IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Marshall, 2008 NSSC 132

Date: 20080320
Docket: CR 285389
Registry: Halifax

Between:

Her Majesty the Queen

and

Wilbert Joseph Marshall

Restriction on publication: **pursuant to s. 497(4) of the Criminal Code of Canada.**

Judge:	Chief Justice Joseph P. Kennedy
Heard:	January 7, 8, 9, 14, 2008, in Halifax, Nova Scotia
Sentence:	March 20, 2008
Written Release of Sentence:	May 5, 2008
Counsel:	Perry Borden and Alonzo Wright for the Crown Joel Pink, Q.C. for the defence

By the Court:

[1] This is the sentence hearing for Wilbert Joseph Marshall. He was last before this court on January 14th, of this year, when a jury found him guilty on one count, Criminal Code sexual assault. The matter was set over to today's date. During the interim I have had the benefit of a pre-sentence report.

[2] Mr. Pink has given an explanation for some of the reactions that Mr. Marshall had expressed to the probation officer, who prepared the pre-sentence report. Mr. Marshall is telling this court that his reaction to the conviction in this matter initially was based on the misapprehension on his part in relation to the nature of the offence. I have listened to and have considered that. Also, let me say that although we received the victim impact statement late in this matter, as a matter of fact as late as this morning, I had an opportunity to consider that statement and it is one of the many factors that I consider in relation to the sentence in this matter. The indication is that the complainant, Ms. W. did not wish to read the victim impact statement to the court, she had that opportunity had she wished to do so.

[3] On January 14th of this year a jury of his peers found the accused, Wilbert Joseph Marshall, to be guilty of the criminal offence of sexual assault. That sexual assault was committed upon a B. W.. You've heard counsel speak to the evidence, I will though, for purposes of this sentence, make short reference to some of the evidence in this matter. Both Mr. Marshall and Ms. W. are aboriginals. He in fact, at the time relevant to this matter, was the Chief of the Chapel Island First Nations. She, at that time was a 20 year old * (*editorial note- information removed to protect identity*) She was in metro, in Halifax attending school at the relevant time, I think preliminary to her going to university. I am told today she is now attending university in Halifax.

[4] Between March 1st, 2006 and April 25th, 2006, some time during that period Mr. Marshall travelled from Chapel Island, Cape Breton, to Halifax. He was accompanied on that trip by Mr. Arthur Johnson, who was also a member of the Band Council. They were coming to Halifax so that they could participate, or at least Mr. Marshall could participate, in a meeting of First Nations Chiefs to be held in Halifax the next day.

[5] When he arrived here on the day before the meeting, they attended upon the residence of one Maynard Marshall who was a close acquaintance of the Chief, of

Wilbert Marshall. So they go to Mr. Maynard Marshall's house in order to get Mr. Maynard Marshall to come with them to enjoy a night on the town.

[6] Maynard Marshall was not home, but present at that residence was B. W.. She testified that she had gone there and used a key that she had to get into that house, because she wanted a place to study. She was there at the time that Mr. Wilbert Marshall arrived. Their meeting was coincidental, was not planned. Mr. Marshall finding Ms. W. there and Mr. Maynard Marshall not present, attempted to have Ms. W. come with he and Mr. Johnson, particularly they were interested in going to a particular bar, that was the Sensations strip bar. Ms. W.'s testimony was that she initially declined this invitation. She said she didn't want to go and expressed that to them because it was a school night and she wanted to study, but eventually when Mr. Wilbert Marshall and Mr. Joseph persisted she acquiesced, she agreed that she would accompany them.

[7] So eventually they arrive at Sensations, the evidence is that the accused Mr. Wilbert Marshall is paying. He is absorbing all costs associated with that night. Pays the cover charge to get everybody in, particularly Ms. W. and then purchases the alcohol.

[8] It was Ms. W.'s testimony that she believed that she drank three or four shooters, described as "liquid cocaine" and she thinks approximately three beers. Suffice to say that Ms. W. became significantly impaired. At one point the accused, Mr. Marshall purchased a "lap dance" for her, had one of the strippers at the bar perform a lap dance with Ms. W..

[9] Ms. W.'s testimony to the jury was that she did remember losing her purse at the bar at some point, but that she did not remember leaving the bar. Did not have any recollection of what transpired after that until the next point of her recollection is when she awakes in the morning with a sheet covering her face, vomit in her hair, she's naked. She testified that Mr. Wilbert Marshall is on top of her and he is having sexual intercourse with her. They are in his Dartmouth hotel room. She told this jury that she did not consent to this sexual activity, she was passed out. Subsequently she said she simply asked to be taken home. She wanted to go home. That was her testimony to the jury.

