IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Jones 2011 NSPC 92

Date: November 29, 2011
Docket: 2291404, 2294277, 2294279, 2294282
Registry: Halifax

Her Majesty the Queen

v.

Dalton Cornelius Jones

DECISION ON SENTENCING

Judge:	The Honourable Judge Anne S. Derrick
Heard:	November 25, 2011
Decision:	November 29, 2011
Charges:	*Criminal Code* sections 145(2)(b); 267(a); 266 x 2;129(a)
Counsel:	Catherine Cogswell - Crown Attorney Dalton Jones for himself Roger Burrill, *amicus curiae*

By the Court:

Introduction

[1] On November 2, 2011 I found Mr. Jones to be not criminally responsible by reason of mental disorder (NCR/MD) in relation to the charges of assault and threats against his now estranged spouse, Shealynn Rogers (counts 2 and 3 in the Information); the March 9, 2011 assault of his daughter, Niala Jones (count 4); the Dawn Street assault of Niala (count 8); and the Walmart assault of Niala (count 9). (*R. v. Jones, [2011] N.S.J. No. 583*)

[2] I referred the NCR/MD charges to the Criminal Code Review Board for disposition and remanded Mr. Jones to the East Coast Forensic Hospital.

[3] I made the following findings in relation to the remaining charges before me:

> **32** I find Mr. Jones criminally responsible for the plastic broom and Bank of Montreal assaults of Niala and for resisting the police when they arrested him. Again relying on Dr. Theriault's expert opinion I am satisfied that Mr. Jones was, at the time of the plastic broom and Bank of Montreal incidents, in the prodromal stage of his mental disorder. While that finding falls short of satisfying the requirements of section 16 of the *Code*, I regard it as relevant to a determination of the fit and proper sentence for Mr. Jones on these charges, a matter I have, of course, yet to receive submissions on…

[4] Mr. Jones also admitted to having failed to attend court on February 21, 2011 and I found him guilty on this charge. (*R. v. Jones, [2011] N.S.J. No. 430, paragraph 68*)

[5] On November 25 I received submissions from Ms. Cogswell and Mr. Jones and Mr. Burrill as the *amicus* on the matter of what is a fit and proper sentence for Mr. Jones on the charges for which I have made a finding of criminal responsibility. Mr. Burrill provided written submissions and some cases on the issue of how Mr. Jones' mental health and the provisions of the *Immigration and Refugee Protection Act* may be relevant to Mr. Jones' sentencing. I will address those issues in due course.

[6] Also relevant to this sentencing are a pre-sentence report and the reports prepared by Dr. Scott Theriault dated October 16 and 26, 2011. I referred to these reports extensively in *R. v. Jones, [2011] N.S.J. No. 583*.

[7] On November 28, I received a copy from Mr. Burrill of a further report Dr. Theriault had sent him dated November 22, 2011. The relevant portion of this report is as follows:

> This is just a brief correspondence to you concerning Mr. Jones' current situation so that you may appropriately inform the court. Mr. Jones has been found not capable of consenting to treatment and treatment has begun with the permission of his Substitute Decision Maker, his brother, Desmond. He has been started on an antipsychotic medication, namely risperidone, recently increased from 2 mg to 3 mg per day. At this time, Mr. Jones is tolerating the medication well but I would inform you that he has not, as of yet, shown any response to the medication. He remains polite and compliant on the unit and there have been no difficulties with Mr. Jones' behaviour. However, he continues to espouse his view that he is in fact Jesus Christ and that all will be made clear in time and he will be vindicated, in his view. He views his being here at this time as a form of persecution for his beliefs.

The Crown's Position

[8] Ms. Cogswell submits that Mr. Jones' sentence should be one day of custody on each charge, concurrent to each other, deemed served by his attendance in court on November 25. Ms. Cogswell has indicated that the sentence she is proposing reflects the fact that Mr. Jones has been found not criminally responsible by reason of mental disorder in relation to the most serious charges. Ms. Cogswell advised that she has also taken into account Mr. Jones' pre-trial custody.

