Docket No.: CAC 161239
Date: 20001124

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Longaphy, 2000 NSCA 136]
Glube, C.J.N.S.; Flinn and Oland, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOSEPH FREDERICK LONGAPHY

Respondent

REASONS FOR JUDGMENT

Counsel: Kenneth W. F. Fiske, Q.C., for the appellant
Roger A. Burrill, for the respondent
Appeal Heard: October 11, 2000
Judgment Delivered: November 24, 2000

THE COURT: Leave to appeal is granted and the sentence appeal is allowed as per reasons for judgment of Oland, J.A.; Glube, C.J.N.S., and Flinn, J.A. concurring.

Oland, J.A.:

[1] The respondent Joseph Longaphy pled guilty to a charge of robbery contrary to s. 344 of the **Criminal Code**. Judge Barbara Beach of the Provincial Court sentenced him to a term of imprisonment for two years less a day. She ordered the sentence to be served as a conditional sentence, in the community and subject to certain conditions, and also ordered a further period of two years' probation.

[2] The Crown applies for leave and, if granted, appeals the sentence. It submits that the sentence is inadequate.

[3] For the reasons which follow, I would grant leave and allow the appeal. I begin by reviewing the facts and the evidence before the sentencing judge and by summarizing her decision.

[4] The respondent robbed a convenience store on Tower Road in Halifax around supper hour on April 22, 1999. In the course of the robbery, he pointed a steak knife with an eight inch blade at the shopkeeper and told him to open the cash register. The shopkeeper fled. The respondent left the store with a cash box containing some $860.00 and was apprehended shortly thereafter. He had made no attempt to hide his identity. The store's video camera captured him on tape and he left his fingerprints on the cash box.

[5] After being charged with robbery, the respondent was remanded in custody. On April 29, 1999, he entered a plea of guilty and was remanded pending sentencing. The sentencing hearing was adjourned several times before proceeding before Judge Beach on November 29th and continuing on December 9th, 1999. She imposed sentence on the second day of the hearing.

[6] The judge was provided with the respondent's criminal record. It showed twelve convictions commencing with an assault causing bodily harm in 1979. Four

of those convictions were for robbery or related offences. In 1980 the respondent was sentenced to two years for armed robbery, in 1989 to three years concurrent for armed robbery and to seven years concurrent for robbery with violence, and in 1997 to three years for attempted robbery. At the time he committed this convenience store robbery, the respondent was on parole for the attempted robbery.

[7] The judge also had a presentence report prepared in June 1999 by a senior probation officer which, among other things, related the respondent's family background, education, employment history, and corrections history. In the report, a parole officer described the respondent as impulsive and prone to violence. He also indicated that the respondent had the intelligence to do something with his life, but had a tendency to turn to drugs whenever he had problems. The final paragraph of the report provided an assessment of community alternatives by its author which included this passage:

> If Mr. Longaphy is to have a chance at surviving in the community, it seems he needs to be employed, completely away from alcohol and drugs and involved in intense counselling. It is certainly obvious that, unless he stops using drugs and alcohol, he will either die from the abuse or be involved in even further criminal activity.

[8] The judge heard three witnesses called by the respondent. They were Dr. Joseph Gabriel, a psychologist, who also presented a written Psychological Assessment; Linda DeBaie, a social worker; and Jerry Smith, who has known the respondent since he was 17, and who, as a parole officer, had supervised him and

was now a peer support counselor to him.

[9] It is clear from the reports and the *viva voce* evidence that the respondent has had a difficult life. He was 36 years old at the time of the sentencing hearing. When he was a youngster he suffered significant physical and verbal abuse from his mother for many years. When he was 15, he was sentenced to two months in Shelburne for joy riding and he claims to have been sexually assaulted by his probation officer. He became involved with drugs and alcohol. When he was 16 or 17, he was sentenced for assault and sent to an adult facility where he claims he was sexually assaulted by inmates. He has a long history of substance abuse - in the presentence report, he described himself as a serious drug addict and an alcoholic. He has a long history of criminal convictions resulting in incarceration.

