
CANADA / JUDGMENT

R. v. McIntosh

2020 BCSC 269

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 269 R. v. McIntosh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McIntosh,

2020 BCSC 269

Date: 20200131

Docket: 51515

Registry: Vernon

Regina

v.

Samule Bruce Edward McIntosh

Before: The Honourable Mr. Justice M. Blok

Oral Reasons for Sentence

Counsel for the Crown:

L. McPheeters

Counsel for the Accused:

R. Dieno

Place and Date of Hearing:

Vernon, B.C.

October 31, 2019 and

January 30, 2020

Place and Date of Judgment:

Vernon, B.C.

January 31, 2020

- [1] THE COURT: I am about to give oral reasons for sentence in this matter. As with all oral reasons, I reserve my right, in the event a transcript is ordered, to edit the transcript, to correct any minor matters, and to add headings and full case citations and matters of that sort. In doing that editing process I will not, of course, change the result or any of the underlying reasoning.

I. Introduction

- [2] Samule McIntosh is before the court for sentencing, a jury having found him guilty on May 14, 2019, of two offences, aggravated assault and assault with a weapon.
- [3] Specifically, Mr. McIntosh was convicted of the aggravated assault of Dayton Martens (Count 1) and the assault with a weapon of Dakota Martens (Count 2). The two victims are brothers. For convenience, and not intending any disrespect, I will at times refer to them by their first names.
- [4] This sentencing hearing took an extended course, a course I will describe shortly. Further information received during an adjournment period caused the accused to change the basis of his submission, but the essential defence position remained unchanged, which is that the accused should be given a suspended sentence of two years less a day with three years' probation. The Crown argues that the proper sentence in this case is a jail term of three years on the aggravated assault count and a consecutive sentence of six to 12 months on the assault with a weapon count.

II. Procedural History

- [5] I begin with the procedural history. As I have said, the jury's verdict was rendered on May 14, 2019. A sentencing hearing was arranged for August 15, 2019, but that date was adjourned due to, as I understand it, a scheduling conflict and because defence counsel needed further time to obtain a medical report or similar information. October 31 was set as the new date.
- [6] At this point, I should mention that Mr. McIntosh used a wheelchair during the trial. He testified that although he had been able-bodied at the time of the events that gave rise to the charges, subsequently he was struck by a vehicle while riding a bicycle and he suffered injuries as a result.

- [7] In order to ensure an efficient sentencing hearing, I asked counsel to file outlines of their sentencing submissions at least a week before the hearing. Counsel did so. Defence counsel's sentencing outline submitted, in general terms, that disabled persons with circumstances such as Mr. McIntosh's "simply cannot be appropriately cared for" in the penal institutions. Crown's submissions included information from both federal and provincial corrections sources that their facilities and personnel are well-equipped to accommodate disabled inmates.
- [8] When the matter came for hearing on October 31, the Crown noted the absence of any medical information concerning Mr. McIntosh's condition and needs. The defence in its submissions said Mr. McIntosh had at some point in the past been diagnosed with ADHD and Fetal Alcohol Syndrome. These had been mentioned in a pre-sentence report ("PSR"), but essentially only in passing, with the PSR author stating she had been unable to confirm that information. At the time, I also pointed out to counsel that the PSR author had listed, but did not discuss, psychiatric reports and similar documents prepared by professionals from the Forensic Psychiatric Services Commission in 2004, 2006, and 2007, as well as other prior assessments. This list of reports in the PSR showed there were psychiatric and intellectual assessments done between the years 1997 and 2007, but there was no information about the results. While those assessments were somewhat dated, and while it might have emerged that they had no information of relevance to these sentencing proceedings, nonetheless there was a notable volume of mental health assessments over a number of years and it was of concern to me that these were not before the Court, even indirectly.
- [9] A further issue emerged during the oral submissions of defence counsel, which expanded considerably on the more generalized written submission that Mr. McIntosh's disability could not be properly accommodated in prison. For example, counsel described specific issues at the L4-5 level of Mr. McIntosh's spine and said surgery was required to at least alleviate the symptoms, with a long period of recovery after that, some or all of which, he said, could not be addressed or accommodated in prison. Counsel added that Mr. McIntosh experiences periods of great pain that requires ready access to pain medication and submitted that possession of pain medication in prison would make Mr. McIntosh a target of other prisoners. Finally, counsel submitted that since Mr. McIntosh cannot stand at all, he needed assistance that was readily available, assistance that would not be provided by prison guards.
- [10] It was at this point in the hearing that I remarked that all of these assertions of physical limitations and medical needs ought to have been detailed in a proper medical report. An extended dialogue ensued, and from that dialogue it emerged that defence counsel had left it to Mr. McIntosh to make arrangements for a medical report and this had proven to be beyond Mr. McIntosh's capabilities.

