IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. O.A.P., 2008 NSSC 365

Date: 20081030
Docket: C.R. NO. 262112
Registry: Halifax

Between:

Her Majesty the Queen

v.

O. A. P.

D E C I S I O N

Restriction on publication: Pursuant to 486.4 (1) Subsection (2) of the **Criminal Code of Canada**

Judge:	The Honourable Justice Douglas L. MacLellan.
Heard:	May 26, 27, 28, 29, 2008, in Halifax, Nova Scotia October 30, 2008, Sentencing, in Halifax, Nova Scotia
Written Decision:	November 19, 2008
Counsel:	Gregory E. Lenehan, for the Crown Kelly Ryan, for the Defendant

Editorial Note
Identifying information has been removed from this unofficial electronic version of the judgment.

A ban on publication of the contents of this file has been placed subject to the following conditions:

486.4 (1) Subject to subsection (2), the presiding Judge or Justice may make an order directing that the identity of a complainant or a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way when an accused is charged with

(a) any of the following offences:

(I) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,

(ii) an offence under section 144, 145, 149, 156, 245, 246 of the **Criminal Code**, chapter C-24 of the Revised Statues of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-24 of the Revised Statues of Canada, 1970, as it read immediately before January 1, 1988, or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a) (I), (ii) and (iii).

This ban is in effect until further Order of the Court.

REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE FOREGOING IS TO PROTECT THE WELFARE OF ANY CHILDREN OR VICTIMS REFERRED TO IN THE PROCEEDING AND/OR AVOID PREJUDICE TO ANY PERSONS FACING CRIMINAL CHARGES.

By the Court:

[1] The matter before me this afternoon is the issue of sentence of the accused O. A. P. as the result of a number of convictions I entered against him following his trial earlier.

[2] Mr. P. was charged with seven counts on an indictment.

[3] He elected Supreme Court judge alone and was tried before me in May of this year.

[4] At the start of that trial he pleated guilty to count number 7. That count is that, at D. aforesaid on or about the 2nd day of November, 2005. While being at large on an undertaking issued on the 15th day of October 2005 entered into before an officer in charge and being bound to comply with a condition of said undertaking did fail without lawful excuse to comply with the condition of said undertaking to wit, abstain from any communicating directly or indirectly with E. A. M. or from going to * (*editorial note-removed to protect identity*) , except through legal counsel, contrary to Section 145 (5.1) of the ***Criminal Code***.

[5] The trial on the other six counts resulted in convictions on five of the six charges.

[6] Mr. P. was found not guilty of count number 2. The charge of threatening E. M..

[7] He was found guilty of the following counts. That he between the 13th of October, 2005 and the 16th day of October, 2005 at or near D. in the County of Halifax, Province of Nova Scotia did unlawfully assault E. M. contrary to Section 266 (a) of the ***Criminal Code***.

[8] Further that he did at D. aforesaid on or about the 2nd day of November, 2005 did unlawfully break and enter a place to with a residence of E. M., situated * (*editorial note- removed to protect identity*), Nova Scotia and did commit therein the indictable offence of assault with a weapon contrary to Section 348 (1)(b) of the ***Criminal Code***.

[9] And further that he at D. aforesaid on or about the 2nd day of November, 2005 did unlawfully utter a threat to E. M. to cause death to the said E. M. contrary to Section 264.1 (1) (a) of the ***Criminal Code***.

[10] And further that he did at D. aforesaid on or about the 2nd day of November, 2005 did without lawful authority confine E. M. contrary to Section 279 (2) of the ***Criminal Code***.

[11] And further that he at D. aforesaid on or about the 2nd day of November, 2005 did unlawfully commit a sexual assault on E. M. contrary to Section 271 (1) (a) of the ***Criminal Code***.

[12] I have received a pre-sentence report prepared by the Adult Probation Service on Mr. P. and also a victim impact statement from E. M.. I have received a sentencing brief from the Crown, which contained a number of cases and also a sentencing brief from defence counsel. I have also heard from both crown counsel and defence counsel today and I have given Mr. P. an opportunity to speak.

[13] The charges against Mr. P. are very serious. Count number 1, assault carries as a maximum sentence five years in jail. Count number 3, break and enter an assault with a weapon carries as a maximum sentence life imprisonment because it was a break and enter into a dwelling house. Count number 4, uttering a threat carries, to cause death carries as a maximum sentence five years in jail. Count number 5, unlawful

confinement carries as a maximum sentence ten years in jail. Count number 6, sexual assault carries as a maximum sentence ten years in jail. Count number 7, a breach of an undertaking carries as a maximum sentence two years in jail.

