Court of Queen's Bench of Alberta

Citation: R v Attia, 2020 ABQB 805

Date: 20201222
Docket: 161404868Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Hisham Attia

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the identification ban.

Reasons for Decision
of the
Honourable Madam Justice M.H. Hollins

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[1] Mr. Attia was convicting of the following charges after his trial:

Robbery (s.344(1)(b));
Unlawful confinement (s.279(2));
Assault (s.266);
Sexual Assault (s.271);
Robbery with choking (s.246(a)); and
Uttering death threats (s.264.1(1)(a)).

[2] On November 30, 2020, I imposed a global sentence of 4 years incarceration on Mr. Attia; 3 years for the robbery with choking, 3 years concurrent for the robbery, 12 months consecutive for the unlawful confinement, 3 months current on the assault, 2 months concurrent on the sexual assault and 6 months concurrent on uttering threats. I promised these written reasons to follow.

[3] The overarching principles of sentencing are found in s.718 of the *Criminal Code* which states:

> 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:
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> (a) To denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
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> (b) To deter the offender and other persons from committing offences;
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> (c) To separate offenders from society, where necessary;
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> (d) To assist in rehabilitating offenders;
>
> (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.

[4] Denunciation is the communication, via the sentence imposed, of society's abhorrence for the crime(s) committed. Deterrence is the discouragement of this offender and any other potential offenders from committing similar crimes and receiving similar punishment*; R v Moriarty*, 2016 ABPC 25 at para.60.

[5] I must remain cognizant of the importance of the possibility of Mr. Attia's rehabilitation, particularly as a first-time offender. Although the seriousness of these crimes mean that some

term of incarceration is necessary to a proportionate sentence, the sentence should not be so lengthy so as to crush any hopes of rehabilitation on release; *Moriarty, supra* at para.69.

[6] In crafting a sentence, I must be mindful of the fundamental principle of proportionality; namely that the sentence passed must be proportionate to the gravity of the offence and the responsibility of the offender. Section 718.2 of the *Criminal Code* further directs me to consider relevant aggravating and mitigating factors of the offence and of the offender, as well as other principles, including consistency in sentencing.

[7] The imposition of a sentence for these convictions also raised issues of which sentences, if any, should be served consecutively versus concurrently, as well as the proper application of the totality principle.

Circumstances of the Offences

[8] On December 3, 2016, Mr. Attia picked up the victim, whom he knew to be a sex trade worker, and took her to his apartment. He agreed to pay her $250 but once they got to his apartment, he wanted to call off the date and get his money back. The victim would not return the money. For the next couple of hours, the offender refused to let her leave his apartment as he continued to demand the return of the money. He threatened to kill her, telling her that he had given her a false address so no one would know where she was. Unbeknownst to Mr. Attia, the victim had called 9-1-1 and hidden her phone so there is a partial, albeit not completely clear, transcript of the evening.

[9] Although he no longer had any wish to engage in sexual activity with her, he pretended that he did, kissed her against her will and put his hands inside her bra believing the money to be hidden there. When he did not find the money in the victim's bra, he then choked her unconscious, went through her purse and took her wallet and other personal belongings. When she came to, he assaulted her and forced her to remove her jewellery, which he also kept. He then kicked her out of the apartment in her underwear and a light sweater.

[10] The police were already looking for her so were able to assist her. Mr. Attia was arrested the next day, returning to his apartment with all the victim's belongings in a bag.

Circumstances of the Offender

[11] Mr. Attia was 35 years old at the time of these offences and is now 39 years old. He was raised in Egypt where he obtained a post-secondary degree in tourism. He had immigrated to Canada from Egypt only months before committing these offences. His brother, Hany Attia, was already living in Canada when Hisham Attia arrived. Hisham got a job working for his brother's office cleaning company when he arrived and Hany has also provided a letter of support.

[12] Since the time of these offences, Mr. Attia has done work for his brother but also various short-term service contracts through a company called TIPS, which has lauded his service and calls him an "exceptional employee".

[13] Prior to these charges, Mr. Attia had no criminal record although, while on release pending trial, he breached several of his conditions of release, including consuming intoxicants and failing to obey his curfew.

[14] Beginning as a teenager, Mr. Attia struggled with substance abuse and addiction. At some point prior to these offences, he completed an inpatient rehabilitation program, which led to him doing volunteer work and taking some training in addiction treatment. At the time of these offences, Mr. Attia had just broken up with his then-fiancé, which had been distressing for him. He had relapsed and was using drugs and alcohol again, although that played no part in his committing these offences. He has more recently, in 2019 and 2020, been attending other treatment programs here, including one at the Sheldon Chumir hospital.

