SUPREME COURT OF NOVA SCOTIA

R. v. Rhyno, 2013 NSSC 217

Date: 20130709
Docket: CRH. No. 357546
Registry: Halifax

Between:

Her Majesty the Queen

v.

Michelle Florence Rhyno and Michael Raymond Rhyno

Sentencing Decision

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	June 26, 2013, in Halifax, Nova Scotia
Counsel:	Richard B. Miller, for the Crown J. Brian Church, Q.C., for the Defence, Michael Rhyno Lyle D. Howe, for the Defence, Michelle Rhyno Stewart

By the Court:

[1] This is a sentencing decision for Michelle Florence Rhyno and Michael Raymond Rhyno. On June 26, 2013 I delivered an oral decision as to sentence. I indicated to the parties that I would provide a written decision setting out the reasons for the conclusions reached. What follows is my reasons.

[2] This matter was tried before a jury. On October 26, 2012, verdicts were entered on a three-count indictment. Michelle Rhyno was found guilty of robbery pursuant to count 1 of the indictment, and of the included offence of theft over $5,000.00 pursuant to count 2 of the indictment. Michael Rhyno was found guilty of robbing Matthew Keay pursuant to count 1 of the indictment, and of the included offence of theft over $5,000.00 pursuant to count 2. Mr. Rhyno was found not guilty of possession of a weapon dangerous to the public peace pursuant to s. 88(1) of the *Criminal Code*.

The Facts

[3] Matthew Keay contacted Michelle Rhyno, an escort, to attend at 6266 Shirley Street, Halifax, in the early morning hours of June 4, 2011. The residence at Shirley Street was owned by a friend of Mr. Keay, Mr. McGinley, who was fast asleep, as he and Mr. Keay had been out drinking. Before going to Shirley Street, Ms. Rhyno woke her son, Michael Rhyno, to accompany her for protection. After calling a cab they proceeded to the Shirley Street address. Matthew Keay met Ms. Rhyno at the door. According to Mr. Keay, he told her he was no longer interested in her services. Further, Mr. Keay testified that he did not have the money to pay Ms. Rhyno but had hoped that he could "game her", that is, he felt he could possibly talk her into providing her services for free.

[4] Ms. Rhyno was allowed entry into the premises. According to Mr. Keay she asked to go to the washroom. Ms. Rhyno's version of events was that she performed sex acts on Mr. Keay and then he refused to pay her, at which time her son intervened.

[5] Mr. Keay testified that Mr. Rhyno then knocked on the front door and Mr. Keay let him in. Mr. Rhyno produced a knife and demanded the money that was owed to Ms. Rhyno. When no money was forthcoming Michael and Michelle

Rhyno filled grocery bags with property from the residence. Most of the property was later recovered. Michelle Rhyno was later arrested and interviewed by police. She provided information regarding the involvement of her and her son. The police obtained a search warrant and recovered some of Mr. McGinley's property in Michelle Rhyno's residence. Mr. McGinley owned the premises and he was the individual who had been out drinking with Mr. Keay.

Position of the parties

The Crown:

[6] The Crown's position is that this is a "home invasion" and that the range of sentence for this type of offence is between six and eight years incarceration. The Crown opposes any enhanced credit for remand time, arguing that it is not applicable because of s. 515(9.1) of the *Criminal Code*. According to the Crown, both Mr. Rhyno and Ms. Rhyno were denied bail because of prior convictions. If that is the case, enhanced remand credit is not available under s. 719(3.1). The Crown also seeks to limit Mr. Rhyno's parole eligibility. In submissions from Michael Rhyno's counsel, a conditional sentence was proposed. The Crown made submissions on this issue suggesting that it was not available to Mr. Rhyno in this case. At the hearing, Mr. Rhyno's counsel withdrew the request for a conditional sentence indicating it was no longer being sought by Mr. Rhyno.

Michelle Rhyno:

[7] Defence counsel on behalf of Ms. Rhyno submits that an appropriate sentence for Ms. Rhyno would be a term between two to three and one-half years imprisonment, less consideration for remand time.

Michael Rhyno:

[8] Mr. Rhyno's counsel suggests that this is not a "home invasion" as argued by the Crown, and that a range of six to eight years incarceration is excessive. Counsel proposes a sentence of three years less remand time.

Sentencing Principles

[9] As stated in s. 718 of the *Criminal Code*, the fundamental purpose of sentencing is to contribute 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:

i to denounce unlawful conduct;

ii to deter the offender and other persons from committing offences;

iii. to separate offenders from society, where necessary;

iv. to assist in rehabilitating offenders.

[10] Section 718.1 goes on to state that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Other sentencing principles are set out in s. 718.2, including the requirement to take into consideration any relevant aggravating or mitigating circumstances relating to the offence or the offender, as well as proportionality, parity and restraint.

Issues:

[11] There are a number of issues to be determined:

i. Is this a home invasion as asserted by the Crown?

ii. Were Michelle Rhyno and Michael Rhyno detained under s. 515(9.1) such that s. 719(3.1) would not apply, as argued by the Crown?

iii. If not, should enhanced credit for remand time be given to Michelle Rhyno and/or Michael Rhyno?

iv. In these circumstances, should parole be delayed for Michael Rhyno.

v. What are appropriate and just sentences for Michael and Michelle Rhyno?

