

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Kagan, 2008 NSSC 26

Date: 20080122

Docket: CR 225051

Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul David Kagan

SENTENCING DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: May 9, 10, 14, 15, 16, 17, 18, 22, 23, 24, 25, 28, 29, June 11, 12, 13, 15, 18, 19 and July 5, 2007 in Halifax, Nova Scotia

Counsel: Frank Hoskins, Q.C. and Mark Heerema, Esq., on behalf of the Crown
Jean Morris, Esq., on behalf of the Accused

By the Court:

[1] Paul David Kagan (hereinafter referred to as “Mr. Kagan”) was charged that he, on or about the 8th day of December A.D. 2000, at or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did wound Jason Kinney thereby committing an aggravated assault contrary to section 268 of the Criminal Code of Canada (hereinafter referred to as “Criminal Code”).

[2] Mr. Kagan's trial before a Supreme Court Judge sitting alone lasted for 19 days. This court found Mr. Kagan guilty of the offence in a decision rendered July 5, 2007.

[3] Mr. Kagan has continued his release on bail subject to certain conditions of a recognizance since the time of his conviction.

[4] The sentencing of Mr. Kagan was initially scheduled for October 25, 2007. The court had received a Pre-Sentence Report (hereinafter "PSR") but due to concerns about the contents of the report the sentencing had to be adjourned. Certain portions of the PSR were redacted by the Court. It is this edited version that is now before this Court. In addition, the Court has been provided with the earlier PSR prepared for sentencing after Mr. Kagan was found guilty at his original trial before a Supreme Court Judge and Jury.

[5] Defence counsel has also filed a Psychiatric Report prepared by Dr. Graham D. Glancy, M.D. as well as a Psychological Evaluation Report prepared by Dr. Pierre Roberge, Ph.D. There are also letters of support from various other sources including former teachers, relatives, friends and acquaintances of Mr. Kagan all who attest to his good character generally.

[6] The Crown has also filed materials including Victim Impact Statements of the victim and the victim's father.

[7] The Court appreciates counsels' efforts to provide these written submissions in advance of the sentence hearing. I am also indebted to counsel for their balanced and thorough oral submissions.

[8] The offence of aggravated assault is described in section 268 of the Criminal Code. It states:

268 (1) Everyone commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[9] The punishment for the offence is provided for in sub-section (2) of the section. It reads:

268 (2) Everyone who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[10] The offence is not one for which the Parliament of Canada has prescribed a minimum period of incarceration. It is therefore one that is open to the full panoply of sentencing options including a conditional sentence should the Court decide to impose a sentence of less than two (2) years and further provided it is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental principles of sentencing as set out in sections 718 to 718.3 of the Criminal Code. These sections provide the following:

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.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (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,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

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

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(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, with particular attention to the circumstances of aboriginal offenders.

[11] Section 718.3 deals with punishment generally and need not be recited here other than to say the Court has considered the general intent of this particular section in reaching its decision today.

[12] Ms. Morris, counsel for Mr. Kagan, as an alternative to a suspended sentence asked this Court to consider a conditional sentence for her client to be served in the community. Such a sentence is more commonly known as "house arrest". She has referred me to the Supreme Court of Canada in **R. v. Proulx**, [2002] 1 S.C.R. 61,

which is a decision of former Chief Justice Antonio Lamer. In para. 1 of the decision Chief Justice Lamer wrote:

By passing the Act to amend the *Criminal Code* (sentencing) and other Acts in consequence thereof, S.C. 1995, c. 22 ("Bill C-41"), Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison. In an attempt to remedy the problem of overincarceration, Parliament has introduced a new form of sentence, the conditional sentence of imprisonment.

[13] Conditional sentences are provided for in section 742.1 of the Criminal Code. It reads:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and

(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

I will refer once again to the decision of Chief Justice Lamer who provided a summary of what he said in his reasons at para. 127:

1. Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing.

2. A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception.

....

6. The requirement in s. 742.1(b) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate. In making this determination, the judge should consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.

...

8. A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.

9. Generally, a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.

10. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. However, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served.

11. A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.

[14] Since no minimum sentence is prescribed for the offence of aggravated assault, at least not at the time that this offence took place, a conditional sentencing can be

considered. However, before doing so I must in a preliminary determination reject a penitentiary term and probationary measures as inappropriate. (For that I would refer you back to item 4 of the summary by C.J. Lamer in **Proulx**, *supra*).

[15] In addition, section 742.1(b) states that the Court must be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the Criminal Code. These are condition precedents to the imposition of a conditional sentence.

[16] With this as a framework for sentencing in general I will now look at the specifics of the case that is before me.

