NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Partridge***, 2005 NSCA 159

Date: 20051209
Docket: CAC 244169
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Carl Stanley Partridge

Respondent

Judges:	Bateman, Oland and Fichaud, JJ.A.
Appeal Heard:	November 15, 2005, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Bateman, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	William D. Delaney, for the appellant Andrew House and Joshua Arnold, for the respondent

Reasons for judgment:

[1] The Crown seeks leave to appeal and, if granted, appeals the sentence imposed by Justice Douglas L. MacLellan of the Supreme Court of Nova Scotia. The offender/respondent is Carl Stanley Partridge. The sentencing decision (**R. v. Partridge** (23 February 2005), Antigonish Cr. S.A.T. No. 2563 (S.C.)) is unreported.

BACKGROUND:

[2] On November 6, 2000 Mr. Partridge was charged with four counts of common assault (s. 266 **Criminal Code**) and two of uttering threats (s. 264.1 **Criminal Code**). The victim, in all cases, was his then spouse, Mary MacIntosh.

[3] On October 17, 2001 a jury returned verdicts of guilty on three counts of common assault and not guilty on the remaining charges. With the court's permission, Mr. Partridge moved to British Columbia pending sentencing, provided he return on December 11, 2001. At Mr. Partridge's request, the sentencing hearing was adjourned from December 11, 2001 to a date in February, 2002. Mr. Partridge failed to appear on that date and remained at large for almost three years until apprehended by the R.C.M. Police when he returned to Nova Scotia for his mother's funeral.

[4] Sentencing finally took place on February 23, 2005. MacLellan, J. imposed a conditional sentence of twelve months on each of the three convictions, all sentences running concurrently, followed by a global probationary period of one year. In addition to statutory conditions, Mr. Partridge was subject to house arrest during the first nine months of the sentence, provided he could leave his home for employment; supervisor approved appointments; and for three hours per week to deal with necessities.

[5] The Crown says the judge erred in principle and that the sentence is otherwise unfit. The sentence, says the Crown, inadequately reflects the objectives of denunciation and deterrence. The judge did not take into account Mr. Partridge's related record of offences which revealed a pattern of exploiting vulnerable female family members nor did he consider that Mr. Partridge had not accepted responsibility for the offences. Mr. Partridge's history of non-compliance with court orders, as well as his failure to appear on sentencing, in the Crown's

submission, made him an unsuitable candidate for a community-based sentence — another relevant factor not considered by the judge.

[6] The Crown attorney summarized the trial evidence about the three convictions:

> The first matter arose in the month of November 1997. I want to remind Your Lordship that Mr. Partridge was released from custody in April of 1997 for the offence from 1994. Ms. MacIntosh described in her evidence . . .
>
> . . .
>
> In any event, Ms. MacIntosh talked about how in November of 1997, she had returned to her dwelling from her brother's residence to get some clothing. At that time, her mother was at home from the hospital. She was suffering from cancer.
>
> After getting to the residence, Ms. MacIntosh wanted to go back to her mother's residence, but the accused refused to allow her to go. She attempted to exit through the rear exit, but he pushed her back into a chair.
>
> She fell back into the chair, and she recalls that her foot came up and struck him in the groin area. After that occurred, he began striking her about the head region. She recalled, I think it was three or four times or several times, whatever her evidence was. There was a friend actually present that evening. So that was the nature of that first assault for which he was found guilty.
>
> The second assault for which he was found guilty was the second count on the matter. At that time, it was in April of 1998, and she was eight months' pregnant. She recalls that during that month of pregnancy, the defendant, or the accused, were involved in an argument when she fled from the home in fear of him.
>
> She stumbled and fell in the road below the residence at that time. He caught up with her and, while holding onto her arm, he - - to use my words - - dragged her back to the residence. Once they got back there, he's yelling at her. He's yelling at her on the way back as well.
>
> And once they got back to the residence, he grabbed her by the throat, forced her back against the outside wall of the dwelling. And her evidence at trial was to the effect that he actually lifted her up off

> the ground while he held her by the throat against the wall. It was only after another person intervened that he released her.
>
> The third incident occurred in February of 2000. Mr. Partridge was in the house. He had a gun, a .303. He was talking about shooting himself. At one point as she was trying to intervene, he grabs her by the throat and pushes her down onto the floor during the course of that incident.