[10] Between his jail sentences, there were several intervals during which the respondent stayed out of trouble and even did fairly well. He attended university for two years in a commerce program, and completed another year of studies through an extension course while in penitentiary. He worked steadily between 1994 and 1997 and at one time had his own business. He has had some stable relationships, and is the father of a young son who has been diagnosed with AIDS which the respondent believes the boy acquired from his mother.

[11] The judge heard evidence that the respondent was able to obtain counselling after his arrest for this robbery in April 1999. He has finally been able to disclose his experiences of physical and sexual abuse. She was told that he is now willing to address those issues and to examine his life.

[12] In his Psychological Assessment and his testimony, Dr. Gabriel indicated that the respondent has a pervasive problem with anger and that that anger and his resentment, hostility, and shame arose from the mistreatment he had received since he was a child. He described a cycle or pattern that has repeated since the respondent was 19. On release from prison he seeks out employment or schooling, establishes a relationship and residence, and attempts to abstain from substance abuse and criminal activity. However he does not know how to cope with pressure, frustrations, and disappointments so the cycle continues through a return to substance abuse and finally criminal activity to support his substance abuse. The psychologist recounted how this convenience store robbery followed a chance, uncomfortable meeting the respondent had with his mother which led to his using drugs again.

[13] It was Dr. Gabriel's view that for various reasons, including the counseling and his becoming a father, the respondent might be at a "turning point" in his rehabilitation. He felt that the respondent was ready to change and a return to jail

would not serve as a deterrent and might even make him worse. He testified that consistent, intensive counseling for another two years would be needed before an assessment could even be made of how to proceed further to continue rehabilitation. His Psychological Assessment concluded:

> Mr. Longaphy's risk for recidivism is high. Breaking the cycle . . . is the only way that he will ever be able to successfully re-enter society on a permanent basis. His present involvement in therapy and the identification of the core underlying issues may provide the first real opportunity for Mr. Longaphy to break the criminal cycle.

[14] Both Dr. Gabriel and Linda DeBaie testified that there was no guarantee that the respondent would be able to assimilate himself into society. However, Ms. DeBaie described the respondent as a very smart and motivated individual. In her estimation, he had improved significantly since they started meeting weekly some seven months before the sentencing hearing. He told her that he had not used drugs while in remand during those months. Ms. DeBaie agreed with Dr. Gabriel's report and his testimony.

[15] The Crown asked for a sentence of imprisonment for a period of eight years, after taking into account the seven and a half months that the respondent had spent in remand. Counsel for the respondent sought a conditional sentence. The respondent addressed the court following submissions by counsel. In essence, he stated that no one had ever taken the time to explain things to him and now he knew that he had to break the cycle Dr. Gabriel described. He indicated that he had been

under the influence of drugs every time he had committed a crime, that if he didn't do drugs or drink he wouldn't commit a crime, and that he would do everything he could to end his substance abuse.

[16] Judge Beach ordered the respondent to serve a term of imprisonment of two years less a day, to be served in the community pursuant to s. 742.1 of the **Criminal Code,** and imposed probation for a further two years. In the course of her decision, she stated:

> I've debated at some length, Mr. Longaphy, in my own mind as to whether your situation meets the correct rule required for the imposition of a conditional sentence. I've considered the nature of the offence, your criminal record, the lengthy time already spent behind bars for this offence, the evidence of Dr. Gabriel, Linda DuBay (sic) and Jerry Smith, the submissions of counsel, the case law presented both by Crown and Defence, the pre-sentence report, the psychological assessment that was prepared by Dr. Gabriel, the sentencing brief from the Defence which I've referred to.
>
> In my view the greatest hope for the long-term protection of the public is for you to continue therapy and remain drug free and I do think it's appropriate that it continue in the community by way of a conditional sentence followed by a lengthy period of probation. I truly hope, Mr. Longaphy, that you're going to be able to demonstrate to those who support you, but primarily to yourself, that this was the right time to show some degree of leniency here today and I should also tell you, it may not come your way again.

[17] The conditions imposed by the judge, in addition to the mandatory conditions stipulated by the **Code**, included the following:

- Go directly to Carleton Centre and reside there or where directed by supervisor.
- To attend Nova Scotia Commission on Drug Dependency as directed and cooperate with assessment and counselling.
- Attend for counselling as directed by Linda DeBaie or designate.
- Abide by curfew in residence between 9:00 p.m. and 6:00 a.m. except with

permission from supervisor to be out later than 9:00 p.m.

