Date: 20000113
Docket No: C.A.C. 157389

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Harris, 2000 NSCA 7]

Glube, C.J.N.S.; Roscoe and Flinn, JJ.A.

BETWEEN:

PAUL JASON HARRIS	)	Stanley W. MacDonald
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Dana Giovanetti, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	November 30, 1999
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	)	
	)	Judgment Delivered:
	)	January 13, 2000
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THE COURT: Appeal dismissed, per reasons for judgment of Glube, C.J.N.S.; Roscoe and Flinn, JJ.A. concurring.

GLUBE, C.J.N.S.:

I BACKGROUND

(a) OFFENCES

[1] Paul Jason Harris is appealing his sentence of fifteen years for an offence commonly referred to as a home invasion. Originally, the information against Mr. Harris contained two counts of robbery, two counts of aggravated assault, a count of break and enter, two counts of possession of property valued at more than $5,000.00, and one count of break and enter and committing the indictable offence of theft.

[2] On May 6, 1999, Harris pled guilty to the following charges:

1. That he, at or near Halifax, in the County of Halifax, Province of Nova Scotia, on or about the 12th day of April, 1999, did unlawfully rob Betty Delaney and Bob Delaney, contrary to Section 344 of the **Criminal Code**;

2. That he, at the same place and time aforesaid, did unlawfully wound, maim, disfigure or endanger the life of Robert Delaney and thereby commit an aggravated assault upon the said Robert Delaney, contrary to Section 268(1) of the **Criminal Code**.

[3] Robbery carries a penalty of up to life imprisonment and aggravated assault a term not exceeding 14 years. Harris was sentenced to 15 years on the charge of robbery and 14 years concurrently on the aggravated assault charge.

(b) AGREED FACTS

[4] During his submission on sentencing on June 30, the Crown detailed the facts which were agreed to by the defence. The following is a summary of those facts.

[5] On April 12, 1999, Paul Harris, Erin Berry and a young offender, XYZ met at a coffee shop on Spring Garden Road in Halifax. XYZ knew Ms. Berry and indicated to her he wanted to do a break and enter to get some money. Ms. Berry introduced XYZ to Paul Harris who was willing to participate in a robbery. Harris and XYZ spoke about the break and enter and during that evening, left the coffee shop, but returned there on two to four occasions. Ms. Berry was there on at least one occasion when the two males indicated they had targeted 1265 Wright Avenue where elderly and potentially wealthy people resided. This property was just two blocks from the Spring Garden Road coffee shop.

[6] Mrs. Delaney, age 77, resided at 1265 Wright Avenue with her husband, Robert Delaney who was about to turn 80 in May. At approximately 9:30 p.m. on April 12, she saw a silhouette at the kitchen window of their home. Someone was at

the window on her back deck. Mr. Delaney, went to the back door and saw a young man on the deck peeking through the closed screen door. This person indicated he wanted to get in to use the telephone and displayed a youth telephone card. Mr. Delaney also noticed a second male making his way through the back yard to the deck. Mr. Delaney told his wife to call 911 and he proceeded to tell the two people to leave his property. The two males left the back porch and walked out of sight. Mr. Delaney called some neighbours and informed them of suspicious males in the area. Although the Halifax Regional Police responded to the 911 call, they found no one who appeared suspicious in the area and cleared the call at 10:04 p.m.

[7] Harris and XYZ returned to the Delaney backyard on at least two occasions prior to their actual entry, each time cutting the screen on the kitchen window as much as they could without being caught. On one occasion when they returned to the coffee shop, they met Ms. Berry. She indicated to Mr. Harris and XYZ that if people were home, it would not be a simple break and enter; it would be a home invasion and people could get hurt. She told them the starting point for such an offence was a sentence of 6 years.

[8] Wright Avenue is in the south end of Halifax. The only access to the back yard was to either come over the fences of adjoining properties or from the cemetery which backs on the Delaney property.

[9] Although the Delaneys regularly retired at 11:00 p.m., because of what

occurred earlier that night, they stayed awake later. At 11:30 p.m., Mrs. Delaney went to close the kitchen window which was habitually left open to allow air to flow into the house. When she entered the kitchen in the dark, she felt a large gush of wind. As this seemed odd to her she opened the venetian blinds to secure the window at which time Harris and XYZ jumped through the open window into the kitchen. Mrs. Delaney turned and ran toward the inner hallway, screaming for her husband. XYZ pushed Mrs. Delaney and she broke her hip as she hit the floor. Harris ran past Mrs. Delaney and XYZ and came upon Mr. Delaney who had reached the bottom of the stairs holding a small handsaw. Mr. Delaney was waving the hand saw and he struck the knuckles of Harris causing him to bleed. After being struck by the handsaw, Harris disarmed Mr. Delaney. Harris then kicked, punched and struck Mr. Delaney with his own wooden walking stick until the stick shattered. Mr. Delaney collapsed at the bottom of the stairs leading up to the bedrooms. From then on he was in and out of consciousness.