[17] As previously mentioned I have had the benefit of reviewing the original PSR prepared to assist the Court in determining the appropriate sentence after the first trial was concluded in 2003. I have taken this as well as the more recent PSR prepared on 09 10 2007 which was done at the request of this Court. I have also considered the various letters of support filed on behalf of Mr. Kagan.

[18] I have read and considered the Victim Impact Statements filed by the victim of the assault – Mr. Jason Kinney – and his father – Mr. Brian Kinney. These Victim Impact Statements were filed prior to Mr. Kagan’s first sentencing before the Honourable Justice Richard Coughlan of this Court.

[19] Mr. Brian Kinney has filed a more recent update to his original statement. In it he indicated that his son suffers from post-traumatic stress disorder. Let me quote one very poignant remark which is contained in this update from Mr. Brian Kinney. It reads:

We have lost our son and we don’t know if he is every coming back.

[20] Mr. Kagan, I want you to think about the pain and the suffering your irrational and senseless act has caused not only to Jason Kinney but also to his family. If punishment was the sole or even the main objective of sentencing you would be looking at a lengthy custodial sentence. But I must consider the other principles and objectives of sentencing that were referred to earlier.

[21] In so doing I must take into consideration the aggravating and mitigating circumstances of this case. This is a mandatory requirement under section 718.2 of the **Criminal Code**. While none of the examples of aggravating circumstances contained in section 718.2(a) exist in this case there are other aggravating circumstances that do exist:

- (1) The assault against Mr. Kinney involved weapons – first, bear spray was used to, in effect, incapacitate the victim. Then, a pocket knife was used to stab the victim.

I shouldn't use this expression but I will, a pocket knife was used to drive home the point. This was a senseless and violent act that has had a long-lasting, and negative impact on Jason Kinney and his family;

- (2) Mr. Kagan although regretting what he did seems to have difficulty in expressing remorse. This, based on Dr. Glancy's diagnosis of his condition, is likely due to his inability to properly express his emotions;
- (3) Aggravated assault is an indictable offence with a maximum penalty of 14 years imprisonment and obviously something that Parliament has decided should be treated very seriously.

[22] The relevant mitigating circumstances include:

- (1) The age of the accused at the time of the offence – he was only 19 years old;
- (2) The accused's lack of a criminal record and the fact that he has been abiding by the terms of a recognizance for approximately seven years since first being charged in December, 2000;
- (3) The steps taken by the offender to follow the recommended counselling and other treatment devised to help him better

understand and to deal with the symptoms of Aspergers Syndrome;

- (4) The other measures taken by the offender to pursue a University education;
- (5) The offender's volunteer activities at university and at two separate YMCA facilities near where he resides in Montreal;
- (6) Although this Court has accepted the diagnosis made by Dr. Graham Glancy, M.D., and shared by Dr. Pierre Roberge, Ph.D., the condition suffered by Mr. Kagan based on the facts of this case did not satisfy the Court that there was a defence of self-defence. The condition, however, does affect the way the offender interprets the words and actions of those he might encounter. His condition must be considered in arriving at an appropriate sentence in this particular case.

[23] This is not an exhaustive list of either aggravating or mitigating circumstances but are illustrative of what this Court considers to be relevant in reaching the decision it is about to render.

[24] Before doing so I will allow Mr. Kagan as I am obligated to do, to address this Court if he has anything to say. Mr. Kagan, if you do wish to say anything to this Court now is your opportunity.

Mr. Kagan: I would like to just say that, extend my apologies and my love towards the community and Mr. Kinney as, to the best of my ability and I would like to send out those vibrations to everyone as best I can. And my sincere apologies and regrets for the aggravating, the unfortunate situation that has occurred.

Court: Thank you very much Mr. Kagan.

[25] The Crown, in recommending a sentence of 10 months incarceration has presented its arguments in a fair and balanced manner. I would like to once again commend Mr. Heerema and Mr. Hoskins for fulfilling their duties as representatives of the Crown and as officers of the Court in a most professional and skilled manner.

[26] Ms. Morris, as well, has represented her client forcefully, effectively and professionally throughout. You, too, are to be commended for your efforts.

[27] Sentencing is, and will likely always be, one of the most difficult tasks facing any trial judge. Despite the codification of the purpose and principles of sentencing it is never easy to determine the appropriate sentence. Each case is unique and each offender is likewise. Previous sentence decisions can be helpful but they only act as a guide in determining what might be the most appropriate disposition for the case which is before the Court.

[28] I have had the benefit of knowing what my colleague decided at the conclusion of the first trial. I am not, however, bound by it.