Analysis

i. Is this a home invasion as asserted by the Crown?

[12] The Crown asserts this is a "home invasion" and, therefore, the range of sentence is between six and eight years incarceration.

[13] Section 348.1 of the *Criminal Code* sets out the aggravating circumstance of an offence being committed in a dwelling. The section reads as follows:

> 348.1 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 an 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 a person or property.

[14] In *R. v. Fraser* (1997), 158 N.S.R. (2d) 163, [1997] N.S.J. No. 1, the Nova Scotia Court of Appeal emphasized that general deterrence is the most important consideration in a home invasion offence . The case involved an entry into an elderly person's home, during which the offender wore a mask and brandished a plastic knife, demanding money. Pugsley J.A. said, for the court:

> 20 The primary objective in sentencing for this type of offence is protection of the public and that can best be obtained by imposing sentences that emphasize deterrence.
>
> 21 The extent to which Parliament considers these offences to be serious is reflected in the penalties applicable - 10 years for wearing a mask with intent, and life imprisonment for robbery.
>
> 22 This Court has approved a range of sentence of between six to ten years for robberies of financial institutions and private dwellings (*R. v. Brewer* (1988), 81 N.S.R. (2d) 86, *R. v. Leet* (1989), 88 N.S.R. (2d) 161).
>
> 23 Mr. Fraser's age, and his previous unblemished record, while factors, should not materially lessen the length of the sentence. The Court must always consider the opportunity to reclaim the individual when fashioning a sentence, but

> that objective, must in cases of this kind, yield to the primary object of protection of the community (*R. v. Helpard* (1996), 145 N.S.R. (2d) 204 at 207).
>
> ...
>
> 27 I consider that house invasion robbery of this type should attract a sentence greater than that imposed for armed bank robbery.

[15] In *R. v. Greaves*, 2005 BCCA 401, (application for leave to appeal dismissed), the British Columbia Court of Appeal commented on the criminal components of a "home invasion". The appellant had argued that this was not the appropriate standard to apply, but the Court of Appeal held that the sentencing judge accurately understood the criminal components of the events. Saunders J.A. said, for the court:

> 8 ... As this Court has said in the past, there is no offence called home invasion. The term is loosely used to connote a constellation of offences, usually including break and enter, an offence not here present, but also including sometimes confinement, robbery and sometimes assault or threatening, all in a person's home. The gravity of such offences of course may vary greatly, although it is always a serious offence to deprive a person of liberty in, bring violence into, or otherwise interfere with a person's use of, his or her own home. Just as Mr. Justice MacFarlane said in *R. v. Johns* (1999), 125 B.C.A.C. 298, 1999 BCCA 288, that there was no error in drawing a parallel between that offence and home invasion cases, so here the sentencing judge did not err, in my view, in looking for guidance in sentencing, to draw the parallel she did.

[16] Ms. Rhyno's counsel seeks to distinguish the cases relied upon by the Crown. In many cases, as counsel points out, these cases involved masked persons entering residences with the intent to commit robbery or break and enter. For ease of reference I will quote the arguments of Ms. Rhyno's counsel as to why the cases provided by the Crown are distinguishable and as to why this was not a home invasion:

> **Distinguished Case Law**
>
> The case *R. v. Matwiy*, [1996] A.J. No. 134 was cited by the Crown as an appropriate case to set the bench mark for home invasion type offences. In that case, the accused were charged with:

- robbery (s. 344 of the *Criminal Code*);

- break and enter a dwelling-house, and committing an indictable offence therein (s. 348(1)(b) of the *Criminal Code);* and

- unlawful use of a firearm, while committing or attempting to commit an indictable offence (s. 85(1)(a) of the *Criminal Code*).

The accused was sentenced to 10 years with an order that at least half of it would be served before the accused could be eligible for parole. It is the Defence's position that this case is distinguishable from Ms. Rhyno's circumstances for the following reasons:

- There was a loaded shot gun used in the process of the offence;

- The shot gun was discharged during the offence;

- The accused was unlawfully at large from a halfway house where he was serving the remainder of his previous sentence;

- There was a gang style raid involving three men and a fourth accomplice in the vehicle.

The Defence would also distinguish Ms. Rhyno's circumstances from the case in *R. v. Foster*, [1997] N.S.J. No. 392 (NSCA)., where two youth offenders were sentenced to 6 years each for a home invasion. The Defence distinguishes this case for the following reasons:

- The victim was a 62 year old elderly person;

- The accused was masked;

- The accused used severe violence in their attack, hitting the victim in the head as many as twenty times.

The Crown also provided the cases *R. v. Stephenson,* [1998] N.S.J. No. 237, and the Crown also provided the case *R. v. Martinez*, [2007] N.S.J. No. 105 (NSPC). In *Stephenson*, *supra,* the accused was sentenced to 6 years imprisonment for a home invasion robbery. In *Martinez, supra,* the accused was sentenced to fifty months for a break and enter, and three months consecutive for a failure to appear

charge. These cases are distinguishable because the victims were elderly person [sic] persons living alone.