[9] Ms. Cogswell notes that Mr. Jones has spent almost 7 months in custody in relation to the charges. It is agreed that Mr. Jones has been in custody since March 10, 2011, however his remand was interrupted by a sentence on June 23, 2011 of 28 days for offences committed prior to the ones I have been dealing with. The time he spent serving this sentence of 1 month is subtracted from the total time he has spent in custody, leaving about 7 months as the length of his remand time up to November 2, 2011.

[10] Ms. Cogswell advised that Mr. Jones has spent much of his remand time in Protective Custody. This is due to the fact that fellow prisoners reacted with hostility to his disclosures about assaulting his daughter and being Jesus Christ.

Aggravating Factors

[11] The *Criminal Code* reflects that where abuse involves a child, this is an aggravating factor to be considered on sentencing. Section 718.01 of the *Criminal Code* requires that the sentence for an offence involving a person under the age of eighteen must emphasize denunciation and deterrence.

[12] Under Section 718.2(a)(ii.1) of the *Code*, the abuse of a person under eighteen was already an aggravating circumstance. Abusing a position of trust or authority in the commission of an offence is also an aggravating factor. (*section 718.2(a)(iii)*) Ms. Cogswell submits that there is also the aggravating factor that Shealynn Rogers and Isha Rogers were present when Mr. Jones assaulted Niala with the broom handle and at the Bank of Montreal which was traumatizing for them too.

[13] Ms. Cogswell also cites as aggravating the circumstances under which Mr. Jones resisted arrest by the police. This occurred in the gymnasium of the school where he was a volunteer soccer coach and, at first, there were children present. Mr. Jones was unmoved by the urging of the police officers that he cooperate with them and resisted the arrest while there were "several children in the gym and staff members…"(*Testimony of Cst. Allison Henneberry, Trial Transcript, page 556*)

[14] However, as Cst. Henneberry noted in her testimony, once she noticed them, she immediately instructed the staff members to remove the children from the gym "which they did quite quickly." (*Testimony of Cst. Allison Henneberry, Trial Transcript, page 556*)

[15] When compliance was achieved, there was no one in the gymnasium but Mr. Jones and the three police officers and only a few people "out in the hallway looking in." (*Testimony of Cst. Joshua Collins, Trial Transcript, page 609*) Mr. Jones' arrest, including bringing him to the police car took "not even ten minutes". (*Testimony of Cst. Allison Henneberry, Trial Transcript, page 564)*

[16] Cst. Henneberry observed an unusual reaction from Mr. Jones once he was subdued by police. While still in the gymnasium and as he was being escorted out

to the police car, he was smiling and almost giggling. Cst. Henneberry testified that having seen Niala's face before going to arrest Mr. Jones for assaulting her, she felt that his behaviour was "not a normal reaction that one would expect, and I've never had somebody smile or giggle when they've been arrested before." (*Testimony of Cst. Allison Henneberry, Trial Transcript, page 562)* The other officers involved in the arrest also noticed Mr. Jones' peculiar demeanor. (*Testimony of Sgt. Leonard Haughn, Trial Transcript, page 589;Cst. Joshua Collins, page 606)*

[17] I have reviewed the relevant portions of the trial transcripts and my decision from Mr. Jones' trial and I am not persuaded that there was anything aggravating in the circumstances of Mr. Jones' arrest. I accept the Crown's submission that police duties and responsibilities are challenging and can involve risk but there was nothing about the encounter with Mr. Jones that made his resistance against being arrested any more significant than many other arrests that are undertaken by police. The most outstanding feature of the arrest seems to have been Mr. Jones' odd demeanor. Obviously, if a person is passive on arrest they do not get charged with resisting. Everything more than passivity cannot be treated as aggravating for sentencing purposes or the mere fact of resisting would be turned into an aggravating factor when it is already the basis for the charge in the first place.

[18] Ms. Cogswell points to Mr. Jones' criminal record as an aggravating factor in this sentencing.

[19] Mr. Jones' first conviction was on November 28, 2005 for assault. I am told Mr. Jones hit a previous partner in the face with his palm. This occurred on August 18, 2005. He received a conditional discharge. That is all I know about that matter.

