

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Kagan, 2003 NSSC 153

Date: 20030704

Docket: C.R. 173841

Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul David Kagan

Judge: The Honourable Justice C. Richard Coughlan

Heard: February 10-14, 17-20, 2003, June 6, 2003 and July 4, 2003, in Halifax, Nova Scotia

Written Decision: July 4, 2003 (Orally)

Counsel: Glen A. Scheuer, for the Crown
Joel E. Pink, Q.C., for the Defence

Coughlan, J.: (Orally)

[1] On February 20, 2003, Paul David Kagan was found guilty:

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.

[2] I have read the pre-sentence briefs of Mr. Pink and Mr. Scheuer and the cases referred to therein, the pre-sentence report dated May 26, 2003, the report of Dr. Graham D. Glancy, the victim impact statements of Jason Kinney and Brian Kinney (Jason Kinney's father), the letters from Edward Williamson, Art Stone, B. E. Robson and Daniel Lanouette, and heard the submissions of counsel.

[3] I also provided counsel with copies of the following cases and invited comments from them:

R. v. Hamilton, 156 Man. R. (2d) 250 (C.A.)
R. v. Biln (1999), 204 W.A.C. 254 (B.C.C.A.)
R. v. Roslin, (2001) Carswell B.C. 2964 (B.C.S.C.)
R. v. Monchka, [2000] O.J. No. 1069 (Ont. C.A.)

[4] The Crown seeks incarceration for a term of 18 to 24 months, followed by a three year period of probation. The defence is seeking a suspended sentence with conditions or a conditional sentence.

[5] Mr. Kagan entered Dalhousie University in September, 2000. He was assigned an apartment at the Fenwick residence of Dalhousie University. He did not have a roommate. He got used to having the apartment to himself. In October, a roommate was assigned to Mr. Kagan. Over the fall, tension developed between the roommates and Mr. Kagan discussed the problems with his parents.

[6] On December 7th, 2000, Mr. Kagan went to the Army and Navy Surplus Store and purchased pepper spray and a knife. On the same day, his father told

Patrick MacIsaac, Residential Facilities Manager at Dalhousie University, who looks after Fenwick, that his son was scared of his roommate. Mr. MacIsaac spoke to Paul Kagan and told him there was a room available he could have. Paul told Mr. MacIsaac he did not know if he wanted to move. On December 8, Mr. MacIsaac told Jason Kinney of the vacant room and Jason made arrangements to move that afternoon.

[7] On December 8th, Paul Kagan did not come out of his room until 10:30 to 11:00 a.m. Jason Kinney left the apartment at 12:00 noon to go to a recital. Jason pushed the elevator button and went back to the apartment to shut his bedroom door. He left the apartment and thought he heard Paul say, “he’s gone now”. Jason went to the elevator, went down 18 floors and then returned to the apartment. Jason did not say anything to Paul and left again. Jason went into the hall and pushed the button for the elevator. Paul Kagan opened the door of the apartment and said to Jason “since you are moving out, do you think you can buy your own cutlery?” Jason gave Paul the middle finger and told him to “fuck off”. Paul Kagan knew Jason was leaving the apartment.

[8] Jason returned to the apartment to confront Paul. Jason went back to the apartment, into Paul’s room and asked Paul if he had anything to say to him. Paul either did not respond or said “no”. Jason told Paul to clean up the kitchen because it is a pig sty.

[9] Jason left the apartment and heard Paul lock the door. Jason was “pissed off” and he returned to the apartment to confront Paul. Jason unlocked the door and entered the apartment and was sprayed with pepper spray by Paul Kagan. The spray blinded Jason and he was disoriented. Paul Kagan stabbed Jason in the back.

[10] We are dealing here with a serious offence which has a maximum penalty of 14 years. Mr. Kagan purchased the spray and knife the day before the attack. He turned down the opportunity to obtain another room. After he knew Jason Kinney was moving, Mr. Kagan upon Mr. Kinney leaving the apartment said to Mr. Kinney, “since you are moving out, do you think you can buy your own cutlery?” Clearly a provocative statement given the relationship between the two.

[11] Mr. Kagan is 21 years old. At the time of the offence he was 19 years old. He is attending Concordia University, studying computer engineering. Mr. Kagan has no criminal record. Mr. Kagan resided in his family home until he attended

boarding school in grade eleven. His first experience of independent living occurred when he attended Dalhousie University commencing in September, 2000.

[12] In dealing with Mr. Kagan's present situation in the pre-sentence report, it sets out:

At present, Paul is in his second year of Engineering studies at Concordia University in Montreal, Quebec and resides in his own apartment. He reports that he has an active lifestyle outside of school. He exercises at the gym and participates in Yoga on a daily basis to relax.

