PROVINCIAL COURT OF NOVA SCOTIA

Citation: ***R. v K.R.***, 2014 NSPC 41

Date: May 7, 2014
Docket: 2272469, 2272470
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

K.R.

Identifying information has been removed

Judge:	The Honourable Judge Theodore Tax,
Heard:	October 10, 2013, in Dartmouth, Nova Scotia
Decision	May 7, 2014
Charge:	Criminal Code 348(1)(b) and 266
Counsel:	Alex Keaveny, for the Crown Luke Craggs, for the Defence

By the Court:

INTRODUCTION:

[1] Ms. KR was found guilty following the trial of the offence of unlawfully breaking and entering the residence of AH on May 5, 2010, and therein committing the indictable offence of assault, contrary to section 348(1)(b) of the **Criminal Code**. Ms. KR was also found guilty to being a party to the assault of Ms. AH, contrary to section 266 of the **Criminal Code** by virtue of the operation of sections 21(1)(b) and 21(1)(c) of the **Criminal Code.**

[2] In addition to those findings, I found Ms. KR not guilty of being a party to committing an assault of AH with a weapon or threatening to use a weapon to wit, a pair of scissors, contrary to section 267(a) of the **Criminal Code**. The final charge, that Ms. KR faced, namely the intimidation or wrongful use of threats of violence to Ms. AH, contrary to section 423(1)(a) of the **Criminal Code** was dismissed by the Court, by way of a directed verdict, following the completion of the evidence and the submissions of Counsel on July 25, 2013. The Crown had proceeded by way of Indictment on all of the charges before the Court.

[3] The issue before the Court today is to determine the just and appropriate sentence, in all of the circumstances of this case.

POSITIONS OF THE PARTIES

[4] It is the position of the Crown that the Nova Scotia Court of Appeal has established a "benchmark" or "starting point" sentence of 3 years in prison, in several cases, including **R v. Zong** (1986), 72 NSR (2ND) 432, **R. v. McAllister**, 2008 NSCA 103 and **R. v. Adams**, 2010 NSCA 42. for the offence of break, enter and commission of an indictable offence, contrary to section 348(1)(b) of the **Criminal Code**. The Crown Attorney acknowledges that the sentence ordered by the Court may be increased or decreased from the so-called "starting point", depending on the facts and circumstances of the offence or the offences committed, the circumstances of the individual offender and any aggravating or mitigating facts. It is the recommendation of the Crown that Ms. KR should serve a sentence of three years imprisonment in a federal penitentiary and that a Conditional Sentence Order, (hereafter "CSO"), is neither an available option nor an appropriate option in all the circumstances of the case. The Crown Attorney submits that Ms. KR has been convicted of a serious personal injury offence as a party, and as such, she is equally liable for the assault of AH. Crown Attorney also seeks a DNA order, under section 487.051 of the **Criminal Code**, as this is a

primary designated offence and a mandatory 10 year firearms order, pursuant to section 109(1)(a) of the **Criminal Code**.

[5] Furthermore, the Crown Attorney submits that Ms. KR's actions, as a 35 year old, when these offences were committed, were highly aggravating in that she participated in the break and enter of the AHs' house and then aided and abetted three young persons, who entered the house with her, in the assault of a 14 year old girl. As the only adult involved in this serious offence, the Crown Attorney submits that Ms. KR's moral responsibility is very high and that therefore a three year sentence is appropriate. In addition, it is the position of the Crown that are few mitigating factors, but there are several aggravating factors and that therefore, the appropriate sentence should not be reduced from that "starting point" of three years in prison.

[6] Finally, the Crown Attorney agrees with the position advanced by the Defence Counsel, that although the Court found that Ms. KR had aided and abetted and was a party to the assault of Ms. AH, since the commission of the assault was part of the allegation contained in the break, enter and commit an assault charge contrary to section 348(1)(b) of the **Criminal Code**, a sentence imposed for the separate assault charge would amount to double punishment for

the same offence under the **Kienapple** principle, and therefore, the Court should enter a conditional stay of that charge.

[7] It is the position of the Defence, that a CSO is an “available” disposition, as Ms. KR, has been found guilty of a break and entry of a residence and being a party to a commission of a low-end assault. As such, that offence cannot be considered to be a serious personal injury offence, as defined in section 752 of the **Criminal Code**. Defence Counsel submits that Ms. KR did not personally use or attempt to use any violence against Ms. AH and that the Court found her guilty because she had aided and abetted the actions of the young persons who were involved in the incident. Although Defence Counsel acknowledges that the statutory aggravating circumstances found in section 348.1 of the **Criminal Code** may be applicable, there are also some mitigating factors as she is a single young mother who is trying to focus her efforts on her family to maintain the relationships with her daughter and two sons.

