

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Smith*, 2014 NSPC 86

**Date:** 2014-09-09

**Docket:** 2685086, 2685087,  
2685088, 2685089, 2685094

**Registry:** Sydney

**Between:**

The Queen

v.

Dana Smith

Judge: The Honourable Judge A. Peter Ross  
Heard: September 9, 2014 in Sydney, Nova Scotia  
Oral Decision: September 9, 2014 in Sydney, Nova Scotia  
Charge: 344 (b) CC, 334 (B) CC, 90 CC, 733.1 CC, 351(1) CC  
Counsel: Darcy MacPherson, for the Public Prosecution  
Alan Nicholson, for Dana Smith

## **Summary**

Smith, a young aboriginal man, entered a drug store alone with his face covered, demanded prescription pain-killers from the pharmacists, claimed he had a gun, was refused and told to leave, and did leave without further incident. A short time later he stole a bottle of spirits from a nearby liquor store. Charges to which he subsequently pled guilty included attempt robbery, having his face masked during commission of an offence, and simple theft. A Gladue report was prepared. He spent eight months on remand prior to sentence. Counsel agreed that this earned Mr. Smith one year credit against any period of incarceration which might be imposed.

## **Issue**

What sentence is appropriate? What is the effect of s.718.2(e)? The attempt robbery was not eligible for a conditional sentence of imprisonment. Crown submitted that two additional years in jail should be imposed, followed by probation. Defense argued that time served and a period of probation would better fit the governing principles.

## **Result**

A nominal one day in jail, two years' probation, a ten year firearms prohibition, and a DNA order.

**By the Court:**

[1] Alright we are here with Mr. Smith and I have taken the ninety minutes or so since counsel finished submissions to consider the possible sentences. Given the effort that's gone into this sentencing, the preparation of the report etc., I don't want to give short shrift to this. That's not much time, perhaps, to consider all the various elements here but I think it's important to try to bring this to a conclusion in the time that is available to the court. So I've done my best to consider what counsel have submitted, to consider a few other cases that I have read over the lunch hour and of course the Gladue Report.

[2] The facts have been put on record. I won't belabour them but I will just briefly summarize them. They define the extent of Mr. Smith's culpability to a large degree and so it is important to know what those are and to begin with those and to always keep them in mind. And of course the most serious of the offences and the one which I will spend virtually all of my time addressing is the robbery offence. The others pale in significance compared to that one.

[3] The elements of robbery are contained in the Code and the meaning of attempt is pretty obvious. What he did was an attempted robbery. He walked into

Shopper's Drug Mart, here in Sydney in the middle of the day. Mr. Smith pulled down a mask on the way in, over his face. He went to the pharmacy counter, met two personnel there. He said, "I have a gun, get me some pills," or words to that effect. The two staff told him to get out and he did. He had no gun in fact. He did not persist in his course of conduct and of course he did not succeed, otherwise the charge would have been robbery simpliciter and not the attempt. He then went to a nearby liquor store, walked away with a case of beer without paying, took a cab and went to a friend's house. If, on the way out of the liquor store, he had been stopped by the security guard and if he had said, "get out of my way I have a gun", arguably this would have converted that simple theft into a robbery.

[4] It's difficult to categorize offences sometimes and although it is certainly necessary to define and categorize offences in law. The law requires some certainty. Nevertheless within categories of offences there are various degrees of seriousness and this crime even for an attempt robbery, I think it can be fairly stated, falls on the lower end of the scale.

[5] The threat of violence certainly adds an element of dangerousness and seriousness to the situation in the Shopper's Drug Mart. The commodity that he was seeking was not available on the shelves, otherwise he might have done there what he later did at the liquor store. Clerks of these facilities, store employees, are

in a vulnerable position as the Crown has correctly pointed out. The masking of the face adds another threat of intimidation and seriousness to the facts. At the same time I note that this case is not like some others where the victim was working alone late at night in a gas bar or a convenience store.

[6] The two pharmacy staff did not file any victim impact statements. They apparently maintained their composure during the attempted robbery of their pharmacy. But I may presume that they were impacted by this threat of violence to some degree and I may presume and should presume that the community is rightly concerned with such conduct. Many robberies are committed with real and actual guns or weapons. Many are committed with real and actual violence and there is often a very small step between the threat of violence and actual real violence. And so of course the community is concerned with this conduct. Nevertheless this crime was fairly described by the Crown as a half-hearted attempt at a robbery.

