

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacLennan*, 2016 NSPC 85

Date: 2016-11-07

Docket: 2933999

Registry: Pictou

Between:

Her Majesty the Queen

v.

Nicholas Andrew MacLennan

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	7 November 2016, in Pictou, Nova Scotia
Charge(s):	Para. 348(1)(b) of the <i>Criminal Code</i>
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Hector MacIsaac for Nicholas Andrew MacLennan

By the Court:

[1] The court has for sentencing Nicholas Andrew MacLennan. Mr. MacLennan is before the court, having entered a guilty plea to a single count of para. 348(1)(b) of the *Criminal Code*—breaking into a dwelling. That matter is a straight indictable offence. Mr. MacLennan elected to have his trial dealt with in this court and entered a guilty plea on 21 June 2016. Sentencing was adjourned for the preparation of a pre-sentence report. The victim declined to file an impact statement.

[2] Para. 348(1)(d) of the *Criminal Code* states that:

348.(1) Every one who

...

(b) breaks and enters a place and commits an indictable offence therein,

...

is guilty

(d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life.

[3] The facts which the court heard from the prosecution in accordance with ss. 723 and 724 of the *Code* and accepted as accurate by defence counsel are that on 24 November 2015, Constable Kyle Lesko of the New Glasgow Regional Policing

Service responded to a 911 call of a break and enter into a residence in the north end of New Glasgow. The caller reported to police that someone had entered his home and assaulted him with a hammer.

[4] Constable Lesko headed to the site of the complaint right away, accompanied by a forensic identification specialist. Police observed that the window of the front door of the home had been damaged and there were shards of glass on an interior floor.

[5] Police interviewed the occupant of the home; it was he who had called 911 and who was the victim of what turned out to have been a home invasion. The victim described being home and asleep in his bed. He told police that he had had the lights turned off and his room was dark. He was trying to get some shuteye in preparation for working backshift at a local supermarket.

[6] The victim informed police that he had been awakened by the sound of breaking glass. He stated that he got up out of bed to investigate the sound. As he entered the hallway of his home, he was confronted by Mr. MacLennan.

[7] The victim described Mr. MacLennan as holding a hammer in his hand. Mr. MacLennan demanded to know the whereabouts of a Mr. L. The victim replied that he had no idea where to find Mr. L. Mr. MacLennan then grabbed the

victim's wrist and neck. The victim described Mr. MacLennan as waiving his hammer and demanding that the victim give up Mr. L., or he would "beat [the victim's] head in."

[8] Mr. MacLennan threatened to kill the victim; he then said to the victim, "You remember that Eddy Phalen? Well, you don't want that happening to you. Right?" Mr. Phalen was an individual who lived in Trenton and who was shot and killed some years back on a street outside his home. I have been informed by the prosecution that this shooting remains under investigation. I wish to point out at once that there is absolutely no evidence before the court that Mr. MacLennan is connected in any way to that homicide.

[9] Mr. MacLennan then proceeded to demand money of the victim. Mr. MacLennan told the victim that if he did not cough up cash, he was going to get hit with the hammer.

[10] Mr. MacLennan told the victim, "I am not here to rob anyone. I am here to collect."

[11] The victim estimated that his confrontation with Mr. MacLennan lasted approximately six minutes. The victim stated that after six minutes he observed another male entering the doorway. That male asked Mr. MacLennan if

everything was alright. Mr. MacLennan turned to this unknown male and advised him to wait outside in the car.

[12] Mr. MacLennan warned the victim, “Tell L. that I am fucking looking for him.” Mr. MacLennan drove off in an SUV.

[13] The victim informed police that the encounter with Mr. MacLennan had left him frightened and rattled.

[14] On 26 November 2015, the victim identified Mr. MacLennan positively in a *Sophonow*-compliant photo lineup, and Mr. MacLennan was arrested by the New Glasgow Policing Service later on that day.

[15] Mr. MacLennan was *Charter* notified and cautioned. He provided a voluntary statement to Detective Constable Bruce MacPhee. Mr. MacLennan told Detective Constable MacPhee that it was he, in fact, who owed Mr. L. \$1,000 for 12 grams of cocaine that he had bought from Mr. L. a few weeks earlier. Mr. MacLennan told the investigator that he had paid a portion of the drug debt, but that Mr. L. was placing pressure on him to pay the balance.

[16] Mr. MacLennan went on to state to the detective that on 24 November 2015, he had gone to a local lounge with a friend. While drinking, Mr. MacLennan told the friend that he planned to do a break-and-enter job into the home of the

victim. Mr. MacLennan saw the victim's home as a promising target to steal money or drugs, or both. Mr. MacLennan saw the victim's home as a "target-rich" environment that might provide him with cash needed to discharge the debt to Mr. L.

