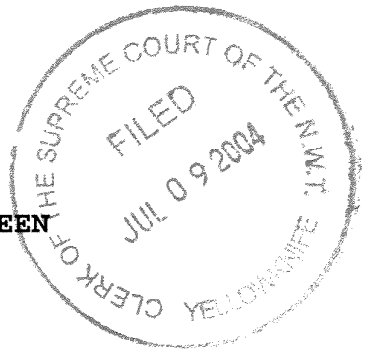
R. vs. McInnes, 2004 NWTSC 42

S-1-CR-2003000118

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:



HER MAJESTY THE QUEEN

- vs. -

KRYS FINDLEY McINNES

Transcript of the Oral Reasons for Sentence by The Honourable Justice V.A. Schuler, at Yellowknife, in the Northwest Territories, on July 7th, A.D. 2004.

APPEARANCES:

Mr. N. Sinclair: Counsel for the Crown

Mr. H. Latimer: Counsel for the Accused

Charges under s. 344, 351(2), 139(2) Criminal Code of Canada

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THE COURT: Krys Findley McInnes has been convicted of three charges; armed robbery contrary to section 344(a) of the Criminal Code, having his face masked with intent to commit an indictable offence contrary to section 351(2), and an attempt to obstruct justice contrary to section 139(2).

Having reviewed the facts when I convicted Mr. McInnes, I will summarize them only briefly. At approximately 5:00 p.m. on January 16, 2003, masked by a balaclava and carrying a Lee Enfield .303 rifle, Mr. McInnes went into the Gallery of the Midnight Sun, a local art gallery and retail outlet in Yellowknife. It is located on Yellowknife's main street less than five minutes' drive from the centre of town. It is not known whether the rifle was loaded.

In the store at the time were the managers, Mr. and Mrs. Seagrave, two employees, who were in a separate room from where these events took place, and a customer. It does not appear from the evidence that the two employees and the customer were aware of the robbery until after the fact.

Mr. McInnes proceeded past where the front cash register was located and jewellery is displayed to an office at the back of the store where the safe is located and money transfers are transacted. He pointed the rifle at Mr. Seagrave's chest and demanded money, which Mr. Seagrave was then in the process of

counting. Mr. McInnes then put the rifle in what was referred to in evidence as the hunter safe position and did not point it again.

After being given the money that was being counted, Mr. McInnes indicated that he wanted what was in the safe. Mrs. Seagrave brought him rolls of coins which she handed to him as he was trying, with some difficulty, to get out the back door. Mr. Seagrave opened the back door for him and Mr. McInnes then disappeared into the darkness.

The amount of money he got away with was $3,197. It has never been recovered. The interaction inside the Gallery of the Midnight Sun took somewhere between two and five minutes. It is evident from what Mr. McInnes later told friends that he hid the money across the street from the Gallery of the Midnight Sun near the Racquet Club and then left the rifle at the apartment where he had been staying. He headed up the main street of Yellowknife and entered a mall where he was in a fight. He later told one of the Crown witnesses that he made a scene during the fight so as to be noticed.

The rifle used by Mr. McInnes in the robbery had been borrowed from a friend whose testimony was that Mr. McInnes had wanted it to rob a drug dealer. After the Gallery of the Midnight Sun robbery, Mr. McInnes asked that friend and the friend whose apartment he had

been staying at at the time of the robbery to dispose of the rifle. They talked about doing that, but eventually one of them took it to the police instead.

While Mr. McInnes and one of the other Crown witnesses, Michael Beauchamp, were in the Yellowknife Correctional Centre at the same time, Mr. McInnes asked Mr. Beauchamp to silence, to shut up one of the Crown witnesses, George Patterson, by doing whatever it might take, beating or threaten him. There was no evidence at trial that Mr. Beauchamp did anything to carry out the request. Those are the facts that give rise to the conviction for attempting to obstruct justice.

Mr. McInnes also wrote a letter to Francis Thrasher in which he tried to get Thrasher to lie for him about a conversation Thrasher had had with a Crown witness. Mr. McInnes's reasons as expressed in that letter for doing this were so as to discredit that witness and get revenge on him and another witness who had also testified against Mr. McInnes at his Preliminary Hearing. Mr. McInnes has not been charged with anything resulting from that letter, but, in my view, it is an aggravating factor and can be considered as such in sentencing Mr. McInnes, so long as no separate charge results from it.

Section 725(2)(b) of the Criminal Code provides that facts dealt with in that fashion are to be noted on the indictment, and, accordingly, I will make the

notation that the letter to Francis Thrasher (which was marked Exhibit P-10 at trial) has been taken into account on this sentencing.

