

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Downey*, 2019 NSSC 384

Date: 20191125

Docket: CRH No. 469488

Registry: Halifax

Between:

Her Majesty the Queen

v.

Daniel Romeo Downey

Decision – Sentence

Judge: The Honourable Justice Denise Boudreau

Heard: November 25, 2019, in Halifax, Nova Scotia

Counsel: Cheryl Schurman and Erica Koresawa, for the Crown
Jonathan Hughes, for the Defence

By the Court (Orally):

[1] Daniel Downey is before the Court to be sentenced in respect of three offences, all events having taken place on or about August 22, 2016. One pursuant to Section 240 of the *Criminal Code*; that is, being an accessory after the fact to the murder of Tylor McInnis. Secondly, an offence pursuant to Section 279(1) of the *Criminal Code*, kidnapping of Liam Thompson. Thirdly, Section 279(2) of the *Criminal Code*, forceable confinement of Liam Thompson.

[2] Mr. Downey was found guilty of these offences by a jury earlier this year.

[3] The essential facts of the matter, which in my view would have had to have been accepted by the jury in convicting Mr. Downey, are mainly taken from the evidence of Ronald Sock. They are as follows.

[4] On the evening of August 22, 2016, a number of individuals were together socializing at 10 Alex Lane, North Preston, Nova Scotia. Those individuals included Ronald Sock, Shawntez Downey, Daniel Downey (who is Shawntez Downey's younger brother) and Nicco Smith.

[5] Shawntez Downey was texting with Tylor McInnis. Shawntez Downey told Mr. Sock that there was going to be a trade of drugs for a gun. Shawntez Downey

later said (in the presence of all) that he wanted to “take the drugs” from Mr. McInnis instead.

[6] Mr. McInnis arrived at 10 Alex Lane at around 8:00 p.m., and Mr. Shawntez Downey went out to talk to him. Then Mr. Sock, Mr. Smith and Daniel Downey came out. Mr. Sock then noticed someone in Mr. McInnis’s car. He went to the vehicle and opened the door. He told the person to get out of the car. This was Liam Thompson. Mr. Thompson got out. Mr. Sock told him to lay on the ground on his stomach, and to not move. Mr. Sock confirmed that this action was his decision alone.

[7] Mr. Sock then told Mr. Smith “I’m good” and “I have him”, referring to Mr. Thompson. Mr. Sock was holding a carrot peeler in his hand.

[8] There was then an altercation between Tylor McInnis and Shawntez Downey, during which Mr. Downey struck Mr. McInnis, and Mr. McInnis ran away. He ran down the driveway and Shawntez Downey, Daniel Downey and Nicco Smith all ran after him.

[9] Mr. Thompson tried to get up and Mr. Sock told him not to move. Mr. Sock then tied up Mr. Thompson with a dog leash he found by the house, by tying his arms and legs to his back. After 15 minutes to a half hour, Daniel Downey returned

alone, on foot, to 10 Alex Lane. He went in the trailer at 11 Alex Lane for a few minutes, and then came back out and headed back in the same direction that he had come. Daniel Downey said to Mr. Sock “Are you good?” and Mr. Sock answered “Ya.” Daniel Downey was gone another 20 minutes or half hour, and then returned again, alone and on foot. Mr. Sock was still waiting with Mr. Thompson who was still tied up. Daniel Downey said, “We have to get Liam in the car and move the car.” Daniel Downey did not explain why. Both Daniel Downey and Ronald Sock put Mr. Thompson in the backseat of his car, still tied up. Daniel Downey drove the vehicle with Mr. Sock in the passenger front seat and Mr. Thompson tied up in the back seat, into another driveway across the road and parked again.