[7] Mr. Smith does have a criminal history. It's been read in by the Crown and I acknowledge it. The most concerning are the offences of which he was convicted and sentenced in 2013. These being recent relatively serious and in a sense related in that they constitute a combination of threats and thefts. Notability Mr. Smith was on probation as a result of that 2013 sentencing at the time of this offence on

December 28, 2013, when he committed the offence, the offences that are before me now.

[8] The Crown has recommended a 2 year jail sentence. The Defence has recommended time served plus 2 years of probation. The Crown submission of course acknowledges the time spent on remand. Per 742.1(c) a conditional sentence is not available as a form of custodial sentence. Crown and Defence agreed that Mr. Smith spent 8 months on remand and should receive an enhanced credit of one and a half times this. In other words he should receive a credit of 1 year in jail. And so I am asked to consider which of these 2 sentences is most fit and appropriate: (a) effective sentence of 3 years in jail, one that of course would emphasize denunciation and deterrence for this crime of violence, or (b) an effective sentence of 1 year in jail and 2 years' probation - the one year of course served already and 2 years' probation going forward - a sentence that would give greater emphasis to the restorative aspect of sentence, to rehabilitation, and so forth.

[9] Not surprisingly there is no case exactly like this one. But I have looked at a few in the literature. In *R. v. Jimmy*, 2009 British Columbia Court of Appeal, a 46 year old aboriginal woman received a 2 year sentence for a crime of robbery an actual robbery that was described as a violent purse snatching from an 81 year old

victim. In that case the accused had a lengthy criminal record which included 10 offences of violence. The Court of Appeal upheld the sentence of 2 years plus a day. In *R. v. Omilgoituk*, 2011 NLCA 77 the Newfoundland Court of Appeal considered the appropriate sentence for a young aboriginal offender on a break enter and assault. Here the accused announced he was going to slit the victim's throat, kicked in the door of his residence, broke the door frame and gained entry. Punched the victim in the face a number of times until the victim pushed him out of the house. The accused plead guilty. Conditional sentence was not available. The Newfoundland Court of Appeal upheld a sentence of 12 months imprisonment for the break and entry and 12 months concurrent for the assault and 12 months of probation.

[10] In a case in this area *R. v. Rose*, [2013] N.S.J. No. 566, he was a young aboriginal person again before the Court on a break enter and uttering threats. There that young man was sentenced to 30 months imprisonment, he got credit for 19 months served but the effective sentence was 30 months. I do note though that by the time he was before the Court he had amassed a record of 42 adult criminal code convictions and it would appear the Provincial Court Judge in that case felt it necessary to emphasize denunciation and deterrence.

[11] In more general terms this sentencing is informed by *R. v. Gladue*. The fundamental principle of sentencing is that it be proportionate to the gravity of the offence and a degree of responsibility of the offender. *R. v. Ipeelee, 2012 SCC. 13*, reaffirmed the principle set out in *R. v. Gladue* which encouraged judges to have recourse to a restorative approach to sentencing when dealing with aboriginal accused. It referred to the over representation of aboriginal people in the Canadian Criminal Justice system. While I don't have the statistics before me, I do know on reasonably good authority from our correctional officials in Nova Scotia that over representation is not so gross here as it is in Manitoba and Saskatchewan.

Nevertheless there does appear to be proportionally far many more in the prison population who are of aboriginal decent in this province than there are people in the general population and the reasons for that must concern the Court. In *R v. Ipeelee, 2012 SCC 13*, the Supreme Court referred to such matters as the history of colonialism displacement, residential schools and how that history translates into lower education, lower incomes, higher unemployment , higher rates of substance abuse and suicide.

[12] *Gladue* factors on Mr. Smith's part do not necessarily justify a different sentence but they provide necessary context for understanding and evaluating case specific information provided by counsel. Failure to apply *Gladue* principles is of

course a matter which can be corrected on review. It's a statutory obligation on me pursuant to s. 718.2 (e) *Criminal Code*, this applies equally in cases of violent and non-violent offences.

[13] The Ontario Court of Appeal, *R v. Jacko*, [2010] 4 C.N.L.R. 211 decision.