[7] At the sentencing hearing, counsel for Mr. Partridge did not take issue with the above summary of the facts, save to advise the Court that Mr. Partridge denied weapons were involved in any of the offences.

[8] Mr. Partridge testified that he was living in Edmonton, Alberta. He had been working for the previous month as an excavator operator with a trenching company and, according to his evidence, had had steady work in that field for some time. He provided a letter from his girlfriend of six months attesting to his character. He was living with her and her two children, although he also maintained separate accommodation.

STANDARD OF REVIEW:

[9] In **R. v. Longaphy (J.F.)** (2000), 189 N.S.R. (2d) 102 at para. 20 (C.A.), Oland, J.A. summarized the standard of review, which calls for a high level of deference to sentencing judges:

> **[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 (M.T.),** [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37; 102 C.C.C. (3d) 193 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. C.A.M.**, [1996] 1 S.C.R. 500; 194 N.R. 321; 73 B.C.A.C. 81; 120 W.A.C. 81; 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 (J.K.D.)**, [2000] 1 S.C.R. 61; 249 N.R. 201; 142 Man. R. (2d) 161; 212 W.A.C. 161; 140 C.C.C. (3d) 449 at § 123-126.

(Emphasis added)

[10] Key to the deference, however, is the absence of error in principle. Where there is error the court's right to intervene is not limited to sentences which are found to be "demonstrably unfit" (**R. v. MacAdam** (2003), 171 C.C.C. (3d) 449; P.E.I.J. No. 20 (Q.L.) (S.C. (A.D.)); **R. v. Rezaie**, (1996), 112 C.C.C. (3d) 97; O.J. No. 4468 (Q.L.) (Ont. C.A.); **R. v. Gagnon**, (1998), 130 C.C.C. (3d) 194; A.Q. No. 2775 (Q.L.)(Que. C.A.) at 198).

ANALYSIS:

[11] For the reasons which follow, I am satisfied the judge both erred in principle and imposed a sentence that is demonstrably unfit. The judge's critical error was his failure to take into account the relevance of Mr. Partridge's jumping bail. This oversight impacted his reasoning process in several key ways:

(1) The pre-sentence report prepared for the first scheduled sentencing date is highly unfavourable. It was reported that Mr. Partridge "vehemently denied" the offences for which he had been found guilty, asserting that his former spouse had lied about the circumstances. The social worker involved with the family at the time of the prosecution characterized Mr. Partridge as extremely volatile, confrontational and unco-operative, refusing to accept any recognition of the problems and opposed to any intervention or counselling. He continued to profess his innocence of the 1994 sexual assault of his step-daughter, for which offence he had been sentenced to three years incarceration. The writer opined that his complete lack of insight and remorse made him an unsuitable candidate for a community-based disposition. Save for commenting that the report was "negative", the judge did not address its contents. He concluded that Mr. Partridge had changed and now accepted responsibility for the offences. There was no evidence before the court that Mr. Partridge had undertaken counselling or any program to address the issues raised in the report. The judge based his conclusion that Mr. Partridge had reformed on the fact that he had not had other criminal convictions while at large; that he acknowledged his guilt at the sentencing hearing; and that he had not abused his current girlfriend. The judge made no effort to reconcile the contents of the report with Mr. Partridge's current

posture. In effect, by jumping bail and remaining at large, Mr. Partridge neutralized the negative effect of the pre-sentence report.

(2) The fact that Mr. Partridge avoided sentencing for three years and submitted only when apprehended by the police, spoke of his continuing denial of responsibility for the offences. The judge did not consider Mr. Partridge's professed acknowledgement of guilt in this context.

(3) Key to a conditional sentence is a finding that the offender will abide by the court's order. That Mr. Partridge defied the order to appear for sentencing was highly relevant to the prospect that he would comply with the terms of a conditional sentence. This was not addressed by the judge.

