

IN THE PROVINCIAL COURT

R.

vs.

R. J. W.

(Cite as: R. v. R. J. W., 2003 NSPC 1)

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

The Honourable Judge C.H.F. Williams, JPC
Delivered orally December 30th, 2002

Counsel: Eric R. Woodburn, Crown Attorney
Mark T. Knox, Defence Attorney

Introduction

The police charged the young offender RJW that he on March 3, 2002, committed the offences of attempted murder contrary to *Criminal Code* s.239; robbery contrary to *Criminal Code* s.344; breach of a probation order contrary to *Young Offenders Act* s. 26 and breach of an undertaking contrary to *Criminal Code* s.145(3). On August 1, 2002, after a Transfer Hearing pursuant to the provisions of *Young Offenders Act* s.16, the Youth Court Judge ordered that the offences proceed in ordinary court in accordance with the law ordinarily applicable to an adult charged with the same offences. With the consent of the crown and pursuant to *Criminal Code* s.606(4) the accused, on November 22, 2002, pleaded guilty to the offence of aggravated assault pursuant to *Criminal Code* s.268. I then found him not guilty of attempted murder and the Crown agreed to withdraw the charges of robbery, breach of probation and breach of an undertaking.

Facts Relating To The Offence

An agreed statement of facts was read into the record by the Crown. Here, I need not repeat those facts.

See Exhibit S-3. [Inserted]

Exhibit S-3

AGREED STATEMENT OF FACTS

Pursuant to the provisions of Section 655 of the *Criminal Code of Canada*, the Crown is hereby alleging and the accused, **RJW**, is hereby admitting the following fact(s) for the purposes of dispensing with proof thereof:

1. **THAT** on the 3rd of March 2002, at approximately 2117 hours, Ron Lambert, a taxi driver with Bob's Taxi, contacted his dispatcher and informed her that he had been shot. He was shot by a male by the name of [RJW] and AF was also in the cab at the time.

At 2120 hours, Halifax Regional Police arrived on scene and had a conversation with the taxi dispatcher. The victim was accompanied to the QEII Hospital wherein Dr. Tallon attended upon the victim in the emergency room.

Once Mr. Lambert had been shot in the head, he describes that it was "the loudest clap of thunder in my life and all of a sudden I was floating slowly forward but I could feel my hands were moving out. I couldn't control them and at the same time I was thinking I know

that he had shot me in the back of the head, [RJW] did, and I was thinking what could I grab first, my cell phone or my microphone and I reached up to grab for my cell phone and it wasn't where it was supposed to be. I know right where everything's at in my car ... but I reached down. I knew exactly where my microphone was and I just followed the wires of my microphone and said "Emergency, emergency, I've been shot in Hamilton Square." And the last thing I can remember is someone rooting through my pockets. I was praying that they wouldn't shoot me again." Ron Lambert's last words to his dispatcher were: "Tell my daughter I love her."

The victim had known Mr. [RJW], aka [RJW], for some time. He would drive Mr. W. when Mr. W. was delivering drugs. He did not know RJW actual name; however, he knew him as [RJW], and that he lived off [information removed] in Dartmouth. He also knew that he attends [information removed]. In fact, Mr. W. lives at [information removed], in Dartmouth. It has been confirmed that he attended [information removed] and that his nickname was [RJW]. Further, RJW had been described as having tattoos on both forearms. On RJW's right forearm, his tattoo says [information removed].

On the night in question, Ron Lambert picked up W and F at Uniacke Square. It was raining heavily. The three then drove toward the area of Hamilton Lane; W was seated directly behind Lambert. When on Gottingen Street, on the way to Hamilton Lane, W discharged one shot from his gun, a bolt action .22 calibre handgun, into the driver's seat of Ron Lambert's vehicle. Ron Lambert did not know that the gun was discharged into his car. Ron Lambert is able to describe the gun, as he had viewed it the night before when he had driven W to Mulgrave Park. W had discharged the gun into the air from the rear passenger seat of Ron Lambert's vehicle. He had the same gun on this person on the date in question.

The intention of going to Hamilton Lane was to allow W to make a sale of cocaine. The person who would buy from him habitually arrived quickly; however, on this night no one came. The stereo in the car was playing loudly while they waited. Ron Lambert discussed with Mr. W that he was losing money by waiting for this person. Banter was exchanged between Mr. W and Ron Lambert wherein the accused told Ron Lambert that he should shoot him. This type of banter was not uncommon, and was often the subject of joking between Lambert and W. Generally the two got along very well. When W indicated on this occasion that he should shoot Ron Lambert, Ron Lambert stated something to the effect of "do what you have to do." Ron Lambert indicated to Mr. W that he didn't have the balls to shoot Ron Lambert. At this point, Ron Lambert looked over his right shoulder and saw A F put his hands to his face. W fired one shot into the back of the head of Ron Lambert and Ron Lambert slumped to his right. Ron Lambert did not know that R W had the gun pointed at his head at any point on that evening.

