

**COURT OF QUEEN'S BENCH OF MANITOBA**

**BETWEEN:**

HER MAJESTY THE QUEEN

- and -

NICHOLAS RAYMOND EMSLIE,

Accused

) **APPEARANCES:**

)

) Michelle Bright

) for the Crown

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)

) Zilla Jones

) for the accused

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)

) Judgment delivered:

) June 7, 2017

**TOEWS J.**

[1] Following a trial with a co-accused, Nicholas Raymond Emslie (Emslie) was convicted by a jury of the following offences:

- a) House break and enter, and commit robbery;
- b) Use of a firearm while committing an indictable offence;
- c) Use of a firearm in a careless manner;
- d) Unauthorized possession of a firearm;
- e) Possession of a firearm knowing it to be unauthorized;
- f) Pointing a firearm; and

g) Disguise with intent.

[2] These are the reasons for my decision in respect of a fit and proper sentence in respect of these convictions. His co-accused, Jozie Marie Amyot (Amyot), is to be sentenced separately at a future date in respect of the count on which she was convicted by the same jury.

### **Facts**

[3] The convictions all relate to a home invasion that Emslie undertook with Amyot and a number of other unidentified accomplices on the evening of February 11, 2014. In view of the convictions that were entered by the jury and in light of the evidence, including admissions made by Emslie in the course of his testimony when he took the stand in his own defence during the trial, the facts can be summarized as follows.

[4] For a number of months before the date of the offence Emslie and Amyot were involved in a romantic relationship. Emslie was a drug dealer who sold approximately ¼ kilograms of cocaine a week through a number of confederates, but as a result of being unable to pay a debt of about \$3,500 to his suppliers, his source of cocaine dried up. Moreover, his suppliers were insistent that he make good on his debt sooner rather than later. While refusing to advance him any drugs on credit that he could then sell in order to pay off the debt, his suppliers had a number of conversations with him suggesting that he rob another drug dealer in order to obtain the money he needed to clear up his debt. Although his suppliers did suggest whom he might wish to rob, it appears that they were not too particular as to who the victim was, as long as he obtained the necessary funds.

[5] As it so happened, Amyot had at one time been involved in a brief romantic relationship with a small time marijuana drug dealer, an individual by the name of Ryan David Joseph Bromley (Bromley), and although no longer romantically involved with him, they remained on friendly terms. In view of Amyot's connection with Bromley, Emslie put together a plan by which Amyot was to gain entry to Bromley's residence, a suite in an apartment block, by paying him a social visit and subsequently allowing Emslie to get inside the suite.

[6] On the evening of the offence while Amyot was in the suite, she remained in contact with Emslie through an exchange of text messages. When Emslie and an unidentified accomplice were in place at the doorway of the suite in the apartment hallway, Amyot told Bromley that she was leaving. As she opened the door and left the apartment, two masked intruders, one of whom was Emslie, entered the suite brandishing a long-barreled 308 rifle which they had carried into the apartment block inside a hockey bag.

[7] Once inside the suite, Emslie and his accomplice forced Bromley to open his safe and approximately \$2,000 in Canadian currency and jewellery, also worth approximately \$2,000 was taken. In addition to taking \$50 worth of commemorative coins and Bromley's wallet containing his identification, credit and bank cards, Bromley was punched several times in the face. Although he suffered abrasions and bruising, he declined medical attention. However, as was clear from his testimony at trial, the event was very traumatic. During the course of the robbery, Bromley was forced to kneel execution style and the firearm was pointed at his head in an effort to make him

disclose the whereabouts of any valuables and drugs. If any drugs were taken from Bromley, it appears to have been a relatively small amount of marijuana.

[8] As a result of a police investigation, both Emslie and Amyot were arrested and both gave statements to the police. The statement made by Emslie resulted in the recovery of the hockey bag containing the rifle used in the robbery. Furthermore, it is evident from the statements and evidence given at trial, that one of the reasons Bromley was chosen as the victim in this robbery was that since Bromley was a drug dealer, Amyot and Emslie thought that he would not go to the police to complain if he was robbed.

[9] Emslie has been in custody since his arrest.

### **Exhibits at the Sentencing Hearing**

[10] In preparation for this sentencing hearing, Emslie consented to the preparation of a pre-sentence report. In the course of the preparation of that report, the author of the report also completed a LS/CMI (Level of Service/Case Management Inventory). Both documents were tendered as exhibits at the sentencing hearing.

