IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Bowden, 2015 NSPC 13

Date: March 13, 2015

Docket: 2491519

Registry: Halifax

Between:

Her Majesty the Queen

v.

Philip Jason Bowden

SENTENCING DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: March 9, 2015

Decision: March 13, 2015

Charges: sections 267(b) of the *Criminal Code*

Counsel: Christine Driscoll, for the Crown

Brad Sarson, for Philip Bowden

By the Court:

Introduction

[1] Philip Bowden's son, X, was born on July […], 2012. Six weeks later X was admitted to hospital with life-threatening head injuries and Mr. Bowden was charged with aggravated assault.

[2] On January 26, 2015, the Crown accepted a plea of guilty from Mr. Bowden to the included offence of assault causing bodily harm to X. The Crown has proceeded summarily on that charge.

[3] As a consequence of Mr. Bowden's guilty plea, I am entering an acquittal on the aggravated assault charge, Count 2 on the Information. The Crown has offered no evidence on a charge of failing to provide the necessaries of life to X so I am dismissing that charge, Count 1 on the Information.

[4] The Crown is seeking a jail sentence of eighteen months for Mr. Bowden followed by three years' probation. Mr. Sarson submits that Mr. Bowden should receive a conditional sentence, or in the alternative, a jail sentence of no more than three to six months, with a probationary term of two years.

[5] A conditional sentence can only be imposed if certain prerequisites are met. An offender who qualifies for a penitentiary term or who would endanger the safety of the community if he were to serve his sentence in the community cannot receive a conditional sentence. Ms. Driscoll and Mr. Sarson indicate those concerns are not present in this case. What is in issue is whether a conditional sentence for Mr. Bowden is consistent with the purpose and principles of sentencing.

[6] I have concluded that a conditional sentence in this case is not consistent with the purpose and principles of sentencing, specifically the principles to be foregrounded, which are denunciation and deterrence. A jail sentence followed by probation is the appropriate sentence for Mr. Bowden, although I am satisfied that neither should be as long as proposed by the Crown.

History of the Case

[7] This matter has had a lengthy history. It was originally set for trial. On March 28, 2014 I set aside a previous guilty plea entered by Mr. Bowden in January 2014 as I was not satisfied he was admitting to the elements of the offence of bodily harm. Since June 2014 Mr. Bowden has been represented by Mr. Sarson. New trial dates were set. Another guilty plea was entered. I am satisfied that Mr. Bowden, with the benefit of his representation by Mr. Sarson, is now admitting to the essential elements of the offence of assault causing bodily harm.

Facts

[8] X was born healthy. He was last seen for a regular medical appointment by his family physician on August 9, 2012. No concerns were noted.

[9] On the morning of Monday, August 13, six-week old X was admitted to the IWK Emergency Department with severe head injuries. He was having seizures and required assistance with his breathing. Anti-seizure medications were administered and he was intubated and connected to a ventilator. CT and MRI diagnostic imaging revealed extensive bleeding in his brain. The Crown indicates that the doctors were concerned X might not survive his injuries.

[10] Mr. Bowden and X's mother accompanied him to the hospital. They had been living together and caring for X. They described a minor incident that was ruled out as an explanation for X's severe head injuries. The doctors at the IWK suspected that X had not been injured accidentally.

[11] During a lengthy interrogation by the police soon after X's admission to hospital, Mr. Bowden admitted that he had slapped X across both sides of his face in a back and forth motion with both hands. I find it is likely that happened on the weekend immediately preceding August 13. Mr. Bowden's admission was relayed by the police to the doctors managing X's care. In the opinion of the doctors, X's severe head injuries were consistent with what Mr. Bowden had described to police.

[12] X has been permanently disabled by Mr. Bowden's assault. He has permanent brain damage and is visually impaired. Information obtained by the Crown in February 2014 in anticipation of the scheduled March 28, 2014 sentencing, indicated that X was developmentally delayed, suffered reflux when

eating, was making sounds but no words, was not weight bearing, i.e., unable to stand even with support, and needed assistance with sitting.