The panel comprising of J. Winkler, J. Goudge and J. Watt reviewed the principles of sentence. They also touch on those principles as applying to aboriginals and they state in the judgement that *Gladue* teaches us that the aboriginal community may understand the nature of a just sentence differently from non-aboriginal communities and the objectives of restorative justice may be more significant. The Court says that in general the more serious and violent the offence, the less likely it is to find disparity between the terms of imprisonment for similarly circumstanced aboriginal and non-aboriginal offenders. However, serious crime and restorative justice are not incompatible.

[14] Turning to the offender before me, Mr. Smith. The very motive for this crime gives some insight into Mr. Smith himself. He wanted more pills. He had been taking Percocets or Bennies, I can't remember which, the night before this crime. That itself was yet another pill binge that so called pill binge was yet itself part of a larger pattern of prescription pill abuse and that pill abuse itself was yet again an aspect of his personal history. His personal history has been influenced,

even determined to some extent, by the history of his community and his people. And that of course brings us to the *Gladue* report in this particular case. As a preface to considering it, I would note and would hope that the report doesn't only give me some understanding of Mr. Smith and his history. I hope that it imparts some understanding to Mr. Smith himself. The *Gladue* report I think is written primarily for the Court's benefit. However I would like to think and it is reasonable to think that it may also serve to give Mr. Smith himself some measure of self-understanding that he might not gain otherwise. When something is reduced to writing, even things that we know inside ourselves, when it's reduced to writing and when you look at it on the page, assembled, organized, irrefutable much of it, then I think the truth of it can emerge in a very powerful way. I hope the process; and it's not an easy one, it's an expensive one, but I hope the very process of assembling and compiling this report benefits Mr. Smith in that sense.

[15] So Mr. Smith and the Court both have to confront this *Gladue* Report and we both have to confront the truths that are set out in it, the history etc. Here I see that he is actually of Ojibwe and Cree decent although his parents became members of the Membertou First Nation. I am not going to deal with the report in great detail. I am going to touch on just a few parts of it here and there.

[16] Page 8, some interesting antidotes come from his maternal grandfather, George Smith, one of his children being Sandra, Mr. Smith's mother. He talked about moving, talked about the process of losing and then regaining his Indian status. Spoke about becoming friends with Grand Chief Donald Marshall when he moved to Sydney in the early 1980's. Talked about his own struggles with alcohol and substances and of course gave some other comments about his grandson with whom he said he had a good relationship at one point. He spoke in very frank terms about his daughter Sandra, the mother of the accused. I then began to read about Mr. Smith's father, Darrel Simon, a member of the Ojibwe tribe and read sadly that the relationship between his parents was a violent relationship, forcing his mother to leave for a period of time to go to Newfoundland. The report describes beatings that took place, violence within the home and it also sets out that at the age of four, Mr. Smith, the accused here, began to have anxiety attacks and nightmares, and this of course speaks to the deep impact that such conduct has on young people who witness it.

[17] His mother had begun a second relationship with an Ian Christmas but this too became characterized by violence. His mother was very frank and seemingly very honest in describing how angry she was with Mr. Christmas and how she had initiated many fights. Mr. Smith was himself beaten by Mr. Christmas who was

something of a stepfather to him at that time. Eventually he was put in protective custody. Before that he described something which if true of course, would have an enormous impact. He describes being sexually abused by another individual who was charged but evidently acquitted of the charges. That of course is not inconsistent with the events actually occurring and indeed if they did, they would have had a terrible and traumatic effect on this accused. In any event he was put in protective custody and remained there for I think three years. And he says, referring again to the person who was charged with the sexual abuse, that when the verdict of not guilty was entered he turned to drugs, moved out of the foster home, back with his mother and began to drink, smoke cigarettes and take pills.

[18] There is a tendency to rationalize behavior in retrospect and blame things we do on other events. It's possible that's what he is doing. It's possible he would have turned to drugs whether that they were any sexual abuse or not. It's possible he might have turned and become involved in drugs whether there had been any family violence or not. Other young people have found themselves in trouble with drugs even though they had excellent upbringings. But it's also reasonable to think that his very difficult personal circumstances at such an impressionable age lead to his own drug abuse and ultimately to the behaviour which he displayed when he

went into the Shopper's Drug Mart on December 28, 2013. And so we are back to the circumstances of this offence.