In *R. v. Dusiegne,* [2003] A.J. No. 621, the accused was sentenced to nine years imprisonment with a delay in parole after he was convicted of a home invasion robbery. This case was distinguished from Ms. Rhyno's circumstances as follows:

- The accused was masked;
- At the time of the offences, the accused was on parole for armed robbery;
- He was convicted of multiple counts of robbery;
- The accused impersonated a police officer to gain entry into the home, at which point he attacked the victim with a golf club.

In *R. v. Greaves*, [2005] B.C.J. 1893 (BCAA), the accused was sentenced to a global sentence of eight years imprisonment for the two separate incidents of robbery, confinement and uttering threats as well as possession of stolen property and use of an imitation firearm. This case is distinguishable from Ms. Rhyno's circumstances because it involved more than one violent incident where the victims were tied up.

The case *R. v. Shea,* [2011] N.S.J. No. 653 (NSCA), is distinguishable from this case at bar because the accused was charged with forcible confinement, extortion and breach of recognisance [sic]. Ms. Rhyno was not charged or convicted of these offences.

[17] Defence counsel for Ms. Rhyno cites the following cases in support of her position: *R. v. D.R.N.,* 2011 ONCJ 178; *R. v. J.B.,* 2011 ONSC 1150; *R. v. Sutherland*, 2010 ONCJ 103; *R. v. D.B.,* 2012 ONCJ 564; and *R. v. M.S.B., 2011 BCPC 238*. In summary, defence counsel for Ms. Rhyno submits that the offences committed by Ms. Rhyno would not constitute a home invasion for the following reasons:

i. the defendants did not plan to commit a home invasion;

ii. the defendants did not commit an offence of breaking and entering;

iii. Ms. Rhyno was invited into the home by Mr. Keay;

iv. Ms. Rhyno did not arm herself with a weapon; and

v. Ms. Rhyno did not threaten anyone during the process of the offence.

[18] The Crown, at pp. 8 and 9 of their brief, provide the following response:

> *"The defendants did not plan to commit a home invasion."* The Crown takes issue with this statement. The evidence shows that when Michael Rhyno entered the residence he immediately threatened Mr. Keay and asked for his mother. Mr. Keay stated that they didn't have to communicate about anything as they seemed to have worked things out previously. This clearly indicates that the Rhynos had formulated a plan to rob the victim. The case law has consistently held that such plans need not be sophisticated nor well thought out.
>
> *"The defendants did not commit an offence of breaking and entering."* Quite frankly this is irrelevant. They committed a robbery. They were never charged with breaking and entering. Had they been charged, evidence shows that they would have been found guilty of this offence.
>
> *"Ms. Rhyno was invited into the home by Mr. Keay.* This is not supported by the evidence. Mr. Keay clearly wanted Ms. Rhyno to leave and to not enter the residence. Mr. Keay felt deceived by Ms. Rhyno as she clearly misrepresented her age to him being almost twenty years older than what she had represented to Mr. Keay. Mr. Keay reluctantly allowed Ms. Rhyno to use the washroom, where she was able to contact her son and conspire to rob Mr. Keay. Neither Michelle Rhyno nor Michael Rhyno was invited into the residence.
>
> *"Ms. Rhyno did not arm herself with a weapon."* Again another irrelevant consideration, as her son Michael had a weapon and she was a party to this. Clearly she and her son both threatened the victim with violence.
>
> *"Ms. Rhyno did not threaten anyone during the process of the offence."* This is contrary to the evidence of Mr. Keay who stated that both Michael and Michelle threatened him. Clearly the jury accepted that violence occurred, or the accused would have been found not guilty. The evidence of Michelle Rhyno was rejected by the jury.

[19] In *R. v. H(PJ),* 2000 NSCA 7, the Court of Appeal referred with approval to the Alberta Court of Appeal decision in *R. v. Matwiy* (1996), 105 C.C.C. (3d) 251 (Alta. C.A.). Glube C.J.N.S. said:

> 70 The decision in *Matwiy* provides a thorough review of cases dealing with home invasions in Alberta, including several where 15 years sentence were upheld on appeal. The case lists the basic, essential features of a "home invasion" robbery, namely,
>
> ... A mature individual with no prior record,
>
> (a) plans to commit a home invasion robbery (although the plan may be unsophisticated), and targets a dwelling with intent to steal money or property, which he or she expects is to be found in that dwelling or in some other location under the control of the occupants or any of them;
>
> (b) arms himself or herself with an offensive weapon;
>
> (c) enters a dwelling, which he or she knows or wold reasonably expect is occupied, either by breaking into the dwelling or by otherwise forcing his or her way into the dwelling;
>
> (d) confines the occupant or occupants of the dwelling, even for short periods of time;
>
> (e) while armed with an offensive weapon, threatens the occupants with death or bodily harm; and
>
> (f) steals or attempts to steal money or other valuable property.

