SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2015 NSSC 165

Date: 2015-06-04
Docket: CRH No. 399220
Registry: Halifax

Between:

Her Majesty the Queen

v.

Cory Patrick Melvin

Sentencing Decision

Judge:	The Honourable Justice James L. Chipman
Heard:	June 3, 2015, in Halifax, Nova Scotia
Oral Decision:	June 3, 2015
Counsel:	Eric R. Woodburn, for the Crown Patrick MacEwen, for Cory Patrick Melvin

Orally by the Court:

Introduction

[1] By this decision I will determine Cory Patrick Melvin's sentence arising from a jury conviction earlier this year. Following a two and one half week trial on February 19, 2015, a jury found Mr. Melvin guilty of aggravated assault and possession of a weapon. Mr. Melvin was acquitted on four counts relating to incidents on the same date, August 16, 2011.

[2] The Crown seeks a sentence of three and a half to four years' incarceration along with a lifetime weapons prohibition and a DNA Order. The Defence asks for a disposition of six months custody in a provincial facility.

Documents Tendered For The Sentencing Hearing

[3] The matter was originally scheduled for sentencing disposition on May 19, 2015. In advance of this date, on May 12th, the parties filed briefs with enclosed caselaw. Further, the Defence included two letters of reference in support of Mr. Melvin. As well, the Crown provided Mr. Melvin's criminal record to the Court.

[4] On May 13th Defence counsel sent a letter to the Court stating, *inter alia*:

> Furthermore, we wish to advise that the victim in this matter, Callum MacDonald was recently interviewed by a private investigator in relation to this matter and a transcript has been ordered of same. However, my office has been advised that the transcript will not be available for the purpose of sentencing on May 19th, 2015, and as such the Defence will be seeking a short adjournment of Mr. Melvin's sentencing on May 19th, 2015. It is our position that the contents of Mr. MacDonald's statement are directly relevant to the aggravating circumstances as set out in the Crown's brief.

[5] This correspondence prompted a May 15th on the record conference call between counsel and the Court. During the call it was agreed sentencing would be adjourned until June 3rd and this was confirmed when the Court convened with Mr. Melvin present on May 19th.

[6] On May 15th the Defence filed "Sentencing Documents" consisting of five job descriptions and three reference letters for Mr. Melvin.

[7] When Court convened on May 19th, Mr. MacEwen handed up the transcript mentioned in his May 13th letter. In particular, this is an 18 page transcript of a May 8, 2015 interview of Mr. MacDonald taken by Eric Mott, a private investigator hired by the Defence. The Crown responded with a short brief filed on May 29th.

[8] In coming to my sentencing decision I have carefully read and considered all of the above referenced materials along with Mr. MacDonald's April 6, 2015 Victim Impact Statement and Mr. Melvin's May 6, 2015 Pre-Sentence Report prepared by probation officer Jennifer Keeler. Further, I have considered the oral arguments of counsel. Finally, I have taken into account the trial evidence, as highlighted in the below section of this decision.

Factual Background to the Incident

[9] Pursuant to s. 724(2) of the *Criminal Code*, I accept the following facts as forming the basis of the verdict. The charges arise from an incident which occurred in downtown Halifax in the early morning hours of August 16, 2011. As shown by the videos tendered in evidence (Exhibits 1-3), Mr. Melvin was initially punched by the victim, Callum Paul MacDonald. The punch to Mr. Melvin's face caused him to fall to the ground on Grafton Street in the area between Cheers and Freeman's.

[10] After punching Mr. Melvin, Mr. MacDonald ran southbound on Grafton Street. As for Mr. Melvin, after he collected himself, he walked in a southerly direction on Grafton Street towards the general area where Mr. MacDonald is last seen on the video.

[11] Shortly after these events, complainants Matthew Warmerdam and Melvin Day witnessed an altercation at the corner of Grafton and Prince Streets. They testified that as they approached Mr. Melvin (who was involved in the altercation), he waved a knife in their direction.

[12] Following this altercation, a call was received through 911 dispatch (played in evidence at the trial) from Mr. MacDonald stating that he had been stabbed. An ambulance (Emergency Health Services) was dispatched to the corner of Blowers and Argyle Streets. The ambulance attendant who gave evidence at trial, Jennifer Zwicker, testified that upon arrival she observed Mr. MacDonald to have a laceration of approximately five inches in length to his lower lumbar region. She

testified that when she arrived bleeding was controlled with pressure and the wound appeared to be superficial.