[10] Daniel Downey then got out and ran back up the driveway, saying he would be back. Mr. Sock remained in the car with Liam Thompson. Another half hour went by, and then Mr. Sock heard one gunshot. Daniel Downey then came jogging back about 15 minutes later, saying they had to bring the car to the road. Daniel Downey again drove the vehicle with Mr. Sock in the passenger seat and Mr. Thompson tied in the back seat, up the road for one minute, and then pulled up to a ditch on Downey Road. Standing near the ditch were Shawntez Downey, Nicco Smith and a person known to the group as “Little Jiggy”.

[11] The body of Tylor McInnis was in the ditch and wrapped in a tarp/plastic. Mr. Sock, Shawntez Downey and Nicco Smith placed the body in the trunk, without assistance from Little Jiggy or Daniel Downey.

[12] Mr. Sock, Little Jiggy, and Daniel Downey then ran back to 10 Alex Lane to get Little Jiggy's car. Little Jiggy's car was driven back to where the Thompson car was parked, and they picked up Nicco Smith. Shawntez Downey said, "Follow me." Shawntez Downey drove Mr. Thompson's car with the body of Tylor McInnis in the trunk and Mr. Thompson still tied in the back seat. The others followed in the second car. Both cars went to a local graveyard, which was about a five minute drive.

[13] At the graveyard, Shawntez Downey got out and opened the back door of the vehicle and shot at Mr. Thomson at very close range, numerous times, with a large caliber rifle. Mr. Thompson's car was then left at the graveyard, with Mr. McInnis' body in the trunk and Mr. Thompson in the back seat. The others all went back to Little Jiggy's car and returned to 10 Alex Lane.

[14] Those are the essential facts which I take into account in sentencing Daniel Downey for the crimes which he is found to have committed.

[15] I start by saying that counsel have agreed that the Section 279 convictions (that is to say, the kidnapping and the forcible confinement) invite the application of the rule against multiple convictions for offences containing essentially the same elements (*Kienapple v. R*, [1975] 1 S.C.R. 729). I agree. Accordingly, I will enter a judicial stay of the conviction pursuant to ss. 279(2) of the *Criminal Code* (unlawful confinement).

Pre-Sentence Report / Cultural Impact Assessment

[16] I have the benefit of a pre-sentence report in relation to Mr. Downey. Mr. Downey is presently only 21 years old. At the time of the events before the Court, he was 18. He is from the community of North Preston, Nova Scotia. He is in a long-term relationship with a girlfriend and together they have a child that was born this past summer.

[17] Mr. Downey has a high school diploma, graduating in 2016. He has had limited employment or further education since that time, but it must be remembered he is only 21 and the events that took place to bring him before the court today happened in August 2016. I note that Mr. Downey has availed himself of programs within the correctional facility and, during a period of time while he

was out on bail, he was employed. That certainly speaks to Mr. Downey's ambitions and interest in bettering himself.

[18] Mr. Downey reports no difficulties with either alcohol or illicit substances. As to his record, he has one conviction noted in the material before the Court. An event occurring on March 21, 2016, resulted in a conviction for assault causing bodily harm for which he received 52 days custody and 18 months probation. Two things of note about that last conviction: first, Mr. Downey only turned 18 in January 2016, so he had been an adult for only two months before committing his first offence. Secondly, the sentence for that offence was handed down in January 2017, which means that at the time of the offences before me (August 2016), Mr. Downey was on judicial interim release for that offence.

[19] I have also had the benefit of a Cultural Impact Assessment. That document certainly gave me a much greater insight into Mr. Downey himself, as well as his community. Mr. Downey is African Nova Scotian and was brought up in North Preston, Nova Scotia, a largely black community outside Dartmouth, Nova Scotia. The assessment addressed Mr. Downey's cultural and historical roots, both individually and within the larger context of the community of North Preston. The report notes the significant impact that racism as well as intergenerational poverty have had on Mr. Downey's life and development, those impacts including social,

academic, employment, and so on. I found the report very helpful and gave me much insight into Mr. Downey, his background, and his family. I should also note that, as requested by Mr. Downey, I had asked for the preparation of a Gladue Report in respect of Mr. Downey. However, no connection to an Indigenous family or community could be established.