[10] After both the Delaneys were immobile on the floor, XYZ pulled the phone off the wall rendering it inoperable. At some point apparently, one of the two invaders cut the exterior phone lines. Mr. Delaney was lying at the foot of the stairs; Harris and XYZ had to walk over him in order to get up the stairs to complete stealing the Delaneys' belongings. They remained in the house for approximately an hour to an hour and a half, with XYZ checking on the Delaneys periodically.

[11] While gathering items belonging to the Delaneys, Harris and XYZ asked

for carrying bags. They took approximately $1,000.00 in cash which was not recovered, in addition to numerous items of jewellery, duffle bags, a walkman, a VCR, credit cards, checkbooks, two gold watches, an air pump, and Mr. Delaney's war medals.

[12] As Harris and XYZ were leaving the home, Mrs. Delaney asked them to help her husband and to leave a light on in the house so she could see where she was going. This request was refused. Harris and XYZ rubbed down the house to remove any fingerprints and then left the Delaneys in the dark. Despite his severe injuries Mr. Delaney dragged himself and stumbled into the front room, leaving blood marks on the wall from his head. Mrs. Delaney spent the night trying to get attention from people outside and checking on her semi-conscious husband. She eventually got to the front room, pulled herself into a chair in the front window, and early the next morning, she was finally able to attract the attention of a neighbour who called for help.

[13] After leaving the Delaney home, Harris and XYZ took a taxi cab to the apartment where Ms. Berry was staying. Ms. Berry had waited for them at the coffee shop, but when they failed to arrive, she eventually returned to her apartment and met them there. At the apartment, XYZ called 911 to request assistance for the Delaneys. However, inaccurate information was given to 911 as to the location of the problem. The 911 operator immediately called back saying they knew the phone number and address where they were calling from. Although 911 called back, Ms.

Berry denied there was any problem and the call was ended.

[14] The stolen property was distributed among the three; some was hidden and some money was spent. Ms. Berry cleaned blood off Harris' sneakers and shortly after all three were at the apartment, Harris and Ms. Berry went to Shoppers Drug Mart on Spring Garden Road to buy hair coloring products. Later on, Harris did try to color his hair.

[15] When the police examined the Wright Avenue property, they found a fingerprint which was later identified as belonging to XYZ. On Wednesday, April 14, the police saw XYZ on Tower Road. Harris was with him. When the police pulled up, a shiny object fell between Harris and XYZ which at the time, appeared to be a knife. Later, the object was identified as a screw driver with tinfoil. XYZ was arrested for robbery and aggravated assault. Harris was charged with possession of a weapon. When Harris was searched, the police found and seized a large knife, two pairs of rubber gloves and a ski mask. In her statement Mrs. Delaney described one of the assailants as wearing a mask throughout the home invasion. The two parties were advised of their rights and cautioned. Upon being placed in the police car, XYZ spontaneously said Harris was with him on the night of the break and enter.

[16] At police headquarters, Harris and XYZ each gave detailed statements admitting their involvement in the break and enter. Much of what they said was corroborated by the statement of Mrs. Delaney and from the forensic evidence.

Harris also indicated that he and XYZ were on their way to do another robbery when they were arrested. It is unclear whether it was to be a car jacking or robbing a gas station, or both.

[17] In his statement, Harris described how the screen was cut off and the window was halfway up when someone was pushing the window down. He said his blood pressure went up and it was like bells ringing in a boxing match; there was no way out. He climbed through the window, heard the woman calling for her husband, but he did not touch her. He saw the husband holding the miniature handsaw which he started to swing at Harris, cutting him on his knuckles. Harris grabbed a cane which was against the wall. He recalls thinking this is not right but “buddy” is just going to cut me up so he started hitting Mr. Delaney with the cane. When Harris was stuck in the leg with the pointy part of the saw, he said he then kicked Mr. Delaney in the head and he recalls that the situation got really bad.

[18] After obtaining a search warrant, the police took Harris to Ms. Berry’s apartment, and instructed him to call Ms. Berry to get her to cooperate with the search. Harris was overheard saying, “I don’t know what the fuss is all about. These people were just beaten up. People die in the streets of Halifax every day.” He was also heard to say, “When I get out of jail I’m going to be bigger, badder and madder.”

(c) INJURIES TO MR. DELANEY

[19] The report of Dr. Howes dated June 28, 1999 describes the injuries to Mr. Delaney. They included abrasions, bruising and swelling of the head, face and chest with lacerations on his face. His left cheek was fractured as was his left upper jaw and the under surface of his skull, with bleeding into and from his left ear. The fractures have subsequently healed. The Doctor suggested there may have been some hearing loss from the fracturing of the left ear. Mr. Delaney also had a laceration on his left forearm, abrasions on his back and pressure wounds from lying on his back which have all resolved. He had evidence of bruising of his brain. The effects of this bruising and his subsequent respiratory failure left him confused, unable to swallow and unable to care for himself throughout his hospital stay on the neural surgical service at the Halifax Infirmary. Bruising on his chest plus the consequences of the other injuries led to respiratory failure requiring prolonged ventilation and a tracheotomy to provide access to his airway. Ultimately, Mr. Delaney was removed from the ventilator and the tracheotomy closed. At the time he was discharged from the neurosurgery floor, he was still unable to swallow and required a feeding tube. He had significant impairment of memory and was disoriented and unable to care for himself. Dr. Howes concluded by saying, “The prognosis for recovery from this brain injury at his age will probably lead to permanent impairment such that I would be pessimistic that he would ever be able to attain independent living again.”