F and W immediately exited the vehicle and ran west toward Brunswick Street.

It should be noted that, while in the car, A F was very quiet and did not say a word the entire time. Further, once shot, the victim could feel someone going through his shirt pockets. He

was pulled over the driver's seat into the rear of the vehicle for a brief time and the money from his shirt pockets was taken. He usually has five- and ten- dollar bills in his left pocket and twenty-dollar bills in his right pocket.

The police investigation revealed that the cell phone of the victim was smashed and found near the sewer drain on Brunswick Street, just north of Artz Street. The storm drain revealed a cell phone battery.

The Identification Section utilized blood spatter forensic analysis. This analysis confirmed that the shooter was directly behind the victim at the time the gun was discharged. Further, blood spatter analysis reveals that the victim was then dragged into the rear seat for a short time. Further, a bullet was found in the rear of the motor vehicle, submitted to the Crime Lab and confirmed to be a round from a .22 calibre gun. Finally, gunshot residue tests revealed the presence of gunshot residue on the right hand and right side of the face of R W. The swabs were taken upon his arrest, the day after the shooting.

The accused was arrested without incident at [information removed] the next day. He did not provide a statement to the police. He has been remanded since to the Waterville Youth Centre.

2. **THAT** Ron Lambert is presently unable to work, rendered blind, and on financial assistance from the CNIB. The blindness is a direct result of the gunshot to the head. The bullet remains lodged in the middle of Ron Lambert's brain. It was believed by the doctors and Mr. Lambert at that time that Mr. Lambert would not survive the gunshot injury. A priest had been called to administer Ron Lambert's last rites.
3. The accused admits to his full criminal record, and the fact that he was on probation and a recognizance at the time of the shooting.
4. The Crown alleges and the accused agrees that the accused and the victim had previously got along well. On this occasion, however, the accused's reaction to Ron Lambert's goading was to shoot him in the back of the head.
5. The Crown agrees that the accused is remorseful for his actions.

Offender Profile

At the time of the offence, RJW was 17 years old. The Predisposition Report prepared July 25, 2002 and the Update of December 11, 2002 described him, in part, as having a disadvantaged childhood raised mainly by his grandmother. However, the court ordered Psychological Examination and Report dated July 9, 2002, at p. 23 described him as socialized in an environment that:

...fostered and reinforced the development of criminal attitudes and behaviours. He identifies heavily with a criminal subculture (many of whom are family members). His criminal activity has earned him financial rewards in the community and social status within a correctional facility. Although he verbally expresses a strong desire to change, to set a better example for his younger brother, he may lack the confidence that he has the skills to do so.

This same Report related that despite his upbringing that involved parental neglect, lack of adequate parental or adult supervision with no positive role models, drugs, sexual, physical and emotional abuses, and truancy with borderline intellectual functioning, he did comparatively well in his studies at school with a career goal to complete “ Grade 12 and going to University or College to take a mechanics course or to play football.” Furthermore, despite the probability that he may reoffend due to his antisocial lifestyle, because of his youth and determination to do better, he can still be rehabilitated in a structured environment. The Predisposition Report Update discloses that “he took responsibility for his actions, however, minimized his responsibility by suggesting he “made a mistake.” Young Offender W did not admit remorse for this offence.”

Record

The crown tendered the following uncontested record of the accused:

Sept. 11/00	12 months Probation	s. 4 (1) C.D.S.A.	
Jan. 22/01	Time served Remand Dec. 12 - Jan. 22) 9 months Probation	s. 145 (3) C.C.	Breach of recognizance
Mar. 14/01	3 weeks open custody 12 months Probation	s. 5 (2) C.D.S.A.	
Sept. 13/01	3 months open custody	s. 5 (2) C.D.S.A.	
	3 months closed custody	s. 145 (3) C.C.	Recognizance Breach
Sept. 19/01	1 month open custody	s. 264.1 C.C.	

Nov. 14/01	30 days closed custody		s. 145 (3) C.C.	
July 24/02	6 months Probation	((s. 266 (a) C.C. s. 145 (3) C.C.	Pled guilty Pled guilty

Aggravating Circumstances

From the submissions of counsels I find the following aggravating factors:

- act of gratuitous violence
- use of a firearm in a drug related environment
- harm done to the victim, his family and community are profound and enduring
- the victim was left to die
- the accused was on probation at the time of the incident

Mitigating Circumstances

- age of the accused, both chronologically and developmentally
- a guilty plea - save the victim from testifying
- he has no serious related criminal record
- he is remorseful

Victim Impact

The Crown read into the record the Victim Impact Statement.