[20] Mr. Downey is described by various contacts in the Cultural Impact Assessment report as a generally nice, quiet, unassuming young man. His situation growing up had a number of challenges; he was raised mainly by his mother and maternal grandmother, and the family struggled financially. His parents were in an on-again off-again relationship throughout his childhood. His parents had multiple relationships, according to the report, with different partners. Mr. Downey is, in fact, the youngest of seven children born to his father and the youngest of eight children born to his mother. Mr. Downey's mother had her first child when she was 15 years old. Mr. Downey was also exposed to negative childhood experiences, including community violence and substance abuse within and outside his family.

[21] According to the report, Mr. Downey is very proud of his community and he loves his family. He places a high value on his family and community connections. He describes the positive values he was raised with. That said, he has struggled to

find positive role models to show him how to fulfill his dreams of having a good life. Mr. Downey clearly has such dreams; he describes wanting to go college, to have his own business, to provide for his child and to show his child a better way. I believe he is sincere about those dreams. Mr. Downey has been accepted into college and he has pursued opportunities when they have presented themselves.

[22] The report goes on to describe some of the patterns that can develop within young black males as responses to systemic racism, exposure to violence as children, and feelings of powerlessness in society; in particular, the glamorization of guns and gun violence. As to this issue, Mr. Downey has some interesting insight. He sees these negative behaviours in others; he is able to articulate and contextualize the maladaptive behaviours that he sees exhibited by those around him, and he rejects those behaviours. I quote from the report at page 26.

What is important to acknowledge is during the clinical interviews with Mr. Downey, he does not endorse maintaining either of these maladaptive coping strategies as part of his core values or worldview. He is able to identify members of his cohort who have a strong attachment to identifying with “cool pose” and “vacant self-esteem” as a means of surviving and positioning themselves within this cohort – given their lifestyle choices. Mr. Downey reports: “I can see why some of the brothers feel the need to do what they have to do but that’s not how I see myself.”

[23] These types of insights coming from Mr. Downey certainly give me hope for his rehabilitation.

[24] Having said all of that, on the evening of August 22, 2016, Mr. Downey committed enormously serious crimes and he is entirely responsible for his own actions. It is possible that he did what he did out of loyalty to his brother Shawntez, who killed one person that night and attempted to kill another person that night. Perhaps Mr. Downey did these things out of respect for the “street code”, to simply go along with whatever plan was made by the person holding the gun. I cannot know, but, either way, Mr. Downey chose wrongly. He chose to participate in the terrorization of Mr. Thompson. He chose to actively and knowingly assist in the moving and hiding of the body of Mr. McInnis, who had been murdered and was dragged to the road, and who was coldly and callously thrown into the trunk of a car, thereby furthering the pain felt by his family. I hope Mr. Downey heard the statements this morning from Mr. McInnis’ family and friends. I want Mr. Downey to think about the added trauma his actions have inflicted on these suffering people; to think about how he would feel if his loved ones were treated in this way.

[25] Mr. Downey is still a young man. If he is truly sincere about making a life for himself, he has the capacity to do it. He will need to learn how to love his family and community while entirely rejecting these violent codes and violent choices that he has been exposed to.

Victim Impact Statements

[26] I have heard the Victim Impact Statements that were read out today. It is always difficult to listen to these statements, so full of pain and anguish. The statements were all relating to Tylor McInnis and what his family and friends have lost. I appreciate that Mr. Downey was not convicted of killing Mr. McInnis, but of helping Shawntez, his brother, after Mr. McInnis was killed. Mr. McInnis was a beloved son, father, family member, and friend. His death has caused so much suffering for his loved ones. Shawntez Downey was convicted of murdering Mr. McInnis and he will soon be sentenced for that act, at which time I will have more to say. But as today relates to Daniel Downey's actions, I want Tylor's family and friends to know that I have heard your pain. To know that your loved one was not only murdered, but that, after he died, he was treated with so little dignity, discarded in such a cold and callous manner. I can only imagine the grief you have felt and continue to feel.

