Court of Queen's Bench of Alberta

Citation: R v McKnight, 2020 ABQB 443

Date: 20200731
Docket: 161396254Q3
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Matthew McKnight

Accused

Restriction on Publication

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Oral Reasons for Judgment on Sentencing
of the
Honourable Madam Justice D.A. Sulyma

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[1] I am charged with rendering a sentence on Mr. McKnight regarding the five guilty verdicts returned by the Jury.

[2] My reasons are oral as today I am of the view that it is important to Mr. McKnight and the public that my imposition of sentence is timely and certainly in considering the fact that the Court has not been sitting regularly during the last months of the Covid pandemic. Indeed, it was anticipated that the sentencing submissions would be heard in April, some months ago.

Findings of Fact

[3] The Crown analyses the evidence on each count as does the Defence. For purposes of this oral decision, I must say generally that the Crown has put forth a submission of individual sentences on each count on a principled basis and using the ***Arcand*** starting point. The Defence has relied on s 724 of the *Criminal Code* which allows for a trial judge considering a jury

conviction do her best to determine the facts necessary for sentencing from the issues that were before the jury and the jury's verdict.

[4] In its submission, the Defence relies on the recitation of guidance in this area and quotes excerpts from ***R v Ferguson***, specifically paragraphs 16-18 and 22, a 2008 decision of the Supreme Court of Canada (SCC).

[5] The process recommended by the SCC is that a trial judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

[6] The Defence distinguishes express and implied factual implications from the verdict where the factual implications of the jury's verdict are ambiguous. The Crown relies on the mandatory wording of s 724 that the judge is bound by the expressed and implied factual implications of the jury's verdict.

[7] The distinction is most relevant to my task of noting any aggravating facts as such must be proved by the Crown beyond a reasonable doubt. This in contrast to the burden on a balance of probabilities where there is ambiguity in determining the findings of fact. That allows a trial judge to consider the evidence and make her own findings of fact consistent with the evidence and the jury's findings.

[8] The task of the jurors was to find guilt or not guilt on each of the counts put forward by the Crown. It appears to me their verdicts were straight forward as the elements of the offence of sexual assault are not complex. They really require determination of the physical elements and the presence of or lack of consent and intent. These are the essential elements on which they founded their verdicts.

[9] It is in the context of these principles of factual implication that the Defendant revisited the evidence in his submissions and notably included an analysis of the credibility of evidence of all of the witnesses in relation to the five guilty verdicts.

[10] The above are the legal rules that I must apply in determining the evidence and findings of fact relevant to my sentencing. I will make further comments on evidence as related to each of the five counts that resulted in a guilty verdict.

[11] I adopt the general principles of sentencing. This begins with the objectives of sentencing set out in s 718 of the *Criminal Code*. Further, the Courts in the land have determined that the objectives of denunciation and deterrence are primary in the imposition of a sentence for a crime of sexual assault. I take this into account and also note that the restorative objectives of sentencing set out in s 718(d)(e) and (f) must be weighed in this case, and also the principle of restraint. Indeed, the Courts have considered circumstances where an offender is a first-time offender who is of previous good character that the rehabilitation potential may be high and thus be an important factor even where the offender has committed a serious criminal offence. Where a potential for rehabilitation exists, a crushing sentence ought to be avoided.

[12] Counsel have agreed that the approach to sexual assault sentencing in Alberta is enshrined in the Court of Appeal decision of ***Arcand*** which mandates a starting point of three years incarceration in instances of a major sexual assault.

[13] The definition of major sexual assault includes each of the convictions here as implicit in the jury findings of guilt is, in each case, an instance of intercourse, and penetration.

[14] The other major principles of sentencing include the principle of proportionality, the consideration of aggravating and mitigating circumstances relating to the offence or the offender and the principle of totality, which further relates to the principles of proportionality and parity. I have already stated that s 724 is very relevant to a consideration of aggravating and mitigating circumstances. The principle of totality is relevant to the issue of whether each sentence is to be served concurrently or consecutively. The Supreme Court of Canada in ***R v CAM*** stated at paragraph 42:

> "42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in Principles of Sentencing (2nd ed. 1979), at p. 56:
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> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".
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> Clayton Ruby articulates the principle in the following terms in his treatise, Sentencing, supra, at pp. 44-45:
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> > The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects." (Emphasis added)

[15] Parity and restraint are further principles that apply here.