On March 3rd, 2003 at approximately 9:15 p.m. my life changed forever. No matter what sentence the offender receives, I'm sentenced for life. I have had to turn in my driver's licence. I have lost my ability to earn a living and my freedom.

I have to force myself to go on each day. I am dependent on others as I have lost my independence. There are 3 pieces of bullet that will stay in my head forever. I am in constant pain with headaches and a stiff neck. My sight is all but gone.

I now suffer from Post Traumatic Stress Disorder. Suicide is constantly on my mind. I have no relationships anymore. I have become withdrawn and am afraid to go outside. I spend most of my time in my room with my door locked.

I am literally learning a new life style. I am hoping the CNIB will provide retraining for me, so that I may someday regain a little of my independence.

Sentencing

Today, I sentence RJW only on the offence of aggravated assault. First, I should say that crimes that involved violence and great harm to the victim would attract lengthy penalties. Second, I am mindful of the purposes and principles of sentencing that are set out in the *Criminal Code* s. 718 to 718.2. I am also mindful that there appears now to be a prevailing recourse to violence, involving the use of a firearm in circumstances suggesting a subculture of illegal narcotics. When such offences are committed, particularly by a youth, they arouse the passions of a public that has become tired of violent crimes, whether by a youth or by an adult, and wonder why at the time of punishment the Courts do not extract retribution from the offender. However, as was put by Lamer C.J., in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 81, ". . . retribution requires the imposition of a just and appropriate punishment and nothing more . . ." Third, in attempting to arrive at a just and appropriate punishment, I must assess the seriousness of the crime, the surrounding circumstances and attempt to compare the event, the accused and the circumstances to the worst possible instance committed by the worst offender. Here, it seems to me that we can all agree that the crime before me is certainly one that endangered the life of the victim in a most serious manner

I think that objectively, here, the punishment must reflect the moral blameworthiness of RJW. Moreover, when I deal with the "starting point" approach, I bear in mind the words of McLachlin J. [as she then was] writing for the minority in *R. v. McDonnell*, [1997] 1 S.C.R. 948, [1997] S.C.J. No. 42, 114 C.C.C.(3d) 436, at paras. 58 and 101:

The starting point approach to sentencing involves two steps. First, the judge determines the range of sentence for a typical case. Using that range as a starting point, a trial judge then adjusts the sentence upwards or downwards on the basis of factors relating to the particular offence and offender . . . This approach is distinguished from the tariff approach of sentencing which takes no account of the individual circumstances of the offender . . . the starting point approach combines general considerations related to the crime committed with personalized conditions relating to the particular offender.

.....

The starting point merely indicates the appropriate range of sentence for an offence of a certain degree of seriousness.

Sopinka J. writing for the majority stated at para. 43:

I add that I do not disagree with McLachlin J. that appellate courts may set out starting-point sentences as guides to lower courts. Moreover, the starting-point may well be a factor to consider in determining whether a sentence is demonstrably unfit. If there is a wide disparity between the starting-point for the offence and the sentence imposed, then, assuming that the Court of Appeal has set a reasonable starting-point, the starting-point certainly suggests, but is not determinative of,

unfitness.

Furthermore, in *R. v. Harris*, [2000] N.S.J. No.9 (C.A.), a sentencing for home invasion and aggravated assault, Glube C.J.N.S. stated at para. 53:

Although courts of appeal can still speak to elements of blameworthiness, gravity of offences, aggravating and mitigating factors and the like providing some guidance, they should not create minimum sentences.

The *Criminal Code* s.718.1 enacts the principle of proportionality. In *R. v. Priest* (1996), 110 C.C.C.(3d) 289 (Ont. C.A.) Rosenberg J.A. stated at pp. 297-98:

In the recently-proclaimed s. 718.1, Parliament sets out the fundamental principles of sentencing.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender and the harm occasioned by the offence. The Court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good.

Discerning the "starting point" from the reported cases is not too difficult, notwithstanding the myriad of aggravating and mitigating circumstances involved. I have considered the numerous cases referred to by the Crown and defence to determine the range of the sentence for this type of aggravated assault. Although helpful in assisting me to determine the appropriate range, no two cases are exactly the same. I am also reminded of the provisions of the *Criminal Code* s.718.2(b) which state:

A court that imposes a sentence shall also take into consideration the following principles:

(b) a sentence should be similar to sentences imposed on

similar offenders for similar offences committed in similar circumstances.

In **R. v. Muise** (1994), 94 C.C.C.(3d) 119 (N.S.C.A.) Hallett J.A. wrote at p.124:

...sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected from a sentencing judge is to arrive at a sentence that is within an acceptable range.

In **R. v. AD** July 7, 2002, Prov.Ct., unreported, the victim was stabbed repeatedly and suffered injuries that changed his life and the life of his wife and daughter forever, and Curran, PCJ., imposed a sentence of 10 ½ years.

