

S-1-CR2013000044

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

DUSTIN MARTINO

Transcript of the Reasons for Sentence of The Honourable
Justice L. A. Charbonneau, at Yellowknife in the Northwest
Territories, on June 28th A.D., 2013.

APPEARANCES:

Mr. A. Godfrey:

Counsel for the Crown

Mr. S. Petitpas:

Counsel for the Accused

1 THE COURT: Earlier this week,
2 Mr. Martino pleaded guilty to a charge of
3 break and enter and commit robbery. I heard
4 sentencing submissions from Crown and defence.
5 I have now had the opportunity to consider
6 those submissions and the authorities that
7 were filed.

8 Counsel have presented a joint submission
9 on this matter. That joint submission is that
10 a sentence of imprisonment of two years less a
11 day be imposed, to be followed by a period of
12 probation. Counsel have left the duration of
13 the probation and the specific conditions in
14 the Court's discretion although they have each
15 made representations about what types of
16 conditions might be useful.

17 It is well established in law that a joint
18 submission must be given very careful
19 consideration by a sentencing Judge. Unless
20 that joint submission is clearly unreasonable,
21 it should be followed. Sentencing Judges
22 always retain the ultimate discretion to
23 decide what is a fit sentence for any given
24 crime. But where a joint submission is
25 presented and that joint submission is not an
26 unfit sentence having regard to all the
27 circumstances, a sentencing Judge should

1 follow it.

2 In this case, and for the reasons that
3 follow, I have decided to accept the joint
4 submission that was presented.

5 The circumstances of this offence were
6 read into the record earlier this week at the
7 sentencing hearing but I will refer to them
8 again to put my decision in context.

9 On January 9th, 2013, the accused and two
10 other individuals were drinking at a residence
11 in Hay River. At some point after midnight
12 they went to a nearby residence to buy a
13 bottle of liquor. They then returned from
14 where they had come from to drink the liquor.

15 There was then a discussion about going
16 back to the same house to steal more liquor.
17 Apparently this was the idea of one of the
18 other individuals who was there. Mr. Martino
19 tried to dissuade him from this plan but
20 eventually went along with it.

21 The two of them returned to the residence.
22 They armed themselves with a piece of wood and
23 a black airgun that looked like a real
24 handgun. The other man kicked in the door to
25 the residence. Mr. Martino stood at the door
26 and pointed the airgun at two people who were
27 sitting in the livingroom of the residence

1 watching television. The other man went to
2 the bedroom where the owner of the residence
3 was sleeping. He took a black suitcase from
4 that bedroom and then he and Mr. Martino left.
5 As it turned out, that suitcase was full of
6 clothes. Mr. Martino threw the airgun in the
7 garbage.

8 The matter was reported to the police and
9 Mr. Martino was cooperative from the start.
10 He gave a full confession about his
11 involvement in this incident. He also
12 testified at the trial of the other individual
13 charged with this offence. I heard that that
14 matter is still pending in the Territorial
15 Court of the Northwest Territories because
16 there was insufficient time to complete it on
17 the date that the trial started but
18 Mr. Martino has testified at that trial.

19 Mr. Martino is 27 years old. He was born
20 in Edmonton. I heard from his counsel that
21 his parents separated when he was young. His
22 father lives in Edmonton and his mother lives
23 in Oshawa, Ontario, and he has spent some time
24 in both places as he grew up.

25 I heard that he had a difficult
26 upbringing, frequently being exposed to family
27 violence in his mother's home between his

1 mother and her common-law partner. I also
2 heard that he was in and out of foster homes
3 and group homes during his teenage years.

4 Mr. Martino had not been living in Hay
5 River for very long when this happened. He
6 has two children who live with their mother in
7 Oshawa and he had been in a relationship for
8 some time with a woman who lives in Hay River
9 and who has two children of her own.

