PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Julian, 2006 NSPC 67

Date: November 20, 2006
Docket: 1579712
1579713
1570714
Registry: Truro

Between:

Her Majesty the Queen

v.

John Freeman Julian

Revised decision:	The text of the original decision has been corrected according to the attached erratum dated February 6, 2007.The text of the erratum is appended to this decision.
Judge:	The Honourable Judge Anne S. Derrick, Judge of the Provincial Court
Heard:	Truro, Nova Scotia
Oral decision:	November 20, 2006
Written decision:	January 26, 2007
Counsel:	Richard Hartlen for the Crown Luke Craggs for the Defence

Introduction:

[1] On September 8, 2006, following a trial, I found Mr. Julian guilty on charges of assault causing bodily harm to Sarah Michael, contrary to section 267(b) of the *Criminal Code*, a breach of probation for failing to keep the peace and be of good behaviour, contrary to section 733.1 of the *Criminal Code*, and a breach of an Undertaking dated October 2, 2005 not to communicate with Ms. Michael, contrary to section 145 (5.1) of the *Criminal Code*. Mr. Julian's sentencing was adjourned from October 26, 2006 to November 20, 2006 to allow for the preparation of an updated Pre-sentence Report and for the calling of evidence on the *Gladue* factors in the case. At that time, I indicated my intention to elaborate in written form on the *Gladue* process and factors in sentencing. This is my decision on Mr. Julian's sentence, rendered on November 20, 2006, with that elaboration.

Facts

[2] I accepted Ms. Michael's evidence that Mr. Julian had punched her with a

closed fist on her ear, breaking her glasses. The punch cut Ms. Michael's ear, probably due to a ring on Mr. Julian's hand, and caused it to bleed. I also accepted that the punch knocked Ms. Michael off the chair where she was seated and that while she was on the floor, Mr. Julian kept hitting her with both fists and kicking her on her knees and legs. Ms. Michael testified that the blows landed on her head and her chest. While this was going on Mr. Julian was accusing Ms. Michael who had been out of the house visiting friends, of "fucking around."

[3] Photographs tendered in evidence showed bruises to Ms. Michael's knees and on her arm and a cut on her ear. The attack terrified Ms. Michael and she fled to a neighbour's house, bleeding. An ambulance was called and Ms. Michael was cleaned up and checked for injuries. She did not require stitches and while she has recovered physically, she has suffered lasting psychological effects.

[4] As Mr. Julian was on probation at the time with a condition to keep the peace and be of good behaviour, I found him guilty, as a result of the assault on Ms. Michael, of failing to comply with his probation. I also convicted him on breaching an Undertaking dated October 2, 2005 which prohibited him from having any communication with Ms. Michael. The evidence established beyond a

reasonable doubt that Mr. Julian went to Ms. Michael's home the day after the assault, while on an Undertaking to have no contact with her.

Victim Impact Statement

[5] Ms. Michael filed a Victim Impact Statement describing her physical injuries from the beating by Mr. Julian. She notes that she has experienced a lot of "fear, stress and anxiety" as a result of the assault and that a pre-existing heart condition has been aggravated requiring her to have surgery. Ms. Michael also describes the psychological and emotional effects of being assaulted by Mr. Julian, saying that she is mentally worn out and feels hopeless. She describes anger, fear of being alone, humiliation because of the fear, feelings of betrayal, depression, worthlessness, sleeplessness, nightmares, and suicidal thoughts. It is apparent that Mr. Julian's criminal acts against Ms. Michael have had a profoundly damaging effect on her.

Pre-Sentence Report and Updates

[6] Mr. Julian has provided the Court with a Pre-Sentence Report dated June 15, 2006 and an updated report dated October 13, 2006. I have also been provided with a second Pre-Sentence Report update dated November 15, 2006, which specifically addresses treatment programmes Mr. Julian has had with respect to alcohol and other issues, where those programmes were provided and their outcomes. I have heard submissions that the probation file, which it would have been helpful for everyone concerned to have had access to, has gone missing and so the second updated Pre-Sentence Report was only able to provide very limited details about one program that Mr. Julien attended until it was canceled and another program he has been wait-listed for.