[15] Mr. Attia married Elham Shehata in 2017. She appears to believe that his involvement in these offences was the result of difficulties in adapting to a new culture. Although they have had ongoing issues in their marriage and as a result do not presently live together, they are apparently planning for their future together. They do not have children. Ms. Shehata does not work due to health reasons and is financially dependent on Mr. Attia.

[16] Subject to deportation, Mr. Attia has been waiting for a pre-removal risk assessment from the Canada Border Services Agency. Because of the length of sentence herein imposed and the ranges for sentence suggested by counsel and supported by case law, his deportation proceedings are not relevant to the determination of his sentence.

[17] I note that, like his wife, Mr. Attia seemed to blame his conduct on the fact that he was new to Canada at the time these offences were committed. The Pre-Sentence Report commented that he demonstrated “little understanding or appreciation for the impact on the victim and instead emphasized the implications for himself”.

Mitigating and Aggravating Factors

[18] Section 718.2 of the Criminal Code provides that a sentence shall be increased for aggravating factors and reduced for mitigating factors. While none of the statutory aggravating factors were present in this case, the defence conceded and I agree that the fact the victim was a sex trade worker and thus particularly vulnerable to this precise sort of abuse was an aggravating factor. I would also consider the offender’s lack of remorse and avoidance of personal responsibility for what he did to this victim to be aggravating factors.

[19] As for mitigating factors, I do note that Mr. Attia has no criminal record. He has had the support of his wife and extended family throughout these proceedings and sentencing. Further, although his alcohol and drug addictions did not play a part in his actions giving rise to these convictions, he has demonstrated a promising mentality and a discipline in his work to become and remain sober that speaks well of his possible rehabilitation.

Approach to multiple convictions

[20] In *R v H(KD)*, 2012 ABQB 471, Mandersheid, J set out an approach to concurrent versus consecutive sentencing in this passage at para.48:

> The Alberta Court of Appeal cases that comment and instruct on concurrent vs. consecutive sentencing do not seem to disclose a single set of guidelines or a consistent approach to this issue. Being mindful of the special relevance of *R. v. Lemmon* as a "Judgment Reserved", and that all these cases are binding on subordinate courts including the Alberta Court of Queen's Bench, I propose to sentence KDH under the following principles:

> 1. It is generally appropriate to group offences that involve related persons, facts and events, and evaluate concurrent vs. consecutive sentence assignment within those groups ...
>
> 2. Chronologically distinct offences or offence groups warrant consecutive sentences ...
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> 3. Offences or offence groups that involve different victims or victims warrant separate consecutive sentences ...
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> 4. In an offence group, a concurrent sentence should not negate the intent of Parliament that sentencing courts sanction categories of misconduct ...
>
> 5. The total sentence of a group of offences may be calculated by a combination of consecutive sentences, or by certain offences acting as aggravating factors that increase the sentence assigned to the most serious offence ...
>
> 6. The most serious offence in an offence group is evaluated by the facts of the case ...
>
> 7. All 'possession' type offences that relate to the same date are served concurrently ...

[21] This case has been cited by our Court of Appeal; *R. v. Meer*, 2016 ABCA 368 and many judges of this Court have followed this approach, as do I.

Parties' Positions

[22] The accused and the Crown agreed that the more serious offences were the unlawful confinement, the choking and the robbery and the less serious offences were the assault, sex assault and uttering threats.

[23] On the less serious offences, both recommended concurrent sentences between 3-6 months.

[24] However, for the more serious offences, the Crown takes the position that the robbery is the most serious of all the convictions and that there is a 3-year starting point for that offence. Further, the Crown asks for the sentences for both the unlawful confinement and the choking to run consecutively to the sentence for the robbery. Applying the totality principle, and in consideration of the mitigating and aggravating factors in this case (discussed later) the Crown asks for sentence of 8 years.

[25] The defence characterizes the choking as the most serious offence, suggests a sentence of 2.5 years and submits that the robbery and the unlawful confinement sentences should run concurrently. The global sentence suggested by the defence is therefore 2.5 years or 30 months.

Choking/Overcoming Resistance by Choking (s.246(a))

[26] I agree with the defence position that the choking is the most serious conviction. As with many or most choking convictions, this was an act committed in the course of committing another separate offence, robbery. When Mr. Attia could not find the money he was looking for in the victim's bra during the course of his sexual assault, he put his hands around her neck and choked her unconscious. Judging by the 9-1-1 tape, she was unconscious for just over a minute.

She spoke at trial of regaining consciousness and of hearing her own breath, but not realizing that it was her own.

[27] Although no victim impact statement was provided at the sentencing hearing, no objection was taken to the Crown reading portions of the victim's testimony from the preliminary inquiry. That testimony spoke of her ongoing fear and disruption, particularly relating to the sensations she described at trial.

