

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. MacLean*, 2015 NSSC 146

Date: 2015-04-16

Docket: *Halifax*, No. CRH No. 427000

Registry: Halifax

Between:

Her Majesty the Queen

v.

Kathy Denise MacLean

SENTENCING DECISION

Judge: The Honourable Justice Allan P. Boudreau

Heard: April 13 and 14, 2015, in Halifax, Nova Scotia

Written Decision: May 19, 2015 (*oral decision was rendered on April 16, 2015*)

Counsel: Angela Nimmo, Federal Crown, for the Plaintiff
Luke Craggs, for the Defendant

INTRODUCTION:

[1] Ms. MacLean was employed as a nurse at the Central Nova Scotia Correctional Facility in Dartmouth, Nova Scotia for approximately a decade. In March of 2013 she was charged with several counts of trafficking a controlled substance and one count of breach of trust, which were alleged to have occurred between July 2012 and November 2012.

[2] In January of 2015, she pled guilty to one count of providing steroids to an inmate at the Correctional Facility and one count of breach of trust and she is now being sentenced on those two counts.

[3] The Prosecution is seeking an 18 month total period of imprisonment and the Defence is seeking a 12 month sentence (conditional) to be served in the community.

BACKGROUND:

[4] Ms. MacLean is 43 years of age. She is single. After graduating from High School she went on to St. Mary's University where she graduated with a Bachelor of Arts Degree in 1992. She then studied nursing at the Victoria General Hospital, graduating in 1994 as a registered nurse.

[5] She held various positions as a nurse with the Capital District Health Authority from 1994 to 2012, a period of some 18-19 years.

[6] She had a particular interest in working in the mental health field. She testified that that was where she thought she could make an impact to help those she considered marginalized in our society.

[7] She worked in forensic nursing at the Nova Scotia Hospital dealing with patients who had been found to be not criminally responsible. After a number of years working at the Nova Scotia Hospital, the forensic and mental health assessment of offenders was transferred to the then new Correctional Facility in Dartmouth. There Ms. MacLean worked in the newly opened Mentally Ill Offenders Unit for some 5 years. It was that Unit's mandate to assess if offenders were too mentally unstable to be in the general population.

[8] Around 2001, Ms. MacLean started to work in the General Offender Health Unit at the Correctional Facility. She was there until November 2012 when the events which I shall recount led to her suspension and eventual termination and the loss of her registered nurse license.

[9] Ms. MacLean testified that she had had several relationships with men over the years between University in the 1990's and about 2005-2006. She said they

were verbally abusive and at times financially abusive and all ended badly. As a result, it appears she never married.

[10] Ms. MacLean also testified that the work environment at the Correctional Facility was very stressful, with daily abusive and belittling language and, at times, direct threats. She said she approached management for support on a number of occasions, but that little was done. She said she tried to get help for the stress from the Employee Assistance Program a number of times and found it not very helpful. She felt all she could do was, as she implied, “suck it up” and go on with the work.

[11] Some offenders would send her explicit sexual notes and one even threatened to rape her when he got out. She witnessed three deaths while there. She said the nurses would just have to work around these things and even continue to deliver medications to the ones who had threatened them.

[12] Ms. MacLean testified that work conditions deteriorated during her last years at the Correctional Facility to the point that staff were not getting along, and bullying was going on, adding to the stress. She said management did not seem to care about the worsening “toxic” work environment. Ms. MacLean said she learned to internalize the stress and tried to cope with it by having a glass of wine or so to relax when she got home.

[13] About July of 2012, an inmate by the name of Kenneth Wingfield started passing flattering love notes to Ms. MacLean. These progressed to love letters.

[14] In the letters and when he had an opportunity, Kenneth Wingfield would tell her what he knew she wanted to hear. That she was beautiful, that he loved her. That he would protect her in the Institution, that he would be getting out soon and would have a relationship with her and take care of her. The latter was something which she says she never had and she had a longing for such attention.

