

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Halpenny*, 2018 NSSC 30

Date: 20180213

Docket: Hfx No. 458987

Registry: Halifax

Between:

Her Majesty the Queen

v.

Donald Dwight Halpenny

SENTENCING DECISION

Judge: The Honourable Justice Felix A. Cacchione

Heard: February 13, 2018, in Halifax, Nova Scotia

Oral Decision: February 13, 2018

Written Decision: February 13, 2018

Counsel: William Mathers, Provincial Crown
Patrick MacEwan, on behalf of Mr. Halpenny

By the Court (Cacchione, J.) Orally:

[1] Donald Dwight Halpenny, (hereinafter referred to as the “accused”) was initially charged on a 25-count Indictment dated August 5, 2015. Twenty-four of those counts were for various firearms offences and one count involved an offence under the *Controlled Drugs and Substances Act*, 1996, Chap. 19 (as amended).

[2] The accused first appeared in Provincial Court on August 5, 2015. On August 7, 2015 he was released from custody on a recognizance with one surety to justify and certain conditions.

[3] The case was adjourned on four separate occasions after his release and before he elected his mode of trial. On January 29, 2016, the accused elected to be tried in the Supreme Court by a judge alone.

[4] A preliminary inquiry was commenced on October 18, 2016 and, after several adjournments, finally completed on January 4, 2017. The accused was committed to stand trial.

[5] The accused first appeared in this Court on January 12, 2017. On February 23, 2017 trial dates were set for October 10 – 13, 2017.

[6] On October 10, 2017 the accused entered guilty pleas to the following six counts:

Count 3 that he on or about the 30th day of July 2015 possessed a loaded prohibited firearm, a Smith & Wesson 9 mm Luger, and was not the holder of an authorization or license under which he may possess the firearm, or a registration certificate for the firearm, contrary to Section 95(1) of the *Criminal Code*.

Count 5 that he possessed a prohibited firearm, a Colt Cobra .38 calibre revolver, together with readily accessible ammunition capable of being discharged from the firearm, and was not the holder of an authorization or license under which he may possess the firearm, or a registration certificate for the firearm, contrary to Section 95(1) of the *Criminal Code*.

Count 7 that he possessed a loaded restricted firearm, an Arminius .357 calibre revolver, and was not the holder of an authorization or license under which he may possess the firearm, or a registration certificate for the firearm, contrary to section 95(1) of the *Criminal Code*.

Count 10 that he possessed a loaded restricted firearm, a Tanfoglio .22 calibre revolver, and was not the holder of an authorization or licence under which he may possess the firearm, or a registration certificate for the firearm, contrary to section 95(1) of the *Criminal Code*.

Count 12 (as amended) that he possessed firearms without being the holder of a license under which he may possess them or a registration certificate, contrary to Section 91(1) of the *Criminal Code*.

Count 24 (as amended) that he possessed prohibited devices, muzzle attachments, without being the holder of a license under which he may possess them, contrary to Section 91(2) of the *Criminal Code*.

CIRCUMSTANCES OF THE OFFENCE:

[7] On July 30, 2015, the police executed a search warrant on a property located at 46 Old Mines Road, Mount Uniacke, Nova Scotia. The property contained a trailer, which served as the accused's home and a large garage from which he operated a business. In the garage the police located firearms, ammunition and prohibited devices.

[8] In the garage itself, the police found the .38 caliber, .22 caliber, and .357 caliber revolvers together with two muzzle attachments, better known as silencers.

[9] Six rifles of various calibers and two shotguns were located in a gun safe in the garage. Inside a hidden compartment in the back wall of the gun safe the police found a loaded .9 mm pistol. Two rifles, wrapped in plastic, were also found hidden in the ceiling insulation of the garage. Quantities of various types of ammunition were also found in the garage.

[10] The search of the garage also revealed a Kevlar vest (body armour), a police traffic vest and rain hat cover, a police duty belt, handcuffs, baton, flashlight holder and pepper spray holder.

CIRCUMSTANCES OF THE OFFENDER:

[11] The accused is 57 years old. He has a small, dated and unrelated criminal record for possession of stolen property and drinking and driving offences. He appears to have had a normal upbringing.

[12] At the age of 18 he moved out of the family home and joined the Canadian military. He married at age 25 and had 2 daughters. The marriage lasted 28 years.

Despite their failed marriage, he and his ex-wife continue to enjoy a positive relationship.

[13] His eldest daughter is aware of his present situation. She indicates that her father feels badly about his present situation and appears to be stressed and upset about it. She described him as a patient, hard-working, honest and dependable person who has never let her down. She does not believe that he has any issues with alcohol or illicit drugs nor does he have any anger management issues.

