

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. C.B.K.*, 2015 NSSC 62

Date: 2015-02-24

Docket: *Syd.* No. 425656; 425663

Registry: Sydney

Between:

Her Majesty the Queen

v.

C. B. K.

Restriction on Publication: S.486.4 Identity of Complainant
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Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Robin C. Gogan

Heard: October 21, 22, 23, 31, February 3 and 24, 2015, in Sydney, Nova Scotia

Oral Decision: February 24, 2015

Written Release of March 5, 2015

Oral Decision:

Counsel: Mark Gouthro, 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. C.***

B.K.. On October 31, 2014 Mr. K. was found guilty of the following offences:

- One count of sexual assault contrary to s. 271 of the ***Criminal Code of Canada***;
- One count of unlawful confinement contrary to s. 279(2) of the ***Criminal Code***;
- One count of assault causing bodily harm contrary to s. 267(b) of the ***Criminal Code***;
- One count of uttering a threat to cause death contrary to s. 264.1(1)(a) of the ***Criminal Code***;
- One count of uttering a threat to damage property contrary to s. 264.1(1)(b) of the ***Criminal Code***; and
- One count of theft under contrary to s. 334(b)(ii) of the ***Criminal Code***.

[2] On February 3, 2015, I heard sentencing submissions from both Crown and Defence Counsel. I have also received and reviewed written submissions from Crown and Defence Counsel, a Pre-Sentence Report and a Victim Impact Statement.

[3] I have now had the opportunity to review and consider all of the information supplied to me and the following is my sentencing decision in this matter.

Facts

Circumstances of the Offences

[4] The circumstances of the offences in question were reviewed in detail in the decision rendered on October 31, 2014.

[5] In summary, this proceeding involves a series of events which occurred in the overnight period from January 22 to January 23, 2014. Prior to the offences occurring, the offender and the victim were in a relationship. They had known each other for somewhere between 5-6 years. They had initially been friends, but for 2 years preceding the events in question they had been more than friends. They had an intimate relationship. There was no history of violence in the relationship prior to January 22, 2014.

[6] The offender spent some time in jail in the months preceding the offences now before the Court. He was released on or about December 20, 2013 and then moved into the victim's trailer located at [...], [...], Nova Scotia. The parties continued to reside together for a number of weeks. At some point in the middle of

January, 2014, the offender moved out of the home. The exact nature of this separation was the subject of some dispute but they continued to have contact.

[7] On January 22, 2014, the offender was told by a friend that the victim had been cheating on him with her former boyfriend. The offender went to the victim's home and arrived at about 9:30 in the evening. The events that followed the offender's arrival that night are the basis for the offences before the court for sentence. The offender readily admitted that he snapped when he saw pictures of the victim and her former boyfriend on the victim's phone. He began hitting the victim. He admitted to a lack of control of himself during various periods of time over the course of the night. My findings can be largely summarized by the following quotation from the Decision:

What I do believe is that the complainant was subject to a violent and volatile environment throughout the night in question. The accused would get mad, lose his temper and hit her. He hit her many times. He inflicted multiple significant injuries. He threatened her when he was hitting her. He would calm down and feel remorse then lose his temper again. In this environment, he took her money and he had sex with her. And it was his evidence that she could have left if she wanted to go.

[8] I went on to find that the victim was not free to leave throughout this course of events. She did not have that opportunity until the next morning, January 23, 2014 at about 7:30 am. She fled to a neighboring house. She was then observed to

be injured and distraught. She was taken to the hospital and received medical attention. Her numerous injuries were documented and presented to the court during the trial of the matter.

Circumstances of the Offender

[9] The offender is now 26 years old. He is a young man. He was born in [...], Nova Scotia. He has a Grade 12 education. He graduated from [...] in [...] with a vocational program in [...]. He has little work experience. He last worked when he was 20 years old. His plan is to obtain a trade and go west for work.

[10] The offender is an only child to his parents. His parents separated when he was 3. In his formative years, he lived with his mother and spent weekends with his father. He says that his basic needs were always met but he did have challenges in his early life. First, he was subject to physical abuse at the hands of his mother's boyfriend, later step-father. Second, at a young age, the offender was diagnosed with ADD and was followed by a pediatrician. His mother reported that the offender adjusted well in school in spite of his challenges. Third, the offender's father died about 7 years ago. It would seem that this was a very significant event for the offender. His mother observed behavior problems and negative social influences soon after. He had run-ins with the police. His mother identified that the

offender had increasing difficulty controlling his emotions, particularly his anger. His brother corroborates these observations and adds that the offender began to attract bad people who began to “take advantage” of him after the death of his father. Both the offender’s mother and brother identified the offender’s anger issues as a significant issue. Both expressed concern over the offender’s mental health.

