

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Bernard*, 2014 NSSC 463

**Date:** 2014-12-17

**Docket:** *Syd* No. 422063

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Christopher William Bernard

**Judge:** The Honourable Justice Robin C. Gogan

**Heard:** December 17, 2014, in Sydney, Nova Scotia

**Oral Decision:** December 17, 2014

**Written Release of** May 13, 2015

**Oral Decision:**

**Counsel:** John MacDonald, for the Crown  
Ann Marie MacInnes, for the Accused

**By the Court (Orally):**

**Overview**

[1] The proceeding before the court today is the Sentencing Decision in *R. v. Christopher William Bernard*. On April 9th, 2014, Mr. Bernard pled guilty to one charge contrary to s.348(1)(b) of the *Criminal Code of Canada* acknowledging that he had committed a break and enter to a dwelling house situate at 4734 Shore Road, Eskasoni, Nova Scotia.

[2] On October 30th, 2014, I heard sentencing submissions from both Crown and Defence Counsel. I have also received and reviewed written submissions from both Crown and Defence Counsel, a Gladue Report and a Pre-Sentence Report.

[3] I have now had the opportunity to consider all of the information supplied to me and I am prepared to provide a sentencing decision in this matter.

## **The Facts**

### *(a) Circumstances of the Offence*

[4] The circumstances of the offences in question are summarized in the transcript of proceedings of April 9th, 2014 which has been filed in this matter and is located at Tab 1 of the Crown's written submission to the Court.

[5] In summary, the offence took place on or about September 29th, 2014. Mr. Bernard was in Eskasoni and had attended a social gathering at the home of Angie Stevens. He had only been there briefly. The next morning, the residents noted a number of items missing from the home including a PS3 game console, a Wii game console, approximately 50 games, money, car keys and sneakers. There was suspicion that it was Mr. Bernard who had taken the items.

[6] The police began an investigation and Mr. Bernard was contacted. Mr. Bernard acknowledged to police that he had committed the break and enter. All of the items taken during the break and enter were subsequently recovered and returned to their owners.

[7] Mr. Bernard was arrested and has been in custody since September 30th, 2013. As noted, he has pled guilty to the offence before the Court and the question

today is what is a fit and just sentence for Mr. Bernard given all of the relevant circumstances.

*(b) Circumstances of the Offender*

[8] Mr. Bernard is 35 years old. He was born in Sydney, Nova Scotia. He is an Aboriginal person of Mi'kmaq descent. He grew up and lived in Eskasoni and Millbrook. He has a Grade 10 education. He has very little work experience.

[9] Mr. Bernard had a difficult start in life. Aside, but perhaps related to, systemic disadvantages which will be discussed further in a moment, he had significant personal challenges to deal with even at a very young age. His parents Michael Denny and Eleanor Denny separated after only 7 years of marriage. The reasons included both domestic violence and substance abuse. His mother left the home and moved to Millbrook. Mr. Bernard lived for a while with his father. It has been referred to as a difficult and abusive relationship. Later, Mr. Bernard reports incidents of sexual abuse in his life.

[10] Mr. Bernard left home at 11 to live with his mother. He then lost his mother in a car accident in 1995. Mr. Bernard would have been about 16 years old at the time he lost his mother. The information provided to me supports that the loss of his mother was devastating for Mr. Bernard. He reports that he subsequently felt

that he didn't have a home. It is unfortunate, but sadly not surprising, that Mr. Bernard then lost his way in life. He got into trouble and spent 11 years in incarceration in various locations. He reports that "jail was better than home". It is a troubling commentary on Mr. Bernard's early life that he felt more safe and secure in jail than not.

[11] Mr. Bernard has a large extended family. He has 2 sisters and 13 half siblings. Mr. Bernard reports good relationships with his siblings although he is estranged I believe from his sister Kyla. He himself is single, having separated from his spouse of 14 years after she miscarried at 7 months. This happened only last year. Mr. Bernard has a total of 6 children.

[12] I note at this point that after a difficult start in life and some traumatic events, Mr. Bernard found himself struggling with addictions to drugs and alcohol. It is my view that these addictions are presently the overriding negative influence in his life. Given that he started drinking at 16, one is struck by the fact that Mr. Bernard has unsuccessfully struggled with addictions now for half of his life. Collateral contacts report that Mr. Bernard is a follower but that his is a good person, respectful and helpful when not under the influence of his addictions. It is clear to me that there is significant potential for Mr. Bernard if he can rise to the very difficult challenge of overcoming his addictions permanently.

