PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v.Caverley,* 2014 NSPC 93

Date: 2014-11-14
Docket: 2569826, 2569827, 2569843
Registry: Pictou

Between:

Her Majesty the Queen

v.

Robert Douglas MacInnis

and

Docket: 2570079, 2570080, 2570077

Her Majesty the Queen

v.

Corey Michael Caverley

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	15, 17, 31 July 2014; 13 October 2014 , in Pictou, Nova Scotia
Charge:	Sub-ss. 349(1) and 430(4) of the Criminal Code of Canada
Counsel:	William Gorman, for the Nova Scotia Public Prosecution Service Joel E. Pink Q.C, for Robert Douglas MacInnis Ian A. (Sandy) MacKay Q.C. for Corey Michael Caverley

By the Court:

[1] Robert Douglas MacInnis and Corey Michael Caverley were charged separately with the offences of breaking into a dwelling and committing mischief (case 2569826 against MacInnis, case 2570079 against Caverley), damaging the property of the victimized homeowner (case 2569827 against MacInnis, case 2570080 against Caverley), and damaging somebody-else's van (case 2569843 against MacInnis, case 2570077 against Caverley). All charges proceeded indictably, and both elected trial in this court. Mr. MacInnis got to trial first; he pleaded guilty to the two charges of damaging property; I found him not guilty of break and enter, but guilty of the included offence of being unlawfully in a dwelling, contrary to sub-s. 349(1) of the *Code*. My reasons for that verdict have been published.[1] In the aftermath of that decision, Mr. Caverley pleaded guilty to the two counts of damage to propery; the prosecution amended the break-and-enter charge to an unlawfully-in-a-dwelling count, and Mr. Caverley pleaded guilty based on the facts found by the court in the MacInnis trial. All parties consented to a joint sentencing hearing. Therefore, there is just this one sentencing decision to be published by the court. In reaching my decision, I have had the benefit of

[1] 2014 NSPC 55.

thorough and comprehensive briefs prepared by the prosecution and counsel for Mr. MacInnis, for which I am grateful; they were of considerable assistance in reviewing the applicable principles of sentencing.

[2] The facts are fairly uncomplicated. Mr. MacInnis heard that his common-law partner had engaged in sexual intimacy with two other male persons. Right off the mark, he and Mr. Caverley and two others drove to the homes of those persons; equipped with a bat and tire iron, they smashed out the windows of a van at one home; they then proceeded to the second, entered, confronted the homeowner and proceeded to commit a substantial amount of property damage. The message of intimidation was simple: do it again, and the next time we won't just rearrange the furnishings.

[3] During the MacInnis trial and the sentencing hearing, much seemed to be made of what was referred to as the "infidelity" of the common-law partner of Mr. MacInnis. I made no findings of fact at trial whether anything intimate occurred between this lady and the two victims. She testified that it really did happen; the one victim who was called to give evidence denied it adamantly. To my mind, it has no bearing at all on this sentencing hearing. Even if I were to have found that this lady and the victims had been sexually involved with each other, what of it? This is not a court for matrimonial causes trying a case for jactitation of marriage

back in Dickensian days. It is now 2014 and the law is clear: provided people abide by those statutes that prohibit violence and intimidation, require clear and informed consent as a precondition to engaging in intimate activity, specify ages of minority and majority, prohibit incest and bigamy and marriages within the prohibited degrees, then people are free to arrange their consensual intimate lives pretty much as they see fit. To be sure, certain choices might attract legal consequences that flow from the ending of a domestic relationship—such as division of property, the fixing of support obligations, and the arranging of the care of children—but one of those consequences ought never be violence or the threat of violence. It would be a poor policy that excused to any degree the employment of violence because of a broken heart or hurt feelings. Accordingly, regardless of what, if anything, Mr. MacInnis' partner did, she bears no responsibility for what Mr. MacInnis and Mr. Caverley did. Rather, they employed their own judgment, intellect and will to commit serious criminal acts, and they alone are the ones responsible.

[4] I am mindful of the mitigating factors here: Mr. MacInnis has no record; Mr. Caverley's is a relatively minor one. Both are hard workers with families to support. Mr. MacInnis went to trial, but had a triable issue that was resolved in his favour; Mr. Caverley pleaded guilty once the MacInnis charges got sorted out.

