IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Connors, 2010 NSPC 63

Date: 20101019

Docket: 2213633 / 2180292

Registry: Sydney

Between:

Her Majesty the Queen

v.

Shayla Connors

Revised Decision: Counsel for the defence "Donald MacLennan" replaces "Ann Marie MacInnes". This decision replaces the previously distributed decision.

Judge: The Honourable Judge A.P. Ross

Heard: October 19, 2010

Written decision: October 19, 2010

Oral decision: October 19, 2010

Charge: s. 344 and 334(b) cc

Counsel: Diane McGrath , for the Crown

Donald MacLennan for the Defense

[1] Shayla Connors has pled guilty to a charge of robbery with violence. This is a decision concerning sentence. The issue is the availability of a conditional sentence of imprisonment.

The circumstances of the offence

[2] The facts were briefly set out by the Crown. At 5:30 p.m. on the 17th of May, 2010 two young people were approached on a street in Glace Bay by a group of five others and asked if they had any money. They gave no reply, but continued on to a fast food restaurant. One of the five went in as well. Upon leaving, the two young persons were stopped under a bridge by this same group of five and asked how old they were. They replied that they were fifteen. They were then restrained and their pockets searched.

[3] One of the two young persons, a girl whom I will refer to as N., was struck in the face and her hair pulled. The other, a boy whom I will refer to as H., struggled as he was restrained by one of the five, while Ms. Connors, the accused, searched his pockets and relieved him of$30. After this brief encounter the five left the area. The two victims did not report the incident to anyone that day, but did the next when they spotted the same group at a Tim Horton's outlet.

[4] Police charged two males and three females. Two were young persons themselves, sixteen years of age. One was twenty, another twenty one. The accused was eighteen.

[5] On the same day Ms. Connors and one of the others, who appears to have been her boyfriend at the time, stole items valued at $65 from a store in Glace Bay.

[6] The charge is that Ms. Connors "did steal monies from N. and H. and at the time did use violence to H. and N., contrary to s.344 of the Criminal Code." As such it mirrors one of the definitions of robbery in s.343(a). While Ms. Connors did not herself strike or search N., this was clearly a planned action with all five acting in concert.

[7] Ms. Connors may be the first of the five to have arrived at the sentence stage. She made her first Court appearance on May 19th and pled guilty on June 24th. A pre-sentence report was ordered, and submissions on sentence made on October 13th. Ms. Connors has thus pled guilty and submitted herself for sentencing as quickly as could be expected. She has no prior record. She has never been before the Court until now. She admitted her involvement to police right away and has been cooperative with them and with those preparing the pre-sentence report. Prior to this incident she was not known to police and has not been a concern to them since.

[8] H. filed a victim impact statement. He describes feeling like a different person as a result of the events of that day – uncomfortable around crowds, unsafe even in familiar places, and angry.

[9] The impact of this crime extends to the wider community. Citizens should not be afraid to walk in public places for fear of being robbed. These two young persons were preyed upon, and although the level of violence was low, and there were no injuries, and there were no weapons used, and the amount taken was relatively small, there is nevertheless an obvious need for the court to deal with this as a very serious matter.

<u>The circumstances of the offender</u>

[10] Ms. Connors is the youngest of two children. Her mother is from Glace Bay. Her father, of aboriginal descent, is from the Six Nations Reserve in Ontario.

Her parents lived together for a short time in Ontario but soon separated. The mother returned to Glace Bay and moved in with her own parents. Aside from a brief stint in Brantford, Ontario the children were raised in Glace Bay by their grandparents while their mother sought work in various places and struggled with an addiction.

[11] Ms. Connors began to lose interest in school in Grade 10. She and her friends began to skip classes. She has been assessed as having obsessive compulsive disorder and takes medication for it. She also uses marijuana nearly every day "to calm herself." She worked at Seaview Manor between 2007 and 2009, a few hours here and there, assisting elderly people with their meals. Staff there describe her as a kind and thoughtful person who was very good to the residents, enjoyed being in their company, and was herself well-liked.