[20] Mr. Jones was next in trouble four and a half years later on March 18, 2010 when he resisted arrest. He was sentenced on June 2, 2010. At the same time, he was sentenced for breaching a no-contact provision of an undertaking or recognizance by having contact with Shealynn Rogers. The undertaking or recognizance and the arrest were in relation to charges the Crown ultimately did not proceed with. At his June 2, 2010 sentencing Mr. Jones received a four-month probation order.

[21] Mr. Jones breached two conditions of this probation order, in the period of June 8, 2010 to September 15, 2010, by not reporting or complying with conditions

(*Pre-Sentence Report, page 6*) and on July 31, 2010 when he was charged with causing a disturbance by fighting, screaming, shouting and swearing at Shealynn Rogers. The police responded while this was happening and Mr. Jones resisted being arrested. For these offences, the causing a disturbance and resisting arrest, and the probation breaches, Mr. Jones was sentenced on June 23, 2011 to a total of 28 days in custody. This is the sentence I referred to earlier in these reasons that occurred during his remand for the charges I have been dealing with.

[22] Ms. Cogswell submits that much of Mr. Jones' record is "domestic related." This, she says, is an aggravating feature of his record in relation to the charges I am sentencing him for which are also "domestic" in nature.

The Position of Mr. Jones

[23] Mr. Jones had little to contribute at his sentencing hearing. He advised that he had no comments in relation to the submissions by Ms. Cogswell other than to say he agreed with them. I put no stock in this given Mr. Jones' delusional state. He had read the written submissions of Mr. Burrill and had nothing to say in relation to them either. Before I turn to Mr. Burrill's submissions, I will review Mr. Jones' pre-sentence report to which Mr. Burrill has referred.

The Pre-Sentence Report

[24] Mr. Jones is 31 years old. He was born in Sierra Leone. He came to Canada with his mother and two brothers to escape the civil war in either 2001 or 2002 – both dates are mentioned in the pre-sentence report. It is well-known that Sierra Leone experienced a brutal, vicious civil war from 1991 to 2002. According to the pre-sentence report, Mr. Jones now has four brothers in Canada, all older. Two of Mr. Jones' brothers live in Halifax and two live in Edmonton. He has a close and positive relationship with his mother who lives in Halifax.

[25] Although Mr. Jones grew up in poverty, he had a positive upbringing. I have been advised that he has a very supportive family who are deeply concerned about his circumstances. Mr. Jones has support from members of the community as well. This support has been evident during the many court appearances we have had in this case. Mr. Jones will need this support as he is treated and once he is discharged by the Criminal Code Review Board.

[26] Mr. Jones was in a common-law relationship before he met Shealynn Rogers. He has twins from that relationship but has not had contact with these children since December 2009.

[27] Mr. Jones acquired vocational skills both in Sierra Leone and since coming to Canada. He did not finish high school in Sierra Leone but attended two separate technical schools and completed an Apprenticeship Program in masonry construction. He received a certificate from the Nova Scotia Community College in Office Information Technology after completing a one-year programme.

[28] Mr. Jones has worked in a variety of jobs including at hotels on the front desk and in housekeeping, as a labourer, and with a personal care agency sitting with patients in hospital. He worked in a masonry company in West Africa and has been employed on a part-time basis with his brother's painting/renovation business in Halifax. Mr. Jones has not been entirely successful holding on to jobs and has had no paid work since December 2009.

[29] The pre-sentence report indicates that Mr. Jones participated in an anger management programme through the Kentville Probation office in relation to "a domestic violence related offence." (*Pre-Sentence Report, page 5*) This programme was ordered at the time Mr. Jones was given a conditional discharge for the assault of his partner in 2005. He also completed an anger management programme. (*Pre-Sentence Report, page 6*)

[30] Shealynn Jones was interviewed for the pre-sentence report and described how her "somewhat uneventful" life with Mr. Jones changed when he became "controlling, demanding and unpredictable." (*Pre-Sentence Report, page 6*) She does not want to have any contact with him nor does she want him to have any contact with Niala.

[31] The author of the pre-sentence report also described Mr. Jones' delusional beliefs about being Jesus Christ.

The Submissions of the *Amicus Curiae*

[32] Mr. Burrill indicated at the sentencing hearing that he has had contact with Mr. Jones' family and some information from them is contained in his Brief. Mr. Jones' brother, Harold Jones, advises that he will employ Mr. Jones with his construction business "if and when mental health is restored." He describes Mr.

