

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Bernard*, 2017 NSSC 129

Date: 2017-05-16

Docket: *Syd.* No. 449499

Registry: Sydney

Between:

Her Majesty the Queen

v.

Albert Michael Bernard

Sentencing Decision

Judge: The Honourable Justice Robin C. Gogan

Heard: February 8, May 9 and May 16, 2017

Oral Decision: May 16, 2017

**Written Release of
Oral Decision:** May 18, 2017

Counsel: Darcy MacPherson and John MacDonald, for the Crown
Darlene MacRury, for the Defence

By the Court (Orally):

Overview

[1] The proceeding before the court today is the Sentencing Decision in *R. v. Albert Michael Bernard* (see: *R. v. Bernard*, 2016 NSSC 358).

[2] On November 3, 2016, I found Mr. Bernard guilty of one count of second degree murder contrary to s.235(1) of the *Criminal Code of Canada*. This conviction carries with it an automatic life sentence. The question today relates to the appropriate period of parole ineligibility.

[3] I have had the benefit of hearing the parties' submissions. I have also received and reviewed written submissions from both Crown and Defence Counsel, a **Gladue** Report and a Pre-Sentence Report. I have heard and considered a considerable number of Victim Impact Statements. I have reviewed the offender's criminal record and I had the opportunity, of course, to hear directly from Mr. Bernard.

[4] What follows is my decision on the remaining sentencing matters. In coming to this decision, I am not deciding on sentence *per se*. The sentence to be

imposed is life imprisonment. This is mandatory. And it is the maximum sentence that can be given in Canada.

[5] However, s.745(c) of the **Criminal Code of Canada** requires a person convicted of second degree murder to be “sentenced to imprisonment for life without eligibility for parole until the person has served at least 10 years of the sentence or such greater number of years, not being more than 25 years, as has been substituted therefore pursuant to s.745.4.” In making this decision, I am required by the **Criminal Code** to consider the character of the offender, the nature of the offence and the circumstances of its commission in order to determine a period of parole ineligibility that is fit in the circumstances. There are other considerations as well which I will come to in a moment.

[6] So, the only issue that Parliament has assigned to this Court today is a determination as to when the offender may apply for parole. Parole is a possibility for Mr. Bernard. Offenders convicted of second degree murder must serve a minimum of 10 years before being eligible to apply for parole. However, a sentencing judge is required to consider whether that minimum period should be increased by some number up to a maximum of 25 years. It must be remembered that Mr. Bernard will now forever be subject to a sentence of life imprisonment. He may never be released on parole. Whether he is granted parole at some point is

in the hands of the Parole Board. The issue for me is a determination of how much time Mr. Bernard must serve before being able to apply for parole.

The Facts

(a) Circumstances of the Offence - Decision

[7] The circumstances of this offence are found in my decision dated November 3, 2016.

[8] In brief summary however, I will say that after a long trial, I was left with no reasonable doubt that Albert Bernard attacked and killed Dale Dennis on the night of July 4, 2015 with the requisite intent for second degree murder. The findings of fact were canvassed in detail in the trial decision. The facts are painful to review and I do not intend to belabor the proceedings today by reviewing them once again in detail. I return only to an excerpt from the conclusion as a reminder of the factual basis for the conviction. The parties will recall my decision as follows:

The nature of this attack satisfies me that the accused intended to cause the kind of serious bodily harm he knew would likely cause death and continued anyway. The attack was intense and it was focused. He made the most destructive use of his hands and feet on an unresponsive victim. And he focused on the head and neck area. Common sense says that these are the most vulnerable areas to inflict blunt force trauma to a human being. On this basis, I find it to be a sound inference that the accused intended to cause bodily harm that was likely to kill and continued despite the risk.

The evidence satisfies me beyond a reasonable doubt that Albert Bernard despite

his level of intoxication, was aware of what he was doing and intended his attack on Dale Dennis. The attack had predictable consequences.

[9] Mr. Bernard was arrested and has been in custody since July 4, 2015, and he was convicted of second degree murder on November 3, 2017.