Gladue Report

[7] In addition, I have been provided with what has been described as a Gladue Report dated November 20th, 2006 prepared by Ms. Abrams, an Aboriginal Courtworker with the Mi'kmaw Legal Support Network of the Confederacy of Mainland Mi'kmaw.

[8] Ms. Abrams' *Gladue* Report was prepared after I adjourned Mr. Julian's sentencing on October 26, 2006 for the purpose of obtaining more information relevant to his status and circumstances as an Aboriginal offender, as required by the decisions in *R. v. Gladue*,[1999] S.C.J. No. 19; *R. v. Wells*, [2000] 1 S.C.R. 207; and *R. v. Kakekagamick*, [2006] O.J. No. 3346 (Ont. C.A.). I want to say I appreciate Ms. Abrams' efforts, at short notice, to put together a report for the Court. She indicated her concerns about doing so at the October 26 court appearance and I recognize that the work she does and the services that are provided through her program are stretched and, undoubtedly, underfunded, and the report was obviously prepared under those constraints.

[9] Ms. Abram's Report sets out Mr. Julian's background, his education (which included attendance at the Shubenacadie Residential School), his health, places where he has lived, his employment, his responses to the offences listed in his CPIC record and the plan proposed for Mr. Julian. In the Report, Mr. Julian identified his issues with anger that "relate to foster care, residential school and with the police." He told Ms. Adams that he believes factors such as distrust for police, alcohol addiction and his temper when drinking have contributed to his involvement in the criminal justice system.

Cases

[10] I have also been provided with a number of cases by Crown and Defence. The Crown provided:

R. v. MacDonald, [2003] N.S.J. No. 99 (NSCA)

R. v. McIntosh, [2004] N.S.J. No. 39 (NSCA)

R. v. Timmons, [2003] N.S.J. No. 367 (NSCA)

R. v. Patridge, [2005] N.S.J. No. 498 (NSCA)

R. v. Youngman, [2005] A.J. No. 1931 (Alta. Prov. Ct.)

R. v. Williams, [2004] B.C.J. No. 2587 (B.C. Prov. Ct.)

R. v. Cormier, [2005] N.J. No. 46 (NL S.C.)

R. v. King, [2005] N.J. No. 283 (NL Prov. Ct.)

R. v. Taylor, [2001] Y.J. No. 150 (YT Terr. Ct.)

R. v. Reid, [2005] A.J. No. 539 (Alta. Prov. Ct.)

[11] The Defence provided:

R. v. McBride, [2003] N.S.J. No. 508 (NSSC)

R. v. Williams, [2004] B.C.J. No. 2587 (B.C. Prov. Ct.)

R. v. Bennett, [2004] N.J. No. 296 (NL Prov. Ct.)

R. v. B.M., [2005] O.J. No. 5777 (Ont. Ct. of Justice)

R. v. Atigikyoak, [2002] N.W.T.J. No. 107 (NWTSC)

Position of the Crown

[12] There is no agreement between Crown and Defence as to the appropriate sentence in this case. Mr. Julian has a lengthy record, including for violent offences, which includes two prior convictions for assaults against Ms. Michael and one conviction for a threat. The Crown notes a total of 32 offences on Mr. Julian's record. It is the Crown's position that Mr. Julian should receive a sentence of incarceration, which I understand from the submissions today should be two years. It is agreed that Mr. Julian, if sentenced to custody, should receive a remand credit totaling six months, that is, a double credit for three months in custody since I revoked his bail following his conviction.

Position of the Defence.

[13] The Defence, on the other hand, is seeking a sentence of less than two years in jail to be served as a conditional sentence in the community. In support of this submission, the Defence points to the updated Pre-Sentence Report which quotes Mr.
Julian as stating that he will never drink again and is prepared to take counselling and programs to help him deal with his addictions and issues of abuse from his childhood. Mr. Julian apparently told the author of the Pre-Sentence Report that he will comply with any disposition from the Court and will attend for assessment and treatment in the areas of substance abuse and anger management. The Pre-Sentence Report author concludes by saying,

> Given the subject's state of intentions of compliance with any disposition from the Court, he is considered a suitable candidate for community supervision.