[12] Although Ms. Connors and her brother spent three summers with their father in Ontario it appears he has contributed little to their lives. There has been very little by way of financial support. He resisted giving the information which might have entitled them to a status card and its attendant benefits. Neither Ms. Connors nor her brother have been involved in aboriginal culture. Her father, who owns a roofing company, apparently held out the possibility of employment this past summer. Ms. Connors left for the Six Nations reserve on July 3rd, but reports that when she got there she found no job, no food, and no support. Consequently she went to live with her mother in Cambridge, Ontario and it is to Cambridge she hopes to return after sentencing. Her plan is to resume her schooling, having dropped out of Glace Bay High in Grade 12, and then pursue a career in cosmetology or photography.

[13] Sources describe the accused as remorseful for her involvement in the events which bring her to court. It is said that she was "in the wrong place at the wrong time" and "mixed up with the wrong crowd." She is said to be pleasant, intelligent and outgoing. She claims to have severed her ties with

the others who participated in the robbery. Her grandparents, who have shouldered most of the responsibility for her upbringing, think it would be best for her to make a fresh start with her mother in Ontario.

The availability of a conditional sentence of imprisonment – "serious personal injury offence"

[14] Although robbery is generally regarded as theft accompanied by the use of force, and thus a crime of violence, this is not always or necessarily the case. Robbery is defined in various ways in s.343. Subsection (d) for instance states that everyone commits robbery who steals from any person while armed with an offensive weapon. While there may be an implicit threat of violence in such a case, and a greater risk of harm to the victim than in a simple theft, a robbery committed in such a way may not involve actual violence.

[15] Robbery usually attracts a federal term of imprisonment of at least two years. For some time three years was regarded as a "benchmark" against which a sentencing court should measure the length of sentence. In R. v. Bratzer 2001 NSCA 166 the Nova Scotia Court of Appeal recognized that there are cases that do warrant sentences below a penitentiary term. There the court referred to the decision in R. v. J.W. 99 O.A.C. 161 in which the Ontario Court of Appeal referred to the often negative impact of imprisonment, particularly upon youth or first time offenders. The court held that even in cases of robbery, which normally will result in a federal term of imprisonment, there are situations where the sentencing court may properly impose a sentence of less than two years. Further, in exceptional cases, where there is information before the court that the protection of the public is best achieved through reformation and rehabilitation of the offender, a sentencing court may consider the imposition of a conditional sentence of imprisonment rather than a conventional jail sentence so that

the offender may serve the sentence in the community under house arrest. Such was the situation in R. v. Hendsbee 2009 NSPC 50 where Judge Tufts imposed a term of imprisonment of 21 months in the form of a conditional sentence.

[16] In Hendsbee, and again in R. v. Griffin 2010 NSPC 47, the provincial court grappled with the implications of recent amendments to the Criminal Code, changes made subsequent to the decision in Bratzer, and changes which have a direct bearing on the case before me.

[17] Conditional sentences of imprisonment have always been restricted to sentences of less than two years where the offender would not pose a danger by being in the community on house arrest. This alone, on the Crown's view, ought to disqualify Ms. Connors from a conditional sentence. Recognizing that the level of violence here is on the lower end of the scale, but still mindful of the need for deterrence and denunciation, the Crown is recommending a two year term of imprisonment for this accused. Defence, on the other hand, suggests that the court should impose a sentence somewhat under two years, which would allow for the possibility that Ms. Connors serve it in the community, under supervision of correctional officials in Cambridge Ontario. Defense cites her young age, the fact that it is her first and only offence, and her prospects for future success as factors which justify this length and form of sentence.

[18] Purely in terms of length of sentence, there is little difference between two years and two years less a day. Comparing Ms. Connors with the accused in the Hendsbee and Griffin it appears her prospects for rehabilitation are even stronger than theirs, and the courts saw fit to impose conditional sentences in those cases. These considerations lend strong support to the Defense position that Ms. Connors should be sentenced to less than two years, and permitted to serve it in the community under house arrest. However, amendments to the Criminal Code effective December 1, 2007,

appear to preclude me from even considering the possibility of a conditional sentence of imprisonment.