[27] As to Mr. Thompson, he has given no Victim Impact Statement. We all recall how he testified at the trial. Mr. Thompson does not acknowledge what happened that night, but clearly the jury accepted the evidence of Mr. Sock as to what took place because they convicted Mr. Downey.

[28] There is no doubt in my mind that Mr. Thompson was and would have been severely traumatized by the events of August 22, 2016. To be in a strange location at night, to have your friend chased away by three grown men with one of them holding a handgun, to then be tied up and driven around for hours to unknown locations for unknown reasons, and then finally, to experience an ultimate in nightmares, to be repeatedly shot at, at close range with a large rifle firearm when you are completely helpless. It is difficult to imagine a more traumatizing and terrorizing experience. Again, Mr. Daniel Downey did not shoot Mr. Thompson, but he did actively participate in his confinement and kidnapping that evening.

Law / Caselaw

[29] Sections 718 of the *Criminal Code* and following sections provide the principles and purposes of sentencing. The principles by which I guide myself here are denunciation, both specific and general deterrence, but also rehabilitation and promoting a sense of responsibility. While sentencing is always an individualized process, it must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. In doing so, I am also to consider the aggravating and mitigating factors which exist within any given case.

[30] In the case of Mr. Downey I consider as mitigating his youthfulness, his family support (within which I include his partner and child), and the fact that Mr. Downey does appear motivated to better himself, as evidenced by his participation in educational pursuits. That does give me some hope for his rehabilitation.

[31] Mr. Downey denies committing these acts and maintains his innocence. That is entirely his prerogative, and I do not consider that to be a factor in this sentencing.

[32] There are a number of aggravating factors here, which I will address in the context of each conviction.

[33] Firstly, in respect of the kidnapping conviction, some aggravating factors are: the context that the kidnapping was done in conjunction with a drug deal turned into a robbery turned into a murder. Although I acknowledge that Mr. Downey did not initiate the binding of Mr. Thompson's hands and feet, he was involved in the movement of Mr. Thompson while bound; in fact there were two movements of Mr. Thompson by Mr. Downey, the second time while picking up the body of Mr. McInnis.

[34] As noted by the Crown in their brief, there are various types of types of “kidnapping offences”. The more serious or “classic” form might involve a planned kidnapping, resulting in confinement, removal to other location(s), binding hands and feet and/or gagging, perhaps extortion, perhaps ransom demands. Other forms might resemble a robbery-type circumstance, with a shorter period of confinement.

[35] In *R. v. Brar*, 2014 BCCA 175. The accused helped plan the kidnapping of the victim and was the person who brought the victim to the location where he was accosted. He then left the scene. The victim was threatened, but not physically harmed and then released. The accused was found to be an aider and not a principal, he was 44 years old with no record and he was remorseful. The Court ordered a five year sentence.

[36] The *Brar* case provides us with a list of relevant considerations for the Court in assessing the fit and proper sentence in a case of kidnapping (at para. 23):

The purpose of the kidnapping, specifically whether it is carried out for ransom or as a means of extorting a payment or repayment from the victim;

- (a) The extent to which there is planning and premeditation;
- (b) The length and the conditions of the confinement;
- (c) The extent to which there is violence, torture or significant physical injuries;
- (d) Whether third parties are threatened;

- (e) Whether guns are used;
- (f) Whether there is gang involvement;
- (g) Whether the kidnapping occurs in the course of the commission of another offence; and
- (h) The circumstances in which the kidnapping ends.

