PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. McNamara, 2014 NSPC 80

Date: 2014-September-23
Docket: 2533096
Registry: Halifax

Between:

Her Majesty the Queen

v.

James Joseph McNamara

DECISION ON SENTENCE HEARING

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Marc C. Chisholm
Heard:	May 15, 2014; June 25, 2014; July 21, 2014; July 24, 2014; September 8, 2014 and September 23, 2014, in Halifax, Nova Scotia
Decision:	September 23, 2014
Charge	Section 344 CC

Counsel: Ronald Lacey, for the Crown
Peter Nolen, for the Defendant

By the Court:

September 23, 2014

[1] The accused, James Joseph McNamara was charged that he on or about the 17th day of November of 2012 at or near Halifax, Nova Scotia, did unlawfully rob R. M. contrary to Section 344 of the Criminal Code of Canada. Mr. McNamara was arraigned on that charge on the 27th of November of 2012. After a series of adjournments, all requested by the Defence, on May 14th of 2013 the accused elected to be tried in the Supreme Court by a judge and jury and requested a preliminary hearing. The Court set September 24th of 2013 as the date for that preliminary hearing. On a motion of the Defence, the preliminary hearing was rescheduled to December 3, 2013.

[2] On December 3, 2013, the accused re-elected to be tried before the Provincial Court of Nova Scotia. Pursuant to Section 606(4), the accused tendered a plea of guilty to an offence that he did unlawfully assault R. M., causing bodily harm to R. M., contrary to Section 267(b) of the Criminal Code of Canada. The Crown consented to the acceptance of that plea by the Court. Sentencing on that offence was adjourned to March 3, 2014 and a pre-sentence report (PSR) was

ordered. On a Defence motion the sentencing was further adjourned to April 30, 2014.

[3] On April 30, 2014, at the beginning of the sentencing hearing, Crown counsel set out the facts alleged by the Crown. Many of those facts were disputed by the Defence. The Crown alleged that the accused and complainant, a gentleman aged 72, had met outside a bar on Dutch Village Road on the late evening of the 17th of November 2012. They walked together to the apartment building across the street where both had apartments. The Crown alleged that they proceeded, together, to the accused's apartment where the accused consumed alcohol and crack cocaine. That the two engaged in consensual sex. That the complainant then invited the accused to his apartment to continue their evening and to sleep there. The Crown alleged that once inside the complainant's apartment, the accused attacked the complainant, striking him several times on the head and face and demanding money. That the accused bent the complainant's arm behind his back and threatened to break it. That the complainant took money from his wallet and gave it to the accused. That as the accused left, he threatened to have people finish off the complainant if he called the police.

[4] The Defence position was markedly different. The Defence admitted that the two men met as alleged by the Crown outside a bar on Dutch Village Road, across from where they both lived. The Defence claimed that the accused helped the complainant across the street and back to his apartment, as requested by the complainant, because the complainant was intoxicated. The Defence position was that the two men proceeded directly to the complainant's apartment and that, at the complainant's apartment door, the accused opened the door for the complainant, and the complainant then attempted to grab, or did grab, the accused's privates. That the accused grabbed the complainant's hand, removed it and then punched the complainant once in the face, causing a cut to his brow and knocking him backwards into his apartment. That the accused then left.

[5] On the defence version of the facts, it appeared to the Court that the accused was admitting all of the essential elements of the offence of assault causing bodily harm to which he had pled. That in punching the complainant, he was not acting in self-defence but acting out of anger in response to what had been done to him.

[6] Section 724(3) of the Criminal Code provides:

> Where there is a dispute with respect to any fact that is relevant to the determination of a sentence, the Court shall request that evidence be adduced as to the existence of the fact, unless the Court is satisfied that sufficient

> evidence was adduced at trial. The party wishing to rely on a relevant fact, including a fact contained in a pre-sentence report has the burden of proving it. Either party may cross examine any witness called by the other party. Subject to paragraph (e), the Court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence and:
>
> (e): The Prosecutor must establish by proof beyond a reasonable doubt the existence of any aggravating factor or any previous conviction by the offender.

[7] Pursuant to Section 724(3), the Court set the matter down for a hearing to hear evidence on the disputed facts. At the hearing, the Court heard from a number of witnesses including the complainant and the accused. The complainant's evidence was very much consistent with the Crown allegations and if accepted would support a finding of guilt, not only to assault causing bodily harm, but to the full offence of robbery.