[14] The accused has a grade 10 education. He successfully completed various courses while in the military including air-conditioning and refrigeration courses which led to him obtaining his journeyman papers in that field. He has been self-employed as an air-conditioning and refrigeration technician since 1991 but has been unemployed since the commission of the present offences. According to information in the presentence report his financial situation is precarious and he appears to be on the verge of declaring bankruptcy.

[15] He advised the author of the presentence report that he has been a hunter most of his life and a gun collector for many years. He indicated that he stopped renewing his firearms permits because, in his words, he “got tired of it.” He denied any intention of using the guns.

[16] A friend who has known him for 15 years and acted as his surety was shocked to hear of the offences. He described the accused as a nice guy who has a big heart, is very generous but is sometimes taken advantage of. This friend commented that the accused does not drink as much as he used to, mostly due to his present financial situation. He does not believe that the accused has any anger management or substance abuse issues. He also commented that the accused’s biggest concern was the recent heart attack he suffered in July 2016 and his current financial situation. No further information was provided in the presentence report regarding the severity of the heart attack other than he is currently taking baby aspirin as prescribed by his family physician.

[17] Another friend who has known the accused for approximately 45 years was both surprised and saddened to hear of his current situation. He described the accused as an extremely generous individual who is a loyal, good friend. This person does not believe that the accused has any addictions, anger management or mental health issues.

[18] Several letters were received by the Court this morning. I will quote from them. The first letter is from Mr. Eric Foren who is the President of MasterTech HVAC and Plumbing Inc. He has known Mr. Halpenny for 20 years and he, although a competitor in the industry, described Mr. Halpenny as someone with *“ethical work and customer satisfaction records and opinions second to none in a very challenging industry.”* He said that Mr. Halpenny *“demonstrated great maturity and creativity and a willingness to go the extra mile for his clients.”* He also said that Mr. Halpenny *“is mature beyond his years”* and that he calls upon him often for his experience in the field. He had demonstrated *“professionalism and willingness to provide advice”* whenever needed. He is someone who *“has designed rigging services and has expertise”* that Mr. Foren’s company relies on. Finally, he indicated that Mr. Halpenny is *“intelligent, capable, dedicate, and a personable man.”*

[19] Ronald Clowes who is President of GTL Transportation Inc. has been a friend for many years and has always found him to be of *“good character, a hard worker and a good business man.”* He indicated that Mr. Halpenny *“has always been attracted to unusual things for example, a fire truck”* that was on his property as depicted in the photographs. Mr. Clowes indicates that he feels *“that this trait may have landed him in the predicament he finds himself in.”*

[20] Finally, Michael Schmid has known Mr. Halpenny for 20 years. He describes him as a *“dedicated father to his two daughters, who’s [sic] education he values dearly. He always conducted his business in a professional manner... has been a hard worker at whatever he sets his mind too [sic]... and honourable with a good sense of what is right and wrong.”* He believes that Mr. Halpenny’s problems were brought on, in part, by an honest mistake *“because the Don I know was a law-abiding citizen.”* As well he references that the past 2.5 years have been difficult for Mr. Halpenny and that he *“is a good man caught in a bad situation.”*

[21] The Crown is seeking a term of incarceration in the range of four to five years.

[22] The Crown argues that the accused’s acceptance of responsibility for his actions by his guilty plea is the sole mitigating factor present in this case.

[23] The Crown refers to the following as aggravating factors:

1. The degree of planning and deliberation required in hiding weapons sealed in plastic within the ceiling and behind a false wall within the gun safe;
2. The keeping of unsecured pistols concealed but quickly accessible, for example, in a holster under an article of clothing; and,
3. The presence of silencers.

[24] The Crown also submits that the presence of police rain gear and duty belt, along with body armour, is troubling and difficult to reconcile with simple possession by a hobbyist.

[25] The Defence submits that the principles of sentencing can be satisfied by allowing the accused to serve his sentence within the community under a conditional sentence order.

[26] It argues that the firearms posed no danger to others in the community since they were contained in a locked building on the accused's rural property. It also submits that the accused has been under restrictive release conditions which have detrimentally affected his ability to earn an income. It also argues that the accused has shown that he can abide by court-imposed conditions while living in the community and that he has the support of his peers and others, as evident from the number of people present in Court this morning.

[27] The range of sentences for s. 95(1) offences is broad and can be anywhere from a conditional sentence as in *R. v. Haus*, 2016 BCPC 11; to eight years incarceration as in *R. v. Kift*, 2014 ONCJ 625. Such a range demonstrates that no two cases are alike and much is dependent on the circumstances of the offence and those of the offender.

[28] In *Haus* the accused had no prior criminal record and was described as a pillar of the community. He plead guilty to six firearms offences. He was described as someone who had a passion for weapons of all sorts. His hobby led to his conflict with the law. The Court noted that while this was not simply a technical offence such as an error in licensing, the circumstances were within the least blameworthy end of the spectrum identified in *R. v. Nur*, 2015 SCC 15. The sentencing judge found in that case that, among other things, no harm was intended and that there were no surrounding circumstances of criminal behaviour.