[37] In Mr. Downey's case, when looking at these factors, there was no ransom or payment demands. The confinement and kidnapping of Mr. Thompson had only one motive that I can see; that is to say, to allow the robbery of Mr. McInnis to unfold without interference and without witnesses. Mr. Thompson was confined for a relatively short period, a few hours, albeit under terrifying conditions, while his friend was being robbed, chased, and finally was murdered. While Daniel Downey did not himself cause Mr. Thompson any injuries, it is clear to me that Daniel Downey must have known or should have known that his continued confinement and transportation of Mr. Thompson, through the events of that night, was going to result in further violence being done to Mr. Thompson. In the end, Mr. Thompson was shot at in the vehicle while still tied up. Both Daniel Downey and Shanwtez Downey and their friends, then, simply left Mr. Thompson possibly for dead. The fact that Mr. Thompson only suffered minimal physical injuries is frankly astonishing.

[38] In *R. v. Vu*, 2015 BCSC 1441, the accused was not a principal in a kidnapping, but helped plan and prepare for it. The victim was held over the course

of eight days at three different locations. Violence ensued and bodily harm was caused to victim and there was also a gun involved. The accused was 25 years old and had no record. He was sentenced to a period of custody of five years.

[39] In the case of *R. v. Babb*, 2002 158 O.A.C. 377 (ONCA). The accused and a co-accused had stopped a person and forced him back to his store, opened the safe, stole \$12,000 and left the victim in a freezer from which he escaped with no injuries. The accused was 45 years old and had no record. He was sentenced to a five year period of custody.

[40] *R. v. Choquette*, [2010] O.J. No. 1851. The accused participated in the kidnapping of a pawnshop owner due to an unsettled debt. The accused openly had a knife in his possession during the incident, although he was not the main participant. He was sentenced to a period of four years.

[41] As to kidnapping, the maximum punishment prescribed by law is life imprisonment; in this circumstance there is no minimum. A conditional sentence order is not available.

[42] The Crown seeks a period of incarceration of five years for this conviction. The defence submits that a period of four years is proper.

[43] Obviously sentencing is a difficult exercise; one can always distinguish facts as being more or less serious than others. However, given all of the factors I have noted here, the facts of this case, the *Criminal Code* sentencing provisions, the various mitigating and aggravating factors, and the relevant caselaw, I conclude that for the kidnapping of Mr. Thompson, which is the offence pursuant to Section 279(1) of the *Criminal Code*, that a sentence of four years is fit and appropriate.

Accessory after the fact

[44] There are aggravating factors to the offence of being an accessory after the fact as well. Mr. Daniel Downey was most definitely not a passive observer that evening. He was actively involved in the events of that entire evening.

[45] We know that, early in the evening, Mr. Downey was aware that Shawntez Downey planned to rob Mr. McInnis. He was present when Shawntez Downey struck Mr. McInnis with the pistol. Daniel Downey was one of the persons who chased after Mr. McInnis from the driveway of 10 Alex Lane into the wooded area. Mr. McInnis was not seen alive again after that point. Mr. Daniel Downey returned twice from that wooded area and then went back to it again, for unknown reasons. He then came and took the vehicle to Downey Road, knowing that the body of

Tylor McInnis would be there, with the clear intention of helping move that body, again, away from the vicinity of Alex Lane.

[46] Daniel Downey then went and obtained another vehicle, and with that second vehicle followed the first vehicle to yet another location, with the intention of assisting his brother Shawntez Downey to abandon the vehicle containing Mr. McInnis and be transported back to their home. All this was done in the hopes of avoiding responsibility for a murder. Mr. Downey was very much active in these events.

[47] In the case of *R. v. Gowen*, 2011 NSSC 259, the accused had no direct involvement in a murder or its aftermath, but did assist in creating an alibi for his brother, who was the murderer, and convincing others to support it. He also tried to dispose of evidence. The accused was youthful (21 at the time of sentencing). He did have one conviction, but there was no criminal record. He was sentenced to a period of three years incarceration.