[13] There is no more recent information because X has since been adopted foreclosing the Crown from getting an update on his condition. While it is possible (although we don't know) that X may have progressed in some respects, as of February 2014 he was assessed as having permanent disabilities – brain damage and significant visual impairment.

Pre-sentence Report

[14] A pre-sentence report was prepared on March 4, 2014 for the sentencing that was to have occurred on March 28, 2014. Mr. Sarson indicated an update to the pre-sentence report was unnecessary and advised he would provide some current information about Mr. Bowden's circumstances.

[15] Mr. Bowden is 40 years old. He described a "very positive childhood with a very loving and supportive family." He is of African-Nova Scotian heritage and experienced racism growing up in small town Nova Scotia. A long-term relationship with a woman he eventually married endured a lot of tension caused by the racist attitudes of his wife's family. A daughter was born not long before the relationship ended in 2004. Mr. Bowden has since lost touch with his ex-wife and daughter.

[16] Mr. Bowden left school after Grade 10 to work. His father described him to the author of the pre-sentence report as a self-taught auto mechanic who is "a good worker who likes to keep busy." Mr. Bowden confirmed that he has worked around cars most of his adult life and after various short-term jobs has always returned to auto mechanics.

[17] A very close friend of Mr. Bowden, Nolan Reddick, was interviewed for the pre-sentence report. Mr. Reddick, a corporal in the Armed Forces, has known Mr. Bowden since childhood. Mr. Reddick described Mr. Bowden as "a gentle person who has never been violent." He was shocked to learn of Mr. Bowden's involvement in the assault of X.

[18] Since being charged with the assault of X, Mr. Bowden has been living with his parents under house arrest conditions. He has been wholly compliant with the terms of his release conditions.

Additional Submissions by Mr. Sarson

[19] Mr. Sarson provided an update on Mr. Bowden's circumstances. Mr. Bowden has been working as a mechanic and also doing some snow removal this winter. When the weather improves he will return to doing some landscaping.

[20] Mr. Sarson noted that Mr. Bowden is a very reserved person who is not forthcoming about his feelings or opinions. He described Mr. Bowden as having "some limited insight" with respect to what caused X's injuries. Mr. Sarson explained that Mr. Bowden has not wanted it to be inferred that he used all of his force against X. Mr. Bowden admits to having hit X as he described in his police interrogation but not to having used unrestrained force in doing so.

[21] Mr. Bowden was described by Mr. Sarson as someone with a certain amount of pride that impeded his willingness to ask for help with the care of a fussy newborn. It is common ground that Mr. Bowden and X's mother had access to various supports – his parents and a support worker – but friction over certain issues meant that Mr. Bowden was disinclined to reach out. It was Mr. Sarson's submission that Mr. Bowden, stressed by work, the responsibilities of an infant, and a partner with limitations, found himself unable to cope with an unsettled baby.

Purpose and Principles of Sentencing

[22] Sentencing has been explicitly recognized as a "profoundly subjective process." (*R. v. Shropshire, [1995] S.C.J. No. 52, paragraph 46*) Determining "a just and appropriate sentence is a delicate art" which requires the careful balancing of "the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence..." (*R. v. M. (C.A.), [1996] S.C.J. No. 28, paragraph 91*) An appropriate sentence cannot be determined in isolation. Regard must be had for all the circumstances of the offence and the offender. (*R. v. Nasogaluak, [2010] 1 S.C.R. 206, paragraph 44*) Sentencing, as the Supreme Court of Canada has recognized, is a "profoundly contextual" process in which the

sentencing judge has broad discretion. *(R. v. L.M., [2008] S.C.J. No. 31, paragraph 15*)

[23] The maximum sentence for assault causing bodily harm where the Crown proceeds summarily is eighteen months. There is no mandatory minimum sentence. Crafting the fit and proper sentence for Mr. Bowden has involved consideration of the purpose and principles of sentencing and the weighing and balancing of the aggravating and mitigating factors.