In regards to the offence, Paul indicated regret in terms of letting the situation escalate to violence. He stated "I probably should have done something much earlier" and "should have been more forceful in my opinion to have left the situation". He related that he is upset about what has occurred. Mrs. Kagan reported that "we [parents] are worried about him breaking down", referring to the offence and the subsequent court involvement. Paul stated that he has learned from this incident and makes it common practice to assess his relationships with others and determine "if they need to be a part of my life".

[13] Dr. Glancy deals with Mr. Kagan's personal history in his report where he states:

The subject's personal history was outlined in the evidence at trial of Paul Kagan, his father, Harvey Kagan, and myself. He shows a pattern of significant interpersonal difficulties as well as the development of restrictive and repetitive patterns of behaviour, interest and activities. There were no cognitive delays. In fact, on the contrary, he is of above average intelligence. It is of note that he had significant birth problems. He has a pattern of experiencing high anxiety at particular times of stress. He has had psychiatric and psychological assessment, and counselling at various junctures in his life.

Following the subject's withdrawal from Dalhousie after the incident, in December 2000, Paul returned home. He was sad, and lost his confidence, but reapplied to universities for the fall of 2001, and enrolled at Ryerson University where he took half courses in History, Calculus and English. Although he attended classes, he did not socialize, feeling that all the students were older and did not read the books nor write the exams. He spent time with his brother, Ryan. However, when Concordia accepted him for the 2001 fall term, the "lights went on" again.

Over the years Paul participated successfully in a number of extracurricular activities at school and in the community. He played community baseball at the family's Muskoka cottage, won some Muskoka/Parry Sound tennis championships, attained a Silver level in sailing, and achieved his Bronze Medallion in swimming. At Rosseau Lake School, he was captain of the cross-country team. He is currently on the ski team at Concordia. He enjoys being on a team.

Paul has had limited experience in the work force. In addition to his partial summer with RMC, he worked one summer for two weeks at the CNE. Another summer he obtained an OAC French credit when he attended school in France, and apparently had no problems during that venture. Paul contributed a number of volunteer hours at Rosseau Lake as student Head of the Waterfront program, being an effective leader and swim coach.

[14] And in dealing with Mr. Kagan's medical and psychiatric history:

As an infant and young child, Paul's monthly and yearly physicals were always fine, and he had only normal childhood illnesses (pediatrician: Dr. Norm Saunders). He had no learning disabilities nor ADD/ADHD, and is intellectually gifted (one WISC test apparently determined his IQ to be 144, although another test performed some time later, while on Risperidone, showed a 20 point drop, according to Whitby Hospital findings. A Hearing Society test, performed when he was in Grade 2, determined that he had trouble concentrating if there was noise in the room. ...

Paul saw a psychologist, Dr. Lerner, for assistance regarding appropriate school placement, when he was applying to Toronto French School. Paul was the third generation in his family to obtain support/counselling from Dr. Larry Cash, psychologist, and Director, YMCA Career Counselling. He began seeing him for "casual counseling" between Grades 4 - 7.

Paul had contact with Hospital for Sick Children, Psychiatry, for help with his behaviour, when he was in Grade 8. He was admitted to the Hospital for Sick Children for two weeks for assessment while in Grade 10 in April 1997. The family received no diagnosis, although Paul was placed on Risperidone at that time, which he stayed on from his April discharge time through to September that year. As noted above, that drug made him "weird, and a zombie".

Following an incident in August 1997, Paul was admitted to Whitby Mental Health Centre, Adolescent Unit for 30 days. An MRI and CT scan were done. According to Dr. Lazor, the treating psychiatrist, a trial of anticonvulsant medication was recommended. The family understood that from his stay there "there were no firm conclusions, and everyone had a different theory". He was diagnosed as having a psychotic disorder although the clinical picture was unusual.

Following discharge, Paul was seen in out-patient follow up approximately five times by Dr. Garry Schomair before going away to school that year.

As above, Paul also had a brief admission to BFC St-Jean. He was diagnosed as suffering from an acute anxiety reaction.

The family also noted that “there is something about Paul and sleep,” and that he requires more sleep than the average, and can regularly nap in the daytime, and go to bed early, obtaining 12 hours sleep. A number of the behavioural incidents occurred when Paul had less sleep.

[15] With regard to sentencing, Dr. Glancy stated:

The best predictor of future violence is previous violence. Although the subject has a history of violence towards objects when he is under particular stress, he has never been directly violent to another person, causing injury to that person, except for this one occasion.

The Hare PCL-R is the instrument that is best correlated to recidivism. The subject scores **four** on this rating scale related to his early behavioural problems and impulsivity. The cut off score for psychopathy, which predicts violent behaviour, is **thirty**, although a score of **twenty-four** has been used in some research studies. The subject scores well below these cut off scores. This predicts a low probability of recidivism.