[8] Defence Counsel also submits the Court must keep in mind the parity principle and that similar offences committed by similar offenders, in similar circumstances should have a similar sentence. In this regard, Counsel points to the fact that the young persons, who were the principals in this matter, were ordered to serve a period of probation under the **Youth Criminal Justice Act.** As such, it is

the position of the Defence that it would be a significant disparity in sentencing if the principals received a period of time on terms of probation, while Ms. KR, who was convicted of the offence as a party, received a significant period of incarceration. Although Ms. KR does have a prior record for low-end property offences, Defence Counsel submits that a CSO is the appropriate disposition in this case, as she does not present a risk to the safety of the community and that a CSO would be consistent with fundamental purpose and principles of sentencing, set out in sections 718 to 718.2 of the **Criminal Code**. With respect to that issue, Defence Counsel acknowledges that Ms. KR committed three further offences shortly after these charges, but she has been a law-abiding citizen for the last three and half years without any further incidents. In the final analysis, it is the position of the Defence that a short period of incarceration followed by probation or a lengthy CSO would be within the range of appropriate sentences for this case.

CIRCUMSTANCES OF THE OFFENCES

[9] In my trial decision, I concluded that Ms. KR had broken into and entered the residence of AH along with three teenage girls (BR, KL and HJ) and that she was present while Ms. AH was assaulted by at least two of the young persons who had also broken into and entered the house with her. I found that the break and

enter was a result of unlocked door being opened and as such the entry was not forced but for the purpose of trial, the definition of a "break" and entry was met.

[10] Based upon the evidence that I accepted during the trial, I found that the assault of Ms. AH had occurred at approximately 11:00 AM on May 5, 2010. In addition, I accepted the evidence of AH that Ms. KR was in the basement room where Ms. AH was located, with the three teenage girls, just before the assault occurred. I also found that Ms. AH placed a call to her father as soon as she heard Ms. KR and the three teenage girls enter the house, yelling and screaming about KL's boyfriend and Ms. AH "ratting on them". Ms. AH believed that the reference to "ratting on them" related to her telling the truth to her lawyer about charges pending in Youth Court, which involved her and the other teenage girls. In addition to those facts, I accepted Ms. AH's evidence that just before the assault began, HJ told Ms. KR that she was not angry enough to hit Ms. AH and, at that point, Ms. KR started pushing HJ backwards, five or six times, "to get her wound up". A few moments later, KL and HJ began punching and kicking Ms. AH. I also found that the evidence established Ms. KR was present when AH was punched and kicked by her assailants, but that she had left the residence before one of the teenage girls threw a pair of scissors at Ms. AH. For that reason , I found

that Ms. KR was not a party to the offence of assault with a weapon, to wit, a pair of scissors, contrary to section 267(a) of the **Criminal Code**.

[11] I accepted Mr. GH's evidence that when he received a call from his daughter between 10:00 and 11:00 AM on May 5, 2010, he knew something was "up" because the children were advised not to call him while he was working unless it was an emergency. AH said "they're here" and when GH asked what she meant, she said "they're in the house" and added it was KR and BR. During that call, GH heard Ms. KR's voice say "get her off the phone, that's her father". I accepted his voice identification evidence that the person who had stated those words was, in fact, Ms. KR. I found that Mr. GH's evidence established that he was quite familiar with the voice of KR based upon several face-to-face meetings, as well as numerous telephone conversations with her. I also found that shortly after Mr. GH told his daughter to phone 911, the phone went dead and when he tried to call her back on their house phone and her cell phone, there was no answer.

[12] I also accepted Mr. GH's evidence that he received another call during the afternoon of May 5, 2010 between 3:30 and 4:00 PM from a female speaking a lower, softer toned voice, almost like a whisper, who said "it's K". During that short call to Mr. GH, which I found to have been made by KR, she said that she did not touch AH. When Mr. GH responded "but you were in the house", she

responded “yes but I did not touch AH”. Again, based upon the voice recognition evidence and the fact the caller had identified herself as “K”, I had no doubt that the caller was, in fact, Ms. KR.

[13] For the reasons set out in my trial judgement, I did not accept the Defence evidence of Ms. KR’s husband, LR or the evidence of her daughter BR where it differed with any of the other evidence that I had accepted. The essence of their testimony, which I rejected for the reasons outlined during the trial decision, was that Ms. KR had stayed in her own residence when the three teenage girls left to confront Ms. AH in her house. As I indicated, I did not accept the alibi evidence proffered by either Mr. LR or Ms. BR, which claimed that the assault of AH had occurred around 3:00 PM on May 5, 2010 and, at that time, KR was at home doing the laundry. Based upon the trial evidence, which I accepted, I found the break, enter and assault of Ms. AH had occurred around 11:00 AM on May 5, 2010.