[24] Parliament articulated the fundamental purpose and principles of sentencing in sections 718 and 718.1 of the *Criminal Code*:

> 718 [Purpose] The fundamental purpose of sentencing is 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;
> (b) to deter the offender and other persons from committing offences;
> (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 and to the community.

[25] Section 718.2 recites the other principles to be taken into consideration, which for the purposes of this case are:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders ...

[26] The proportionality principle set out in Section 718.1 is also relevant to sentencing Mr. Bowden: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Assessing proportionality requires a "complicated calculus" by the sentencing judge. *(L.M., paragraph 22*)

[27] Mr. Bowden's moral culpability for X's injuries is high. He intentionally struck X with a level of force that resulted in life-threatening injuries, leaving X with permanent disabilities.

Aggravating Factors

[28] There are statutory aggravating factors that apply in this case: Mr. Bowden abused a person under the age of eighteen (*Criminal Code*, section 718.2(a)(ii.1) and, as a parent, abused his position of trust in relation to his infant son. (*Criminal Code*, section 718.2(a)(iii). X was an acutely vulnerable victim, was very badly injured and has been left with significant, permanent impairments.

Mitigating Factors

[29] Although Mr. Bowden has a criminal record, some of it is very stale (theft convictions from 1993) and none of it involves any violence. The most recent offences are from 2006 and 2008 for driving with a blood-alcohol content of over .08 and a failure to attend court in 2009. Mr. Bowden's criminal record has played no role in my determination of his sentence.

[30] There are some mitigating factors in this case. While Mr. Bowden did not plead guilty at an early opportunity, I have recognized that he was originally charged with aggravated assault. Crown and Defence reached a plea agreement that the appropriate charge is assault causing bodily harm. Furthermore, Mr. Bowden admitted assaulting X early on, when he was interrogated by police. Through his

guilty plea to assault causing bodily harm, he has now acknowledged responsibility for injuring X. He took appropriate steps to get X medical attention when X's condition began to deteriorate. Mr. Sarson indicated that Mr. Bowden has paid a heavy price for what he has done: the child he loved is now lost to him.

[31] Mr. Bowden's assault of X was, as Mr. Sarson noted, a single incident. As best I can discern from the submissions of counsel, it occurred as a result of Mr. Bowden becoming frustrated and overwhelmed. There is no evidence that Mr. Bowden was deliberately trying to hurt X. It appears that Mr. Bowden was fleetingly violent, unrestrained by any thought that hitting his infant son across the face in the manner he did could cause serious injury.

[32] Having said that, Mr. Bowden was not a young, first-time parent. He had been a father previously to an infant although the extent of his involvement in the care of his daughter is something I don't know. But the vulnerability of infants is hardly an obscure fact to a person of average intelligence. Any reasonable person would realize that striking a baby across the face is very likely to cause significant injury.

Determining the Appropriate Sentence

[33] This is a tragic case for everyone involved. On August 9, X was healthy. On August 13, he had life-threatening brain injuries. He faces a future of significant challenges as a person with a permanent brain injury and severe visual impairment. A frustrated parent changed X's prospects in a single, thoughtless, violent moment. That moment of violence changed X's life and Mr. Bowden's as well.

[34] There is no issue that Mr. Bowden should receive a custodial sentence. The Crown submitted that only a lengthy sentence in a provincial jail will serve the sentencing principles to be emphasized in cases involving assaults on infants – denunciation and deterrence. The Defence argued that these principles can be satisfied by a sentence served in the community as a conditional sentence with strict conditions, including house arrest. In the alternative, the Defence submitted that a shorter jail sentence is sufficient punishment. Both Crown and Defence agreed that probation should follow.