[48] In *R. v. Hynes*, 2014 NSSC 119, the accused helped move the body of the deceased to a secluded wooded area. He confessed and pled guilty, but not until six and a half years later. The accused was 34 years old with a lengthy record, but

most were non-violent offences. He also described having been threatened by the principal in order to assist. He was sentenced to a period of custody of three years.

[49] I note that there was another co-accused to Daniel Downey and Shawntez Downey, that being Nicco Smith. Mr. Smith pled guilty to being an accessory after the fact to the murder of Tylor McInnis and received a sentence of two years. This was proposed as a joint recommendation by Crown and defence. I have described Mr. Smith's involvement already in this decision; it was not the same as Daniel Downey, but comparable to the assistance provided by Mr. Downey. I will note that Mr. Smith pled guilty, which is a mitigating factor.

[50] As to the offence of being an accessory after the fact to murder, the maximum punishment prescribed by law is also life imprisonment; there is no minimum. A conditional sentence order is not available.

[51] The Crown and defence are again not that far off in terms of their recommendations. The Crown seeks a period of incarceration of four years. The defence submits that a period of three years is proper.

[52] Again, sentencing is an individual process to each offence and each offender. I take into account the facts before me, the sentencing principles of the *Criminal Code*, the aggravating and mitigating factors, and the relevant caselaw.

For the offence of being an accessory after the fact to the murder of Mr. McInnis, I sentence Mr. Daniel Downey to a period of three years in custody.

[53] Of course that does not end the analysis. First, given that Mr. Downey was being sentenced for two offences that occurred in proximity in time of each other, I must consider whether it is appropriate for them to run consecutively or concurrently. This is codified in the *Criminal Code*, s. 718.3 (4):

The court that sentences an accused shall consider directing

...

(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when:

(i) the offences do not arise out of the same event or series of events;

(ii) one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal; or

(iii) one of the offences was committed while the accused was fleeing from a peace officer.

[54] The Crown argues that these two offences, although they occurred on the same night, were separate and distinct offences with different societal interests, involving two separate victims. Therefore, they say the sentences should be consecutive to each other. The defence disagrees and submits that these two offences formed part of one continuous transaction, and therefore should run concurrently.

[55] Counsel are quite right to point out that the question of sentences being concurrent or consecutive relates to the question of whether the offences are separate and distinct from one another, so that their respective sentences should run consecutively to each other, or if they are sufficiently interrelated or interconnected that their sentences should quite properly run concurrently.

[56] In my view these two offences, the kidnaping and the accessory after the fact, are two separate and distinct offences. It is true that they occurred within the same time frame, and that there are some connections between the two. But in my view there are two separate and distinct sets of actions committed by Mr. Downey that constituted offences. They are two offences that address different societal values: in the case of accessory after the fact, the preservation of the administration of justice, and in the case of kidnapping the prevention of personal harm to individuals. The victims were two different people and, in my view, the actions that contributed to the commission of one offence were independent from the actions that contributed to the other offence.

[57] I therefore conclude that these two sentences should run consecutively, and not concurrently. That is a total of seven years.

[58] Where a court has imposed consecutive sentences, section 718.2(c) requires a court to give the matter one “last look”; that is to say, to consider the consecutive sentences in their totality to determine if the combined sentence is not unduly long or harsh. Mr. Downey’s combined sentence is seven years. I do not find that unduly long or harsh given the circumstances before the Court here.

[59] Mr. Downey will be given credit for the time he has spent on remand at the rate of 1.5 days for every day he has spent in custody. Counsel have agreed that this equals to a credit of three years and five months, which would then give me a remaining period of time of three years and seven months.

[60] I will also ensure that the Warrant of Committal include an Order pursuant to ss. 743.21 of the *Criminal Code*, a prohibition for Mr. Downey from having any direct or indirect contact with either Ronald Sock or Liam Thompson.

Boudreau, J.