- Refrain from possession and consumption of non-prescription drugs and alcohol.
- Cooperate with any demand made by supervisor for a urine analysis.
- Cooperate with supervisor and attend for assessment and counselling in any areas deemed appropriate by supervisor.
- Perform community service work under the supervision of your probation officer or someone acting in his/her stead. ... and all the work is to be completed to the reasonable satisfaction of the probation officer as laid out below:
- Case number 881249 100 hours to be completed by 20011209 ...

[18] This court was informed that the respondent has twice breached the conditional sentence. In December 1999, the same month he was sentenced, he breached the condition that he refrain from the possession and consumption of non-prescription drugs and alcohol. In March 2000, another Provincial Court judge ordered amendment of several conditions and required him to reside at Talbot House, a drug rehabilitation facility. In June 2000, he admitted a second breach, namely being absent without leave from Talbot House. His counsel indicated that the respondent turned himself in. A third judge canceled the conditional sentence and ordered him to serve the balance of the two years less a day in the Halifax Correctional Centre, where he is presently incarcerated.

[19] The Crown raises issues on appeal as to the adequacy of the sentence imposed by Judge Beach. It argues that the sentence inadequately reflects the objectives of denunciation and deterrence. It also asserts that the sentence is inadequate having regard to the nature of the offence committed and the

circumstances of the offence and the offender.

[20] A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx** (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at § 123-126

[21] It is my view that the sentencing judge erred in principle in imposing sentence in this particular case. In deciding that a term of imprisonment of less than two years was appropriate, she overemphasized restorative objectives and gave minimal, if any, consideration to the principles of denunciation and general deterrence. The sentence does not adequately reflect the objectives of s. 718 of the **Code**.

[22] The purpose and objectives of sentencing and the principles to be considered of the **Code** are captured in the following provisions:

Purpose.
718.The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Fundamental Principle.
718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other Sentencing Principles.
718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, ...
(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[23] When certain criteria are met, a judge can order that a sentence be served in the community:

Imposing of Conditional Sentence.
742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and
(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the

> fundamental purpose and principles of sentencing set out in sections 718 to 718.2,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[24] Judge Beach was alert to the significant changes to the sentencing regime flowing from the September 1996 amendments to the **Criminal Code** which, among other things, created conditional sentences. In her decision, she referred to **R. v. Gladue** (1999), 133 C.C.C. (3d) 385, [1999] 1 S.C.R. 688, then the most recent jurisprudence on s. 742.1 from the Supreme Court of Canada. She referred to what the Supreme Court had called the problem of over-incarceration in Canada and she quoted passages in that decision from reports which questioned the effectiveness of imprisonment in rehabilitating or strongly deterring offenders or in protecting the public for more than a limited time. She was also mindful that conditional sentences had been imposed for serious offences which in the past usually resulted in periods of incarceration.

[25] When the judge sentenced the respondent, the Supreme Court of Canada had not yet decided **Proulx** and the companion cases. **Proulx** is now the leading authority on conditional sentences and a decision that must be included in this court's review of the sentence. At § 45 of that decision, Lamer, C.J.C. listed four criteria that a court must consider before deciding upon a conditional sentence:

> [1] the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
> [2] the court must impose a term of imprisonment of less than two years;
> [3] the safety of the community would not be endangered by the offender serving the sentence in the community; and
> [4] a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[26] As indicated, a court cannot order a conditional sentence pursuant to s. 742.1 unless it has first imposed a sentence of imprisonment of less than two years. In **Proulx**, the Supreme Court rejected a literal two-step analysis in favour of a more purposive analysis in determining the appropriateness of a conditional sentence. It suggested at § 58 and § 59 that instead of determining a fixed term of imprisonment for the offence, the judge should review broad categories at the outset:

> In my view, the requirement that the court must impose a sentence of imprisonment of less than two years can be fulfilled by a preliminary determination of the appropriate range of available sentences. Thus, the approach I suggest still requires the judge to proceed in two stages. However, the judge need not impose a term of imprisonment of a fixed duration at the first stage of the analysis. Rather, at this stage, the judge simply has to exclude two possibilities: (a) probationary measures; and (b) a penitentiary term. If either of these sentences is appropriate, then a conditional sentence should not be imposed.
>
> In making this preliminary determination, the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender.

