SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacDonald, 2010 NSSC 281

Date: 20100618
Docket: CRH 327153
Registry: Halifax

Between:

The Queen

and

Graham Keith MacDonald

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	June 18, 2010, in Halifax, Nova Scotia
Decision:	June 18, 2010 (Orally) (Sentencing)
Written Release of Decision:	July 20, 2010
Counsel:	Timothy S. O'Leary, for the Crown Roger A. Burrill, for the Accused

Coughlan, J.: (Orally)

[1] In a decision dated June 4, 2010, I found Graham Keith MacDonald guilty of aggravated assault on Anna Barreiro, contrary to s. 268(1) of the *Criminal Code.* I have also found Mr. MacDonald guilty of breaching an undertaking, pursuant to s. 145(3) of the *Criminal Code.*

[2] The facts of the case are as follows:

[3] On February 13, 2010, Anna Maria Barreiro and John Graves Smith were panhandling in front of Tim Hortons on Spring Garden Road, in Halifax, Nova Scotia. Mr. Smith was standing and Ms. Barreiro was sitting beside him, cross-legged on her backpack. Just before 9:00 a.m. the accused, Graham Keith MacDonald, approached them, wanting them to leave so he could panhandle in front of Tim Hortons. Tim Hortons is one of the best spots to panhandle on Spring Garden Road.

[4] Mr. MacDonald wanted to panhandle to get money to buy a Dilaudid pill. Mr. MacDonald was addicted to Dilaudid. He had last had a pill at 5:00 or 6:00 p.m. on February 12, 2010 and was experiencing withdrawal symptoms, and was desperate to get money to buy a pill. The withdrawal symptoms were getting worse as time went by. Mr. MacDonald was upset and yelling. Mr. Smith and Ms. Barreiro may have been yelling. Ms. Barreiro told Mr. MacDonald to leave - to get the fuck out of here. Mr. MacDonald bent down toward Ms. Barreiro who remained seated. Mr. MacDonald got close to Ms. Barreiro's face and told her to hit him. Ms. Barreiro pushed Mr. MacDonald away. Mr. MacDonald hit Ms. Barreiro in the face with a left hook, the closed fist of his left hand, with enough force to knock the sitting Ms. Barreiro off the backpack into Spring Garden Road on her back with her legs in the air. Mr. MacDonald knew he hit Ms. Barreiro hard. Ms. Barreiro remained seated cross-legged on her backpack throughout the whole incident until hit by Mr. MacDonald.

[5] The next thing Ms. Barreiro remembers after the punch by Mr. MacDonald was walking into Tim Hortons. As a result of the punch by Mr. MacDonald, Ms. Barreiro's jaw was fractured in two places, requiring surgery. Plates and screws were used in dealing with the fractures. She could not chew for a month and a half.

[6] Ms. Barreiro suffered a broken jaw in two places, a right parasymphysis mandible fracture and a left angle mandible fracture.

[7] At the time of the assault, Mr. MacDonald was on an undertaking to keep the peace and be of good behaviour.

[8] Mr. MacDonald is 38 years old and has a grade ten education. He is single, with one dependent - a twelve year old daughter who resides with his parents. At the time of the assault on February 13, 2010, Mr. MacDonald was addicted to Dilaudid, a pain killing drug.

[9] Mr. MacDonald has an extensive criminal record, going back to 1992 and as recent as 2008, including five convictions for assault. The convictions for assault offences took place in 1994, 2002, 2005 and two in 2006.

[10] The principles of sentencing set out in the *Criminal Code* relevant to this case are:

> **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:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community, and
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> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.
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> **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:
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> (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;
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> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
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> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders ...

[11] In dealing with a sentence appeal involving an aggravated assault, MacDonald, C.J.N.S., in giving the Court's judgment in *R. v. Marsman* (2007), 254 N.S.R. (2d) 374 stated at p. 381:

> In Canada, assault charges are organized along a continuum depending upon the severity of the attack. They range from the least serious *common* assault to the ultimate "assault" - murder. Short of culpable homicide, aggravated assault represents the most serious indictment. It involves either wounding, maiming, disfiguring or the endangerment of life and carries a potential punishment of fourteen years:
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> 268 (1) - Aggravated Assault - Every one commits and aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R. v. Keshane (D.S.), [2005] S.J. No. 97; 257 Sask. R. 161; 342 W.A.C. 161 (C.A.), Cameron, J.A., placed the seriousness of aggravated assault into context:

> ¶ 22 Judges are required, of course, to sentence offenders in accordance with the purpose, objectives and principles of sentencing found in ss. 718, 718.1 and 718.2 of the **Criminal Code**. This includes the fundamental principle that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".
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> ¶ 23 The gravity of an offence lies in the nature and comparative seriousness of the offence, in the circumstances of its commission, and in the harm caused.
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> ¶ 24 Aggravated assault consists of wounding, maiming, disfiguring, or endangering the life of another person, according to s. 268(1) of the **Code**, and constitutes an indictable offence. That is the nature of the offence. Some indication of the comparative seriousness of the offence is apparent on the face of the provisions of the **Criminal Code** regarding various forms of assault. In the scheme of these provisions, assault is an offence against the person, and it ranges through common assault, assault causing bodily harm, sexual assault, aggravated assault, sexual assault with a weapon, and so on.
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> ¶ 25 The first, second, and third of these are either indictable or summary conviction offences, which are potentially punishable in their indictable version by imprisonment of up to five years in the case of the first, and up to ten years in the case of the second and third. The fourth, aggravated assault, is an indictable offence, potentially punishable by imprisonment of up to fourteen years. So is sexual assault with a weapon other than a firearm. In this lies Parliament's general view of the comparative seriousness of aggravated assault.