[14] In the final analysis, I found Ms. KR guilty of being a party but not as a principal to the break, enter and assault of AH. Moreover, I also found her guilty as a party because her actions in pushing HJ back into the room just before the two teenage girls began to assault AH, were actions that assisted or encouraged the perpetrators to commit the offence of assault after KR and the three teenage girls broke into and entered the AH’s residence with that purpose in mind. I also found

that shortly after the assault of Ms. AH began, it was Ms. KR who directed the teenage girls to get the phone away from Ms. AH because she was speaking to her father. I found this was a further example of how Ms. KR's actions aided and abetted the assault of AH and her actions encouraged HJ to prevent any immediate report of a criminal act or to hinder any outside interference with the assault of AH which was already underway.

[15] At the time of the incident, BR and her cousin, KL lived at KR's house.

VICTIM IMPACT STATEMENT

[16] Ms. AH did not file a victim impact statement with the Court. However, there is no doubt, based upon my findings of fact, that AH being a young teenager was surprised, frightened and intimated by three young persons and an adult breaking into her house, entering the premises and then assaulting her. There is no doubt that this offence caused Ms. AH to fear for her safety while she was alone in her own house, where she should have been safe and secure.

CIRCUMSTANCES OF THE OFFENDER:

[17] Ms. KR is now 39 years old; she was 35 years old at the time of this offence. Ms. SM, who is Ms. KR's sister is aware of the matter before the Court and

believes that her sister's action were "out of character". Ms. SM regards her sister as a "loving, caring support system for her children" and her focus has always been on the well-being of her children. Ms. SM added that although her sister would like to be in the workforce, she feels it is important to be at home to provide supervision and guidance to her children.

[18] Ms. KR was married at age 21 to Mr. LR, however, they recently separated, and he has left the province. There are three children from that union, two boys who are ages 16 and 13 and her daughter, BR, who is now 18. Since the pre-sentence report was prepared, BR has had a baby boy who has been taken into care by Child Protection Services. BR has now also moved out of the house, but stated that her mother is a huge support to her and her brothers, making sure that they get to appointments, court and school.

[19] In terms of her education or training, Ms. KR completed grade 10, but left school to travel to Ontario with her boyfriend who later became her husband. While in Ontario, she completed her General Education Diploma. She is unemployed at the present time outside of the house, but indicated that taking care of her children and her grandchild is a full-time job. Her financial situation is not very good and she applied for Income Assistance, but was not eligible. She

supports herself through the Family Allowance Child Tax Credit which she receives each month.

[20] On May 6, 2014, the Court received a letter from Defence Counsel indicating that since the sentencing submissions were made on February 25, 2014, Ms. KR secured full-time employment in a coffee shop/ restaurant business on March 18, 2014.

[21] Ms. KR has been previously convicted of property offences relating to uttering forged documents contrary to section 368(1)(b) of the **Criminal Code,** in April 1995, for which she received a suspended sentence and 18 months on probation. She also has a conviction for fraud contrary to section 380(1)(b) of the **Criminal Code,** in April 1996, for which she received a suspended sentence and 24 months on probation.

[22] In addition, she has several convictions subsequent to the date of this offence, including: a failure to comply with a recognizance or undertaking contrary to section 145(3) of the **Criminal Code** and a theft under charge contrary to section 334(b) of the **Criminal Code,** for which she was fined on May 12, 2010. Those two offences occurred six days after the incident which brings her before the Court today for sentencing. There is also a conviction for fraud contrary to section

380(1)(b) of the **Criminal Code** for an offence which occurred approximately six months before the incident in question. Ms. KR was sentenced on February 9, 2011, to a 30 day intermittent sentence to be followed by 12 months of probation. On May 4, 2011, Ms. KR received a suspended sentence and probation for 24 months for public mischief contrary to section 140(1)(c) of the **Criminal Code** for an offence which occurred six months before the incident in question. Finally, there are also two convictions for possession of stolen property contrary to section 355(b) of the **Criminal Code** which offences occurred in September and October 2010. For those offences, she received a suspended sentence and probation of 18 months on June 24, 2011.

APPLICABLE PURPOSES & PRINCIPLES OF SENTENCING:

[23] In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender. In **R. v. M. (C.A.)**, [1996] 1 SCR 500 at paras. 91 and 92, the Court stated that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same

time taking into account the victim or victims and the needs of and the current conditions in the community.

[24] The Court notes that where the offence of break, enter and commit an indictable offence is committed in relation to a dwelling-house [section 348(1)(d) of the **Criminal Code**], it is one of the most serious offences in the **Criminal Code** and the offender may be liable to imprisonment for life. It is also noted by the Court, however, that Parliament has not established a minimum punishment for this offence.

[25] The purposes and principles of sentencing are set out in sections 718, 718.1 and 718.2 of the **Criminal Code.**

[26] Parliament has also included the principle of proportionality found in section 718.1 of the **Criminal Code** which requires the Court to determine a sentence that is proportionate to the gravity of the offence and the degree of the responsibility of the offender.