10 Mr. Martino himself was living in Alberta, as
11 I understand, when this relationship started,
12 but he moved to Hay River in November 2012;
13 and there, he worked for a plumbing and
14 heating company and he was still employed in
15 that company when this incident happened.
16 Before that, he appears to have been fairly
17 steadily employed at various jobs in the
18 various places where he has lived. I heard
19 that his plans, when he finishes serving
20 whatever sentence is imposed on him today, is
21 to continue living in Hay River and continue
22 with that relationship.

23 Mr. Martino has a criminal record which
24 includes some convictions that are related to
25 the one that I must sentence him for today.
26 There are convictions for property offences
27 and several convictions for breaching various

1 types of court orders. The last entry on his
2 record is from September 2006. He has been
3 sentenced to jail terms in the past but never
4 to very long jail terms.

5 He was arrested on this matter on January
6 9th, 2013, and he has been in custody since.

7 Crown and defence agree that under the
8 relevant provisions of the Criminal Code, and
9 given the reasons given by the Court at the
10 time his detention was ordered, it is only
11 open to me to give him credit for the time
12 that he has spent on remand on a one for one
13 ratio, that is, one day of credit for each day
14 spent in pre-trial custody.

15 This offence, objectively speaking, is a
16 serious one. Breaking and entering a person's
17 dwelling house is always a serious matter.
18 Doing so to commit robbery, which in itself is
19 also a very serious offence, makes it all the
20 more significant. This offence is punishable
21 by a maximum of life imprisonment, which shows
22 how serious Parliament considers it to be.
23 This also recognizes the sanctity of
24 everyone's home - the fact that it is the
25 place where every person should feel the
26 safest; violating that is treated by the law
27 as a very serious crime.

1 Various Courts have recognized the
2 seriousness of this type of conduct and, in
3 particular, in relation to breaking and
4 entering into dwelling houses and committing
5 serious crimes in there, it has given rise to
6 the judicially-created concept of "home
7 invasion robbery".

8 Home invasion robbery is not a separate
9 offence that exists as such in the Criminal
10 Code. It is simply the way that the Courts
11 have used to identify that specific category
12 of break and enter in a dwelling house which
13 calls for very severe penalties. Appellate
14 Courts in different jurisdictions have
15 identified starting points and ranges of
16 sentences to guide the exercise of sentencing
17 Judges' discretion when dealing with offences
18 like this. These starting points reflect the
19 very serious hallmarks of these types of
20 crimes.

21 But even when a case does not involve all
22 of those hallmarks, the fact remains that to
23 break into a person's home for the purposes of
24 committing an offence, and actually committing
25 a serious offence in that dwelling house, can
26 always be expected to be treated very
27 seriously by the Courts.

1 In this case the house that was broken
2 into was one where illegal activities, namely
3 bootlegging, were taking place. But that does
4 not take away the seriousness of the offence.

5 Obviously bootleggers break the law and
6 can themselves face consequences for that. In
7 some communities bootlegging causes a lot of
8 harm actually and in those rare occasions
9 where bootleggers are prosecuted and
10 convicted, Courts tend to treat those offences
11 quite seriously. But that fact is not
12 something that should ever be understood to
13 give anyone license to turn around and commit
14 crimes against the people who engage in those
15 activities or break into the premises where
16 those activities take place. The fact that a
17 person engages in the illegal activity does
18 not give other people the right to break the
19 law themselves. That is not how a civilized
20 society operates.

21 There are several aggravating factors in
22 this case.

23 The first is a statutorily aggravating
24 factor. By this, I mean the Criminal Code
25 specifically says it is an aggravating factor;
26 that is, the fact that Mr. Martino knew that
27 there were people in the house and used

1 threats of violence to effect his purpose,
2 along with his co-accused. Section 348.1 of
3 the Criminal Code says that in itself is an
4 aggravating factor. And I have to say that
5 even if the Criminal Code did not say so, I
6 expect it would be in any event considered an
7 aggravating factor.