[19] These amendments further narrowed the range of offences eligible for a conditional sentence of imprisonment. Offences defined as "serious personal injury offences" in s.752 were excluded from the conditional sentence regime. Despite the label such offences are not defined to mean offences where the victim receives a serious injury. Rather they are defined to mean indictable offences with at least a ten year maximum involving (I) the use or attempted use of violence against another person or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person. (Other offences of a sexual nature are also included in s.752 but these have no bearing on the case before me.) And while the second branch of the foregoing definition may, arguably, apply to the victims H. and N. it is the first – the use of violence – which pertains most clearly in the circumstances here.

[20] In both Hendsbee and Griffin the sentencing judge came to the conclusion that the accused did not use or threaten actual violence upon the victim. I do not need to discuss the reasoning by which they came to that conclusion, nor decide whether I agree with it. Those accused, it would seem, committed robberies as defined in s.343(d). Ms. Connors has been charged under the wording in s.343(a). She is both a direct participant (where H. is concerned), and a party (where N. is concerned) to the robbery. While the actions of the group of five did not ascend to a high level of force, violence was used, and is an element of the very offence to which she pled guilty. Other courts may have struggled with whether a particular robbery involved violence; here there is only one possible conclusion.

[21] An important decision, referred to in the above cases and cited frequently, is R. v. LeBar [2010] O.J. No.1133 from the Ontario Court of Appeal. The

trial judge there made a finding, on the facts of the case, that the accused had resorted to violence in committing the offence. However, the trial judge interpreted the relevant sections of the Criminal Code, referred to above, as permitting an inquiry into the level or degree of violence used when addressing the issue of whether the robbery was a "serious personal injury offence". At para 5 of the Court of Appeal judgment we learn that:

> "the trial judge, upon considering the relevant provisions of the Code, held that although (the accused) committed an offence involving violence, the violence was not sufficiently serious so as to meet the test of a serious personal injury offence. She reasoned that . . . the Code provisions allow a trial judge discretion to assess whether the circumstances . . . support a finding that an objective threshold of severity in the violence has been met, in order to elevate the offence to the serious personal injury realm."

[22] The Ontario Court of Appeal found this approach to be in error. It said that the key to fulfilling the relevant criterion of a serious personal injury offence is a sustainable finding of violence, after which the level or degree of violence is immaterial. The question of whether there has been violence may require a factual determination by the trial judge. As I read Hendsbee and Griffin the courts there did not make a clear finding of violence during the robbery. In the case of Ms. Connors her plea to the offence, described in the very charge as involving violence, supported by the facts described above, hardly require me to make a finding at all. Violence was used, charged and pled to. The fact that it was on the lower end of the scale does not matter. The offence here falls within one of the definitions of a serious personal injury offence in s.752, and is thus excluded from consideration for a conditional sentence of imprisonment under s.742.1.

[23] At para 47 of LeBar the court states ". . . I conclude that the object and scheme of the relevant provisions of the Code, as well as parliament's intention in enacting them, was to reduce judicial sentencing discretion by eliminating the availability of conditional sentences for crimes of violence . .

. This is significant in the light of the trial judge's conclusion that the reduction of judicial discretion was an 'undesired result'. "

[24] Courts must, within constitutional limits, give effect to the intentions of Parliament. Debate about the wisdom of such changes has, presumably, already occurred. Elected representatives have exercised their function as lawmakers. Quite aside from whether a sentence as long as two years ought to be meted out, having Ms. Connors live with her mother Cambridge Ontario on house arrest, serving a conditional sentence of imprisonment, is not an option I can consider.

Disposition

[25] I am inclined to the view that a two year sentence in a federal penitentiary, as Crown is seeking, would not only give appropriate recognition to denunciation and deterrence, but also suit the needs of the offender better than a lengthy term in a provincial jail.

[26] She is therefore sentenced to a two year term of incarceration for the robbery, and one month concurrent for the shoplifting. Given the strong likelihood of parole, I do not see the need for any probation to follow.

Dated at Sydney, Nova Scotia, this 19th day of October, 2010

Judge A. Peter Ross