PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Avery*, 2014 NSPC 40

Date: 2014-06-19
Docket: 2669614
Registry: Pictou

Between:

Her Majesty the Queen

v.

Christian Douglas Avery

DECISION ON SENTENCE

Judge:	The Honourable Judge Del W. Atwood
Heard:	19 June 2014 in Pictou, Nova Scotia
Decision:	19 June 2014
Charge:	Section 267(b) *Criminal Code of Canada*
Counsel:	Patrick Young, for the Nova Scotia Public Prosecution Service Stephen Robertson, for Christian Douglas Avery

By the Court:

[1] Christian Douglas Avery is before the court to be sentenced in relation to a single indictable count of Section 267(b). Mr. Avery entered a guilty plea to that charge following the commencement of his trial that included charges of break and enter and one count of common assault. However, after hearing from the first trial witness, the prosecution offered no further evidence on the para. 348(1)(b) charge or the s. 266 count, and those counts wound up being dismissed. Mr. Avery entered a guilty plea to the para. 267(b) count.

[2] Para. 267(b) of the *Criminal Code* provides as follows:

> Everyone who, in committing an assault,
> *(b)* causes bodily harm to the complainant,
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years . . . .

[3] Para. 267(b) of the *Criminal Code*, when prosecuted indictably, is excluded from the conditional sentencing regime in virtue of para. 742.1(e) of the *Criminal Code;* therefore, conditional sentencing is not an issue before the court.

[4] The fact are that Ms. Jessi Firth chose to end a relationship with Mr. Avery, which she was free to do. Ms. Firth and Mr. Watt—who is the victim of the

Section 267(b) count—commenced a relationship, which they were entitled to do without fear of recrimination from Mr. Avery. Or so it ought to have been.

[5] On the 16 November 2013, Mr. Watt was lawfully in Ms. Firth's residence and had a reasonable expectation of his privacy and security while a guest there. Instead, while prone in bed and vulnerable, he was the victim of a vicious and unprovoked assault carried out by Mr. Avery that resulted in serious injury to Mr. Watt. The medical, emotional and financial effects upon Mr. Watt were, and continued to be, serious. The court heard Mr. Watt recite into the record his victim impact statement which he prepared on 3 December 2013.

[6] Mr. Avery's level of remorse and commitment to rehabilitation are questionable. He approached anger management with what was described by the program facilitator in the pre-sentence report as "a bad attitude", but appeared to adapt positively. However, one must question seriously Mr. Avery's commitment to rehabilitation and anger management given the social-networking post published by Mr. Avery shortly after the court adjourned 20 May 2014. That post was exhibited before the court and reads as follows:

> It should just have dropped considering I will already have done about 8 months house arrest. Two nights in Burnside and wrongfully accused of assaulting a girl and breaking into a house. All for beating someone up who a majority would say deserved it just in my opinion.

[7] This, in my view, displays a singular lack of empathy and a certain lack of reality. In fact, at the point in time that Mr. Avery composed that message, he had been subject to approximately six and a half months of house arrest rather than the eight referred to by Mr. Avery and the eight to nine mentioned at the sentencing hearing. Furthermore, making public such a comment— "all for beating someone up who a majority would say deserved it"—causes me to draw the inference that Mr. Avery continues to pose a threat to Mr. Watt, if not of actual physical harm, then of psychological harm, as comments of this nature clearly constitute cyberbullying within the definition of para. 3(1)(b) of the Cyber-Safety Act.[1]

[8] Section 718.1 of the *Criminal Code* informs the court that the primary purpose of sentencing is proportionality; that is, "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". The gravity of the offence in this case is significant. Mr. Avery has been found guilty of a serious indictable offence that resulted in serious bodily harm to the victim. Mr. Avery's degree of responsibility is high. He is solely responsible for what happened to Mr. Watt and there was no justification for Mr. Avery's conduct.

[1] S.N.S. 2013, c. 2.

[9] Although the prosecution chose not to proceed, very fairly, with the break and enter charge, the court would observe that the facts of the case, as described under oath by Ms. Firth, resemble very closely a home-invasion break and enter. Mr. Avery may very well have had some colour of right to enter Ms. Firth's residence on that date in November of 2013; however, it was certainly not to commit an assault upon Mr. Watt. Further, it was clear to the court that Mr. Avery arrived at Ms. Firth's intending to deal rough justice to Mr. Watt.

[10] The court must obviously show restraint in imposing sentence, and I apply the principles set out in paras. 718.2 (d) and (e) of the *Criminal Code*. The court must be cautious not to impose a sentence that would crush the prospect of rehabilitation.

[11] This is Mr. Avery's first offence, and the court certainly applies the principles set out by *R. v. Salituro*, [1990] O.J. No. 805 (C.A.), *aff'd.*, [1991] S.C.J. No. 97.

[12] The court recognizes, however, that, for offences resembling home invasion break and enter, sentences of between eight and ten years have been imposed by courts in this province; I refer to the judgment out of our Court of Appeal in *R. v. Harris*, 2000 NSCA 7.

[13] In this particular case, Mr. Avery pushed his way into Ms. Firth's apartment on a mission. Ms. Firth asked Mr. Avery to leave; instead of doing so, Mr. Avery went looking for Mr. Watt. The fact of the matter is that Ms. Firth was not Mr. Avery's property, and she was free to be with whomever she wished; the person whom she chose to be with was entitled to enjoy her company in security and safety. While Mr. Avery might have had some colour of right to enter Ms. Firth's apartment, it was just barely so. Certainly, Mr. Avery was not entitled to enter it in order to assault Mr. Watt.