[14] The Crown made several submissions on this opinion and notably, advised that his communications with the author of the Pre-Sentence Report revealed that the author was unaware of details concerning this offence, that is, the assault against Ms. Michael, Mr. Julian' s record, or his previous offences against Ms.

Michael. I do not, therefore, place any real stock in that opinion. It does not equate with the view of experienced probation officers that Kelly, J. relied on in R. v. McBride([2003] NSJ No. 508, paragraph 49) as a central factor in his decision to impose a conditional sentence in a case of domestic violence.

The *Gladue* Decision

[15] Mr. Julian is Mi'kmaq so I have given close attention to section 718.2 (e) of the Criminal Code and also the *Gladue* decision. In *Gladue*, the Supreme Court of Canada recognized that there is a "drastic over-representation of Aboriginal people within both the Canadian prison population and the criminal justice system, [revealing] a sad and pressing social problem." (paragraph 64) The Court held that Parliament intended, by providing for distinct sentencing treatment in Section 718.2 (e) of the *Criminal Code* to attempt to redress this social problem to some degree.

[16] Section 718.2(e) of the Criminal Code provides that:

> A court that imposes a sentence shall also take into consideration the following principles...all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[17] In *Gladue*, the Supreme Court of Canada held at paragraphs 64 and 65:

> The provision that is in the Criminal Code may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it to the extent that a remedy is possible through the sentencing process.
> ...

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education and lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail or whether other sentencing options may be employed, which will play perhaps a stronger role in restoring a sense of balance to the offender, victim and community and in preventing future crime.

[18] Mr. Julian's history is, as the Defence pointed out to me, a tragically common profile of abuse, dislocation, chaos and discrimination. The harms done to him in his childhood and youth were not his fault. He bears the scars of them

and the very difficult legacy of alcohol addiction and anger. I am required to approach Mr. Julian's sentencing differently "because the circumstances of Aboriginal people are unique and call for a special approach." (*Gladue*, paragraph 6) The *Gladue* analysis must be performed in all cases involving an Aboriginal offender, regardless of the seriousness of the offence. (*Gladue*, paragraph 79: also see: *R. v. Jensen*, [2005] O.J. No. 1052 (Ont. C.A.) and *R. v. Abraham*, [2000] A.J. No. 645 (Alta. C.A.))

[19] I have also made a careful examination of the *Wells* decision from the Supreme Court of Canada and the Kakekagamick decision from the Ontario Court of Appeal. *Wells* and *Kakekagamick*, building on the approach in *Gladue*, outline the appropriate approach for a sentencing court to take with respect to an Aboriginal offender. *Gladue* established the framework for the sentencing court in discharging its duty to determine a fit and proper sentence for Aboriginal offenders, requiring that a judge sentencing an Aboriginal offender must examine:

> (a) The unique systemic or background factors which have played a part in bringing the particular Aboriginal offender before the courts; and

> (b) The types of sentencing procedures and sanctions, which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. (paragraph 66, *Gladue*)

[20] In *Kakekagamick*, the Ontario Court of Appeal, citing its recent decision in *R. v. Brizard*, [2006] O.J. No. 729 held that: "Failure to give adequate weight to an offender's Aboriginal status in accordance with section 718.2 (e) and *Gladue* amounts to an error of law." (paragraph 31) Failure by a sentencing judge to undertake an adequate inquiry, where appropriate and practicable, into the Aboriginal offender's circumstances and alternative approaches for sentence, constitutes an error in law. (*Kakekagamick*, paragraphs 52 - 55) In *Kakekagamick*, the sentencing judge was held to have been in error for not pursuing additional inquiries beyond references that the offender was Aboriginal and had grown up in an environment of alcohol abuse on his First Nation. Where the issue of more information or evidence is not raised by counsel, it falls to the sentencing judge to *consider whether or not further inquiries are either "appropriate or practicable." (Kakekagamick*, paragraph 53)