[19] In the report Mr. Smith describes feeling suicidal on a number of occasions and indeed over dosing on pills. I note he moved schools a number of different times. That is very disruptive and I think it's been demonstrated clearly that change in schools at elementary grades frequently has a very disruptive influence on the education of young people. It interferes with forming stable relationships and positive relationships. However, the picture for Mr. Smith is not altogether bleak. I go on to read that he worked for his stepfather in the fishing industry. He shows a willingness to work. He moved to Calgary, had an interesting experience there. Appears to be an enterprising young man, Appears to be a personable, capable young man. Appears to be someone who is capable of staying out of trouble, did so for 3 years after returning to Membertou, so he says, and I think that's compatible with the criminal record that was read in. But he does acknowledge that at the age of 23 he began again to use drugs. He acknowledges selling and says he fell into a pattern. When fishing he would stop drinking and smoking weed and using pills, but when not fishing collected unemployment, became bored I guess, and would return to drinking and to drugs.

[20] The counsellor Mr. Wells seems to be somewhat frustrated with Mr. Smith. That's what I read from this, that he's been offered counselling and Mr. Wells is saying it's basically up to Mr. Smith at this point. He expresses a level of frustration with him. Rebecca Johnson is a girlfriend and the mother of his children, speaks well of him and poorly of him. Says he's a good father when he's clean and sober but I don't think she is very happy that she has to make excuses for him, that she has to lie to her children to try to prevent the children from knowing the truth about him. I don't think she's happy about the fact that she is living on social assistance now.

[21] Mr. Smith talked about the pill binge; he seemed to speak frankly about his conduct. Mr. Smith did plea guilty, he has admitted his wrong doing, he has said in court today that he understands that what he did was wrong, and why, and that he understands this sentencing is not just about him, but it's about the victims and about the broader community.

[22] One final point which defence counsel made, and which I think is relevant and perhaps worthy of heightened consideration with aboriginal accused, and that is, what this young man might be doing were he not to be in jail. I have in the past dealt with persons of aboriginal descent who although having committed serious crimes were capable of being positive role models in their community and I recall

one lady who was a teacher who taught in Mi'Kmaq in a local reserve who committed a serious crime of violence where I was persuaded that a non-custodial sentence, perhaps a conditional sentence, which was available at that time, was appropriate in that it was not only good for her to maintain her career, of course that almost goes without saying, but that it also leant a positive benefit to her community for her to be living in it in a productive and meaningful way and providing a role model to others. Heaven knows that there are a dearth of role models in our communities and perhaps particularly so in local aboriginal communities. People who can provide a positive example are needed and people in jail by definition are not doing that.

[23] Mr. Smith does seem to have potential to lead a productive life, to be a responsible parent, to provide a good example to his children and to his community. Despite the fact that he breached probation, despite the fact that there is a history, never the less I am persuaded having read the report, having considered the nature of the offence, the fact that it is a fairly low end for an attempt robbery, persuaded that one year in jail served by the time that he has spent on remand and two years of probation is a fit and appropriate sentence and is the one that ought to be imposed on Mr. Smith. This is one that would see him released from custody today on conditions which include the following. Mr. Smith

stand up please. I'm sentencing you Mr. Smith to one day in jail, to time served, and to probation for two years. This will be on the charge of attempt robbery. For all the other charges I'm imposing one day in jail concurrent. The terms of probation will be: report to probation office within one week and thereafter as directed, you will have to advise probation of your address and any change of address, you are to remain in Nova Scotia except that you may leave for employment; or education; or counselling provided you give notice to your probation officer, you are to stay away from any Shoppers Drugmart in the Cape Breton Regional Municipality and from any Nova Scotia Liquor Commission Outlet in the Cape Breton Regional Municipality, you are to abstain absolutely from the use, consumption or possession of alcohol and drugs and take drugs only as prescribed, you are to stay away from any place that alcohol is sold or distributed a primary product, take any personal, psychological, or psychiatric counselling that is recommended by the officials at the Native Alcohol and Drug Abuse Counselling Association, seek and accept any assessment, counselling and treatment for substance abuse that is recommended to you by probation including a residential treatment program at the Mawiomí treatment center in Quebec, take any assessment, counselling and training as directed by probation including a plumbing program at Marconi Campus.

[24] Mandatory firearms prohibition under section 109 for a period of ten years, and mandatory DNA order. You can apply for an exemption at a later date on the firearms prohibition if it interferes with your exercise of an aboriginal or treaty right.