[17] Mr. MacLennan then modified his account and explained to police that his friend had no knowledge of the break in. Mr. MacLennan simply had asked his friend to drive him to the victim's home, where he was going to buy cocaine from "this guy" whom he knew.

[18] Mr. MacLennan stated to police that he retrieved a hammer from the back seat of his own vehicle, and entered the victim's home after breaking the door window and unlocking the door's lockset. Mr. MacLennan described to police entering the hallway and meeting the victim. Mr. MacLennan stated that he fled after demanding the victim give him drugs. He took off empty handed.

[19] Police executed a search warrant of Mr. MacLennan's residence on 27 November 2015. Police located and seized a claw hammer with a black and yellow handle from a carpenter's pouch found in the porch of Mr. MacLennan's home. Mr. MacLennan identified this as the hammer that he had brandished when he did the home invasion.

[20] As stated by the Supreme Court of Canada in *R. v. Lacasse* 2015 SCC 64 at paras. 52-54, the imposition of sentencing is highly individualized. At para. 12, the Court reaffirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of an adjudicated crime and the moral blameworthiness of the individual offender. The Court recognized that assessing proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining the public's confidence in the administration of justice. This is related directly to the principle that, in assessing an offender's moral culpability, a sentencing court must take into account the fact that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as is set out in Section 718.1 of the *Criminal Code*.

[21] In *R. v. Ipeelee*, 2012 SCC 13 at para. 38, the same Court stated that, in determining a fit and proper sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances as is prescribed by para. 718.2(a) of the *Criminal Code*.

[22] A sentencing court must consider also they array of objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham*, 2013 SCC 15 at para. 8.

[23] At para. 37 of *Ipeelee*, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims, and proportionality seeks to ensure public confidence in the justice system.

[24] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Code*, that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity. Certainty of outcome has a lot to do with the principle of legality. People have to know the likely penal consequences of contemplated conduct.

[25] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. These important

principles of restraint are set out in paras. 718.2(d) and (e) of the *Criminal Code*.

[26] In *R. v. Gladue* 1999 SCJ 19 at paras. 31-33 and 36, the Supreme Court of Canada stated that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law; rather, the provision was to be seen as a remedy whereby imprisonment was to be the sanction of last resort.

[27] In assessing the seriousness of Mr. MacLennan's crime, I take account of the fact that the victim's home was occupied at the time of the commission of the offence and that Mr. MacLennan knew it, or was reckless as to whether the home was occupied. In fact, breaking in and confronting the victim was integral to success. Mr. MacLennan needed the victim to locate and cough up the cash in order for his purpose—to pay off the drug debt to Mr. L.—to be achieved.

[28] Accordingly, I am satisfied that this crime meets the definition of a home-invasion break and enter within the definition of section 348.1 of the *Criminal Code*. That is, Mr. MacLennan knew that the dwelling was occupied and used

threats of violence and actual violence against the victim. It is an aggravating factor in virtue of the statute.

[29] Mr. MacLennan possessed a weapon, namely a claw hammer. I draw what I consider to be the reasonable inference that, if used as a weapon, a claw hammer is capable of inflicting serious and potentially lethal injury upon a victim. Although Mr. MacLennan did not assault the victim with the hammer, he manhandled the victim while brandishing it; clearly, Mr. MacLennan used violence against the victim.

[30] Mr. MacLennan threatened the victim and the threats were, indeed, fearsome. Threats of death and sly reference to the Phalen shooting would undoubtedly have left the victim in fear of his life.

[31] The motivation in this particular case was the desire to rob the victim. There was some limited level of planning and premeditation; however, I do take into account the fact that Mr. MacLennan abandoned his plot quite quickly and left empty handed. It was thought out, but not very well.

[32] Based on my assessment of those circumstances, I regard the seriousness of the offence as being at the mid-range of seriousness for a very serious classification of offence.

[33] When I take into account the personal circumstances of Mr. MacLennan, I observe that Mr. MacLennan has pleaded guilty and has accepted responsibility for his actions.

[34] Mr. MacLennan has no prior record.

[35] It would appear that Mr. MacLennan's lifestyle had been unremarkable up to the point in time that he left for western Canada a few years back for the purposes of employment.

[36] As set out in the pre-sentence report, Mr. MacLennan came back from out west, as described by his mother, "in a mess". Drugs and alcohol had become a significant problem for Mr. MacLennan, including the use of hard drugs, mostly cocaine.

[37] Mr. MacLennan has insight into the nature of that problem and informed the author of the pre-sentence report, "I was doing it too much, and using way too much".

