

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Al-Rawi*, 2020 NSSC 386

Date: 20201217

Docket: CRH 485671

Registry: Halifax

Between:

Her Majesty the Queen

v.

Bassam Aladin Al-Rawi

SENTENCING

Judge: The Honourable Justice Gerald R.P. Moir

Oral Decision: December 17, 2020

Written Release: January 11, 2021

Counsel: Carla Ball, for the Crown
Ian Hutchison, for the Defence

Moir, J. (Orally):

[1] I have to sentence Mr. Al-Rawi for committing sexual assault. I have the following evidence to consider in addition to the trial evidence:

1. A presentence report prepared by Mr. Alex Llewellyn on September 30, 2020.
2. Victim impact statement read yesterday, a written copy of which was filed.
3. Letters from physicians for Mr. Al-Rawi's wife about her pregnancy, the need to avoid stress, and her desire to return to Germany as soon as possible.
4. Ms. Rebecca Mueller's statement dated December 11, 2020.

Also, Mr. Hutchison made factual representations on uncontroverted subjects about Mr. Al-Rawi's leaving Iraq for Germany and Canada, his wife's prospects for visiting Canada from her native Germany, and the operation of his business in Germany.

[2] The sexual assault was inflicted on Ms. ECB at Halifax on December 15, 2012. Initially, the police refused to lay charges. Charges were laid five and a half years later, in 2018. Mr. Al-Rawi is a resident of Germany. He waived extradition and appeared here faithfully when required by the court. Even when his trial was interrupted by Covid restrictions in Germany and Canada, he cooperated in resuming trial with the *Jordan* deadline in mind.

[3] I gave my reasons for finding Mr. Al-Rawi guilty on August 28, 2020 and the decision has been transcribed. I will only provide a brief summary of the circumstances of the offence. The detailed account is in my decision of last August.

[4] Mr. Al-Rawi picked an intoxicated Ms. ECB up in the early hours of Saturday, December 15, 2012. She was not a fare. The ride appeared to be a compassionate gesture toward a stranger.

[5] Eventually, Mr. Al-Rawi headed for a highway, and ended at his apartment building. He escorted Ms. ECB to his third floor apartment. She was still very intoxicated.

[6] Mr. Al-Rawi had sex with Ms. ECB on his bed in his bedroom. She did not want this. She communicated nothing for consent. Indeed, she pretended to have passed out in an effort to avoid sex.

[7] The presentence report puts Mr. Al-Rawi's personal circumstances in a very good light.

[8] Mr. Al-Rawi has solid family supports.

[9] He was brought up well in a middle class household in Baghdad with good parents and three siblings. He fled Iraq in the face of persecution against Sunni Muslims after the American invasion. Two decades later, he still maintains good relations with his parents and siblings.

[10] Mr. Al-Rawi and his spouse have been together for over ten years. They are expecting their first child. His wife travelled with him to Nova Scotia to support him during the trial. She says they are "together, strong and committed".

[11] Mr. Al-Rawi received a good education in Baghdad. Study appealed to him, especially the study of languages. After high school, he earned a Biomedical Degree with good marks. Upon moving to Germany, he learned German and Swedish.

[12] Mr. Al-Rawi left Germany for Canada, where he was accorded refugee status. Between 2010 and 2015, he came close to obtaining a commercial pilot's licence. However, mounting legal expenses caused him to withdraw before he could complete the last hours of required flying time.

[13] Mr. Al-Rawi has an excellent work record. He established his first business shortly after emigrating to Germany. He operated that business for seven years before moving to Canada. While studying for the commercial pilot's licence, he drove and sublet taxi cabs. Since 2016, Mr. Al-Rawi and his wife operated a medical service business and a car rental and driver business in Germany with good results.

[14] He and his wife had substantial incomes. They own a home, have liquid investments, and carry a debt load.

[15] I accept his wife's statement about the severely adverse effects separation by imprisonment will have on her. Also, I accept her statements about the severe impacts of such on the business.

[16] The Crown recommends a sentence of three to four years. It prefers four. The defence would like to see a non-custodial sentence in light of severe consequences imprisonment holds for Mr. Al-Rawi, his wife and child, and his businesses. Failing that, the defence recommends two years.

[17] I must keep in mind the principles of sentencing enacted in s.718, 718.1 and 718.2 of the *Criminal Code*.

[18] Proportionality has to be assessed in light of the inherent wrongfulness and harmfulness of major sexual assaults. The Crown says that the application of *R. v. Friesen*, 2020 SCC 9, in *R. v. Brown*, 2020 ONCA 657, to major sexual assaults on adults supports increasing prison terms for those offences generally. I do not see those decisions as having that result in Nova Scotia. The devastating impact of major sexual assaults seems to have been recognized in Nova Scotia.

[19] Judge Buckle provided an extensive and helpful review of such sentences at para. 41 to 46 of *R. v. Percy*, 2019 NSPC 12. Allowing that sentencing in a sexual assault case “has to reflect the unique circumstances of that offence and that offender” (para. 41), she concluded “...the range, across Canada, for sexual assault involving intercourse is from 18 months to four years” (para. 46).

[20] Judge Tax found a range of two to three years in *R. v. Simpson*, 2017 NSPC 25, reversed on other grounds, 2018 NSCA 25. Sentences of two years were imposed by this court in *R. v. Burton*, 2017 NSSC 181 (Arnold, J.), and *R. v. J.A.M.*, 2018 NSSC 285 (Scaravelli, J.).

[21] In my assessment, a sentence of four years would offend the principle of parity. Also, a sentence of three to four years is inconsistent with the need for individualization to accord with the very positive evidence of Mr. Al-Rawi’s personal circumstances.

[22] In my assessment, a non-custodial sentence would offend the principle of parity. Also, it would offend the principle of proportionality.

[23] Evidence of collateral consequences has a place in sentencing, but it is limited. See *R. v. Kotio*, 2020 NSSC 68, para. 31, discussing *R. v. Pham*, 2013 SCC 15.

[24] Mr. Al-Rawi will suffer numerous negative collateral consequences from a period of imprisonment. His residency permit for Germany will be in question after April, 2021. He will be separated from his child and his wife when the child is born. His businesses will suffer and, likely, fail. He and his wife will likely be unable to service the debt secured against their home.

[25] I have “flexibility”, but it cannot be used to impose “inappropriate and artificial” sentences in order to avoid collateral consequences”: *Pham*, para. 15. In my opinion, the severe collateral consequences rightly incline to the low end of the range in the hope that some of the consequences will be alleviated by the shorter imprisonment, but that is at the limit of the flexibility.

[26] In my assessment, the positive aspects of Mr. Al-Rawi's personal circumstances and his cooperation with the trial process also compel the lower end of the range.

[27] I sentence Mr. Al-Rawi to two years imprisonment. This is not a case for probation after prison.

[28] Mr. Al-Rawi does not consent to the ancillary orders requested by the Crown, but he makes no opposition either. So, I will grant the requested orders.

J.