[13] At trial the Crown qualified RCMP forensic laboratory scientist Nicole McCullough as an expert. She was stepped through her four reports, entered as exhibits 9-12. She testified that the knife (exhibit 7) in question was tested for DNA and that the blade exhibited the DNA of two persons, Callum Paul MacDonald and Cory Patrick Melvin.

[14] Mr. MacDonald was not available to testify at trial. The Defence called Mr. MacDonald and one other person, Jacob Henry, as witnesses through their previous testimony. By agreement between the Crown and Defence, the jury heard these individuals' recorded sworn testimony at the preliminary inquiry. Further, they heard Mr. Henry's evidence from the previous trial (declared a mistrial) and Mr. MacDonald's recorded sworn statement to a police officer as well as the aforementioned 911 call.

[15] In convicting Mr. Melvin of aggravated assault and possession of a weapon, the jury concluded that the evidence established beyond a reasonable doubt that Mr. Melvin stabbed Mr. MacDonald with the knife in question.

[16] On the morning of the incident, Mr. MacDonald did not cooperate with police, so no photographs were taken of the wound. From the EHS report dated August 16, 2011 (exhibit 21), the following description of the injury appears:

> Has a ~5 inch lac to R lower thoracic region, bleeding controlled with pressure, appears to be superficial.

[17] The Emergency/Trauma Report (exhibit 22) of the same date and prepared by Dr. Janet MacIntyre reads:

> …
>
> On arrival in the emergency department, the patient had a GCS of 15 and was breathing spontaneously. He denied any trauma in addition to the penetrating trauma to his chest. His vital signs on arrival in the emergency department were a blood pressure of 140/70, heart rate of 120, and respiratory rate of 18 and oxygen saturation of 100%.
>
> Examination revealed a large laceration on the right chest wall.

> Chest x-ray was normal with no pneumo or hemothorax. FAST was indeterminate.
>
> The wound was explored and there was no penetration into the chest or abdominal cavity. The wound was closed with staples. The patient was informed that the staples should be removed in 10 days. The patient's care was transferred to the emergency physician at the QEII.
>
> …

[18] Mr. MacDonald was discharged from the hospital later on the morning of August 16, 2011.

Information Gleaned in Respect of Mr. MacDonald's Situation

[19] The tendered medical evidence confirms Mr. MacDonald did not have any injury complications. In his April 6, 2015 Victim Impact Statement he says he did not have an infection and that he is left with a small scar that is barely visible. He goes on to say he has not suffered any psychological problems as a consequence of the incident and/or scar.

[20] I do not find that the transcript of Mr. MacDonald's May 8, 2015 interview adds much to my consideration of the appropriate sentence for Mr. Melvin. For example, the only discussion of the wounding appears at pp. 6-7:

> Q. He swiped you with it?
> A. Yeah.
> Q. Where did you get cut anyway? I didn't look. It just said on the side somewhere.
> A. Yeah, just on my side there.
> Q. So it was a slash type thing not a stab?
> A. Yeah… no it was just a slash… it wasn't deep or anything it was just a…
> Q. Oh, okay, took a few staples?
> A. Yeah.

[21] Towards the end of the interview (p. 16) Mr. MacDonald agrees with the interviewer that he has a good job and is moving ahead.

[22] To my mind the bulk of the rest of the document relates to what the interviewer alludes to at the top of p. 15; i.e. an appeal. In my analysis of a proper sentence, I have chosen to focus on the evidence before the jury.

Aggravating and Mitigating Factors

[23] Section 718.2(a) of the *Criminal Code* requires me to consider any aggravating factors or mitigating circumstances in my determination of the nature and extent of sentence.

Aggravating Factors

1) Mr. Melvin's act was out of proportion to the initial incident. What I would characterize as an initial "sucker punch" was met with a stabbing;

2) The aggravated assault did not occur spontaneously or in self-defence. Rather, Mr. Melvin sought out Mr. MacDonald by following him down the street;

3) The weapon, a Gerber knife with a four inch blade, was produced at the scene of the offence and presumably Mr. Melvin earlier had the weapon concealed on his person;

4) Mr. Melvin was on a conditional sentence at the time of the offence;

5) Mr. Melvin was on bail conditions at the time of the incident; and

6) Mr. Melvin's criminal record includes a crime which may be characterized as somewhat violent.