[15] Ms. MacLean began to believe Kenneth Wingfield, that he actually cared for her and that she loved him as well. To many of us, that may seem quite naïve, but to Ms. MacLean it seemed real. Kenneth Wingfield began to call Ms. MacLean at home, although she had avoided giving him her phone number or address or any personal or family details. She does not know how he came to get her home phone number. Ms. MacLean did not report the letters or phone calls to her employer. When asked why, she said she thought she had already crossed the line with the relationship she had allowed to develop with Kenneth Wingfield, that she would lose her employment in any event if this was disclosed.

[16] Then, around October 2012, “out of the blue”, two children aged 7 or 8 arrived at the door of Ms. MacLean’s home with a bouquet of flowers. They gave

her the flowers and left. The flowers were from Kenneth Wingfield and inside was a package containing what appeared to be steroid pills. Ms. MacLean knew then and there what was being asked of her.

[17] She testified that she talked with Kenneth Wingfield that evening but that she did not bring the package to the Correctional Facility the next day. That next day she told Kenneth Wingfield that she did not want to bring the package into the Correctional Facility. She said Kenneth Wingfield told her that she had “no choice, that they now know where you live and the car you drive.” Ms. MacLean said she did not know who “they” were, but that she assumed it was a Spryfield gang with which Kenneth Wingfield had been associated. She said she was also told that “they” knew her mother lived in the New Glasgow area.

[18] Ms. MacLean testified that, by then, she felt she had no other choice. Also, that if her relationship with Kenneth Wingfield was disclosed by anyone, including her, that she would lose her employment. The next day she took the package into the Correctional Facility in her purse and gave it to Kenneth Wingfield.

[19] In spite of all this, Ms. MacLean still felt she was in love with Kenneth Wingfield. That he would get out soon and “take care of her.” She did not inquire why Kenneth Wingfield was in jail or for how long. This speaks to her delusion

and denial about Kenneth Wingfield. Calls and love notes or letters continued, and over the next number of weeks two more packages were delivered to Ms.

MacLean's home. She brought them into the Correctional Facility and gave them to Kenneth Wingfield. She was unaware what the last two packages contained and those contents remain unknown.

[20] Around the latter part of October 2012, Ms. MacLean's relationship with Kenneth Wingfield came to be known to her employer and she was suspended from her work and eventually terminated.

[21] At that time, the authorities suspected that some contraband may have been brought into the Correctional Facility by Ms. MacLean and a "sting" operation was mounted whereby undercover agents posed as a go between Ms. MacLean and Kenneth Wingfield. Third party calls were arranged with Ms. MacLean and an agent and with Kenneth Wingfield on another phone. Calls and discussions with Ms. MacLean and the agent also occurred and all the calls were monitored and/or recorded. Some of those recorded calls were placed in evidence at this hearing. The transcripts have also been placed in evidence.

[22] The purpose of this "sting" operation was to see if Ms. MacLean would provide incriminating evidence of contraband having been brought into the

Correctional Facility by her. This culminated in a lengthy interrogation of Ms. MacLean by police on March 7, 2013 where she provided sufficient information to the police and she was formally charged on that date with criminal breach of trust for trafficking a controlled substance.

[23] Ms. MacLean was subsequently released on strict conditions, one of which was a 10:00 p.m. to 6:00 a.m. curfew, seven days a week, which remains in effect.

[24] Ms. MacLean's participation in the offences has resulted in her losing her job at the Correctional Facility and, ultimately, with the Health Authority. The body governing registered nurses also revoked her license to work as such. The result being that Ms. MacLean has lost an annual income of between \$60,000 and \$70,000. This has resulted in her having to declare bankruptcy.

[25] Ms. MacLean has, since about a year now, been working at a delivery/trucking firm earning some \$32,000 per year. With this new job and income, she was able to salvage her home and car from the bankruptcy, presumably because she was able to continue the payments and there was not sufficient equity in those assets to warrant a sale.

[26] Ms. MacLean also suffered the public humiliation of these charges and the humiliation *vis-à-vis* her former professional colleagues, her family and friends.

[27] Since the charges, Ms. MacLean has, on her own initiative, sought counselling to try to understand why she made these poor choices and what she needs to do to avoid making such poor choices, especially as they pertain to her choice of relationships with men.

