

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Melvin*, 2020 NSSC 346

**Date:** 20201229

**Docket:** 447189

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

James Bernard Melvin

**Decision on September 26, 2020 Incident re Joshua Preeper**

**Judge:** The Honourable Justice Peter P. Rosinski

**Heard:** November 2 and 3, 2020, in Halifax, Nova Scotia

**Counsel:** Christine Driscoll, Q.C., Eric Woodburn, and Sean McCarroll  
for the Crown  
Raymond Kuszelewski and Laura McCarthy for the  
Defendant

**Introduction**

[1] James Bernard Melvin Junior (DOB March [..], 1982) was in the midst of defending an application by the Crown that he be declared a dangerous offender, when on September 26, 2020 he had physical contact with another inmate at the

Atlantic Institution, located at Renous, New Brunswick. The victim, who was in good physical health beforehand, was left unconscious, with life-threatening injuries requiring he be placed on a ventilator, and was induced into a comatose state, until October 20, when he opened his eyes but had no idea where he was, had no idea what had happened to him, and did not recognize his own physician.

[2] The Crown wishes this to be evidence at his dangerous offender hearing – Mr. Melvin argues it should not be so.

[3] I am satisfied that this evidence is admissible at Mr. Melvin’s dangerous offender hearing. I am satisfied beyond a reasonable doubt that Mr. Melvin committed a “serious personal injury offence” as defined in s. 752 CC in relation to Joshua Preeper ( DOB-June [..], 1992) - attempted murder and aggravated assault.

[4] Let me explain these conclusions.

**The admissibility of the events of September 26, 2020 at the Atlantic Institution, Renous, New Brunswick**

[5] On September 11, 2020, the Crown closed its case on the dangerous offender application and tendered its exhibits. On October 7, 2020, it advised the Court that:

“The Crown has received information that alleges Mr. Melvin was involved in a violent assault upon another inmate at the Atlantic Institution at Renous, New Brunswick on

September 26, 2020. The incident is currently under investigation by the RCMP, and charges are expected. The victim remains in hospital with serious injuries... It is the Crown's position that this assault is relevant to these proceedings. Mr. Melvin's alleged role in this assault fits squarely within the pattern of behaviour that forms the basis of this application. As such, the Crown will be respectfully requesting to call further *viva voce* evidence to prove the circumstances of this assault."

[6] On November 2, 2020, the court heard evidence regarding the admissibility of this evidence. The available evidence included *viva voce* testimony of persons involved with the Institution, the incident and victim, and videotaped surveillance of the location when/where the assault took place.

[7] Mr. Melvin's counsel argued that:

1. the entire videotaped surveillance should be excluded as evidence against Mr. Melvin because it was not necessary insofar as there would be *viva voce* testimony, and the prejudicial effect on Mr. Melvin's fair trial rights outweighed its probative value. The potential prejudice argued is based on a concern that the images would unduly and indelibly affect the court's view of the expanse of evidence that predated the incident, and the incident evidence itself would receive more weight than it would otherwise deserve;
2. alternatively, even if the videotape was found to be admissible, it should be restricted to any time before 8:31:56 a.m. by which time

any actions toward the injured inmate by Mr. Melvin or Mr. Morgan James McNeil (DOB March 5, 1991) were complete.<sup>1</sup>

[8] Mr. Melvin is also concerned that if this court concludes beyond a reasonable doubt that he has committed a criminal offence in relation to Mr. Preeper, this will prejudice his right to a fair trial should the police investigation result in criminal charges against Mr. Melvin.<sup>2</sup>

[9] The Defence agrees that: it is Mr. Melvin that is shown in the videotape; that the videotape has been sufficiently authenticated as to date and time, completeness; and it is a fair and accurate representation of what took place.<sup>3</sup>

[10] In order to best appreciate the probative value and any prejudicial effect, the court reviewed the videotape in open court.

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<sup>1</sup> Mr. McNeil (aka MacNeil) also assaulted Mr. Preeper, though in no material way for present purposes. I make no decision or pronouncement about his potential or actual criminal culpability.