[28] I note that the serious physical danger attendant on this conduct has been the subject of appellate comment:

> Rendering a person unconscious, whether by choking, strangulation or suffocation, is an inherently dangerous act that is easily capable of causing death, or brain injury with devastating lifelong consequences. See *R v Horvath* (1982), 2 CCC (3d) 196 (Ont. CA), *R v Wallin*, 2003 BCSC 809 (BCSC) and *R v Muckle* (unreported, July 28, 2006, Alta PC). The difference in outcome, between unconsciousness, brain damage and death, may be only a matter of a few additional seconds of pressure. In the final analysis, this is an act of cruel domination met by sheer horror and often accompanied by serious physical and psychological harm.
>
> In short, although this crime is typically employed as a means to achieve another, it is often the more serious and life-threatening. Accordingly, it would be wrong to treat the offence of choking, suffocation or strangulation, where the victim has been rendered unconscious, as merely a particular or detail of the underlying offence. To do so would fail to hold the offender responsible for what is often the more serious offence, and in the process marginalize extremely dangerous conduct; *R v Lemmon*, 2012 ABCA 103 at paras.28-29.

[29] Because the offence of choking under s.246 of the Code is almost always committed in conjunction with one or more offences, the fact patterns vary widely. As a result, attempting to achieve sentencing parity is challenging. Most of the cases involve choking to commit sexual assault. However, *R v Robinson*, (1993) 135 AR 342 (CA) involved a woman choked to unconsciousness while the offender attempted to steal her car. The Court of Appeal increased the 2.5 years imposed by the trial judge to 4 years.

[30] A thorough review of the relevant cases to that time was done by Judge Meagher in *R v Kruse*, 2004 ABPC 194 at paras.42-62. In that case, the offender took his money back from his victim, a sex trade worker, after they had had sex. He then tried to sexually assault her. When she screamed and fought back, he threatened to kill her and tried to choke her. She was not rendered unconscious but the circumstances are otherwise similar to the case at bar. Mr. Kruse was sentenced to 3 years imprisonment.

[31] In *R v Lonechild*, 2008 ABPC 263, Fradsham, J sentenced the offender to 4 years for choking in the context of a sexual assault and other offences but reduced it to one year in applying the totality principle.

[32] Here we have a victim rendered briefly unconscious but without the serious injuries suffered by the victim in *Robinson, supra* and with no major sexual assault. The Crown argued for 4-5 years for the choking conviction and the defence, as mentioned above, suggested 2.5 years. I have determined that an appropriate sentence on this conviction is 3 years. As explained

below, this will be concurrent to the sentence for robbery but consecutive to the sentence for unlawful confinement.

Robbery (s.344(1)(b))

[33] In my view, the robbery committed by the offender was not subsumed in the choking to commit robbery outlined above to the point that *Kienapple* would apply. It is clear that the offender was initially and primarily intent on finding and keeping the $250 the victim had taken from his wallet. He choked her when he could not find the money in her bra and she resisted his attempts to do so.

[34] However, he did not stop there. Once she was unconscious, Mr. Attia dumped out her purse and went through the contents. He took and kept her wallet, containing the $250, but also took and kept all her identification, her keys and various personal mementos kept in her purse. In my view this supported a conviction for robbery that was not "Kienappled" into the choking conviction but is closely-enough related to the choking that the sentence for the robbery should be concurrent to the 3-year sentence above for choking.

[35] I accept that the current law is that I am to consider a 3-year starting point for robbery; *R v Johnas*, 1982 ABCA 331 at para.33. Defence counsel argued that the recent *R v Friesen*, 2020 SCC 9 has cast doubt on the utility of starting point sentences; paras.36-41. I do not agree with that interpretation of *Friesen, supra*, nor am I proposing to read the tea leaves on the pending cases from the Supreme Court that are anticipated to more directly address starting points. In my view, a 3-year sentence for this conviction is appropriate in any event.

[36] The Crown attempted to characterize this as closer to a home invasion and the defence attempted to characterize it as closer to a mugging. This was neither. While the victim agreed to go to the offender's apartment, once there, she was not allowed to leave and was robbed of all her belongings. This was not an attempt to simply take things of value to the offender. This was a robbery designed to take from the victim everything that she possessed that was of value only to her personally; costume jewellery, identification, keys, mementos and even her clothes.

[37] The Crown argued for 4-5 year imprisonment on the robbery charge (again, with some other offences to be concurrent) and the defence argued for 1.5-2 years on this conviction. I impose a sentence of 3 years, concurrent to the choking conviction above.

Unlawful Confinement

[38] The unlawful confinement is not subsumed in these other offences, in my view. The unlawful confinement began as soon as they arrived at Mr. Attia's apartment and continued throughout the entire interaction between him and his victim. While Mr. Attia ended up taking all the complainant's belongings through violence, the unlawful confinement lasted much longer than the other more discreet offensive conduct and involved separate harm to the victim.