[13] There is some good news reported on that issue. Mr. Bernard has been drug and alcohol free since the beginning of his most recent incarceration in September of 2013. He has attended AA meetings. There is certainly hope for Mr. Bernard. But, in my view, these are still early days in his effort to free himself from his drug problem.

[14] I note that Mr. Bernard has attempted to recover from his addictions in the past but has been unsuccessful. He is prone to criminal activity and viewed to be at high risk to re-offend while using drugs. He reports that when he committed the offence before the Court he had been “high all day and looking for money to get high”.

[15] Mr. Bernard pled guilty to the offence in question. This plea was entered on the day the trial was to commence. The Pre-Sentence Report notes that Mr. Bernard takes responsibility for his actions and is very remorseful and ashamed.

[16] Mr. Bernard has a considerable criminal record. The offences include a multitude prior convictions for a variety of offences from breaches to theft and assault. I am unable to conclude that there is a progression in the severity of offences but it is likely a sound conclusion that in many of these offences drug use was a significant factor. The most significant aspect of Mr. Bernard’s criminal

record is a conviction for robbery which resulted in a 3 year period of incarceration.

[17] I have reviewed the Gladue Report provided. I am advised that this is the first time that such a report has been provided to the Court on Mr. Bernard's behalf. The report provides a comprehensive history of the offender's home community, cultural and family background. The population of his home community and the environment of greatest influence upon him is a significantly disadvantaged one. There are educational challenges, a significant unemployment rate and broader social and economic issues. There are well documented issues of violence and addiction issues in the community. Mr. Bernard was exposed to all of these disadvantages and challenges, likely from his earliest recollections.

[18] Mr. Bernard's personal history is reflective of that of his greater community. He has been a victim of physical and sexual abuse, he has not finished high school, he has a poor work history, he has been homeless and suicidal and he has a high rate of involvement in the criminal justice system. Before being arrested in September of 2013, Mr. Bernard reports that he was at the lowest point in his life.

[19] I note at this point that I have considered the summary of factors listed at page 51 of the Gladue Report.

[20] Since his incarceration, Mr. Bernard has connected with elders in his community. He has taken their advice, fostered his spirituality and re-established broken connections in his life.

[21] I was struck by Mr. Bernard's comment in the pre-sentence report that "he sees more potential in himself". This, in my view shows the development of some goals and an increased sense of his own personal value and his value to his community. These views are a positive development. I conclude based upon some of the most recent positive developments in Mr. Bernard's life that the goal of rehabilitation cannot be abandoned.

*(c) Impact on the Victim or the Community*

[22] No victim impact statements were before the Court for consideration. There was no violence, no physical harm caused, nor were there threats of harm to individuals in this case. However, the offence committed by Mr. Bernard, although not an offence directly against a person, is nonetheless very serious. He entered a house while people were there and took their property.

[23] Break and enter offences such as this can send fear through a community and cause property owners and the community at large to question their personal security and the sanctity of their own homes. The impact of this cannot be



understated. This was a serious offence and I must consider that his entry into a residence as an aggravating factor on sentence. I also note however, that the items taken, were quickly recovered.

### **Legal Parameters**

[24] As noted, Mr. Bernard is before the Court today for sentence on a single count of break, enter contrary to s.348(1) of the *Criminal Code*. The offence has a potential penalty of imprisonment for life.

[25] There is no minimum sentence requirement.

### **Position of the Crown and Defence**

[26] The Crown seeks a period of incarceration for Mr. Bernard. It is the Crown's submission that a sentence of 4-5 years of incarceration is appropriate in this case.

[27] In support of its position the Crown relied on the sentencing benchmark established *R. v Zong*, [1986] N.S.J. No. 207 (N.S.C.A.). In that case, Clarke C.J.N.S. stated for a unanimous court:

This court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant.

[28] The Crown submission correctly notes that the case law allows the sentencing judge to offset the benchmark one way or another for mitigating or aggravating circumstances. They submit that the aggravating factors are an occupied dwelling house and the criminal record of the accused. Given the considerable criminal record, it is argued that previous rehabilitative sentences have been unsuccessful and that the focus should now be on separation, denunciation and deterrence. The late guilty plea is at most only a somewhat mitigating factor for the Crown.