[11] The offender says that he has attempted suicide. He admits to recreational drug use in significant quantities but denies any substance abuse issues. He readily admits that many of his closest friends are “known criminals in the drug trade”. He admits that he has a problem with anger. He admits that this contributed to the offences now before the court. He accepts responsibility and expresses remorse for the offences with the exception of the sexual assault. He denies committing a sexual assault.

[12] The offender has a significant criminal record. He has previous convictions for offences dating back to January of 2010. Notably, the offences include breaches of court orders, previous threats to cause death or bodily harm, criminal harassment, simple assault, assault with a weapon, assault causing bodily harm and unlawful confinement.

[13] He was in custody from December 6, 2011 until December 20, 2013. He was back in custody by January 23, 2014 and has remained there since. Previous to these periods in custody, the offender served a period of probation. Throughout this entire period, the offender has had opportunities to obtain services for substance abuse and anger management but failed to complete any programs. Predictably, he has had disciplinary issues in custody, being disciplined 30 times for breaking facility rules and engaging in confrontations with other offenders. Not surprisingly, the Pre-Sentence report concludes by noting that the offender is a high risk to re-offend unless he takes steps to deal with his issues.

[14] More will be said about the offender's criminal record below.

Impact on the Victim or the Community

[15] The victim filed a victim impact statement and read the statement during the sentencing hearing. She said that the offences took place during the "most traumatic night of her life" and since that time her life has changed for the worst. She described being in love with the offender and offering her support to him, then feeling betrayed by his violence against her.

[16] Following the assaults, the victim said that she continued to go to school for months even with her injuries which included 2 black eyes. With support, she was

able to complete the first year of a [...] course. After the loss of her father in [...], she was unable to cope and couldn't complete her course. She reports now being terrified to be alone and stressed in every situation. She says that she doesn't trust anyone and can't sleep at night. She has dreams of being held captive and being chased for her life. She feels that she will not love again and fears that she will always be a cold person.

Legal Parameters

[17] As noted, Mr. K. is before the Court today for sentence on multiple offences. The Crown and Defence agree that the most serious of these offences is the sexual assault. The offender in this case is not eligible for a Conditional Sentence Order given the nature of the offences. More will be said about the range of sentences available for the various offences below.

Position of the Crown and Defence

[18] Both the Crown and Defence agree that the offences before the court will result in a federal custodial sentence. The Defence does not object to the Crown's request for ancillary orders including a DNA Order, a lifetime weapons ban and a SOIRA order. Beyond that there is disagreement.

The Crown Position

[19] The Crown takes the position that a global sentence of 6-7 years is appropriate. This is broken down as follows: 3 years for the sexual assault, 2 years consecutive for the assault causing bodily harm, 1 year consecutive for the unlawful confinement and 4 months each for the remaining offences. It further submits that the offences of assault, sexual assault, unlawful confinement and threats were prolonged, significant and degrading and should be considered serious violent offences.

[20] The Crown says that the sentence it seeks takes into consideration the totality principle. As set out in the Crown submissions, this position also considers the criminal record of the offender, the circumstances of the offences, including domestic violence, and the sheer nature and number of offences that are before the Court for sentence.

The Defence Position

[21] On behalf of the offender, it is submitted that a “go forward” sentence of approximately 2 years is appropriate. This sentence is broken down as follows; 2 years for the sexual assault, 1 year consecutive for the assault causing bodily harm with sentences on the remaining offences to be served concurrently.

[22] The offender has been on remand for these offences since January 23, 2014. It is acknowledged that this offender was sentenced for other offences on January 8, 2015 and is currently serving an 8 month sentence in relation to those offences. The calculation of remand credit should be limited to the period from January 23, 2014 to January 8, 2015. The parties agree to a 1.5 to 1 remand credit for this period which totals a possible remand credit of 525 days or 1 year, 5 months and 10 days. The Defence says that with a 1.5 remand credit, the total sentence imposed would be just under 3.5 years.

Case Law

[23] Both the Crown and Defence supplied case law in support of their respective positions. I have now had an opportunity to review the cases provided. Although no two cases are identical, the authorities provided did assist in determining the appropriate sentence in this case.