(b) Circumstances of the Offender

[10] Mr. Bernard, I believe now, is 38 years old. He is an Aboriginal person of Mi'kmaq descent born and raised in the First Nation Community of Eskasoni. He has a Grade 7 education along with training to operate heavy machinery. He has a considerable criminal history and he was on probation when he killed Dale Dennis.

[11] It is clear to me that Mr. Bernard had a difficult start in life. Aside, but perhaps related to, systemic disadvantages which will be discussed further in a moment, he had significant personal challenges to deal with even at a very young age. His parents separated when he was 16 years old after years of domestic violence and alcohol abuse. In spite of being a witness to all of this, he found the breakdown of his family upsetting. He had thoughts that the separation was his fault. Following his parents' separation, Mr. Bernard lived with his father.

[12] Mr. Bernard has a fairly large extended family. He has four full siblings and two half siblings. His father is now deceased. Mr. Bernard reported a history of

good relations with his siblings but acknowledged being out of contact since the matter now before the court. Mr. Bernard is single, and has one child. He had a relationship with the mother of his child and a subsequent lengthy relationship with Anita Googoo. Mr. Bernard acknowledges that both of these relationships were impacted by his drug and alcohol abuse.

[13] Mr. Bernard began drinking at 11 years of age and first used drugs at 13. It was telling to me that Mr. Bernard did not admit in a robust way that alcohol use is a problem for him. He admits to drinking to the point of blackouts, to behaving badly while drinking, to having witnessed alcohol abuse in his parent's marriage and acknowledges the negative role it has played in his own relationships. Yet, his assessment of the role of alcohol in his life falls short, even in the wake of all that has happened to him. This likely explains why his previous involvement in treatment programs have had no impact. In light of the role that alcohol played in the events now before the court, I find this aspect of the offender's circumstances very troubling. I will have more to say about that in a moment. For the time being, I note that Mr. Bernard did admit that he was an alcoholic in the **Gladue** Report and it seemed to me that Mr. Bernard was more comfortable with his participation in the **Gladue** Report than the Pre-Sentence report as the disclosures in the former were somewhat more forthright and insightful.

[14] In reviewing the Pre-Sentence Report, I find some of the most helpful remarks come from Mr. Bernard's family. I was moved by his mother's remarks that Mr. Bernard had difficulty with school, that he was bullied and then became a bully. She wanted the Court to know that the Offender had grown up surrounded by violence in his own home, that he was mistreated by his father and it was her belief that his anger issues are the result of this mistreatment. Similar comments came from John Bernard who said that his brother could be the nicest person when not under the influence of alcohol. His issues with drinking to excess are long standing and have had an impact on his relationships. John Bernard said that the Offender would get jealous and controlling under the influence of alcohol.

[15] The Offenders trouble with alcohol and anger were also reflected in the remarks of the Eskasoni police who had extensive dealing with Mr. Bernard over the years. The offender has an extensive criminal record, punctuated by a significant history of violence. Cst. Denny said that Mr. Bernard is well known and is considered a threat to the community.

[16] There is a question relating to both remorse and responsibility. I begin with responsibility. I am satisfied that the Offender now takes responsibility for what he has done. When I say responsibility, I mean that he accepts that his actions killed Dale Dennis and, as he said, "There is no forgiving what I did". But there is

evidence that his sense of responsibility has evolved and continues to evolve. I have some sense from the totality of the comments made, including his own, that the Offender still deflects some responsibility on his drinking and resulting jealousy and anger for example. However, I found more insightful comments about drinking at page 21 of the **Gladue** Report where he explained that drinking is a significant event in his life and ... “That this first lesson, is now his last lesson.”

[17] The concept of remorse was vigorously contested and I find is somewhat complex. I acknowledge the extensive Crown submissions on this point. I further acknowledge that Mr. Bernard was not remorseful whatsoever in the immediate aftermath of the death of Dale Dennis. It seems to me that his sense of remorse has changed somewhat since then. The Pre-Sentence Report contains an expression of remorse but it is something less than fulsome. The Offender’s statement to the Court contained an apology but was vague as to the basis of his remorse. The Crown submitted that the Offender is not truly remorseful but rather focused on the impact that all of this has had on him, including his loss of liberty along with the loss of his family and community support. I must say that I am not convinced that his remorse is fulsome. For now, I am only satisfied that it has moved away from a

complete lack of remorse to something that I think is still evolving or perhaps currently beyond his emotional capacity to convey.