[14] The facts as found by me at the trial related to two incidents between the accused and his common law partner E. M.. The first incident occurred in mid October at their apartment in D. where they had lived together for just over a year. The accused and Mrs. M. got into an argument. During the course of the argument the accused kicked her on the legs and struck her with his open hand. He also grabbed her purse causing the strap to break and snap back hitting on the arm causing a bruise. She called the police and the accused was arrested.

[15] He was released on bail with a condition that he have no communication with Mrs. M. and that he not go to their apartment at * (*editorial note- removed to protect identity*) in D..

[16] Following his arrest Mrs. M. was fearful that the accused might come to their apartment and she indicated that she put nails in the apartment door in addition to the normal lock on the door.

[17] About two weeks later the accused appeared at the store where Mrs. M. worked and while looking at her made a gesture with his thumb across his throat, which she understood and interpreted as a threat to her.

[18] The next morning when she was leaving for work at around 6:30, Mrs. M. started out her door and the accused was in the hallway. This was despite the fact that the apartment was supposed to be a secure apartment building.

[19] The accused pushed her back into the apartment and at that time he was carrying a tire iron. He covered her mouth with his hand and he ordered her to call her job site and tell them that she would not be in for work.

[20] He forced her to get undressed and take a shower and while lying on her bed he told her he was going to kill her at around 7 a.m. That comment was made just shortly before 7 a.m. To stop that from happening Mrs. M. suggested that they have sex. He agreed and she gave him oral sex. Following that he stayed in her apartment until the evening during which time they had sex on two other occasions.

[21] In the evening Mrs. M. suggested they go for a drive, which they did. He put the tire iron he had taken into the apartment into the trunk of her car. She dropped him off and when she returned to her apartment she called the police. That was around 8 p.m. that evening.

[22] The Crown in its sentencing brief and oral statement have, has suggested that the accused should be sentenced to a total sentence of 12 years plus 2 months. The defence through counsel suggests a sentence in the range of three to five years.

[23] I have been provided with a number of cases from this province and other provinces dealing with home invasion type cases. I can indicate to counsel that I tend to rely more on cases from our province and especially from our Court of Appeal.

[24] The ***Criminal Code*** by Section 718 provides the principals of sentencing. It indicates:

> "The fundamental purpose of sentencing is to contribute, along with crime prevention initiative, 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."

[25] Section 718.2 of the code provides:

"A court that imposes a sentence shall also take into consideration the following principals:

(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.

(ii) evidence that the offender, in committing the offence, abused the offenders' spouse or child (common in law partner)

shall be deemed to be aggravating circumstances;"

[26] And I find in this case that the victim of, Mr. P.s actions was his common law wife.

[27] Also relevant and agreed by both crown and defence is Section 348.1 of the Code and that provides:

> "If a person is convicted of an offence under section 98 or 98.1, subsection 279(2) or section 343, 346 or 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as a aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person in committing the offence,
>
> (a) knew that or was reckless as to whether the dwelling-house was occupied; and
> (b) used violence or threats of violence to the person or property. 2002, c. 13, s 15; 2008, c. 6, s. 34."

[28] I find in this case that it was a break and enter into a dwelling house and that Mr. P. was aware that Mrs. M. lived at that residence.

[29] The crown have provided me with a copy of Mr. P.'s criminal record. The record starts in 1994 in October when Mr. P. was convicted of assault under Section 266 (b) of the ***Criminal Code***, he was fined $300.00. The same time in 1994 he was convicted of damage to property or mischief under Section 430 (4) (b) of the ***Criminal Code*** and was placed on probation for a period of one year with restitution in the amount of $380.92. In March of 1996 he was convicted of the offence of uttering threats under

Section 264.1 (1) (a) of the code and was given a suspended sentence and probation for a period of two years with a 100 hours of community service work. In June of 2001 he was convicted of the offence of theft under Section 334 (b) of the ***Criminal Code*** and was sentenced to three months in custody and probation for a period of one year.

[30] I have been provided with a pre-sentence report on Mr. P.. It indicates that the accused is 42 years of age and is currently in a relationship with one Ms. L. L. since February of 2008. The report indicates that this lady is pregnant by him and is expecting * (*editorial note - removed to protect identity*) of 2009.

[31] Mr. P. in the last years prior to these offences was a labourer. He was described in the report as a good worker by his employer.

[32] The report indicates that Mr. P. disclosed a history of sexual abuse on him when he was 15 or 16 years old, which he had not disclosed to his family at that time.

[34] The report indicates that he left school after completing grade eight or nine when he was about 15 years old.

[35] Mr. P. had lived with Mrs. M. for over a year prior to these incidents in the fall of 2005.

[36] In the pre-sentence report the accused did not accept responsibility for the major charges against him and told the probation officer that Mrs. M. owed him $45,000.00 and that he was coming back for it.