[29] In the *Kift* case the accused was a former RCMP officer who was on parole for gun trafficking offences and subject to a weapons prohibition order when he was charged with further firearms offences. The sentencing judge referred to what was found during a search of the accused's residence as an arsenal of guns, ammunition and explosives. The arsenal included submachine guns, handguns, explosives including grenades and detonators as well as over 10,000 rounds of ammunition.

[30] The purpose and principles of sentencing are set out in ss. 718 and 718.3 of the *Criminal Code*.

[31] Section 718 states that the fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) To deter the offender and other persons from committing offenses;
- (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 or to the community.

[32] Section 718.1 requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[33] Section 718.2 requires a court that imposes a sentence to take into consideration aggravating and mitigating circumstances relating to the offence or the offender.

[34] The accused's guilty plea, late as it was, is the only mitigating factor present in this case. The plea was entered on the first day of trial.

[35] The aggravating factors are, in my opinion, the following:

1. that 4 of the 15 firearms seized were handguns;
2. that three of these handguns were loaded;
3. that two of the long guns were wrapped in plastic and hidden in the ceiling insulation of the garage;
4. that one of the loaded handguns was inside a hidden compartment in the back wall of the gun safe and that the other three were not in the gun safe but in the garage itself and readily accessible; and,
5. that two silencers were also in the garage.

[36] The search of the accused's premises also revealed the presence of a Kevlar vest (body armour); a police traffic vest; a police rain hat cover; a police duty belt, handcuffs, baton, flashlight holder and pepper spray holder. While these items were not the subject of any charges before this Court, they are troubling and difficult to reconcile with the accused's statements in the presentence report that he has hunted for most of his life and has been a collector of guns for many years. He did not indicate that he was also a collector of police paraphernalia.

[37] The accused's release conditions included that he attend Court as and when required; that he reside at his home unless permission to reside elsewhere was obtained from the Court; that he remain within the Province of Nova Scotia; that he not associate with or be in the company of anyone with a criminal record, Youth Court record or *CDSA* record except for incidental contact in an education or treatment program or while at work except for his surety, Mr. John Smaggus, and Corey Melvin; that he not possess, use or consume a controlled substance except in accordance with a medical prescription or a legal authorization; and, that he not possess any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance. There was also a condition that he have no direct or indirect contact or communication with Jimmy Melvin, Junior and Jimmy Melvin, Senior, both of whom are notorious and violent crime figures in this city.

[38] The release conditions were not particularly onerous as the accused was not subject to house arrest or a curfew.

[39] The presence of loaded handguns, silencers, body armour and police paraphernalia does add a different dimension to his possession of the firearms in question. An inference can be drawn that the accused is not simply a gun collector or a gun hobbyist.

[40] The presence and use of firearms is an increasing problem in our society and in this city. Media reports are replete with stories of offences involving firearms. Courts, not only in this Province but throughout Canada, usually impose sentences of incarceration where firearms are involved.

[41] It is trite to say that guns are dangerous and that handguns are particularly dangerous. Possession of loaded handguns together with silencers is not something one would equate with a gun hobbyist. An inference can be drawn that such possession was for nefarious purposes, not necessarily by the accused, but by others with whom he associated.

[42] The possession of readily accessible loaded handguns poses a real, immediate and extreme danger to the public and anyone in the presence of those weapons. Such behaviour must be denounced. The offender and other like-minded individuals must be deterred from actions that endanger the public at large. I do not accept the submission by counsel for the accused that because the guns were contained in a locked outbuilding on a rural property they posed no danger to the community. Those weapons were available to the accused and to anyone who, either legally or illegally, had access to his garage.

[43] The accused indicated to the probation officer that he was hunter most of his life and a gun collector for many years. With all due respect, I find it difficult if not impossible to accept that a true hunter would practice this sport with handguns and silencers.

[44] A period of incarceration is required in order to deter this accused and other like-minded individuals. There will be a global sentence of thirty months imprisonment broken down as follows:

1. On count 3, s. 95(1), the loaded 9 mm pistol: six months incarceration;
2. On count 5, s. 95(1), the .38 caliber revolver: three months *consecutive*;

3. On count 7, s. 95(1) the loaded .357 caliber revolver: six months *consecutive*;
4. On count 10, s. 95(1), the loaded .22 caliber handgun: six months *consecutive*;
5. On count 12, section 91(1), the other firearms: three months *consecutive*; and
6. On count 24, s. 91(2), the muzzle attachments (silencers): six months *consecutive*.

[45] There will also be a weapons Prohibition Order under s. 109 of the Criminal Code for life; an Order of Forfeiture of the weapons seized, under s. 491 of the *Criminal Code* and a DNA Order under ss. 487.051.

Cacchione, J.