[10] Sexual assault is s. 271(1) of the Criminal Code, it is in this form an indictable offence and so attracts a sentence of up to, we are speaking the maximum now,

attracts a maximum sentence of 10 years in a federal institution. It is a serious criminal offence.

[11] Let's talk a bit about the accused, Mr. Marshall. I make reference to the pre-sentence report. He is a 39 year old man, he was years older than Ms. W., twice her age. Was, as indicated, the Chief of the Chapel Island Band at the time of the offence. The pre-sentence report indicates that he had a strong supportive family background and that he lives in that community, obviously amongst people who care for him and support him. He has, I believe, four children as a result of a number of relationships.

[12] He has of note served six years, three separate terms as the Chief of the Chapel Island Band since the year 2002, so he not only has been elected Chief of that Band, but has been re-elected. Wasn't only elected he gets re-elected. That position was terminated on January 18, 2008, as a result of this conviction. Very shortly after his conviction was brought down, conviction comes down on January 14th, as of January 18th he is no longer Chief of the Chapel Island Band.

[13] Numerous people were interviewed and spoke highly of the accused. Matter of some interest to me, two of the other Band Chiefs in this Province suggested that this entire thing is politically motivated. This is some sort of political thing that's going on here, that somehow inspired by opposition that the Chief may have in the Band, also that same suggestion was echoed by that gentleman who is the Professor at Cape Breton University, who professed that he felt that the accused was innocent and that this offence was typical of the opposition's attempt to slander and defeat the leadership in the First Nation's Community. Please understand that I know it is not the accused who is saying this, I just note that it was being said and my reaction of that is, that those statements are irrational, bizarre. Those people who made those statements did not sit in this courtroom and listen to this evidence as this Nova Scotia jury did. All I can say is that these suggestions, from my perspective, are ridiculous.

[14] There was reference in the pre-sentence report to the accused, Mr. Marshall, denying his behaviour in this matter was wrong and being betrayed by the justice system dwelling on the fact that the offence has ruined his life. Well I do not know whether the offence has ruined his life or not, I would suggest that it's somewhat premature for a 39 year old man to suggest that, but I can say this, that I now have heard both his counsel and Mr. Marshall explain what may have motivated that reaction to the offence and they tell me that rather than denying the offence, his

reaction was based upon a misunderstanding of the constituent elements of the offence, particularly what he considered to be the element of consent and I listened to that explanation. He heard the evidence. He shouldn't be confused.

[15] Mr. Marshall has a prior record that I do consider, that I think should be considered appropriately. He has a string of *Motor Vehicle Act* offences, none of which is relevant to the type of matter that brings him before this court today, they are indicative I guess of the fact that he is a bad driver. An offence for uttering threats, conviction as recently as 1996, well I guess that's not so recent, that's 12 years ago, 11 years ago. He has a conviction for being at large, escaping custody. It is relatively recent, 2007. Obviously somehow connected to this mischief offence of s. 430(1)(d) of the *Criminal Code* which I believe was explained to me as having something to do with damage to a computer. So that's an offence that I note and s. 249(1) of the *Criminal Code* which is motor vehicle flight which I interpret to be not stopping for the police. So he does have a criminal record, it's proper that I reflect upon that criminal record, none of the offences particularly relevant to this sexual assault offence that is before the court.

[16] I am familiar with the principles of sentencing that counsel have spoken of and I do not intend to repeat them either, suffice to say s. 718 of the *Criminal Code* sets them out, it is a nice guideline for trial judges in this country as to how they are to approach the sentencing process. I am fully familiar with the concept of portionality, that the punishment should suit the offence and the circumstances of the defendant. I am familiar with what then Chief Justice Antonio Lamer, Supreme Court of Canada, said in *R. v. C.A.M.* , [1996] 1 S.C.R. 500 decision of that court about sentencing.

