

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Burnett*, 2015 NSSC 214

Date: 201506003

Docket: CRH No. 426054

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jay George Burnett

Judge: The Honourable Justice M. Heather Robertson

Heard: June 3, 2015, in Halifax, Nova Scotia

Written Release: July 22, 2015 (**Orally: June 3, 2015**)

Counsel: Janine Kidd, for the Crown
Alfred Seaman, for the Offender

Robertson, J.: (Orally)

[1] Jay George Burnett has plead guilty to aggravated assault contrary to s. 268 of the *Criminal Code*.

[2] There has been an agreed summary of facts read into the record, so I do not propose to revisit the facts other than to say that there was an outdoor party near Ostrea Lake and Mr. Burnett encountered Brandon Gates whom he had known earlier in life. There was some slight or comment made and Mr. Gates having made the comment continued to walk on. Mr. Burnett managed to bend down, pick something up, what we now call the unknown object and smashed Mr. Gates on the left side of his face causing severe damage which resulted in surgery to the face. He now has two titanium plates and seven screws permanently embedded in his face. So, most certainly the agreed statement of facts recognizes the seriousness of the assault and no doubt this factored in the Crown's discretion in determining what charge should be laid against Mr. Burnett.

[3] Mr. Gates provided the court with the victim impact statement. It has been read into the record. He spoke of the injury, the surgery and the impact on his life that will continue.

[4] The accused has a criminal record. I note that Mr. Burnett is now 20-years of age. It includes a conditional discharge for the breaches September 2013 and these breaches occurred while he was on probation with respect to this charge and he received a 27-day intermittent sentence and one-day pre-trial credit which he did complete successfully.

[5] However at the time of this offence I do want to acknowledge that Mr. Burnett did not then have a criminal record and I agree that his offence record is post-offence and somewhat limited by nature. It is serious however that there was the breach of house arrest and he abused alcohol in that circumstance and got caught doing so.

[6] That is more than a year ago and Mr. Burnett seems to have come to terms with some of these underlying problems including misuse of alcohol.

The position of the Crown and defence counsel

[7] The Crown says Mr. Burnett's actions require a lengthy term of imprisonment and says that a conditional sentence is not an available as a sentencing option. We all acknowledge that for this offence and they suggest rehabilitation is addressed in terms of probation following a custodial sentence and that the sentence needs to promote a sense of responsibility by Mr. Burnett and there should be an acknowledgment of the harm done to Mr. Gates. Given the seriousness of the offence, and taking into account Mr. Burnett's personal circumstances, the Crown recommends a custodial sentence in the range of six to nine months to be followed by two years of probation. The Crown requests the mandatory ancillary orders for a DNA Order and a ten-year section 109 *Criminal Code* Prohibition Order for the possession of weapons.

[8] Defence counsel seeks remand credit and urges the court to consider his lengthy house arrest and submits that he was arrested June 18, 2013, spent a night in custody, brought to court June 19, 2013, remanded until July 21, 2013, again that date until June 25, 2013. He spent pretty much June 18 - 25 in custody with remand credit of 8 days and defence counsel want that to be given credit as 1.5 days for pre-trial credit therefore to count as 12 days remand credit.

[9] Mr. Burnett has been subject to a recognizance with surety since June 25, 2013 and has effectively been on house arrest which is the highest form of release available during this two-year period up to sentencing.

[10] Defence counsel says given the pre-trial remand credit, almost two years house arrest and the positive pre-sentence report, defence submits that the maximum intermittent sentence of 90 days would be appropriate and would address the principles of denunciation and deterrence and that a period of probation of 24 months with conditions as outlined and recommended to the court would address the principles of sentencing in a balanced and purposeful way.

Purpose and Principles of Sentencing

[11] Now the purpose and principles of sentencing are all well known to us. Derrick, J. in *R. v. MacDonald*, [2014] N.S.J. No. 174, para. 6 said:

6 Sentencing has been explicitly recognized as a "profoundly subjective process." (*R. v. Shropshire*, [1995] S.C.J. No. 52, paragraph 46) Determining "a just and appropriate sentence is a delicate art" which requires the careful

balancing of "the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence..." (*R. v. M. (C.A.)*, [1996] S.C.J. No. 28, paragraph 91) An appropriate sentence cannot be determined in isolation. Regard must be had for all the circumstances of the offence and the offender. (*R. v. Nasogaluak*, [2010] 1 S.C.R. 206, paragraph 44) It is a "profoundly contextual" process in which the sentencing judge has broad discretion. (*R. v. L.M.*, [2008] S.C.J. No. 31, paragraph 15)

[12] The fundamental purposes of sentencing are set out in ss. 718 and 718.1 of the *Criminal Code*. In s. 718 it demonstrates or it articulates the purpose of sentencing:

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.

