C.A.C. No. 02858

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Jones and Matthews, J.J.A.

Cite as: R. v. Leger, 1993 NSCA 185

BETWEEN:

ARMAND ROGER LEGER Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Appellant in Person Gordon S. Gale, Q.C. for the Respondent Appeal Heard: October 13, 1993 Judgment Delivered: October 18, 1993

THE COURT: Appeal dismissed from conviction for robbery (**Code** s. 344) and appeal dismissed from sentence per reasons for judgment of Clarke, C.J.N.S.; Jones and Matthews, J.J.A. concurring.

CLARKE, C.J.N.S.:

Mr. Leger is appealing from his conviction for robbery and, subject to leave being granted, from the sentence that was imposed.

Following his trial over which Justice Davison presided, a jury found Mr. Leger guilty of the charge that,

> *"he at or near East Amherst on the 25th day of September, 1990, in the County of Cumberland, Province of Nova Scotia, did rob Clarence Embree of a sum of money, contrary to Section 344 of the Criminal Code of Canada."*

Section 344 of the **Criminal Code** states:

> *Every one who commits robbery is guilty of an indictable offence and liable to imprisonment for life.*

The offence for which section 344 provides the punishment is described in section 343:

> *Every one commits robbery who*
>
> *(a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;*
>
> *(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;*
>
> *(c) assaults any person with intent to steal from him; or*
>
> *(d) steals from any person while armed with an offensive weapon or imitation thereof.*

During the daylight hours of the afternoon of September 25, 1990, Clarence Embree, then 80 years old, and his wife, Ethel May, then 84 years old, were bound, beaten and robbed of the money they had in their possession at their farm home at East Amherst.

Mr. Embree was kicked and punched in the face. Mrs. Embree suffered broken ribs. An attempt to steal Mr. Embree's small truck would have been successful had the robbers been able to get it started.

Messrs. Harris, Doiron and Mitchell, from the Moncton area, were convicted of robbery and each was sentenced to terms of three and four years imprisonment. Two carried out the robbery and the third drove a car to provide transportation.

At the trial of Mr. Leger, these three identified him as the directing mind behind the robbery plan. Harris, in particular, gave detailed evidence of the leadership role played by Mr. Leger. The evidence was that he, mainly through Harris, organized the plot in Moncton, travelled with them to Amherst in the morning of September 25, 1990, identified the Embree residence and informed them that Mr. Embree was reported to have from $200,000.00 to $300,000.00 in the basement of his house. Mr. Leger, who lived most of his life in and around Amherst, was familiar with the area and Mr. Embree.

After physically injuring both Mr. and Mrs. Embree and creating havoc and turmoil throughout the house, the robbery netted the offenders between $100.00 and $150.00 cash from Mr. Embree and $12.00 from his wife. Mr. Leger was not present at the Embree home when the armed robbery occurred. The others said he was with them at the K-Mart Mall in Amherst before the robbery and returned with them to Moncton afterward. The thrust of the Crown's case was that Mr. Leger was a party to the offence because he aided or abetted the offenders (**Code** section 21(1)(b) and (c)).

Mr. Leger testified that he did not know Harris and that he was in Tidnish attempting to get the radiator of his car repaired at the time he was alleged to be meeting with the other three men in Moncton. Merlin Estabrooks of Tidnish said that Mr. Leger came to his house that morning, and again in the afternoon, to discuss the problems he was having with his malfunctioning radiator. In spite of the defence evidence, however, the jury found Mr. Leger guilty of the offence

with which he was charged.

On March 8, 1993, before being sentenced for the robbery offence, Mr. Leger pled guilty to four other charges against him for offences he was alleged to have committed at Amherst. They were:

1. defrauding Employment and Immigration Canada of a sum in excess of $1,000.00 contrary to section 380(1)(a) of the **Code**,
2. knowingly using a forged document as if it were genuine contrary to section 368(1)(a) of the **Code**,
3. defrauding TRA Foods Limited of cigarettes valued in excess of $1,000.00 contrary to section 362 of the **Code**, and
4. defrauding Cumberland County Social Services of a sum in excess of $1,000.00 contrary to section 380(1)(a) of the **Criminal Code.**

After hearing submissions from both Crown and the Defence and providing Mr. Leger with an opportunity to speak on his own behalf, Justice Davison sentenced him to five years imprisonment for the robbery offence and two years for each of the four offences, described above, to which he had pled guilty. He further ordered that each of the four two year terms would be served concurrently, but consecutively to the five years for the robbery offence.