[24] Counsel for the Crown provided an extensive number of cases. I do not intend to review all of them but simply highlight those that were a particular source of guidance.

[25] First, in *R. v. Howe*, 2014 CarswellNS 722, Chief Justice Kennedy sentenced an offender on one count of sexual assault. In my view, the circumstances of that particular case are distinguishable but at paras 7-8, Chief Justice Kennedy concluded:

7 Section 718.1 of the Criminal Code states that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2(b) of the Criminal Code, a sentence should be similar to the sentences imposed on similar offenders for similar offences committed in similar circumstances.

8 Let's be specific about sexual assault, it is difficult to describe a precise sentencing range. Cases bearing similarity to this one suggest that sentences in this province, in Nova Scotia would, even in the absence of a criminal record....would generally not attract less than two years federal time.

[26] Chief Justice Kennedy then went on to refer to a number of cases with sentences ranging from 3-5 years depending upon the circumstances.

[27] One of the cases relied upon by Chief Justice Kennedy in *Howe*, *supra*, was *R. v. W. (J.J.)*, 2012 CarswellNS 699. In that case, the Nova Scotia Court of Appeal dealt with an offender who had been convicted of 1 count of sexual assault and 2 counts of assault, all in a domestic context. The sentencing judge sentenced

the offender to a global sentence of 16 months including a 5 month custodial term in relation to the sexual assault. The offender had no prior record. The Crown appealed and the Court of Appeal found the 5 month sentence demonstrably unfit. A sentence of 2.5 years in custody would have been an appropriate sentence in the circumstances. In so finding, Oland J.A. extensively reviewed the range of sentences for sexual assaults from various jurisdictions and directed at para. 32, in part:

32 ... Persons convicted of serious sexual assaults must appreciate that the principles of sentencing include specific and general deterrence and denunciation and such offences will attract serious consequences. The five month sentence of imprisonment for sexual assault does not send that message. In my view, considering the principles of sentencing set out in the Criminal Code, it is clearly unreasonable.

[28] In that case, the jurisprudence indicated that a major sexual assault involving intercourse, particularly in the spousal context, mandated a term of imprisonment of at least two years less a day, and frequently a term of between 3 and 5 years. The starting point approach to sentencing was rejected.

[29] The decision in *R. v. W. (J.J.)* was considered by Judge Whalen of the Provincial Court in *R. v. Dennis*, 2013 CarswellNS 793. In *Dennis*, *supra*, case, the offender was convicted of sexual assault against his former spouse as well as a number of other offences including assault. The sexual assault involved 2 separate

acts. There was a significant prior criminal record. The offender pled guilty to the offences. Crown counsel relied upon the decision on *R. v. W(J.J.)*, *supra*, and argued that the appropriate range was from 2 to 5 years for similar offending behavior. Judge Whalen concluded that a fit and just sentence for the sexual assault was 4 years with a 1 year sentence for assault and several 6 month sentences to be served concurrently. In imposing this sentence, Judge Whalen concluded that the sexual assault “offended the core values of society” and that the offender must be deterred. She referred to the decision of Fry, J. in *R. v. Kennedy*, [2013] N.J. No. 113 (N.L. T.D.) at para. 58:

Any sentence imposed must denounce the unlawful conduct and in this case a custodial sentence is required. Deterrence is necessary for two purposes, specifically for the defendant and generally for others who may be tempted to engage in similar behavior. These two sentencing principles have been recognized as the most significant for consideration in sentencing for sexual assault. However, other sentencing principles must also be considered. The message must be sent that society will not tolerate sexual assault.

[30] Similar reasons were set out in *R. v. Martin*, 2014 ONSC 973. In that case, an offender was before the court for sentence on both assault and sexual assault. The offender was 28 years old with an extensive criminal record which included escalating violence. Sentence imposed was 4 years for the sexual assault and 6 months for the assault. S.C. Hill J. reasoned that general deterrence was the

dominant sentencing principle as the accused was a recidivist in the use of violence who employed physical force to violate the complainant's sexual integrity.

[31] In *R. v. Nelson*, 2012 ONSC 4248, an offender was sentenced to 5 years for threatening death or bodily harm, unlawful confinement, sexual assault causing bodily harm and assault with a weapon. The offender was 31 years old with no prior criminal record. This case did not involve a spouse or former spouse.