[13] Section 718.2 recites the other principles to be taken into consideration, which for the purposes of this case are:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...
- (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 ...

[14] Now we know that in this case the law is changed. There is no conditional sentence available for this offence and everyone recognizes that in the courtroom.

[15] So, s. 718.1 also requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility the offender should accept.

[16] Counsel in their briefs have recognized the aggravating and mitigating factors. Defence counsel set them out nicely. Mr. Burnett did plead guilty before trial. He has a limited, unrelated crime record that post-dates this offence. He is a youthful offender now only 20 and only 18 on the offence date.

[17] The Crown points out those aggravating circumstances that the assault on Mr. Gates was unexpected and based on what Mr. Burnett interpreted as a verbal slight, this was a senseless act of violence. Mr. Burnett picked up an object and struck the unarmed Mr. Gates as hard as he could on the left side of the face and then fled the area. The assault caused significant, permanent injuries to Mr. Gates and that is indeed the aggravating factor.

The Pre-Sentence Report

[18] I have certainly read the pre-sentence report. Mr. Seaman your reply summarized it I thought. We have a 20-year-old offender here. He enjoys a positive relationship with his family members. His father when contacted said he believes his son is doing much better as of late and has been doing well on house arrest and that school has helped him focus on his priorities. Mr. Burnett finished Grade 12 in 2013. He is attending a community college and completing first year of the welding course he is taking and begins second year in September 2015. Mr. Burnett is employed now, as you say, by a related company to Jim MacDonald's Roofing and Masonry. And, I note that they spoke very favourably of his work ethic and his work habits, his abilities when he worked for them last summer in the summer term. Mr. Burnett, it does seem that he has come to terms with those stimulants that affect his life. He does not currently use drugs or alcohol. And he does not associate with negative peers any longer – people who are bad influences in his life. Certainly, Mr. MacArthur found him to be a pleasant and cooperative

young man whom he believes to be sincere and had a good outlook, understood the seriousness of the offence he committed and agrees to accept responsibility for his actions and is remorseful. The pre-sentence report indicates that he seems to have developed better coping strategies and realizes the effect that alcohol has had in the past. He has completed counselling and addiction services and continues to attend and Mr. MacArthur described Mr. Burnett as somebody that had taken his probation seriously and had been cooperative and deems him to be a suitable candidate for a community-based disposition.

[19] So it was a good pre-sentence report – as good as you can get under these circumstances.

[20] I have considered all the case law that was presented by counsel:

[21] The Crown's cases were *R. v. Willis*, 2013 NSCA 78; *R. v. Coleman*, [1992] N.S.J. No. 84 (S.C.); *R. v. Metzler*, 2008 NSCA 26; *R. v. Moller*, 2008 NSSC 158; *R. v. MacDonald*, 2010 NSSC 281; *R. v. Ali*, 2010 MBCA 14; *R. v. Marsman*, 2007 NSCA 65 and *R. v. MacNeil*, 2013 NSPC 6.

[22] I tend to agree with defence counsel that some of these were more serious physical injuries or more serious to the extent that they were in some cases more premeditated or ongoing or more lasting - an ongoing assault. Clearly here we seem to have a spontaneous moment of bad judgement that resulted in a very serious effect.

[23] I have also read and considered the defence counsel's cases. *R. v. Potter*, 2013 NSCA 68; *R. v. MacDonald*, 2014 NSPC 14; and *R. v. MacDonald* incorporated of course *R. v. Bratzer*, [2001] N.S.J. No. 461 in the discussion.

[24] I also agree with Mr. Seaman to the extent to these cases and there always is prosecutorial discretion exercised when informations are completed and charges laid. But in *R. v. Pottie, supra*, and *R. v. MacDonald, supra*, these cases felt similar to me in that they were facial attacks involving serious injuries. They did not lead to charges of aggravated assault, however, but were comparable cases to the situation that Mr. Burnett is in.

[25] So, on examining and balance the principles of sentencing that we engage upon the primary objective of sentencing is the protection of the public and one must balance the objectives of denunciation and deterrence with the potential that

an offender can be rehabilitated and become a useful and productive member of society.

[26] In this case, I think what tips the balance for me is that Mr. Burnett is a youthful offender. He is now age 20. He was age 18 when this event occurred.

[27] This positive pre-sentence report holds out hope for him that he could be a person who has come to grips with his life and will grow up now and become a useful member of our society notwithstanding the seriousness of this assault, this event, this bad moment in time in his life.