[11] The pre-sentence report states that Emslie did not complete high school and that he has worked off and on in the construction industry, primarily as a roofer. He also spent two seasons employed as a groundskeeper at a cemetery, but left that employment to go back into the construction industry. He states that he intends to go back into the construction industry once he is released from custody.

[12] The report discloses that Emslie states he is not addicted to drugs and has been sober for several years as a result of his incarceration. However, he stated that he used drugs as he enjoyed the lifestyle and environment that came with drug use.

[13] Although his family background was a difficult one, it appears that he has a relatively good relationship with his mother and a brother, both of whom have certain disabilities. Both of his parents were present at the sentencing hearing and they appear to be genuinely concerned about the problems that their son is facing. However, in my opinion, I think there is a lack of understanding by his mother especially, about the extent of her son's involvement in the drug trade and how it contributed to his involvement in this matter. Furthermore, it appears from all of the evidence, that Emslie, while not a high level drug dealer, is a leader and ran his own organization or, as he described it, "coaching a team of hustlers" in the drug business. On the basis of the material contained in the pre-sentence report, one cannot help but come to the conclusion that the probability of Emslie re-involving himself in the drug business and the associated lifestyle once he is released is quite significant.

[14] In fact, it is that issue that was the focus of his counsel's examination of the author of the pre-sentence report and the associated LS/CMI which states that Emslie is "in the High risk/need level". The report concludes that based on the factors considered in the LS/CMI, Emslie has approximately a 45% chance of being re-incarcerated within one year of his release. Whether one accepts the accuracy of the test to that degree of precision, I am satisfied that a review of the evidence at trial as well as the background information in the exhibits at the sentencing, warrants a

conclusion that even if the risk to reoffend and the probability of re-incarceration is not as high as stated in the reports, in my opinion, unless Emslie takes more positive steps in the future to change the direction of his life, it should surprise no one if he does re-offend.

### **Position of the Crown**

[15] It is the position of the Crown that a fit and proper sentence in this case is a global sentence of eight and one-half years. This sentence is calculated on the basis that he should receive a seven and one-half year sentence for the home invasion or break and enter to commit robbery (count 1) and a one year consecutive sentence in respect of the use of the firearm in the course of the break and enter (count 2). That one year sentence in respect of the firearm is a mandatory consecutive sentence. The Crown submits that the sentences for the other convictions should be served concurrently.

[16] Crown counsel properly points out that the court take into account the purpose and principles of sentencing set out at s. 718 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"). Furthermore, the Crown relies on the decision of the Manitoba Court of Appeal in *R. v. Ross*, [1999] 138 Man.R. (2d) 75, 42 W.C.B. (2d) 470 (QL), in which the court states (at paras. 14 and 15):

**14** Home invasion robberies are a particularly serious and egregious threat to the sanctity of one's home, and the safety of the community as a whole. There have been a number of such offences that have come before this Court over the past few years. It is imperative that a strong and clear message be sent that society will not tolerate offences of this kind and that when committed they will be dealt with severely. Sentencing, of course, is an art rather than a science. There will undoubtedly be circumstances where the appropriate and fit sentence for a home invasion robbery could be higher or lower than the usual range of

sentence. Nonetheless, it seems to me that a period of incarceration of seven to ten years constitutes a realistic range for serious home invasion robberies such as we have before us on this appeal.

**15** For such an offence, general and specific deterrence is obviously of paramount importance.

[17] The Crown asks the court to consider the following mitigating circumstances:

- a) The relatively youthful age of Emslie;
- b) The lack of any prior significant criminal record; and
- c) A difficult upbringing, but positive family support at the present time.

[18] In respect of aggravating factors, the Crown points out that:

- a) The planning of the crime and the preparation is extensive, including planning how to get into the apartment block which was secured by locks and by having a getaway driver assist him in leaving the scene after the robbery;
- b) Committing a robbery of this nature in order to pay off a drug debt is highly aggravating;
- c) The accused wore a disguise and used a hockey bag to hide the fact that he was carrying a firearm;
- d) The victim was specifically targeted;
- e) The firearm, whether loaded or not, was used to intimidate the victim who had no way of knowing whether it was loaded and certainly feared for his life;

- f) The manner in which the victim was assaulted, including the fact that he was made to get down on his knees during the course of the robbery, leaving him with the belief that he was going to be killed; and
- g) The robbery was Emslie's idea, and although the co-accused had a significant and important role in carrying out the robbery, he manipulated her into assisting him in the robbery.