<sup>2</sup> To address the latter point, on November 2, 2020 the court imposed an interim publication ban of the details of the September 26, 2020 incident. The continuation of that publication ban was fully addressed on December 4, 2020 – 2020 NSSC 356.

<sup>3</sup> Although there was no dispute here, regarding authentication of surveillance video footage, I keep in mind the jurisprudence such as contained in the reasons in *R v Tessier*, 2020 ABCA 289 at paras. 70 – 80; and regarding the prerequisites for the reception of recognition evidence based on the video or photographic evidence capturing the commission of an offence and the identity of a perpetrator: *R v Hudson*, 2020 ONCA 507 at paras. 28-35. Incidentally, witness testimony in this proceeding also confirmed that the videotape is authentic, and a fair representation of the location and events on the date and time in question.

[11] I have also heard *viva voce* testimony from: Roland Mazerolle, Acting Security Intelligence Officer at the Atlantic Institution, who at the material time of the incident was only involved “after-the-fact”; David Durelle, Correctional Officer at the Institution, who observed the incident; Brent Carter, Correctional Officer at the Institution, who was directly involved in the immediate aftermath of the incident; Carolyn Morrison, RN, who attended to the injured inmate until he was transported by ambulance to the Miramichi Hospital; Dr. Camille Haddad, MD (Family Medicine), who was familiar with the injured inmate’s health status from having worked with him at the Institution, and monitored his medical status thereafter, up and until the day of his testimony, on November 2, 2020.<sup>4</sup>

[12] Mr. Melvin presented no evidence.

[13] The Crown position, regarding the admissibility of this evidence and the videotape in particular, is as follows:

1. this is highly probative evidence because it is another example of Mr. Melvin’s “pattern of repetitive behaviour” or “pattern of persistent

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<sup>4</sup> Dr. Haddad was qualified as a medical doctor licensed to practice in the Province of New Brunswick (Family Medicine), and to give a medical opinion regarding the health status of Joshua Preeper. The doctor was not asked for, nor did he offer, his opinion regarding the nature and source of the causes of Mr. Preeper’s injuries. His testimony was limited to his own observations of, and interactions with, Mr. Preeper before the incident and after, as well as being based upon his access as a medical doctor to the hospital records related to Mr. Preeper, and their interpretation and significance to these court proceedings.

aggressive behaviour” per s. 753(1) CC, which it acknowledges, as an uncharged criminal offence, must be proved beyond a reasonable doubt<sup>5</sup>;

2. in any sentencing process, it is desirable that the court has as much information as possible, and that is even more so true in the case of a dangerous-offender proceeding<sup>6</sup>;
3. the videotape is the “best evidence” of the physical contact between these individuals, and it clearly shows Mr. Melvin sucker-punched the victim Joshua Preeper, without any hint or warning, and thereafter proceeded to further punch, stomp on the head, and kick the head, of the victim on the ground. It also shows a period of time when no other persons, but the three inmates Melvin, McNeil and Preeper were present to give an accounting of what preceded, and for how long the assault continued. The video shows that the three inmates, who were scheduled to be there for two hours, were alone in the recreation area

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<sup>5</sup> The Defence did not object when the Crown tendered videotaped surveillance of the North Nova Institution at Priestville, NS, which shows Mr. Melvin on March 24, 2018, in a similar fashion overwhelming and attacking Correctional Officer Greg Aitken - see Exhibit 30.

<sup>6</sup> I conclude that there has been proof beyond a reasonable doubt of a crime committed on September 26, 2020, which behaviour is subsequent to that of Mr. Melvin’s conviction for crimes committed on December 2, 2008. According to common law, the September 26 assaults are generally not admissible on sentencings as an aggravating factor, though it may be admissible in relation to his potential for rehabilitation (the Coke principle - see *R v RM*, 2020 ONCA 231 at paras. 31-36), whereas in the case of a dangerous offender proceeding, the Coke principle is *not* applicable - *R v Williams*, 2020 ONCA 3 at paras. 60-71.

from approximately 8 AM until 830, during which time there was no visually noteworthy hint or warning of the imminent attack.