Mitigating Circumstances

1) There was a significant element of provocation by Mr. MacDonald prior to the assault;

2) Mr. Melvin has been the subject of significant state supervision since the time of his release in 2011 and since his convictions in this matter. But for one relatively minor breach, he has conducted himself in a law-abiding manner since the date of the offences of almost four years ago;

3) The reference letters confirm support from clients and co-workers; and

4) The Pre-Sentence Report dated May 6, 2015 is generally positive and includes background indicating:

    a. Solid family support

b. Grade 12 diploma and crane operator's course
c. Ongoing employment
d. No issues with drugs, alcohol or gambling
e. Father figure to his niece, Macie
f. Financial independence
g. Appropriate peer group
h. Donated time and resources to local charities.

Analysis

[24] The objectives of sentencing are set out pursuant to s. 718 of the *Criminal Code*. These oft repeated principles are deterrence, denunciation, separation of offenders from society, rehabilitation, reparation to the victims and promotion of a sense of responsibility for the harm to victims. Courts typically impose custodial sentences for serious violent crimes to achieve the goals of denunciation and deterrence.

[25] In dealing with a sentence appeal involving an aggravated assault, MacDonald, C.J.N.S., in giving the Court's judgment in *R. v. Marsman* (2007), 254 N.S.R. (2d) 374 (N.S. C.A.) stated at p. 381:

> In Canada, assault charges are organized along a continuum depending upon the severity of the attack. They range from the least serious *common* assault to the ultimate "assault" - murder. Short of culpable homicide, aggravated assault represents the most serious indictment. It involves either wounding, maiming, disfiguring or the endangerment of life and carries a potential punishment of fourteen years:
>
> > 268(1) - Aggravated Assault - Every one commits and aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
> >
> > (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[26] Accordingly, aggravated assault is a serious personal injury offence as defined by the *Criminal Code*. It is a strictly indictable matter with a maximum punishment of fourteen years' imprisonment. Having said this, Parliament has not set a minimum sentence for an individual convicted of aggravated assault. Again, in this case, the Defence suggests six months and the Crown 3.5 to four years' incarceration. The aggravated assault caselaw demonstrates a vast range of

sentences, ranging from offenders being suspended with periods of probation to significant periods of federal incarceration.

[27] Both the Crown and the Defence in their submissions referred to the Ontario Superior Court of Justice case of *R. v. Tourville,* 2011 ONSC 1677, wherein Justice Code provides a detailed review of sentencing for the offence of aggravated assault. Indeed, both sides commended the Court to the below reproduced paras. of this decision:

> 27 The parties have helpfully provided me with a large number of sentencing cases, dealing with the offence of aggravated assault. That offence, contrary to s. 268 of the *Criminal Code*, carries a maximum sentence of fourteen years imprisonment. The cases disclose a wide range of sentences. At the bottom end is an exceptional case like *R. v. Peters* (2010), 250 C.C.C. (3d) 277(Ont. C.A.) where an Aboriginal offender received a suspended sentence and three years probation on her guilty plea to aggravated assault. She was twenty-six years old with no prior adult record. She had used a broken beer bottle in the assault, during a bar room dispute, causing serious facial lacerations to the victim. The "*Gladue* report" disclosed a very difficult upbringing in a violent and abusive home, leading to alcoholism and drug abuse. By the time of sentencing, she had obtained employment and was making real progress in counseling for her substance abuse problems. Some of these features are not dissimilar to the case at bar.
>
> 28 In the mid-range are cases where high reformatory sentences have been imposed of between eighteen months and two years less a day. These cases generally involve first offenders and generally contain some elements suggestive of consent fights but where the accused has resorted to excessive force. See: *R. v. Chickekoo* (2008), 79 W.C.B. (2d) 66 (Ont. C.A.) [2008 CarswellOnt 3653 (Ont. C.A.)]; *R. v. Moreira*, [2006] O.J. No. 1248 (Ont. S.C.J.); *R. v. Basilio* (2003), 175 C.C.C. (3d) 440 (Ont. C.A.).
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> 29 All three of the above cases were arguably worse offences or worse offenders than the case at bar. In *Chickekoo, supra*, the Aboriginal accused came from a similar background to Mr. Tourville but had a prior criminal record, including a conviction for assault. She caused "severe, life-threatening and permanently disfiguring" injuries to the head and face of the victim as a result of assaults with a broken beer bottle during a fight. In *Moreira, supra*, the accused was the aggressor who followed the victim on a public street in Toronto, provoking a consent fight. During the fight, the accused pulled out a knife and slashed the victim. He was in possession of the concealed knife for the dangerous purpose of using it in a fight and he was convicted of these further possessory offences, in addition to aggravated assault. He was a nineteen year old first offender at the time of the offences but had gone on to commit a number of