[18] I have reviewed the **Gladue** Report several times. The report provided a comprehensive history of the Offender's home community, cultural and family background. The population of his home community and the environment of greatest influence upon him is significantly disadvantaged in some respects. There are educational challenges, a significant unemployment rate and broader social and economic issues. There are well documented issues of violence and addiction issues in the community. Mr. Bernard was exposed to all of these disadvantages and challenges, likely from his earliest recollections.

[19] Mr. Bernard's personal history is reflective of that of his greater community. He has been a victim of physical and sexual abuse, he has not finished middle school, he has a poor work history, and he has a high rate of involvement in the criminal justice system. Most disturbing and predictive was his exposure to family violence and his early involvement with alcohol. I was struck by a comment at page 17 of the **Gladue** Report that "violence was a form of conflict resolution in the Bernard household".

[20] I note at this point that I have considered the summary of factors listed at page 32 of the **Gladue** Report.

(c) Impact on the Victim or the Community

[21] I now turn to consideration of the impact this offence had on the community. Suffice to say that it is hard to conceive of a greater impact on the general community.

[22] There was a total of 15 victim impact statements before the Court for consideration. These statements came from Dale Dennis' family and friends. Common themes emerge from their statements. Dale Dennis was a good father, close with all his children and active in their lives. He was a well known and well liked member of the Eskasoni community. He was described as having a charismatic personality and a great sense of humor along with a sensitivity to the needs of others. It is clear that he will be missed by the entire community.

[23] It was also clear that the nature of the offence had a tremendous impact on the community. Many of the statements spoke to the effect of the brutality of the attack. Some witnessed the immediate aftermath of Dale Dennis's injuries. Some bore witness to those injuries at the time of the wake and some only became aware of the nature and extent of the brutality during the course of the trial. For all those

who spoke to this type of impact, it was poignant and understandable. I was particularly moved by the fact that Dale Dennis' children are either aware or will likely become aware of the terrible way their father died.

[24] In terms of impact on the community, I also consider the comments of Chief Leroy Denny. Chief Denny said that the violent attack on a well-liked member of the community had a big impact and that the offender is no longer welcome back to the community.

Position of the Crown and Defence

[25] I now turn to a review of the positions of the parties.

[26] The Crown seeks a period of parole ineligibility of 15 to 16 years. In this submission, the Crown points to the considerable criminal record of the offender which includes 16 violence-related offences. It also relies on the argument that the offender exhibits a considerable lack of remorse.

[27] It is the Defence submission that the minimum period of 10 years is appropriate in this case. The Defence points to a list of seven main considerations at page 15 of the written submissions in support of its position.

The Law

[28] Both the Crown and Defence supplied authorities in support of their respective positions and provided extensive and excellent oral submissions.

[29] Before turning to a discussion of the authorities offered by each party, it is useful to reference some general principles. In my view, the leading case for consideration is the 2010 decision of our Court of Appeal in **R. v. Hawkins**, 2011 NSCA 7. The decision in **Hawkins** references the 1995 decision of the Supreme Court of Canada in **R. v. Shropshire**, [1995] 4 S.C.R. 227 and the subsequent introduction of s.718 of the **Criminal Code** which codified the sentencing principles. All of the foregoing informs the determination of the appropriate period of parole ineligibility and sets the standard for assessing the positions of the parties.

[30] I am also directed by the reasons of Robertson, J.A. in **R. v. Nash** as adopted in **Hawkins**, *supra*, at p. 67 where it was said:

...Not only are the cases instructive, they provide support for a general thesis: more often than not, trial and sentencing judges work with three time frames when fixing the period of parole ineligibility: (1) 10-15 years; (2) 15-20 years; and (3) 20-25 years. In practice, the third time frame is reserved for the “worst of the offenders” in the “worst of the cases”. The first is reserved for those offenders for whom the prospects of rehabilitation appear good and little would be served by extending the period of parole ineligibility other than to further the sentencing objectives of denunciation and retribution. The second time frame is reserved for

those who fall somewhere in between the first and third. Obviously, these time frames are not cast in cement and represent a basic starting point for analysis.

