R. v. Jackson, 2018 ONSC 2527 - Summary

R. v. Jackson, 2018 ONSC 2527 (CanLII)
by Léo Fugazza

In the sentencing decision of R v. Jackson, Justice Nakatsuru of the Superior Court of Justice, took judicial notice of the difficulties faced by African Canadians, and the systemic discrimination that has lead to their over-incarceration. His Honour stopped short of ruling that the background of African Canadiasn should automatically be taken into account, such as with Indigenous people (something that Robyn Maynard made a case for in her book Policing Black Lives), the decision is an important recognitions of the need to look at the context of racism in sentencing.

This important judgement tackles the issue of race factors on sentencing, here particularly for being Black in Canada.

On systemic factors, Justice Nakatsuru rejects the proposal to extend the Gladue approach, applicable to Indigenous offenders, to African Canadians. (par. 55-60) (see footnote 1 of the judgment for the use of the term) However, after distinguishing both R. v. Borde, 2003 CanLII 4187 (ON CA), and R. v. Hamilton and Mason, 2004 CanLII 5549 (ON CA), he notes the Supreme Court's larger reasoning in Gladue on the significance that ss. 718 and 718.2(e) of the Criminal Code, emphasizing their remedial role against over-incarceration. (par. 75-79) This leads him to take judicial notice of various factors particular to African Canadians.

At par. 82, he states: "I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration. [...]" He then supports this judicial notice in law. (par. 83-92). Of note is par. 86: "Taking judicial notice of the historical and systemic injustices committed against African Canadians and African Canadian offenders is preferable to a strict adherence to the traditional rules of evidence which will only serve to advantage the status quo. The offender should not be burdened with the requirement to bring such evidence, usually in the form of expert evidence, to their sentencing when these social and historical facts are beyond reasonable dispute."

On individual factors, he refuses to make Impact of Race and Culture Assessments presumably required. He leaves the process at the judges discretion: "[The parties] may or may not prepare an IRCA or a similar report. A sentencing judge may or may not require further information. There is no one right way to go about determining a fit and proportionate sentence for an African Canadian offender." (par. 100)

These factors are to be taken into consideration on sentence in the manner provided in par. 105-110, especially to avoid inadvertent discrimination through the use of "neutral" criteria, and to evaluate the moral culpability of the offender. However, they do not push (based on the factual evidence tendered in this case, though this could be different in the future) for alternative, culturally-specific sanctions. (par. 113-114)

It remains to be seen how this judgement will be used by defense attorneys and sentencing judges. It is however a potentially powerful tool to address systemic wrongs suffered by African Canadians.

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