Jones as having worked for him in the past and says he was a valued employee. Apparently Mr. Jones can live with his mother once he returns to the community.

[33] Mr. Burrill notes that "Mental health issues may have a significant mitigating impact on sentence." He refers to the comments of the Alberta Court of Appeal in *R. v. Tremblay,[2006] A.J. No. 1124*:

> **7** [W]here an offender is found to be criminally responsible, but suffering from a serious mental illness, a more lenient disposition reflective of the offender's diminished responsibility is called for: R. v. Taylor (1975), 24 C.C.C. (2d) 551 (Ont. C.A.); R. v. Moreau (1992), 76 C.C.C. (3d) 181 (Que.C.A.); and R. v. H.M.T., [2004] A.J. No. 1228 (Q.B.)

[34] The other issue that Mr. Burrill has brought to my attention is what he refers to in his Brief under the heading the "Immigration and Refugee Protection Act Implications of Sentence." Mr. Burrill advises that the sentencing of Mr. Jones, particularly in relation to the "plastic broom incident" has "significant potential consequences" under the *Immigration and Refugee Protection Act* (*IRPA*). Section 36(1) of the *IRPA* states as follows:

> 36. (1) A permanent resident or foreign national is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

[35] As Mr. Burrill points out, the "plastic broom incident", an assault with a weapon contrary to section 267(a) of the *Criminal Code* and prosecuted in this case by indictment, carries a maximum term of imprisonment not exceeding 10 years. The imposition of a term of imprisonment of more than six months also renders a permanent resident inadmissible on grounds of serious criminality under the *IRPA*. (*section 36(1)(a)*)

[36] Mr. Jones' immigration to Canada was facilitated by his older brothers, Desmond and Harold, who entered the country in 1999. They obtained Canadian citizenship in 2003. Mr. Jones' mother became a Canadian citizen in 2007. Mr. Burrill submits that Mr. Jones, through "inadvertence", has not applied for

citizenship status and remains a permanent resident. Accordingly, he comes within the purview of section 36(1)(a) of the *IRPA*.

[37] Under section 64(1) of the *IRPA*, Mr. Jones has the right to appeal any removal order made on the grounds of "serious criminality" to the Immigration Appeal Division. Section 67(1) of the *IRPA* provides that the Immigration Appeal Division may allow an appeal if "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."

[38] In his oral submissions, Mr. Burrill indicated that Mr. Jones is "naïve" about the *IRPA* implications that can be triggered by his sentencing. He noted that Mr. Jones' family is very concerned about the *IRPA* and its implications for Mr. Jones as a permanent resident.

[39] In light of the consequences to Mr. Jones of a conviction, particularly for the "plastic broom" incident, Mr. Burrill suggests I should consider section 730 of the *Criminal Code* which permits the ordering of a discharge instead of a conviction, where it is in "the best interests of the accused and not contrary to the public interest."

[40] Mr. Burrill makes the following submission on the issue of a conditional discharge in this case:

> Should this Court see fit to impose a form of discharge, then Mr. Jones, of course, would not have been convicted per s. 36 of the IRPA and, therefore, not subject to a removal order. A conditional discharge, accompanied by probation with discretionary terms requiring attendance and monitoring of mental health issues would serve to protect the public as well as recognize the special circumstances of this case. (*Amicus Brief, page 6*)

[41] Mr. Burrill has also referred me to cases where conditional discharges have been granted in cases involving violence (*R. v. H.M.T., [2004] A.J. No. 1228 (Q.B.); R. v. McKinney, [2010] A.J. No. 560 (P.C.); R. v. Stevens, [2009] N.S.J. No. 449(P.C.)*), including a case where a father assaulted and threatened his eight year-old son. (*R. v. J.F.C., [2006] N.S.J. No. 37 (S.C.)*).

The Crown's Position on the Appropriateness of a Conditional Discharge

[42] Ms. Cogswell is opposed to Mr. Jones receiving a conditional discharge. As I have noted, in her submissions she emphasized Mr. Jones' prior record and the severity of the plastic broom assault on Niala. She takes the view that a discharge would not even be in Mr. Jones' interest as it would "send the wrong message to [him]" in light of his record for "domestic related" offences. She regards a discharge as also contrary to the public interest given the aggravating factors in this case and Mr. Jones' prior record.