8 The second aggravating factor is the use
9 of the airgun. It looked like a handgun and
10 the victims probably thought it was a handgun.
11 It is not difficult to imagine how frightening
12 it would be to be sitting in a house, have the
13 door kicked in, two men barge in and one
14 pointing what looks like a firearm at you.
15 The introduction of a weapon in this kind of
16 this situation not only adds to the impact on
17 the victims but it always creates a very real
18 risk of escalation of the seriousness of the
19 matter and of the violence. People thinking
20 this is a real firearm might react in all
21 sorts of ways trying to defend themselves.
22 And it goes without saying that much more
23 serious consequences can flow from that.

24 The third aggravating factor was the
25 planning element in this. I accept this was
26 not a long, thought-out plan. I accept it was
27 not Mr. Martino's plan. And I accept that he

1 was in an intoxicated state when he made the
2 sad decision to agree to join in in that plan.
3 But still, it was not a completely spontaneous
4 act either. It involved some discussion,
5 making a decision, the individuals arming
6 themselves with weapons, and ultimately
7 carrying out their plan.

8 The fourth aggravating factor is the
9 criminal record because it does include
10 convictions for property and weapons offences
11 which are not unrelated to this one. But, I
12 agree with Mr. Martino's counsel that the
13 record does not disclose a persistent pattern
14 for the type of conduct (he displayed in this
15 incident). I also recognize that there is a
16 gap in the criminal record and that the types
17 of offences that appear on it and the
18 sentences that were imposed do not suggest
19 that these offences were at the higher end of
20 the spectrum of seriousness. In fact, the
21 offence that I am sentencing Mr. Martino for
22 today is by far the most serious one that will
23 appear on his criminal record. And hopefully,
24 it will be the last.

25 As far as mitigating factors, the main one
26 is that Mr. Martino has pleaded guilty. He
27 has also waived his preliminary hearing so

1 none of the witnesses involved in this had to
2 testify to prove the charge against him.

3 This willingness to take responsibility
4 manifested itself early on in the process.
5 When this matter was investigated, he gave a
6 statement to the police and he admitted his
7 involvement. At his first appearance, I
8 heard, he conveyed an intention to plead
9 guilty to this. And he cooperated with the
10 authorities further in testifying in the trial
11 of his co-accused - something that not
12 everyone is prepared to do.

13 Through counsel, he has expressed remorse
14 and I accept that he is remorseful. I also
15 agree that, based on everything that I have
16 heard, his guilty plea should be given the
17 maximum mitigating impact that it can have.

18 There are other things that were mentioned
19 by his counsel which, in my view, are more
20 reflective of the absence of what would
21 otherwise be an aggravating factor. For
22 example, if he had been the leader or
23 instigator of this, that would be aggravating.
24 If his criminal record was more significant,
25 it would be aggravating. If the matter had
26 been planned a long time in advance with a lot
27 of sober thought, that would also make it more

1 serious.

2 Some cases were submitted by the Crown,
3 and I have reviewed them all.

4 I think the main principles that emerge
5 from those cases are, first, that for this
6 type of offence, the sentencing principles
7 that are the most important are deterrence and
8 denunciation. Second, when a home is broken
9 into and an offence is committed in that home,
10 particularly where it involves violence or
11 threats of violence, a significant jail term
12 must be imposed to address those sentencing
13 principles. Third, if the hallmarks of what
14 has been termed "home invasion robberies" (in
15 cases such as R. v. Matwiy [1996] A.J. 134,
16 (Alta CA), R. v. Reader [2008] M.J. No. 120
17 (Man CA), or R. v. Bernier [2003] B.C.J. No.
18 466 (BCCA)) are present, significant starting
19 points are engaged to address the fundamental
20 sentencing principle of proportionality.

21 Matwiy talks about a starting point of
22 eight years; Leader talks about a starting
23 point of seven to ten years. It appears that
24 the starting point adopted by the British
25 Columbia Court of Appeal is slightly lower
26 than that but still, it also signals the
27 requirement for a very significant jail term

1 to be imposed. This is also reflected in
2 cases from this jurisdiction as demonstrated
3 in the case of R. v. Kakfwi and Lennie 2006
4 NWTSC 8 quoted by Crown counsel during his
5 submissions. In that case this Court referred
6 to Matwiy, as well as to other another case
7 from this jurisdiction, R. v. Payne 2005 NWTSC
8 42, and quoted the starting points with
9 approval, saying that but for the guilty pleas
10 this is the range of sentence these offenders
11 could have expected to receive.