[20] An updated report from Dr. Michael Quigley dated September 21, 1999 indicates Mr. Delaney had major brain damage as a result of the assault, resulting in

a major change in his physical and psychological functions. Mr. Delaney is confined to bed or a wheelchair, cannot walk without assistance for support and balance and only for short distances. He is fed by a gastrostomy tube as he is unable to swallow liquid or soft food. If he does swallow such food or liquid, he is at risk of aspiration of these substances and choking. Dr. Quigley goes on to state,

> Psychologically, he is markedly impaired. He has total amnesia with regard to the physical assault and resulting head injury. Becomes very agitated and confused at times and he required medication to control the confusion and agitation. His general cogitative function is impaired - poor memory, delayed conversation, emotionally labile, and he needs prompting with all his ADL's [Activities of Daily Living].He required twenty four hour nursing care to attend to his ADL and administer his medication.
>
> Long range prognosis is very poor. He will require 24 hour care for the remainder of his life. He would be unable to manage in his home setting with the help of his elderly wife, as he needs nursing assistance with feedings (tube feeding) and administration of necessary medication for behaviour control and all ADL.
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> [Emphasis added.]

(d) VICTIM IMPACT STATEMENTS

[21] Both Robert James Delaney, Jr. and Mrs. Delaney filed victim impact statements. The former dated May 26, describes his father's injuries which Robert Jr. saw when his father was initially brought in to the hospital, including a sneaker print on his back and severe bruising of his hands and face. He referred to the fact that his father is completely dependent upon care givers. At the time of writing his victim impact statement, it was too soon for therapy and the only emotions shown by Mr. Delaney Sr. were agitation and verbal abuse as a result of the brain injury. His father did not know his own whereabouts, nor was he able to communicate what the impact

of the assault had on him. It was too early to determine the costs of medical care but damage to the home not covered by insurance amounted to approximately $1,600.00. His major concern was that his father was not able to return to his home and his independence and as he is eighty years of age, there would not be enough time for his brain to heal.

[22] Mrs. Delaney's victim impact statement dated May 26, 1999, describes that her broken hip required a full hip replacement; she had bruises on her knee and buttocks and remained in the hospital for a week and a half and then was in Camp Hill Hospital for three weeks. At the time she wrote her statement, she required a cane and no longer enjoyed the walks she always took. Psychologically and emotionally, she thought about the incident every day and had guilt about being unable to help her husband that night. She has a fear and hatred for what happened to them. She is angry that her life has been changed forever, stating that she spent the last fifty-five and one half years with her husband every day. Now she is forced to see him only at the hospital, and the person that is lying there is not the person she was used to. She states, "I have 'LOST' the person I shared my life with." She refers to the financial impact and further that they were very independent and able to look after themselves using public transit and walking everywhere. They lived downtown where they shopped and loved the area and the people. She concludes by saying, "I really hope I'll feel safe again one day."

(e) PAUL HARRIS

[23] A number of documents were filed relating to the background of Mr. Harris. He was born December 17, 1978 in the United States. He did not know his natural father and his mother died of an AIDS related illness on September 8, 1989 at the age of 35. As a result of his mother's drug use, he was born addicted to the drug Talwin and was apprehended by Child Welfare four times between 1979 and 1985 due to physical abuse, parental neglect, non-supervision, and drug abuse by his mother. After her death he became a temporary ward of Children and Family Services and was in nine foster homes and two residential centres between 1989 and 1994. This information is detailed in a pre-sentence report prepared in 1997, when he was 18, for sentencing after a guilty plea to one count of possession of a narcotic. For that offence he was sentenced to one month. At the same time he received 3 months concurrent for failure to comply with a Youth Court Disposition (s. 26, **Young Offender's Act**). In 1994, he received a sentence of one month and twelve months probation for mischief under $1,000.00 (s. 430 (4) of the **Criminal Code**), and one month and one year probation for possession of a narcotic under s. 3(2) of the **Narcotic Control Act** (2 charges) and break and enter (s. 348 of the **Criminal Code**).

[24] The June 1999 update of the 1997 pre-sentence report, relates that initially after Mr. Harris was released from the Waterville Youth Centre in early May 1997, he received funds from Children and Family Services while he was in an adult high school program where he was getting marks in the 80's. He also became involved in amateur boxing. He quit school shortly after his probation ended in May 1998 and, as

a result, lost his financial support. He moved around over the next period including a short stay with his aunt in Alberta. By March of 1999, he was back in Nova Scotia, lived with a girlfriend from the New Minas area for a month and a half and after they broke up, he came to Halifax where he immediately met the accomplices and was soon involved in these offences. Harris told the probation officer that he did not enter the Delaney home with the intention of hurting the victims, but once he was involved in the assault, he claims he lost control. The probation officer spoke with one former girlfriend who described a physically violent relationship by both parties, with Harris wanting to control her. Harris told of receiving a serious injury in a "bar fight" approximately a year earlier and claims to have four metal plates in his head as a result of the injuries he received. Harris felt he did have a problem with narcotics and planned to be involved in a drug rehabilitation program after he was sentenced.