- [11] As a result, I concluded that I ought not to proceed with sentencing without some medical evidence, as well as, if possible, the psychiatric assessments and reports referred to in the PSR, despite the fact that an adjournment had already been granted largely for this same purpose. Accordingly, I adjourned the sentencing hearing so that medical and other information could be obtained, and I set a date for a pre-sentence hearing (November 27, 2019) in order to ensure that there were no difficulties in this process.
- [12] At the pre-sentence hearing of November 27, 2019, defence counsel indicated he had obtained a number of medical records or documents. Crown counsel said: (1) she had obtained, or would be obtaining, a prior PSR concerning Mr. McIntosh; (2) she would make a request of the Forensic Psychiatric Services Commission for copies of prior reports; and (3) the PSR author would be providing a further report, and for this purpose the PSR author had spoken to, or hoped to speak to, medical professionals involved in Mr. McIntosh's care. I told counsel to exchange any materials received, and I set a deadline of January 17, 2020, for that further PSR.
- [13] As a result of the efforts of counsel, the Court now has: (1) copies of several reports from professionals associated with the Forensic Psychiatric Services Commission, these being psychiatric assessments from 2004, 2006 and 2007; (2) a pre-sentence report dated June 16, 2003; (3) an inquiry form completed by physician Dr. Margaret McKnight in April 2019, describing Mr. McIntosh's medical situation; and (4) an updated PSR dated January 10, 2020.

III. Circumstances of the Offences

- [14] Since this was a trial by judge and jury, we do not have reasons for judgment from which to derive the circumstances of the offence. This situation is governed by s. 724 of the Criminal Code, which reads as follows:

724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

- (2) Where the court is composed of a judge and jury, the court
- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

- [15] In *R. v. Ferguson*, 2008 SCC 6, the court said:

- [16] The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.

- [16] Accordingly, I will proceed to outline the facts as I have found them, which are necessary to decide the appropriate sentence.
- [17] The essential circumstances of the offences may be briefly stated. On August 28, 2016, Mr. McIntosh was confronted on a downtown street in Vernon, British Columbia, by Dayton Martens, who believed Mr. McIntosh to be the person who had had some sort of run-in with an extended family member of his some weeks prior.
- [18] The confrontation led to a physical altercation between the two men. There were differing accounts about the nature, extent, and duration of the physical altercation. Dayton Martens said there was no real fight because he was stabbed when the two of them first came together. Mr. McIntosh described a more extended altercation and said Dayton was holding him up in the air and punching him. I conclude it is not necessary that I resolve these differing accounts.
- [19] What is undisputed and indeed was admitted by Mr. McIntosh, is that Mr. McIntosh used a knife to stab Dayton three times in the back of his neck. Dayton collapsed on the street.
- [20] Dakota Martens then approached Mr. McIntosh, looking for his brother. Anticipating that Dakota was going to fight him, Mr. McIntosh, in his own words, "struck first". He stabbed Dakota in the back of his neck.
- [21] The central issue at trial was self-defence. By its verdict of guilty on both counts, it is apparent the jury concluded the Crown had shown beyond a reasonable doubt that self-defence did not apply.
- [22] Dayton's injuries were very serious and life-threatening. The main wound ran from the base of his skull to his upper back, 15 centimetres in length, and gaping open for 10 centimetres. It was also deep, four centimetres or so, going all the way down to his spinous processes, meaning one could see the bones of his spine. The attending emergency physician, Dr. Edgar, said Dayton showed signs of hemorrhagic shock and without medical attention he might have bled out.
- [23] Dayton also suffered two other lacerations in his neck area, both three or four centimetres in length. They were similar to the main wound, but not as deep or as long.
- [24] Dakota's wound was a penetrating wound that was similar to the smaller wounds on Dayton and it was in a similar location in his neck area.

IV. Impact on the Victims

- [25] Both brothers testified at trial concerning some of the effects of their injuries. In addition, Dayton Martens provided a victim impact statement. Dakota did not provide a victim impact statement.