[43] Ms. Cogswell has not been unsympathetic with respect to the potential for immigration consequences for Mr. Jones as a result of this sentencing. In this regard, after a recess during the sentencing hearing on November 25, Ms. Cogswell indicated she would be prepared to "re-elect" on the "plastic broom incident" (the section 267(a) charge) if it were possible to do so. Mr. Burrill further examined the *IRPA* and was able to advise that even if the Crown had proceeded summarily on this charge the immigration consequences for Mr. Jones would still be present.

[44] In her submissions when the "re-election" issue was being mooted on November 25, Ms. Cogswell was clear about her objective as Crown counsel in these proceedings: she stated explicitly that she does not want the precedent of a conditional discharge for a section 267(a) assault on a child.

Legal Principles - Sentencing

[45] Parliament has 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.

[46] Section 718.2 recites the other sentencing principles that the sentencing court is mandated to take 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;

[47] The proportionality principle set out in Section 718.1 is also highly relevant to sentencing Mr. Jones: a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender.

[48] Sentencing is an individualized process requiring an examination of the facts of the offence and the circumstances of the offender and an assessment and weighing of the relevant sentencing principles to arrive at a fit and proper disposition. *(R. v. C.A.M., [1996] S.C.J. No. 28; R. v. Proulx, [2000] 1 S.C.R. 61, paragraph 82; R. v. L.M., supra, paragraph 17; R. v. Nasogaluak, [2010] 1 S.C.R. 206, paragraph 44)* It has been described as a “profoundly subjective process” (*R. v. Shropshire, [1995] 4 S.C.R. 227, paragraph 46*) and a "profoundly contextual" process in which the sentencing judge has broad discretion. *(L.M., supra, paragraph 15*)

[49] In *L.M.*, the Supreme Court of Canada cited the following commentary with approval:

> **22** [The] objectives of denunciation, deterrence, separation from society, rehabilitation, reparations and retribution are all quite general, and there is no precise standard that can be applied to rank them. At first glance, this is desirable, since the sentencing process is fundamentally an individualized one in that sentences will necessarily vary from one offender to

> another in light of the particular emphasis that will be placed on one or the other of the objectives in order to arrive at the appropriate sentence, having regard to all the circumstances, in each case. (*referencing Dadour, Francois. De la determination de la peine: principes et applications. Markham, Ont: LexisNexis, 2007*)

[50] As acknowledged by our Court of Appeal in *R. v. Muise, [1994] N.S.J. No. 487*:

> **83**... 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.

[51] It is a fundamental principle of sentencing that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code; R. v. Naugle, [2011] N.S.J. No. 165 (N.S.C.A.), paragraph 31*) This issue of moral blameworthiness must be examined carefully in a sentencing where mental illness was a factor in the commission of the offence. Assessing proportionality requires a "complicated calculus" by the sentencing judge. *(R. v. L.M., [2008] S.C.J. No. 31, paragraph 22*)

Analysis

[52] I am sentencing Mr. Jones for four offences – two assaults, one of which was an assault of a child with a plastic broom handle, resisting arrest, and a failure to attend court. I discussed the facts of these offences in *R. v. Jones, [2011] N.S.J. 430* at paragraphs 14 – 18 (the plastic broom incident), paragraphs 19 – 20 (the Bank of Montreal incident), paragraphs 56 – 67 (the arrest) and paragraph 68 (the failure to attend court).

[53] The Crown proceeded by way of indictment. I find that election not to have the significance to this sentencing that it might have in different circumstances than these. The Crown's election was made well before the full extent of Mr. Jones' mental health issues was known or understood. On the most serious charges Mr. Jones was subsequently found not criminally responsible by reason of mental disorder. Furthermore, as I mentioned earlier in these reasons, Ms. Cogswell was prepared to "re-elect" if that was an option to remove the potential for an adverse immigration consequence for Mr. Jones.

[54] Addressing the issue of the Crown's election is necessary, in my opinion, in order to place it in its proper perspective. Another factor that assists in putting Mr. Jones' offences in their proper perspective is his mental health.