(4) Mr. Partridge had been at large for three years. The judge reasoned that because he had not been in conflict with the law for that period, it was unlikely he would re-offend. He said "on the positive side" Mr. Partridge had no "brushes with the law since his conviction in 2001". While he had no convictions, his failure to appear for the scheduled sentencing since February 2002, resulting in a warrant, clearly qualifies as a continuing "brush with the law" and is not a "positive". Based on this mistaken premise the judge failed to look at Mr. Partridge's pattern of offending, as revealed by his record. He was first convicted in 1979 of theft under and fined; in 1983 he was again convicted of theft under and fined; in 1990 he was convicted of break and enter receiving a suspended sentence; in early 1991 he was convicted of assault on a former spouse; in 1994 he was convicted of sexual assault and received a three-year prison sentence; he committed the first of the three offences before the Court in 1997, with the assaultive behaviour repeated in 1998 and 2000. In addition, Mr. Partridge had been convicted of two, and possibly three, breaches of probation while under court order. Thus, in concluding that having been offence-free for three years Mr. Partridge was unlikely to re-offend, the judge failed to appreciate the pattern of offending.

[12] When an offender jumps bail before sentencing and uses his time at large to rehabilitate himself, two conflicting principles come into play: pre-sentence

rehabilitation is a mitigating factor, however, an offender should not be rewarded for his own wrong (**R. v. Thompson** (1989), 50 C.C.C. (3d) 126; A.J. No. 769 (Q.L.) (Alta. C.A.)). In particular, Mr. Partridge should not benefit from his "perpetual defiance of the law" through his continued refusal to submit to sentencing (**Thompson** at p. 131). To reward the consequences of an offender jumping bail, may have the effect of encouraging others to do so (**R. v. Jones No. 2**, (1972), 56 Cr. App. R. 413 (C.A.) at pp. 421-2)

[13] The effect of rehabilitation during a lengthy period of pre-charge delay has been extensively considered. It arises, most often, in cases of historic sexual offences. Less common is rehabilitation occurring during an unilaterally created sentencing delay. In **R. v. Critton**, [2002] O.J. No. 2594 (Q.L.) (Ont. Sup. Ct. J.), Hill, J. reviewed cases involving both situations and summarized the emerging principles (at para. 76):

(1) the effect of delay on sentencing is a case-specific inquiry
(2) deliberate acts to evade detection by the authorities, whether flight or contribution to delayed complaint tend to weigh against assigning mitigating impact to the fact of delay
(3) reform and rehabilitation during the intervening period tend to eliminate the prospect of recidivism and to nullify the need for specific deterrence to be reflected in the court's disposition
(4) certain very serious crimes require sentences with measures of general deterrence and denunciation regardless of the offender's lengthy crime-free existence subsequent to the crime(s)
(5) objectively speaking, taking into account delay, the court's disposition should not be seen as a reward or benefit eliminating or depreciating the concept of proportionate punishment.

[14] Where a crime is one which requires a sentence emphasizing denunciation and general deterrence, as is spousal assault **(R. v. MacDonald** (1992), 173 C.C.C. (3d) 235; N.S.J. No. 99 (Q.L.) (N.S.C.A.)), a long passage of time between the commission of the offence and detection or between conviction and sentence does not lessen the need for such emphasis notwithstanding that the offender has unblemished conduct during that time (**R. v. Spence** (1992), 78 C.C.C. (3d) 451; A.J. No. 1129 (Q.L.)(C.A.) at pp. 454 - 55).

[15] Before imposing a conditional sentence the judge must be satisfied that having the offender serve his sentence in the community does not endanger its safety (**R. v. Proulx**, [2000] 1 S.C.R. 61; S.C.J. No. 6 (Q.L.) , para. 63). In **Proulx**, **supra**, at paras. 69 and 70, the Court listed the factors which assist in assessing community safety. Of those, particularly relevant to this discussion are: (i) whether the offender has previously complied with court orders; (ii) whether the offender has a criminal record that suggests that she/he will not abide by the conditional sentence; (iii) the relationship of the accused with the victim; and, (iv) the offender's conduct following the commission of the offence. Here Mr. Partridge's record speaks of a pattern of offending within his family. His crimes were not restricted to the spouse who was the victim of these offences but included a former spouse and a step-daughter. He is a serial perpetrator of domestic violence, but at the time of sentencing was in yet another intimate relationship. In jumping bail before sentence and remaining at large, Mr. Partridge's post-offence conduct reflects a lack of remorse and failure to accept responsibility for the offences. His flight from sentence coupled with his record of breaching court orders, reflects Mr. Partridge's lack of regard for the authority of the courts. It is reasonable to infer he will not comply with court-ordered conditions. Not one of these factors was considered by the sentencing judge.

