PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacLean*, 2017 NSPC 34

Date: 2017-02-21
Docket: 2788204
Registry: Pictou

Between:

Her Majesty the Queen

v.

Randall Edwin MacLean

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	21 February 2017 in Pictou, Nova Scotia
Charge:	Sub-s. 268(2), *Criminal Code of Canada*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Joel Sellers for Randall Edwin MacLean

By the Court:

[1] The court has for sentencing this afternoon Randall Edwin MacLean. Mr. MacLean was found guilty by this court of a single count of sub-s. 268 (2) of the *Criminal Code*, aggravated assault, case number 2788204. It is a straight indictable offence. My decision setting out the pertinent facts and publishing the verdict is reported at 2016 NSPC 59

[2] The court has had the benefit of reviewing a pre-sentence report. I have reviewed the brief of the prosecution prepared 15 February 2017. I have reviewed the sentencing case submitted to the court by Mr. Sellers. And I have conducted my own research of the pertinent case law.

[3] The prosecution has made a submission to the court that the court consider the imposition of a period of imprisonment of 18 months followed by a term of probation of 12 months. Defence counsel urges a sentence of six months.

[4] At the time of the commission of this offence, s. 268 of the *Criminal Code* penalized aggravated assault as follows:

> (1) Everyone commits an aggravated assault who wounds, maims, disfigures, or endangers the life of the complainant.
>
> (2) Everyone who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

[5] Again, at the time of the commission of this offence, s. 742.1 of the *Code* provided that:

> If a person is convicted of an offence and the Court imposes a sentence of imprisonment of less than two years, the Court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community subject to the conditions imposed under s. 742 .3 if:
>
> . . . .
>
> (c) the offence is not an offence prosecuted by way of indictment for which the maximum term of imprisonment is 14 years or life.

[6] Accordingly, the offence before the court is ineligible statutorily for a conditional sentence order, and it is important that the court underscore that restriction at the commencement of its sentencing decision.

[7] In determining an appropriate penalty, it is important that the court recognize that sentencing is a highly individualized process. This was stated by the Supreme Court of Canada in *R. v. Ipeelee* 2012 SCC 13 at para. 38.

[8] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances. That is prescribed by paragraph 718.2(a) of the *Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case, as directed by the Supreme Court of Canada in *R. v. Pham* 2013 SCC 15 at para. 8.

[9] Assessing a person's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. That fundamental principle is set out in s. 718.1 of the *Code*. In *Ipeelee* at paragraph 37, 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.

[10] In *R. v. Lacasse* 2015 SCC 64 at para. 12, the Supreme Court of Canada confirmed 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 a crime and the moral blameworthiness of the individual offender. The Court recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of justice.

[11] In determining an appropriate sentence, this 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.

[12] 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 circumstance. That principle is set out in paras. 718.2 (d) and (e) of the *Code*.

[13] In *R. v. Gladue*, [1999] S.C.J. 19 at paras. 31 to 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 a sanction of last resort.

[14] In determining the seriousness of this offence, I would observe that, based on my findings of fact as recorded in 2016 NSPC 59, the injury that Mr. MacLean inflicted upon Mr. Gaudet was not life-threatening, although it was certainly moderately disfiguring.

[15] The assault upon Mr. Gaudet was not prolonged and it was not premeditated. There was no evidence of escalating violence. I found as a fact that Mr. MacLean's

conduct prior to the assault was not blameworthy in any way. Having said that, the court certainly recognizes that an aggravated assault is a serious offence carrying a maximum potential penalty of 14-years' imprisonment.

[16] Because of the fact the assault was not prolonged, was not premeditated, did not result in a life-threatening injury to Mr. Gaudet, I would situate this aggravated assault at the lower end of the range of severity.

[17] In assessing Mr. MacLean's moral culpability, again, I would note the fact that Mr. MacLean did not calculate or premeditate his assault upon Mr. Gaudet. Mr. MacLean's assault was spontaneous and instantaneous: a lashing out as a result of a perceived wrong in being ordered about and manhandled in the course of being evicted from a home which was the site of a family wake.

[18] I take into account the fact that, although Mr. MacLean does have a prior record, it is intermittent and it is limited.