[35] As Ms. Driscoll and Mr. Sarson acknowledged, the sentences for these kinds of cases are "all over the place." In some cases, even where the offender had no criminal record, was youthful, and the child appeared to have fully recovered, a conditional sentence has been rejected as "inadequate to express society's denunciation of this heinous offence." (*R. v. O'Brien, [2000] B.C.J. No. 669 (C.A.), paragraph 10*)

[36] The consistent theme that runs through the cases is that the primary sentencing objective is the protection of vulnerable children. (*R. v. T.J. V., [2000] N.W.T.J. No. 51 (S.C.), paragraph 17*) This has been expressed in plain terms by the Prince Edward Island Appeal Division in *R. v. T.J.S.*, [2006] P.E.I.J. No. 10 at paragraph 27:

> While each sentence must take into consideration the circumstances of each offence and each offender, in all cases where injuries are inflicted intentionally upon innocent and defenceless children, denunciation of the conduct and general deterrence have to be the paramount objectives of the sentence…

[37] Infants are to be cared for and protected by their parents and care-providers. (*R. v. E.M., [2005] O.J. No. 386 (C.J.), paragraph 89*) Infants are especially vulnerable victims, unable to protect themselves and unable to tell anyone when they have been harmed. (*E.M., paragraph 69*)

[38] In her submissions, Ms. Driscoll indicated that the Crown relied heavily on the Alberta Court of Appeal decision of *R. v. M.J.S.* ([2006] A.J. No. 928) for its position that a conditional sentence is not appropriate in Mr. Bowden's case. M.J.S. was sentenced for an assault causing bodily harm to his infant son aged one to three months. M.J.S. admitted to having applied force to the baby's ribs and legs on multiple occasions when he was crying, causing fractures. M.J.S. was 32 years old. He was assessed as having severely deficient parenting skills. While M.J.S. provided no real explanation for his actions, he accepted responsibility and was remorseful. The Alberta Court of Appeal upheld the sentencing judge's determination that a conditional sentence was not appropriate, stating:

> However, in our view, a conditional sentence is clearly not warranted in this case. A jail term is necessary to properly address the principles of general deterrence and denunciation, which are the predominant objectives in child abuse cases. (*cite omitted*)

[39] Mr. Sarson provided me with several cases where conditional sentences have been viewed as consistent with the purpose and principles of sentencing in cases of assaults on babies. Despite his very able submissions, I find the distinguishing features of these cases to be significant. What underpinned their outcomes is not present in Mr. Bowden's circumstances or the circumstances of his offence.

[40] In the Alberta Queen's Bench decision of *R. v. Sharpe*, [2010] A.J. No. 1058 a 33 year old offender pleaded guilty to the aggravated assault of his seven month old son. He admitted to throwing the baby up in the air four times, hitting his chin with his thumb on the third occasion. He explained that he sometimes "just gets mad." At the hospital the baby was observed to have subdural hematomas and bilateral retinal hemorrhages. The medical opinion was that an acceleration/deceleration type mechanism, with or without impact, was responsible, and a significant amount of adult force was required to have caused the injuries. At the time of sentencing the baby was doing well. While acknowledging that the sentencing emphasis in cases of assaults against a child must be on denunciation and deterrence, the sentencing judge concluded that these principles of sentencing could be satisfied by the punitive conditions of house arrest and curfew pursuant to a conditional sentence order of two years less a day.

[41] I note that the sentencing judge in *Sharpe* differentiated between abuses of trust for personal gain and the abuse of trust committed by a parent who assaults his child. He found that kind of abuse of trust less aggravating. (*Sharpe, paragraph 11*) There is no authority for such a distinction being made. The emphasis on denunciation and deterrence in sentencing parents who assault their infant children confirms the law's high expectations for these obligations of trust.

[42] A conditional sentence was ordered by the British Columbia Supreme Court in *R. v. Kierkegaard*, [1998] B.C.J. No. 2991, where a foster mother had been convicted of criminal negligence causing bodily harm. The foster baby had been

born methadone-addicted and was extremely needy. Ms. Kierkegaard was ill-equipped to deal with her, over-stressed by all the demands she faced as a single mother with her own child and another foster child with special needs, and sleep-deprived. Desperate with frustration she shook the baby causing permanent brain injuries and blindness. The sentencing judge noted that Ms. Kierkegaard "was not prepared for the intense, incessant, inconsolable needs of such a baby." (*Kierkegaard, paragraph 24*) She described the offender's actions as "isolated, spontaneous, non-premeditated…in circumstances which are stunningly unique." (*Kierkegaard, paragraph 57*) Ms. Kierkegaard had sought out and was still undergoing counselling after the incident. A two year less a day conditional sentence was imposed.