- [26] Dayton's statement was lengthy. He said he required intensive medical treatment in the immediate aftermath of the event, which included 32 staples and numerous sutures, follow-up appointments for both wound care and intravenous treatments with antibiotics, and weeks of physiotherapy and rehabilitation. He was off work completely for 15 weeks and then did a graduated return to work. He did not return to work full-time until four months after the stabbing. His fiancée also lost work because Dayton was unable to drive and she had to drive him to appointments. Dayton estimated he lost \$12,000 in wages and his fiancée lost \$2,000. The loss of income left them in deep financial difficulty, and they had to delay their wedding plans.
- [27] Dayton has been left with a prominent scar running from the base of his skull to his upper back, a permanent disfigurement that causes him embarrassment.
- [28] Dayton also wrote of the stress, worry, and anxiety throughout the post-incident time period beginning with concerns he had about nerve or spinal damage, and thus permanent disability, during the time he was being transported to Kelowna for specialist care, as well as financial worries, family stresses, and the substantial fears he had that the attacker, who was not identified until some time later, would come after him or his family. He said all of these things put "huge stresses on my life".
- [29] On that latter point, it appears that Mr. McIntosh was taken into custody on December 15, 2016, three-and-a-half months after the incident, but Dayton said he was not told of that at the time and he continued to worry for the safety of himself and his family.
- [30] As of the date of his victim impact statement, which was January 2017, Dayton continued to suffer from neck stiffness and pain as well as occasional anxiety, insomnia and nightmares.
- [31] As already noted, Dakota did not provide a statement, but at trial he said he has a scar on his back from the wound he suffered in the incident.

V. Circumstances of the Offender

General Background

- [32] Mr. McIntosh is 37 years old; he was 34 at the time of the offences. The author of the two pre-sentence reports noted Mr. McIntosh's childhood and family life were unstable and were characterized by significant involvement by the Ministry of Children and Families. Mr. McIntosh was described as unmanageable and so he lived in a few different foster homes as well as in a residential facility for challenging or vulnerable children and youths.
- [33] The PSR author indicates Mr. McIntosh had a lengthy history of behavioural issues throughout school. He required constant supervision and his outbursts became increasingly more physical. Mr. McIntosh was diagnosed with ADHD and Fetal Alcohol Effect when he was in elementary school. Mr. McIntosh was expelled from school at some unidentified point but later obtained his Dogwood diploma evidencing completion of high school.

- [34] There was little detail about Mr. McIntosh's employment history other than stating that he held "a variety of employment over the years" with most of it being manual labour. There is a reference in a 2007 psychiatric report to Mr. McIntosh having long-term problems with employment instability and poor overall motivation with regard to employment. His last work was in 2016 at a convenience store. He is currently on a government disability pension.
- [35] At the time of the first PSR, Mr. McIntosh lived with a common law partner of three years. She was with Mr. McIntosh at the time of the incident in question and testified at trial, during the course of which she admitted she was a heroin addict. Mr. McIntosh told the PSR author that although he lived with an addict, he does not have substance abuse issues himself. It appears from the report that in his early to mid-20s he used marihuana heavily and abused alcohol and perhaps other drugs, but he said he abstained from these for seven years starting around age 26. He now drinks socially and uses marihuana.

Criminal Record

- [36] Mr. McIntosh has a lengthy criminal record that starts with youth offences. His youth record includes four assault convictions and one conviction for assault with a weapon. By my count, he has 22 convictions as an adult, 19 of which occurred prior to the incident in question. The 19 convictions include three convictions for uttering threats, four convictions for assaulting a police officer, and one conviction for assault. In addition, he has two convictions for property offences and nine convictions for breach-type offences. The sentences imposed have included probation orders, conditional sentence orders, and jail up to six months' duration.
- [37] The listed offences start in 1997 and run through to 2017. The last convictions prior to the subject offences were in May 2009 and those were for assaulting a peace officer and two breaches of probation and thus there was a gap of about seven years between that date and the date of the subject offences.

November 2017 Injuries

- [38] As noted earlier, in November 2017, Mr. McIntosh was riding a bicycle when he was struck by a vehicle. He suffered leg and hip injuries which his counsel earlier suggested rendered him permanently wheelchair-dependent.
- [39] A medical inquiry form filled out by Dr. Margaret McKnight, evidently done in April 2019, noted that a CT scan showed a "broad-based bulging disc" at the L5-S1 spine level and that no fractures or nerve root compression were identified. Dr. McKnight noted that the "CT appears fairly reassuring".

- [40] In the updated PSR of January 2020, the author reported that Mr. McIntosh can walk around with a cane and a crutch at home and he uses a wheelchair when out in the community, but the author also noted that she herself had seen Mr. McIntosh walking in downtown Vernon using a walker.
- [41] Dr. McKnight told the PSR author that the CT scan showed a "small bulging disc", but no pinched nerves, and there is no explanation as to why he struggles when walking. Dr. McKnight also reported that Mr. McIntosh was very difficult to assist because he had failed to attend scheduled appointments and was difficult to contact. The PSR author also interviewed a physiotherapist and occupational therapist involved in Mr. McIntosh's treatment and they both noted Mr. McIntosh's frequent failure to attend therapy appointments.
- [42] The PSR spoke to both federal and provincial correctional authorities, who said inmates have access to medical treatment and services on site and, for any medical services not available on site, an inmate can be escorted off-site to obtain the required treatment.