[16] Mr. Partridge's pattern of exploitation of vulnerable female family members is particularly aggravating. It was another relevant factor not clearly addressed by the sentencing judge.

[17] Having found material error, it falls to this Court to craft an appropriate sentence. On this appeal, Mr. Partridge has provided information from his sentence supervisor, Shelly Collins, a Probation Officer in Edmonton. He has complied with the conditions of his sentence, including the house arrest, and has reported as requested. On her recommendation he began, in mid-September, 2005, a twenty week group counselling program dealing with family violence. The group will continue to meet weekly through to the end of January 2006. Ms. Collins believes he is attending these sessions. She has spoken to his current common law partner who reports no incidents in the relationship. Ms. Collins says it is very important that Mr. Partridge carry through with the counselling program which addresses anger management and appropriate boundaries within a family context, particularly when conflict arises. Upon completion of the program ongoing support will remain available to Mr. Partridge should he require it. She

recommends amending his probation order to include a term that he take any counselling that may be directed.

[18] At the hearing before Justice MacLellan, the Crown initially sought a ten to twelve month term of imprisonment. In oral submissions, the Crown revised its position to request an unspecified longer period of custody followed by a lengthy probationary period. On appeal, it was the Crown's submission that imprisonment in the ten to twelve month range is appropriate.

[19] The sentence imposed inadequately reflects denunciation and general deterrence. It is unfit given Mr. Partridge's past record of offending and non-compliance with court orders. However, in view of the post-sentence update and considering that Mr. Partridge has now completed his nine months of house arrest, re-sentencing Mr. Partridge is troublesome.

[20] When a conditional sentence is varied to incarceration on appeal the offender is generally given 1:1 credit. There is no precise formula with the result being governed by a general principle of fairness (**R. v. F.(G.C.)** (2004), 188 C.C.C. (3d) 68; O.J. No. 3177 (Q.L.) (C.A.)). This Court has commonly credited at 1:1 (see **R. v. Henry** (2002), 203 N.S.R. (2d) 40; N.S.J. No. 113 (Q.L.); **R. v. C.V.M.** (2003) 213 N.S.R. (2d) 344; N.S.J. No. 99 (Q.L.); **R. v. Jones** (2003), 214 N.S.R. (2d) 289; N.S.J. No. 146 (Q.L.); **R. v. MacLeod** (2004), 222 N.S.R. (2d) 56; N.S.J. No. 58 (Q.L.)). There will be circumstances where the offender receives more or less credit — for example, where there have been particularly onerous or unusually lenient conditions (**R. v. F.(G.C.)**, **supra**, at para. 29). I can see no reason here to recognize other than 1:1 credit.

[21] In **R. v. Hamilton** (2004), 186 C.C.C. (3d) 129; O.J. No. 3252 (Q.L.)(C.A.) the appeal court found that conditional sentences for the importation of cocaine by the two offenders were unfit, with a more appropriate sentence being twenty months incarceration for one offender and two years (less a day) imprisonment for the second. Both offenders had served seventeen months of their conditional sentences. In concluding that the administration of justice was best served in allowing them to complete their conditional sentences Doherty, J.A., for the Court wrote:

> [165] The ultimate question is, however, should these respondents be sent to jail now? They have served close to 17 months of their conditional sentences. There is no suggestion that they have not

> complied with the terms of those sentences or that they have committed any further offences. This court has recognized both the need to give offenders credit for conditional sentences being served pending appeal and the added hardship occasioned by imposing sentences of imprisonment on appeal. The hardship is readily apparent in these cases. Had the respondents received the appropriate sentences at trial, they would have been released from custody on parole many months ago, and this sad episode in their lives would have been a bad memory by now.
>
> [166] This was a significant appeal for the administration of justice. The decision of the trial judge raised important issues that required the attention of this court. Appeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event. The administration of justice would not be served by incarcerating the respondents for a few months at this time. They have served significant, albeit, inadequate sentences. To impose now, what would have been a fit sentence at trial, would work an undue hardship on the respondents. The administration of justice is best served by allowing the respondents to complete their conditional sentences.