[29] The Defence proposes that Mr. Bernard's sentence be a period of 2 years incarceration. It is submitted that I have wide latitude to fashion an appropriate sentence. It is acknowledged that the starting point however, is a 3 year period of incarceration, subject to adjustment. On behalf of the accused, it is submitted that an Aboriginal offender appearing before the court be treated differently than non-aboriginal offenders. It is also submitted that I consider that the circumstances of the offence were impulsive, that Mr. Bernard was not violent, that he was largely cooperative with police when confronted, and that all items taken were returned. Mr. Bernard has taken responsibility for his actions, has detoxified in remand and now has the support of his family and community.

[30] Both Crown and Defence agree that the offender should receive credit of 1.5 to 1 for days in custody.

### **The Case Law**

[31] Both the Crown and Defence supplied case law in support of their respective positions and both provided extensive and excellent oral submissions.

[32] Counsel for the Crown referred to the three year benchmark established in *R. v. Zong*, *supra*, as referred to and applied in many cases thereafter. Also provided was the more recent decision of our Court of appeal in *R. v. Adams*, 2010 NSCA 42, in which Justice Bateman confirmed the 3 year starting point for the offence of break, enter and theft. Justice Bateman further confirmed that this starting point is a benchmark from which the sentencing judge should move if the circumstances warrant.

[33] I note at this point that the Crown did not provide any cases where this benchmark was applied to an Aboriginal offender.

[34] In response, the Defence submitted case law to establish that although a sentencing benchmark exists, the sentencing exercise must be one that considers each individual set of circumstances. The Defence provided a number cases where

sentences for the offence in question were less than the benchmark. On the basis of those cases, it was submitted that a common disposition for the offence of break and enter into a dwelling house is in the 2 year range.

[35] The Defence further relied upon the decision of the Court of Appeal in *R. v. Perrin*, 2012 NSCA 85. In that case, the Crown appealed a sentence that it argued was manifestly unfit and relied upon the benchmark of 3 years as confirmed in *R. v. Adams, supra*. Justice Beveridge acknowledged the benchmark in *Adams* but upheld the original sentence noting that the Court of Appeal has imposed or upheld non-custodial or short jail sentences for break and enters over a wide range of circumstances.

[36] Both counsel acknowledge the applicability of the decisions of the Supreme Court of Canada in *Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*, 2012 SCC 13;

[2012] 1 S.C.R. 433. In *Gladue, supra*, it was noted at para 75:

The role of the judge who sentences the aboriginal offender is, as for every offender, to determine a fit sentence taking into account all of the circumstances of the offence, the offender, the victims and the community. Nothing in Part XXIII of the Criminal Code alters the fundamental duty as a general matter. However, the effect of 718.2(e), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

[37] I am urged by the Crown to consider that the circumstances of this offender and this offence merit a sentence similar to what would be imposed upon a non-aboriginal offender. In making this plea, the Crown relies on paragraph 79 of *Gladue*. However, I also consider the overall mandate imposed upon the sentencing judge by the *Criminal Code* and *Gladue*. I must consider the unique situation of the Aboriginal offender. I am left with discretion as to how to factor this consideration into the determination of a fit and appropriate sentence.

[38] I am also mindful of the direction given by the Supreme Court of Canada in *Ipeelee* that courts must ensure that a more formalistic approach to parity in sentencing does not undermine the remedial purpose of 718.2(e). There are two further points from *Ipeelee* that bear weight in the present case; (1) to the extent that the application of the *Gladue* principles lead to different sanctions for Aboriginal offenders, those sanctions will be justified based upon their unique circumstances – circumstances which are rationally related to the sentencing process; and (2) systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his level of moral blameworthiness. Failing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[39] I note at this point that counsel for the Defence has provided a number of cases which consider the application of the *Gladue* factors in cases involving the offence of break and enter or robbery. I refer to the 2013 decision of Judge Whalen in *R. v. Rose*, 2013 NSPC 99 and the more recent decision of Judge Ross in *R. v. Smith*, 2014 NSPC 86. Both of these decisions were of great assistance to me in fixing the sentence I do today for Mr. Bernard.