Address to the Court

- [43] Mr. McIntosh addressed the court and began by explaining that he has not ignored his physical rehabilitation, but instead has pursued it on his own at the local recreation centre.
- [44] Mr. McIntosh attributed his current predicament to a lack of evidence or an inability to bring proof. He said the justice system has a "huge blind side" and evidently considers that it would have been better if he and his then life partner had been injured. He said, "I did what I thought I had to do".
- [45] Mr. McIntosh said he is trying to change his life for the better. He is going to church, he has a job offer, and there is no need to send him to jail.

VI. Past Psychiatric Assessments

- [46] As noted earlier, Mr. McIntosh has been assessed by psychiatrists on three prior occasions, in 2004, 2006, and 2007. Each was a post-disposition assessment, that is to say, an assessment following a conviction or convictions. In the 2007 report, the psychiatrist noted Mr. McIntosh had been attending follow-up appointments through Adult Forensic Services "on and off over the past three years".
- [47] Generally, these reports noted Mr. McIntosh's troubled background, his long history of behavioral and psychiatric difficulties, and his long history of problems with substance abuse, although the authors noted the latter problems were in remission at times.
- [48] Between the three reports, there were several diagnoses made, including substance abuse disorder, ADHD, chronic relationship conflict, antisocial personality disorder, impulse control disorder, and mild learning disability.

VII. Positions of the Crown and Defence

A. The Crown

- [49] The Crown said the primary sentencing principles in this case are denunciation and both specific and general deterrence. Rehabilitation is of doubtful importance here due to Mr. McIntosh's past record of violent offences and given his continuing view that his actions were justified on the basis of self-defence.
- [50] The Crown says there are numerous aggravating factors in this case including: (a) the use of a knife; (b) the location of the wounds inflicted on both victims - the neck - a crucial and vulnerable area of the body; (c) the extent of the injuries caused to Dayton Martens and the significant emotional and financial loss he suffered; (d) the long-term consequences of the offence, particularly to Dayton Martens; and (e) Mr. McIntosh's serious and related criminal record for violent offences.
- [51] The Crown says there are no identifiable mitigating factors in this case. Any physical limitations Mr. McIntosh has do not constitute a mitigating factor.
- [52] The Crown seeks a sentence on Count 1 (aggravated assault) of three years' jail and, on Count 2 (assault with a weapon) a sentence of between six and 12 months' jail, to be served consecutively. The Crown notes there is a very wide range of sentence for both offences and, in the case of aggravated assault, it runs from 16 months to six years in jail.
- [53] The Crown says that the sentences imposed should be consecutive due to the separate nature of the offences and the separate victims, citing in this regard *R. v. Berry*, 2014 BCCA 7 [Berry]. Counsel said that if concurrent sentences are to be imposed, which Crown urged the court not to do, the second offence must be seen as being aggravating of the first.
- [54] The other authorities cited by the Crown were *R. v. Billing*, 2017 BCSC 1107, and *R. v. Stauffer*, 2007 BCCA 7 [Stauffer], together with an earlier decision involving the same offender in that case, *R. v. Stauffer* (unreported, December 10, 2001, Vancouver Registry CCO10035, B.C.S.C.).
- [55] As to ancillary orders, the Crown seeks a lifetime ban on possessing any firearms, prohibited weapons, et cetera, as per s. 109 of the Criminal Code; a DNA order, which Crown says is mandatory; and a non-communication order pursuant to s. 743.21 of the Code regarding the two complainants and Sandor Kertesz, who is the "extended family member" I referred to earlier.