The evidence about the telephone discussion that Mr. McInnes had with Kari Neilsen about George Patterson was, as I said on the conviction, not very clear as to whether Mr. McInnes was trying to involve her in talking to Patterson or was just voicing his anger or concern about Patterson having gone to the police. That incident did not occur at the same time as the conversation with Mr. Beauchamp at the correctional centre. I have decided to disregard that incident as simply too uncertain.

The fact that armed robbery, in other words, robbery in the course of which a firearm is used in some way, is considered one of the most serious offences in our law is reflected by Parliament having set the punishment for it at a maximum of life imprisonment and a minimum of four years' imprisonment.

There are not many offences in the Criminal Code that carry a minimum term. Manslaughter, sexual assault and aggravated sexual assault are examples of serious offences that carry no minimum term. So when a minimum is prescribed, it will not be of much assistance to consider what sentence someone might get for a different offence such as manslaughter that does

not carry a minimum.

The courts have also said that armed robbery, especially of a financial institution, a bank or other establishment that stores money or its equivalent, for example, jewellery, must attract a significant jail sentence. Robbery of such establishments has been placed in a different category, a category attracting a lengthier sentence from, for example, robbery of a convenience store or smaller retail outlet not generally considered to be the source of a lot of cash or expensive goods.

The reason for this, as the Alberta Court of Appeal explained in R. v. Hung in 1990, is that institutions that store money or its like are tempting targets for hold-ups due to the availability of large amounts of money. So deterrence is even more necessary in those cases. The reason for the distinction also appears to be that robbery of a bank usually involves a level of sophistication that is not found in robbery of a convenience store.

In this case, the Gallery of the Midnight Sun is somewhat unique. It does not fit neatly into either category. It does sell jewellery and diamonds and operated in a sense like a bank for the transfer of funds to and from outlying communities.

Mr. McInnes, on entering the Gallery of the Midnight Sun, headed for the back office rather than

trying to take the jewellery that was on display on the way there. So I can infer that he must have expected that there was money back there. Whether he knew about the diamonds is not something that I can tell from the evidence. It seems that he was really after cash. Both in terms of expectation of a large amount of cash and sophistication, in my view this robbery does fall somewhere between the financial institution and the smaller retail outlet.

The reason that armed robbery is treated so severely, as I have said, is that the emphasis must be on deterrence. In some cases, such as the Johnas case from the Alberta Court of Appeal, the prevalence of robbery in a certain community has been considered to merit more emphasis on deterrence and less on rehabilitation of the offender.

Defence counsel correctly points out that armed robbery is not prevalent in Yellowknife, and I can say from experience as a Judge who travels throughout the Northwest Territories that neither is it prevalent in the communities. However, deterrence is also relevant where a crime is not prevalent but the court seeks to prevent it from becoming so.

Mr. McInnes is now 31 years old. His lawyer has provided the Court with a letter from his mother, a resume and a letter from a former employer which outline his background. He is Metis and was born in

Hay River to a very young mother. He had an unsettled life, living at times with his mother and at times with other relatives, including his grandmother, who died in his presence and despite his trying to help her when he was only 14.

His unsettled life included a father who was in jail, different stepfathers and much disruption to his schooling. He has a nine-year-old son whom he's not seen for several years. He is described by his mother and was also described by some of the witnesses at trial as an avid mountain biker and has had some success at that. According to his resume, he has trained and worked in a number of different occupations, such as logging, labouring and expediting, from 1996 to 2004.

The reference letter from the shop foreman at Tundra Drilling in Inuvik describes Mr. McInnes as a very capable individual who is a quick learner, punctual in his work habits, efficient and trustworthy. That latter assessment stands in stark contrast to Mr. McInnes' criminal record which spans the same time period and contains seven property offences and five offences of failing to comply with court processes, which suggest that he is not trustworthy. The record also contains other offences related to the offences for which I must now sentence him, including assaults in 1995 and 2000 and possession

of a weapon and uttering threats in 2003.

It appears from the record that Mr. McInnes has never been sentenced to anything more than four months for any of his crimes. With these charges, especially the armed robbery, he has increased the seriousness of his criminal behaviour. So the sentence I impose must be directed at deterring not just other people, but Mr. McInnes, as well, from any further criminal behaviour.

As with any offence, the mitigating and aggravating factors have to be considered. Here there are no mitigating factors associated with the offence. The fact that no actual violence was used is not a mitigating factor. Any time a firearm is carried there is the potential for violence. The pointing of the rifle at Mr. Seagrave's chest as he described it with the muzzle one foot away can only be described as a significant threat of violence and any victim of that conduct would assume that he is at immediate risk of being shot even if no ammunition is visible.

It is well-recognized in the cases counsel have referred to that the experience of such a robbery is traumatic and terrifying for the victim or victims. This is certainly borne out by the comments made by Mrs. Seagrave in her victim impact statement and what was said by Mr. Seagrave in his trial testimony.