[27] In section 718.2 of the **Criminal Code**, Parliament has required the Court to consider other sentencing principles in imposing a just sanction which will contribute to respect for the law and maintenance of a just, peaceful and safe society. Pursuant to section 718.2(a) of the **Criminal Code**, the Court is required

to increase or reduce the sentence to be imposed by taking into account any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[28] The parity principle outlined in section 718.2(b) of the **Criminal Code** requires the Court to take into account the fact that similar sentences should be imposed on similar offenders for similar offences committed in similar circumstances.

[29] In addition, although Ms. KR is not a youthful first-time adult offender, her record is not extensive and primarily consists of property related offences, without any prior crimes of violence. Therefore, I find that it would also be appropriate to consider the impact of this sentence on her rehabilitation. This principle of restraint in imposing a first sentence of imprisonment was succinctly stated by Rosenberg J.A. in **R. v. Priest**, 1996 CanLii 1381 (Ont. C.A.) at page 5:

> "Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this Court that the first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused, rather than solely for the purpose of the general deterrence"

AGGRAVATING & MITIGATING CIRCUMSTANCES:

[30] The Crown Attorney submitted that there are several aggravating circumstances present in this case: (1) the statutorily aggravating circumstances found in section 348.1 of the **Criminal Code** is present because this was a home invasion and that Ms. KR committed the break, enter and commission of an indictable offence contrary to section 348 of the **Criminal Code** knowing that the dwelling house was occupied and she was a party to the use of violence, that is, the assault of AH in her house; (2) pursuant to section 718.2(a)(ii.1) of the **Criminal Code**, the evidence established that the offender, in committing the offence, as a party, abused Ms. AH, who was a person under the age of 18 years; (3) the actions of Ms. KR and the three young persons who entered AH's house with her were premeditated and they entered the AH's house acting as a group for the purpose of assaulting a vulnerable, young victim while she was alone in her own home.

[31] Looking very carefully at all of the other circumstances, while there are the mitigating circumstances mentioned by Defence Counsel, Ms. KR is not a youthful first time adult offender and there was no real expression of remorse. She had stated that her family has been her priority up to now, however, I was informed yesterday that she commenced work at a coffee shop/restaurant in March, 2014. Of course, I also wish to underline that the absence of any mitigating circumstances is not considered by me to be an aggravating circumstance.

ANALYSIS:

[32] As is evident from the sentencing submissions made by the Crown Attorney and Defence Counsel, there is a significant difference between a three year sentence to be served in the penitentiary and an 18 month sentence to be served in the community under the terms of a Conditional Sentence Order ("CSO") of imprisonment. In the alternative, Defence Counsel submits that if the Court was to conclude that a CSO was not an "available" option because this was a "serious personal injury offence" as defined in section 752 of the **Criminal Code**, then he would recommend a short period of provincial custody which could be served on an intermittent basis followed by a period under the terms of a probation order.

[33] As mentioned previously, there is no question that the break, enter and commit an indictable offence of assault in relation to a dwelling house represents one of the most serious charges in the **Criminal Code**. In this case, I find the primary objectives of sentencing are the denunciation of the unlawful conduct, specific deterrence of Ms. KR, general deterrence of other like-minded individuals, the protection of the public and of course, the rehabilitation of the offender. Moreover, Parliament has also legislated that where an offence involves the abuse of a person under the age of 18 years, the Court shall give primary consideration to

the objectives of denunciation and deterrence of the unlawful conduct in section 718.01 of the **Criminal Code**.

[34] In addition, where an offence involves a home invasion and an assault, which is a crime of violence, an offence of that nature undermines the confidence that members of the public have in the peace and security of their own homes and freedom from intrusion. For those reasons, I also find that general deterrence, denunciation of the unlawful conduct and protection of the public are the primary purposes of sentencing to be emphasized by the Court.

[35] With respect to the proportionality principle found in section 718.1 of the **Criminal Code**, I have no doubt that this is one of the most serious offences found in the **Criminal Code**, and as such, I find that the gravity of the offence is quite high. In terms of the degree of responsibility of the offender, I also find that Ms. KR's actions reflect a high degree of responsibility for the break, enter and assault of AH. While I found that she did not actually hit or kick Ms. AH herself, I found that, pursuant to section 21 of the **Criminal Code**, she was a party to that offence as she broke into and entered AH's residence and then aided and abetted the young persons who broke into and entered the AH's house with her, to assault Ms. AH. By virtue of that finding, although Ms. KR may not have been the principal who

actually committed the offence, I found that she is equally culpable as a party to this offence.

[36] Moreover, as the only adult involved in this offence, who should have acted as a responsible adult and parent instead of becoming embroiled in what Defence Counsel characterized as a "teenage drama", I find that her degree of responsibility remains quite high. Ms. KR joined the teenaged girls and then broke into and entered the AH's residence. Once she was inside the residence, I found that she actively aided and abetted the young persons in committing the offence of assaulting Ms. AH. For those reasons, I find that her degree of moral responsibility for this offence remains high.