12 The same can be said for this case.

13 Kakfwi and Lennie involved two people
14 breaking into a residence for the purpose of
15 stealing alcohol - much like this case. In
16 that case, one of the men held a knife to the
17 occupant's throat. Here, we have an airgun
18 pointed at people, admittedly creating less of
19 an actual risk of injury but likely every bit
20 as terrifying for those who the gun was
21 pointed at. Mr. Kakfwi had a significant
22 criminal record and he received a three year
23 sentence, even though he pleaded guilty.
24 Mr. Lennie was much younger and his personal
25 circumstances were more favourable. He
26 received a sentence of two years.

27 Given all of this, the suggested sentence

1 of two years less a day, I think, can be
2 characterized as quite lenient. It is at the
3 very low end of what people can expect to be
4 sentenced for when they commit these types of
5 of crimes, even when they plead guilty. But I
6 cannot say, based on the cases that have been
7 submitted, that the sentence is outside the
8 range of what can be considered and that is
9 why I have decided to follow it.

10 The criminal record and the numerous
11 breach convictions that appear on it made me
12 reluctant at first to have this sentence
13 include a term of probation. But I recognize
14 that the gap in the criminal record may be an
15 indication that Mr. Martino has decided to
16 change his ways and may be more responsive now
17 to being on probation than he has been in the
18 past as far as following court orders.

19 Alcohol was a factor in the commission of
20 this offence and whether Mr. Martino considers
21 himself to have an actual alcohol problem or
22 not, I am of the view that he needs to give
23 that question some careful thought.

24 Drinking alcohol is one thing; getting
25 heavily intoxicated even is one thing. But
26 behaving in this manner when intoxicated shows
27 a level of loss of control and loss of

1 judgment that, in my respectful view, should
2 make Mr. Martino very scared to consume
3 alcohol.

4 I infer from what his counsel has said
5 that Mr. Martino feels that alcohol was a
6 contributing factor to the bad decision he
7 made that night, although I also note he
8 accepts responsibility for what he did. But I
9 infer that he feels he would have made perhaps
10 a different decision if he had been sober.
11 That fact alone, the fact that he did choose
12 to get himself involved in something so
13 serious while intoxicated, raises some issues.

14 He has indicated through his counsel that
15 he is willing to abide by a no drinking
16 condition, and I think that is a good idea.
17 As I said during submissions, it is not
18 something that I do as a matter of course and
19 it is not something that I do unless I hear
20 from the offender that they think they can
21 comply with it and they wish that type of a
22 condition to be part of probation. But I
23 think it is a good idea in this case. And I
24 also think it would be a good idea for
25 Mr. Martino to explore a bit more the nature
26 of his relationship with alcohol. The reality
27 is that with this conviction now on his

1 record, he will not be able to expect or hope
2 for leniency in the future if he ever finds
3 himself involved in this type of conduct
4 again.

5 Can you stand up, please, sir.

6 Mr. Martino, for the reasons that I have
7 given, I am going to go along with the joint
8 submission that your lawyer and the Crown
9 counsel have presented. I hope that you do
10 understand it is a very lenient sentence,
11 considering what you did. I hope I am the
12 last Judge who has to sentence you for
13 anything because if there is a next time, that
14 Judge may not have the same options as those
15 that I have today dealing with you. I hope
16 that you understand that.

17 THE ACCUSED: I do.

18 THE COURT: I am imposing a sentence of
19 two years less one day. And because you have
20 been in pre-trial custody for five months and
21 three weeks, you are going to get credit for
22 that time on a one-for-one basis which is all
23 that I am, in law, permitted to give you
24 credit for. That will leave 18 months and one
25 week to serve.

