

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. O'Brien, 2009 NSSC 195

Date: 20090421

Docket: CR. Am. 302025

Registry: Amherst

Between:

Her Majesty the Queen

v.

Marty David O'Brien

Judge: The Honourable Justice John D. Murphy

Heard: 21 April 2009, in Amherst, Nova Scotia

Oral Decision: 21 April 2009

Written Decision: 22 June 2009

Counsel: Mr. Bruce Baxter, for the crown
Ms. Kymberly Franklin, for the defence

By the Court:

[1] As I indicated at the outset, Mr. O'Brien was charged on a three count indictment with robbery, wearing a face mask and having in his possession a knife for the purpose of committing an offence. The facts are not disputed, as I understand it, by Ms. Franklin, as relayed by the crown, and I won't review them here except to indicate that it was a late evening robbery of a convenience store where there was one clerk present, and only one person in the store. Mr. O'Brien, according to the evidence, was wearing a Halloween mask and used a knife. He took all the cash that was in the store and left, or at least what wasn't dropped on the way out. It was not a large amount of money, however it was all the money that was there and was available to him.

[2] It's clear that Ms. Coates, the clerk in the store, was shaken up. That was apparent to me from her testimony and from the video, and also from the evidence of the police officers.

[3] While this is not a bank robbery in the classical sense, nor is it a home invasion, it's a very serious offence, and Parliament has recognized that in that an offence under section 344 is subject to a maximum punishment of up to life imprisonment.

[4] It was clearly a premeditated event, in that Mr. O'Brien was wearing a mask. As I have indicated, it was very traumatic for the victim. I have to bear in mind the principles of sentencing which are set out in the *Criminal Code*, particularly at section 718, 718.1 and 718.2. I'm not going to read those in detail, but I will highlight them. Section 718 indicates:

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.

[5] Section 718.1 indicates that it's a fundamental principle of sentencing that it: ...be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[6] Section 718.2 directs that the sentence consider aggravating and mitigating circumstances. The particular ones specified in the *Criminal Code* do not apply in this case, but section 718.2 also directs that:

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

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances...

In this case, there is no reasonable availability of less restrictive sentences than a time in custody.

[7] There are aggravating circumstances in this case. Certainly one aggravating circumstance is Mr. O'Brien's very lengthy and very troublesome criminal record, the fact that this was a robbery, that a weapon was used and that there was an innocent victim alone in the store, in my view is all an aggravating circumstance.

[8] Frankly, there are no mitigating circumstances which have been pointed out in this case.

[9] The accused's profile is troublesome. Although we don't have a pre-sentence report, it's clear from the three exhibits introduced at this sentencing hearing that he has been in constant conflict with the law for approximately 30 years with approximately 70 convictions for various offences, many of them serious, including a previous robbery conviction and break and enter convictions.

[10] Denunciation and deterrence are important, very important, indeed paramount considerations when imposing a sentence for robbery. While I could refer to any number of the authorities that have been provided to me, I think it's summarized in *R. v. Longaphy* (2000), 189 N.S.R. (2d), paragraphs 27 to 29. I'm just going to refer briefly to that decision, which is the most recent of the cases that counsel have provided. In that case the Court of Appeal, at paragraph 27 said:

In my view, the sentencing judge erred in concluding that here a penitentiary term of two years or more imprisonment was not appropriate. The considerations to be taken into account when determining sentence for robbery have been reviewed by this court in numerous cases. It has emphasized that the primary consideration in cases of armed robbery must be protection of the public.

And reference is made to *R. v. Brewer* (1988), 81 N.S.R. (2d) 86 and then to *R. v. Leet* (1989), 88 N.S.R. (2d) 161. Justice Chipman is quoted in paragraph 28 of the *Longaphy* decision, where he said in *Leet*:

Robbery is a very serious offence, carrying a maximum punishment of imprisonment for life. The sentencing court is thus left with a very wide discretion as to the penalty in any given case. Rarely is a sentence of less than two years seen for a first offence and terms ranging up to six years are commonly imposed. In the more serious robberies, including those committed in financial institutions and private dwellings, the range has generally been from six to ten years.

And he continued:

Robberies of financial institutions and other businesses pose a very grave threat to society. Such offences endanger not only those who work in those places, but the public in the vicinity of them and the police who are called upon to protect them and apprehend the perpetrators.

[11] So I am directed by the Court of Appeal to consider denunciation and deterrence as primary considerations. That is not to say that the accused's situation doesn't warrant consideration. I am cognizant here of the fact that Mr. O'Brien, while he has a very long record and a very troublesome record, has not committed any offences in more than four years. Now the reason for that may well be that he has been in custody for all of that time, but as he did point out, he has already been in custody for five years on this stretch, and the record does show that his last offence took place more than four years ago.

[12] The crown in this case asks for a sentence of nine to 12 years on the robbery charge. The crown points to his record and includes in that record the most recent conviction for an offence in December of 2004, after the events giving rise to this charge occurred. The defence suggests that the penalty should be in the range of five to six years.

[13] I have considered all of those factors, and I'm going to impose sentence as follows. Would you stand please, Mr. O'Brien?

[14] First of all, there will be a DNA order under the provisions of the *Criminal Code*, and I would ask the crown to prepare that order, if you don't have one here. I recognize there is a prior DNA order and it may be redundant, but it should be imposed in any event. There will also be a firearms order under section 109 of the *Criminal Code*.

[15] For the robbery offence, the section 344 offence, bearing in mind all of the considerations that I have referred to, I have concluded that the nine to 12 year range which the crown asks for is more than is appropriate in this situation, given that Mr. O'Brien has not been involved in any criminal activity for more than four years, that he has been serving sentences for the last five years. But considering also the admonition that crimes of this nature attract sentences of six to ten years, even for people without a significant criminal record, in my view the five to six

years which the defence asked for is too low, and I have concluded, with respect to the robbery charge, that a sentence of six years and six months will be imposed, to be served in a federal institution, to be served consecutive to any time presently being served.

[16] With respect to the mask offence, there will be a sentence of two years to be served concurrently, at the same time as the sentence on the robbery charge. And with respect to the weapons offence, for the use of the knife, there will be a three year sentence to be served concurrently with the robbery six year, six month term.

[17] The only comment I'm going to make in making the six year, six month sentence with respect to the robbery, I've considered the total situation with respect to Mr. O'Brien and the fact that he is in custody, and has been in custody for five years, and this will be added to the end of that sentence. I have also considered that it's, although I'm not giving any credit for remand time, it's possible that in a very best case scenario, he might have been out of custody for the last month or two. So I've considered all of those factors and reached the decision which I have just indicated.

J.