[25] Harris wrote a letter for the sentencing judge in which he set out some of his background. He described getting mixed up with the wrong people and breaking into an elderly person's home, and continues:

> ... went around the corner and there was Mr. Delaney swinging a miniature handsaw in my face. I put my hands up to protect my face and my wrist was cut. I seen the blood and then all I remember is standing over a bloody, beaten Mr. Delaney while shaking and sweating. Judge, I do deserve the maximum penalty for this which I believe is 15 years. I just wanted the person that is in power of my life for the next few years to understand my head. I've held a lot in and took it out the wrong .. on the wrong person but I hurt a family who didn't deserve it. Please listen to how much time the prosecutor is asking for ...
>
> [Emphasis added.]

[26] Other documents describe Mr. Harris and his behavior in 1993 and 1995

when he was in foster homes and a residential centre and how he sabotaged relationships when a feeling of attachment arose. His attitude was often one of defiance, being disrespectful to staff, and exhibiting inappropriate behavior towards his peers. Those attitudes appear to remain to the date of the offences, although he was 20 years of age then and not 14 and 16 as described in the documents.

II DECISION OF SENTENCING JUDGE

[27] The sentencing judge delivered a lengthy oral decision which touched upon all the areas usually included in a sentencing decision.

[28] After setting out the principles of sentencing found in s. 718 and 718.1 and 718.2 of the **Criminal Code**, Judge Digby granted a prohibition order under s. 109(1)(a) of the **Criminal Code**. He did not repeat the facts as they had just been put on the record by the Crown. He did read into the record Dr. Howes' report on the injuries suffered by Mr. Delaney as well as the victim impact statements previously referred to.

[29] The Judge listed the aggravating facts as the planning, the premeditation, returning to the house on at least two occasions, being aware of the possible sentence, the extreme violence, that they were elderly victims and the knowledge that the victims would be in their home at the time of the break-in. He suggests the remorse of Mr. Harris was "somewhat hollow in view of the fact that there was a great

outcry in the press" and the fact that when stopped by the police, he was on his way to do another robbery. He remarked on the comments Harris made to Ms. Berry when he called her about the search warrant, but found the remarks were not the most aggravating factor. The most aggravating factor he found was what happened that night. He looked at Harris' background and had "considerable sympathy" for him and recited some of the events of his childhood as previously referred to above. He found that this background provided an explanation for the behaviour of Harris in terms of cause and effect, but that it did not provide any justification or excuse. The Judge also referred to Harris as someone who likes to intimidate women and found Harris had a great potential for violence.

[30] Judge Digby then proceeded to list the mitigating factors. First, Harris was only 20 at the time of the offences but, he stated, "the youth of young offenders is of little concern when one is dealing with a crime of extreme violence" which he found this crime to be.

[31] Second, Harris did plead guilty at the first or early opportunity which the Judge found of limited value as XYZ had pointed the finger at Mr. Harris at the time of their arrest. The chief value of the guilty plea was that it saved the Delaneys from having to testify.

[32] The third mitigating factor was remorse, but the Judge went on to relate that in the pre-sentence report, it states:

> Mr. Harris expressed remorse but indicated he knows his comments do not lessen the seriousness of actions. He further indicated he deserves the maximum sentence and did not want the Court considering his family background as an excuse.

Further, the Judge found the comments about remorse of limited value and not significant, as Harris had been remorseful in the past yet continued to get into difficulty with the law. Although Harris had a non-violent record, he was on his way to do another crime which the Judge found had a high potential for violence, when arrested on these charges.

[33] The Judge found the fact that Mr. Harris did co-operate with the investigation by providing a written statement should be given some weight, but not a lot. He further found the two month remand not significant.

[34] At this point in his decision, the Judge again referred to the principles of sentencing and to the pre-sentence report and the efforts made in the past by social service agencies to assist Harris; the sentencing Judge concluded that he had little confidence in any efforts towards rehabilitation in the short run. He found the primary emphasis had to be “to denounce unlawful conduct, to deter Mr. Harris and other persons from committing similar offences” by which he meant, “the type of offence where people prey on elderly people in their own home with actual or potential for violence.” He found as an absolute necessity that Harris had to be separated from society, as he was a “damaged” person who might want to do the right thing from time

to time, but was incapable of doing so and did not have “ the skills to get by in society without exploding into violence.”

[35] The Judge made a restitution Order under s. 738 of the **Code** in favor of the Delaneys in the amount of $1,000.00.

[36] Finally, he found the circumstances horrific and sentenced Harris to 15 years for the robbery and 14 years for the aggravated assault to be served concurrently.

III GROUNDS OF APPEAL

[37] The appellant cites the following grounds of appeal:

> 1. THAT the sentences imposed over-emphasize the element of general deterrence.
>
> 2. THAT the sentences imposed are excessive having regard to the nature of the offences committed and the circumstances of the Appellant.

IV STANDARD OF REVIEW

[38] As a general principle, sentencing is for the trial judge and it is not the role

of the Court of Appeal to re-sentence based upon its view of the facts.