[16] In this case, the Defence also urged I take into account a submission of State misconduct as a collateral consequence of an assault that occurred in the Edmonton Remand Centre. Also to consider strict bail conditions as a factor.

[17] In each case of these five victims, there was penile/vaginal intercourse. Accordingly, in each case a major sexual assault occurred. By the authority of ***Arcand***, the starting point for each sentence in relation to each victim is three years imprisonment.

[18] Mr. Bottos, on behalf of the Defence, revisited the evidence in his submissions including an analysis of the credibility of evidence of all of the witnesses.

[19] I am of the view that this is not what is contemplated by s 724. These other argued issues of fact ought not to be pursued in the face of the verdict in each case here. That is, that a detailed analysis of credibility is not what is contemplated by that section of the *Criminal Code.*

[20] However, such issues are relevant to a determination of aggravating and mitigating circumstances on each verdict. The law is that any aggravating fact of previous conviction must

be proved by the Crown beyond a reasonable doubt. This in contrast to the burden on a balance of probabilities where there is ambiguity in determining the findings of fact which allows a trial judge to consider the evidence and make her own findings of fact consistent with the evidence and the jury's findings.

[21] These are the applicable principles of the law of sentencing. In each case here, the victim was vulnerable as a young, intoxicated victim under the control and power of Mr. McKnight. I exclude KK from this statement as she only had one drink.

Count 1 - JS

[22] The Crown sets out the essential facts to the Jury verdict. In paragraph 10 of their submission they state this was a drug facilitated sexual assault. In argument, I took issue with that statement. I cannot find that there is evidence, let alone evidence of proof beyond a reasonable doubt, that the blackout she experienced was caused by anything other than alcohol. Indeed, she herself stated that it was probably due to the consumption of alcohol.

[23] Thus, that cannot be considered as an aggravating factor.

[24] It can be said that it is clear that Mr. McKnight was in complete control. However, I cannot find it proved that in that circumstance, he manipulated JS, ignoring her protestations or the fact she was in no position to provide affirmative consent to sexual activity. That conclusion goes too far.

[25] I find that there are few aggravating or mitigating circumstances. An aggravating circumstance is the fact that Mr. McKnight did not use a condom during the intercourse. It can be said that there was some evidence of empathy in Mr. McKnight bringing her friend, M, into the bedroom. Also, although she does not remember, she did not leave the apartment until the next day. I do not view either of these facts as mitigating. In my view, these facts are merely part of the narrative.

[26] Thus, there is an aggravating circumstance and I cannot find any mitigating circumstances. As a result, I find that a fit and proper sentence for this assault in the circumstances is four years imprisonment.

Count 3 - TN

[27] TN was in an unusual, sad situation as she had gone to meet Mr. McKnight as she was of the view he had asked her on a dinner date.

[28] She had a blank memory during her date time and her next memory after the last place was waking up in Mr. McKnight's bed in the morning, completely naked. He was asleep beside her and covered by a sheet. She felt tenderness around her vagina and associated that with intercourse.

[29] It is clear to me that the Jury accepted that intercourse occurred. However, as above, I cannot find evidence of Mr. McKnight using something in addition to the alcohol he provided that night. She was not certain of that fact or if the blackout was solely due to alcohol consumption. I cannot find the Crown has proved that her symptoms over the course of the night were due to drug consumption other than alcohol.

[30] Obviously, the Jury found that, in view of the evidence there was an absence of consent to sexual activity, whatever they accepted it to be.

[31] There was some mild form of consensual touching and kissing she admitted having with Mr. McKnight earlier in the evening, and she found him attractive. This is not a mitigating circumstance. The Courts have clearly stated that the only point of consent that matters is consent to the act, in this case intercourse.

[32] I do not find any aggravating or mitigating circumstances that would allow me to stray significantly from the starting point. However, the evidence does impel me to lower the sentence of three years imprisonment and find it to be two and a half years.

Count 6 - KK

[33] KK had worked that evening at Knoxville's. When she was at the party, she described his providing her with a drink that he re-provided her later in the evening. She did not recall discussions with her friends afterwards. There is an issue as to her recount that she was vomiting and what other witnesses stated.

[34] She did have comments on the context of her possible intoxication after this occasion. Other persons present at the party also had comments regarding her lack of apparent intoxication.