[37] With respect to the "parity principle" found in section 718.2(b) of the **Criminal Code**, it is clear that, the sentence for Ms. KR should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. However, on that point, given the highly individualized nature of the sentencing hearing which focuses on the circumstances of the offences and the circumstances of the individual offender, it is often difficult to find that similar offender who has committed similar offences in similar circumstances.

[38] The Crown Attorney referred to the decisions of **R. v. Zong**, [1986] NSJ No, 207 (Nova Scotia Court of Appeal) and **R. v. McAllister**, 2008 NSCA 103 which established a three-year "benchmark" or "starting point" for a break, enter and theft involving commercial premises. The Nova Scotia Court of Appeal noted in those cases that the appropriate sentence may be one that moves up or down from that "benchmark" or "starting point" depending upon the circumstances of the offence, the particular offender and any aggravating or mitigating factors. In fact, in **R. v. Adams**, 2010 NSCA 42, the Court reaffirmed the three year benchmark and also stated that it is a sliding scale which may descend to a two-year level in cases involving individuals who do not have prior records. The Crown Attorney also referred to the case of **R. v. Greencorn**, 2013 NSPC 112, as a similar case where the offender broke into and entered the residence after kicking down the door, not to carry out a theft or an assault, but rather to confront the homeowner about paying the debt, threaten him and challenge him to a fight. In that case, Mr. Greencorn was sentenced to three years of imprisonment for the charge contrary to section 348(1)(b) of the **Criminal Code**.

[39] For his part, Defence Counsel submitted that the "benchmark" in **Zong** and **Adams** does not fully round out the Nova Scotia Court of Appeal's view on break and enter offences. Counsel points to the case of **R. v. Perrin** [2012], NSJ No. 443

which involved a plea of guilty to a break, enter and theft from an unoccupied summer cottage by a youthful adult offender. There, the Court ordered a 30 day sentence of imprisonment to run consecutive to a CSO which had been collapsed. Defence Counsel cited this case for the purpose of noting that our Court of Appeal has either imposed or upheld non-custodial or short jail sentences for break, enter and theft charges in wide a range of circumstances.

[40] Defence Counsel also referred to **R. v. Munt**, 2012 BCCA 228 where the accused was convicted of breaking into and entering the house of a woman he had met earlier in the evening, and then sexually assaulting her in the residence. Although there were several mitigating factors, the Court sentenced Mr. Munt to a term of 30 months of imprisonment to stress the primary purposes of sentencing which were general deterrence and denunciation of the unlawful conduct. The appeal was dismissed, at para 15, with the Court stating that a 30 month sentence could be considered to be a "low-end for this offence" and that the Court "did not consider that a conditional sentence was ever a reasonable prospect in the circumstances of this case." Defence Counsel submits that despite the egregious facts present in the **Munt** case, the sentence ordered by the Court was still significantly lower than the Crown's recommendation in this case.

[41] Defence Counsel also referred to the case of **R. v. Reynolds**, 2013 ABCA 382, where the offender was sentenced to 90 days of imprisonment for unlawfully being in a dwelling house and assault causing bodily harm which were to be served intermittently followed by two years on terms of probation which included terms of house arrest and a curfew. The majority of the Court of Appeal dismissed the Crown appeal. The Crown had recommended a sentence in the range of two to three years of imprisonment.

[42] In **Reynolds**, the accused was a former professional football player who had just been released by his team and evicted from his residence. He had been in a long-term relationship with the victim, and although they had separated, the victim allowed the accused to stay overnight at her house. Later that day, they argued at a party and he left to go back to the victim's residence. Despite being told that he did not have permission to return to the residence, Mr. Reynolds entered victim's residence through a patio door. When the victim returned to her residence and demanded that he leave, Mr. Reynolds refused and assaulted her. Mr. Reynolds was found guilty of common assault, assault causing bodily harm and being unlawfully in a dwelling house.

[43] In dismissing the Crown appeal, the majority of the Court of Appeal noted that the complainant was entitled to the security of her home and to freedom from

intrusion, but found that the sentencing judge had properly considered all of the mitigating and aggravating factors and had made no palpable or overriding error of law. The sentencing judge had found that this was an isolated incident in the six year relationship, the accused was intoxicated and emotionally fragile, he had no criminal record and a positive work history and that there would be immigration consequences, as he would be removed from Canada and not allowed to return.

AVAILABILITY OF CONDITIONAL SENTENCE ORDER:

[44] The current provisions regarding the imposition of a CSO of imprisonment in the community were enacted in the **Safe Streets and Communities Act** (S.C. 2012, c.1, s.34) which came into force on November 20, 2012 and amended section 742.1 of the **Criminal Code**. Since this offence occurred on May 5, 2010, the Court's consideration of whether a conditional sentence order of imprisonment in the community is an "available" option and if so, whether it is the "appropriate" order to be granted in the circumstances of this case, is to be determined by the legislation as it existed on the date of this offence.