[39] Section 687(1) of the **Criminal Code**, R.S.C., 1985, c. C-46 governs sentence appeals and provides:

> (1) **Powers of court on appeal against sentence** - Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.

[40] Several recent cases decided by the Supreme Court of Canada need to be examined to understand that court's evolving position on the role of the Court of Appeal in sentencing.

[41] The function of the Court of Appeal in determining "the fitness of the sentence appealed against" within the meaning of s. 687(1) is to determine whether there is an error in principle, or a failure to consider a relevant factor, or an overemphasis of appropriate factors, or that the sentence is "demonstrably unfit", or clearly unreasonable. (**R. v. C.A.M.** (1996), 105 C.C.C. (3d) 327 at para. 90; **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 at para. 46.)

[42] **Shropshire** was a determination by the trial judge of parole ineligibility of 12 years following a guilty plea to second degree murder. The Court of Appeal reduced

the period to 10 years. The Supreme Court of Canada held that general deterrence was an appropriate factor in setting the period of parole ineligibility and rejected the principle that an increase beyond the 10 year period was only justified in unusual circumstances. However, the decision went on to state, “An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made.” (para. 46). Iacobucci, J. felt intervention was only appropriate if the quantum of the sentence imposed by the trial judge was unfit or clearly unreasonable (para. 46) and in the context of sentencing, that involves an order which falls outside the acceptable range (para. 50). He also relied on the trial judge’s advantage in seeing and hearing the witnesses as a basis for the limited role of a court of appeal. I would add, however, that point is clearly of less relevance in those cases where sentencing takes place after a guilty plea where there is no *viva voce* evidence.

[43] In **C.A.M.**, a trial judge imposed a sentence of 25 years on an accused for a number of serious sexual assaults on his children. The British Columbia Court of Appeal reduced the sentence to 18 years and 8 months on the basis that, absent special circumstances, a cumulative sentence should not exceed a term of 20 years. The Supreme Court of Canada held there was no rule setting an upper limit. Lamer, C.J.C. set down a number of broad principles to be considered in sentencing, including retribution and denunciation. Retribution requires that the punishment must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. Thus, someone who inflicts intentional harm must be punished more

severely than a person who causes harm unintentionally. Denunciation focuses on the offender's conduct on the occasion in question. Denunciation shows the condemnation of society for the offence.

[44] **C.A.M.** also dealt with limits on appellate review of sentencing. Instead of basing the restrictive role of the appellate court on the perceived advantage to the trial judge of having seen and heard the witnesses as in **Shropshire**, **C.A.M.** focused upon the statutory discretion given to the trial judge to fix the appropriate sentence. Further, the decision propounded that, the trial judge has the opportunity of directly assessing the sentencing submission of counsel; the trial judge serves on the front line and has daily experience with sentencing; and, the trial judge usually deals with a case within or near the community which suffered the consequences of the offender's crime (para. 91).

[45] The decision acknowledges the need for appeal courts to review and minimize disparity in sentences for similar offences and offenders throughout Canada. However, this still requires a degree of deference as "there is no such thing as a uniform sentence for a particular crime" (para. 92). Sentences will also vary somewhat across communities and regions. Thus intervention to minimize disparity should only occur "where the sentence imposed by the trial judge is in substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes." (para. 92).

[46] The conclusion to be reached from **C.A.M.** is that appellate courts should refrain from excessive interference. A fit sentence should be determined by the trial judge and "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 imposed at trial if the sentence is demonstrably unfit." (para. 90).

[47] As a corollary to the above, appeal courts should intervene to alter a sentence if there has been an error in principle, including an error of law. Where such error occurs, an appeal court need not defer to the trial judge and must impose the sentence it thinks fit. Even absent error in principle, a sentence which is outside an acceptable range may be found to be clearly unreasonable, manifestly excessive or inadequate, demonstrably unfit, or a substantial and marked departure from the norm, again allowing an appeal court to intervene. Thus, intervention should occur when the sentence shows a marked or substantial departure from those usually imposed for similar offenders committing similar crimes.

[48] Some courts have endorsed the "starting point" approach as a way to deal with the issue of disparity. An example is **R. v. Sandercock** (1985), 22 C.C.C. (3d) 79 which was criticized in **R. v. McDonnell**, [1997] 1 S.C.R. 948. **Sandercock** set a starting point of 3 years for a major sexual assault. Former mitigating factors of good character and no previous record were deemed irrelevant. Psychological and emotional harm to the victim, whether presumed or proved, were overwhelming factors in defining the blameworthiness of the offender and the seriousness of the

offence. The case also set out in detail relevant aggravating and mitigating circumstances which could set the sentence above or below the 3 years. This starting point emphasized general deterrence and denunciation at the expense of all other sentencing principles and fixed a minimum which the legislature had not done.