[37] The report recommends that the accused should be ordered to attend counselling and treatment for anger management and spousal violence along with a mental health assessment.

[38] Mrs. M. has filed a victim impact statement in which she describes the significant effect these incidents had on her. She talks about being afraid that the accused would find out where she lives or works. She says she lives in fear for her life and is unable to sleep without having a light on in her bedroom. She tells of sitting and crying when she goes to leave her apartment in fear of what might be outside her door. Crown

counsel says that after the accused was convicted and taken into custody that Mrs. M. told him that she could now finally go for a walk.

[39] In accessing the appropriate sentence here to impose on Mr. P. I would comment as follows:

(1) I consider it an aggravating factor that the crimes committed against Mrs. M. were done while they were living together. I conclude that Section 718.2 (a) of the code applies here. I reject the suggestion by defence counsel in her brief that because the crimes were committed at the time their relationship was breaking down that it somehow should be considered, to some extent a medicating factor, I conclude the opposite. Most spousal assaults concur when parties are breaking up. All our courts in this province have over the last number of years clearly considered spousal assaults or other crimes committed against a spouse or former spouse a more serious crime then against people who are not in relationships with the offender.

(2) The second aggravating factor I consider here is the fact that the crimes committed on November 2nd, 2005 occurred while the accused was on bail to stay away from Mrs. M. and her apartment. He has plead guilty to that breach of an

undertaking. I therefore conclude that this was not a spur of the moment decision on the part of Mr. P..

(3) The third aggravating factor is the fact that the accused obviously planned this confrontation with Mrs. M.. He went to her place of employment the day before and made a gesture which I find and have found was a threat to her. He then the next day, the next morning went to her apartment and forced his way in. I conclude that he had a plan to instill fear in her at the store and then proceeded to carry out that plan some hours later.

[40] My main task here is to frame a sentence that reflects the particular facts of this case in the particular circumstances of the offender Mr. P.. Mr. P. has very little credits on his side. He is clearly old enough to understand that a person is responsible for his actions. He has a past criminal record for criminal activity including assault and uttering threats. He has no remorse for what he has, what I have found that he has done. I do recognize that his position is that he was wrongly convicted and is appealing those convictions. However in the circumstances I do not see or find any medicating factors here in favour of the accused.

[41] Crown counsel submits that the range of sentence for this type of offence should be six to 15 years. As is the case for offences involving home invasion robberies. Defence counsel suggests that the range of sentence involving offences of break and enter and the commission of a sexual assault is four to six years.

[42] I have considered all of the cases submitted by both crown and defence counsel. I conclude that all courts considered home invasion cases as more serious then other break and enter cases. A person is expected, is entitled to expect that they will be safe in their own home.

[43] In **R. v. Harris** [2000] N.S.J. No. 9, 2000 NSCA 7, our Court of Appeal upheld a sentence of 15 years for an accused convicted of robbery and aggravated assault, in circumstances of a home invasion. That was a very serious case of home invasion involving serious injuries to the elderly occupants of the house.

[44] In **R. v. Wells** [2006] N.S.J. No. 446, 2006 NSSC 313, Justice MacDonald of this court imposed a sentence of nine years on the accused, in circumstances where the accused broke into the home of his girlfriend and beat up a man who was in the bedroom with her. The victim there had serious physical injuries as a result of the assault by the accused.

[45] In **R. v. Andersen** [1998] N.S.J. No. 271, 168 N.S.R. (2d) 393, the accused was sentenced to seven and one half years from breaking and entering with an intent to commit an offence and charges of assault on a spouse and uttering a threat.

[46] I note that in the case of **R. v. Hill** [2000] M.J. No. 65, 142 Man.R. (2d) 314, case from the Court of Appeal in Manitoba the court reduced a 11 year sentence to eight years for breaking and entering and committing aggravated assault in circumstances where the accused broke into a house and assaulted the victim by cutting off his penis. In that case the trial judge had imposed 11 years and the Court of Appeal reduced it to eight years.

[47] I think a review of the case law on this topic indicates that there are a lot of cases going in a lot of different directions and it is very difficult to determine what case fits our factual situation.

[48] However, in **R. vs. Harris** from our Court of Appeal the court said (paragraph 81). I quote:

> "These types of offences (home invasion) require denunciation by society, deterrence of the accused and others from committing this type of offence, and protection of the public as the primary consideration of sentencing those who choose to invade the sanctity of the home of another and do violence through intimidation, terrorism or actual assault."

[49] Crown counsel here has suggested to me that I should not consider that a home invasion case is less serious just because a robbery has not occurred. He suggests that the significant thing is the maximum sentence of life imprisonment for a break and enter into a dwelling house. I tend to agree with crown counsel on this point. It is difficult to reconcile that a person convicted of break and enter into a dwelling house and committing an assault on a occupant is less serious then a break and enter into dwelling house and the taking of money or an object in circumstances that is classified as robbery.