[19] The prior record which is referred to in the pre-sentence report is made up of a finding of guilt for an indictable count of assault in 1991 for which Mr. MacLean received a $500 fine and a period of probation of one year.

[20] Mr. MacLean’s next finding of guilt was an indictable assault recorded on the same date, 14 August 1991, for which Mr. MacLean received an identical sentence of a $500 fine and a period of probation of one year.

[21] Mr. MacLean's next finding of guilt was 18 years later in August 2009 when Mr. MacLean was found guilty of assault causing bodily harm. He received a conditional discharge, was placed on probation for 12 months, and made subject to a DNA-collection order.

[22] Mr. MacLean's next finding of guilt was slightly less than two years later, 30 May 2011. Mr. MacLean was found guilty of a charge of uttering threats, fined $150, and placed on probation for nine months.

[23] I infer from the modest range of penalties imposed that the circumstances of those offences would likely have been at the lower end of the range of severity.

[24] I take into account as well the gap principle which reflects the fact that the passage of significant periods of time between the offences would allow the court to infer that the sentences imposed for those earlier offences likely had an appropriate rehabilitative and deterrent effect. The court applies as well the jump principle, which is a principle that calls upon the court to carry into effect the principle of restraint. It requires the court to impose gradually increasing sentences

for the repetition of a particular class of offence. And in referring to the gap principle and the jump principle, the court would rely upon the binding judgment of the Court of Appeal in *R. v. Bernard* 2011 NSCA 53.

[25] Mr. MacLean made an allocution to the court pursuant to s. 726 of the *Criminal Code* in which Mr. MacLean essentially maintained his innocence of the charge. As has been underscored by this court, relying upon binding judgment from the Nova Scotia Court of Appeal, an offender's maintaining his innocence is not an aggravating factor; it is a neutral factor. I say so relying on the principles enunciated by the Court of Appeal in *R. v. M. C.*, [1987] N.S.J. No. 560; also *R. v. LaBrie*, [1988] N.S.J. No. 357; *R. v. Campbell*, [1977] N.S.J. No. 443; as well as decisions of this court in *R. v. Stewart*, 2014 NSPC 22 at paragraph 13; and *R. v. Pilgrim*, 2013 NSPC 60 at paragraph 3.

[26] In taking into account those facts, the court would situate Mr. MacLean's moral culpability at the lower end of the range of seriousness for an aggravated assault offence.

[27] I take into account the fact that Mr. MacLean has been subject to terms of bail since 14 October 2014 in order number 1699344. That order prevented Mr. MacLean from leaving the Province of Nova Scotia. It required him to live at a

specific address. It prohibited him from consuming alcohol or from entering premises where alcohol is sold as a primary product. It required him to report by telephone to the RCMP. There was a house-arrest condition that ended in October 2015, at which point in time a curfew was imposed upon Mr. MacLean, and that curfew and proof of compliance continued until 22 March 2016. I am satisfied that, for a significant period of time, Mr. MacLean was subject to moderately stringent terms of bail.

[28] Mr. MacLean was first before the court via the Justice of the Peace Centre on 11 October 2014. He was released on a recognizance—the recognizance which I just mentioned, order 1699344, on 14 October 2014; therefore, Mr. MacLean spent four days in custody. Allowing day-and-a-half credit per *R. v. Carvery,* 2014 SCC 27, Mr. MacLean is entitled in my view to six days of credit for that remand time.

[29] In applying the principle of sentencing parity, I have reviewed the authorities presented to the court by the prosecution and defence counsel.

[30] The prosecution presented the court with a number of cases.

[31] I have considered the case of *R. v. Avery* 2014 NSPC 40.

[32] *Avery* was tantamount to a home-invasion offence in which the offender inflicted a vicious and prolonged assault upon his former common-law partner or, I'm sorry, his former girlfriend's current boyfriend resulting in a serious injury. Mr. Avery was remorseless, and the court imposed a sentence of two years less a day. I consider the facts of that case to be substantially more serious than Mr. MacLean's as *Avery* was tantamount to a home invasion and resulted in the victim suffering a broken leg.