[31] As noted in **R. v. Hutchinson**, 2014 NSSC 155, the sliding scale of parole ineligibility is intended to recognize that within the category of second degree murder, there is a broad range of seriousness reflecting various degrees of moral culpability. I also consider the direction in **Shropshire** that the power to extend the period of parole ineligibility beyond the 10-year minimum need not be sparingly used and that it would not be unusual to do so.

[32] Both counsel acknowledge the applicability of the decisions of the Supreme Court of Canada in **Gladue**, [1999] 1 S.C.R. 688, and **Ipeelee**, 2012 SCC 13. In **Gladue**, it was noted at para 75:

The role of the judge who sentences the aboriginal offender is, as for every offender, to determine a fit sentence taking into account all of the circumstances of the offence, the offender, the victims and the community. Nothing in Part XXIII of the Criminal Code alters the fundamental duty as a general matter. However, the effect of 718.2(e), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

[33] I am urged by the Crown to consider that the circumstances of this offender and this offence merit a sentence similar to what would be imposed upon a non-aboriginal offender. This is compelling in these circumstances. However, I must

also consider the overall mandate imposed upon me by the **Criminal Code** and **Gladue**. I must consider the unique situation of the Aboriginal offender. I am left with discretion as to how to factor this consideration into the determination of a fit and appropriate sentence.

[34] I am also mindful of the direction given by the Supreme Court of Canada in **Ipeelee** that courts must ensure that a more formalistic approach to parity in sentencing does not undermine the remedial purpose of s.718.2(e). There are two further points from **Ipeelee** that bear weight in the present case: (1) to the extent that the application of the **Gladue** principles lead to different sanctions for Aboriginal offenders, those sanctions will be justified based upon their unique circumstances – circumstances which are rationally related to the sentencing process; and (2) systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his level of moral blameworthiness. Failing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[35] I note at this point that counsel have provided a number of cases which consider the application of the **Gladue** factors in cases involving the offence of second degree murder. These cases support a broad range of sentencing

possibilities depending upon my findings. This is not surprising. Sentencing is a discretionary exercise driven by the unique circumstances of every case.

[36] In carrying out my mandate as a sentencing judge, I am grateful to have been provided with both the Pre-sentence Report and the **Gladue** Report in this case. The **Gladue** report provides the court with evidence as to the systemic and background factors which I must consider in the case of Mr. Bernard. The report also provides significant information as to Mr. Bernard's personal circumstances and how he has been impacted by those systemic disadvantages too commonly found in Aboriginal communities.

[37] I will return to the issues raised in the report in a moment. Before doing so, I will briefly review the principles of sentencing applicable to this matter.

Principles of Sentencing

[38] The purpose and principles of sentencing are found at s.718 of the **Criminal Code of Canada**. As codified there, the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing sanctions. The sanctions imposed should have one or more of the following objectives:

1. To denounce unlawful conduct;
2. To deter the offender and other persons from committing offences;
3. To separate offenders from society when necessary;
4. To assist in rehabilitating offenders;
5. To provide reparations to victims or the community; and
6. To promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and the community.

[39] Section 718.1 of the **Criminal Code** provides that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 codifies additional sentencing principles and, among other things, obligates the sentencing judge to increase or reduce a sentence to account for aggravating or mitigating factors.

[40] Section 718.2(e) is important here in that it requires particular attention be paid to the circumstances of Aboriginal offenders in order to achieve a truly fit and proper sentence.

Mitigating and Aggravating Factors

[41] Having heard and considered all of the evidence as to Mr. Bernard's sentence, I consider the following to be factors tending to lengthen the period of parole ineligibility:

- (a) Mr. Bernard's extensive criminal record which includes previous convictions for violent offences; and
- (b) The brutal nature of the attack itself.

[42] By contrast, I find little to rely on to mitigate the period. One consideration is the impact of remorse and responsibility. Mr. Bernard takes responsibility for the actions that killed Dale Dennis. He has from the beginning. But as I have already noted, he demonstrated a twisted sense of responsibility in that he was not sorry for what he had done and blamed other people and things for his actions. As I said earlier, I am satisfied that he has developed a sense of remorse but I see this as a still evolving concept for him which remains less than fulsome at the present time.