[39] The unlawful confinement is, in my view, aggravated by the victim's vulnerability. While I take the accused's point that this was not a kidnapping, the victim was in a place where no one knew where she was. The offender was threatening her with death and taunting her that he had given her a false address so that she could not easily be found or rescued. While I found at trial that Mr. Attia did not agree to oral sex, I accepted that the victim was repeatedly offering this as she believed it would allow for her safe escape. That speaks to the fear she felt, which was also clear from her entire testimony at trial.

[40] The Crown argued for 3.5-5 years imprisonment on this conviction and the defence for 12 months – 1.5 years. Again, it is difficult to discern much guidance from other cases in which the unlawful confinement as it is almost always part of a larger criminal undertaking involving a wide spectrum of facts. In my view, the appropriate sentence for this conviction is 1 year, to run consecutive to the robbery and choking convictions.

Uttering Threats

[41] The death threats, which were admitted by Mr. Attia at trial, are a distinct part of his conduct toward the victim that night and so are not subject to *Kienapple*, as agreed by both counsel.

[42] The sentence for this will be concurrent to the other sentences because the threats were part of what made the unlawful confinement particularly terrorizing for this victim. While Mr. Attia explained that he did not intend to kill her but was just trying to scare her, her genuine fear for her life was obvious in her trial testimony and in the 9-1-1 recording.

[43] While the similar cases provided (*Kruse*, *supra*, *R v Manyshots*, 2018 ABPC 17) cited sentences of 3-6 months for uttering threats, I would, in these circumstances, impose a sentence of 6 months, concurrent to the 1-year unlawful confinement sentence.

Assault

[44] The assault conviction refers both to the offender pulling the victim to the bathroom after she regained consciousness and to his pulling her arm or pushing her out of the apartment once he had possession of all her things. The latter is a very minor assault, the former less so. While still clearly not a major assault, he pulled her hair hard enough to have left tufts of it on the floor and to have broken some of her jewellery.

[45] Between the Crown and defence, the suggested range for this assault was from 3-6 months; *R v Bandesha*, 2013 ABCA 255, *R v Henderson*, 2018 ONSC 3550. I believe the appropriate sentence for this conviction is 3 months, to run concurrent to the robbery conviction.

Sexual Assault

[46] This case began with an allegation of sexual assault, namely that the victim had performed oral sex on the offender under threat or coercion, because she believed he would or might allow her to leave if she did. The facts as found at trial did not support that version. I found that Mr. Attia repeatedly refused the offered blowjob and instead embarked on the course of threats, assault and intimidation discussed herein, in order to retrieve the $250 that was the price of their "date".

[47] However, Mr. Attia did commit a minor sexual assault during the course of these events. In attempting to look for the money in the victim's bra, he put his hands in her bra and tried to kiss her, all in an attempt to make her believe he was going to engage in sexual activity with her when his real intent was to find the money.

[48] The Crown conceded that this was akin to "groping" cases and would attract a sentence of 3-6 months. I impose a sentence of 3 months imprisonment, concurrent to the choking and robbery convictions.

Totality

[49] In conclusion, the sentences imposed are as follows:

Choking for the purpose of committing robbery (s.246(a))	3 years
Robbery (s.344(1)(b))	3 years, concurrent
Unlawful Confinement (s.279(2))	1 year, consecutive
Uttering Threats (s.264.1(1)(a))	6 months, concurrent
Assault (s.266)	3 months, concurrent
Sexual Assault (s.271)	3 months, concurrent

[50] The total term of imprisonment thus imposed is 4 years, less some minimal time served at 1.5X multiple.

[51] When sentences are imposed for multiple offences and some of those run consecutively to each other, the total sentence mays not exceed the overall culpability of the offender and may need to be reduced in order to so ensure; *Moriarty, supra* at para.204.

[52] I do not believe that Mr. Attia's total sentence is disproportionately harsh in reference to the events considered as a whole. In my view, there are no adjustments required to the 4-year sentence and so none will be made. Individually, the convictions may seem relatively minor and no doubt this was the basis for Mr. Attia's argument that the total sentence should be 2.5 years. While the events considered as a whole do not support an 8-year prison term as sought by the Crown, they were certainly serious enough to warrant a 4-year prison term.

[53] Ancillary orders are as granted on November 30, 2020, namely a DNA Order, a 10 year weapons prohibition and a 20 year SOIRA Order.

Heard on the 30th day of November, 2020.
Dated at the City of Calgary, Alberta this 21st day of December, 2020.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Richelle Freiheit
for the Crown

Jared N. Craig,
Leanndria Halero (student-at-law)
for the accused