[50] Defence counsel suggests that since robbery itself, carries as a maximum sentence life imprisonment that might make the combined offences each carrying life imprisonment more serious.

[51] I would comment that in the Harris case our Court of Appeal made it clear that sentencing judges are not bound by a starting point or guidelines on sentence and should consider the particular facts of the case before them. I understand defence counsel agrees with that position.

[52] Here I also of course must consider the issue of totality of sentence since most of the offences for which Mr. P. is to be sentenced today all occurred at the same time, that is November 2nd.

[53] Both counsel here have raised the issue of pre-trial detention or custody of Mr. P.. Crown agrees the accused should get credit for 270 days in custody and if the two for one formula is applied he would have in effect already served 540 days or 18 months.

[54] Defence counsel disagrees and suggests that his actual time should be 460 days, grossed up to 920 days for double time. She submits that this was time he served as a result of charges of breach of bail, which resulted in his remand and subsequent trial on the breach charges. If that was considered he would have a credit of 30.6 months.

[55] The information on this issue is difficult for me because no evidence has been presented me on the issue. In the circumstances I am prepared to exercise my discretion and find that Mr. P. be given credit for 24 months of custody time to reflect his pre-trial custody. It has been three years since the commission of these offences.

[56] Considering the particular circumstances of this case, the circumstances of the accused, the case law submitted by both counsel and their brief and my interpretation of the principals of sentence set out in the ***Criminal Code*** and the cases, I conclude that an appropriate sentence would be as follows, Mr. P. if you would stand up sir.

[57] For the offence of assault alleged to have been committed between the 13th day of October and 16th day of October, 2005 I sentence you to a term of imprisonment of six months.

[58] Under count number 3 for the offence of break and enter into a dwelling house and assault with a weapon, I find and determine that the appropriate sentence for this offence, which is the principal offence for which you are to be sentenced, would be seven years in custody. However, in light of my finding that you be given credit for two years I would reduce the sentence on that offence to five years in custody. That five year sentence will be consecutive to the sentence already imposed of six months.

[59] For count number 4 which is the offence of threatening Mrs. M. I understand both crown and defence counsel have agreed that I should enter a stay in regard to that offence based on the Kienapple principal.

[60] For count number 5 which was the a count of unlawful confinement of Mrs. M., I sentence and determine that you should serve two years in custody but concurrent to the sentence already imposed.

[61] Count number 6 in regard to sexual assault I find and determine that the appropriate sentence is two years in prison but it will be concurrent to the sentences already imposed.

[61] Finally in regard to count number 7, which is the breach of the undertaking, I find and determine that the appropriate sentence for that offence is six months in custody consecutive to the sentences already imposed.

[62] In the circumstances therefore sir, the total sentence I am imposing on you today is six years in a Federal Penitentiary.

[63] In addition the crown have asked and the defence has agreed that I should impose a number of orders. The first order is an order requiring or authorizing the taking of bodily substance from Mr. P. to enable his D.N.A. to be registered at the sex offender data bank. I would direct that, I would agree that order will be signed and Mr. P. will submit to that.

[64] In addition to that there is a provision that Mr. P. be registered with the sex offender registration centre. The crown have requested that and I am prepared to issue that order as submitted by crown counsel.

[65] Finally the crown have asked that I make an order of prohibition in regard to prohibited fire arms and weapons and I would order that as requested by the crown

under Section 109 of the ***Criminal Code*** for a period of ten years, minimum of ten years and for life in regard to prohibited weapons. So all the orders requested by the crown I am prepared to order. Thank you Mr. P. you may step down, sit down.

Crown: My Lord, there is...

Court: Yes

Crown: ... one, one issue I, I meant to address before we close and that is one of the offences that is, for which he has been found guilty is Section 271 of ***Criminal Code***. Um, I have been checking my file to see whether or not there had ever been, a publication ban on the identity of Ms. M. under 486.4 (1) Subsection (2), I can not see where there is, it is here, I do not know whether there is an indication in the indictment but you are the presiding Justice and I, I would at this time if it has not been requested before ask that there be an endorsement for that 486.4 (1) Subsection (2) or anything that would identify Ms. M. as the victim.

Court: That is, that is her wish.

Crown: It is her wish.

Court: O.K., I would in the circumstances then hence forth, if it has not been ordered in the past, that order will be imposed in regard to the name of the complainant.

Crown: Thank you My Lord.

Court: Is there anything else from either crown of defence counsel.

Crown: No My Lord.

Defence: No My Lord.

Court: Thank you very much.

MacLellan, J.