[32] Finally, in *R. v. H. (R.)*, 2012 ONCJ 674, an offender was sentenced to 4 years in custody for assault, assault causing bodily harm and sexual assault on his spouse. In passing sentence, the sentencing judge adopted the following passage from the decision of the Supreme Court of Canada *R. v. McGraw*, [1991] S.C.J. No 69 as a powerful reminder of the harm caused to victims of sexual assault. At paragraphs 29-32, Justice Cory said:

29 It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women, rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or by threat of force, it denies women the opportunity to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence...

30 It is difficult if not impossible to distinguish the sexual component of the act of rape from the context of the violence in which it occurs. ...Necessarily implied in the act of rape is the imposition of the assailant's will on the victim

through the use of force. Whether the victim is so overcome by fear that she submits or whether she struggles violently is of no consequence in determining whether rape has actually been committed. In both situations, the victim has been forced to undergo the ultimate violation of personal privacy by unwanted sexual intercourse. The assailant has imposed his will on the victim by means of actual violence or the threat of violence.

31 Violence and the threat of serious bodily harm are indeed the hallmarks of rape. While the bruises and physical results of the violent act will often disappear over time, the devastating psychological effects may last a lifetime. It seems to me that grave psychological harm could certainly result from the act of rape.

32 The psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self-esteem. It is a crime committed against women which has dramatic, traumatic impact...To ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law.

[33] In its submission, Defence counsel relied upon the sentencing range set out in *R. v. W. (J.J.)*, *supra*. Two further decisions were submitted as support for the offender's position on sentence. First, the Court was provided with the decision of Judge Tax of the Provincial Court of Nova Scotia in *R. v. Lemoine*, 2014 NSPC 49. However, I find this decision distinguishable from the present case in many respects, principally due to the fact that it involved a sexual assault by a stranger but also due to the fact that the offender in that case had no prior criminal record. I find the decision of Chief Justice Kennedy in *R. v. Wournell*, 2014 NSSC 305 distinguishable for similar reasons.

[34] Having reviewed the authorities submitted by the parties, I conclude that the appropriate sentencing range for sexual assault is anywhere from 2 to 5 years but typically 3 to 5 years depending upon the relevant circumstances, and the weight to be given to the sentencing objectives and principles.

Principles of Sentencing

[35] The purpose and principles of sentencing are found at s. 718 of the **Criminal Code**. As codified in s. 718, 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 just 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.

[36] 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 any aggravating or mitigating factors relating to the offence or offender. Section 718.2(a)(ii) specifically deems it an aggravating factor when there is “evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner.”

[37] The totality principle must be considered when imposing sentence for multiple offences.

[38] In **R. v. Field**, 2013 NSPC 51 (N.S.Prov. Ct.), Derrick J. states at para. 2:

2 My task is to determine the appropriate sentence for Mr. Field. Sentencing is a “profoundly subjective process.” (R. v. Shropshire, [1995] S.C.J. No. 52, paragraph 46) Determining “a just and appropriate sentence is a delicate art” which requires a careful balancing of “the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence...” (R v. M. (C.A.), [1996] S.C.J. No 28, paragraph 91) An appropriate sentence cannot be determined in isolation. Regard must be had to all of the circumstances of the offence and the offender. (R. v. Nasogaluak, [2010] S.C.J. No.6 paragraph 44) It is a “profoundly contextual” process in which the sentencing judge has broad discretion. (R. v. L.M., [2008] S.C.J. No. 31, paragraph 15) That discretion is structured of course, by how the various sentencing objectives are to be weighed for certain offences....

Mitigating and Aggravating Factors

[39] I move now to a consideration of the mitigating and aggravating factors.

[40] Having heard and considered all of the relevant evidence as to the offender's sentence, I consider the following to be aggravating factors:

(a) The offender assaulted a former intimate partner in her own home. In doing so, he breached a position of trust and committed an offence against the core values of society. Perhaps more importantly however, the offender harmed the victim's sense of safety and security in her own home, and left her with both physical and psychological trauma;

(b) The offender has accumulated a serious criminal record of related and progressively serious offences. The offender's criminal record shows a disturbing pattern of escalating violence against intimate partners.

(c) The Presentence Report is troubling. It indicates that the offender has anger management issues, possible substance abuse issues and underlying mental health challenges. All of these unresolved issues contribute to the offender's recidivism. The offender has had prior opportunities to obtain treatment and manage these risk factors but he has been intransigent about taking advantage of the opportunities made available to him. Without support, he poses a high risk to reoffend.