[33] In the case of *R. v. MacIntosh,* 2014 NSPC 45 the accused was prosecuted for an indictable assault causing bodily harm. He beat and battered the victim mercilessly; there was a joint recommendation for a sentence of two years plus a day. I would underscore that there was a joint recommendation. *MacIntosh* involved a prolonged assault that resulted in serious injury to the victim; I do note that the charge in that case was assault causing bodily harm—a class of offence less serious than aggravated assault, as it carries a maximum term of imprisonment of ten years, as compared to fourteen years for aggravated assault.

[34] I have considered *R. v. Willis*, 2013 NSCA 78. In that case, the Court of Appeal reduced a four-year sentence imposed at the trial level to one of three years. Mr. Willis was charged with aggravated assault. The injuries to his victim were life-threatening. Although the victim recovered quickly, there was a high risk

of lethality due to blood loss. The assault committed by Mr. Willis upon his victim was prolonged and involved the use of a weapon.

[35] I have considered *R. v. Sutton*, 2012 NSPC 98, a decision of my colleague Tax J.P.C. In that case, Sutton was approached by the victim. Sutton and the victim were both intoxicated. The victim's approach to Sutton was benign. Mr. Sutton suddenly threw a punch, struck the victim in the face. The unprovoked assault knocked the victim to the ground and rendered him unconscious. While the victim was lying on the ground, Sutton and three other males continued their assault upon the victim; as a result, the victim suffered a concussion and injuries to his eye and his teeth. Sutton was 19 years of age at the time and had no prior record. The charge in that case was assault causing bodily harm. Tax J.P.C. imposed a sentence of imprisonment of 90 days to be served intermittently, and a period of two years of probation. Sutton had no prior record.

[36] In the case of *R. v. Giles* (1989), 93 N.S.R. (2d) 317, the offender had been convicted of aggravated assault and fined by the trial judge the amount of $ 2000 plus two years of probation. The prosecution appealed the sentence to the Court of Appeal. The facts were that Giles left a tavern at the request of a bouncer. As Giles proceeded to the doors, he was asked to leave a glass of beer inside. Giles at that point threw the beer in the bouncer's face, then struck him over the left eye with the

glass. The bouncer suffered a permanent eye injury. Giles had no prior record. His violent behaviour was out of character. The Nova Scotia Court of Appeal found that the sentence failed to emphasize adequately specific and general deterrence. The Nova Scotia Court of Appeal relied on the decision of *R. v. Perlin* (1977), 23 N.S.R. (2d) 66, and substituted a sentence of four-months' imprisonment plus two years of probation.

[37] I have reviewed the decision submitted to the court by Mr. Sellers, *R. v. Bourque*, 2013 NWTSC 37, which resulted in a sentence of six-months' imprisonment imposed upon a 22-year-old aboriginal offender who had entered a guilty plea to a charge of assault causing bodily harm. A sentence of six-months' imprisonment imposed in that case. I do note that, as underscored by Mr. Young, Mr. Bourque had pleaded guilty. Bourque was an aboriginal offender, had good antecedents, and the Territorial Court placed significant emphasis upon the guilty plea as a mitigating factor.

[38] I have considered a number of cases based on my own research.

[39] First, *R. v. Desmond* (1992), 109 N.S.R. (2d) 174 (C.A.). This was a case of spousal assault. The offender in that case accused his wife of having an affair, perpetrated a significant assault upon his wife resulting in a fracture of her right

shoulder and pneumothorax of the lung. The trial court imposed a sentence of 90-days' intermittent plus two years of probation. The Nova Scotia Court of Appeal substituted a sentence of seven-months' imprisonment, noting the need to denounce crimes of violence involving domestic or intimate partners.

[40] The court has considered the case of *R. v. Cormier* (1994), 130 N.S.R. (2d) 327 (C.A.). Cormier had pleaded guilty to assault causing bodily harm and escaping lawful custody. The trial judge suspended the passing of sentence and imposed two years of probation. The Court of Appeal allowed the appeal, increased the sentence to six-months' imprisonment for assault causing bodily harm, and two-months' concurrent for escape. In that case, the offender was 18 years old. He and two others had attacked a 42-year-old man, hospitalizing him with a fractured nose, two black eyes, and severe headaches. Cormier had no prior record and had entered a guilty plea. He expressed no remorse, only self-concern. This was an unprovoked attack by a gang in a swarming incident upon an innocent citizen, and the Court underscored the need for denunciation and deterrence.