[43] Another British Columbia Supreme Court case, *R. v. D.N.K.*, [2004] B.C.J. No. 3066, produced a conditional sentence of two years less a day for the aggravated assault of a three-month old infant who sustained two skull fractures and a broken femur. By the time of the sentencing the child had fully recovered and the offender had confronted his severe methamphetamine addiction, fully rehabilitating himself. The Court regarded this to be "an exceptional case" making it appropriate to impose a conditional sentence. (*D.N.K., paragraph 62*)

[44] The Alberta Provincial Court case of *R. v. Evans*, [1992] A.J. No. 582 pre-dated the *Criminal Code* amendments that introduced conditional sentencing. Mr. Evans received a suspended sentence for the aggravated assault of an eight-week old infant whom he shook, causing a subdural haematoma. Twenty years old, he was described as displaying the characteristics of many adolescent parents susceptible to frustration and unaware of the "high vulnerability" of infants to whiplash injuries. The Court noted that the child might in future experience seizures and a learning disorder. (*Evans, page 2, QL version*) In sentencing Mr. Evans, the Court held that "…equipped with no particular parenting skills other than his considerable affection for the child, [he] lost his composure for a matter of seconds." (*Evans, page 4, QL version*)

[45] Mr. Sarson also asked me to look at the British Columbia Court of Appeal decision in *R. v. Carle*, [2001] B.C.J. No. 1797. Mr. Carle, a 20-year old father, had pleaded guilty to criminal negligence causing bodily harm in relation to a single incident of shaking his crying three month-old son. The baby sustained a

severe concussion. The British Columbia Court of Appeal overturned Mr. Carle's twelve-month jail sentence on the basis that the sentencing judge had erroneously punished Mr. Carle for a pattern of conduct to which he had not admitted, driving the sentence beyond what should have been imposed for the single act of criminal negligence, the shaking incident. In finding that the sentencing judge had misunderstood the extent of Mr. Carle's criminality, the Court of Appeal held that proper consideration had not been given to the appropriateness of a conditional sentence, stating: "Had he done so I am of the view he would have been persuaded a conditional sentence would have accomplished the purposes of sentencing including those of deterrence and denunciation to which he gave paramount importance." (*Carle, paragraph 9*)

[46] The judgments in *Carle*, *Sharpe*, *Kierkegaard*, and *D.N.K.*, all referenced denunciation and deterrence as the sentencing objectives to be emphasized. In each case, the circumstances of the offences and the offenders persuaded the judges that a conditional sentence could adequately serve these objectives. Mr. Sarson says Mr. Bowden's case also satisfies such an analysis. I find it does not. I do not hold the view that a conditional sentence for the assault of a baby can never be appropriate. It is not a sentence that has been prohibited by legislative amendment for summary assault causing bodily harm. And sentencing is a very individualized, contextualized process with each case requiring close scrutiny on its merits.

[47] The injuries sustained by baby X were very severe and have left him permanently disabled. He is not now doing well as was the case in *Sharpe* and *D.N.K*. and presumably *Carle*. Ms. Kierkegaard severely injured the baby in her care but did so under extreme and quite extraordinary pressures. Although Mr. Sarson noted that Ms. Kierkegaard was trained as a registered nurse, which presumably equipped her with skills other parents are unlikely to have, the sentencing court's judgment made it clear that she had no training or experience that would have helped her cope "with the overwhelming needs of this infant." (*Kierkegaard, paragraph 45*)

[48] As the *Kierkegaard* case indicates, it may be possible to seriously injure a baby by shaking it. Ms. Kierkegaard pleaded guilty to criminal negligence causing bodily harm for doing so. Mr. Bowden's case is not a criminal negligence case. Mr. Bowden assaulted his baby, striking X across the face in a back and forth

motion with both hands. While I accept that he did so out of stress and frustration, it was an intentionally violent act against a tiny, helpless baby. Sentencing for such violence must emphasize denunciation and deterrence. I am simply not satisfied that a conditional sentence in this case, even with strict punitive conditions, is consistent with these principles. A conditional sentence is not the appropriate sentence in this case.

