S.C.C. Nos. 02637 - 02640

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Matthews and Roscoe, JJ.A.

Cite as: R. v. A.T.H., 1992 NSCA 48

BETWEEN:

A.T.H. Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Lisa B. Fraser-Hill and N. Blaise MacDonald for the Appellant Robert C. Hagell for the Respondent Appeal Heard: December 10, 1992 Judgment Delivered: December 10, 1992

THE COURT: Appeal against conviction dismissed; leave to appeal from disposition imposed by the trial judge granted; disposition varied to include a prohibition order, prohibiting the appellant from having in his possession any firearms, ammunition or explosive substance for a period of five years from the date the disposition was imposed, but in all other respects the disposition made by the trial judge is confirmed, per oral reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Matthews, J.A. concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

A.T.H., a young person pursuant to the **Young Offenders Act**, was charged with second degree murder of his father, S.H. He was convicted of manslaughter by Provincial Court Judge Stanley Campbell and sentenced to a two year term of probation with conditions.

A.T.H. appeals the conviction and the Crown appeals the disposition.

The facts surrounding the death of S.H. are as follows:

On May 3, 1991, A.T.H., aged 16, was escorted home by the R.C.M.P. after having been found in illegal possession of beer. Later, Mr. H. came home from work after being advised of the liquor offence by Mrs. H. He was very angry with his son, who had been involved in a similar event a year previous. Mr. H. told A. that as punishment he would have to have his shoulder length hair cut in a brush-cut style.

The next day, Mr. H. told A. to get out of bed, have a shower, and get ready to go for a hair cut. A. had his shower and then asked his mother to intervene for him with Mr. H. Mrs. H. advised her son that he would have to discuss it with his father himself. A. went back to his bedroom and while thinking of how to discuss the problem with his father, passed the time by whittling a pen with a hunting knife.

Shortly thereafter Mr. H. yelled from the kitchen, telling A. it was time to go to the barber shop. A. replied by saying he wasn't going. Mr. H. yelled, "What did you say?" and stormed into A.'s bedroom. A. testified that Mr. H. grabbed him while he was still holding the knife. The scuffle which ensued lasted

less than a minute. When Mr. H. realized he was injured he told A. to get an ambulance. A. yelled for his mother to call for help and then assisted his father by applying pressure to one of his cuts.

Mr. H. suffered three major stab wounds, one to the neck, one to his hand and one in the chest. In addition, there were four other small cuts on his chest. The fatal wound was the larger wound to the chest. The knife had penetrated the pericardium sac and the right ventricle of his heart.

A. suffered minor injuries during the scuffle, including a cut lip, a nosebleed, and bruises resembling finger prints on the inside of both arms.

The trial judge rejected the defences of accident and self-defence. He found that A. had formed the specific intent to wound the deceased with the knife. He found that the number and types of wounds ruled out the possibility of an accidental stabbing.

With respect to self-defence the trial judge said (p. 5 of his decision):

> " There was nothing in the relationship, that is the relationship between the Young Offender and the deceased, which would have justified the Young Offender using the force he did to repel the deceased's aggression. There was no evidence to suggest that the Young Offender had any reason to fear grievous bodily harm at the hands of the deceased, or that the use of such force was the only way to save himself. There were incidents of corporal punishment and of an earlier wrestling match, but whatever view one has of the appropriateness or otherwise of this approach to discipline, they are not grounds to justify the actions the Young Offender took."

In coming to these conclusions the trial judge decided that A. was "not entirely candid with the Court in parts of his testimony".

The trial judge entered a conviction on the lesser included offence of manslaughter, having found no intent to kill.

A.T.H. in his appeal from conviction submits:

> "1. That the learned trial judge misapplied the facts to the law and otherwise erred at law in ruling that the facts did not support the appellant's claim of self-defence or accident and the verdict was therefore unreasonable and cannot be supported by the evidence.
>
> 2. That the learned trial judge erred in law in ruling inadmissible expert evidence offered to establish that the wounds sustained by the deceased were inconsistent with self-defence and accident and inconsistent with the wounds occurring in any other manner."