[55] In my NCR/MD decision, *R. v. Jones, [2011] N.S.J. No. 583*, I accepted the opinion of Dr. Theriault with respect to Mr. Jones' mental status at the time when the various offences were committed. However, as I noted in my decision, Dr. Theriault referred, in his October 26 addendum report, to a "bizarre interaction" by Mr. Jones (the "magic cards" incident) and stated that this would suggest "…that Mr. Jones may have been demonstrating features of a psychotic illness [in the period of time corresponding with the plastic broom and Bank of Montreal incidents.]" (*Dr. Theriault's October 26 Report, page 1*)

[56] Dr. Theriault could not be definitive about this on the evidence he had available from the trial and commented on being "disadvantaged in this process":

> Because the trial has already occurred and because the evidence at trial did not focus on elucidating the features of Mr. Jones' illness, its characteristics, or its onset or progression, it then becomes very difficult to be definitive about the timing of the onset of his illness and its association with the offences in question. In other words, conducting an assessment for assessment of criminal responsibility following completion of a trial adds certain complexities which would otherwise not be there. (*Dr. Theriault's October 26 Addendum Report, page 1*)

[57] Dr. Theriault's opinion about onset is significant to this sentencing. He has identified that Mr. Jones' illness was in a prodromal phase some time before his full delusional disorder took hold. As Dr. Theriault stated in his October 16 report and as I referenced in my NCR/MD decision:

> **16**…There is clear evidence, in my view, that beginning some time, probably in early 2010, but perhaps earlier, that Mr. Jones' developed a delusional disorder with a primary religious focus. Mr. Jones' accounting of the development of his belief that he is Jesus Christ, is consistent with the known development of psychotic disorders…Beginning then, sometime around March of 2010 or perhaps earlier, Mr. Jones began to interpret all of his interactions with other people in light of his belief that he was, in fact, Jesus Christ.

[58] This evidence, which I already accepted, is highly relevant to two aspects of this sentencing – the offences themselves, particularly the two assaults, and Mr. Jones' prior record.

[59] Dr. Theriault was sufficiently unsettled about the onset issue with respect to Mr. Jones' delusional disorder that he submitted his October 26 addendum report. And although the evidence was not there for him to make a more definitive finding about Mr. Jones having been not criminally responsible by reason of mental disorder earlier than March 2010, I am satisfied based on the trial evidence and Dr. Theriault's opinion that Mr. Jones was experiencing the effects of a burgeoning mental illness during the period when he committed the assaults I am sentencing him for. Testifying about these assaults – the plastic broom assault and the Bank of Montreal assault, Dr. Theriault described Mr. Jones as in a 'but for' area, explaining that if he had not been ill, these incidents probably would not have happened.

[60] Although Dr. Theriault was not able to find evidence that Mr. Jones resisted arrest due to his delusional disorder (which by this time, March 2011, had evolved into the apophany phase), his demeanor at the time of his arrest, which I described earlier in these reasons, was inappropriate for the situation. While not NCR/MD on the resisting arrest charge, Mr. Jones was experiencing a mental illness at this time. His mental illness is a factor to be taken into account in sentencing: (*R. v. Resler, [2011] A.J. No. 618 (C.A.); R. v. H.M.T., [2004] A.J. No. 1228 (Q.B.); R. v. Marsman, [2007] N.S.J. No. 222 (C.A.), paragraph 27; R. v. Tkach, [2008] O.J. No. 5973 (C.J.,), paragraph 28; R. v. Kagan, [2008] N.S.J. No. 26 (S.C.), paragraphs 22, 33; R. v. Batisse, [2009] O.J. No. 452 (C.A.), paragraph 38*); *R. v. Rhyno, [2009] N.S.J. No. 474 (C.A.), paragraph 27)*

[61] The significance of a mental illness in sentencing and its relevance to the denunciation and deterrence principles of sentencing was articulated by the Alberta Court of Appeal in *Resler*:

> **14**…Deterrence and denunciation are important principles of sentencing. However, in the context of a mentally ill offender, these principles may be considered to have less weight. Little would be achieved by making an example of an offender whose acts are committed at the time of mental illness, and specific deterrence has little impact on the mentally ill…

[62] This same point was made by the Ontario Court of Appeal in *Batisse*. The Court also observed that,

> **38**…severe punishment is less appropriate in cases of persons with mental illnesses since it would be disproportionate to the degree of responsibility of the offender. In such circumstances, the primary concern in sentencing shifts from deterrence to treatment as that is the best means of ensuring the protection of the public and that the offending conduct is not repeated.