[41] I have reviewed *R. v. Hall* (1998), 167 N.S.R. (2d) 396, a decision of our Court of Appeal. Mr. Hall was convicted of assault causing bodily harm, sentenced to nine-months' incarceration followed by two months of probation. Mr. Hall and two companions passed the victim on the street. Mr. Hall heard something

to which he took offence. Mr. Hall and his companions proceeded to inflict serious injury upon the victim. Mr. Hall had a lengthy criminal record including a conviction for armed robbery. He spent five months on remand. The Nova Scotia Court of Appeal denied leave to appeal the sentence of nine-months' incarceration.

[42] The court has considered the case of *R. v. Ragan*, [2008] N.S.J. No. 26. That was a 12-months conditional sentence imposed upon an offender found guilty following trial of aggravated assault. The 19-year-old offender and the victim had been roommates in a university residence. Unhappy differences had arisen between them. The offender in that case proceeded to assault his roommate, first by spraying him with bear spray and then stabbing him with a knife.

[43] The trial court imposed a 12-month conditional sentence order which was a legal sentence at that time. It is no longer the case.

[44] The conviction was appealed to the Court of Appeal. The Court of Appeal dismissed an appeal from conviction, reported at 2009 NSCA 43. There was no sentence appeal.

[45] I have considered *R. v. Coleman*, a decision of the Court of Appeal, (1992), 110 N.S.R. (2d) 65. In that case, the 21-year-old offender viciously attacked his female companion after he had slapped her as a result of an assault. A stranger

intervened after the victim had been knocked unconscious with a punch; Mr. Coleman continued to beat and kick her. The trial court imposed a sentence of 90 - days' imprisonment plus two years of probation. The Court of Appeal substituted a sentence of 12-months' imprisonment plus one year of probation. The Court noted that deterrence was the primary sentencing consideration to be applied given the prevalence of violent crimes by men against intimate partners.

[46] I have considered the case of *R. v. Hughes* (1991), 107 N.S.R. (2d) 262, also

[47] a decision of the Nova Scotia Court of Appeal. The accused, who was 35 years, old viciously attacked an individual whom he alleged had sexually assaulted his sister. Hughes rendered the man unconscious, then proceeded to kick him twelve to fourteen times as hard as he could. The trial judge, emphasizing the degree of provocation, sentenced the accused to 30-days' imprisonment to be served intermittently plus one year of probation. The Nova Scotia Court of Appeal substituted a sentence of 15-months' imprisonment, noting that the provocation did not justify the accused inflicting such a calculated and severe beating in the name of revenge.

[48] I have considered the case of *R. v. Chisholm (C.B.)* (1998), 169 N.S.R. (2d) 328 (C.A.). Chisholm pleaded guilty to aggravated assault in operating a motor

vehicle while impaired. After an altercation at a bar, Chisholm pursued the victim and continued the fight, subsequently attempted to run over the victim, although the victim was not seriously injured. The trial court imposed a sentence of 16-months' imprisonment, reflecting the need for denunciation and deterrence. The Nova Scotia Court of Appeal upheld the sentence stating that it was not manifestly excessive and did not result from an over-emphasis of deterrence. It was a prolonged assault and involved the use of a motor vehicle as a weapon.

[49] I have considered the case of *R. v. Dzikowski* (1990), 99 N.S.R. (2d) 362, also a decision of the Nova Scotia Court of Appeal. The 41 -year-old offender was visiting his estranged wife, became enraged and verbally abusive. He grabbed a kitchen knife and stabbed his wife in the back and chest. Dzikowski was a regularly employed alcoholic who had difficulty controlling his anger; he had fifteen convictions between 1971 and 1990, six of which were assault related. The trial court imposed a sentence of 12-months' imprisonment. The Nova Scotia Court of Appeal substituted a sentence of 20-months' imprisonment, two years of probation, with a ten-year firearms prohibition. The Court of Appeal relied on the *Perlin* decision, noted the need to emphasize denunciation and deterrence in cases involving spousal-partner violence.

[50] I have reviewed the decision of *R. v. Slaunwhite* 2014 NSSC 41, a four-year sentence imposed by Wright J. There was a joint recommendation arising from a home-invasion aggravated assault. As I have stated, the offence was essentially a home invasion in which the offender was one of several youthful persons who broke into the victim's apartment demanding drugs and money. They were armed with knives and wore masks. These were significant aggravating factors that are not present in this case.