- [56] On the matter of the s. 109 prohibition, Crown notes that the minimum term for this prohibition is 10 years for firearms, other than prohibited or restricted firearms, as well as some other weapons, together with a lifetime ban on prohibited and restricted firearms plus some other weapons. The Crown advocates for a lifetime prohibition on all items covered by s. 109 due to Mr. McIntosh's past record of violent offences and the fact that he has been previously subject to four firearms and weapons prohibitions under s. 110 of the Code.
- [57] I pause there to ask Crown if the lifetime ban is therefore discretionary?
- [58] MS. McPHEETERS: It is, My Lord.
- [59] THE COURT: It is, all right.
- [60] At a point when the defence was arguing for a non-custodial sentence because of his disability, the Crown responded by noting both provincial and federal facilities have full and proper accommodations and facilities for wheelchair-bound prisoners. The Crown also relied on the Court of Appeal decision in Stauffer where the court did not give effect to an argument similar to that formerly made by the defence in this case.
- [61] In her submissions yesterday, Crown counsel noted that the updated medical information and updated PSR paint a different picture of Mr. McIntosh's physical limitations. She also noted that Mr. McIntosh apparently put little effort into his physical rehabilitation. Counsel was careful not to blame defence counsel, who relied on information provided, or to suggest Mr. McIntosh was a malingerer, but said the upshot is that there is little or no basis on which to conclude Mr. McIntosh needs any substantial accommodation or would suffer unduly if incarcerated.
- [62] The Crown saw little value in the three psychiatrists' reports from the 2004 to 2007 time period, noting that Mr. McIntosh was in his early to mid-20s at the time, this was a long time ago, and while they provide some general background, there is no evidence on which it may be concluded that any of the issues discussed in those reports exist today.
- [63] In summary, the Crown submits that there is no evidence of any physical or mental conditions that would override the primary sentencing considerations of denunciation and deterrence. The Crown said a jail sentence is called for in this case.

B. Defence

- [64] Defence counsel initially urged the court to consider a non-custodial sentence because disabled persons could not be appropriately cared for while incarcerated, but counsel abandoned that submission in light of the recently-obtained medical evidence.
- [65] Instead, counsel referred to Mr. McIntosh's troubled background, the several past psychiatric interventions, and his circumstances generally as evidence of the difficulties Mr. McIntosh has in life and of having any stability in his life. Although the Court has indicated it cannot resolve the conflict in the evidence concerning the nature of the physical

interaction between Mr. McIntosh and Dayton Martens, defence counsel said it is nonetheless clear that Mr. McIntosh was confronted and that he did not initiate that confrontation. He said Mr. McIntosh was not looking for trouble at the time of this incident, but he was "hunted down" on the street by the victims and he felt he had to defend himself. This reduces his moral culpability.

- [66] Counsel said that because of Mr. McIntosh's background, situation in life, and personal characteristics, including characteristics identified in the psychiatrists' reports, "He reacts when he feels threatened", as he did here.
- [67] Counsel said that while Mr. McIntosh is remorseful about the injuries he caused to the victims, he did not intend those injuries and felt he was protecting himself and his companion.
- [68] Counsel noted that Mr. McIntosh has only had one other criminal incident in 10 years, he has an offer of employment, and he is motivated to work on his physical recovery.
- [69] In his earlier sentencing submissions, defence counsel acknowledged the aggravating factors identified by the Crown, those being the use of a knife, the vulnerable location of the injuries inflicted, the extent of the injuries inflicted on Dayton Martens, the short and long-term consequences of the injuries to Dayton, and Mr. McIntosh's criminal record of serious and related offences.
- [70] Counsel submits, however, that a lengthy jail term is not required here. Mr. McIntosh has demonstrated over a long period of time that he is no danger to the public.
- [71] Although the defence acknowledges that aggravated assault involving a knife can attract jail terms in the three to six-year range, in this case, counsel urged the court to impose a suspended sentence of two years less a day on Count 1 and six months' concurrent on Count 2, less time served, along with three years' probation.
- [72] In arguing for a concurrent sentence, counsel said the incident in question was one occurrence. Although there was a short period of time in between the two encounters, Mr. McIntosh's response was effectively a response to both of the victims.
- [73] Defence counsel cited the following sentencing authorities: R. v. Moller, 2012 ABQB 259; R. v. Nakamura, 2012 BCSC 327 [Nakamura]; and R. v. Boone, 2013 BCSC 1306 [Boone].

C. Crown Reply

- [74] The Crown noted that the defence characterizations of the evidence, that being that the victims hunted down Mr. McIntosh and that he believed he had to take these actions, amount to no more than claims of self-defence which the jury has rejected. Other assertions by defence counsel to the effect that the psychiatric diagnoses made many years ago would cause Mr. McIntosh to react in a certain way are speculative and are not supported by the evidence.

- [75] The Crown said little or no weight should be ascribed to the outdated psychiatric assessments. They were done a long time ago and there is no evidence that any of the matters identified in the reports have any bearing on his present mental health. In short, the Crown said there is no evidence of any mental health issue that bears either on the offence or on the offender in terms of sentencing.
- [76] In answer to the defence argument that Mr. McIntosh has been subject to conditions for three-and-a-half years as a result of these charges with no conflicts in the justice system in that time, the Crown noted there were many delays caused by Mr. McIntosh, some requiring the issuance of bench warrants, and he should gain no benefit for the delays he himself has caused.