Both appear to be profoundly remorseful for their criminal actions, and have said so in their s. 726 allocutions to the court. Both were admitted to bail a little over a year and a half ago, and neither has been charged with a bail violation.

[5] Of course, when I refer to these as mitigating factors, I mean that they suggest Mr. Caverley and Mr. MacInnis would appear to be guardedly favourable candidates for rehabilitative sentences. None of these considerations mitigates or lessens the seriousness of their offences and their degree of responsibility.

[6] These were serious criminal acts that involved threats of violence by action, as well as callous invasions of other-people's personal space. While Mr. MacInnis and Mr. Caverley had been drinking quite a lot in the hours leading up to their campaign, nobody was pouring anything down their throats; furthermore, the court is well aware that people will often utilize alcohol to steel the will when planning to do the unsavoury, so that alcohol consumption hardly lessens the individual's degree of responsibility.

[7] Furthermore, this type of near home invasion is a very serious violation of people's rightful expectation of safety and security in their own homes. Although classified under Part IX of the *Code* as an offence against property, a section 349 offence affects people very profoundly. Although I have not been presented with

victim-impact statements, I observed the principal victim in court, testifying in the MacInnis trial, and I infer from his indignant demeanour that he remains shaken and offended by his fearful experience. This is an aggravating factor under sub-para. 718.2(a)(iii.1) of the *Code*.

[8] Beveridge J. nailed it in his break-and-enter sentencing in *R. v. Stewart*:

> I accept, without reservation, the Crown's suggestion that homeowners do feel violated by the commission of this kind of offence. To call it a mere property offence is a mis-description. If a property is impacted, it impacts on the feelings of security of not just these particular people, but by others in the community who hear about this – and they do hear about it from them.[2]

[9] I agree with the prosecutor that offences of this nature engage a high risk of lethality. There are a number of reported cases involving the innocent confronted by the armed that turned deadly. In *R. v. Cooper*, an elderly man was bludgeoned to death with a hammer when he went to a neighbouring home on Franklyn Street in Halifax and confronted some young people who had broken inside.[3] In *R. v. Laidlaw*, the victim was stabbed after she confronted a thief trying to steal her car; she bled to death in front of her wheelchair-bound husband.[4] In *R. v. T.T.G.*, a

---

[2] 2009 NSSC 7 at para. 7.
[3] (1981), 49 N.S.R. (2d) 221 (A.D.).
[4] (1989), 93 N.S.R. (2d) 333 (A.D.).

woman was murdered by a young intruder who sought to cover up his robbery.[5] When stoked up males, fuelled by alcohol or drugs, arm themselves and commit themselves to violent acts, they pose a potentially lethal force to anyone in their way. Fortunately for the two targets of Mr. MacInnis and Mr. Caverley, one was not home and the other remained passive, and so no one got hurt physically. But the potential for serious injury was present, most undeniably.

[10] I accept that Mr. MacInnis and Mr. Caverley now regret what they did, and are prepared to make financial amends. That is to their credit. But the criminal law is the law of public wrongs, and there are larger issues here than merely providing financial restitution to the victims. I repeat this when I consider the likely impact of the court's sentence upon them and their families: it is not the sentence of the court that places the liberty and jobs of Mr. MacInnis and Mr. Caverley in jeopardy. This is because the sentence of the court is the inevitable judicial act that flows from the forensically evaluated commission of crime. Nevertheless, I do recognize the significant effect the likely loss of present

[5] (1997), 157 N.S.R. (2d) 208 (A.D.).

employment will have upon the offenders, and I have factored that into my decision.[6]

[11] Going into someone's home intending to commit an offence is a very serious crime because of the sanctity accorded the home in law and in the community. However, the court must be careful here. I agree with the prosecutor that being unlawfully in a dwelling is "inextricably linked" to the offence of break and enter, in that, as I noted in rendering the verdict, the former is included in the latter. But it is also a lesser offence, in that the maximum penalty for an indictable s. 349 charge is ten years, whereas for breaking into a dwelling, it's life. So it is that s. 349 is "inextricably linked" to s. 348 much as it is typical for assault to be inextricably linked to aggravated assault or murder. But one must not forget the "lesser" bit. In the decision of *R. v. Fraser*,[7] referred to by the prosecution, one of the issues considered by the Court of Appeal in reviewing—and, ultimately, sustaining— my sentence was my comment that the difference between s. 349 and s. 348 was "a distinction without a difference". I recall my decision in *Fraser* very well, and the distinction-without-a-difference comment had a context. On the facts of the case, I was satisfied that Mr. Fraser had, as a matter of fact, committed what

