

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Miller, 2005 NSSC 187

Date: 20050628

Docket: Cr. S.AT. No. 242511

Registry: Antigonish

Between:

Her Majesty the Queen

v.

John Russell Miller

DECISION

Judge: The Honourable Justice Douglas L. MacLellan

Heard: Tuesday, June 28, 2005 in Antigonish, Nova Scotia

Written Decision: Wednesday, June 29, 2005

Counsel: Nicole Rovers, for the Crown
Maurice Smith, Q.C., for the Defence

By the Court: (Orally)

[1] The matter before the Court is the question of sentence in regard to John Russell Miller, the accused. Mr. Miller was convicted and pled guilty on March 8th, of this year, to the offence:

That on or about the 30th day of November, 2004, at or near Antigonish, in the County of Antigonish, Province of Nova Scotia, he did rob the Downtown Convenience Store of a sum of money and cigarettes contrary to Section 344 of the Criminal Code of Canada;

[2] The maximum sentence for the offence of robbery is a term of imprisonment for life.

[3] The facts of this offence are as set out in the Crown brief which indicates that on November 30th, 2004, at approximately 6:40 p.m. Mr. Miller entered the Downtown Convenience Store on Main Street in Antigonish, Nova Scotia. Mr. Miller was wearing a green mask and had a knife concealed in his pants. He approached the counter and demanded bills in the denominations of tens and twenties, and showed the clerk, Ms. Melissa Andrews, the handle of the knife he had concealed in his pants. Ms. Andrews put \$430.00 in a plastic bag. Mr. Miller also demanded and received a carton of DuMaurier cigarettes from Ms. Andrews. Mr. Miller then exited the store

and proceeded to his vehicle. There were at least two individuals in the store other than Ms. Andrews. These individuals followed Mr. Miller and were able to provide a description of him and his vehicle to the police. Later that evening Mr. Miller was arrested and charged with robbery contrary to Section 344 of the *Criminal Code*.

[4] It is noted that when the police arrested Mr. Miller apparently he admitted his involvement in the offence, and provided the police with the mask he had been wearing and the knife.

[5] The background of Mr. Miller, the accused, in this case is set out in the presentence report which the Court has reviewed. It indicates that he is 53 years of age; he is apparently living in a common-law relationship, he has a Grade 10 education; he is not working because he has a number of medical problems, mainly, depression and emotional problems that causes him not to be able to work; he is looking for employment; he is presently receiving income from the Department of Community Services; he is taking some treatment for his emotional problems from a psychiatrist and taking addiction counselling for prescription drug abuse.

[6] The pre-sentence report was apparently done by the probation officer who had covered Mr. Miller on a conditional sentence that he served, or completed serving, just a few months prior to the commission of this offence, and Mr. Smith indicates that he should be considered suitable for a community disposition, he says, if he manages to control his addiction and mental health.

[7] Mr. Miller has a past criminal record. In June of 2003, he was sentenced for the offence of theft and he was given a 15 month conditional sentence by this Court. He stole the sum of \$164,000.00 from his employer. At that time, he working as a security person transporting funds to Banks in this area, and was able to embezzle the funds as a result of his job placement.

[8] I have also before me a copy of a Victim Impact Statement from Melissa Andrews, the clerk in the Convenience Store that Mr. Miller robbed, and she sets out how disturbed she is now because of this robbery, and the fear that she has when she goes to work. She indicates that she is nervous and she is scared. She says everyday of the idea that she might run into Mr. Miller the man who robbed her.

[9] The Crown's position here is considering Mr. Miller's past record and the facts of this offence that the Court should impose a period of incarceration of four years.

[10] Defence counsel has submitted that the Court should consider the conditional sentencing principles of the *Criminal Code*, and sentence Mr. Miller to a sentence of less than two years and permit him to serve that in the community under Section 742.1 of the *Code*.

[11] The principles of sentence are now set out in Section 718 of the *Criminal Code* and they do not need repeating, but I will repeat them once again since they are the foundation of a sentencing and it provides:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;

- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[12] Section 718.2 provides in part:

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

[13] The community sentence sections of the *Code* are 742, and in light of the request here for a conditional sentence the Court should consider that, and 742.1 provides:

Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and

- (b) is satisfied that serving 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 purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[14] I have been provided by both Defence and Crown counsel with a brief which refers to a number of cases mainly a lot of which are from this Province for the offence of robbery.