[40] In carrying out my mandate as a sentencing judge, I am grateful to have been provided with both the Pre-sentence Report and the Gladue Report in this case. The Gladue report provides the court with evidence as to the systemic and background factors which I must consider in the case of Mr. Bernard. The report also provides significant information as to Mr. Bernard's personal circumstances and how he has been impacted by those systemic disadvantages too commonly found in Aboriginal communities.

[41] I will return to the issues raised in the report in a moment. Before doing so, I will briefly review the principles of sentencing applicable to this matter.

### **Principles of Sentencing**

[42] The purpose and principles of sentencing are found at s.718 of the *Criminal Code of Canada*. As codified in s.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. The sanctions imposed should have one or more of the following objectives:

1. To denounce unlawful conduct;
2. To deter the offender and other persons from committing offences;
3. To separate offenders from society when necessary;
4. To assist in rehabilitating offenders;
5. To provide reparations to victims or the community; and
6. To promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and the community.

[43] Section 718.1 of the *Criminal Code* provides that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 codifies additional sentencing principles and, among other things, obligates the sentencing judge to increase or reduce a sentence to account for any relevant aggravating or mitigating factors relating to the offence or offender.

[44] Section 718.2(e) is important here in that it requires particular attention be paid to the circumstances of Aboriginal offenders in order to achieve a truly fit and proper sentence.

### **Mitigating and Aggravating Factors**

[45] Having heard and considered all of the relevant evidence as to Mr. Bernard's sentence, I consider the following to be aggravating factors:

- (a) Mr. Bernard's extensive criminal record which includes a previous conviction for robbery with a 3 year sentence;
- (b) The fact that Mr. Bernard's offence involved breaking into a dwelling house that was occupied;

[46] I consider the following to be mitigating circumstances:

- (a) Mr. Bernard has taken responsibility for his actions and exhibits remorse;
- (b) He pled guilty to the offence before the Court (although I have considered that it was provided at the latest opportunity);



- (c) The presentence report is generally positive;
- (d) Mr. Bernard has the support of his family, including his extended family and has reconnected with his community and cultural background;

### **Reasons**

[47] Having reviewed all of the foregoing, the issue remains – what is a fit and proper sentence to impose on Mr. Christopher Bernard?

[48] Mr. Bernard is an Aboriginal person. He is before the Court as a result of the commission of a serious offence, an offence against the safety and security of other members of his community. He has a significant criminal record. He has a turbulent personal and extended family history. He carries many burdens.

[49] That said, I find Christopher Bernard to be an impressive figure. As he presented to the Court on sentencing, he is still a young man who has reconnected with his family, his culture and his community. He has now taken some steps to overcome addiction issues and to accept the support of his family and community. He is insightful and remorseful. It is a rare occasion to see someone in Mr. Bernard's circumstances and find hope and resilience. The fact that I see these

things in Mr. Bernard speaks to who he is at this point in his life and who I hope that he can become to his family and his community. These comments no doubt foreshadow that I believe that rehabilitation remains a goal in sentencing Mr. Bernard notwithstanding his considerable criminal history.

[50] As noted in *Gladue*, “Sentencing is an individual process and in each case, the consideration must continue to be what is a fit sentence for this accused, for this offence, in this community.” I must impose a sentence that reflects the gravity of the offence and the degree of responsibility of the offender. I must consider the unique circumstances of Mr. Bernard as an Aboriginal offender.

[51] Mr. Bernard committed an offence against the safety and security of the members of his community. He entered a home with residents inside, people he referred to as friends, with whom he had earlier socialized, and he must have wandered about looking and taking a variety of things. It is well established that this type of conduct is serious and attracts consideration of denunciation and deterrence (both general and specific) as sentencing goals. People must feel safe and secure in their home. This type of conduct must be condemned and Mr. Bernard and others must be deterred from this type of behavior.

[52] That said, I am satisfied that Mr. Bernard appreciates the gravity of the offence, that he has accepted responsibility and expresses remorse.

[53] I also consider that the circumstances of the offence appear to have been impulsive. There does not appear to have been any plan or pre-conceived intention to commit this offence. Mr. Bernard initially left the home and then not long after returned and committed the offence. Mr. Bernard was under the influence of drugs at the time of the offence and “was looking for money to get high”. He was relatively cooperative with the investigating officers and all of the property taken was recovered quickly.