I believe the subject would benefit from continued counselling with a person to whom he can discuss his goals, aims, and interpersonal relationships. He currently sees a counsellor and is benefiting from this interaction.

As you are aware from my C.V., I spend approximately 40% of my time in correctional facilities treating inmates in these facilities. It would be my opinion that any time in custody would be particularly difficult for Mr. Kagan given his personality structure and view of the world. It is likely that he would be intimidated and bullied in an adult correctional institution. Not only does he have problems defending himself, but his difficulties in interpreting social cues would be exacerbated in this situation. Incarceration of any length would be a considerable setback to the gains that Paul has achieved over the past two years in dealing with his psychiatric problems.

In my opinion, if the Court were considering a community disposition then he would be an ideal candidate for this. He has stable roots in the community, does not have the wherewithal or resources to flee the community and has prosocial attitudes and values that would predict he would abide by any conditions a Court would impose upon him. He could then continue with his school and counselling.

[16] Mr. Kagan has a history of causing property damage when he does not get his way. On one occasion during exams he asked his father to take him to Buffalo, his father said no and Mr. Kagan broke his father's glasses. On another occasion, a school janitor would not let him in the school to get his books and Mr. Kagan took some posters or art off the school's walls and put them in a ravine.

[17] Another time, Paul lost his ski lift ticket. He was not allowed on the lift and he kicked and broke a window. On another occasion Paul physically threatened his mother.

[18] Sentencing remains one of the most difficult tasks for judges, despite the codification of sentencing principles. I refer to the principles relevant to the case at bar:

718. Purpose - 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 Fundamental principle - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles - 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, ...
- (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, ...

[19] In this case we have an offender who was young at the time of the offence - 19 years old. He has no criminal record. He is receiving counselling as set out in the pre-sentence report and Dr. Glancy's report. He has family support in attempting to correct the situation. He has today expressed his apologies to Mr. Kinney and his family. These are all mitigating circumstances with regard to sentence.

[20] I must also consider this was a serious attack. Mr. Kagan purchased the pepper spray and knife the day before the attack, and after disabling Mr. Kinney stabbed him in the back.

[21] What is the appropriate sentence in this matter?

[22] I have been asked to consider a conditional sentence. Section 742.1 of the *Criminal Code* provides:

742.1 Imposing of conditional sentence - 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 purposes 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.

[23] The issue of conditional sentences was addressed by the Supreme Court of Canada in *R. v. Proulx*, 140 C.C.C. (3d) 449 where Lamer, C.J.C. stated at para. 47 in referring to s. 742.1:

[47] In my view, the first three criteria are prerequisites to any conditional sentence. These prerequisites answer the question of whether or not a conditional sentence is possible in the circumstances. Once they are met, the next question is whether a conditional sentence is appropriate. This decision turns upon a consideration of the fundamental purpose and principles of sentencing set out in s. 718 to 718.2. I will discuss each of these elements in turn.

[24] In this case, the offence is not punishable by a minimum term of imprisonment. I am satisfied an appropriate sentence in this case is less than two years.

[25] Considering Mr. Kagan's history of response to situations where he did not get his own way, as well as Dr. Glancy's report and Mr. Kagan's psychiatric history set out in the report, I am not satisfied service of the sentence in the community would not endanger the safety of the community.

[26] Mr. Kagan must be responsible for his actions.

[27] A term of incarceration is required to demonstrate to others that such violence cannot be tolerated.

[28] Considering the case law and legislation, the circumstances of the offender and the offence, I sentence Mr. Kagan to ten months incarceration, followed by probation for a period of one year, on the following conditions:

- Keep the peace and be of good behaviour.
- Appear before the Court when required to do so by the Court.

- Notify the Court or the Probation Officer of any change of name, address, employment or occupation within 72 hours.
- Report to a Probation Officer at 6176 Young Street, Suite 210, Halifax, Nova Scotia, (424-4011), within two days of the date of expiration of your sentence of imprisonment and when required and in the manner directed by the Probation Officer or someone acting in his/her stead.
- Not possess or consume alcohol or other intoxicating substances.
- Not possess or consume drugs except in accordance with a medical prescription.
- Not own, possess or carry a weapon, ammunition or explosive substance.
- Not contact or attempt to contact, at any time, Jason Kinney or members of his family, whether directly or indirectly.
- To continue with your treatment with Dr. Glancy and Mr. Daniel Lanouette and to follow whatever treatment is prescribed.

[29] I also grant a firearms prohibition order pursuant to s. 109 of the *Criminal Code* for a period of ten years; an order pursuant to s. 491 of the *Criminal Code* for forfeiture of the weapon used in the offence; and a DNA order pursuant to s. 487 of the *Criminal Code*.

[30] Considering Mr. Kagan is a student and will be incarcerated, I waive the victim surcharge.

Justice C. Richard Coughlan