[49] **McDonnell** involved two sexual assaults. One in 1983 was of a 16 year old ward of the accused involving partial intercourse. The second was in 1993 of a 14 year old babysitter and involved touching the pelvic and vaginal areas. The question was whether either was a “major” sexual assault which would lead to the 3 year starting point set by the Alberta Court of Appeal. The trial judge did not find either offence to be a major sexual assault. The Court of Appeal disagreed and changed the concurrent sentence from 12 months imprisonment and 2 years probation to 4 years and 1 year consecutive. On appeal to the Supreme Court of Canada, and speaking for the majority, Sopinka, J. found the Court of Appeal made four errors: (1) in holding that the trial judge overlooked relevant facts; (2) in not finding the sentence was demonstrably fit when compared to other similar cases; (3) in holding it was an error in principle for the trial judge not to have found that at least the first assault was a major sexual assault; and (4) in failing to give proper deference to the trial judge’s decision on whether the sentences should be concurrent or consecutive. The 1st, 2nd and 4th errors do not really concern us in relation to the present case. Our concern is with issue (3) which was whether it is appropriate to set starting point sentences for offences. The starting point along with the range for these type of offences were issues presented in argument in the case before us.

[50] After addressing the first two issues in **McDonnell** in the context of **Shropshire** and **C.A.M.**, Sopinka, J. in discussing the 3rd issue and after disagreeing with the Court of Appeal as to whether or not the trial judge found psychological harm, held, "it can never be an error in principle in itself to fail to place a particular offence within a judicially created category of assault for the purposes of sentencing." (para. 32). He further found that establishing categories of offences circumvents the deference due to the sentencing judge and is therefore contrary to **Shropshire** and **C.A.M.**. He made the point that, if what was done by the Court of Appeal was appropriate, deference could be circumvented merely by creating categories of offences and a "starting point" and then treat it as an error in principle if there was deviation in sentencing from the category created (para. 32).

[51] Sopinka, J. further found "there is no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing." (para. 33). It is for the legislature to enact offences and not for judges to create them. (**Frey v. Fedoruk** [1950] S.C.R. 517). By creating a "major" sexual assault, "the Alberta Court of Appeal has effectively created an offence, at least for the purposes of sentencing, contrary to the spirit if not the letter of **Frey**." (para. 33).

[52] Sopinka, J. goes on to hold at para. 43:

> ... I do not disagree with McLachlin J. [dissenting] that appellate courts may set out starting-point sentences as guides to lower courts. Moreover, the starting point may well be a factor to consider in determining whether a sentence is demonstrably unfit. <u>If there is a wide disparity between the starting point for the offence and the sentence imposed, then, assuming that the Court of Appeal</u>

> has set a reasonable starting point, the starting point certainly suggests, but is not determinative of, unfitness.... Unless there otherwise is a reason under **Shropshire** or **M. (C.A.)** to interfere with the sentence, a sentence cannot be altered on appeal, notwithstanding deviation from a starting point. Deviation from a starting point may be a factor in considering demonstrable unfitness ...
>
> [Emphasis added.]

[53] Although courts of appeal can still speak to elements of blameworthiness, gravity of offences, aggravating and mitigating factors and the like providing some guidance, they should not create minimum sentences.

V ISSUES ON APPEAL

[54] The two issues raised on appeal can be dealt with together.

[55] The appellant submits as the main and basic premise of his appeal that the sentences imposed by the sentencing judge far exceed the benchmarks for these type of offences. He then proceeds to cite a series of robbery cases from Nova Scotia, acknowledging that the facts of this case lead to the characterization of this offence as a home invasion robbery but claims there is a bench mark of 6 to 10 years based on statements made in the case of **R. v. Fraser (S.A.)** (1997), 158 N.S.R. (2d) 163 (C.A.). The conclusion the appellant reaches is that the sentence in this case of 15 years exceeds the starting point and the upper end of the range for robbery (by 5 years) for similar cases and, as a result, it is demonstrably unfit. It is further submitted that in spite of the seriousness of the robbery and the presence of significant

aggravating factors, the degree of disparity with other similar cases is practically determinative of the unfitness of the sentence. He uses other cases to show that the sentence for aggravated assault is also excessive and goes further to point out that the sentences in this case exceed those imposed if it was a manslaughter case, suggesting those are in the range of from 4 to 10 years.

[56] In my opinion, it is not appropriate to separate the facts of this case as though there were two distinct events. There are two separate charges requiring two sentences, but one cannot ignore the fact that this was essentially one continuous event involving extreme and excessive violence.

[57] I would reject the submission of counsel for the appellant that, in **Fraser,** this Court established a range of 6 to 10 years for sentences in all cases of home invasion robberies. Pugsley, J.A. stated:

> This court has approved a range of sentence of between six to ten years for robberies of financial institutions and private dwellings. [Citations omitted.] (Para. 22.)

[58] Later at paragraph 27, he stated:

> I consider that house invasion robbery of this type should attract a sentence greater than that imposed for armed bank robbery.
>
> [Emphasis added.]

[59] At paragraph 33, Justice Pugsley stated:

> I agree with the following comments of the Alberta Court of Appeal in **R. v. Matwiy (S.B.) and Langston (J.D.)** (1996), 178 A.R. 356; 110 W.A.C. 356; 105

C.C.C. (3d) 251 (Alta.C.A.) at p. 263:

> We are of the view that the home invasion robbery merits a higher starting-point sentence than the armed robbery of a bank or commercial institution. While offences of violence are abhorrent wherever they occur, offences which strike at the right of members of the public to the security of their own homes and to freedom from intrusion therein, must be treated with the utmost seriousness. Individuals in their own homes have few of the security devices available to commercial institutions. They are often alone, with little hope that help will arrive. Such offences, whether they arise in injuries or not, are almost always terrifying, traumatic experiences for the occupants and the residents, often leaving them with a total loss of any sense of security.