[20] In *R. v. Best,* 2012 NSCA 34, the respondent had participated in an entry and assault, inflicting serious injuries on the victim, including a cervical fracture and injuries to his jaw. The respondent was convicted of break and enter and aggravated assault and sentenced to 90 days intermittent, on the basis of his "secondary involvement" a positive pre-sentence report and the apparent spontaneity of the assault. On a Crown appeal of the sentence, the Court of Appeal held that the trial judge erred by failing to adequately emphasize the factors of denunciation and deterrence. MacDonald C.J.N.S. said:

> 15 … Simply put, for Mr. Best to enter Mr. Robson's home while he is sleeping and to participate in an assault that results in serious injury, deterrence and denunciation must be emphasized. There is no way around this despite the fact that Mr. Best did not land any blows or despite the fact that he had a positive pre-sentence report. This is just too serious a crime. This and other appellate courts have made it clear that, save very exceptional circumstances which do not exist here, such conduct must be seriously denounced with a message to other would-be offenders that serious jail time will result...

[21] In concluding that the sentence imposed was demonstrably unfit, MacDonald C.J.N.S. referred (at para. 25) to the following passage from the Ontario Court of Appeal decision in *R. v. Wright* (2006), 216 C.C.C. (3d) 54:

> 24 **In my view, however, "home invasion" cases call for a particularly nuanced approach to sentencing. They require a careful examination of the circumstances of the particular case in question, of the nature and severity of the criminal acts perpetrated in the course of the home invasion, and of the situation of the individual offender. Whether a case falls within the existing guidelines or range - or, indeed, whether it may be one of those exceptional cases that falls outside the range and results in a moving of the yardsticks - will depend upon the results of such an examination.** I agree with the British Columbia Court of Appeal in [*R. v. A.J.C.* (2004), 186 C.C.C. (3d) 227] (at para. 29), however, that in cases of this nature the objectives of protection of the public, general deterrence and denunciation should be given priority, although of course the prospects of the offender's rehabilitation and the other factors pertaining to sentencing must also be considered. Certainly, a stiff penitentiary sentence is generally called for.
>
> [emphasis added]

[22] After a careful examination of the circumstances of this particular case, I am not satisfied that this is a "home invasion" as asserted by the Crown. I reach this conclusion for the following reasons:

i. There was no evidence of pre-planning to carry out the robbery and theft. Matthew Keay called Ms. Rhyno and requested her services as an escort. Ms. Rhyno attended and after knocking on the door was voluntarily let into the home where Mr. Keay was staying. Mr. Keay told her that he did not want her services, but let her in to use the washroom. I am satisfied on the evidence that there was

no pre-planning and, in fact, the whole situation arose because Mr. Keay called Ms. Rhyno to his residence to perform sexual services, but upon her arrival he declined those services.

ii. There was no break and enter into the dwelling and no concealment of identity by either Michael or Michelle Rhyno.

iii. There is evidence that no weapon was produced until Mr. Keay refused to pay Ms. Rhyno. Michelle and Michael Rhyno then gathered up several items which they subsequently took with them.

[23] These facts can be contrasted with the majority of the cases involving home invasion where there is pre-planning, forced entry to a dwelling, confinement of the occupants, and the perpetrators are frequently armed with an offensive weapon which is used from the onset. In some cases the perpetrator is masked.

[24] While I am satisfied that the convictions entered against Michelle and Michael Rhyno are serious and require sentences which reflect deterrence and denunciation, I am not satisfied for the reasons given that they fall within the definition of "home invasion" which would attract the range of sentence sought by the Crown.

[25] The Nova Scotia Court of Appeal has stated that the benchmark for robbery is three years. For example in *R. v. Morton*, 2011 NSCA 51, the court stated, at para. 12:

> 12 The primary consideration in cases of armed robbery is protection of the public. **The usual starting point for the offence of robbery is imprisonment for three years** although in exceptional cases, considerations of leniency may apply (R. v. Johnson, 2007 NSCA 102, para. 33, para. 35). Again, having examined the record, I see no error committed by the trial judge in imposing a sentence of three years with remand credit of eight months. While I would grant leave to appeal, I would dismiss the appeal from sentence

2. Were Michelle Rhyno and Michael Rhyno detained under s. 519(9.1) prior to this offence such that s. 719(3.1) would not apply as asserted by the Crown?

3. If not, should enhanced credit for remand time be given to Michelle Rhyno and/or Michael Rhyno?

[26] I will deal with issues 2 and 3 together.

[27] Pre-trial custody is dealt with in s. 719(3.1) of the *Criminal Code*. These amendments were passed as part of the *Truth in Sentencing Act*, S.C. 2009, c. 29, which came into force February 22, 2010. With the passage of these amendments Parliament limited judicial discretion in awarding credit for pre-trial custody. Traditional "two- for-one" credit for time spent in pre-trial custody is no longer possible under the new provisions, which now read as follows:

> Determination of sentence
>
> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> Exception
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[28] Upon the passage of this legislation it was not clear what "if the circumstances justify it" meant in s. 719(3.1). In *R. v. Carvery*, 2012 NSCA 107, leave to appeal to S.C.C. granted, [2012] S.C.C.A. No. 519 (No. 35115), the Nova Scotia Court of Appeal interpreted this phrase. By the time of sentencing the accused had spent nine and one half months in custody. The sentencing judge granted him enhanced credit of 1.5:1. The Court of Appeal concluded that the circumstances to justify enhanced credit do not have to be exceptional. The Court also held that the unavailability of remission in statutory release was an acceptable ground upon which to award enhanced credit in appropriate circumstances, under s. 719(3.1). There have been several other cases dealing with the interpretation of this phrase. From these cases a number of principles arise:

(1) The circumstances justifying the enhanced credit need not be exceptional.