[28] The undisputed evidence is that Ms. MacLean has been very diligent in pursuing her treatment and following her counsellor's advice. She has also been extremely diligent at her employment of one year, as can be seen from the reference letters from her present employer. She is described as the best employee the company ever had. I will say more about reference letters later.

ISSUE:

[29] The main issue in this case is not the length or duration of any sentence, but rather whether it is appropriate that Ms. MacLean serve her sentence in the community.

THE LAW

[30] The law which governs whether a sentence can or should be served in the community is codified in section 742.1 and sections 718 to 718.2 of the *Criminal Code of Canada*. I will now quote those provisions of the *Criminal Code*:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

(a) the court 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;

(b) the offence is not an offence punishable by a minimum term of imprisonment;

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;

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(d) to assist in rehabilitating offenders;

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(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 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,

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

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(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 ...

[31] When one considers the foregoing sections of the *Criminal Code* it is clear that a conditional sentence is available in the present case. The question is whether doing so will adequately address the purpose and principles laid out in sections 718 to 718.2, particularly denunciation and general deterrence. It is common ground that specific deterrence is not in question.

ANALYSIS

[32] Numerous cases have been cited to me by both the Prosecution and the Defence. Cases for somewhat similar and somewhat different circumstances range from sentences of probation to several years in prison, with conditional sentences in between. I say somewhat similar or somewhat different because no case is exactly alike; however, the cases do provide guidance in applying the purpose and principles of sentencing outlined in the *Criminal Code*.

[33] There can be little doubt that denunciation and deterrence, especially general deterrence, are very important factors in sentencing offenders for breach of trust involving bringing contraband into a penal institution; however, that does not mean that other factors should not be considered. In fact, the entire package of principles which apply to a particular offender's circumstances and the circumstances of the

commission of the offence must be considered. This approach is mandated by all the authorities, including the *Criminal Code* itself.

[34] Our Court of Appeal has consistently said that sentences are not simply imposed for an offence but are imposed on an offender, considering all the circumstances of both. In *R. v. Grady* [1971] N.S.J. No. 93 our Court of Appeal said at para. 7:

It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear at times that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.

[35] In *R. v. Bratzer* 2001 NSCA 166, a decision of our Court of Appeal, the Court said at para. 62:

I have reviewed the circumstances of this sentence in some detail because it is important to understand that this seemingly lenient disposition is driven by the unique facts of this case. My affirmation of the sentence in no way detracts from the guidance that this Court and others have given in the past about the usual starting point for robbery and the need for a deterrent emphasis. In constructing this sentence I am satisfied Judge MacDonald properly applied the principles of sentencing to the special circumstances of this offender. Individualized disposition has long been a mainstay of the sentencing process (*R. v. Grady* (1971), 5. NSR (2d) 264 (NSCA)).

CIRCUMSTANCES OF THE OFFENDER LEADING TO THE OFFENCE:

[36] It is clear that Ms. MacLean had an exemplary career in nursing for some 18-19 years; the last decade or so dealing with inmates at a correctional facility. She testified about the stress of the work environment and how, as she described it became more and more toxic, with little help or support from management. I will not recite these incidents but, as her testimony showed, they were numerous and serious.

[37] In 2012, she was obviously a person under stress from her work. She also had a history of abusive and failed relationships with men. Low self-esteem seemed to be an issue for Ms. MacLean. She had sought workplace assistance but it was not helpful. She said she had never had anyone love and take care of her since her youth.

[38] She testified that she was the subject of a hostage taking threat, but that when she reported it, nothing really came of it. She had to continue treating the same inmates.

[39] She testified that there was no training in place for nursing or other professional staff at the Correctional Facility as to how to avoid falling into the trap of becoming too familiar or friendly with inmates.

[40] In 2012, Ms. MacLean was in a stressed and vulnerable state. Then along comes Kenneth Wingfield, an expert con man, pardon the pun, and he begins charming her with what she considers genuine love and affection. He promises to love her and take care of her when he gets out and to protect her in the Correctional Facility.

