must therefore be an element in the sentence.

[15] I accept the sentiments of those members of the native community who expressed their sorrow and sense of loss. No one can deny the importance of the bighouse to the Namgis people. Fortunately, the building can be replaced although the artifacts and the cultural aura attached to the bighouse cannot. It must be hoped that the younger generations will soon revive the traditions attached to the destroyed building and, in doing so, will soften the loss to the community and its members.

[16] Defence counsel submitted that Mr. Castro-Andino's act was carried out while he was in a drunken state. However, in the circumstances of this case that is not open to be found in his favour as a mitigating factor. The arson took planning and deliberation, the product of a thinking mind.

[17] Defence counsel supplied the Court with newspaper coverage of my reasons for conviction of March 27, 1998. In the article Chief Patrick Alfred is quoted as calling for a judicial apology for what I said commencing on page 30:

> ... Unfortunately, the Band showed significant racial bias against Mr. Andino and this continued at all times relevant to this case. Generally speaking the Band rejected Mr. Andino as a person with whom they wanted to associate and he was given clear notice of this by some members. This rejection was not on the basis of lack of merit in the person of

> Mr. Andino, but rather because he was a non-native on native land. [He is from El Salvador.]
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> ... Here was a man who had been a better "parent" than had the mother. Yet, apparently because of his origins, he was unacceptable to the Band. The Band even went so far as to lay a complaint [of trespass] with the R.C.M.P. that resulted in his arrest.
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> It will now be up to the community to look inward and consider whether or not its actions were a contributing factor in the loss of a significant portion of their heritage.

[18] Those comments recorded the racial bias that emerged in the evidence. There was no challenge to that evidence. Indeed, one of the Crown witnesses expounded his racial views in giving evidence, which evidence I rejected in part because of that bias.

[19] I find that the manner in which Mr. Castro-Andino was treated by some members of the native community was a factor in motivating him to commit the crime. This is not a finding that the native community or any of its members share any criminal responsibility. It is a balancing of the aggravating factors in sentencing against the mitigating factors. I reject the submission that I should not take it into account in the sentence.

[20] Further in Mr. Castro-Andino's favour is his conduct as a "father" to the children of Ms. Patskovski. This suggests that, in accordance with the philosophy of s. 718, there is a possibility that Mr. Castro-Andino will become a contributing member of society upon his release from prison.

[21] I brought *R. v. Quigley* (March 2, 1998), Victoria V03027, (B.C.C.A.) to the attention of counsel. This case involves the arson of a dwelling house. The charge was brought under s. 433 which provides for a life sentence. The Court noted that the trial judge had rightly emphasized the planned nature of the offence and the need for deterrence and denunciation. The arson, as in the case at bar, was a single incident. The eight year sentence was reduced to five years.

[22] On the basis of the facts in the case at bar, the case precedents, the sentencing principles and the aggravating and mitigating factors, I am of the opinion that a fit sentence is three and a half years less the eighteen months already served. I therefore sentence Mr. Castro-Andino to a further two years less one day incarceration.

"Thackray, J."