The starting point in **Matwiy** was 8 years for home invasion robberies.

[60] At paragraph 34, Justice Pugsley in **Fraser** repeated again:

> As I have indicated, this court has placed a bench mark of six to ten years for robberies of financial institutions and private dwellings. While I consider an invasion of a private dwelling of this type should attract a sentence greater than that for robbery of a financial institution, Mr. Fraser's plea of guilty, his remorse, and the other circumstances detailed in the pre-sentence report, are factors to be considered.

[61] He then varied the sentence of Mr. Fraser to 6 years for the robbery. (See also: **R. v. Stephenson** (1998), 169 N.S.R. (2d) 159 (para. 25)).

[62] These statements in **Fraser** do not settle a range for home invasion robberies of 6 to 10 years. One must look at the individual case and the mitigating and aggravating factors and determine what the appropriate sentence should be. In **Shropshire,** at paragraph 47 and 48, and in **McDonnell**, at paragraph 15, the Supreme Court relied on two decisions from Nova Scotia and stated:

> I would adopt the approach taken by the Nova Scotia Court of Appeal in the

cases of **R. v. Pepin** (1990), 98 N.S.R. (2d) 238, and **R. v. Muise** (1994), 94 C.C.C. (3d) 119. In **Pepin**, at p. 251, it was held 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 (if) the sentence is clearly or manifestly excessive.

Further, in **Muise** it was held at pp.123-24 that:

> In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate....
>
> . . .
>
> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts.... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.
>
> . . .
>
> Unreasonableness in the sentencing process involves the sentencing order falling outside the “acceptable range” of orders; this clearly does not arise in the present appeal.

[63] Sopinka, J. in **McDonnell** refers to the principles just set out in both **Shropshire** and **C.A.M.** of deference absent an error in principle, including the unique qualifications of the judge and the circumstances of the community in which the offence occurred. He also refers to the role of the appeal court in minimizing disparity of sentences recognizing deference to the sentencing judge and that there is no such thing as uniform sentencing.

[64] Turning to the specifics on this case, the following are the aggravating circumstances:

> home invasion plus violence, including acts of terrorism;
>
> conspiracy of three people;
>
> considerable degree of planning and premeditation - going back several times to gradually remove the screen on the kitchen window;
>
> awareness that at least an elderly woman was in the house and perhaps a couple;
>
> girlfriend informed them of the possibility of a 6 year penalty which they ignored by entering the property;
>
> phone line cut ;
>
> extreme violence by Harris to Mr. Delaney;
>
> remaining in the house for more than an hour after both parties injured;
>
> Harris was masked;
>
> leaving the parties in darkness with at least one person clearly seriously injured;
>
> formerly this was a healthy couple living independently, but no longer as Mr. Delaney can never live on his own again; he is both physically and emotionally changed.
>
> Mrs. Delaney’s broken hip has apparently healed, but she will undoubtedly never be the same emotionally;

> upon arrest, Harris admitted he was on his way to another robbery, but this time with gloves, mask, screw driver and a large knife; letter to lawyer, portion read in about deserving the maximum.

[65] In this case, the following are mitigating factors:

> cooperation with the police in giving a statement when arrested;
> early guilty pleas;
> absence of a violent record;
> age - 20;
> unfortunate childhood;
> remorse.

[66] It is acknowledged that Harris probably did not take a weapon with him to the Delaney home. This is not a mitigating factor. It is an absence of an aggravating factor but only to the point where upon feeling threatened by the handsaw held by Mr. Delaney, Harris picked up a cane and used it to inflict harm on Mr. Delaney until the cane broke.

[67] The sentencing judge dealt with each of the mitigating circumstances as set out previously and gave little weight to most of them. He found the following:

> Harris' cooperation with the police and the guilty pleas were to be

given some weight, yet they did not assist him very much as XYZ implicated Harris at the time of arrest.

The pleas did save the Delaneys from having to testify.

Although Harris does not have a violent record, the events of April 12, 1999, the fact he was carrying a knife on the way to do another robbery when arrested, and the violence referred to in his pre-sentence report, led Judge Digby to the conclusion that Mr. Harris "has a great potential for violence".

Although he was only 20, his youth was of little concern when dealing with extreme violence.

Although Harris had a sad life, it did not provide any justification or excuse for what he had done.

Although Harris expressed remorse, he had done so before, yet he continued to get into difficulty with the law, thus, the suggested remorse in the circumstances was questionable.

[68] I would accept that the sentencing judge's remarks on the various mitigating factors are completely valid.

[69] Looking at the aggravating circumstances, they truly speak for themselves and greatly outweigh any of the mitigating factors. Although Harris has a limited number of previous offences, the violence of this one overrides much of what he has done in the past. This was a case where the death of a person could easily have

occurred. In many ways he has condemned Mr. Delaney to a living death and his wife to a totally different and unhappy life with no possibility of finding what they had in the past.