(2) The circumstances justifying the enhanced credit must be specific to the accused.

(3) Loss of remission in statutory release can be justified in individual circumstances to award enhanced credit where the accused can bring evidence to the court that had he or she been a sentenced inmate they would have most probably have received remission and/or statutory release.

[29] I am satisfied that the norm is 1:1 credit and that a party seeking to depart from this established practice bears the onus of proof.

[30] The Crown submits, however, that s. 719(3.1) does not apply in this instance because the reason for detaining Michelle and Michael Rhyno was stated in the record as being under s. 515(9.1). As noted earlier, s. 719(3.1) provides:

> **Exception**
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody **unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1)** or the person was detained in custody under subsection 524(4) or (8).
>
> [emphasis added]

[31] Section 515(9.1) provides as follows:

> (9.1) Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.

[32] In other words, if an accused was detained in custody "primarily because of a previous conviction", then these provisions allowing extra remand credit do not apply.

[33] Mr. Rhyno had a bail hearing on June 10, 2011. The Provincial Court judge denied his release, and noted that Mr. Rhyno was then serving a sentence under the *Youth Criminal Justice Act*. The judge stated his reasons at pp. 30 and 31 of his decision as follows:

> **THE COURT - DECISION:** Thank you. While Mr. Rhyno is presumed to be innocent, the onus is on him to show cause why he should be released. **In light of his current circumstances he is currently serving a deferred sentence under the Youth Justice Act.** The Crown has a case against Mr. Rhyno to be met by him.
>
> What's being proposed is his grandmother as surety, but there doesn't seem to be any real sense of control. She herself admitted that on occasion previously, when she was supervising her grandchild, that he was able to, and did, previously run off without - - or leave from her premises without her knowledge.
>
> The Defendant has not shown cause why he should be released. **He is remanded on both the primary and the secondary ground**. There are outstanding warrants for non-attendance at court, as well. He is remanded over, then.
>
> [emphasis added]

[34] The Crown submits that as a result of the Provincial Court judge denying bail primarily on the basis of a prior conviction of the accused, any remand credit cannot exceed a 1:1 ratio.

[35] On October 6, 2011 a bail hearing was conducted with respect to Michelle Rhyno. Judge Sherar denied release and, according to the Crown, relied heavily on the fact that Ms. Rhyno has a lengthy criminal record. Judge Sherar stated his reasons (at pp. 39 - 41) as follows:

> **THE COURT - DECISION**: Ms. Rhyno is presumed to be innocent of this and any other charge, unless there's proof beyond a reasonable doubt before a Court of competent jurisdiction which would lead one to believe of her guilt, so she's presumed to be innocent.
>
> It's a very serious series of charges. Jointly, with her son, she's alleged to have robbed two people in a domestic scenario, and as you say, in a residential scenario.

> **Ms. Rhyno has previously been before the Court. She's received fines, suspended sentence and Conditional Sentence Orders. She has been convicted of failing to attend Court, escaping and being at large, breach of probation, and she has on two occasions breached Conditional Sentence Orders.**
>
> What's being proposed is that her 80-year-old mother act as a surety, her jailer in the community, to restrict and control her activities in the community. Ms. Rhyno is not under any Court Order at the present time, having completed her obligations to society some time ago with regards to the Conditional Sentence Order.
>
> But mindful of the strength of the Crown's case against the Accused and her antecedent behaviour, first of all, regardless of anything else, with the very greatest respect, Mrs. Betty Francis Swicker is not a person competent to be a jailer in the community for this or anybody else. She's, as everybody agrees, a loving person, a concerned person. She's raised 11 children, but at – with her age and her apparent physical restrictions, she's not in a position to control anybody in the community.
>
> **MR. BLACK:** Sorry, Your Honour.
>
> **THE COURT:** It's the conclusion of this Court, even though the burden is on the Crown, that **the Accused be detained on both the primary and the secondary grounds.** The Crown ought to be able to proceed very expeditiously, or they will be – already being held up because of a Crown Witness.
>
> [emphasis added]

[36] The Crown submits that as a result of the Provincial Court judge denying bail primarily on the basis of prior convictions of the accused, any remand credit for Ms. Rhyno cannot exceed a 1:1 ratio.

[37] According to *R. v. M.C.,* 2011 ONCJ 593, the Crown bears the burden of demonstrating that the offender was detained primarily on the basis of a previous conviction. Any ambiguity as to the basis for the detention operates in favour of the offender. Further, where an accused is detained on the primary basis of a previous conviction, this must be indicated on the record: *Criminal Code*, s. 515(9.1). Failing that, it falls to the sentencing court to determine whether the

detention was on the basis of a previous conviction, but the burden to establish this rests on the Crown. In *M.C, supra,* such proof was established by adducing the audio recording of the bail hearing, from which both counsel and the court were satisfied that the previous conviction was the primary reason for detention.