[6] See Clayton Ruby, Sentencing, 8th ed., (Toronto:LexisNexis, 2012) at pp. 292-293 for a pertinent discussion of this factor.
[7] 2012 NSCA 188 at para. 4.

was essentially a break and enter into a former partner's home. That he was charged with a s. 349 offence only was based on the investigator's faulty reasoning that, as Fraser had been living in the home previously, he had held a colour of right to go back in. I say that's faulty, because Mr. Fraser had no colour of right; less than a week before, I had prohibited him from going back to his girlfriend's as part of a conditional-sentence order. So, there is the context.

[12] I note as well that when Parliament enacted s. 348.1 of the *Code* to codify the long-recognized common-law principle that home-invasion break and enters are particularly aggravating,[8] it did not amend similarly s. 349. Some might argue the implied-exclusion rule. While it may indeed be the case sometimes that the legislative micromanaging of the sentencing process will lead to unintended and undesirable results, that is not the case here. The implied-exclusion rule does not get rolled out very much nowadays;[9] common sense and precedent satisfy me that a s. 349 offence involving someone going into an occupied home with the intention of committing acts of violence or acted-out threats of violence is most serious.

[13] Nevertheless, I do agree with the prosecutor that an indictable s. 349 offence is a serious crime. In assessing the range of penalty, I note that, while the *Code*

---

[8] In force 1 May 2008 in virtue of SI/2008-34, *Can. Gaz., Part II,* 2 April 2008.
[9] See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Toronto: LexisNexis, 2014) at para. 8.106.

describes a notional upper limit for sentencing, the actual range will be governed in large part by the facts before the court, which involves an evaluation of the circumstances of the offence and the offender. This was the key point made by Bateman J.A. in *R. v. Cromwell* in considering the sentence parity provisions of para. 718.2(b) of the *Code*. [10]

[14] I treat Mr. MacInnis and Mr. Caverley (given his very limited prior record) as first offenders. But what kind of first-time offenders are they? What sort of an attitude toward civility and civil society would lead someone, right from the get-go, to arm himself and embark on a campaign of intimidation and destruction? I can certainly see calling out an apprehended adversary with choice words if one feels wronged; the constitutionally protected democratic right of free speech admits of quite a bit, provided the speaker not stray into the threatening, intimidating or disorderly. But to take up a bat and a tire iron, smash up one person's car and another's home exemplifies an arrogance bent away from the rule of the law.

[15] This is an offence that is all too common in Pictou County: young and middle-aged males who believe that, if they dislike someone enough, they can just

[10] 2005 NSCA 137 at para. 26.

go into that person's home and start swinging. It is entirely proper for the court to consider the prevalence and incidence of particular forms of crime in the community, as crimes that occur with greater regularity ought to attract sentences—as s. 718 of the *Code* informs me—promoting greater respect for the law, involving greater accountability and deterrence, and thereby promoting a safer and peaceful society.[11] Here is a list from the past four years; while many where tried as break-ins, the "break" parts were small potatoes compared to the mêlées unleashed once inside.

- Joshua Francis Connors, case 2323460: forcibly entered a home, damaged furnishings and assaulted the homeowner in a settling of scores; minor prior record, mostly as a youth. Sentence: three years.

- Dylon Earl Ronald Bertram MacDonald, case 2323465: accomplice of Connors'. No record. Sentence: two years.

- David Blair Tobin-Chisholm, cases2134120-2134122: forcibly entered home and committed serious assaults on occupants. Significant prior record. Sentence: 6.5 years.

---

[11] See, e.g., *R. v. Prasad*, 2006 BCCA 470 at para. 12 and *R. v. Gibbon*, 2006 BCCA 219 at para. 21 to 26 on the authority of a sentencing court to take notice of the prevalence of crime in the community.