[15] The Crown have referred the Court to the case of *R v. Izzard* [1999] N.S.J. No. 18; which was a sentence for the offence of robbery. Mr. Izzard was 22 years old. He had been sentenced by the Trial Court to one year house arrest by way of a conditional sentence and the Court of Appeal on appeal increased that sentence to two years in a penitentiary.

[16] In that case, Chief Justice Glube, who wrote the decision, talked about the fact that the offence of robbery, traditionally, in this Province, had a benchmark sentence

of three years. She did mention that she would have imposed three years on Mr. Izzard except the fact that the Crown were asking for only two years.

[17] The Crown have referred me also to the case of *R v. Logan* [2002] N.S.J. No. 296; a case by Justice Murphy of this Court where he refused to impose a conditional sentence, but instead, imposed a sentence of two years in jail for the offence of robbery in circumstances where the offender was, in effect, a party to the offence of robbery from his employer.

[18] Justice Murphy stressed in that case the issue of the breach of trust aspect of the case and in spite of the fact that there the offender had a good job, had no past criminal record and had good family support, Justice Murphy felt that an actual jail term was required.

[19] Both counsel have referred me to also the case of *R v. Bratzer* [2001] N.S.J. No. 461; from our Court of Appeal where a conditional sentence was upheld on appeal by our Court of Appeal for three offences by Mr. Bratzer of the offence of robbery.

[20] In that case, Justice Bateman, of the Court of Appeal, did suggest that that case was to be considered based on its particular facts and that sentencing court should not, in effect, throw away the benchmark principles that have been earlier established for the offence of robbery.

[21] Defence counsel has referred me once again to the *Bratzer* case (*supra*) and the *Proulx (J.K.D.)* case, [2001] 1 S.C.R. 61 from the Supreme Court of Canada that established the principles for conditional sentences and Mr. Smith has appropriately pointed out to me that there is no, in effect, a list of cases that you can give conditional sentences for, but every case, subject to the statutory requirements of there being no minimum sentence and if the Court determines that it is a sentence in the range of two years, that the Court should consider a conditional sentence.

[22] Mr. Smith has now also provided me with cases where a Court has imposed a conditional sentence even where an accused commits an offence while serving a conditional sentence, and I agree that that is possible subject to the circumstances of each case.

[23] The Defence has also referred me to the *Logan* case (*supra*) and to a case of *R. v. Merlin* (1991) 102, N.S.R. (2d) 66 (C.A.) where a 20 year old accused was convicted of robbery with a knife of corner store in fact similar to this one here. Apparently, the accused there was a drug addict and the Trial Court, Justice Cacchione of, I believe, the County Court at that time, sentenced the accused to one year in jail. At that time, of course, conditional sentences were not possible because it was a case that was decided prior to the conditional sentence provisions being put in the *Code* and that was upheld in the Court of Appeal.

[24] The question of sentence of an accused always seems to be a balancing of society's interest in being protected from crime with particular circumstances of an offender who many times has individual problems and often an explanation for his crime.

[25] Here, Mr. Miller explains away this crime by suggesting that his emotional state at the time of the offence caused him to commit the offence. It is suggested that he has accepted responsibility for the crime and I do conclude that he has. He has recognized to the probation officer and has attempted to do something for the problems that he felt contributed to him committing this offence and he suggests,

through his counsel, and himself, that he has, sort of so to speak, turned his life around and that he will not be back before the Court.

[26] The Crown here say that this is the second major crime for the accused and that the public would expect that the Court would impose something more harsh than a conditional sentence considering Mr. Miller's background and record, and the circumstances of this offence.

[27] Certainly factors that weigh against a conditional sentence here, I suggest, are mainly the seriousness of the offence. It's a very serious offence. It's one of the most serious offences in the *Code*. It carries a maximum of life imprisonment, and the particular facts of this case. The fact that a man left his home, drove purposely to the store while carrying a knife, went into the store, asked for a specific kind of bills, confronted the young lady, who was, in effect, and could very well have been there all alone, and demanded money while making her aware that he had a weapon with him.