[14] Trial Exhibit Number 1, the photography taken inside Ms. Firth's residence was demonstrative of the very high level of this unprovoked assault. There is widespread blood spatter from Mr. Watt's injuries. I have reviewed, as well, the photography that was submitted to the court taken by Mr. Watt, himself, while in hospital. That photography underscores the fact that Mr. Watt was the victim of a serious and vicious assault that resulted in serious bodily harm to him, the after effects of which he continues to suffer.

[15] I have reviewed in detail all of the cases submitted to the court by both the prosecution and the defence. I have also reviewed cases that have come before this court over the past several years. I find that this case, in many respects, is very factually similar to the *Joshua Francis Connors* case, case number 629385, in

which Mr. Connors received a three-year sentence for a break and enter and assault charge. Mr. Connors entered, without permission, the residence of an individual with whom he was acquainted, for the purposes of settling a score. It is true that Mr. Connors was faced with a break and enter charge. It is true, as well, that Mr. Connors had a minor prior record. However, in the Connors' case, the victim walked away essentially unscarred, in distinction to the case before the court today in which the court is satisfied that Mr. Watt suffered significant, profound and long-lasting injuries.

[16] The court must take into account the prevalence of this sort of crime in Pictou County; accordingly, I apply the principles set out by the British Columbia Court of Appeal in *R. v. Prasad*, 2006 BCCA 470 at para. 12, and *R. v. Gibbon*, 2006 BCCA 219 at paras. 21 to 26, which satisfy me that the court ought to consider the prevalence and incidence of crime in the locality in determining the need for denunciation and deterrence, particularly, with respect to general deterrence.

[17] The court has had occasion to deal with numerous cases involving young males who see the private threshold as no boundary to the wreaking of revenge upon persons in peaceable occupation of dwellings. I would refer to the *Connors* decision, which I mentioned a few moments ago, as well as the *Dylan MacDonald*

case, *R v. Osborne; R v. Best* and *R. v. C.U.* as being emblematic of the prevalence of this particular crime in the community.

[18] Mr. Avery has been subject to fairly stringent terms of release for approximately … well just under seven months now. Although the court regarded initially the pre-sentence report as being guardedly optimistic, the court now has evidence that would make some of the favourable comments in the pre-sentence report as less clear. First of all, with respect to Mr. Avery's attitude toward the offence and toward anger management and violence prevention, Mr. Avery's social-networking comment leaves the court with considerable concern regarding Mr. Avery's risk to the community, and, particularly, his risk to Mr. Watt who is a member of the community.

[19] The pre-sentence report prepared on April 10th, 2014 describes Mr. Avery as performing well in an educational setting. Mr. Avery advised the author of the pre-sentence report that:

> … he is currently enrolled with the Nova Scotia Community college where he is working to obtain his Grade 12. He reports making good grades in school and intends to graduate in June 2014. The subject stated that he would like to obtain his certification to work as an electrician in the future.

[20] On the last date, the court ordered a pre-sentence report update which is now before the court. That update recites as follows, and it is dated 13 June 2014:

> As for school, the subject stated that he decided to leave school as he found himself to be "distracted" and "not able to concentrate" on schooling. He was unclear as to the date he stopped attending school. This writer contacted Mrs. Teresa MacNeil, Nova Scotia Community College, Adult Learning Program, who informed that the subject had originally attended their program from October 2012 through April 2013. He did not show enough progress at that time and was unable to re-enrol until taking one semester off. He re-enrolled in January 2014 and attended school until February 2014. He withdrew from school on March 19th, 2014 at the request of the Nova Scotia Community College due to lack of attendance.

[21] Given the foregoing factors, the court finds, first of all, that it is appropriate that a victim surcharge amount be paid. There will be a $300.00 victim surcharge amount to be paid by Mr. Avery, and Mr. Avery will have 36 months to pay that victim surcharge amount.

[22] There will be a Section 109 order in relation to the charge before the court. The court prohibits you, Mr. Avery, from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, or explosive substance; that order commences today's date and runs for a period of twelve years plus one day. Furthermore, the court orders and directs that you be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[23] There will be, as well, a primary- designed-offence DNA collection order in relation to the charge before the court.

[24] Based on the receipts presented the last date by Mr. Watt, there will be a Section 738 stand-alone restitution order in favour of Mr. Watt in the amount of $306.05.

[25] The court is of the view that, given the circumstances that I have outlined, recognizing the principle of restraint, but also the principles of sentencing proportionality, parity, denunciation and deterrence, the appropriate sentence in this case is one that, indeed, is at the upper end of the range suggested by the prosecution. The court imposes a sentence of two years plus a day, and the warrant of committal is to be endorsed in accordance with the provisions of Section 743.21 of the *Criminal Code*: while in custody, Mr. Avery is to have no contact or communication, either directly or indirectly, with Jessi Amber Firth or with Joshua Alexander Watt.

[26] Any further submissions, counsel, in relation to Mr. Avery?

[27] **Mr. Young**: No, Your Honour.

[28] **Mr. Robertson**: No.

[29] **The Court**: Thank you. I'll have you go with the sheriffs, please, Mr. Avery.

JPC