[38] In this case, the Crown relies on transcripts of the offender's bail hearings before Sherar JPC. With respect to Mr. Rhyno , Judge Sherar noted that he was "currently serving a deferred sentence" under the *YCJA*; that the proposed surety was not satisfactory; and that there were outstanding warrants for non-appearance. Certainly the fact of the sentence already being served was important, although Judge Sherar had more to say about the surety issue. This was also the case with respect to Ms Rhyno. In her case, the proposed surety was not sufficient given "the strength of the Crown's case against the Accused and her antecedent behaviour."

[39] In both cases, the accuseds' previous offences were relevant and significant; were they the "primary" grounds for detention? The Crown suggests that the insufficiency of the surety was "bound up in the fact that the accused has a significant criminal record," as in *R. v. Mullings* (No. 2), 2012 ONSC 2910, where the court said, at para. 41:

> ...It is true that the Justice of the Peace spent a significant amount of time describing the deficiencies associated with the proposed sureties. It is also true, however, that the deficiencies were rooted in the defendant's criminal record. The Justice of the Peace found that the willingness of the defendant's mother and step-father to act as proposed sureties amounted to "distilled wishful thinking" precisely because they ignored his criminal record. The two grounds cannot be separated. Apart from the criminal record, the proposed sureties could very well have led to the defendant's release. With the criminal record, the Justice of the Peace concluded that the sureties were not appropriate.

[40] Counsel for Mr. Rhyno agrees with the Crown's assessment as to the inapplicability of enhanced remand credit. In his brief, counsel for Mr. Rhyno states:

> A review of Provincial Court Judge Sherar's decision indicates that he denied bail on the basis of Mr. Rhyno's youth record and the convictions of breach of court orders. It is unlikely that the Court would consider enhanced credit of 1.5 for every day served.

[41] In this case, there is no doubt that the previous convictions were a significant element going to the decision to detain. In both the case of Michelle Rhyno and Michael Rhyno, I am satisfied that the previous convictions were the main factor in the denial of bail at Provincial Court.

[42] Having so found, I am satisfied that the Crown has met its burden of proving that Michael Rhyno and Michelle Rhyno were detained under s. 519(9.1) such that s. 719(3.1) would not apply as asserted by the Crown. Therefore, enhanced credit will not be considered for either party.

Parole Eligibility Delay

4. In the circumstances of this case should parole eligibility be delayed for Michael Rhyno?

[43] The Crown seeks an order to delay parole for Mr. Rhyno. In the Crown's submission he was serving a custodial sentence and had outstanding warrants when this offence occurred. As well, he has had prior convictions for violent offences and numerous for breaching court orders.

[44] The power of a court to delay parole is found in s. 743.6 of the *Criminal Code*. In *R. v. Zinc*, 2003 SCC 6, the Supreme Court of Canada indicated that determination of conditional release eligibility is a factor in sentencing. Section 743.6 reflects Parliament's intention to allow a trial judge to reduce the discretion of a parole board in certain circumstances by requiring an accused to serve one-half of his or her term of imprisonment before being able to seek parole. The principles of which this court must be cognisant are set out in *Zinc, supra.*, at para. 33:

> 33 As mentioned above, courts must perform a double weighing exercise. First, they must evaluate the facts of the case, in light of the factors set out in s. 718 of the Code, in order to impose an appropriate sentence. Then, they must review the same facts primarily in the perspective of the requirements of deterrence and denunciation, which are given priority at this stage, under s. 743.6(2). The decision to delay parole remains out of the ordinary, but may and should be taken if, after the proper weighing of all factors, it appears to be required in order to impose a form of punishment which is completely appropriate in the circumstances of the case. This decision may be made, for example, if, after due consideration of all the relevant facts, principles and factors at the first stage, it

> appears at the second stage that the length of the jail term would not satisfy the imperatives of denunciation and deterrence. This two-stage process, however, does not require a special and distinct hearing. It should be viewed as one sentencing process, where issues of procedural fairness will have to be carefully considered.

[45] The Crown's position is that it would be appropriate to delay parole for Mr. Rhyno. The Crown submits he was serving a custodial sentence and had nine outstanding warrants when the offence occurred. Moreover, he had prior convictions for violent offences and numerous convictions for breaching court orders.

[46] The Crown relies on *R. v. Duseigne,* 2003 ABCA 166, to support the argument that Mr. Rhyno should serve one-half of his sentence before becoming eligible for parole. In *Duseigne, supra,* the Alberta Court of Appeal dealt with a home invasion robbery where there were no injuries to the victim and any confinement was minimal. The court upheld a nine-year sentence of incarceration and delayed parole eligibility. At the time of the offences the appellant was on parole for armed robbery. The fact that the robbery was committed while the accused was on parole, was but one factor that the court considered in delaying parole. Conrad J.A. said, for the court:

> 8 It is necessary for us to consider the sentence imposed in this case and we have done so. All of the factors required for the guideline sentence for home invasion robberies are present here. In addition, there are some serious aggravating circumstances, namely, that the appellant has a very extensive criminal related record. In addition, this offence was planned and carried out while on parole from a sentence for a previous robbery, and while subject to various arrest warrants for violating his parole.
>
> 9 Thus, while the confinement was minimal, and there were no injuries, we cannot say that the trial judge either erred in principle or that the sentence imposed was demonstrably unfit. Nor can we say that the extra six months sentence for the mask, in all of the circumstances of this case, was demonstrably unfit.
>
> 10 With respect to the argument relating to the requirement to serve one-half of the sentence before eligibility for parole, we see no error. The facts adequately support the findings. Again, some of the facts that would support the findings are: (1) the appellant had such an extensive and related criminal record; (2) the offence

> was planned and committed while he was on parole; (3) the sentences previously given have not deterred the appellant; (4) the psychiatric report cites many factors which increase the appellant's risk for violent recidivism; and (5) the nature of the crime itself being a home invasion robbery.