4. in a similar situation, Judge Derrick, as she then was, permitted a videotape of an institutional setting assault on Christian Clyke by Shawn Shea, who was in the middle of his dangerous offender hearing, and was also caught on videotape – see *R v Shea*, 2014 NSPC 78 at paras. 291 – 297; although overturned in the result, Judge Derrick’s use of the video evidence was relied on by the Court of Appeal in its decision, 2017 NSCA 43 at para 36: “The attack was clearly calculated and unprovoked – decision paragraph 297 – Mr. Shea appears to have deceived the sheriffs to further his violent intent. The dangerous offender application may have ‘caught’ Mr. Shea’s attention – but not for long. He did not change his behaviour, despite the currency of the dangerous offender application.”
5. while the videotape provides no audio component, such that any words exchanged between Mr. Melvin, Mr. McNeil and Joshua Preeper are not captured and available to the court, this is not a material deficiency in the case at Bar, because there was no actual or apprehended physical contact, or overtly intimidating behaviour

between Mr. Melvin and Mr. Preeper before Mr. Melvin's first strike, which appears to have stunned Mr. Preeper- nor was there any self-defence physical response at any time thereafter by Mr. Preeper.

6. the videotape captures Mr. Melvin and Mr. McNeil giving each other the so-called "high five", shortly after the assault ends, which evidence was not seen first hand by any person who testified.
7. although the content of the videotape is disturbing, the prejudicial effect to the fair trial rights of Mr. Melvin would only be a serious consideration if there is a concern that the trier of fact will misuse the evidence, for example to show that Mr. Melvin has a propensity to commit such crimes, or that it may inflame the emotions of the trier of fact against Mr. Melvin, or is somehow otherwise irrelevant / prohibited from becoming evidence in relation to the issues the court must resolve. The Crown says that none of those issues are serious, as the present process involves a judge-alone sentencing, and the court has heard a great deal of evidence of much the same nature (including the videotape of Mr. Melvin's attack on correctional Ofc. Greg Aitken- Exhibit 30).



8. as this is a sentencing, the prejudicial effect on Mr. Melvin’s “fair trial” rights must be assessed through the sentencing lens, which typically involves consideration of what is a fit and proper sentence for the crime committed, and more specifically here, whether Mr. Melvin should be designated as a “dangerous offender”, rather than the trial lens, which focuses on whether guilt has been proven beyond a reasonable doubt.<sup>7</sup>

[14] Mr. Melvin argues that the video should not be admissible at Mr. Melvin’s dangerous offender hearing/sentencing because:

1. the occurrence of the incident, captured by the video, can be adequately described in the proposed narrative by *viva voce* testimony (such as that of David Durelle – albeit, as the Crown points out his testimony is different in some respects from what the video shows); i.e., “that it happened”;

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<sup>7</sup> The appropriate preliminary weighing of the probative value of evidence was described in *R v Farouk*, 2019 ONCA 662 at paragraph 32 – 39 (in the trial context – which should similarly be applicable in the sentencing context). Since this is a new alleged incident of “pattern evidence”, which must be proved beyond a reasonable doubt, I adopt the view that the prejudice/probative value analysis should track that used in a trial context, rather than the sentencing context.

2. to allow the video into evidence before the matter is fully explored in the criminal court prejudices Mr. Melvin's right to a fair trial (at this hearing) because *inter alia* it gives no context to what happened before the three inmates came to the recreation yard, and does not capture relevant utterances at the material times<sup>8</sup>;
3. although the Crown alleges that the video is graphic, that level of visual graphic content is not necessary to these proceedings; "the graphic is not the point";
4. the Defence does not agree with the Crown's submission that the video would better prove the Crown's case; the Crown simply wishes to "enhance" what is clearly established by the *viva voce* testimony.
5. the video becomes irrelevant after 8:31:56 AM because Mr. Melvin's actions (and those of Mr. McNeil) implicated in causing Mr. Preeper's injuries had ended by then.