VIII. Statutory Provisions

- [77] The purpose and principles of sentencing are set out in the Criminal Code, particularly ss. 718, 718.1, and 718.2. I am not going to read those in full, but I have, of course, taken them all into account. I will review and summarize them briefly.

- [78] Section 718 of the Criminal Code says:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct ;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

- [79] Section 718.1 states that:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [80] Finally, s. 718.2 set out a number of further principles including the principle that a sentence should be increased or reduced to reflect aggravating and mitigating circumstances, a sentence should be similar to sentences imposed on similar offenders for similar offences, and where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[81] The Criminal Code prescribes maximum sentences for the offences in question. The maximum sentence for aggravated assault is 14 years. The maximum sentence for assault with a weapon where the Crown proceeds by indictment as it did here is 10 years.

[82] Although there is no suggestion that these maximum sentences are engaged in this case, nonetheless they do indicate the seriousness with which Parliament views these offences.

IX. Discussion

A. Aggravating and Mitigating Circumstances

[83] As I have already mentioned, the Criminal Code says a sentence must be increased or reduced to reflect aggravating and mitigating circumstances.

[84] I find the aggravating circumstances to be as submitted by the Crown and which defence counsel did not contest, those being:

- (a) the use of a knife;
- (b) the location of the wounds inflicted on both victims, the neck area, a crucial and vulnerable area of the body;
- (c) the extent of the injuries caused to Dayton Martens as well as the significant emotional and financial loss he suffered and the long-term consequences of those injuries, the prominent scarring, in particular; and
- (d) Mr. McIntosh's related criminal record for violent offences.

[85] There are no mitigating factors that I can discern in this case.

B. Disability as a Factor in Sentencing

[86] Although the defence abandoned its argument that Mr. McIntosh ought to be given a suspended sentence due to his disability, out of an abundance of caution I will say a few words on the subject.

[87] The Court of Appeal has considered in a number of cases the role that disability or ill-health play in arriving at a fit sentence. These cases include Stauffer; R. v. Potts, 2011 BCCA 9; R. v. Babcock, 2013 BCCA 368; and R. v. Auckland, 2018 BCCA 171. To those Court of Appeal cases, I would add R. v. Salehi, 2019 BCSC 698.

[88] From my review of those cases, I conclude that an offender's ill-health or disability and whether an offender's condition can be properly treated or accommodated in prison may be relevant considerations on sentencing, but they do not displace other considerations such as the gravity of the offence or "drive the analysis", as Madam Justice Devlin put it in Salehi (at para. 43). Also, disability or illness is not to be used as a basis for deducting time from an otherwise fit sentence which is what happened at the trial level in Potts and which the Court of Appeal corrected.

- [89] As already noted, in light of the further information supplied, it is clear there is no element of disability relevant to sentencing in this case.

C. Appropriateness of Suspended Sentence

- [90] I am not persuaded that a suspended sentence would be a fit sentence in this case. The cases cited by the defence are readily distinguishable.
- [91] In Boone, the 40 year old offender pleaded guilty to a charge of assault causing bodily harm. He had a number of convictions for assaults and impaired offences, which the sentencing judge concluded were all associated with the offender's alcohol problem and his resulting inability to control his behaviour. After the offence, the offender took a number of steps to deal with his alcohol problem, maintained steady employment, and was active in alcohol abuse support groups. He had demonstrated sobriety and compliance with conditions for three years prior to sentencing, and he was remorseful. The sentencing judge imposed a three-year suspended sentence, concluding that it was preferable to keep the offender on the path he was on.
- [92] In Nakamura, two 18 year olds and one 17 year old robbed a drug dealer in what the sentencing judge, Mr. Justice Romilly, described as a vicious unprovoked assault. The offender stabbed the victim in the face and stomach, causing life-threatening wounds. He was convicted of aggravated assault and of assault with intent to steal. In imposing a suspended sentence with two years' probation and 500 hours of community service, Mr. Justice Romilly noted: (1) the offender's youth (18 years old), noting that the offender was still in high school at the time of the offence; (2) the offender had secured gainful employment post-offence and appeared to be rehabilitating himself; (3) the offender was remorseful; and perhaps most importantly, (4) the 17-year-old co-offender had been given a sentence of six months of intensive supervision by way of a youth sentence. Romilly J. concluded that despite the different regime that applies to youth offenders he was still obliged to consider parity of sentences. He concluded that each of the three offenders should serve similar sentences.
- [93] Both Boone and Nakamura involved facts very different from the present case. In Boone, there was a guilty plea, a lesser charge, a remorseful offender, an identifiable cause for the offending that had been well addressed by the offender, and considerations that made rehabilitation a very strong sentencing factor. In Nakamura, the offender was an 18-year-old remorseful first offender and the parity principle compelled the court to impose a sentence that was similar to that imposed on the youth who had played an important role in the subject offence. None of those elements is present in this case.