[21] While Parliament and the courts have laid out a different methodology for assessing a fit and proper sentence for an Aboriginal offender, this does not

necessarily lead to a different result. The sentencing judge's fundamental duty to impose a sentence that fits the offender and the offence remains intact. In *Kakekagamick*, the Ontario Court of Appeal found fault with the sentencing judge's sentencing approach but did not disturb the sentence arrived at, five years for aggravated assault based on aggravating factors that included "the brutal nature of the assault; that the victim was [Mr. Kakekagamick's] domestic partner; and the statement in the pre-sentence report that [Mr. Kakekagamick] had been assessed as a high risk to re-offend." (paragraph 71) Laforme, J., writing for the Court held:

> In all the circumstances, especially the aggravating features that include the nature of the assault, that it was in the context of a domestic relationship and that the appellant had been assessed as a high risk to reoffend, it would not be fit and proper to sentence the appellant to anything other than a period of imprisonment. This offender and this offence are serious enough that the objectives of restorative justice expressed in Section 718.2 (e) of the *Criminal Code*, together with the principles established in *Gladue*, ought not to weigh significantly more favourably than those of separation, denunciation and deterrence. Moreover, [Mr. Kakekagamick's] failure to accept responsibilities for his actions weighs against affording him significant consideration by way of mitigation.

[22] The report prepared by Ms. Abrams sets out a proposal by Mr. Julian for the content of a conditional sentence, which would be the alternative to incarceration that he is seeking to have me accept as an appropriate sentence in this case. In the last paragraph of the report it is stated:

> When and if released to the Pictou Landing First Nation Community, [Mr. Julian] hopes to live with Diane, [Denny], and Kevin, her stepson, address his holistic health and rebuild the rest of his life. He will be addressing his back problems through acupuncture and chiropractor therapy, a series of healing circles are to be facilitated by Donna Stephens and co-facilitated by this writer, Alice Abram. This writer has recruited the circle involvement of Native Alcohol and Drug Addiction Association, community supporters, recovering alcoholics New Leaf Program [which I now understand Mr. Julian has contacted himself] survivors of sexual abuse, residential school survivors, elders and a member of the police force. John will also be seeking help through the practice of traditional sweats.

[23] In determining the fit and proper sentence for Mr. Julian, I must consider the cases that were provided to me by the Crown and Defence. I will speak very broadly about some of the principles that emerge from them. In fairness, I want to say that I find *McBride* to be anomalous; for example, I note that it does not address the *MacDonald* decision from the Nova Scotia Court of Appeal which preceded it.

[24] The *Reid* decision of the Alberta Provincial Court, at paragraph 28, one of the decisions provided to me by the Crown, quotes from *R. v. Bonneteau* (1994), 157 A.R. 138, where the Alberta Court of Appeal held that guideline judgments from courts of appeal are binding on trial judges.

> They do not eliminate a trial judge's discretion in sentencing, but they guide it. A trial judge must exercise this discretion within the guidelines, unless the circumstances of the case justify a departure from them. There is no such thing as unfettered discretion.

[25] The guidelines that I have to consider, emerging from the Nova Scotia Court of Appeal, which are binding on me, (for example, *R. v. MacDonald*, [2003] N.S.J. No. 99) and other courts of appeal, are that deterrence and denunciation in cases of domestic violence must be foregrounded and emphasized. This is true even in cases involving Aboriginal offenders. I note, for example, the case of *Youngman* [2005] AJ No. 1931 (Alta. Prov. Ct.), refers to the following passage from the Supreme Court of Canada decision in *Wells*:

> Not withstanding [sic] what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As was held in Gladue, at paragraph 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ between aboriginal and non-aboriginal offenders, given that in these circumstances the goals of denunciation and deterrence are accorded increasing significance.

[26] In *Youngman*, in respect to the sentencing of Mr. Youngman himself, the Court found at paragraph 49 that:

> ...denunciation of family violence is paramount. There is a need to deter Youngman from committing further acts of family violence. There is also a need to say to the community that family violence must stop.

[27] In the *Williams* decision of the British Columbia Court of Appeal, the Court said at paragraph 60 that where no alternatives exist, in a meaningful way, to achieve denunciation and general deterrence, as well as healing, the court will impose a denunciatory type of sentences for domestic violence.