[8] The accused testified that he helped an intoxicated Mr. M. to his apartment door. The accused testified that at the complainant's door, he was grabbed by the complainant "by the nuts" to use the language of the accused. He said that he had to pry the complainant's hand off of him and that the action of the complainant grabbing him in that manner almost made him throw up. That he said something like "you're an F-ing gearbox". That the complainant didn't respond. The accused then testified that the complainant came at him again reaching toward his privates.

The accused testified, "God forgive me, I lashed out and hit him". He went on to say, "it was reflex", and at another point, "I didn't mean to hit him".

[9] In the view of the Court, this evidence differed substantially from the position of the Defence put before the Court when the plea of guilty to assault causing bodily harm was tendered. On the evidence of the accused, he was not admitting to the commission of any offence. If the Court were to accept the evidence of the accused, it would at least raise a reasonable doubt as to whether or not he was guilty of any offence.

[10] Section 606(4) of the Criminal Code states:

> Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty to the offence charged, but guilty to any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor accept that plea of guilty and if such plea is accepted, the court shall find the accused or defendant not guilty of the offence charged, and find him guilty of the offence in respect of which the plea of guilty was accepted and enter that finding in the record of the court.

[11] The Supreme Court of Canada in R. v. Adgey, [1975] 2 S.C.R. 426 held that a trial judge has a discretion whether to accept a plea of guilty to an offence other than the one charged. The discretion may be exercised at the time the plea is tendered or following the hearing of evidence. The discretion must be exercised

judicially. Therefore, the first question for the Court to address in relation to this matter is whether or not the Court ought to accept the accused's plea of guilty to assault causing bodily harm, given the circumstances of this case.

[12] In R. v. Naraindeen (1990) 80 C.R. (3d) 66 the Ontario Court of Appeal held that, in most cases, the trial judge ought to give substantial weight to the decision of the prosecutor to accept a plea to a lesser offence. But the judge has discretion to refuse to accept the guilty plea where the facts relied upon support the full offence. This is not to say that a judge would be wrong in accepting a plea to the lesser offence although the facts supported the full offence, where a case is made out that the result reflects a reasonable exercise of prosecutorial discretion, having regard to the public interest in the effective administration of justice.

[13] During submissions in this matter, when asked by the Court, Crown counsel indicated that the decision to accept the plea to assault causing bodily harm was influenced by the elderliness of the complainant and his desire to avoid having to testify. In the Court's view, those are appropriate considerations for the Crown. Whether in this case they justified the taking of a plea to assault causing bodily harm, this Court need not decide. And I do not wish to have my comments viewed as being critical of the Crown's exercise of prosecutorial discretion.

[14] However, in this case, a serious difficulty arose from the fact that Crown and Defence counsel did not, as part of the plea negotiations, conclude an agreement as to the facts being admitted. And the facts are very substantially in dispute. The dispute in relation to the facts in this case is not, in the Court's view, just proof of an aggravating fact. For example, in a case of sexual assault where the accused may admit to a touching of the victim's breast but denying the removing of the garments of the victim, the removal of the garments may be seen as an aggravating fact denied by the defence.

[15] In this case, the Court is being called upon to determine not only aggravating facts, but, in the Court's view, whether or not the accused is guilty of the offence to which he has tendered a plea of guilty.

[16] It is problematic for a judge at a sentencing hearing to be required to make findings of fact as to whether or not an offence was committed. That should occur in the context of a trial with its procedural and legal safeguards, not at a sentencing hearing.

[17] Further, and even more problematic, on this sentencing hearing, the accused, in his evidence, denied an essential element of the offence to which he tendered a plea of guilty. He denied the *mens rea*. His evidence on this hearing differed from

the position presented by counsel at the commencement of the sentencing hearing, which could have supported his plea of guilty to that charge.

[18] Based upon his testimony and the total circumstances in this case, I am not satisfied that upon entering a plea of guilty to assault causing bodily harm, the accused intended to admit all of the essential elements of that offence. I find that it would not be appropriate in relation to the proper administration of justice for the Court to accept the accused's plea of guilty to assault causing bodily harm in this case. Although this decision will cause further delay in the finalizing of these charges, and inconvenience to the witnesses and all persons involved, I am persuaded that it is the appropriate action for the Court to take.

[19] For those reasons, the Court does not accept the plea to assault causing bodily harm. The charge before the Court is one of robbery. It is scheduled for plea.