[43] And, of course, I must consider Mr. Bernard's personal and cultural history as an Aboriginal person.

Reasons

[44] Having reviewed all of the foregoing, the issue remains – what is a fit and proper sentence to impose on Albert Bernard?

[45] Mr. Bernard is an Aboriginal person. He is before the Court as a result of the commission of one of the most serious offences a person can commit. He has a significant criminal record. He has a turbulent, personal and extended family history. He carries many burdens.

[46] As noted in **Gladue**, “Sentencing is an individual process and in each case, the consideration must continue to be what is a fit sentence for this accused, for this offence, in this community.” I must impose a sanction that reflects the gravity of the offence and the degree of responsibility of the offender. I must consider the unique circumstances of Mr. Bernard as an Aboriginal offender.

[47] Mr. Bernard has struggled with an alcohol problem for many years. He himself is the product of a violent upbringing and he has been left with anger issues. Several of the contacts in the Pre-sentence Report commented on the significance of Mr. Bernard’s alcohol addiction. It drives his criminal conduct. As noted, he has a significant criminal record. He admits drinking since he was 11.

The nature and extent of the criminal record is a great concern to the Court as is his failure to deal with his problems with alcohol over an extended period.

[48] The Crown submits that rehabilitation should not be an objective at this time. The focus should be on denunciation, deterrence and separation. This view drives the 15 to 16 year period of parole ineligibility which the Crown seeks. This is not an unreasonable position given Mr. Bernard's criminal record and the brutality of the attack on Dale Dennis. Also clear to me is that unless Mr. Bernard finds a way to conquer his demons, he will be a threat to himself and his community in the future.

[49] It is at this juncture that I give consideration to the information provided in the **Gladue** report. Mr. Bernard, as a member of an Aboriginal community has lived with systemic disadvantages and barriers all of his life. It will no doubt be difficult for him to find a way to overcome an alcohol problem and propensity for violence that has been with him for most of his life and now defines who he is as an adult.

[50] I am not convinced, in light of the history of this offender, that past sentences have served any deterrent purpose for Mr. Bernard. He has a lengthy and serious and escalating criminal history. He committed the present offence while

under Court supervision to no effect. It would seem that the goals of specific deterrence and rehabilitation have had little prior impact. So, where does this take the court on sentence?

[51] There is no question that a fit and proper sentence for Mr. Bernard is one whose primary purpose is deterrence and denunciation. An overriding consideration is the immediate need to ensure that Mr. Bernard is separated from society and that society is protected from the person he has become. In this context, and given the very serious nature of the offence now before the court, rehabilitation must take a back seat.

[52] However, I am not prepared to completely abandon rehabilitation as a sentencing goal. Mr. Bernard is very clearly the product of his cultural and personal history. The legacy of life as an Aboriginal person must be acknowledged, considered and addressed. The information provided suggests that should Mr. Bernard find a way to free himself from his addiction to alcohol and manage his anger and propensity for violence, that he has the potential to once again become a productive member of society. As I say this, I am mindful that Mr. Bernard's life to date, 38 years, has been defined by alcohol abuse and violence. Separation from these long-term influences will not happen overnight and not without much hard work on Mr. Bernard's part.

[53] These are the findings that guide my decision on parole eligibility.

Ancillary Orders

[54] The Crown seeks a DNA order and a lifetime firearms prohibition. The orders sought are hereby granted.

Final Decision

[55] Please stand Mr. Bernard.

[56] Albert Michael Bernard, I hereby sentence you to serve a term of life in prison for the second degree murder of Dale Dennis. You shall be not be eligible for parole until you have served a total of 14 years in custody as of July 4, 2015. I commend to your custodians the **Gladue** Report dated February 2, 2017 and refer them to page 34 of the report for their list of recommended programs and services. It is my hope that you are able to access those programs and services in custody and that improves your prospects, Mr. Bernard.

[57] That concludes my sentencing decision in this matter. My thanks to Counsel for their excellent submissions.

Gogan, J.