C.A.C. No. 02910

NOVA SCOTIA COURT OF APPEAL

Hallett, Roscoe and Pugsley, JJ.A.

Cite as: R. v. G.A.W., 1993 NSCA 191

BETWEEN:

W. (G.A.) Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Patricia Fricker for the Appellant Robert E. Lutes, Q.C. for the Respondent Appeal Heard: September 28, 1993 Judgment Delivered: November 1, 1993

THE COURT: Leave to appeal granted and appeal on all matters dismissed, per reasons for judgment of Roscoe, J.A.; Hallett and Pugsley, JJ.A. concurring.

ROSCOE, J.A.:

The appellant pled guilty to eleven charges in Youth Court: four break, enter and thefts, six thefts and one prowling at night. He was sentenced to a total of ten months open custody at the Waterville Youth Centre, one month on each of the break and enters and one month on each of the thefts to run consecutively and one month concurrent on the prowling charge. A period of two years probation following his release from custody was also ordered. He appeals the sentences for the four indictable offences and applies for leave to appeal the sentences for the summary conviction matters.

At the time of the disposition hearing, the appellant was seventeen years old and had not previously been convicted of any criminal offence, although he had been dealt with by the alternative measures program regarding another matter. He was enrolled in grade 10 but had some lapses in attendance. At the time of the offences he was having some personal problems as a result of his mother's illness and a dispute with his stepfather.

The Youth Court judge in his remarks indicated that the young person had to be held accountable for his actions and that protection of the public was an important factor given the prevalence of these offences in the community. He said :

> "The facts of the matter are disturbing. It is not something that literally came out of no where, there was some difficulty here, there was some difficulty here with the young man's adjustment. The facts are disturbing in that they involve private homes, they involve multiple private homes, they involve multiple automobiles and the items taken were all taken with some consideration.
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> . . .
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> But again, to go back to this young man's involvement, one of the house was occupied, at least one was occupied. The effects of a person's house being broken and enter is . . . having been commented upon often, and I think they are well known and not to be argued with. I've watched the young man and I'm not at all sure that he's not

> manipulative He's obvious . . . obviously he's well spoken, ... He needs direction, he needs counselling."

The appellant argues that the sentence is excessive, that the trial judge failed to apply the appropriate principles of sentencing and that he wrongly stressed deterrence rather than rehabilitation.

In order for this Court to grant leave to appeal the summary conviction dispositions, there must be an error in law (see s. 830 of the **Criminal Code**). The appellant submits that the imposition of consecutive rather than concurrent dispositions constitutes an error in law. This Court held in **R. v. Brush**, (1975) 13 N.S.R. (2d) 669 that the issue of whether sentences should be concurrent or consecutive was a question of law.

Considerations that are relevant in determining whether one sentence should be consecutive or concurrent to another include the time frame within which the offences occurred, the similarity of the offences, whether a new intent or impulse initiated each of the offences, and whether the total sentence is fit and proper under the circumstances. (See **R. v. Hatch** (1979), 31 N.S.R. (2d) 110 and **R. v. Brush**, **supra**.)

In this case all eleven offences occurred over a period of three days. On the 25th of May, the appellant broke into one home and committed four thefts from automobiles, on the 26th of May he broke into another home and stole items from a car, and on the 27th of May he broke into two yachts, prowled at night and stole items from a vehicle. While these fairly similar offences over this brief period of time could be termed a "spree", a "single enterprise" or "closely linked together", they each required a new intent and a fresh impulse and in each separate offence additional property was acquired. These crimes were separate and distinct, quite unlike, for example, those in **R. v. Brush**, **supra**, where MacKeigan, C.J.N.S. described the events in this passage at p. 670:

> "The facts are that on the evening of July 5, 1975, the appellant, in a drunken rampage, during ten minutes or so, smashed six store windows on the main street at Yarmouth.

> We agree that on the particular facts this seems to have been a single criminal spree, involving similar acts committed at the same time and place. A concurrency of intent occurred in that essentially one purpose, thought, impulse or plan generated the offences. It was only coincidental that the six sheets of glass were in six shops and not, say, in only one or two shops. It is not a case of breaking one window at one end of the street and then another at the other end where two 'intents' rather than one might well be involved and where a judge in the exercise of his discretion might therefore well decide that the accused undertook two distinguishable and separable enterprises which justified consecutive sentences."

Considering the fact that the trial judge sentenced the appellant to only one month on each of ten offences, it is apparent that he took into account the principle of totality. Single counts of break and enter into a home could result in a sentence of much longer than one month. In my view, the trial judge did not commit an error in law by imposing consecutive sentences in this case nor is the sentence excessive .

The appellant also submits that the trial judge improperly stressed the principle of general deterrence rather than rehabilitation. Reference was made to cases from other jurisdictions where it has been held that general deterrence is not a factor when sentencing young offenders, for example **R. v. C.W.W.** (1986), 25 C.C.C. (3d) 355 (Alta. C.A.). That issue has, however, been settled by the Supreme Court of Canada in **R**. **v. M.(J.J.)** (1993), 20 C.R. (4th) 295. General deterrence must be considered, but it has diminished importance in determining the appropriate disposition under the **Young Offenders Act**.

The trial judge did consider general and specific deterrence and weighed those factors with the need of the appellant for direction and counselling, which is a difficult task. It cannot be said that he over-emphasized deterrence or that the disposition is too harsh.

Another point raised on this appeal is whether the Youth Court judge should have fashioned a sentence that took into account how

a custodial sentence would interfere with the appellant's education. The disposition was imposed in July and would run until April of next year which means that he will be released at a point too late in the school year to easily transfer back into classes in his community. Education is extremely important to every young person, and has been recognized as a relevant factor in some cases. For example, in **R**. **v. S.A.B.** (1990), 96 N.S.R. (2d) 374, this Court confirmed a custodial sentence for a young offender in a situation where it enhanced his educational opportunities.

In this case a post-disposition report from the youth facility indicated that education was a priority for the appellant and to assist in that goal he had been granted a temporary absence privilege in order to attend school. The report was favourable in all respects. This is indicative of a positive change since the pre-disposition report. In my view a disposition that is otherwise fit and proper at the time of sentencing should not be interfered with by this Court because of its conflict with the school year. That is a matter better left to be dealt with by the review provisions of the **Young Offenders Act**, specifically sections 28(3) and (4).

I find no error on the part of the Youth Court judge. I would grant leave to appeal the summary conviction matters, but dismiss the appeal on all matters.

J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.