In terms of aggravating factors, I take into account that the robbery was committed while Mr.

McInnes had other charges pending. Also, the robbery was planned and deliberate, not spur of the moment. He had obviously thought about disguising himself and used a balaclava. Although the evidence at trial did not reveal how far in advance or to what extent there was planning, I note from Chris Bishop's testimony that Mr. McInnes had said he was planning to commit a robbery, although of a drug dealer, not the Gallery of the Midnight Sun.

Mr. McInnes also involved others in trying to cover up the offence, asking the witnesses, Bishop and Patterson, to get rid of the rifle for him. That is an aggravating factor more so with Patterson, since it was Bishop who had given him the rifle and expected to make some money for that from the robbery of the drug dealer. So Bishop had already involved himself. It is also aggravating, as I said, that Mr. McInnes tried to get Mr. Thrasher to lie.

The fact that Mr. McInnes pleaded not guilty to the offences and exercised his right to a trial cannot be held against him or taken in aggravation. It simply means that he does not benefit from the mitigation that a guilty plea normally carries with it.

I do take into account that Mr. McInnes is an Aboriginal offender. However, no systemic or institutional factors have been brought to my attention that would suggest that his heritage has played a part

in his criminal behaviour or that he should somehow be considered less responsible for what he has done. Because of the statutory minimum four-year sentence and the seriousness of the offence, this is not a case where being Aboriginal might justify a lesser sentence.

There has been reference to Mr. McInnes being addicted to cocaine and alcohol, but little detail about the extent of those problems and no evidence that he was under the influence of either substance at the time of the offences. He has been able to work out of town in conditions in which one would expect that alcohol and drugs would not be available to him and seems to have been able to cope with that.

His pre-trial custody has to be considered, as it would in any other case. I am told that he was detained on these charges on July 25, 2003. He was released after a 90-day review on January 29, 2004 and was on release until his bail was revoked in mid-April, 2004. So he was in custody for six months initially, and the Crown does not dispute that I should give what is generally considered the usual two-for-one credit, as acknowledged in the Supreme Court of Canada decision in the Wust case, which would be one year.

Mr. McInnes seeks to have added to his pre-trial custody and, therefore, credited the time that he spent on release between January and April, 2004, a period of

almost three months. During that time he was on a recognizance with conditions that he remain at his employer's remote camp and not come into Yellowknife except for medical and court purposes.

I find no merit in the argument that that time should be counted as pre-trial custody. Inevitably, it is the person who is seeking release who suggests the conditions upon which he hopes to gain release and by which he is prepared to abide rather than be detained, so they must represent something different than detention to him.

Furthermore, I have not heard any evidence about the exact conditions under which Mr. McInnes was working or their impact on him, which I think would be necessary if I were even to entertain the argument that his release was equivalent to detention. On what is before me in evidence, there is no basis upon which I can say that those three months he was on release were the same as being detained in jail.

Mr. McInnes also asks that I take into account what he described when he spoke from the prisoner's box as interference with his job. He submitted that after his job at the camp was over he returned to Yellowknife and obtained another job which was interfered with and so he lost the job and started drinking and getting into trouble and had his bail cancelled. I understand his argument to be that the time he spent in custody

after April should receive credit.

However, the evidence does not bear out any interference with his job, just that Mr. Seagrave and Constable Gramiak both made inquiries of his employer because it appeared that Mr. McInnes was not complying with the terms of his recognizance which required him to be at a remote camp. Although Mr. Seagrave said he expressed to the employer his displeasure with the situation, he also said he did not ask that Mr. McInnes' employment be terminated.

The inquiries that were made may have angered or embarrassed Mr. McInnes, but the route to go would have been to apply to amend the recognizance. That he, instead, turned to alcohol, it seems to me, was his choice and cannot be laid at the feet of those who made the inquiries or justify his having breached his recognizance.

The credit for remand time, therefore, will be the one year that I have already referred to for the time in custody between July, 2003 and January, 2004, and I am not ignoring when I say that the approximately three weeks since the trial concluded until sentencing, but the total credit will be one year.

On the charge of being masked, similar cases do indicate that the jail sentence for that should be concurrent, and both Crown and defence agree with that. The masking charge is serious, because it is

committed in an attempt to avoid being identified and escape detection. It must also add a level of intimidation to the encounter and, therefore, to the trauma experienced by the victims.

With regard to the offence of attempting to obstruct justice by asking Mr. Beauchamp to threaten or harm a witness, that clearly requires a sentence that will send the message that interference with witnesses and the court process will not be tolerated. In my view, the fact that Mr. McInnes spoke to a third party and not directly to the witness does not make the offence less serious, because his intention was clearly that the witness suffer violence or at least the threat of same.