In **R. v. S.F.A.**, [2001] N.S.J. No.28 (S.C.), physical injuries by use of a shotgun and egregious conduct by the accused, Cacchione J., imposed a sentence of 6 years.

In **R. v. Melanson**, [1998] N.B.J. No. 140 (C.A.), the court imposed a sentence of 8 years where the accused had a history of violence and left his victim in a coma.

In **R. v. Pitkeathly**, [1994] O.J. No.546 (C.A.), the court imposed a sentence of 8 years where drunkenness was a factor and the victim suffered severe injuries that resulted in permanent disfigurement and post traumatic stress disorder.

In **R. v. Opsitnik**, [1986] O.J. No.83. (C.A.), the court imposed a sentence of 14 years where there were serious injuries, an unrepentant accused with antisocial personality disorder. (After trial on a charge of attempted murder, found guilty of aggravated assault.) Here the accused had a prior record that included attempted murder and armed robbery.

In **R. v. Izzard**, [1995] N. S.J. No 619 (Prov. Ct.) MacDonald PCJ, imposed a sentence of 5 years for the use of a hatchet.

I have considered as well **R. v. Julian**, [1991] N.S.J. No.84 - 4 years, and the sentences that were imposed in what has been commonly referred to as the Darren Watts beating, McQuaid, Smith, Dixon et al. Sentences of 8 years were upheld in these particular cases where the victim was beaten and kicked by a group of assailants and left with some permanent serious brain injuries.

Having considered these and other cases not referred to by counsels and balancing the societal goals of sentencing against the moral blameworthiness of RJW, I conclude that the appropriate range of a sentence for this offender in the circumstances that present, is one between five years and ten

years.

The accused is a young man. At his age and circumstances, any lengthy loss of freedom is severe. He has no major past violent criminal convictions but has convictions for possession of narcotics, trafficking in narcotics and breaches of court orders. Here, however, the violence is overwhelming. It calls for denunciation and condemnation. In a society where the entertainment industry daily depicts violence gratuitously there is a growing body of evidence that tragic results take place. This is one of them. Thus, the message to be heard by all members of society is that there are severe consequences for real life personal violence even for youthful offenders. From the evidence, I would characterize RJW's conduct as not only inexplicable but reprehensible and moronic. In general, I think that young persons who commit these types of crimes should know that their age will not save them from appropriate and lengthy sentences. This message must be loud and clear. Also, this is no time for an imperceptible and sentimental approach as crimes of this type will not stop if offenders such as the accused run the risk of only short terms of imprisonment. Real deterrence is required to protect society.

Having said that, I must however consider RJW's circumstances, the nature of the offence and what a lengthy sentence will do in the context of his rehabilitation. I must also consider his potential for rehabilitation into civilized society. He has accepted responsibility for his action. Rehabilitation is possible. However, here, it must be clear that denunciation, deterrence and the protection of society are the prevailing factors. On the facts and submissions, I find that he is not the worst of offenders and despite his disadvantages does well when in a structured environment. True, his conduct has left lasting and profound consequences. However, in terms of similar offences by similar accused, on the submissions before me and considering the aggravating and mitigating factors, as I have presented, in my view, this is not the worst of offences.

Further, in my opinion, the personal difficulties and disadvantages experienced by the accused are no justification to commit aggravated assault. They are of course factors to be considered. However, given the seriousness of the offence, the rehabilitation of the offender, must yield to the principle of deterrent both general and specific. **R. v. Grandy** (1986) 70 N.S.R. (2d) 270, **R. v. Brophy** (1989) 89 N.S.R. (2d) 417, **R. v. Colley** [1991] N.S.J. No.62, 100 N.S.R. (2d) 447 (C.A.).

However, as put by Freeman J.A., in **Colley**:

In dealing with lengthy sentences courts must not lose sight of the fact that each day, to say nothing of each year, an individual is deprived of liberty is a significant punishment. If the need to protect society can as well be served by a shorter sentence as by a longer one, the shorter is to be preferred. The specific question in this case is whether society's interests demand a fifteen year sentence, as in **Sonier**, or whether a twelve year sentence would suffice, as in **Rollin**. If doubt exists, the individual should be given the benefit of that doubt.

The prisoner will stand. This court sentences you to a period of incarceration of 7 years and 9 months. I have taken into consideration the period of 10 months that you have spent on remand and have given you a credit of 15 months or 1 ½ the time you were on remand. Total Incarceration 7 years and 9 months accordingly.

You will also be subjected to a firearms, crossbow and prohibited weapons restrictions for 10 years, from time of your release. Also, you will be subjected to a DNA order. That is an order where your DNA will be on the national data bank. That in itself is a great restriction to you at your youth. That is the sentence of this court.