The combined grounds of appeal advanced by Mr. Leger are:

1. He did not commit the robbery offence.
2. His lawyer failed him at his trial by not properly representing him and by failing "to produce witnesses and facts that would have cast light on (his) case".
3. His co-accused were sentenced to terms of three and four years while he was sentenced to seven. The trial judge should not have judged him on his past record because he had been out of jail for twenty years.

First, with respect to the conviction, section 686(1)(a) of the **Criminal Code** provides that a Court of Appeal may allow an appeal against conviction where,

> *(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,*
>
> *(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or*
>
> *(iii) on any ground there was a miscarriage of justice;*

The principal ground to be considered here is that provided in section 686(1)(a)(i). The leading case on point is the decision of the Supreme Court of Canada in **Yebes v. The Queen** (cited **R. v. Yebes**) (1987), 36 C.C.C. (3d) 417, where it is stated at page 426:

> "*As a general proposition, the verdict at trial will stand where there is evidence before the jury going in proof of all elements of the offence and where the trial judge has properly charged the jury on all matters of law which arise in the case and has made such references to the evidence as may be necessary to facilitate the application of the law to the facts. However, s. 613(1)(a)(i) of the **Criminal Code** provides an additional basis for the challenging of the verdict at trial. A Court of Appeal may allow an appeal against a conviction where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence*."

And, at page 430:

> *"The function of the Court of Appeal, under s. 613(1)(a)(i) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."*

A review of the transcript of evidence reveals that there was sufficient evidence upon which the jury could reasonably convict Mr. Leger. It was for the jurors to assess the evidence and decide what they found credible and believed to be the facts. It was for the trial judge to explain the law and describe the legal principles that apply to the facts as found by the jury. The jurors, and not the

judge, are the sole triers of fact.

A study of the charge given the jury by Justice Davison indicates that it was fair and complete. He spoke about the need to take special care in examining the evidence of Harris, Doiron and Mitchell, who had already been convicted, even though the law does not require them to be treated differently than other witnesses. He explained the law applicable to the offence carefully and in language that could be understood by the jurors. He chose to caution the jurors about accepting the evidence of Harris, Doiron and Mitchell and indicated how their evidence, if believed, could impact against Mr. Leger in the circumstances. He spoke about the need to take special care in examining the evidence of accomplices. He reviewed the evidence offered by Mr. Leger and Mr. Estabrooks. He said nothing to the jury which cast Mr. Leger or his counsel's theory of the defence in an unfavourable light. In short, Justice Davison "properly charged the jury on all matters of law which (arose) in the case and .. made such references to the evidence as (was) necessary to facilitate the application of the law to the facts".

Thereafter, it was the function of the jury to decide on the guilt or innocence of Mr. Leger.

After reviewing, re-weighing and reconsidering all of the record, the verdict of the jury cannot be set aside on the ground that it is unreasonable or cannot be supported by the evidence or that it suffered from any miscarriage of the judicial process. The first ground should be dismissed.

Second, and again from a review of the record, it appears that Mr. Leger's lawyer gave him a good defence, even though Mr. Leger disagrees. His examination and cross-examination of the witnesses was adept and effective as was his address to the jury. Mr. Leger gave evidence on his own behalf so that

he had a full opportunity to be heard and seen by the jurors and to tell them his case in his own words. Often times on appeal to this Court, after conviction, appellants complain that they were not given an opportunity to be heard, else they could have turned the trial around to their favour. Not so in the case of Mr. Leger. Whether on reflection other witnesses should have been heard, as Mr. Leger now suggests, was a judgement call between him and his counsel. It is now too late to review those judgement calls. This Court is one of review and not re-trial.

The second ground should also be dismissed.

Third, and last, is the matter of the sentence.