[17] Particularly and specific to this matter I am and I repeat, fully aware of the fact that Mr. Marshall is aboriginal which as a result s. 718.1(2) of the Criminal Code becomes relevant. It becomes relevant because the Canadian Parliament in its wisdom has directed trial judges to consider aboriginal circumstances and background, to take judicial notice of some of the difficulties that commonly are associated with life within the aboriginal community, that persons within that community have to struggle to deal with and to overcome. That, in my mind, is good law. Good law. It is, I think, reasonable that courts should consider the circumstances of aboriginals and the aboriginal society in this country, that is why within this pre-sentence report I have a paragraph referred to as *Gladue* factors and *Gladue* is the leading Supreme Court of Canada case that speaks to the aboriginal factor in relation to sentencing *R. v. Gladue*, [1999] S.C.J. No. 19. And the probation officer who prepared this report and

provided paragraph specific to *Gladue* factor so that I would have the opportunity to consider those aboriginal specific matters in dealing with Mr. Marshall. He spoke of the fact "that within the Chapel Island Community there is a high rate of substance abuse, high unemployment, in the winter months particularly and that there is racism that exists between aboriginal and non-aboriginal members, persons within that and adjacent communities." We know that to be correct. The courts of this country have no difficulty in taking judicial notice in relation to what goes on between non-aboriginal and aboriginal persons in this country. Some of the very unfortunate circumstances that continue to persist in relation to aboriginal communities. So yes, I am aware of s. 718.2(b) and I am aware of *Gladue*. I am aware of the subsequent decision of Justice Iacobucci of the Supreme Court of Canada in *R. v.Wells,* [2000] S.C.J. No. 11. Let me just quote from para. 80 in *Gladue* for benefit, so that the record will reflect what that says, what guidance that gives to trial judges in these circumstances, I am quoting now from *Gladue*:

> As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case basis): For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown?

[18] Justice Iacobucci in *Wells* para. 49 says that a sentence which is just and appropriate in the circumstances, what the court is striving to accomplish:

> ... sentencing judges have been provided with a degree of flexibility and discretion to consider an appropriate circumstances alternative sentence to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purposes of sentencing. In this way effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

[19] It does go on to say though at para. 50 from *Wells* that:

> The more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders ...

[20] So that the *Gladue* principles are likely to be more commonly activated in sentencing that is less serious than some other offences. Suffice to say, the courts must consider these factors. This court has had the benefit of the pre-sentence report, the reference to *Gladue* in the pre-sentence report, this accused, the benefit of Mr. Marshall's own testimony as to his background and the benefit of his counsel's statement to this court. One of the interesting factors is that, Mr. Marshall does not appear to have a significant substance abuse problem which is good.

[21] I now wish to be specific in relation to this matter. Firstly, I did wish to say to you Mr. Marshall, that to the extent that you have any doubt about your guilt in this matter, that you were found guilty sir, by a Nova Scotia jury after carefully assessing the evidence in this matter. They determined guilt on this offence. That was a good jury Mr. Marshall. That was a good decision. I listened to that evidence, all of the evidence. So it is on the basis of that jury decision that I sentence you today. I have to say sir that the evidence of your behaviour in this specific, in this situation, simply put, is disgraceful. It is disgraceful Mr. Marshall. The victim in this matter at the time was a 20 year old girl. She was and is a success story. She is a success story having come out of her circumstances, the circumstances that you ask me to consider today. She comes out as a high school graduate to attend school and then university. She and the other young natives like her are the future of the aboriginal society in this country. They are the hope of the aboriginal society, and you Mr. Marshall were * (*editorial note- information removed to protect identity*) Rather, when you came to Halifax on that evening you took her away from her studies, you took her to a strip bar, you provided her with alcohol until she was significantly intoxicated, you purchased a lap dance for her, then while she was, and the jury has so found, passed out and unconscious lying in her own vomit, you had sexual intercourse with her. That's not your model community leader Mr. Marshall. So yes, your behaviour in this specific was disgraceful. And you lament sir that your conviction has cost you your position as Chief and I can only say to that sir, I certainly hope so. I hope so. I surely hope that that is one of the ramifications of your behaviour in this matter.

[22] I have considered all of the various factors in the difficult process of balancing. I have considered conditional sentencing. I have considered the *Gladue* factors in relation to the aboriginal community, I have considered the specific situation before

me, I do not consider that the Chief was in a position of authority *vis-a-vis* Ms. W.. On the other hand, I do consider that he was a community leader and had a particular responsibility. I believe this offence, this sexual intercourse with an unconscious woman, to be of such gravity as to justify public denunciation. Public denunciation. I recognize rehabilitation and all of the other factors that are necessary, but public denunciation in this specific is very important. After having considered that s. 718.2(b) directive and as indicated the *Gladue* principles, I do not consider that a conditional sentence, that a sentence of less than two years that would allow for a conditional sentence is appropriate in the specific. Rather, I am sentencing Mr. Marshall to 3 years in a Federal Institution. That being the case I will be signing both of the Orders including a Sexual Offender Registration Order and I will do so on the basis of what I understand to be the evidence in this matter. Thank you.

Chief Justice Joseph P. Kennedy