[27] In my view, the sentencing judge erred in concluding that here a penitentiary term of two years or more imprisonment was not appropriate. The considerations to be taken into account when determining sentence for robbery have been reviewed by this court in numerous cases. It has emphasized that the primary consideration in cases of armed robbery must be protection of the public: see, for example, **R. v.**

Brewer (1988), 81 N.S.R. (2d) 86 at § 8.

[28] The position the court has consistently taken with respect to robbery was set out in **R. v. Leet** (1989), 88 N.S.R. (2d) 161; 225 A.P.R. 161 (C.A.) where Justice Chipman stated at § 14:

> Robbery is a very serious offence, carrying a maximum punishment of imprisonment for life. The sentencing court is thus left with a very wide discretion as to the penalty in any given case. Rarely is a sentence of less than two years seen for a first offence and terms ranging up to six years are commonly imposed. In the more serious robberies, including those committed in financial institutions and private dwellings, the range has generally been from six to ten years.

and continued at § 21:

> Robberies of financial institutions and other businesses pose a very grave threat to society. Such offences endanger not only those who work in those places, but the public in the vicinity of them and the police who are called upon to protect them and apprehend the perpetrators.

[29] In **R. v. Izzard (B.W.)** (1999), 175 N.S.R. (2d) 288; 534 A.P.R. 288, Glube, C.J.N.S. writing for the court at § 17 stated:

> For many years, this court has consistently viewed robbery with violence and armed robbery as cases requiring strongly deterrent sentences. The cases refer to a minimum bench mark sentence of three years and occasionally going as low as two years.

The citations for several of the cases which established that starting point follow that passage. The starting point can, of course, be moderated as circumstances dictate.

[30] Judge Beach referred to the starting point of three years' imprisonment for robbery and pointed out that the decisions of this court which set out a penitentiary term as the starting point were largely issued prior to the 1996 sentencing provisions of the **Criminal Code**. As Roscoe, J.A. commented in **R. v. S.C.** (1999), 175

N.S.R. (2d) 158; 534 A.P.R. 158, at § 10, sentencing cases which predate those provisions are subject to and limited by the legislative directions in s. 718.2(d) and (e) that an offender not be deprived of liberty if less restrictive sanctions may be appropriate and that all available sanctions that are reasonable in the circumstances should be considered for all offenders. In my opinion, the earlier cases can no longer be regarded as establishing rigid starting points or ranges against which sentences decided after these legislative changes came into effect must be measured. They are to be read with great care and awareness of the sentencing principles which now apply, particularly those pertaining to incarceration as a last resort and the focus upon individualized sentencing.

[31] The directions in s. 718.2(d) and (e) are only two of the sentencing principles set out in the **Code**. The fundamental principle in s. 718.1 that a sentence must be proportionate to the gravity of the offence and to the degree of responsibility of the offender and the other principles in s. 718.2 must also be properly considered. Further, the purpose of sentencing and the objectives which a sentence should attempt to achieve as mandated by Parliament in s. 718 are to be taken into account.

[32] In her decision, the judge recognized that the protection of the public is a fundamental purpose of sentencing. She had quite a bit of evidence about the respondent, his background, his efforts in therapy to learn coping skills, and the

support now available to assist him. She properly considered the rehabilitation of the respondent, sanctions other than imprisonment, and restorative principles of sentencing.

[33] However, she failed to give proper weight to certain objectives of sentencing, particularly denunciation, deterrence, and promoting a sense of responsibility in the offender. Her decision does not mention denunciation. There is only one specific reference to deterrence and that is in her summary of the Crown's submission; she stated that the Crown had urged incarceration in the interest of general deterrence. She herself did not address deterrence as an objective of sentencing in her decision. There is no indication how the sentence she ordered would promote a sense of responsibility in the respondent.

