S.C.C. No. 02804

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Hynes, 1993 NSCA 156

Jones, Hallett and Matthews, JJ.A.

BETWEEN:

TERRY LEE PHILIP HYNES	)	
	)	
the appellant appeared	)	in person
Appellant	)	
	)	
- and -	)	
	)	Gordon S. Gale, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	May 18, 1993
	)	
	)	
	)	Judgment Delivered:
	)	May 20, 1993
	)	

THE COURT: Appeal against the convictions dismissed and appeal against sentence allowed in part per reasons for judgment of Jones, J.A.; Hallett and Matthews, JJ.A. concurring.

JONES, J.A.:

On September 3, 1992, the appellant entered pleas of guilty before Judge A. Peter Ross in the Provincial Court to the following charges:

> "On or about the 10th day of June, 1992, at or near Sydney Mines in the County of Cape Breton, Province of Nova Scotia, being at large on a recognizance entered into before Justice David Burke on December 15, 1991, and being bound to comply with a condition of that recognizance directed by the said justice, fail to comply with that condition to wit: do nt possess any firearm contrary to Section 145(3) of the **Criminal Code**.
>
> AND FURTHER on or about the 10th day of June, 1992, at or near Sydney Mines, in the County of Cape Breton, Province of Nova Scotia, did attempt to steal the sum of money from T. Brogan & Sons while armed with an offensive weapon to wit: a sawed-off shotgun, contrary to Section 343(d) and 463(d) of the **Criminal Code**.
>
> AND FURTHER did with intent to commit an indictable offence did have his face masked contrary to Section 351(2) of the **Criminal Code**."

On December 3, 1992, he was sentenced to a term of seven years on the charge of attempted robbery, two years on the first count and three years on the third count. The latter sentences are to run concurrently to the sentence of seven years.

On June 10, 1992, the appellant entered the offices of T. Brogan & Sons at 9:45 a.m. wearing a mask and armed with a sawed-off shotgun. He demanded money and when it was handed to him, he was overpowered by three employees of the firm after a struggle. Three shotgun shells were found on the floor. There was some evidence that the appellant was under the influence of drugs. Before sentencing, the appellant was remanded for psychiatric examination. The subsequent report diagnosed a personality disorder but stated that the appellant was fit to stand trial.

The appellant in his notice of appeal indicated that he wished to appeal both the convictions and sentences. The appellant was represented by counsel on the trial. There is no basis to suggest that he was nt fully aware of the consequences of his guilty pleas and accordingly we see no merit in the appeals against the convictions and accordingly the appeal

on that ground is dismissed.

With regard to the appeal against the sentences the main complaint is with regard to the seven year term. The appellant was not represented by counsel on the appeal. He contends that the record discloses that the trial judge in fact imposed a sentence for the offence of robbery. While the appellant was only 24 years of age, he has a record dating back to 1984. The offences were mainly property related. He has managed to obtain Grade 12 G.E.D. He has developed a common-law relationship. Family relationships have not been stable in the past. There is some evidence that he suffers from drug abuse and he indicated that he desired psychological and medical assistance.

The attempted robbery was a very serious offence and having regard to all of the circumstances it cannot be stated that the sentence was clearly excessive. We agree with the learned trial jduge that the primary consideration was the protection of the public.

The trial judge also directed under s. 741.2 of the **Code** that the appellant would not be eligible for parole until he had served one-half of the seven year term. Section 741.2 provides as follows:

> "741.2 Notwithstanding subsection 120(1) of the **Corrections and Conditional Releas Act**, where an offender is sentenced,a fter the coming into force of this section, to a term of imprisonment of two years or more on conviction for one or more offences set out in Schedules I and II to that **Act** that were prosecuted by way of indictment, the court may, if stisfied, having regard to the circumstances of the commission of the offences and the character and circumstances of the offender, that teh expression of society's denunciation of the offences or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less."

This section came into force as of November 1, 1992. This was after the conviction for the offence. Counsel for the Crown referred to s. 11(i) of the **Charter**. In his

view s. 741.2 is not mandatory. While the sentence in this case was substantial it should nt rule out the rehabilitation of the appellant having regard to his age. The appellant is obviously in need of treatment and assistance if rehabilitation is to be effected. In my view general deterrence does not require an order under s. 741.2 of the **Code** having regard to all of the circumstances and indeed may be harmful to the rehabilitation of the appellant. It is unnecessary to deicde the applciation of the **Charter** section. I would grant leave to appeal against the sentence of seven years and allow the appeal to the extent of deleting the order under s. 741.2 of the **Code**.

J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.

S.C.C. No. 02804

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

TERRY LEE PHILIP HYNES	)	
Appellant	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT
BY: HER MAJESTY THE QUEEN	)	
	)	JONES,
	)	J.A.
Respondent	)	
	)	
	)	
	)	
	)	
	)	
	)	