> further offences while on bail for which he received jail sentences. In *Basilio, supra*, as in *Moreira*, the accused was convicted of being in unlawful possession of a knife for a dangerous purpose, in addition to aggravated assault as a result of using the knife in a fight outside a bar. He stabbed the victim from behind, causing "life-threatening injuries" to the chest, diaphragm and liver. The accused did not retreat from the fight but swaggered about afterwards waving the knife. It should be noted that the Court of Appeal described the two years less a day sentence in *Basilio* as "lenient" and the eighteen month sentence in *Chickekoo* as "the lower end" of the appropriate range.
>
> 30 At the high end of the range are cases where four to six years imprisonment have been imposed. These cases generally involve recidivists, with serious prior criminal records, or they involve "unprovoked" or "premeditated" assaults with no suggestion of any elements of consent or self-defence. See: *R. v. Scott*, [2002] O.J. No. 1210 (Ont. C.A.); *R. v. Thompson*, [2005] O.J. No. 1033(Ont. C.A.); *R. v. Vickerson* (2005), 199 C.C.C. (3d) 165 (Ont. C.A.); *R. v. Pakul*, [2008] O.J. No. 1198 (Ont. C.A.).

[28] Whereas the Crown characterizes *R. v. Tourville, supra*, as setting, "… out a helpful range for aggravated assaults of this nature. In the context where a knife is used in a fight the offender is usually looking at a sentence in the three and a half to four year range depending on all the circumstances," the Defence counters, "it is submitted that the circumstances in this case are far more serious than those relating to Mr. Melvin and the injuries suffered by Callum MacDonald."

[29] In their submission, the Crown goes on to cite three further Ontario Superior Court of Justice decisions at pp. 6, 7 of their brief:

> I have also included several other cases that fall on the lower end of the range but can be distinguished because the offenders had no criminal record and other mitigating factors.
>
> *R. v. Garraj*, 2013 ONSC 1401, the offender received approximately a two year sentence for a single stab wound to the abdomen and a cut to a hand that occurred in the context of a "consensual fight". The accused had no previous record but was later found to be an accessory after the fact to a manslaughter.
>
> In *R. v. Charles*, 2011 ONSC 3034, a first time offender received a sentence of 18 months jail and two years probation for an unprovoked stabbing in the abdomen. The accused had a positive PSR and lived in a stable family environment with his wife and children and was active in his community through his church.

> *R. v. Haley*, 2012 ONSC 2302 is a more serious stabbing than the one at bar, however, once again the accused had no prior record. The court handed down a total of 54 months incarceration to the accused.
>
> I included these cases to highlight the Court's view of violent offences. As one can see the offences and offender vary from case to case, however, the Courts are united on the fact that individuals must be deterred from committing such violent crimes. In order to deter them, Courts have consistently agreed that the offenders should be separated from society. The range appears to be around two years upward to four years for similar facts and offenders. In coming to a decision with regards to these offenders we must distinguish the features that place each one within that range.