**Conclusion as to the admissibility of the videotaped evidence of the September 26, 2020 incident at Atlantic Institution, Renous, New Brunswick**

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<sup>8</sup> See *R v Gillis*, 2018 NSSC 22, at paras. 60-88, where I respectfully suggest that in cases of "mere" provocation, "conduct or words by the victim, short of at least satisfying the historical requirements for the 'defence of provocation', should not reduce an offender's moral blameworthiness" in cases where bodily harm is caused. I conclude that, even without an audio record of the utterances of each of the inmates, a review of the videotaped evidence satisfies me beyond a reasonable doubt that, immediately prior to him striking Mr. Preeper, only Mr. Melvin was physically or otherwise animated, such that there is no air of reality to a self-defence argument by Mr. Melvin – See also *R v Chan*, 2005 NSCA 61.

[15] Generally speaking, for evidence to be admissible at a trial, it must be logically and legally relevant, subject to certain exceptions (statutory or common law/jurisprudential). It should also be material in the sense that it is offered to prove or disprove a fact in issue - *R v Calnen*, 2019 SCC 6.

[16] The videotape is logically and legally relevant, and material. It is not precluded by any applicable exceptions. I largely agree with the Crown's submissions herein.

[17] I have considered Mr. Melvin's arguments about the prejudicial effect on his fair trial rights:

1. in relation to this sentencing wherein he is concerned that the court may be unduly influenced to confirm a dangerous offender designation for him based upon the video evidence- the court is aware of this concern and will guard against this;
2. in relation to potential criminal charges arising from the same incident and his concern that the publicity surrounding the content of the videotape will pre-dispose potential jurors or a single judge as trier of fact to convict him- the court placed an interim publication ban on the details of the videotape content to address this concern;

3. in relation to his concern that the court has an incomplete record (no audio; no context of the history between Mr. Melvin and Mr. Preeper particularly inside the institution)-I conclude that the lack of audio recording and specific evidence of prior relations between Messrs. Melvin and Preeper are not problematic in these circumstances, where the court is able to view the interactions between Mr. Melvin and Mr. Preeper during the immediately preceding 30 minutes, and in light of the “sucker punch” surprise nature of Mr. Melvin’s attack on Mr. Preeper, which rendered him almost immediately defenceless. Mr. Melvin had the opportunity to present evidence from himself, Mr. McNeil, or other persons, and could thereby have introduced any oral communications or other evidence that he considered important to his position. Moreover, their prior relationship would only become relevant if Mr. Melvin was making an argument of a pre-emptive self-defence claim, for which there is no air of reality in these circumstances.

[18] The video captures some matters that David Durelle (the only eyewitness to the assault) did *not* see: the inmates’ behaviour during the 30 minutes in the yard before the assault; the “high-five” of Messrs. Melvin and McNeil almost

immediately after the assault; the time interval immediately before the start of the assault. It permits a more objective view of the nature and quantity of, and location where Mr. Preeper's body was struck by, the blows administered by Mr. Melvin and Mr. McNeil respectively.

[19] Regarding the argument that the video becomes irrelevant after 8:31:56 because Mr. Preeper is no longer being assaulted, I conclude that the video remains relevant because: it shows the effect of the assault on Mr. Preeper (who was rendered unconscious at an early point during the assault, and remained so after he was taken out of the recreation yard area); shows the callousness of the "high five" between Messrs. Melvin and McNeil, which I conclude is directly related to, and is a celebration of, their physical attack on Mr. Preeper. Mr. Preeper's condition was not immediately known, and therefore he was transferred to the healthcare unit of Atlantic Institution. The video captures the precise moments RN Morrison arrived, and when he was removed from the recreation yard.

[20] I find the videotaped evidence (which also shows the inmates while inside the institution on their way towards the recreation yard) to be admissible at this dangerous offender/sentencing hearing.

[21] I conclude that the entire videotape is admissible. Its probative value significantly outweighs any prejudicial effect on Mr. Melvin's fair trial rights.

[22] Next, I will go on to assess whether the physical attack by Mr. Melvin upon Mr. Preeper rises to the level of a crime, and whether there is proof beyond a reasonable doubt that he committed a crime.