26 You can sit down.

27 THE ACCUSED: Thank you.

1 THE COURT: This will be followed by a
2 period of probation for one year. For this
3 period, the conditions are going to be that
4 you keep the peace and be of good behavior;
5 that's fairly simple. Within 48 hours of your
6 release, you are to report to Probation
7 Services, and then they will assign a
8 probation officer to you, and thereafter you
9 will report as directed by your probation
10 officer. I am going to include a condition
11 that you take counselling as directed by your
12 probation officer. What I expect will happen
13 is that this will be the subject of
14 discussions between the two of you. I don't
15 think they tend to make people take
16 counselling that the person really doesn't
17 want to take but I encourage you to think
18 about whatever is suggested and think about
19 whether it might help you. Ultimately this is
20 for your own good. And I will include a
21 condition that you abstain absolutely from the
22 possession and consumption of alcohol for that
23 full year. It is a long time and if you reach
24 a point, and Mr. Petitpas can explain this to
25 you as well in more detail, if you reach the
26 point, for whatever reason, where that
27 condition feels like one that you cannot

1 comply with, you need to ask the Court to vary
2 it. I don't know what would happen, it would
3 depend on the circumstances, but you cannot
4 just stop following that condition because
5 then it is an offence in itself to breach a
6 probation order. So you have to take steps to
7 get that changed if it becomes too difficult
8 for you for whatever reason. And the last
9 condition is that you will have no contact
10 directly or indirectly with Leon Durocher,
11 Joanne Martel and Walter Beaulieu. I realize
12 that Hay River is not a large town but that
13 type of condition places the onus on you to
14 remove yourself from the situation if there is
15 a risk that you might have contact with them.

16 There will also be a DNA order; it is
17 mandatory under the Criminal Code for this
18 type of offence.

19 There will be a firearms prohibition
20 order, also mandatory under the Criminal Code
21 for this type of offence. It will commence
22 today and it will expire ten years from your
23 release from imprisonment. Do you have any
24 firearms?

25 THE ACCUSED: No.

26 THE COURT: All right, so the order will
27 say that you are to surrender whatever you

1 have forthwith. If you don't have any, that's
2 not a problem.

3 THE ACCUSED: Okay.

4 THE COURT: Finally, given that you have
5 been on remand for a number of months and
6 because I am imposing the jail term that I am
7 imposing today, I am going to waive the victim
8 of crime surcharge because I am satisfied that
9 imposing one would result in hardship.

10 I am not going to make an order dealing
11 with exhibits because I know that there is
12 this other matter that is still ongoing so I
13 am just asking, Mr. Godfrey, that when that
14 other matter is concluded that the Crown
15 ensure that whatever needs to be ordered in
16 relation to the exhibits is. But for the
17 purposes of this case, I will not make any
18 specific order.

19 Is there anything, counsel, that I have
20 overlooked or that needs to be clarified?

21 MR. GODFREY: I don't believe so, Your
22 Honour, thank you.

23 MR. PETITPAS: No, Your Honour.

24 THE COURT: All right.

25 MR. PETITPAS: Your Honour, just one last
26 thing. Would the Court be inclined to make a
27 judicial recommendation?

1 THE COURT: Yes, thank you for reminding
2 me, Mr. Petitpas; that is something that I
3 completely forgot.

4 Defence counsel had asked that the warrant
5 of committal be endorsed with the judicial
6 recommendation that Mr. Martino serve his
7 sentence in the facility at Hay River because
8 that is where his spouse is and that is where
9 his connections are, and I am going to make
10 that endorsement. It is not something that I
11 can order, it is not up to me, but the
12 recommendation will be there on the warrant of
13 committal that he be allowed to serve his
14 sentence in Hay River, assuming that it is
15 deemed appropriate for his needs. It then
16 will be up to the authorities to make the
17 decision.

18 Thank you for reminding, Mr. Petitpas. I
19 am just going to sign the DNA order now.

20 We will stand down briefly, counsel.
21 There is another matter on the docket this
22 afternoon that I am not involved with, so we
23 will stand down and court will reconvene
24 shortly.

25 Thank you, counsel, for your submissions.

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