- [94] A suspended sentence is primarily a rehabilitative tool: *R. v. Samuelson*, 2015 BCCA 29. While rehabilitation must always be taken into account as a sentencing factor, in this case, it is of lesser significance given Mr. McIntosh's age, his past record of assaults and threats, his convictions for failing to comply with court-ordered conditions, and his lack of insight into his offending.

D. Consecutive versus Concurrent Sentences

- [95] The Crown argues for consecutive sentences, citing *Berry*.
- [96] *Berry* involved, among other offences, the aggravated assault of two women in their home by an offender who was known to them. The offender assaulted and stabbed both women. The Court of Appeal, after citing the test for imposing concurrent sentences ("whether the acts constituting the offence were part of linked series of acts within a single endeavour": *R. v. Li*, 2009 BCCA 85, at para. 42) emphasized that the decision whether to impose consecutive or concurrent sentences is a matter of discretion for the sentencing judge. The court went on (at para. 89) to list some of the factors to be considered in determining whether to impose consecutive or concurrent sentences: (1) the nature and quality of the criminal acts; (2) the temporal and special dimensions of the offences; (3) the nature of the harm caused to the community or to victims; (4) the manner in which the criminal acts were perpetrated; and (5) the offender's role in the crimes.
- [97] The court in *Berry* also noted that a consecutive sentence may be appropriate not only in relation to wholly unconnected incidents, but also in circumstances where the offences are committed against multiple victims in close proximity (para. 53). The court added (at para. 55) that the most significant issue, in sentencing appeal cases at least:

is not whether sentences imposed should have been consecutive or concurrent, but whether the global sentence is unreasonable or unfairly reflects the moral culpability of the offender. That requires us to consider whether the total sentence is in keeping with the offender's record and future prospects.

[Emphasis in original.]

- [98] Accordingly, in this sense, it may not matter whether the sentences imposed are concurrent or consecutive. Whether a global sentence is imposed with concurrent sentences on individual counts or consecutive sentences are imposed, with a reduction to reflect the totality principle, both approaches ought to bring about the same effective sentence.
- [99] Defence counsel argued that the imposition of a consecutive sentence for an event that has more than one component may result in an inflated total because of the stacking of the sentences upon one another. Crown counsel said concurrent sentences may result in there being no effective punishment for a distinct component of the overall event. I do not disagree with either of these observations, but the remedy is for the Court to be mindful of these factors when crafting an appropriate overall sentence or sentences.

- [100] I accept that consecutive sentences are justifiable here, but so are concurrent sentences. Indeed, in *Berry* itself (at para. 61) the court referred to a case involving a fact pattern very similar to the case that court was addressing, a person bursting into a house and stabbing two people, where the offender was given a concurrent sentence of five-and-a-half years on two counts of aggravated assault: *R. v. Willier*, 2005 BCCA 404.
- [101] Here, though there are two separate stabbings, both are closely linked. They are essentially one event, but with two components. Both had their genesis in a past event and both involved the victims confronting the offender in some manner. The harm to the victims and to the community at large is similar. I conclude a global approach, with concurrent sentences, is appropriate here.

E. Range of Sentence

- [102] The sentencing range for aggravated assault has been articulated many times by the Court of Appeal. Perhaps the most comprehensive expression of that range is found in *R. v. Craig*, 2005 BCCA 484:
- [10] It is not disputed, and it appears clear on the cases, that a sentence of two years' imprisonment for the commission of aggravated assault (which is the sentence that was effectively imposed by the judge) is at the low end of the range of sentences imposed on similar offenders in similar circumstances (*R. v. Chana* (1998), 115 B.C.A.C. 159, [1998] B.C.J. No. 2458 (Q.L.) (C.A.) at para. 6). The range of sentence for similar offences was described as being between 16 months and six years in *R. v. Johnson* (1998), 131 C.C.C. (3d) 274 (B.C.C.A.), two years less a day to six years in *R. v. Biln*, 1999 BCCA 369, and, most recently, between 18 months and six years in *R. v. Willier*, 2005 BCCA 404. In determining an appropriate sentence within this broad range, an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end. See in particular: *R. v. Willier*, at para. 22, and *R. v. Johnson*, at para. 10.