[35] Again, I cannot find that, having regard to the submission that she had only consumed one drink that night, that that is appropriate evidence or proof beyond a reasonable doubt that Mr. McKnight had added a substance to that drink. That is not an inference I can rely on.

[36] There was much made of her memory that she saw two males in the bedroom watching. They testified they had been looking for the bathroom. I do not have to accept or analyze that portion of the evidence as the Jury did find that a sexual assault occurred and the Jury was charged regarding acceptance of a witness' evidence.

[37] Part of that same narrative was that he advised her not to say anything to anyone because it was her fault and only whores worked at Knoxville's. Given the gaps and inconsistencies in this portion of the evidence, I do not find that it is an aggravating circumstance that Mr. McKnight made those offensive comments.

[38] There are no mitigating factors. This young woman was indeed young and inexperienced. I see no reason to depart from the starting point of three years.

Count 7 - DS

[39] This complainant had fairly vivid memories of the sexual encounters. She attested to vaginal sex and forced sex, and to being in a star position on her back.

[40] Her evidence was that she did state, "it hurts" and "stop". She believed he ejaculated on her back. This was confirmed by forensic evidence. That is, she had his semen on her back.

[41] Again, I cannot find on the evidence that this assault involved a drug other than alcohol being administered by anyone, let alone Mr. McKnight. The Defence submits that DS admits that the sexual activity inside the bedroom began consensually as she performed fellatio on Mr. McKnight for a short time. Obviously, the Jury did not focus on that and nor should they have, and focussed properly on the issue of consent to intercourse.

[42] He did not use a condom on this occasion and that is an aggravating circumstance.

[43] Her own evidence was of bruising. There was also evidence of Nurse King that confirmed bruising. I do conclude that that has been proved beyond a reasonable doubt and is an aggravating factor as it reflects a violence in the exchange.

[44] I certainly decline to find that the consensual context such as it was constitutes a mitigating factor.

[45] I find that the sentence on this charge ought to be four years.

Count 12 - KC

[46] The complainant testified that she was waking up when his penis was inside of her and he continued to have vaginal sex with her.

[47] There were other graphic descriptions of intercourse and forceful behaviours including her comment that she had asked that he please put on a condom and his vulgar reply. There was also forced oral sex. She left the apartment in the morning and went to a Mud Derby Festival the next day. She believed she had been drugged. I can find no proof of that assertion beyond a reasonable doubt.

[48] The fact that he did not use a condom is an aggravating circumstance.

[49] It could be an aggravating factor that she still has hip pain. However, that is not proof of that further physical injury.

[50] In the case of KC, I find that the starting point of three years is an appropriate sentence.

Totality

[51] Consecutively these sentences would add to a sentence of 16.5 years.

[52] The Crown has breezed past the issue of totality. Yet the rationale for such is clear as the Supreme Court of Canada stated in ***R v CAM***. That is, a cumulative sentence may offend the totality principle. I find that principle to be very pertinent to an overall sentence.

[53] I accept the proposition that the sentences must be consecutive as each is obviously in regard to a specific and separate person, act and place. This is not a situation of a "spree" given there are five instances of sexual assault over six years. The Jury by their verdicts have narrowed the scope of consideration as it may relate to the Crown theories of planning and plying that the Crown states apply to this offender. I say again that consecutive sentences must be imposed. However, I have regard to the principle of totality both as a consideration of the overall sentence and what has been called "a last look".

[54] Mr. McKnight is a first-time offender of previous good character.

[55] The global sentence of 16.5 years is disproportionate in the circumstances of these offences as each was an isolated offence over a total of many years. Also, given the eight acquittals on the other charges. I do not consider the moral blame worthiness of Mr. McKnight to be so grave as to require such a lengthy sentence to demonstrate society's need to denounce and deter other like-minded persons. A sentence of 16.5 years simply exceeds what would be just and appropriate in light of the overall culpability of this offender.

[56] This is in service of the principle of proportionality. I am of the view that the aggregate sentence must be reduced substantially in order to properly give effect to this principle. As a mathematical matter, I am of the view that totality applies to reduce the aggregate of the consecutive sentences to 10 years.

[57] I decline to analyze totality on a percentage basis as was urged upon me by Mr. Bottos. Indeed, it can be shown that his calculations had some fault as they were consecutively applied to a lesser outcome in the first instance. Or put another way, a compounding feature as the Crown submitted.