[45] In 2007, Parliament amended section 742.1 of the **Criminal Code** and those amendments were in force on May 5, 2010, when the circumstances giving rise to the charge before the Court occurred. The 2007 amendments to section 742.1 of

the **Criminal Code** limited the offences to which a conditional sentence order could apply. The relevant provisions of section 742.1 of the **Criminal Code**, at the time, provided as follows:

> 742.1 If a person is convicted of an offence, other than a **serious personal injury offence** as defined in section 752…. **and** the Court imposes a sentence of imprisonment of less than two years **and** is satisfied that the service 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, the Court **may**, for the purpose of supervising the offender's behavior in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3" (Emphasis is mine)

[46] During their submissions, Counsel disagreed on the issue of whether Ms. KR had been convicted of a "serious personal injury offence" as defined in section 752 of the **Criminal Code**. The relevant provisions of section 752 defined a **"serious personal injury offence"** as follows:

> (a)**an indictable offence**, other than high treason, treason, first degree murder or second degree murder, **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
>
> and for which the offender **may be sentenced to imprisonment for 10 years or more.** (Emphasis is mine)

[47] Looking at issue of whether a CSO is an available option in section 742.1 of the **Criminal Code**, the Crown Attorney submits that Ms. KR has been found guilty of a "serious personal injury offence" as defined in section 752 of the

Criminal Code. Therefore, he submits that there is a statutory bar to the Court even considering the option of a CSO in all the circumstances of the case.

[48] In **R. v. Griffin**, 2011 NSCA 103 at para 17, our Court of Appeal dealt with the issue of "serious personal injury offence" and stated that the focus is on the effect on a victim, rather than the conduct of the offender. The Court of Appeal observed that the definition, which is broadly stated, would include violence **or** attempted violence **or** conduct endangering or likely to endanger the life or safety of another **or** likely to inflict severe psychological damage upon another person. As such, the Court of Appeal noted that there may be no actual adverse impact on the victim physically or psychologically and yet a serious personal injury offence has occurred by the "attempted use" of violence.

[49] It is the position of the Crown that because the violence perpetrated on Ms. AH was committed in the context of a break, enter and the commission of the indictable offence of assault in a dwelling house, which was prosecuted by indictment, Ms. KR is liable to imprisonment for life pursuant to section 348(1)(d) of the **Criminal Code**. The Crown Attorney submits that all aspects of the definition of a "serious personal injury offence" have been met because Ms. KR has been found guilty of an indictable offence which involved the use or attempted use of violence against person and for which she may be sentenced to

imprisonment for 10 years or more. Therefore, he submits that a CSO is not an "available" sentencing option.

[50] For his part, Defence Counsel submits that this is not a "serious personal injury offence" because his client did not use or attempt to use violence against Ms. AH. Counsel draws this distinction by submitting that his client was found guilty as a party to the offence because she aided and abetted the act of violence, but she, herself, did not actually commit an act of violence or attempted violence. It is the position of the Defence Counsel that the Court should also have regard to the "degree of violence" and also consider whether the offender was a principal or a party to the offence. Moreover, Defence Counsel submits that the assault was at the lower end of a continuum since there was no bodily harm caused and therefore, this is not an offence which, in fact, involved a "serious personal injury".

[51] In my view, the Nova Scotia Court of Appeal has addressed and determined the issue that is disputed here between the parties. Our Court of Appeal pointed out in **Griffin**, *supra*, at para 22, that "violence is not defined in the **Criminal Code** but has been the beneficiary of argument in many cases". The Court endorsed the comments of Epstein J.A. in **R. v. LeBar,** 2010 ONCA 220 at paragraphs 47-49, which essentially stated that the 2007 amendment reflected Parliament's intention to reduce judicial sentencing discretion by eliminating the

availability of conditional sentences for crimes of violence within a certain set of criteria. To be true to Parliament's intention, the concept of violence must be given a broad interpretation. As a result, the meaning of "violence" must be informed by the entirety of the definition of "serious personal injury offence".

[52] In this case, I have no doubt that the offence for which I have found Ms. KR guilty was, in fact, a "serious personal injury offence" as defined in section 752 of the **Criminal Code**. The offence involved the break, enter and commission of the indictable offence of assault in a dwelling house contrary to section 348(1)(b) of the **Criminal Code**, and as such, she is liable to imprisonment for life as outlined in section 348(1)(d) of the **Criminal Code**.

[53] In coming to this conclusion, I do not agree with Defence Counsel's submission that the Court ought to conduct a qualitative evaluation of the degree of "violence" which was actually inflicted on Ms. AH. I find that **Griffin**, *supra*, at para 17 forecloses that argument as the Court of Appeal noted that a "serious personal injury offence" could occur in circumstances even where there was an "attempt" or "conduct endangering" and as such, "there may be no actual adverse impact on the victim physically or psychologically and yet a serious personal injury offence has occurred".