F. Analysis

- [103] What stands out in this case is the terrible injury Mr. McIntosh inflicted on Dayton Martens. The photographs of the main wound show it to be a very large, deep wound that is gaping wide open for a significant part of its length. The photographs are alarming, and it is difficult to convey in words the seriousness of that wound.
- [104] The attending emergency physician, Dr. Edgar, testified that the wound appeared to be made by way of a "top down" motion, which I took to mean it was not merely a straight-in penetrating wound, but the manner of inflicting it involved a downward motion that created the long, gaping wound. Dr. Edgar also said Dayton had been lucky in the sense that the knife missed major arteries. As noted earlier, the wound was life-threatening and, but for urgent medical intervention, Dayton might have bled out.

- [105] The stabbing injuries have had serious physical, psychological and financial consequences to Dayton Martens and have left him with a very prominent scar.
- [106] While I have found that the wounds inflicted on Dayton Martens were inflicted following some sort of interaction between the two men, it was not a situation, for example, where an assailant has attacked someone without warning or without any prior interaction. This event was not initiated by Mr. McIntosh, who at the time was minding his own business. Unlike the offender in Billing who exhibited highly aggressive behaviour from the moment he arrived on the scene, Dayton Martens located and then confronted Mr. McIntosh in a manner that Dayton himself agreed might well lead to a fight. In saying this, I am not casting blame on the victim. I am merely putting the facts in their proper context in order to identify the proper sentence within the range that the Court of Appeal had identified. The manner in which these events began attenuates Mr. McIntosh's moral culpability somewhat.
- [107] However, the same comments cannot be made concerning Mr. McIntosh's stabbing of Dakota Martens because Mr. McIntosh stabbed Dakota pre-emptively.
- [108] The defence made much of Mr. McIntosh's mental health and psychiatric history. While I agree with the Crown's submission that there is no evidence directly linking that history with the offending in this case, the diagnoses made in the past do not seem to be the type of conditions that a person could merely shrug off. These diagnoses, I conclude, probably explain why Mr. McIntosh has led an unstable life and has been unable to secure and maintain employment. They form part of the picture of the offender that is before the Court.
- [109] Finally, I must comment on Mr. McIntosh's lack of remorse or, more accurately, his profound lack of insight into his offending behaviour. Simply put, he sees nothing wrong in what he did. He regrets the extent of the injuries to the victims, but he is otherwise unremorseful. This does not bode well in terms of his rehabilitation.
- [110] I conclude that denunciation and deterrence, both specific deterrence and general deterrence, are the primary sentencing principles in this case and a significant jail sentence is called for as a result.

X. Imposition of Sentence

A. Ancillary Orders

- [111] I will begin with the ancillary orders, which defence counsel did not oppose:
1. pursuant to s. 109 of the Criminal Code, I exercise my discretion to impose a lifetime ban on possessing any firearms, prohibited weapons, et cetera, as per the wording of that section;
 2. pursuant to s. 487.051 of the Code, there will be an order in Form 5.03 authorizing the taking of samples of bodily substances for the purpose of forensic DNA analysis; and

3. an order pursuant to s. 743.21 of the Code prohibiting you, Mr. McIntosh, from communicating directly or indirectly with Dayton Martens, Dakota Martens, or Sandor Kertesz during the custodial period of your sentence.

B. Credit for Time Served

- [112] Counsel agree that Mr. McIntosh was in pre-trial custody for 59 days. Credit for time served at the usual rate of 1.5 to one results in a total credit of 89 days.

C. The Sentence

- [113] In arriving at a fit sentence, I have considered the cases cited by counsel, Billing, in particular, as well as other authorities such as Craig and Samuelson. I have concluded that concurrent sentences are appropriate here, but I have borne in mind Crown's concerns that the second stabbing incident involving Dakota Martens might be left unpunished. It will not be.
- [114] Mr. McIntosh, please stand.
- [115] I have concluded that the appropriate overall sentence for both offences is three years in jail. Giving you credit for time spent in pre-trial custody at the usual rate of 1.5 to one, the sentence of three years or 1,095 days reduces to a net sentence of 1,006 days. That is the sentence I impose on Count 1. On Count 2, I sentence you to six months in jail, to be served concurrently with Count 1.
- [116] You may be seated.
- [117] Pursuant to s. 743.2 of the Criminal Code, I direct that a copy of these reasons be prepared and sent to the Correctional Service of Canada, together with copies of the two pre-sentence reports that were prepared in this matter, the three psychiatric reports that were marked as Exhibits 4, 5, and 6 at this sentencing hearing, and the medical letter and attached CT scan report that was marked as Exhibit 7 at this hearing.
- [118] Those conclude my reasons.

"Blok J."

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