[19] It is clear that he was proud of what he had done and as he displayed pictures of the proceeds of his robbery on his social media account, he bragged about how he had hit the jackpot.

[20] I think it is important to note here that while Emslie is not being sentenced because he admitted to being a drug dealer, his drug dealing and how it eventually led him to the decision he made to rob the victim, forms an important part of understanding his crimes in their appropriate context and therefore it is relevant to consider this factor in applying the principles of sentencing to the facts.

### **Submissions of Counsel for the Accused**

[21] Counsel for the accused submits that the global sentence in this case should be slightly less than that recommended by the Crown, but still within the seven to ten year range set out by the Manitoba Court of Appeal in *Ross*. Counsel states that the accused should receive six and one-half years on the break and enter charge and a one year consecutive sentence as mandated by the *Code* in respect of the firearms charge set out at count 2 of the indictment.

[22] Counsel points out that Emslie's parents attended the hearing and are supportive of their son. He states that Emslie has been of assistance to both his mother and his brother when he was living with them at home as both suffer from certain disabilities. He points out that Emslie took advantage of the programming available to him while in custody and although he took no steps to upgrade his high school education level at the same time, counsel advises that the goal setting and the support offered by the goal authorities in respect of advancing his educational level were not satisfactory.

[23] Finally, counsel points out that Emslie has recently become aware of a four-year-old daughter with whom he has been trying to build a relationship while he is in custody and whom he hopes to see more of when he is finally released from custody.

[24] When asked whether he wished to add any comments to those already made by both counsel, Emslie declined to do so, being satisfied with the submissions which his counsel made on his behalf.

## **Decision**

[25] I would note that the respective positions of the Crown and the accused in respect of a global custodial sentence are not particularly far apart. I am satisfied that in light of the sentencing range suggested by the Manitoba Court of Appeal in **Ross** and considering the principles of sentencing set out in the **Code** and the mitigating and aggravating factors identified by counsel in their submissions and evident from the proceedings, a fit and proper global custodial sentence in this case is a period of incarceration of eight years.

[26] Accordingly, Emslie shall serve a period of incarceration of seven years in respect of the break and enter (count 1) and a period of one year incarceration in respect of the offence of using a firearm while committing an indictable offence (count 2), consecutive to the sentence imposed in respect of count 1. In respect of counts 3 through 7 inclusive, there will be a sentence of 12 months on each count concurrent to each other and concurrent to counts 1 and 2.

[27] In coming to this conclusion, I wish to note that while Bromley, the victim in this case, was targeted because Emslie believed him to be a drug dealer and therefore he would be reluctant to report a robbery to the police, I want to specifically state that whether or not Bromley was a drug dealer should not be an issue of any consequence in fashioning a fit and proper sentence. The dangers that home invasions pose are not only to those who are specifically targeted, but to the many innocent and law abiding men, women and children who might, unknown to those carrying out this type of robbery, be nearby or even inside the residence being entered. They could easily be hurt or even killed in the course of this very dangerous crime. Again, as noted by the Manitoba Court of Appeal in **Ross** (at para. 14):

Home invasion robberies are a particularly serious and egregious threat to the sanctity of one's home, and the safety of the community as a whole.

[28] Both counsel are agreed that Emslie is entitled to credit of 1.5 days for each day which he has been incarcerated before being sentenced today. Given that he has been in custody since February 14, 2014, this amounts to slightly more than 1200 days of incarceration and therefore more than 1800 days or five years of credit. I will leave the determination of the exact amount of time for which he will receive pre-trial credit to

the correctional authorities, bearing in mind that the exact amount of credit is to be determined on a 1:1.5 ratio as noted above.

[29] In respect of the ancillary orders, I would order as follows:

- a) Emslie is required to provide a DNA sample;
- b) There will be a firearms and all other weapons prohibition of 20 years pursuant to the ***Code***;
- c) There will be a forfeiture of all articles seized by the police in this case, including the firearm, with the exception of any property owned by Bromley and which is no longer required by the police or the Crown for the purposes of these or other legal proceedings; and
- d) Emslie will pay a victim surcharge fee of \$200 on each count of which he has been convicted, for a total of \$1,400 payable within two years of his release from custody.

\_\_\_\_\_ J.