[47] Counsel for Mr. Rhyno submits that delayed parole is only to be used when the facts of the case are out of the ordinary, and only after determining a fit and appropriate sentence.

[48] As I have already determined, this is not a "home invasion"- type case, which would attract a sentence of 6 to 8 years incarceration, as the Crown alleges. While Mr. Rhyno has a prior record, he is a young man and this is the first time he has appeared in adult court. To say the least, he has had a very troubled upbringing. He comes before this court as a first time adult offender.

[49] The circumstances of this case are not as serious as those in *Duseigne, supra*. The robbery and theft occurred as a result of Mr. Keay's call to Michelle Rhyno for sexual services and his refusal to accept or pay for these services.

[50] In the circumstances of this case, I am not satisfied it is appropriate to make any order delaying Mr. Rhyno's parole eligibility as requested by the Crown.

Disposition:

<u>Michelle Rhyno</u>

[51] Michelle Rhyno has 26 prior convictions, including five for assault seven for theft and 12 breaches of court orders. Her criminal record was provided in the materials from the Crown.

[52] A pre-sentence report was completed for Michelle Rhyno on February 19, 2013. Ms. Rhyno was born July 11, 1961 and is 51 years of age at the time of sentencing. She came from a family consisting of 11 children, and described her father as a "violent alcoholic". She indicated that her mother remarried when she was child, and that her step-father was physically and verbally abusive. To say the least, Ms. Rhyno's upbringing was difficult. Ms. Rhyno was married for a time to Donald Rhyno. They had two children: Michael Rhyno, presently age 19 and Donald Rhyno, age 24.

[53] Linda Grandy, with the Stepping Stone Program in Halifax, indicated that she has been providing support for Ms. Rhyno during her incarceration. She noted that Ms. Rhyno has applied to the Options Program and the New Opportunities For Women Program. According to Ms. Grandy, both programs offer skills development, career exploration and job preparation sessions, including computer skill training and GED preparation. She felt that Ms. Ryhno would be a good candidate for these programs upon her release.

[54] Ms. Rhyno has no income. She has a long history of substance abuse, having begun using alcohol at age 14. She experimented with drugs, specifically Valium, cocaine and marijuana and had overdosed in the past as a result of her drug abuse. She now believes her addiction issues are under control. She claims that most of her involvement in the criminal justice system has been while under the influence of drugs or alcohol. With respect, given Ms. Rhyno's long history of substance abuse, I note that there is no independent evidence to suggest that her addiction issues are under control.

[55] On a positive note, the pre-sentence report indicates that Ms. Rhyno has taken responsibility for the matter now before the court. Despite this assertion in the pre-sentence report, the Crown submits that Ms. Rhyno has not shown any remorse.

[56] While Ms. Rhyno has not had any history of being able to move beyond drugs and alcohol, at least during her incarceration she has made some efforts to receive some educational programs. Upon release, she wishes to continue with her education and her counselling in the area of substance abuse. Dawn Gillis, a case management officer at the Central Nova Scotia Correctional Facility, indicated that Ms. Rhyno spends a lot of her time participating in programming and education, and only had minor disciplinary issues. Ms. Gillis did confirm Ms. Rhyno's statement that she began upgrading her education with a goal toward a GED diploma.

[57] As mitigating circumstances, counsel points to a number of programs in which Ms. Rhyno has engaged since she was arrested in June 2011. These programs include the following:

- Meeting with Court Support & Legal Workers from Stepping Stone;
- Completing the Woman's Journey: "I am Here" self-awareness program in February 2012;
- Completing the Effective Communications program offered by the Elizabeth Fry Society in January 2012;
- Completing the Healthy Relationship program offered by the Elizabeth Fry Society in February 2012;
- Completing the Personal Boundaries program offered by the Elizabeth Fry Society in April 2012;
- Completing the Awakening to your spirit program offered by Cloverdale; and
- Completing the Model of Change Workshop offered by Cloverdale in July 2012.

[58] The Crown submits that these courses taken by Ms. Rhyno have very little, if anything to do with the substance abuse problem she needs to address. As noted in her pre-sentence report (at pp. 5 and 6 under "Corrections History") Ms. Rhyno's attendance for substance abuse has been inconsistent and according to the Crown, she could not refrain from the use of alcohol, ultimately being found in willful breach of her conditional sentence order. The Crown submits that Ms. Rhyno had been given the opportunity to attend many programs in the past, which she did not do, and that her prospects for rehabilitation are slim.