[63] Furthermore, Mr. Jones is still profoundly mentally ill as Dr. Theriault's report of November 22 indicates. Where the defendant remains unable to appreciate, due to a serious mental disorder, that what he has done was wrong, denunciation and deterrence cannot accomplish the sentencing objectives they are intended to serve. And, Mr. Jones' compromised ability to appreciate this aside, it is not as though there have been no denunciatory or deterrent consequences: it is to be remembered that Mr. Jones spent 7 months on remand for these charges, mostly in the isolation of Protective Custody and while experiencing a severe, untreated delusional disorder.

[64] Mr. Jones' mental illness is also relevant to the issue of his criminal record. A criminal record is typically an aggravating factor in sentencing. But what must be acknowledged in Mr. Jones' case is that all his recent offences were committed at a time that Dr. Theriault has concluded was the apophany phase of Mr. Jones' delusional disorder. His offences were committed on March 18, 2010, May 11, 2010, June 8, 2010 – September 15, 2010, and July 31, 2010. Dr. Theriault has described the apophany phase as follows:

> During this phase of the illness, the person comes to experience themselves in the context of their delusional belief and begins to interpret all the information around them in light of that belief. (*Dr. Theriault's October 16 Report, page 5*)

[65] Dr. Theriault has not made any NCR/MD finding with respect to these prior offences of course and I am not treating Mr. Jones' criminal record as though he had. My point is that the usual significance and aggravating character of a criminal record like Mr. Jones' is significantly diluted in these circumstances where there is clear evidence, that I have already accepted, of Mr. Jones having been seriously mentally ill during the period when these offences were committed.

[66] Having closely examined the issue of Mr. Jones' offences and his prior record in the context of his mental illness, I do not believe it would be appropriate to approach the issue of aggravating factors as I would if the circumstances were different. An approach that recognizes the unique features of this case is most in keeping with the requirement for individualized sentencing.

[67] The individualized nature of sentencing does mean that the extent to which a person's mental illness mitigates a sentence will be determined according to the specific facts of each case and all its circumstances. (*see, for example: R. v. Marsman, paragraphs 26 and 27*)

[68] Dr. Theriault's opinions concerning Mr. Jones have enabled me to understand Mr. Jones' mental health and consider it in an informed way in this sentencing. I have retained my concerns that embedded in Mr. Jones' thinking are antiquated views about the relationships between husbands and wives and fathers and children. I addressed this in *R. v. Jones, [2011] N.S.J. No. 430, paragraph 73*. Dr. Theriault offers some insight into this issue, noting that it appears Mr. Jones' delusional belief that he is Jesus Christ "…simply has given him a sense of righteousness…" without fundamentally reorienting him towards being a better person. (*Dr. Theriault's October 16 Report, page 6*)

[69] That being said, it is treatment of Mr. Jones' disorder that is necessary to avoid him being in future conflict with the law. As Dr. Theriault has stated:

> [Mr. Jones] continues to profess his belief that he is Jesus Christ. Until such time as he is treated he is at risk of conducting himself in a fashion similar to that which brought him initially before the courts. (*Dr. Theriault's October 16 Report, page 8)*

[70] It is also relevant for me to take into account the jeopardy that Mr. Jones may face in the context of his immigration status if he is convicted of any of these offences. This is a legitimate consideration in sentencing. (*R. v. Koc, [2008] N.J. No. 161 (S.C.T.D.), paragraphs 22, 24; R. v. Huang, [2011] O.J. No. 1830 (S.C.J.), paragraph 16*) Under section 36(1) of the *IRPA*, a conviction in relation to the "plastic broom" assault will make Mr. Jones inadmissible in Canada on grounds of "serious criminality". The provision does not say a conviction "may" make Mr. Jones inadmissible; it states that a permanent resident convicted of "serious criminality" *is* inadmissible. As I have noted, Mr. Jones would have to

establish on appeal a basis for “sufficient humanitarian and compassionate considerations” to warrant “special relief.”

