

Date: 20010125
Docket: CR 99-161159

1999

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as R. v. Clayton, 2001 NSSC 7]

Between:

Her Majesty the Queen

and

Larry Clayton

DECISION (*SENTENCING*)

Heard before: The Honourable Associate Chief Justice Michael MacDonald

Place Heard: Halifax, Nova Scotia

Dates Heard: October 2 and 3, 2000

Date of Sentence: January 5, 2001

Written Release

Sentence Decision: January 25, 2001

Counsel: Robert McCarroll, *Public Prosecution Service for the Crown*

Stanley MacDonald & Nick Lenco, A/C, Garson Knox & MacDonald for the Accused

- [1] Thank you counsel. I want to repeat my appreciation for your hard work in preparing a joint recommendation for the Court. As I stated sentencing is a very difficult thing for the Court, probably the most challenging task we have. As well I want to thank Mr. Lenco for his very helpful brief on the DNA aspect of the matter which given its newness will be of assistance to the Court in the future.
- [2] I have some remarks to make as far as this offence is concerned and am prepared to give reasons for my accepting the joint recommendation of counsel.
- [3] On October 25th, 2000, following a judge alone trial, I found the Defendant, Larry Clayton, guilty as charged on a four count indictment. He is before me today for sentencing.

Background

- [4] These offences stem from Mr. Clayton's acrimonious break-up with his girlfriend Ms. Cantrell Clyde. Mr. Clayton threatened her (*Count 1*) while he was on an undertaking to have no contact with her (*Count 2*). Mr. Clayton subsequently rang the doorbell of the Clyde family home. As Ms. Clyde's father opened the door Mr. Clayton threw acid in Mr. Clyde's face causing serious eye injury (*Counts 3 and 4* - aggravated assault and possession of a weapon to with acid).

The Offender

- [5] Mr. Clayton is 36 years of age with a grade 12 education (GED). He has a lengthy and serious criminal record dating back almost twenty years. In fact his most recent convictions for which he is presently incarcerated involve Ms. Clyde. He is physically healthy but due to his ongoing incarceration he is unemployed.

The Principles of Sentencing

[6] Sentencing remains one of the most difficult tasks for judges despite the recent codification of sentencing principles. I refer to those principles relevant to the case at bar:

718 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.**

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2(a) A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing.**
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,**
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,**
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or**
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization**

Shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;**
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;**
- (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, with particular attention to the circumstances of aboriginal offenders.**

[7] While not exhaustive, the following factors have particular relevance to the case at bar:

1. The very nature of the aggravated assault is extremely troubling. First of all to throw acid in an unsuspecting person's face is a horrifying deed. The consequences could have been much more devastating for Mr. Clyde. He is lucky he did not lose his sight.

Secondly, this act by its very nature is a cowardly one. It is hard to imagine a more vicious and unsuspecting attack.

Thirdly, it was motivated to settle a romantic score; something which according to Mr. Clayton's record he is prone to.

Fourthly and perhaps most importantly, this offence shattered the sanctity of this family's private home. Although robbery was not the motive, this was a home invasion with all the crushing consequences. As is borne out by the victim impact statements, the Clyde family now lives in fear. This crime involved a significant degree of premeditation. Our courts have emphasized the need to deter this type of crime by way of lengthy custodial terms.

2. Another significant factor involves Mr. Clayton's lengthy criminal record. It includes serious crimes, many of which involve the use of threats and Mr. Clayton's fulfilment of those threats by damage to property and injury to individuals. Obviously Mr. Clayton has a major long standing problem with anger management which according to his pre-sentence report Mr. Clayton has refused to adequately address. I urge you Mr. Clayton for your own benefit to

please consider doing what you can to resolve your difficulty with anger management. I believe in the long run it will be much, much better for you.

Caselaw

- [8] I have reviewed the caselaw that counsel has provided to me and it has served as a helpful guide. Sentences for these types of offences range from two years to ten years or even more. I have earlier alluded to some of the difficulties the court has in the sense that no case is ever identical. Cases in which acid or other types of material were thrown very often involve injuries much more serious than that to Mr. Clyde. Mr. Clayton is lucky for that. Other types of assaults with very serious consequences often have an element of spontaneity as opposed to the premeditation. Some offenders have long records and some have no records. So it is difficult to find a case that is identical.

Sentence

- [9] I concur with counsel's joint recommendation that a period of six years is the appropriate period. I so order.
- [10] I order 6 years for the aggravated assault (*Count 3*). *Counts 1* and *2* (threat and breach of undertaking) to be six months each concurrent to *Count 3*. *Count 4* (weapon) will be nine months concurrent to *Count 3*.
- [11] I also confirm that the order is net of any remand time.
- [12] I also confirm that Mr. Clayton shall serve half of his time before being eligible for full parole. I make this order pursuant to s. 743.6(1) of the *Criminal Code*.
- [13] Given Mr. Clayton's present age of 36 and the fact that a Firearms Prohibition Order will not take place for some time I believe the appropriate time for such an Order under s. 109 of the *Criminal Code* is 15 years and I so direct. In so doing I find that I, despite the wording of s. 109, have the discretion to order a prohibition order that is less than life and more than ten years.

[14] The Crown has applied for retrospective DNA sampling and presented the Court with a form of order which Defence counsel agrees with. I am prepared to again accept counsel's joint recommendation on that matter.

[15] I refer to the relevant portions of s. 487.052 of the *Criminal Code*:

(1) ...if a person is convicted...of a designated offence committed before the coming into force of subsection 5(1) of the *DNA Identification Act*, the Court may on application by the prosecutor, make an order Form 5.04 viable authorizing the taking from that person...for the purpose of forensic DNA analysis of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of investigative procedures described in subsection. 487.06(1), if the Court is satisfied that it is in the best interests of the administration of justice to do so.

(2) In deciding whether to make the order, the court shall consider the criminal record of the person...the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's...privacy and security of the person and shall give reasons for its decision.

[16] This is as a request for a retrospective order. Thus it is a discretionary matter for the Court. I accept Defence counsel's remarks that the onus would therefore be on the Crown to satisfy the Court that it is indeed in the best interest in the administration of justice to make such an order.

[17] In exercising my discretion I have considered the relevant criteria under ss. 2. This includes the criminal record of the offender. In this case it is a lengthy criminal record which includes offences that would be considered primary offences but for a retrospective request, as well as other secondary offences. All of this certainly leads me to conclude that it would be appropriate to make such an order.

[18] Furthermore I must consider the specific offence, the consequences of that offence, and the surrounding circumstances of that offence. Clearly this is a very serious offence with grave consequences.

- [19] Finally I must consider the impact such an order would have on Mr. Clayton's privacy and security. While I agree with the joint recommendation, I also agree with the Defence that blood taking represents a significant invasion of a person's privacy and security. Where it is discretionary I do not believe a court should rush into granting these orders. However given primarily Mr. Clayton's lengthy criminal record and the types of offences for which he is charged, on a fact specific basis I concur that the order in the form presented would be appropriate.
- [20] I also confirm that it would be futile to order a fine surcharge and I make no such order.

Michael MacDonald
Associate Chief Justice