[12] In *R. v. Coleman* (1992), 110 N.S.R. (2d) 65 (N.S.S.C.-A.D.), a case concerning an aggravated assault, after referring to a number of cases Hallett, J.A., in giving the Court's judgment, stated at p. 68:

> We were referred to these cases by counsel for the appellant. I agree with his summation:

> In summary, the principal thrust of these cases is to indicate that general deterrence requires a significant period of incarceration in a provincial institution.

[13] The facts show Mr. MacDonald carried out an act of serious violence on a virtual stranger. Ms. Barreiro was extremely vulnerable at the time of the assault as she was seated on her backpack on the sidewalk when Mr. MacDonald punched her. Ms. Barreiro suffered a broken jaw in two places as a result of the assault. She required surgery. Plates and screws were use in dealing with the fractures. Ms. Barreiro could not chew for a month and a half. She suffered permanent nerve damage.

[14] Mr. MacDonald has an extensive criminal record, including five convictions for assault.

[15] Mr. MacDonald submits, in assessing the appropriate sentence, I should consider the injuries were caused by a single blow which was reactive in response to Ms. Barreiro's telling Mr. MacDonald "get the fuck out of here" and pushing Mr. MacDonald away. Mr. MacDonald was suffering the effects of Dilaudid withdrawal.

[16] The Crown is seeking a period of incarceration in the range of 12 to 18 months, followed by a period of probation. The Crown is also seeking a DNA order and a lifetime weapon's prohibition order pursuant to s. 109 of the *Criminal Code*.

[17] Mr. MacDonald submits the appropriate sentence is between 6 to 9 months incarceration. Mr. MacDonald refers to *R. v. Ali*, [2010] MBCA 14, a case in which the Manitoba Court of Appeal sentenced a 19 year old with a youth record including assault to a sentence of 9 months incarceration.

[18] Considering the circumstances of the offences and Mr. MacDonald, the principles of sentencing and the case law to which I was referred, I sentence Mr. MacDonald for the charge pursuant to s. 268(1) of the *Criminal Code* to 12 months incarceration. For the charge pursuant to s. 145(3) to a sentence of one month, to be served concurrently to the charge pursuant to s. 268(1). Following the period of incarceration, in order to promote Mr MacDonald's rehabilitation and the

protection of society, I order he comply with the following terms and conditions of probation for a period of twelve months:

1. Keep the peace and be of good behaviour.

2. Appear before the Court when required to do so by the Court.

3. Notify the Court, Probation Officer or Supervisor in advance of any change of name, address, employment or occupation.

4. In addition, report to a Probation Officer at 6176 Young Street, Halifax, Nova Scotia, Suite 201, within seven days from the date of expiration of your sentence of imprisonment, and when required, as directed by your probation officer or supervisor.

5. Remain within the Province of Nova Scotia unless you receive written permission from your Probation Officer in advance.

6. Have no direct or indirect contact or communication with Anna Barreiro.

7. Attend for substance abuse assessment and counselling as directed by your Probation Officer.

8. Attend for assessment, counselling or a program directed by your Probation Officer.

[19] It is for the trial judge to determine the credit to be given for pretrial detention. As Arbour, J. stated in giving the Court's judgment in *R. v. Wust*, [2000] 1 S.C.R. 455 at p. 479:

> I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A., *supra*, in *Rezaie*, *supra*, at p. 105, where he noted that:

> ... provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis. ... Although a fixed multiplier may be unwise, absent justification, sentencing judges should give some credit for time spent in custody before trial (and before sentencing). [Citations omitted.]
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> ... The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[20] There is no evidence before me to justify a variation from the two for one credit for pre-sentence custody. Mr. MacDonald was in custody from February 13, 2010 to June 18, 2010 and is to be given credit for that remand time of two for one.

[21] I grant an order pursuant to s. 109(2) of *Criminal Code* prohibiting Mr. MacDonald from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance from today's date and ending not earlier than ten years after the release from imprisonment; as well as a prohibition from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[22] I grant an order pursuant to s. 487.051 of the *Criminal Code* for an order in Form 5.03 authorizing the taking for the purpose of forensic DNA analysis samples of Mr. MacDonald's bodily substances.

[23] Considering Mr. MacDonald’s circumstances, I waive the victim surcharge.

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Coughlan, J.