[70] The decision in **Matwiy** provides a thorough review of cases dealing with home invasions in Alberta, including several where 15 year sentences were upheld on appeal. The case lists the basic, essential features of a "home invasion" robbery, namely,

> … A mature individual with no prior record,
>
> (a) plans to commit a home invasion robbery (although the plan may be unsophisticated), and targets a dwelling with intent to steal money or property, which he or she expects is to be found in that dwelling or in some other location under the control of the occupants or any of them;
>
> (b) arms himself or herself with an offensive weapon;
>
> (c) enters a dwelling, which he or she knows or would reasonably expect is occupied, either by breaking into the dwelling or by otherwise forcing his or her way into the dwelling;
>
> (d) confines the occupant or occupants of the dwelling, even for short periods of time;
>
> (e) while armed with an offensive weapon, threatens the occupants with death or bodily harm; and
>
> (f) steals or attempts to steal money or other valuable property.
>
> The starting-point for sentences for a home invasion robbery as we have defined it, should be eight years. (Paras. 30 and 31.)

[71] Clearly, Mr. Harris is not a "mature" individual with no prior record and there is no evidence he went in the Delaney home with a weapon. However, as a former boxer and immediately picking up the cane, he had a weapon. Thus, he meets all of

the **Matwiy** guidelines and more.

[72] Many cases could be examined with similar facts to this one to try to find a true comparable and undoubtedly there could be partial success, but no two cases are truly identical. Counsel for the respondent referred to cases from British Columbia, Ontario and Quebec with sentences ranging from 12 years up to life. The following cases all have similarities to the present case: **R. v. Hingley** (1977), 19 N.S.R. (2d) 541 (N.S.C.A.); **R. v. Johnson** (1984), 61 N.S.R. (2d) 357 (N.S.C.A.); **R. v. Perrault** [1996] B.C.J. No. 702 (B.C.C.A); **R. v. Ferreira** [1995] O.J. No. 287 (Ont. Gen. Div.); **R. v. Simard** [1987] A.Q. No. 1423 (Q.C.A.); **Bernier**; **Guy Pronovost v. R.** (1987), 7 (Q.A.C.) 309.

[73] The appellant submits that the sentencing Judge was influenced by the public outcry and, as a result, lost objectivity. He points to the beginning of the Judges' remarks where he refers to it not being easy for defence counsel to represent someone "who is so unpopular as evidenced by the comments in the media." With respect to the appellant's argument, I would find this a factual statement by the Judge.

[74] Later in his decision the Judge found Harris' remorse hollow, "in view of the fact that there was a great outcry in the press."

[75] In the context of the entirety of the decision, I would find those two

statements do not show a loss of objectivity by the sentencing Judge.

VI CONCLUSION

[76] As stated in s. 718.1 of the **Criminal Code:**

> **718.1 Fundamental principle** - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This is a mandatory requirement.

[77] Section 718.2(b) states:

> **718.2 Other sentencing principles -** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[78] Thus the requirement to take into account similar sentences for similar offences is simply something to be taken into consideration. (**R. v. Maxwell** [1999] B.C.J. No. 2670 (B.C.C.A.) para. 7.) In **Maxwell**, after a home robbery and death, the sentence for manslaughter was 12 years. The Court of Appeal stated this was equivalent to 17 years because of time served.

[79] Judge Digby examined the issue of rehabilitation and stated the following:

> ... in view of the efforts made by social service agencies in the past and the extent of the deprivation suffered by Mr. Harris I have little confidence in any efforts at rehabilitation of Mr. Harris in the short run. I think the primary emphasis in imposing sentence today has to be to denounce unlawful conduct, to deter Mr. Harris and other persons from committing similar offences and by

> similar offences I mean the type of offence where people prey on elderly people in their own home with actual or potential for violence.

I would agree with this evaluation. (See **Hingley**; and **R. v. Bernier** [1999] B.C.J. No. 700 for an overview of the matters to be looked at by a sentencing judge.)

[80] It is appropriate for a sentencing Judge to denounce unlawful conduct, to cite deterrence of the offender and others as the prime factors, as well as the necessity of separating Harris from society. It is also quite appropriate for the sentencing Judge to recognize the circumstances of the community in which the offence occurred and in which he presides.

[81] These types of offences (home invasion) require denunciation by society, deterrence of the accused and others from committing this type of offence, and protection of the public as the primary considerations of sentencing those who choose to invade the sanctity of the home of another and do violence through intimidation, terrorism or actual assault.

[82] In my opinion, the sentencing judge made no error in principle, he considered all relevant factors, he did not place undue emphasis on any factor, and the sentence is not “demonstrably unfit” or “clearly unreasonable” considering the horrific nature of the assault and the circumstances surrounding the whole robbery. Protection of the public and deterrence are paramount and absolutely necessary in this case. I would find the sentences imposed were within the range, were not

manifestly excessive and were fit sentences.

[83] I would grant leave to appeal, but dismiss the appeal.

Glube, C.J.N.S.

Concurred in:

Roscoe, J.A.

Flinn, J.A.