[22] Similarly in **R. v. Edmondson** (2005), 196 C.C.C. (3d) 164; S.J. No. 256 (Q.L.), the Saskatchewan Court of Appeal found a conditional sentence of two years less a day unfit for a sexual assault, taking objection not to the length of the sentence but the fact that it was to be served in the community. There too, the Court declined to incarcerate the offender who had served twenty months of the sentence without incident. Cameron, J.A. commented, for the Court:

> **[131]** . . . Even if we were to set aside the conditional sentencing order, only about four months of his sentence would remain. And not all of that would have to be served in prison. Indeed, he would soon qualify for release it seems, so what would that accomplish? Little if anything. Indeed, requiring him to serve out his term of imprisonment in the community, subject to the conditions he must abide, would be arguably more onerous as we shall see.

(See to similar effect, **R. v. Symes** (1989), 49 C.C.C. (3d) 81 (C.A.); **R. v. Shaw**, [1977] O.J. No. 147

(Q.L.)(C.A.); **R. v. Boucher** (2004), 186 C.C.C. (3d) 479; O.J. No. 2689 (Q.L.) (C.A.); **R. v. Hirnschall** (2003), 176 C.C.C. (3d) 411; O.J. No. 2296 (Q.L.) (C.A.); **R. v. Fox**, [2002] O.J. No. 2496 (Q.L.) (C.A.) and **R. v. F.(G.C.)** (2004), 188 C.C.C. (3d) 68; O.J. No. 3177 (Q.L.)(C.A.).)

[23] Had Mr. Partridge received the suggested term of imprisonment instead of the conditional sentence, assuming he obeyed the rules of the institution, he would now be released (see N.S. Reg. 248/88, s. 35(1) made pursuant to the **Corrections Act**, R.S.N.S. 1989, c. 103, s. 22 which permits earned remission). If we were to impose the ten months imprisonment suggested by the Crown, Mr. Partridge, having now served nine months, would have less than one month remaining in custody, not counting any remission earned during that period. At the higher end, he would face incarceration for three months, again without consideration for earned remission. I am satisfied, however, that incarceration would have a harmful effect on his rehabilitation. He is now taking the steps he should have taken years ago to address his lack of control and propensity to family violence. He appears to be open to treatment and is compliant. I accept his supervisor's opinion that it is critical he complete his current counselling program. In these unusual circumstances I would not substitute incarceration for the conditional sentence.

DISPOSITION:

[24] I would allow the appeal and extend the conditional sentence for a further six months to be followed by a one year probationary period. For clarity, the total term of the conditional sentence is eighteen months on each conviction, running concurrently. The house arrest portion of the conditional sentence shall be extended from the current nine months to twelve months and contain the same restrictions currently in place. For the remaining six months of the conditional sentence the terms shall be as ordered by Justice MacLellan (in addition to the statutory conditions, all those set out in Schedule A, attached). During the one year probationary period Mr. Partridge shall (i) keep the peace and be of good behaviour; (ii) report as directed by his probation officer; and, (iii) continue with

or undertake such programs of counselling as are recommended by his probation officer. The five year firearm prohibition (s. 110 of the **Criminal Code**) and the DNA order (s. 487.051 of the **Criminal Code**), both as directed by Justice MacLellan, shall remain in effect.

Bateman, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.

Schedule "A"

In addition to the compulsory conditions contained in s. 742.3(1) of the **Criminal Code**, the following conditions apply:

For the first twelve (12) months you will be confined to your place of residence (address to be specified in the Conditional Sentence Order) with the following exceptions:

(1) You will be permitted, with the written approval of your supervisor, to attend scheduled appointments;
(2) You will be permitted, with the written approval of your supervisor, to attend for any employment in the Province of Nova Scotia, or if transferred to the Province of Alberta, to attend for any employment;
(3) You will be permitted, with the written approval of your supervisor, to leave the residence for three hours per week to deal with the normal necessities;
(4) You must carry on your person a copy of this Conditional Sentence Order when permission has been granted to leave the residence and produce the same, when and if requested to do so;
(5) You must attend for any assessment and counselling as directed by your supervisor;
(6) You are to present yourself to the door of your residence when and if requested to do so by your supervisor or a peace officer.

After the first twelve (12) months of house arrest and for the remaining six (6) months of the Conditional Sentence Order you are:

(1) To keep the peace and be of good behaviour; and
(2) Attend for assessment and counselling, as directed by your supervisor.