[41] I consider the following to be mitigating circumstances:

(a) The offender has taken responsibility for most of his actions and exhibits remorse, the notable exception being the offence of sexual assault; and

(b) The offender is a young man and the prospect of rehabilitation cannot be abandoned;

Reasons

[42] Having reviewed all of the foregoing, the issue remains – what is a fit and proper sentence to impose on Mr. C. K.?

[43] The offender in this case remains a young man. His life to this point exhibits challenges. He endured the separation of his parents as a young child and abuse from a step-father during his formative years. He was diagnosed with ADD but persisted and completed his education. He had love and support in his early life and he was able to overcome his challenges. He developed a plan for further education and employment.

[44] Unfortunately, the offender's path was interrupted. I find that a significant event in the life of the offender was the death of his father. In the wake of this loss, the offender began to have difficulty with his relationships, he attracted negative influences, he was increasingly challenged by his anger and there were signs of unresolved mental illness. He developed a dependence on substances which he began to use in significant amounts. He developed friendships with those who would take advantage of him. Not surprisingly, he came into conflict with the law.

[45] As he comes before the Court today for sentence, I am mindful of the offender's path to this point. He is only 26 years old. The period of time since the death of his father has been a troubled and troubling one. But his age requires that serious consideration be given to the possibility that he can get his life back on its original track and that he can one day be a productive member of society with healthy relationships in his life. In order to do this, he will have to acknowledge his barriers to rehabilitation. He will have to be open to treatment for his anger and substance abuse. There is some indication that he is ready to do this now. I must say however, given his recent history, including his disciplinary history during remand, that I am less than persuaded that he is ready to embrace these opportunities.

[46] This brings me to the dominant considerations in the present case. The offender has a serious criminal record. It is a related history of escalating violence toward his partners and general disrespect for the law. In combination with the absence of any meaningful efforts to deal with anger issues and substance abuse, he is presently a high risk to re-offend. In short, he is a danger to women.

[47] This offender has failed to respond in a productive way to some of his previous sentences. He has failed to avail himself of prior opportunities to rehabilitate himself. Rather than learn from his previous mistakes, his behavior has

further deteriorated. He has graduated from violence, abuse and intimidation to sexual violence. This is a serious escalation. Moreover, the evidence suggests that this offender continues to lack insight into the very serious nature and consequences of his behavior toward women. All of this mandates that the court focus on a sentence that achieves denunciation, deterrence and separation from society.

[48] Such a focus is further supported by the very nature of the offences before the Court for sentence. They are despicable acts of a man that admittedly could not control his rage. He assaulted a woman who had once his greatest source of love and support. This woman has now been victimized. She suffered physically and her emotional trauma endures. The Court must condemn this behavior in strong terms. Intimate partners and trust relationships cannot be the subject of dominance and violence.

[49] I am persuaded that a fit and proper sentence for this offender is one in which the goals of deterrence (both general and specific) and denunciation dominate but which also affords the offender the opportunity to change his life if he is open to such a course.

[50] This sentencing involves multiple offences all of which occurred in the period between 9:30 pm on January 22, 2014 and 7:30 am on January 23, 2014. Although the offender attributes most or all of his behavior to a fit of rage, I find that separate and distinct offences occurred throughout the period. I am mindful of the totality principle as I impose the following sentences:

Final Decision

[51] For the offence of sexual assault, the sentence shall be 3 years;

[52] For the assault causing bodily harm, the sentence shall be 1 year which shall be served consecutively to the sentence for sexual assault;

[53] For the offence of unlawful confinement, the sentence shall be 1 year, to be served concurrently to the sentence for sexual assault;

[54] For the offence of threat to cause death, the sentence shall be 6 months to be served consecutively;

[55] For the offence of threat to damage property, the sentence shall be 6 months concurrent; and

[56] For the offence of theft, the sentence shall be 6 months concurrent.

[57] The total custodial sentence imposed is therefore 4.5 years. It is my hope that this sentence balances the need to give effect to the dominant sentencing objectives with a sentence length that doesn't crush the prospect of rehabilitation.

[58] I am prepared to allow a 1.5 remand credit to January 8, 2015 which results in remand credit of 525 days. I calculate the remaining custodial sentence for these offences to be 3 years and 23 days. This sentence shall commence with the expiry of the offender's current sentence.

Ancillary Orders

[59] The Crown seeks a number of ancillary orders and I am prepared to grant those orders.

Gogan, J.