[59] The Crown submits, and I agree, that there do not appear to be any mitigating factors. As to aggravating factors, Ms. Rhyno has a significant criminal record. The robbery did happen in an occupied private dwelling and there was a significant theft. The Crown submits and, I agree, the starting point for robbery is a sentence of three years. Defence counsel suggests a range of between two and three-and-one-half years. Considering the circumstances of this case, an appropriate sentence of incarceration on the robbery count is three and one-half years. On the theft charge I impose a sentence of one year concurrent. I am satisfied that a level of violence was used against Mr. Keay, although I have

considered the circumstances surrounding Mr. Keay having engaged Ms. Rhyno as an escort to attend at the premises on that evening and then refusing to pay her and/or engage her services.

[60] Credit for pre-trial incarceration is 1:1 and, therefore, credit will be given for 748 days of pre-trial incarceration. I also order a s. 109 weapons prohibition and DNA order.

Michael Rhyno

[61] Mr. Rhyno was born June 27, 1993, and he comes before the court as a first time adult offender. He was arrested on June 7, 2011 and has been incarcerated since then. He was twice denied bail. While incarcerated awaiting trial he was sexually assaulted. He says he has been continually harassed while in custody, presumably because he reported the offender who he alleges sexually assaulted him. In addition to the sexual assault, Mr. Rhyno indicates that he has suffered verbal abuse and has had urine and faeces thrown at him while in custody. Since the reporting of the sexual assault Mr. Rhyno has been in protective custody and in his cell for 23 hours each day.

[62] Mr. Rhyno, through his counsel, submitted a letter to me dated June 7, 2013 in which he indicates he is sorry for what happened and asked for "a bone to be throughed [sic] at me and to give me a chance to start over and live a normal life".

[63] The Crown is seeking a sentence in the range of six to eight years. As noted, I have already determined that this is not a "home invasion" type case to which that range would be appropriate. Therefore, the appropriate starting point for a sentence of robbery, as discussed earlier, would be three years.

[64] Generally the pre-sentence report of February 8, 2013, outlines a troubled youth. Mr. Rhyno's parents separated when he was 3 years old. Child Protection Services became involved and his grandmother subsequently took custody of him. He resided with her up to age 12. After that he resided in group homes between the ages of 12 and 16, then lived independently, although he did try to reside with his mother periodically. He had virtually no relationship with his mother until he began using drugs with her. He indicated that she was a negative influence on him. In his youth, Mr. Rhyno, developed relationships with negative peer groups

and began experimenting with drugs. Mrs. Betty Rhyno, his grandmother, confirmed that Mr. Rhyno became involved in drugs during his adolescent years. She suggested that he had feelings of resentment towards his mother due to her rejection of him. Ms. Rhyno was unsure whether Mr. Rhyno could resist the temptation of drugs if he were released into the community.

[65] Mr. Rhyno completed grade 9. He has no employment history. He has no form of income, nor any debts. He has Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder and Conduct Disorder. He is currently being medicated in custody. He suffered from depression as a result of sexual assault while in custody. Mr. Rhyno did confirm his substance abuse. He started experimenting with drugs at the age of 10 years and began using crack cocaine at the age of 12 years. For a time he committed petty theft to support his habits, and he was involved in the sex trade at the age of 13 in order to support his drug addiction.

[66] Mr. Rhyno has a prior criminal record. He was sentenced on youth offences on May 2, 2011. He was supervised by Jeffrey Martin, a probation officer who generally did not provide a positive report. Mr. Martin indicated that"Mr. Rhyno has a history of non-compliance with orders, including accruing new charges and failing to comply with community based orders". Further, he said, "Mr. Rhyno "had a substance abuse issue that he is not willing to address (crack cocaine) and was generally dishonest and manipulative throughout the order". Finally, he said, "Overall, his upbringing and addiction issues put him in a difficult situation throughout his life, but despite attempts by the Department of Community Services, Department of Justice and his grandmother, he made no measurable effort to make changes in his life."

[67] Mr. Rhyno is now before the court suggesting that he wishes to seek rehabilitation for substance abuse, yet the comments by Jeffrey Martin recited earlier, would suggest that many attempts were made to assist him in his rehabilitation in the past, but he made no effort to help himself.

[68] There are no mitigating circumstances other than the relatively young age of Mr. Rhyno. There are several aggravating factors. Michael Rhyno, while still young, has a longer criminal record than his mother with 45 prior convictions, including multiple convictions for assault, theft and breaching court orders.

[69] At the time of this offence he was under a custodial disposition and there were warrants out for his arrest. This robbery happened in an occupied dwelling house and Mr. Rhyno possessed a knife. A significant theft occurred. According to the Crown, Michael Rhyno has shown no remorse. Mr. Rhyno's PSR does not make reference to any remorse or suggest that he has taken responsibility for the events which form the basis of his conviction.

[70] According to the Crown this was a planned robbery. With respect, the evidence does not support this contention and I do not consider this to be a pre-planned robbery. The robbery arose when Mr. Keay refused to pay Ms. Rhyno.

[71] Mr. Rhyno is relatively young, but he has an extensive criminal record. This is a serious robbery and the benchmark from our Court of Appeal is three years as a starting point. I sentence Mr. Rhyno to three and one-half years incarceration on the robbery charge. On the count of theft over $5000, I impose a one year concurrent sentence. I allow 1:1 credit for pre-trial incarceration of 639 days. A s. 109 weapons prohibition and DNA order are imposed.

Pickup, J.