**Why I conclude there is proof beyond a reasonable doubt of criminal conduct by Mr. Melvin in relation to the injuries sustained by Joshua Preeper on September 26, 2020<sup>9</sup>**

[23] Mr. Melvin enters the razor-wire chain-link fence recreation area first, at approximately 7:56 AM. Mr. McNeil arrives within a minute. They shake hands in a friendly manner. Mr. Preeper arrives approximately a minute later, and he shakes hands with both Melvin and McNeil in a friendly manner.<sup>10</sup>

[24] About 8:16 am, Mr. McNeil is making punching and kicking gestures while looking at Mr. Melvin, as if in a questioning manner. Mr. Melvin is seen pacing about the recreation area in what seems to be an agitated state, and not unlike what boxers might do before they begin a fight. He is wearing gloves.

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<sup>9</sup> It should be noted that I viewed multiple angles and times of surveillance videotape contained on the Exhibit. These different vantage points give one an aggregated better understanding of the physical movements of the three inmates at the relevant times. After I reached my conclusions herein, but before release of my decision, Mr. Melvin was charged with having committed an aggravated assault on Mr. Preeper.

<sup>10</sup> Roland Mazerolle, Acting Security Intelligence Officer at the Atlantic institution, testified that he has known Mr. Melvin for approximately 10 years while working as a correctional officer and especially well in the last two years in his role as an SIO. He stated that the three inmates had separate cells at the time, and this would have been their first interaction that day. He confirmed that he has input into which inmates can be included in a recreation group, and this is in order to ensure their compatibility with each other (that is, that they do not have pre-existing animosity for gang-related, personal beef, or other reasons). He is involved in interviewing inmates in this respect to make sure they are compatible. The inmates are asked if they agree to be in a recreation group with the proposed other inmates. His last assessment regarding Mr. Melvin and Mr. Preeper had taken place about 2 to 3 weeks earlier, and Mr. McNeil had just joined them the day before, as he had been only recently transferred to the Atlantic Institution.

[25] The videotape provides reliable and compelling evidence that Mr. Melvin, without any apparent reason or warning, first by using his hands, intentionally struck Mr. Preeper in the head/eye area with great force - a so-called “sucker punch” (es). This stunned Mr. Preeper, as he clutched his eye area. Thus, he was rendered momentarily defenceless, as Mr. Melvin continued to rain blows upon Mr. Preeper’s head area, who was forced/tripped to the ground, and almost immediately rendered utterly defenceless.

[26] A review of the video surveillance confirms that Mr. Melvin himself struck Mr. Preeper as follows (between approximately 8:29 and 8:30 am):

1. The first blows are struck at approximately 8:29 am. Within seconds, Mr. Preeper is on the ground holding his eye area with one hand and trying to shield his head with his arms, as Mr. Melvin continues to punch him;
2. Mr. Melvin then proceeds to repeatedly raise his leg up to knee level and stomps on Mr. Preeper’s exposed head with deliberation and great force, 4 times in relatively quick succession, while Mr. McNeil is kicking him in the torso area;

3. After the fourth stomp, the victim's body appears to become limp, as if he is unconscious;<sup>11</sup>
4. Mr. Melvin continued in the same fashion to stomp on Mr. Preeper's exposed head with deliberation and great force 6 more times. 10 stomps on the head of a defenceless victim. I am satisfied that Mr. Melvin clearly knew that he was under recorded surveillance while doing this. At one point, he nonchalantly looks up at the surveillance camera;
5. Mr. Melvin then immediately steps back, as if to kick a field goal in football, and so kicks the helpless victim in the head with great force once; then steps back again and kicks him a second time; and steps back and kicks him a third time; and steps back and kicks him a fourth time; and steps back and kicks him a fifth time; and steps back and kicks him a sixth time; and steps back and kicks him a seventh time;