[49] That being said, what is the appropriate jail sentence for Mr. Bowden? Mr. Bowden has no record for violence. He has pleaded guilty and accepted responsibility, and it is plain to me this has been difficult for him. He made inculpatory admissions to the police early on even if he struggled with pleading guilty. I accept what is implicit in this case - that Mr. Bowden did not deliberately set out to seriously injure his baby. He has endured the loss of his son. He has the support of his parents and his close friend who offered very positive comments in the pre-sentence report. I note that Mr. Bowden's father told the author of the pre-sentence report that Mr. Bowden is "broken" and "a shadow of his former self."

[50] Mr. Bowden has a record for alcohol-related driving offences and was sentenced in January 2010 to a thirty-day custodial sentence to be served intermittently. This will be Mr. Bowden's first straight-time jail sentence. I find it should be no longer than is required to satisfy the principles of denunciation and deterrence. The retribution that functions as an aspect of sentencing is constrained by proportionality. It

> …represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. (*C.(M.A.), [1996] S.C.J. No. 28, paragraph 81*)

[51] Mr. Bowden was fleetingly violent. He does not have a record for violence. Other than his more recent alcohol-related driving offences he has endeavoured to

be a responsible, contributing member of the community. Restraint and rehabilitation should also inform his sentence.

[52] The denunciation that must be emphasized in this case does not only find its expression in Mr. Bowden's sentence. He has been subjected to the onerous experience of the criminal justice process, which in his case has included ongoing media coverage. He has had to comply, and has complied with two and a half years of stringent release conditions. (I will note that on the authority of our Court of Appeal's decision in *R. v. Knockwood*, [2009] N.S.J. No. 448, I am not able to take Mr. Bowden's bail conditions into account as a mitigating factor without a demonstration of "actual hardship". No such evidence was presented.)

[53] Denunciation and deterrence are not the only sentencing principles that govern the crafting of Mr. Bowden's sentence. There is also the principle of rehabilitation that must not be marginalized. I find that Mr. Bowden's first straight-time jail sentence should not be overly lengthy and that the rehabilitative benefits of a probationary term should not be unduly delayed.

[54] In Mr. Bowden's case I find the appropriate sentence to be eight months in jail followed by two years' probation. I note Ms. Driscoll indicated that X's injuries were, in her words, "as serious as it gets" for a summary assault causing bodily harm so the Crown sought the maximum jail sentence available. I am imposing a jail sentence less than the maximum having taken into account the mitigating factors in this case, the denunciation and deterrence inherent in Mr. Bowden's experience of the criminal justice process and the important fact that he is accountable for committing a single act of violence only.

[55] Mr. Bowden's probationary conditions shall include the statutory conditions to keep the peace and be of good behaviour, to attend court if and when required, and to advise of any change to his name, address, employment or occupation. He shall also report to a probation officer within two days of being released from custody and thereafter as required; and attend for any assessment, counselling or programme as directed by his probation officer. I will note what Mr. Sarson has said about Mr. Borden not being very forthcoming and recommend that he be given the benefit of individual counselling if it is determined that would be helpful. His father mentions in the pre-sentence report that counselling would be beneficial.

[56] I will also include as a condition of Mr. Bowden's probation that he report to his probation officer if he becomes involved in an intimate relationship where there are children or a pregnancy.

[57] I am granting the Crown's request for a DNA order and a section 110 weapons' prohibition order for a ten-year term. There will be no victim surcharge as it would constitute an undue hardship in the circumstances.