[54] Defence Counsel also submitted that the Court should not rule out the availability of a CSO as he maintains that his client has not committed a "serious personal injury offence" herself , because she was found guilty of being a party to that offence, but not as one of the principals who actually assaulted Ms. AH. It is the position of the Defence that the Court found Ms. KR guilty of the offence because her actions aided and abetted the principals in perpetrating the violence on Ms. AH.

[55] Having considered Defence Counsel's submissions on this point, I do not agree with the position that he advanced during the sentencing hearing. First, section 742.1 of the **Criminal Code** is engaged if a person is "convicted" of an offence, and I find that Parliament did not limit the criteria for imposing a CSO to only those people who, in fact, actually "committed" the "serious personal injury offence" in question. Secondly, I find that section 742.1 of the **Criminal Code** does not distinguish between principals, aiders and abettors. As I mentioned previously, the section clearly states that a person who has been convicted of a "serious personal injury offence" for which they are liable to imprisonment for 10 years or more, in ineligible for a CSO of imprisonment in the community. In this case, I found that Ms. KR had participated in that offence by aiding and abetting

other parties in committing the offence, and as a party to the offence under section 21 of the **Criminal Code**, she was equally guilty of the offence.

[56] As a result, I conclude that Ms. KR, in fact, has been convicted of a "serious personal injury offence" as defined in section 752 of the **Criminal Code**, and that therefore, a CSO in not one of the "available" sentencing options in all circumstances of this case.

[57] Given my conclusion that a CSO is not an "available" sanction, I do not find it necessary to conduct further analysis to determine whether of serving a CSO in the community was also an "appropriate" sanction under section 742.1 of the **Criminal Code**.

THE JUST AND APPROPRIATE SANCTION:

[58] As I indicated previously, I find that the facts and circumstances of this case as well as the number of aggravating circumstances, combined with the relatively few mitigating circumstances, require the Court to give paramount consideration to denunciation of the unlawful conduct and to specific and general deterrence. Of course, since no one sentencing principle or purpose trumps the others, in each case, the weight to be put on the individual objectives varies depending on the facts and circumstances of the offence and of the offender. The Court also has to

consider protection of the public and rehabilitation of the offender in determining the just and appropriate sanction.

[59] First and foremost, I have to underline the seriousness with which I regard this offence as it involved four people breaking into and entering an unlocked dwelling house and the assault of a 14 year old girl by other 14 and 15 year old girls who were aided and abetted by a 35 year old mother of three children. There is no question that a person should be able to feel safe and secure in their own residence from outside intruders, and the Court regards this offence as a serious intrusion on a person's sense of security and privacy that a person would expect in their own home. Parliament has clearly recognized the seriousness of a crime which involves a break, enter and commission of an indictable offence in a dwelling house as one of the most serious offences committed under our criminal law, with a potential punishment of imprisonment for life. Moreover, as indicated previously, I have no doubt that section 348.1 of the **Criminal Code** is engaged as an aggravating circumstance in that this amounted to a home invasion, as I find that Ms. KR knew, in committing the offence, that the AH's residence was occupied and she was a party to the violence that was used during the offence by the principals.

[60] The fundamental principle of sentencing codified in section 718.1 of the **Criminal Code** is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Some measure of the objective gravity of a crime can be ascertained by looking at its maximum punishment as prescribed by Parliament. In some instances, Parliament has also provided a minimum punishment for an offence. In addition, as Watt J.A. aptly pointed out in **R. v. Jacko**, 2010 ONCA 452 (CanLii) which dealt with a home invasion, break, enter and assault as well as robbery of the victim, at para 53:

> " Degrees of responsibility vary. Some are principals. Others are aiders, abettors, counselors or parties to a common unlawful purpose. And even within each mode of participation, some bear greater responsibility than others. Although all are parties in law and equally guilty of the offence, greater punishment is the usual consequence of greater responsibility."

[61] In **Jacko**, *supra*, at para 55, Justice Watt also dealt with the parity principle found in section 718.2(b) of the **Criminal Code**. He noted that the principle does not command identical sentences for co-accused, only similar sentences for co-accused whose participation in the offences is similar and who have similar antecedents, present circumstances and future prospects. Disparity of sentences among co-accused does not *per se* amount to an error.

[62] In his submissions, Defence Counsel submitted that BR, who had a similar role to her mother, had admitted responsibility for this offence in Youth Court and

she was placed on nine months of probation under the provisions of the **Youth Criminal Justice Act (YCJA)**. Defence Counsel submits that it would be a gross disparity in sentencing if Ms. KR, who committed similar offences in similar circumstances to her daughter BR, was to be sentenced to a term of three years of imprisonment as recommended by the Crown Attorney, when her daughter was ordered to serve a nine month period under terms of probation.

[63] With respect to these submissions, I find that it is important to keep in mind the comments made by Watt in **Jacko**, *supra*, concerning the parity principle and its interaction with the proportionality principle. As I have indicated previously, I found this to be a very serious offence and that Ms. KR's degree of responsibility as the only adult involved in this incident, aiding and abetting teenagers in the commission of the offence, to be quite high.