[28] Now, I recognize that the serious of an unprovoked aggravated assault requires a significant acknowledgment by the court and requires the imposition of jail time.

[29] Mr. Burnett stands at a crossroad in his life. I believe he has recognized the need to address some underlying issues in his life, especially the role of alcohol in his life. He also recognizes the underlying issues of anger that can be triggered by the consumption of alcohol. He recognizes the path to the future, to growing up and becoming a productive member of society rests in education. He completed high school. He has completed one year of a community college course so he in one more year will have completed that program successfully and will be a welder and will have a career and a way forward to be a good member of our society and live a productive life.

[30] In my view, the best way for him to show remorse is to now live an exemplary life, grow up and accept responsibility for his actions and not allow any of these ill-defined inappropriate events to occur again.

[31] I am not emphasizing rehabilitation over deterrence and denunciation. There is no question in my mind, this is a very serious assault. It requires jail time. We need to let society know that people just cannot let their anger or the past overcome them because they have been drinking and are not thinking quite straight.

[32] This offence has had an effect on Mr. Burnett's life too and he understands its seriousness. It is a defining moment in his life and he either moves on from here and commits that nothing like that will ever happen again, accepting responsibility and becoming a productive good member of society. And, that is the crooks of it.

[33] The task for me is to balance these principles of sentencing and possibly Ms. Kidd you might say I am giving Mr. Burnett too much of a break giving the seriousness of the assault, but I think his situation is distinguished from the facts of the cases upon which you have relied. It was not a premeditated matter. It was a moment in time and he regrets it and it will define the rest of his life. But I am prepared to ensure that he serves a custodial sentence, but it should be intermittent and it will be for a term of 90 days to be served intermittently on weekends. And Mr. Seaman has presented a disposition, a copy he has filled out for the court, and what I wanted to do with this intermittent sentence, and this is the most important part, it is to recognize that this young man works, goes to school, he has the chance to complete a career and get on with life. He can do that and as I say he can live an exemplary life and make up for this violent act that changed Mr. Gates' life.

[34] So, I want him to be able to continue with school, continue working and yet serve jail time as is required for an offence of this serious nature. So, I would also require that he serve a 2-year probation after that custodial sentence. The conditions that apply are that he keep the peace and be of good behaviour. To appear before the court when required do so. Give the usual notice required if there are any changes in the circumstances – his address, his employment, his occupation, etc. He would have to report to the probation officer within three days of the expiration of the sentence. I agree that he would not be able to possess or take or consume alcohol and any other intoxicating substances. There could never be any repeat of the day he was picked up while on house arrest. It is much too serious. He cannot possess or take or consume any controlled substances – no drugs. I agree with the orders; DNA and weapon ban under s. 109 (2) for 10 years. He should have no direct or indirect contact with Brandon Gates. He must maintain employment. He must continue with the educational program that he is enrolled into its successful completion. He must continue to attend counselling sessions in anger management and attend assessment or counselling programs as directed by his probation officer and he must participate and cooperate with any assessment programs directed by the probation officer including any alcohol-related programs recommended.

[35] These conditions of probation along with the custodial sentence in the circumstance of this case, in the circumstances are a consequential sentence but one that in fact tries to balance all of the principles of sentencing. This will be reduced to writing. I will have to edit a bit but not make any change in substance.

Mr. Seaman: Sorry, My Lady, I did forget to mention there is always a victim impact or a victim surcharge that we have to deal with. So the victim surcharge in this case, I think this would be pre-amendment, so I there is a \$100 victim surcharge that would apply.

The Court: Yes, fine.

Mr. Seaman: I just ask for a year to pay.

The Court: Yes, all right.

Ms. Kidd: Would that be enough for an indictable offence?

Mr. Seaman: From before the evidence. Sorry, the offence date here is

The Court: June 13, 2013. June 16th.

Mr. Seaman: So, at that time I believe a summary matter was a \$50 victim surcharge and indictable matter was \$100 and now it is \$100 and \$200 since October of 2013. I say to be corrected but whatever the amount is for the victim fine surcharge which automatically applies we are just asking for a year to pay.

The Court: I would have thought it would have been the \$100 applied from the date of the offence. Is that a problem Ms. Kidd?

Ms. Kidd: No.

The Court: Okay. But look, Mr. Burnett is working this summer so this is another consequence of accepting responsibility. I will require that the victim surcharge be paid by August 30th.

Mr. Seaman: August 30th

The Court: of this year

Mr. Seaman: Okay, thank you.