[54] Admittedly, Mr. Bernard has struggled with a drug problem for many years. Several of the contacts in the Pre-sentence Report commented on the significance of Mr. Bernard’s drug addiction. It drives his criminal conduct. As noted, he has a significant criminal record. He admits drinking since he was 16 and having a drug addiction since the age of 22. Not surprisingly, the criminal record provided to the court dates back to 1999. In 1999, Mr. Bernard would have been 20 years old, drinking, using drugs, out of school with no employment. His initial offences are entry level offences. It is not surprising that at the time he says he developed an addiction to drugs, he also graduates to more serious criminal activity. He has

convictions for theft, robbery, fraud and trafficking along with a multitude of breach offences. This record is a great concern to the Court.

[55] The Crown submits that rehabilitation should not be an objective at this time. The focus should be on denunciation, deterrence and separation. This view drives the 4-5 year custodial sentence which the Crown seeks. This is not an unreasonable position given Mr. Bernard's criminal record along with past opportunities for drug treatment that were not successful, uncompleted community service, unpaid restitution and many breaches of court ordered conditions.

[56] I am concerned about Mr. Bernard's ability to abstain from alcohol and drugs at the time of his eventual release. This is not so much of a personal criticism of Mr. Bernard as it is a reality of those struggling with addictions. Repeated and persistent efforts at abstinence are not unusual. What is clear however, is that unless Mr. Bernard finds a way to life-long abstinence, he will be a threat to himself and his community in the future.

[57] It is at this juncture that I give consideration to the information provided in the Gladue report. Mr. Bernard, as a member of an Aboriginal community has lived with systemic disadvantages and barriers all of his life. It will no doubt be

difficult for him to find a way to overcome a drug problem that has been with him for most of his life and now defines who he is as an adult.

[58] I am not convinced, in light of the history of this offender, that past custodial sentences have served any deterrent purpose for Mr. Bernard. Admittedly, Mr. Bernard felt more comfortable in jail. He stated in the Pre-sentence Report that “jail was better than home”. It is hard to see how specific deterrence would be effective in such circumstances. So, where does this take the court on sentence?

[59] In my view, a number of things have now changed for Mr. Bernard. First of all, his personal circumstances have changed. He has reconnected with his family, his culture and his community and he has begun to develop a support network for himself. He has shown some leadership skills while in custody. He is currently drug and alcohol free and attending AA meetings. He has expressed a desire for treatment and counselling and he has connected with his spirituality. He sees potential in himself and says that he now expects more from himself. I conclude that the goals of separation and deterrence, largely ineffective in the past, may now have a great impact on Mr. Bernard. I am further persuaded that Mr. Bernard is now at a point in his life where he is truly ready to take on the challenge of life long abstinence from drugs and alcohol.

[60] Second, I am advised that in spite of his lengthy criminal record, this has been the first occasion on which a Gladue Report has been provided to the Court on Mr. Bernard's behalf. The content of the report puts Mr. Bernard's life and past conduct in an Aboriginal perspective. I conclude from this information that rehabilitation and restorative goals should still be considered as appropriate for this offender. The information provided suggests that should Mr. Bernard find a way to free himself from his addiction issues that he is a good person, respectful, helpful and has the potential, with support, to become a productive member of the community and a good and responsible parent to his children.

[61] I am persuaded that a fit and proper sentence for Mr. Bernard is one that balances the goals of deterrence and denunciation with rehabilitation and restorative justice. I am therefore prepared to impose a total sentence of 2 years less one day followed by 2 years probation less credit for time served. It is my hope that the period of custody followed by the probationary period will assist Mr. Bernard's transition back into his family and community with the appropriate amount of support.

### **Ancillary Orders**

[62] The Crown seeks a DNA order. The order sought is hereby granted.

**Final Decision**

[63] Please stand Mr. Bernard.

[64] I hereby sentence you to a total period of imprisonment 24 months less 1 day. In addition, I find it just and appropriate that your period in custody shall be followed by 2 year of probation during which time you shall be bound by the standard conditions, you shall abstain from non-prescription drugs and alcohol and you shall follow any treatment plan or attend any personal, psychological or psychiatric counselling which his directed or recommended, and you shall stay away from any place where alcohol is sold or distributed as a primary product.

[65] I am advised that Mr. Bernard has been in pre-sentence custody since September 30, 2013 for which he shall receive a credit of 1.5:1 as agreed by counsel.

Gogan, J.