THE LAWYER'S DAILY

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Family

Battered woman syndrome: Appeal court halves murder sentence

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(January 19, 2022, 2:06 PM EST) --

As we discussed in the first article of this series, the Alberta Court of Appeal strongly affirmed "battered woman syndrome" as a mitigating principle in sentencing women who kill their abusive partners.

R v. Nalsund 2022 ABCA 6 was a very unusual case in that defence counsel for Helen Doris Naslund in the lower court had entered into a plea agreement under which an 18-year sentence was imposed, and yet, with different counsel, she sought to set it aside on appeal. In its decision, the Court of Appeal thoroughly reviews the mitigating factors underlying conventional sentencing principles. In the end, the court concluded that the 18-year sentence was "… a significant departure from what a fit sentence would be based on conventional sentencing principles and is, at minimum, "demonstrably unfit."

However, the court further concluded that, as the threshold to meet the "public interest" test was higher, further consideration was warranted. In this regard, the Court of Appeal found that "the 18-year joint submission … [was] so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances … to believe that the proper functioning of the justice system had been broken down [and] as a result, it must be rejected" (para. 173).

The majority of the appellate court suggested that Naslund may well have been acquitted at trial on the basis of self-defence, or because she lacked the intent for murder. They suggested there was "professional ambivalence" of trial defence counsel in failing to bring the battered woman syndrome front and centre (paras. 139, 140), and, in the result, the sentencing judge fell into outdated and stereotypical thinking:

> [140] Without this concept of "battered woman syndrome" front and centre, the sentencing judge assessed Ms. Naslund's actions on the basis of the kind of stereotypical thinking Lavallee [*R v. Lavellee*, [1990] 1 S.C.R. 852] sought to avoid. The sentencing judge suggested that Ms. Naslund had "other options" open to her, implicitly the option to walk out the door. This failed to appreciate that Ms. Naslund felt psychologically trapped — other options were not open to her, at least in her own mind. As the Agreed Statement of Facts itself explained, "… due to the history of abuse, concern for her children, depression and learned helplessness, she felt she could not leave".
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> [141] For the sentencing judge to suggest that battered women have "other options" is to invoke a stereotype that a battered woman stays in a situation of domestic violence by choice, either because "she was not as badly beaten as she claims or she would have left the man long ago" or "if she was battered that severely, she must have stayed out of some masochistic enjoyment of it": *Lavallee*, 873. *Lavallee* debunked this type of thinking over 30 years ago in recognizing the effects of battered woman syndrome. It is impermissible and outdated thinking to suggest that women who are unable to leave situations of domestic violence remain by choice, and such thinking could not help but have influenced the lens through which the joint submission was viewed in this case.

The majority of the Alberta Court of Appeal underscored that proportionality was the key sentencing principle in cases regarding battered women, and that the principle

of deterrence was of diminished significance. Battered woman syndrome must be taken into account as a mitigating factor in sentencing.

In the result, the majority of the appellate court agreed with appellate defence counsel that the 18-year sentence was unduly harsh and found it to be demonstrably unfit as it was an unreasonable departure from the sentencing principle of proportionality. It brought the administration of justice into disrepute and was contrary to the public interest. Sentencing Naslund afresh, the majority considered the aggravating factors of her post-offence conduct, including the indignity to a human body, and causing the RCMP to waste time and resources, and sentenced her to nine years.

R v. Naslund is an important case focusing on domestic violence. Further to the amendments to the *Divorce Act*, RSC 1985, c 3 (2nd Supp.), which expanded the context of family violence beyond physical violence by acknowledging a pattern of behaviour aimed at controlling a family member or causing fear, *R v. Naslund's* thorough review of criminal cases and principles is a milestone and will advance the legal understanding of domestic violence in the courts. Media interest in the Naslund case since the original sentencing, and in particular, following the release of the recent Court of Appeal decision, underscores the importance of the manifestations of domestic violence and its consequences for public policy.

This is the second of a two-part series. Read part one: Battered woman syndrome: Correcting the stereotype.

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