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<sup>11</sup> Carolyn Morrison, RN testified that she attended the injured inmate in the recreation area and was with him until at 8:58 am he was taken by ambulance to the Miramichi Hospital. She found Mr. Preeper laying on his side with obvious head injuries which were bleeding. He had two lacerations on the left side of his head, and his right eye was swollen shut. His head appeared to be deformed. His voice clearly evinced pain, and he was breathing in an "moaning" way. Dr. Haddad had been the Doctor for Mr. Preeper before September 26, 2020, as he was responsible for inmates at the Atlantic Institution. He testified his health was "good", he had no chronic issues, although he was on addiction treatment. He saw Mr. Preeper within 1 to 2 days of the incident at the Miramichi Hospital ICU. He followed him thereafter to the date of his testimony on November 2, 2020. He characterized Mr. Preeper as having had "life-threatening injuries". He had access to all the medical records, and those suggested Mr. Preeper seems to have some form of brain stem injury, which will require quite a lot of rehabilitation, and which hopefully will make him better neurologically, because at present he cannot walk, cannot stand, and cannot follow commands.



and steps back and kicks him an eighth time; and steps back and kicks him a ninth time; and steps back and kicks him a tenth time; and steps back and kicks him an eleventh time; and steps back and kicks him a twelfth time, and almost to the point of physical exhaustion, steps back and kicks him a thirteenth time before correctional officers are virtually at the fence, and Mr. Melvin steps away from the body.

[27] The videotape also shows Mr. Melvin and McNeil giving each other a “high five” shortly after the attack.

[28] Correctional Officer Brent Carter, arrived to see an injured inmate on his back and two other inmates standing close to him. “As I arrived [and was approximately 8 to 10 feet away from them], the two backed away – inmates Melvin and McNeil. I yelled to them to ‘stop’ and I pointed my pepper-spray towards them and told them to ‘back away’.”

[29] He was asked about Mr. Melvin’s demeanour – he stated that Mr. Melvin was in a “heightened agitated state” and “saying - ‘wasn’t my fault.’”

**Why I conclude beyond a reasonable doubt that Mr. Melvin committed the offences of attempted murder and aggravated assault upon the person of Joshua Preeper on September 26, 2020 at the Atlantic Institution, Renous, New Brunswick, Canada**

[30] I accept the *viva voce* testimony of each of the witnesses as truthful and reliable, and where their evidence clearly conflicts with the videotaped surveillance evidence, I accept their evidence was given honestly, but mistakenly. I found no such material differences.

[31] The essential elements of *attempted murder* include:

1. Mr. Melvin had the specific intention (*mens rea*) to kill Mr. Preeper;
2. Mr. Melvin's repeated assaults (the number and nature thereof) upon Mr. Preeper constitute the *actus reus*. (which simply stated, must be one step beyond mere preparation to kill another person).

[32] I am satisfied that Mr. Melvin's repeated assaults satisfy the *actus reus* requirement beyond a reasonable doubt.

[33] Furthermore, in the circumstances of this case, the deliberateness, forcefulness, and various repetitions with which Mr. Melvin intentionally struck Mr. Preeper in the head area satisfies me beyond a reasonable doubt that he intended to kill Mr. Preeper.<sup>12</sup>

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<sup>12</sup> See for example the discussions in *LeBreton v R*, 2018 NBCA 27 per Baird, JA; and *R. v. PES*, 2020 NBCA 124 per Steel, JA at para. 43-44.

[34] Aggravated assault is a separate offence that is not included within an un-particularized count of attempted murder: *R v Pelletier*, (2012) 291 CCC (3d) 279 (ONCA).

[35] The essential elements of *aggravated assault* include:

1. the intentional application of force;
2. without the consent of the victim;
3. that Mr. Melvin knew the victim did not consent to the application of force;
4. that Mr. Melvin intentionally applied force that did wound, maim, disfigure, Mr. Preeper; or endanger the life of Mr. Preeper - and it was objectively foreseeable that bodily harm would result.

[36] I am satisfied that each of these essential elements has been proved beyond a reasonable doubt.

## **Conclusion**

[37] I am satisfied beyond a reasonable doubt that Mr. Melvin committed the following criminal offences during his assaults on Mr. Preeper on September 26, 2020: attempted murder and aggravated assault.

[38] These findings are admissible as “pattern” incident evidence at Mr. Melvin’s dangerous offender hearing.

Rosinski, J.