[29] I have the added benefit of knowing how the offender – Mr. Kagan – has conducted himself in the past 4 and one half years since his release pending appeal. He has demonstrated a commitment to his studies at University and a better appreciation for the medical condition he lives with. He has sought treatment and counselling and has functioned independently while learning to better adapt socially to his environment. He has progressed in a positive way which hopefully he will continue to do.

[30] I have concluded that to sentence Paul David Kagan to a period of incarceration would not be the appropriate disposition in this case.

[31] The purpose and principles of sentencing and the objectives to be sought can best be realized by the imposition of a conditional sentence. I am satisfied that the pre-conditions for a conditional sentence exist. By serving the sentence in the community the safety of the community would not be endangered.

[32] All of the objectives outlined in section 718, including deterrence, (both generally and specific) can be achieved. I am mindful of the suffering that Jason Kinney has experienced and continues to experience. I believe the sentence I am about to impose will reflect society's denunciation of Mr. Kagan's actions but yet allow him the opportunity to continue to rehabilitate himself to better fit into society as a contributing member.

[33] To send him to prison given his medical condition could have disastrous consequences. No one including Mr. Kinney, I am sure, would want that to happen.

[34] I will call upon Mr. Kagan to please stand while I pronounce sentence.

[35] Mr. Kagan, for committing the offence of aggravated assault I sentence you to a conditional sentence of 12 months to be served in the community subject to the compulsory conditions prescribed in section 742.3(1) of the Criminal Code modified as follows:

- (a) keep the peace and be of good behaviour;
- (b) appear before the Court when required to do so by the Court;
- (c) report to a supervisor:
 - (i) within five working days after the making of the conditional order, and
 - (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;
- (d) to be permitted to leave this jurisdiction but to report and remain within the jurisdiction where you presently reside and attend University in Montreal, Province of Quebec and to remain in that jurisdiction unless permission to go outside that jurisdiction is obtained from a Court or your supervisor in that Province;
- (e) notify the Court or the supervisor in that jurisdiction in advance of any change of name or address, and promptly notify the Court or the supervisor of any change of employment or occupation including schooling.

[36] You are also required to abide by the following additional, optional conditions. Optional in the sense that the Court has the option of imposing them, not optional in the sense that you have an option of following them or not; so, in your case they are mandatory conditions and they are as follows:

- (a) abstain from:
 - (i) the consumption of alcohol or other intoxicating substances, and
 - (ii) the consumption of drugs except in accordance with a medical prescription;
- (b) abstain from owning, possessing or carrying a weapon including any type of bear spray or pepper spray or pocket knife or any other type of knife that can be concealed.
- (c) to continue to attend counselling as and when recommended by your supervisor and to follow the advice of your counsellor and other treating professionals as they deem appropriate.

[37] For the first six months of your 12-month conditional sentence you will be under house arrest save for those times when you are required to attend classes, including any laboratory sessions that are part of your University engineering degree program. You are to provide your class schedule to your supervisor so that he / she knows when you will be away from your apartment for such purposes.

[38] You shall also be permitted to continue with the twice weekly volunteer sessions at the YMCA on Wednesday evening from 6:00 p.m. to 10:00 p.m. and Thursday afternoon from 1:00 p.m. to 4:00 p.m. but you are to return home immediately after these sessions by the most direct route available.

[39] You shall also be permitted six hours per week to attend to your personal business affairs the exact day and times to be worked out in advance with your supervisor.

[40] If you are involved with any University or community sports programs you will also be permitted time to continue your training and your participation in any related competitions all of which is to be discussed and approved by your supervisor.

[41] After the expiration of the first six months of your conditional sentence you shall continue to abide by the mandatory and optional conditions imposed and be under a curfew to be in your place of residence each day from 11:00 p.m. until 6:00 a.m. the following morning.

[42] Arrangements can also be made, if the need arises, to obtain the permission of your supervisor to visit your family in Ontario on compassionate grounds during the term of this conditional sentence.

[43] Given how long Mr. Kagan has been living on conditions of a recognizance I do not think it is necessary to order any additional period of probation after completion of the conditional sentence.

[44] In addition to this, the Crown motion for an order of prohibition under section 109 and section 114 of the Criminal Code, a DNA order under sections 487.051 and 487.052 of the Criminal Code, and an Order for forfeiture under section 491(1)(a) of the Criminal Code are hereby granted.

The Court: Mr. Kagan, you can sit down. Counsel, have I neglected to cover anything?

[45] Mr. Kagan, I hope you have learned a valuable lesson from all this and, that in the future, you do not resort to such senseless violence to express your emotions. Good luck with this and good luck with your studies at University.