[51] Finally, I have considered *R. v. Dixon* (1997), 156 N.S.R. (2d) 81, a decision of the Nova Scotia Court of Appeal. Dixon was one of six individuals who committed an unprovoked and savage assault upon a pedestrian who had come to the aid of a friend who was being assaulted by two companions of Dixon's. Dixon and five others encircled the victim, preventing his escape; they committed a prolonged, serious, and vicious assault upon the victim, leaving him near death and permanently brain-damaged. Dixon had no prior record. The trial judge sentenced Dixon to seven years of imprisonment for aggravated assault, giving one-year's credit for remand time. The Nova Scotia Court of Appeal dismissed the sentence appeal. The Court noted that, although the sentence was lengthy, it was not clearly unreasonable or manifestly excessive.

[52] In applying the principles of sentencing parity, I recognize that this was an assault of a short term of duration; it was not planned or premeditated. It was a reaction to a misperceived wrong.

[53] I take into account as well the fact that the injuries to Mrs. Gaudet were not life- threatening. I take account of the fact that Mr. MacLean did not use a knife or any other weapon. I take into account as well that, although Mr. MacLean does have a prior record for violence-related offences, that record in large measure is distant, and the penalties imposed for those prior offences would suggest to the court that those prior offences did not involve the serious infliction of violence.

[54] I take into account the presentence report that would suggest to the court that Mr. MacLean is a guardedly favourable candidate for a rehabilitative sentence. I take into account the fact as well that Mr. MacLean has been subject to moderately stringent terms of bail since his release from custody in October 2014, and has been bail-compliant.

[55] I take into account the principles of sentencing parity, and I have given full consideration to the authorities presented to the court by the prosecution and defence as well as those that I have researched on my own.

[56] In my view, the appropriate sentence in this case is one which I will impose as follows. First of all, this is an indictable offence and carries a $200 victim surcharge amount. A $200 victim surcharge amount will be imposed, and Mr. MacLean will have 24 months to pay that victim surcharge amount.

[57] There will be a primary designated offence DNA collection order.

[58] Under the remarks to that order, it is to be noted again that it is a primary designated offence. It is to be noted under remarks that the charge is aggravated assault. It is to be noted in remarks that the charge is a straight-indictable offence.

[59] The Court is required to impose a s. 109 order, as this is an offence that falls within the definition of para. 109 (1) (a) of the *Criminal Code*; therefore, the court orders and directs that Mr. MacLean be prohibited from possessing any firearm other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition, and explosive substance beginning today's date and expiring ten years after Mr. MacLean's release from imprisonment. The court orders also that Mr. MacLean be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[60] In relation to the charge of aggravated assault, the court sentences Mr. MacLean to a term of imprisonment of six months. That will be followed by a

period of probation of 12 months. The court expressly orders and directs that the period of probation not commence immediately, but it commence immediately upon Mr. MacLean's release from custody.

[61] That period of probation will require that Mr. MacLean:

- keep the peace and be of good behaviour;
- appear before the court as and when required by the court;
- notify the court or the probation officer in advance of any change of name, address, employment or occupation;
- Mr. MacLean, you are ordered to report to a probation officer at the Corrections address in New Glasgow no later than ten days after your release from custody and after that as directed;
- you are not to have alcohol in your body outside your residence;
- you are to stay away from the persons, homes, places of work or education of Michael Paul Gaudet and Gerry Miller, and you must have no contact or communication with them directly or indirectly even if invited to do so no exceptions;

- attend for any assessment, counselling, or program directed by your probation officer including: anger management, violence-intervention prevention assessment and counselling as directed by your probation officer and any other assessment, counselling or programming directed by your probation officer;

- you must participate in and cooperate with any assessment, counseling, or program directed by the probation officer according to the terms as directed by the probation officer, and you must immediately report to your probation officer any missed assessment or counseling appointments;

- and you must sign immediately all consents to release of information required by your probation officer to arrange rehabilitative services.

JPC

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Erratum

Erratum Date: July 25, 2017

Erratum: The date of the decision has been corrected to read "2017-02-21" in lieu of the previously listed date "2017-02-17"