[38] Mr. MacLennan self-reports that he has not consumed alcohol or used illicit substances since the time of the offence. He stated that he had been confronted by his mother. It woke him up; therefore, he stopped. Mr. MacLennan's mother offers a good moral compass, and she supports her son very strongly.

[39] Having said this, Mr. MacLennan embarked upon an offence that carried with it a substantial risk for lethality. The deployment of a hammer in a home-invasion robbery, in my view, involves a significant degree of moral culpability. This was not a trivial, smash-and-grab break and enter. This one, indeed, carried a significant risk for lethality, because the court must be attuned not just to the actual outcome, but to the risks that are inherent in cases of this nature. I do take into account the fact that Mr. MacLennan was alcohol and drug impaired at the time. While that does, in my view, attenuate or mitigate to some extent Mr. MacLennan's moral culpability for his conduct, in that illegal drugs and alcohol may have a disinhibiting effect leading to uncharacteristic violence, it does so only to a very slight degree, as the violence in this case was great and the impairment was self-induced.

[40] I take into account the principles of sentencing parity, and I have considered the authorities presented to the court by the prosecution. The starting-point authority in the Province of Nova Scotia on break-and-enter sentencing is *R. v. Zong*, (1986) 72 N.S.R. (2d) 432. In that case, the Nova Scotia Court of Appeal increased to three years Mr. Zong's sentence for an enterprise-level break and enter into a pharmacy.

[41] I recognize that there have been sentences imposed by the Court of Appeal in the past that have recognized the need for leniency in appropriate cases.

[42] In the case of *R. v. Coolen*, [1987] N.S.J. No. 351, the Court of Appeal dealt with an offender-parolee who committed a break and enter for the purposes of stealing liquor. The sentencing judge had given Mr. Coolen a suspended sentence. The prosecution appealed from sentence to the Court of Appeal. The Court of Appeal affirmed the sentence, noting that the sentencing judge had taken into account, appropriately, an array of rehabilitative programming that Mr. Coolen had taken while serving his penitentiary term and later while on parole; the Court of Appeal was of the view that the sentencing judge had been justified in imposing a lenient sentence, given the prospects of Mr. Coolen's resuming a pro-social lifestyle and following through on the rehabilitative steps that he had started while in penitentiary.

[43] I take into account, as well, the principle enunciated by the Court of Appeal in *R. v. Colley*, (1991) 100 N.S.R. (2d) at 447: if the need to protect society might well be served by a shorter sentence as by a longer one, a shorter one ought to be preferred when dealing with a youthful, first offender. That is the case here.

[44] This offence is conditional-sentence ineligible per paras. 742.1(c) and (e) of the *Code*.

[45] Home invasion cases—which often resemble robberies—have consistently attracted in Nova Scotia substantial in-custody sentences. *R. v. Rhyno* 2013 NSSC 217—3.5 years. *R. v. Harris* 2000 NSCA 7, a case involving serious violence and bodily harm inflicted on senior citizens, 15 years. *R. v. Fraser*, [1997] N.S.J. No. 1 (C.A.), 3 years. *R. v. Avery* 2014 NSPC 40, 2 years for a domestic-violence related home invasion. *R. v. MacInnis* 2014 NSPC 93, 2 years for a revenge-inspired home invasion not involving any elements of robbery.

[46] The prosecution has recommended that the court consider a sentence in the range of four to six years. Defence counsel has recommended the court consider a sentence in the range of two to three years.

[47] In my view, taking into account the principles of proportionality, parity and restraint, the court should impose a sentence as follows.

[48] First of all, there will a primary-designated-offence DNA collection order.

[49] The warrant of committal will be endorsed in accordance with the provisions of section 743.21 of the *Criminal Code*, while serving his sentence, Mr.

MacLennan is to have no contact or communication, directly or indirectly, with the victim. The name of the victim will be recorded in full in the warrant.

[50] There will be a section 109 order, commencing immediately and running for 10 years following the expiration of Mr. MacLennan's sentence of imprisonment. Mr. MacLennan is prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance. Again, that begins immediately, and it runs for 10 years after the expiration date of the sentence of imprisonment that the court is about to impose; in addition, that order will expressly direct that Mr. MacLennan be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[51] As I mentioned, there will be a primary designated offence DNA collection order.

[52] There will also be, as is mandatory, a \$200 victim-surcharge amount, and Mr. MacLennan will have 48 months to pay that victim-surcharge amount.

[53] The sentence of the court in relation to the charge before the court, case number 2933999, will be that Mr. MacLennan serve a sentence of imprisonment of three years in a federal penitentiary.

Atwood, JPC