[41] She develops a friendly and familiar relationship with Kenneth Wingfield and believes him and that she actually loves him. It is worth noting that there never was a physically intimate relationship between the two. It's easy for us to say now; how could a person be so "naïve" or "gullible"? But, we hear stories of such cases on a regular basis, especially over the internet. Vulnerable people do vulnerable things. But we say, Ms. MacLean was educated and was knowledgeable about the environment in which she worked; that she was aware of the risks in what she was doing. However, vulnerability does not seem to depend on education, age, sex or other factors. Vulnerability is just that. It appears to have really struck Ms. MacLean that she was in a difficult predicament when the first package was unexpectedly delivered to her house by two young children. She knew then that she was in trouble but she could not see a way out without exposing her relationship with Kenneth Wingfield and, as a consequence, losing her job, and maybe her career.

[42] As the Prosecution put it in its closing argument – “In for a penny, in for a pound”. “Once an employee is compromised, they’re stuck.” The Prosecution also stated, in closing, that the relationship with Kenneth Wingfield put herself and her family at risk. It said that specific threats are not needed. Once the relationship exists, the risks and dangers to herself and her family exists.

[43] What has Ms. MacLean already suffered which would act as a general deterrence to others in a similar position from committing similar offences? Firstly, she was extensively interrogated and subsequently arrested, facing public humiliation. She was fired from the Correctional Facility. She faced humiliation *vis-à-vis* her professional colleagues. She faced humiliation before family and friends. Ultimately, her license as a registered nurse was taken away.

[44] In addition to the \$60,000 to \$70,000 salary as a nurse, as she stated, she lost her life, her identity, the biggest part of herself, her reason for being and what she had wanted to do all her life.

[45] As a result, she had to declare bankruptcy. She has been able to start a new life because a friend referred her to a delivery/trucking company and she has been working there approximately one year earning \$32,000. With this income, as I

said, she was able to keep her home and car. Incarceration will clearly lead to Ms MacLean losing her life a second time.

[46] She has voluntarily and sincerely undergone counselling and therapy regarding the circumstance which led to her poor choices.

[47] When one looks at what kind of an offender is before this Court, one just has to first look at the pre-sentence report which is as positive as they get. Ms. MacLean now shows some insight in what led to the offences and she is very remorseful.

[48] The numerous and very positive letters of support (Ex. 7) are testimony to what kind of a person is Ms. MacLean. I do not need to go over them individually. They are from employment, past and present colleagues, family and friends. They are impressive. Ms. MacLean is clearly a “good person”.

[49] In my estimation, the circumstances surrounding the commission of these offences speak more to her “humanness” than to her “criminality”.

CONCLUSION

[50] What more can be accomplished by putting Ms. MacLean in prison? Is it necessary in order to satisfy the purposes of denunciation and deterrence?

Considering all of the circumstances mentioned above and at the hearing, I find that it is not. Here, I am particularly mindful of section 718.2 (d) and (e) of the *Criminal Code of Canada* which states that:

• • •

(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 ...

[51] Therefore, I impose a total sentence of 18 months, as requested by the Prosecution, that is 18 months on the breach of trust and 12 months on the section 5(1) count, to be served concurrently, but that I am satisfied and order that Ms. MacLean serve the sentence in the community, subject to conditions imposed under section 742.3 of the *Criminal Code of Canada*.

[52] I am clearly satisfied that serving this sentence in the community would not endanger the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2. I am particularly

mindful of sections 718 (a) and (b) of the *Criminal Code*. The Supreme Court of Canada has affirmed that conditional sentences, suitably crafted, can provide a significant denunciation and deterrence element to the sentencing process. Ms. MacLean has up to now paid dearly for her mistakes. I can see nothing more that would be achieved by a period of imprisonment; except once again take away the productive life which Ms. MacLean has been able to forge for herself in the face of this personal ordeal since 2013, all with the unwavering support of family and friends.

[53] The total 18 month conditional sentence shall be served as follows; 1/3 of house arrest, 1/3 10:00 p.m. to 6:00 a.m. curfew and 1/3 under supervision, as well as 120 hours of community service, plus the conditions which are imposed under Section 742.3 of the *Criminal Code*.

Boudreau, J.