The function of this Court in dealing with this issue was aptly described by Matthews, J.A. in **R. v. Pepin** (1990), 98 N.S.R. (2d) 238 at 251:

> *"By virtue of s. 687 of the **Code** we are empowered to 'consider the fitness of the sentence appealed against'. This Court has said on numerous occasions that, in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or that the sentence is clearly or manifestly excessive. See among others, **R. v. Cormier** (1974), 9 N.S.R. (2d) 687; **R. v. Wilson** (1974), 10 N.S.R. (2d) 629; 2 A.P.R. 629."*

The record of the proceedings at Mr. Leger's sentencing shows that the trial judge heard and considered the submissions of counsel for both the Crown and Mr. Leger. In addition, before passing sentence, he asked Mr. Leger if he had anything to say. Mr. Leger responded, "no, I don't".

The trial judge spoke of the offence in these words:

> *"The evidence established to the jury's satisfaction that the accused was a party to the offence. In fact it was said it was his plan, that he recruited these individuals and showed them the home and transported them between Moncton and Amherst."*

He referred to the pre-sentence report and to the substantial criminal record accumulated by Mr. Leger, particularly between 1958 and 1972 when he

was last convicted of break, enter and theft. He observed that from 1972 forward Mr. Leger had a clear record except for two offences of uttering forged documents in 1989 for which he received minimum sentences, being primarily fines. The trial judge referred to and quoted from **R. v. Grady** (1973), 5 N.S.R. (2d) 264, which is a decision of this Court that discusses the principles to be applied in the sentencing process. Then, in summary, Justice Davison said:

> *"I have to consider also at this time, the fact that there is before me guilty pleas with respect to four other offences and I have to take into consideration the totality of the sentences that I mete out.*
>
> *I have considered the comments of counsel and I have considered the **R. v. Grady**, and I have considered the pre-sentence report and I have considered the criminal record of the accused including the fact that a substantial portion of it is old and probably stale. I have also considered the circumstances of the crime. It was a brutal crime and I have no doubt that the accused went forward and planned this crime knowing the very real possibility of injury to this elderly couple."*

Robbery is a very serious offence. It is so serious that parliament has imposed a maximum penalty of life imprisonment. Here the offence was aggravated by a planned and unlawful intrusion into the private dwelling of two senior citizens causing each of them physical injuries and all of which was motivated by greed. Society can only be protected from such unwarranted acts by imposing penalties that will punish those who commit such violence and at the same time give notice to the general public that acts of this kind will not be tolerated by the law. Imprisonment for a term of five years is certainly well within the range that has been imposed in this jurisdiction, and approved by this Court for such violent acts.

Mr. Leger alleges he has suffered a disparity in the sentence imposed upon him when compared to the others who are also involved.

The first observation is that he has not been sentenced to seven years for the robbery offence. There are four other sentences involved and to which he

pled guilty. They are separate and apart from the offence committed against Mr. and Mrs. Embree. The trial judge stated that he was taking into account the principle of totality when sentencing Mr. Leger for all five offences at the one time. Doing this was to apply a principle of sentencing that was the most favourable to Mr. Leger. The trial judge would not have been wrong had he decided otherwise.

The second observation is that the circumstances that are applicable to each offender and that offender's participation and involvement in the offence must be considered by the trial judge. It is apparent that judges other than Justice Davison dealt with Harris, Doiron and Mitchell. What their personal circumstances may have been and what consideration the court(s) may have had to consider were not before Justice Davison when he dealt with Mr. Leger. He was required to deal with this offence and this offender after hearing the representations of both counsel and Mr. Leger who, as the record indicates, was obviously content with the submissions his lawyer advanced on his behalf. In the circumstances that exist here, the disparity as alleged by Mr. Leger is an insufficient cause to warrant any further consideration of that issue by this Court.

While leave to appeal against sentence should be granted, the appeal should be dismissed because the sentence, both in its totality and in its parts, is neither manifestly excessive nor unfit having regard for all of the circumstances.

Conclusion

I would dismiss the appeals against both conviction and sentence.

C.J.N.S.

Concurred in:

Jones, J.A.

Matthews, J.A.

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Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
HER MAJESTY THE QUEEN	)	
	)	CLARKE, C.J.N.S.
	)	
Respondent	)	
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