Is a Conditional Discharge Appropriate in This Case?

[71] I will now return to consider the sentencing options in the circumstances of this case. A discharge is available to Mr. Jones. He is not disqualified from receiving a discharge because he was granted one in 2005. In view of his immigration status, I find that a conditional discharge would be in his best interests. I do not accept, particularly given the current state of his mental health, that granting a discharge will send the wrong message to Mr. Jones as Ms. Cogswell has suggested. It is only through successful therapeutic treatment that Mr. Jones will acquire an understanding that his actions were wrong. A sentence of one day in custody, time served, will not achieve this.

[72] Conditional discharges are generally granted in circumstances where the defendant can show s/he is of good character. This is not a case where the issue of Mr. Jones’ character can be properly assessed given that his conduct has been so heavily influenced by the nature and extent of his serious mental illness. It is another example of how the customary considerations in sentencing have to be examined through a different lens in the case of Mr. Jones.

[73] Ms. Cogswell has argued that a conditional discharge is contrary to the public interest. This submission was grounded in the principles of denunciation and deterrence that are to be emphasized where a parent assaults a child. Ms. Cogswell also focused on Mr. Jones’ prior record and the nature of it as an aggravating factor. She has expressed her concern about the setting of a precedent. In addition to what I have already said about denunciation and deterrence in the circumstances of this case, the nature of the offences, Mr. Jones’ mental illness, and his prior record, I will note that a conditional discharge has been held by the Nova Scotia Supreme Court, sitting as a summary appeal court, to be a fit and proper sentence where a father assaulted his 8 year old son by hitting him 10 – 12 times with a broom handle on different parts of his body. (*R. v. J.F.C., [2006] N.S.J. No. 37 (S.C.)*) In *J.F.C.*, the conditional discharge was upheld on the basis that it was not contrary to the public interest to avoid the harm that would be experienced by J.F.C.’s family if he lost his job due to having a conviction.

[74] Although of a different nature, there are family consequences in this case if Mr. Jones is removed from Canada under section 36(1) of the *IRPA* because of a conviction for "serious criminality."

[75] In light of what I said earlier about the Crown's election in this case, the *J.F.C.* case is really not distinguishable on the basis that the Crown there proceeded summarily. There are differences in the facts of course: the assault in *J.F.C.* was more severe, Niala was a younger child, J.F.C. had no prior record and no mental health issues. Whatever the differences, in both cases, there is the spectre of a young child being beaten by a parent.

[76] Mr. Jones' case must be assessed based on all its circumstances. These reasons indicate how I have considered these circumstances, the offences, and the principles of sentencing, and my conclusion is that it is not contrary to the public interest to grant Mr. Jones a conditional discharge for the offences of assault, resisting arrest and failing to attend court. The conditional discharge order will require him to comply with conditions imposed by the *Criminal Code Review Board* under section 672.54 of the *Criminal Code*. The duration of the discharge order will be 12 months. If Ms. Cogswell, Mr. Jones and/or Mr. Burrill think I should be including other conditions in the conditional discharge order, I invite them to speak to this.

[77] The restoration of Mr. Jones to good mental health so that he can be a productive member of the community, as his brothers and mother are, is in the public interest. It is contrary to the public interest, in the circumstances of this case, to impose a sentence that places in jeopardy Mr. Jones' immigration status where he is a permanent resident with strong family and community ties to Canada.

[78] I have considered the remand time served by Mr. Jones as a factor in this sentencing and apportion it as follows: for the broom handle assault – 3 months credit; for the Bank of Montreal assault– 2 months credit; for the resisting arrest and failing to attend court offences – one month credit for each offence.

[79] I will sign a DNA order and a five year section 109 *Criminal Code* weapons prohibition order.

[80] In concluding, I want to thank Ms. Cogswell for her fair and vigorous advocacy on behalf of the Crown and Mr. Burrill for his thoughtful and skilled assistance in what has been an especially challenging case for everyone concerned.