Crown counsel submits that a global sentence in the range of eight to 11 years before credit for the remand time is appropriate. Defence counsel submits that the global sentence should be five to six years before credit for remand time. Obviously, counsel are very far apart.

I have reviewed all the cases that were submitted. They have been very helpful. In the end, of course, no two cases are ever exactly the same. I do agree with the observation in the Cullen case from the Prince Edward Island Supreme Court Appeal Division that in sentencing for armed robbery the Court has to be mindful that the context is that of a legislative

provision that provides for imposing a minimum punishment of four years in prison to a person who may be a first offender who inflicted no bodily injury and who had no criminal record. Here we have an offender who has a lengthy and related record, although he has not been convicted of robbery before. He is no longer a youthful offender. Although he did not inflict any bodily injury, he did more than simply carry the gun. He pointed it at one of the victims. He involved others after the fact and tried to get a friend to lie for him.

His case does not have the mitigating factors that might justify the minimum sentence or one very close to it. The sentence I impose must be proportionate to the gravity of the offence and the degree of responsibility of the offender. On both those points, a term of imprisonment substantially in excess of the minimum is called for.

Although Mr. McInnes professed, when he spoke, to be on the road to healing, his outburst at the witness Bishop during this trial makes me somewhat skeptical about his commitment to that. Because you will be serving a lengthy sentence, Mr. McInnes, I hope that you will give some thought about what you said here about wanting to get back into your son's life. You are setting a terrible example for him. The letter from your mother attributes a lot of your own

difficulties to the bad example set by your own father, and you should be doing everything you can to make sure that you are not putting your own son in the same situation, and the only way you can do that, obviously, is to change your ways.

Stand, please. Considering all the circumstances and the totality of the sentences I am about to impose, I sentence you as follows: On count 1, armed robbery, in my view in this case six years would be appropriate. I am going to credit the one year against that. So the sentence will be five years. On count 2, the masking charge, the sentence is one year concurrent; and on count 3, the obstruction charge, the sentence is one year consecutive. So the total sentence will be six years. You can sit down, Mr. McInnes.

The place where you will serve your time is up to the correctional authorities and any recommendation that the Court makes is just that, a recommendation. In this case, I decline to make any recommendation. A sentence of this length would normally be served in a southern penitentiary, and with the influence that Mr. McInnes has tried to exert on various of the witnesses who testified at his trial, there may be good reason why he should not remain here in the Northwest Territories, but I leave that entirely up to the correctional authorities.

There will be a firearm prohibition order in the usual terms under section 109 of the Criminal Code for a period of time that commences today and expires 10 years after Mr. McInnes' release from imprisonment. As robbery is a secondary designated offence, there will also be a DNA order in light of the record and the seriousness of the robbery charge, which must prevail over any privacy concerns. The firearm that was an exhibit will be forfeited to the Crown pursuant to section 491(1)(a) of the Criminal Code and in the circumstances there will be no surcharge. Do you have a DNA order?

MR. SINCLAIR: Yes. I provided signed copies of the DNA order and the firearms order to the Clerk, Your Honour.

THE COURT: All right. Madam Clerk, I will ask you to date the DNA order.

THE COURT CLERK: Yes, Your Honour.

THE COURT: I am just going to endorse the indictment as I indicated. Is there anything further that I need to deal with? There will be the usual order returning exhibits at the end of the appeal period or upon the conclusion of any appeal that is taken.

MR. SINCLAIR: Your Honour, the RCMP will return to the offender, to Mr. McInnes, any items which were seized from him that have been put into evidence. So

when those exhibits go back to the Crown, they will then go to Mr. McInnes.

THE COURT: All right. That's fine. I don't think there were any other exhibits that belonged to anyone else, if I am correct, other than the firearm.

MR. LATIMER: Mr. McInnes just indicated if anything was to come back, he would like to have them mailed to -- in care of his mother in Edmonton. I can provide the address. We have the address on her letter.

THE COURT: Well, that's fine. You can deal with that. From the Court's point of view, the order is just that they be returned to the rightful owner. Is there anything further that I need to deal with?

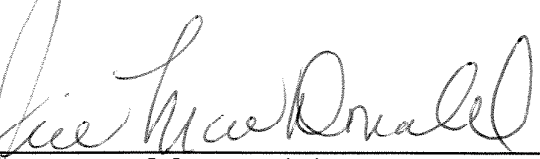
MR. LATIMER: Not from the defence, Your Honour.

MR. SINCLAIR: No, Your Honour. Thank you.

THE COURT: All right. Well, thank you very much for your presentation of the case, counsel. We will close court.

(AT WHICH TIME THE ORAL REASONS FOR SENTENCE CONCLUDED)

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules.



Jill MacDonald, CSR(A), RPR
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