After having carefully considered the evidence and arguments we find no error in law on the part of the trial judge in arriving at his conclusions. His rejection of the defences of accident and self-defence was based to a great extent on a finding of credibility. The verdict was one which the judge, acting judicially, could reasonably have rendered on the whole of the evidence.

With respect to the second ground of appeal, the appellant submits that the pathologist called by the defence ought to have been allowed to testify as to how the knife wounds might have been inflicted, and whether they were inconsistent with accident or self-defence.

The difficulty with this argument is that the simple question of whether the knife wounds were defensive was not put to the witness. Starting at p. 256 of the transcript, defence counsel asked the doctor to demonstrate positions the deceased could have had his hands at the time his hand was stabbed. The sequence of questions and answers is somewhat confusing, but the doctor does give a few examples of how the hand wound could have happened. The question not allowed by the trial judge is rather convoluted. It contains thirteen assumptions and then concludes with the words: "Can you tell me whether the neck wound, first of all, is consistent with that description of facts?" The trial judge ruled that the question was not within the field of medicine and therefore the doctor could not offer his opinion. We are unable to find that the trial judge was in error in so ruling.

The appeal against conviction is therefore dismissed.

The Crown appeals the disposition of two years probation on the grounds that it inadequately reflects the element of general deterrence and that it is inadequate given the seriousness of the offence.

In his decision on disposition, the trial judge reviewed the extremely positive pre-disposition report, the applicable sections of the **Young Offenders Act** and numerous decisions of this Court. He concluded by saying (p. 394 of the Appeal Book, p. 5 of the decision on disposition):

> " In this instance the P.D.R. establishes to my satisfaction that we are dealing with a young man, who enjoys present good health, is intelligent, is inclined towards completing his education and who is free of any psychiatric, drug or alcohol problems. There is no record of criminal activity of any kind.
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> Despite the tragic circumstances of this case, and his part in them, the P.D.R. also demonstrates that he retains the support of his family, both maternal and fraternal aspects. His support from his home community at large remains constant.
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> There is nothing in his background nor in any of the psychiatric commentary heard during preliminary motions before trial, nor afterwards, that would suggest to me that society is in need of protection from this young man.
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> I consider expressions of remorse by this young man to be genuine. These expressions of remorse were immediate and have been repeated whenever the occasion presented itself. In those circumstances the element of specific deterrence has in my view been addressed.
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> In so far as the element of general deterrence is concerned, the unique character of the circumstances which gave rise to this charge dictate that the question of sending a message to others similarly inclined, must take a very secondary role to the element of rehabilitation.
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> The question of accountability has again been answered, in my view, through the actions of the accused since the offence. He has expressed remorse, he has co-operated with everyone involved including the probation people, the medical people and most importantly he has taken steps to pick up the pieces and begin again. His expressions of concern for his mother's situation speak loudly in the areas of rehabilitation and accountability. He has resumed his schooling and is progressing well.
>
> In my opinion the appropriate disposition in this matter is one which will allow the young offender to begin rebuilding his life and

> one which will support him in his efforts. I consider incarceration at this point to be counter productive. I cannot see that anything will be gained by incarceration."

We are informed that since the date of disposition A. has continued his education and is now in Grade 12. He has continued his psychiatric counselling as ordered in the probation order. The post-disposition progress reports indicate that the trial judge was correct in his belief that on the facts of this case, a probation order would achieve the desired effect.

In the very unique circumstances of this tragic case, we agree that the trial judge properly emphasized the element of rehabilitation. We find that he did not err in principle in imposing the disposition he did. Section 100(1) of the **Criminal Code** mandates an order prohibiting the youth from having in his possession any firearms or any ammunition or explosive substance for a period of five years from the date the disposition was imposed by the trial judge. We so order.

Leave to appeal from disposition is granted, the disposition is varied to include the prohibition order described above, but in all other respects the disposition made by the trial judge is confirmed.

J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.