[28] Crown counsel have appropriately pointed out to me that this community, the small community of Antigonish, is very aware of this type of offence in light of the

fact that just a short period of time ago, there was such a robbery of a small store which resulted in the death of the store clerk who was working alone and was alone at the time he was approached by the criminal. So I think the public recognizing and being aware of that, if they were informed of this offence and these particular circumstances would be perturbed, I would suggest, if they felt that the offender, for whatever reason, was dealt with lightly. However, the Court must only consider that as one factor in sentencing.

[29] Crown counsel has pointed out the fact that the defendant here has this serious criminal record. A criminal record for the offence of theft can be a very minor offence and can be a very serious one. In these circumstances, I conclude that the offence for which the accused here has been convicted was a very serious crime. Once again, not the kind of crime that you expect in this community considering the amount of money involved, and also to some extent the issue of trust and breach of trust in that case.

[30] The factors mitigating in favour of a conditional sentence is, as Mr. Smith has pointed out, the fact that the accused has pleaded guilty. The Crown have not had the necessity of proving the offence at trial, and the particular circumstances of the offender that appears to have had a lot of trouble in his life. He's had a lot of medical

problems, mental problems, and appears to be, to some extent, turning them around. When the Court tries to balance these factors it must make a decision and I conclude that here, despite what Mr. Smith has suggested that we're not going to see Mr. Miller back, that specific deterrence is important. The mandate is to deter the offender and others from committing the offence of robbery. That's general deterrence and specific deterrence. There is a serious concern the Court has with the fact that Mr. Miller, in effect, committed a very major offence shortly after completing that sentence went out and committed another major criminal offence. It seems to me that the Court must express its concern and denunciation of the conduct of the accused and considering that, I have concluded that it is not appropriate in these circumstances that the matter be disposed of by way a conditional sentence despite the fact that I am going to impose a sentence that is in the range that could make a conditional sentence possible.

[31] Considering the facts of this case and the submissions of both counsel and the materials I have reviewed, I would impose the following sentence.

[32] Mr. Miller, would you stand-up, sir?

[33] For the offence of robbery for which you have been convicted, I sentence you to a term of imprisonment for two years in a federal penitentiary. That jail term will be followed by two years probation. The terms of the probation will be that you will keep the peace and be of good behaviour; report to a probation officer as required by him or her; attend for mental health assessment and counselling as may be directed by your probation officer; attend for substance abuse assessment and counselling as may be directed by your probation officer. I would also direct that during the period of probation that you not have any contact, direct or indirect, with Melissa Andrews and that you are not to go to or enter the property or premises of the Downtown Convenience Store, in Antigonish, Nova Scotia.

[34] In addition to that Probation Order -- Ms. Rovers, is there anything else that the Crown were interested in as far as the Probation Order? I know you didn't want a Probation Order, but...

[35] **THE CROWN:** I'm...

[36] **THE COURT:** I'm also going to make an order under Section 109...

[37] **THE CROWN**: 109...

[38] **THE COURT**: ...prohibition of firearms, ammunition, whatever that term...

[39] **THE CROWN**: Okay. Because absent that I would – it could be a condition of the Probation Order, as well, but with that order in place I believe the Crown’s concerns would be met.

[40] **THE COURT**: I’m also under the provisions of Section 109 of the *Criminal Code*, I will impose a Prohibition Order on the possession or use of any firearm – okay, where is it? Prohibited firearm, restricted firearm, prohibited weapon, prohibited device – where is it? What’s the wording here? Possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited weapon and explosive substance for a period of 10 years. Is that the wording, Ms. Rovers?

[41] **THE CROWN**: Under Section 109.

[42] **THE COURT**: Okay. This is the Order. Yes, from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for a period of 10 years. Well, I think Ms. Rovers is it possession – possessing of any firearm, ammunition or cross-bow, restricted weapon or explosive substance. Is that...

[43] **THE CROWN**: Firearm, prohibited firearm, restricted firearm, any cross-bow, restricted weapon, ammunition and explosive substance...

[44] **THE COURT**: Yes. For a period of 10 years. That's the order I make under that Section. That's mandatory for 10 years after the conviction for an offence that carries – okay – that is the sentence. Mr. Miller will be taken into custody to commence his sentence. Thank you.

J.