[34] Lamer, C.J.C. in **Proulx** has made it clear that the objectives of denunciation and deterrence can be accomplished by a conditional sentence. However, as he noted at §106:

> ...there may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct.

He also commented in §107 that there may be circumstances in which the need for deterrence will warrant incarceration.

[35] The judge herself described the robbery of the convenience store by the respondent, while armed with a weapon, as a serious fact situation with a very real

potential for violence. She spoke of the impact on the shopkeeper. She pointed out that the maximum penalty for robbery is life imprisonment and called his criminal record "significant."

[36] The respondent is not a young person but a mature adult**.** He is not a first-time offender or a person with a minor record. He is a repeat offender with a lengthy and significant criminal record. This was his fifth robbery. He has used a weapon in committing robberies before, and he used one again during this offence. He robbed a convenience store. Not only the storekeeper but any customer who entered could have been harmed. He was on parole following an attempted robbery at the time of this robbery.

[37] Section 718 of the **Code** sets out several objectives of sentencing including denunciation, deterrence, and rehabilitation. In my view, it was essential in the circumstances of this offence and of this offender that denunciation and deterrence, both specific and general, be carefully addressed in determining the appropriate sentence. It is not sufficiently clear from the decision that they were. Accordingly, I must conclude that the judge gave too much emphasis to the possible rehabilitation of the respondent and to consideration of sanctions other than imprisonment and insufficient weight to denunciation and deterrence. This amounts to an error in principle which permits an appellate court to intervene to vary

the sentence.

[38] Having considered the purpose, objectives and principles of sentencing, the nature of this offence and the circumstances of this offender, and the submissions of counsel, I would find that the sentence of imprisonment for a term of two years less a day imposed on the respondent is manifestly inadequate and that an increased term is appropriate. Since one of the underpinnings for a conditional sentence in s. 742.1 is that the sentence must be for less than two years, the conditional sentence imposed on the respondent cannot stand.

[39] I would reiterate that when Judge Beach sentenced the respondent, **Proulx** had not been decided. She did not have the benefit of its analysis of s. 742.1 nor of its consideration of appropriate conditions such as house arrest. As is apparent from my references to her decision, she was alive to the many issues before her. In some ways, her decision to try something different for this offender, something that would also protect the safety of the public, was creative and to a degree perhaps even prescient; however, the length of the sentence was not appropriate in the particular circumstances of this case.

[40] To eliminate any misunderstanding, I hasten to add that no offence is excluded from the conditional sentencing regime unless it is punishable by a minimum term of imprisonment. Robbery is not an excluded offence. As stated

by Lamer, C.J.C. in **Proulx** at § 41, a conditional sentence can provide significant denunciation and deterrence. I am not saying there could not be a case of robbery where a sentence of less than two years could be imposed and where a conditional sentence could be appropriate. This case, however, is not such a case.

[41] I would grant leave and allow the appeal. In my view, given the circumstances of this particular offence together with the circumstances of this particular offender, considered in light of the purpose, principles and objectives of sentencing in s. 718, 718.1 and 718.2, a five year sentence would be appropriate in this particular case. I would vacate the conditional sentence and the order of probation and impose a term of imprisonment of five years commencing December 9, 1999, the date sentence was originally imposed. The respondent is to be given credit of 11 months against sentence, that being the time he has already served in the community and in custody since the conditional sentence was ordered. There is to be no reduction for the remand time between his guilty plea and the imposition of the conditional sentence since the respondent was on parole at the time of this robbery and he would have been automatically returned to custody.

[42] I would recommend that if it is available to him while he is incarcerated, the respondent continue to receive intensive counselling and treatment for substance abuse.

[43] The sentencing judge failed to make the mandatory prohibition order under s. 109(1) of the **Code**. Accordingly, I make an additional order prohibiting the respondent from possessing any firearm, restricted weapon, ammunition, or explosive substance for life.

[44] In summary, I would grant leave to appeal and allow the appeal of the sentence. I would vacate the conditional sentence and impose a sentence of five years imprisonment commencing December 9, 1999 and adjusted for time served as indicated. In addition, I would impose a lifetime prohibition order under s. 109(1).

Oland, J.A.

Concurred in:

Glube, C.J.N.S.

Flinn, J.A.