[28] I am not satisfied in Mr. Julian's case that "alternatives exist, in a meaningful way, to achieve denunciation and general deterrence, as well as healing". I am not satisfied that in this case the paramount considerations of deterrence and denunciation can be satisfied by a conditional sentence. Mr. Julian is a repeat offender, having two prior convictions for assault against this victim. He was on probation when he assaulted Ms. Michael this time and then, when released, he broke the terms of his undertaking and had contact with her and the contact, according to Ms. Michael whose evidence I found to be credible, was to try and talk her out of pressing charges and going to court. A conditional sentence is just not appropriate in my view given those facts.

[29] Furthermore, I am not satisfied that Mr. Julian does not pose a risk to the community. In this regard I am referring to the requirement under section 742.1 (b) of the *Criminal Code* that imposing a conditional sentence requires me to be satisfied that the serving of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

Sentence: (Oral Decision)

[30] I do not have evidence that the issues that have caused Mr. Julian to be violent previously have been adequately addressed. Mr. Julian, you may well be able to address these issues, including the alcohol addiction you spoke of having underestimated, which I thought was an honest and insightful comment on your part, and I encourage you to commit yourself to doing so, but I do not have the comfort of knowing that you have been able to do that successfully yet. Willingness to address these issues is a very important start, and I have heard some evidence that you are expressing a willingness to try and address these issues and I see that there is an indication that you have endeavoured to do so in the past. But these remain starts only; ultimately you have to make real progress

so that you are not a risk to others, perhaps especially to the women that you become involved with.

[31] So, in the circumstances I am sentencing you to a period of imprisonment of 14 months, less the six months remand credit, for a total of 8 months remaining. I am sentencing you to 14 months on the assault. I am sentencing you to two months on each of the breach of probation and breach of undertaking charges, to be served concurrently. I am also sentencing you to a period of probation of two years. That probationary period will involve the usual statutory conditions that you are to keep the peace and be of good behaviour, Mr. Julian. You are to report to the Court as and when required to do so and you are to advise your probation officer or the Court of any change in your name, address, employment or occupation.

[32] In terms of the optional conditions, that is the additional conditions – they are not optional to you, they are optional to the Court – that I am imposing, you are to have no direct or indirect contact or communication with Sarah Michael. You are not to possess or consume any alcohol or drugs, except in accordance with a prescription from a doctor. You are not to attend at Indian Brook. You are

to take treatment and counselling as directed by your probation officer, specifically with respect to domestic violence. You are not to possess any weapons as defined by the *Criminal Code*, or ammunition.

[33] I am also imposing a DNA order, as requested by the Crown, Mr. Julian, and I am imposing a ten-year firearms prohibition.

[34] I want to say, finally, and while this was said perhaps a little differently by the British Columbia Provincial Court than I might say it, the general sentiment is one that I share:

> The Court takes no pleasure in this sentencing, and does not wish to send any aboriginal people to jail, as they are already over crowded with aboriginal people, and the Court commends to the community to continue with its efforts to offer alternatives that the Court can rely on for the future. (*Williams*, at paragraph 79)

[35] I certainly want to echo that, Mr. Julian. I recognize that like so many First Nations people, you have had a difficult and challenging life and I take no pleasure in arriving at the conclusion that I should impose a custodial sentence on you, but I am satisfied, given all the factors that I have taken into account, including the *Gladue* factors, that it is a fit and appropriate sentence in this case.

[36] I want to thank counsel. You have both obviously endeavoured to assist me and I thank you for your efforts. That concludes the matter.

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Anne S. Derrick, PCJ

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JOHN FREEMAN JULIAN

Revised decision: The date at the top of the page has been corrected by this erratum dated February 6, 2007.

JUDGE: The Honourable Judge Anne S. Derrick,
Judge of the Provincial Court

HEARD: Truro, Nova Scotia

ORAL DECISION: November 20, 2006

WRITTEN DECISION: January 26, 2007

COUNSEL: Richard Hartlen for the Crown
Luke Craggs for the Defence

ERRATUM

Please note that the date at the top right of the decision should be November 20, 2006 , the date of the oral decision, rather than January 26, 2007, the date of the written decision.