[30] As for the Defence, they cite the following additional cases in their brief:

R. v. Kagan, [2003] N.S.J. No. 281 [10 months custody]
R. v. Marsman, [2007] N.S.J. No. 222 [Two years less a day]
R. v. Peters, 2010 ONCA 30 [Suspended sentence plus three years probation]
R. v. Nakamura, 2012 BCSC 327 [Suspended sentence and probation for two years]
R. v. Nicholls, [2013] B.C.J. No. 1369 [Thirty months suspended sentence and probation]
R. v. Greenough, [2013] B.C.J. No. 1822 [Two years suspended sentence and probation]
R. v. MacDonald, [2014] N.S.J. No. 174 [Two years suspended sentence and probation]
R. v. Hunter, 2015 ONSC 325 [Three years suspended sentence and a period of probation]
R. v. Wickham, 2015 ONSC 1544 [12 months custody plus 24 months probation]

[31] I have carefully reviewed and considered the submissions of the Crown and Defence, inclusive of the above-cited cases. Returning to *R. v. Tourville, supra*, I do not regard the case at Bar as fitting within either the bottom end or high end of the range of cases analyzed. Accordingly, it does not warrant a lenient sentence involving a suspended sentence nor a harsh sentence involving several years of imprisonment. It would seem both the Defence and Crown agree since their respective positions do not advocate either scenario.

[32] In my view, this case constitutes a mid-range case. As Justice Code observed these, "… are cases where high reformatory sentences have been imposed of between eighteen months and two years less a day."

[33] As for the Crown's submission concerning the other three Ontario cases they cite, while it is true the offenders did not have criminal records, I do not accept there were "other mitigating factors". Indeed, the injuries sustained by the victims in those cases were more severe than what we have here.

[34] With respect to the Defence submission, it is important to recall that Mr. Tourville was sentenced to twenty-one months imprisonment. Certainly, the victim's injuries (see para. 10) were more significant than what Mr. MacDonald endured. On the other hand, Mr. Tourville was a first time offender of Aboriginal heritage and Code J. was mindful of *Gladue* factors in his sentencing decision.

[35] Of the other nine cases cited by the Defence, six involved suspended sentences. Of these six, five involved first time offenders with *R. v. Hunter, supra*, the exception. With Mr. Melvin, there is a criminal record involving some violence. Furthermore, there are the five other aggravating factors I have set out at para 23, supra.

[36] The length of the custodial sentence imposed must send a message of deterrence and denunciation for the aggravated assault perpetrated on Mr. MacDonald. Mr. Melvin's response was way out of proportion to the initial sucker punch. A call to 911 would have been the most appropriate reaction. Wounded feelings and bravado in the downtown afterhours bar milieu may have rendered such a response unrealistic; however, Mr. Melvin's response was extreme. That Mr. Melvin was packing a knife with a four inch blade is indeed disturbing. This was not a Boy Scout or Swiss Army knife. It was a maiming device which one should not ever expect to have to encounter on the streets of Halifax. It is indeed fortunate Mr. MacDonald's vital organs were not touched and that he recovered so well.

[37] At the end of the day, the relatively minor injury becomes a mitigating circumstance. So too are the factors set out in para 10, *supra*, including the Pre-Sentence Report.

Sentence

[38] Having regard to all of the factors, Cory Patrick Melvin is sentenced as follows:

a) To 18 months imprisonment for aggravated assault, six months to be served concurrently for possession of a weapon for a dangerous purpose.

b) To 18 months probation on the following terms:

(i) You will keep the peace and be of good behaviour.

(ii) You will appear before the Court when required to do so by the Court and notify the Court or the Probation Officer in advance of any change of name or address and promptly notify the Court or the Probation Officer of any change of employment or occupation.

(iii) You will report to a Probation Officer within two working days of your release and thereafter when required by the Probation Officer and in the manner directed by the Probation Officer.

(iv) You will refrain from communicating directly or indirectly with Callum Paul MacDonald.

(v) You will attend for and actively participate in, and to the satisfaction of your Probation Officer, any assessment, treatment or counselling as required by your Probation Officer, including for anger management and you will sign whatever consents or releases that may be required by your Probation Officer in order to monitor and verify compliance with said assessment, treatment or counselling and you will provide written proof of completion of said assessment, treatment or counselling to your Probation Officer.

c) There will be an Order made under s. 109 of the *Criminal Code* which prohibits you starting today and ending ten years following your release from imprisonment from owning, possessing or carrying any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance.

d) There will be an Order authorizing the taking of such bodily substances as are necessary for the purposes of a forensic DNA analysis.

Chipman, J.