[58] Nor have I accepted the Crown's position that in the circumstances there should be no reduction.

[59] I have already taken into account aggravating and mitigating factors in each verdict above and that has resulted in the aggregate sentence before my application of the totality principle.

[60] I do not find it necessary to wade into the area of use of victim impact statements. The women involved in this case all gave extremely powerful and articulate accounts of their individual distress on each of their parts. They did, in my view, cover the same issue in their testimony in court. That is why I do not need to use those victim impact statements in a way that would affect any of the principles that I have applied here. In my view, the very concept of the starting point and how a court can adjust it inherently contains the possible physical and mental effects of the assault itself on an individual. I have already taken into account aggravating and mitigating factors in each verdict and that has resulted in the aggregate sentence before my application of the totality principle.

[61] The totality principle is very much connected to the principles of proportionality and parity. The cases of violent crimes and resulting sentences that were cited by Mr. Bottos was indicative of how courts approach these cases and in comparison to the 22.5 year sentence that is being offered here. I see them as comparable sentences that I can consider. However, I have already applied principles that apply to each guilty verdict and my reduction on the totality principle.

[62] The attack in the Remand Centre was visibly vicious. The Court was able to see that on videotape. The Court was also provided with reports from officers involved and that of an oversight officer from the Edmonton Police Service.

[63] These reports were troubling to me as at least one or another officer checked off the minor injury designation which was clearly inappropriate. Another one or two used the term 'assaultive' in their description of Mr. McKnight's behaviour after the officers entered the cell.

[64] All in all, there are disconnects between that evidence and what I saw depicted in the video.

[65] The report of oversight officer Rosnow stated that he had reviewed the video. Again, I cannot reconcile a proper review of that video to the comments he then relates. That is, the conclusion that follows from his meagre investigation. He used the word 'assaultive' in labelling Mr. McKnight's actions. That is not what I saw. The attack was not just vicious, it was ignored by the appropriate authorities by this coverup. I realize Rosnow may have been referring to Mr. McKnight's so called "failure to obey commands" but it is incorrect to say that he was at any time "assaultive" while being subdued by the officers.

[66] The other matter of concern is the almost gang action of up to 15 officers coming in and out with many of them applying substantial force to Mr. McKnight when he had been the victim at the time and not one officer had questioned that. Rather, they are all taking the opportunity to subdue him, yet from what I saw, he was the victim, and what I observed and Mr. McKnight testified to, is that he was in a state of confusion. This whole action was to me to be similar but worse to "rubber neckers" on the highway viewing an accident.

[67] The issue is much more than that of imprecise language in the records or the following of provincial regulations. It is also not in my view, a matter of whether excessive force was used. Rather, it is the whole inappropriateness of these officers flooding into the cell and many of them subduing a wronged man.

[68] I am of the view that this is related to sentencing as a mitigating factor. It is not outside vigilante behaviour such as occurred in the ***Suter*** case. I find that the law on collateral consequences does allow me to utilize my finding here and that the circumstances further warrant a further reduction in sentence. I take off one year from the 10 years I have set above as a result.

[69] Counsel addressed what kind of weight to give the rigorous bail conditions of which there were no breaches except one minor one at the beginning of the bail period. Also, the Crown submits that there is no evidence I can have in regard to determining Mr. McKnight's chances of rehabilitation.

[70] I disagree. Certainly, other cases could involve an assessment of risk or a psychological assessment of Mr. McKnight that could assist me in reaching that conclusion. But that is not the only way that the Defence can establish such on a balance of probabilities. In this case, I do have regard to the fact that Mr. McKnight is a first time offender, and youthful. I accept his own statements to me at sentencing that he is very repentant.

[71] I do not characterize his actions in the last four years as mere lifestyle changes. Rather, I find that he has been obedient to the requirements of the justice system. I am also of the view he is well aware that this is not any longer an issue of lifestyle choices but rather of criminal convictions.

[72] I am persuaded that he has excellent chances to rehabilitate and has faced now specific deterrence and factor that in as a further mitigating circumstance into a further reduction of one year, bringing the total sentence down to eight years.

Heard on the 16th day of July, 2020.
Dated at the City of Edmonton, Alberta this 31st day of July, 2020.

D.A. Sulyma
J.C.Q.B.A.

Appearances:

Mark Huyser-Wierenga and Katherine Fraser
for the Crown

Dino Bottos
for the Accused