- Allan Michael Davidson, cases 2133295-2133298: accomplice of Tobin-Chisholm's. Significant prior record. Sentence : 6.5 years.

- Aaron Dale Rundle, case 2133980: accomplice of Tobin-Chisholm's. Minor role in crime. No prior record. Sentence: 2.5 years.

- *R. v. Best* 2012 NSCA 34. Court of Appeal would have increased intermittent-sentence term imposed by trial judge to a federal term of three years, but for the fact that the warrant-expiry date had passed. Offender played a secondary role in an attack on a homeowner who had shown up, unbidden, at a neighbour's party and made a nuisance of himself.

- *R. v. Greencorn* 2013 NSPC 112. Three-year term imposed on young adult male with limited record. While drunk, offender entered a rental home that had been occupied previously by an acquaintance. Offender was ordered out by the new tenant, but returned a short time later, re-entered without permission, and challenged the tenant to a fight. Sentence: three years.

[16] The section 349 offences are excluded from the condition-sentencing regime, in virtue of sub-para. 742.1(f)(x) of the *Code*;[12] the s. 430 charges are not

[12] In force 13 March 2012 in virtue of SI/2012-40 *Can. Gaz., Part II,* 20 June 2012.

excluded. However, as the total sentences here that I feel are appropriate for each offender are not less than two years, not even blended conditional sentences would be legal. I have considered all alternatives to custody in this case. Given the weight of appellate authority, the principle of sentence parity, the governing sentencing principles which I have referred to explicitly throughout this decision, but never losing sight of the prospect of rehabilitation, I find that the appropriate sentences here are as follows:

[17] For the s. 349 offences, case number 2569826 against Mr. MacInnis, and case number 2570079 against Mr. Caverley, I impose a sentence of two-years' imprisonment upon each offender. Those are the starting-point sentences.

[18] For the charges of damaging the contents of the home, case number 2569827 against Mr. MacInnis, and case number 2570080 for Mr. Caverley, although I am not satisfied that those charges should be stayed under the principles laid out in R. v. Keinapple (in that one can enter a home unlawfully without necessarily damaging property, so that the facts of the lesser charge are not encompassed in the greater charge in this case) I do believe that these were single transactions attracting the principle of concurrency, as outlined insightfully by Scaravelli J. in

R. v. McKenna.[13] Accordingly, the sentence for each offender will be a three-month term of imprisonment, but to be served concurrently.

[19] For the charges of damaging the van, case number 2569843 for Mr. MacInnis, and case number 2570077 for Mr. Caverley, I consider this crime sufficiently disconnected in time and place from the s. 349 counts as to require consecutive sentences; accordingly, I impose sentences of four-months' imprisonment upon each offender, to be served consecutively to the s. 349 sentences.

[20] There will be secondary-designated-offence DNA collection orders against each offender in respect of the s. 349 counts, and ten-year plus 2 years and four month/life s. 109 prohibitions against each offender in respect of those counts, as well.

[21] These charges occurred prior to the 24 October 2013 in-force date of the amendments to the victim-surcharge provisions of the *Code*. Given the duration of the sentences imposed today, and given the financial and family obligations of the offenders, I find that victim surcharge amounts would work an undue hardship, and I decline to impose them.

---

[13] 2014 NSSC 92.

[22] Financial restitution is an important part of a sentencing hearing. This is underscored in s. 738 of the *Code*. I may order it on the application of the prosecution—an application I do not recall having been made in this case—or of my own motion. However, as with any other judicial remedy, restitution is evidence driven. I was not presented with clear evidence about the costs incurred by the victims. There is a reference in Mr. Caverley's PSR about the costs of fixing the van and replacing child-car seats, but there were no supporting invoices. Mr. MacInnis has agreed to pay the homeowner $1220; I do not know how it was that figure got calculated. The victims are entitled to compensation. However, it will have to be pursued privately or in the civil courts, as I do not have enough information to order it.

[23] The warrants of committal will be endorsed pursuant to s. 743.21 of the *Code*. While in custody, the offenders are to have no contact or communication with either victim or their immediate families. The endorsements will set out the full names of the victims as shown in case nos. 2569843, 2570077, 2570080 and 2569827.

[24] All orders accordingly. This decision is subject to editing until published in final form.

JPC