[64] In addition, one cannot ignore the significant difference in the sentencing purpose and principles which are outlined in sections 718-718.2 of the **Criminal Code** for adult offenders and the quite distinct and different declaration of the principles and objectives that apply to "young persons" under the **Youth Criminal Justice Act (YCJA)**. In the declaration of principles and policy in Canada with respect to a youth criminal justice system, section 3(1)(b) of the **YCJA** clearly establishes that the criminal justice system for young persons must be separate

from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and state in section 3(1)(b)(ii) of the **YCJA** that it must emphasize "fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity". Furthermore, the declaration of principle found in section 3(1)(c)(iii) of the **YCJA** adds that "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social and other agencies in the young person's rehabilitation and reintegration."

[65] Therefore, given the significant difference in the purpose and principles of sentencing which apply to adult offenders under the **Criminal Code** versus the purposes and principles that apply to young persons under the youth criminal justice system, I find that it is high likely that a young person and an adult charged with similar offences which have been committed in similar circumstances, will have different outcomes. Indeed, the gravity of the offence may be equally high for both the young person and the adult charged with the same offence, but given the greater dependency of young persons and their reduced level of maturity

compared to an adult offender, it is likely that an adult court would conclude there is a difference in their degree of responsibility.

[66] Having considered the differences between the purpose and principles of sentencing for adult offenders in the **Criminal Code** and the declaration of principles which apply in the youth criminal justice system under the **YCJA**, I conclude that the parity principle found in section 718.2(b) of the **Criminal Code** applies only to similar adult offenders who have committed similar offences in similar circumstances. This point is also established by reference to the sentencing principles found in section 38(2) of the **YCJA** which require the Youth Justice Court to determine a sentence for a young person in accordance with the principles set in section 3 and with respect to the youth justice parity principle found in section 38(2)(b) of the **YCJA** which states that "the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances."

[67] As indicated previously, I have found that this offence was one of the most serious ones known in our criminal law and that Ms. KR's degree of responsibility as an adult remained very high given the role that she played in aiding and abetting three young persons to break, enter and assault a vulnerable 14 year old girl in her own house. In terms of the parity principle, I find that the cases cited by the

Crown Attorney, and in particular the **Greencorn** decision, establish a range of sentence for a break, enter and commission of an indictable offence such as an assault in the range of two to three years in prison.

[68] With respect the cases cited by the Defence Counsel, I find that the **Munt** case which resulted in a 30 months sentence for a break, enter and sexual assault certainly involved more egregious facts but, at the same time, had several mitigating factors which are simply not present in this case. Moreover, the British Columbia Court of Appeal also noted, in upholding the sentence , that it was at the "low-end for this offence". Given those comments by the Court, I find that the **Munt** case would be in the middle of a just and appropriate range of sentence in all of the circumstances of this case. I find that the **Reynolds** case be distinguished on the facts of the case, the charges for which he was convicted and the very significant mitigating circumstances which included his deportation from Canada.

[69] After reviewing the similar cases cited by Counsel, I find that the appropriate range of sentence for the offence committed by Ms. KR is between two to three years of imprisonment in a federal penitentiary. Having considered all of the aggravating circumstances and the relatively few mitigating circumstances, as well as the proportionality principle in relation to the role played by Ms. KR in the commission of this offence, I find that, for the purposes of deterrence and

denunciation of her unlawful conduct as well as keeping in mind the principle of restraint and the prospects for rehabilitation, I hereby order her to serve a sentence of imprisonment of 2 years in a federal penitentiary.

[70] I am also prepared to sign and hereby order that Ms. KR provide a sample of her DNA to the authorities pursuant to section 487.051 of the **Criminal Code** as this is a primary designated offence for those purposes.

[71] I am also ordering that she be subject to the mandatory 10 year firearms order section 109(1)(a) of the **Criminal Code** which prohibits her from possessing any firearm, crossbow, restricted weapon, ammunition, and explosive substance during a period that will begin today and end not earlier than 10 years after her release from imprisonment. She will also be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[72] In addition, both Counsel had indicated during their sentencing submissions that the charge contrary to section 348(1)(b) of the **Criminal Code** included the specific allegation that in committing the break, enter of the AH's house, Ms. KR had committed the indictable offence of assault of AH. Since I also found Ms. KR guilty of the assault charge contrary to section 266 of the **Criminal Code**, I agree

with the joint recommendation made by Counsel that to order a separate sentence for that offence in addition to the charge contrary to 348 of the **Criminal Code** would amount to a double punishment under the **Kienapple** principle for the same offence. In these circumstances, I therefore order a conditional stay of Ms. KR's conviction for the assault charge contrary to section 266 of the **Criminal Code**.

[73] Finally, in view of the federal term of incarceration that I just ordered, I hereby waive the victim fine surcharge.

Theodore K. Tax, JPC