**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***R. v. Johnson***, 2007 NSCA 102

**Date:** 20071026
**Docket:** CAC 278213
**Registry:** Halifax

**Between:**

Her Majesty the Queen

Appellant

v.

Brian Joshua Johnson

Respondent

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| **Judges:** | Roscoe, Bateman and Hamilton, JJ.A. |
| **Appeal Heard:** | September 21, 2007, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal granted and appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Hamilton, JJ.A. concurring. |
| **Counsel:** | James A. Gumpert, Q.C., for the appellant<br>Jean Morris, for the respondent |

**Reasons for judgment**:

[1] The Crown appeals from an order of Anne Crawford, J.P.C. imposing a conditional sentence of imprisonment on the respondent, Brian Joshua Johnson.

[2] Mr. Johnson was charged on a three count Information with robbery (s. 344 **Criminal Code**); unlawful confinement (s. 279(2) **Criminal Code**) and breach of probation (s. 733.1(1)(a) **Criminal Code**). All charges arose out of the same incident on July 21, 2006. He originally entered a guilty plea to the offences which, on the date of trial (December 1, 2006) he changed to guilty on the robbery and breach of probation charges. The Crown subsequently withdrew the unlawful confinement charge.

[3] The facts of the offences were read into the record by Crown counsel at the sentencing. Andrew Hines, a student in his early 20's, was sitting in his car on July 21, 2006, in a small parking lot behind a store, waiting for his girlfriend to finish work. Mr. Johnson, wearing a stocking over his face with two eye holes in it, jumped into Mr. Hines' car. He removed the mask and demanded that Mr. Hines drive him to Brunswick Street, which was several blocks away. Mr. Johnson warned Mr. Hines not to try any moves or he would "shank" him. When they arrived at the Brunswick Street location Mr. Johnson told Mr. Hines that he would take his laptop computer which was in the back seat of the car. Mr. Hines pleaded with Mr. Johnson not to take the laptop and offered him money instead, telling him he was carrying $500.00 cash. Mr. Johnson agreed to take the money in lieu of the computer but was so intoxicated he could not count the money. He directed Mr. Hines to do so, warning him that if the amount was even $20 short, he would stab him. Taking the money, Mr. Johnson entered the apartment building where Mr. Hines had parked. Coincidentally, Mr. Hines encountered the police as he was driving away from the scene. He returned with the police and Mr. Johnson was apprehended. He was combative with the police during the arrest. At the time of the offence Mr. Johnson was on a probation order which had commenced on March 30, 2006.

[4] A detailed victim impact statement revealed that Mr. Hines was significantly affected by this robbery. He suffered ongoing emotional trauma.

**ISSUES**

[5] The Crown says the judge erred in failing to follow the proper procedure when imposing the conditional sentence and, in any event, the sentence is manifestly inadequate.

**STANDARD OF REVIEW**

[6] In fixing sentence a judge is exercising a statutorily authorized discretion under s. 718.3(1) of the **Criminal Code**. As with other discretionary decisions, the standard of review on appeal is a deferential one. This standard has been articulated in a number of ways. As expressed by Macdonald, J.A. of this Court in **R. v. Cormier** (1975), 9 N.S.R. (2d) 687 at p. 694:

> 20 Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.

[7] More recently, in **R. v. Shropshire**, [1995] 4 S.C.R. 227; S.C.J. No. 52 (Q.L.) Iacobucci, J., for a unanimous Court, said:

> [46] ... 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. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[8] Similarly, in **R. v. C.A.M.**, [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), Lamer, C.J.C., for a unanimous Court, said:

> [90] Put simply, 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. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* ...
>
> [91] . . . The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.
> (Emphasis in original)

[9] This deference recognizes the unique qualifications of front line judges and is equally applied whether the sentence arises after a trial or from a guilty plea.

**ANALYSIS**

[10] Section 742.1 of the **Criminal Code** provides the authority for conditional sentences:

> 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
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> (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,
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> 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.

[11] In **R. v. Proulx**, [2000] 1 S.C.R. 61; S.C.J. No.6 (Q.L.), the Supreme Court of Canada detailed the procedure to be followed by a judge when considering a conditional sentence.

[12] At the first stage, the judge, must conclude that neither probationary measures nor a penitentiary term would be suitable taking into account the circumstances of the offender and the offence before the court. In other words, the judge must be satisfied that the appropriate sentence is a custodial one of less than two years (**Proulx**, paras. 58 and 59; s. 742.1(a)).

[13] Even should the sentence meet the above criteria, the judge may not impose a conditional sentence unless satisfied that having the offender serve the sentence in the community would not endanger its safety (**Proulx**, para. 63; s. 742.1(b)). Only if so satisfied may the judge go on to consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 (**Proulx**, para. 65; s. 742.1(b)).

[14] "Safety of the community" refers to the specific threat posed by the offender before the court (**Proulx**, para. 68). This requires an assessment of both the risk of the offender re-offending and the gravity of the damage that could ensue on re-offence (**Proulx**, para. 69).

[15] In **Proulx**, the Court rejects the proposition that certain offences are presumptively excluded from the conditional sentencing regime. However, neither is there a presumption in favour of a conditional sentence once the prerequisites are met. The particular circumstances of the offence and the offender must be considered in each case (**Proulx**, para. 85).

[16] The appellant Crown submits that, here, the judge failed to consider the safety of the community. Had the judge turned her mind to this issue, says the Crown, Mr. Johnson's extensive and escalating criminal record coupled with his multiple breaches of prior court orders precluded a finding that he did not pose a danger to re-offend if permitted to serve his sentence in the community.

[17] Mr. Johnson committed the offences in question on July 21, 2006. Born on April 1, 1987, he was a nineteen year old adult offender and no longer a "young person" under the **Youth Criminal Justice Act**, S.C. 2002, s. 1.

[18] His lengthy youth criminal record began in the year 2000. He was convicted of offences committed on March 25, 2000 (theft); April 22, 2001(property damage); May 9, 2001(2 x break and enter); May 10, 2001(break

and enter); May 11, 2001(break and enter) ; August 14, 2001(breach of recognizance); December 2, 2002 (theft); October 18, 2003 (break and enter; breach of an undertaking); August 7, 2004 (2 x assault with a weapon; property damage; 3 x failure to comply with a disposition); May 29, 2005 (**Liquor Control Act** offence); and July 22, 2005 (failure to comply with a disposition).

[19] For this collection of offences Mr. Johnson received a variety of sanctions, primarily probation. On a number of occasions, several offences were caught within a global sentencing order. Twice, in December 2003 and again in January 2005, he was sentenced to deferred custody (the equivalent of an adult conditional sentence) followed by probation. Four times he offended by breaching his probation.

[20] On March 30, 2006 he received his first conviction as an adult - for again failing to comply with a prior disposition. For that offence he was sentenced to one year probation with community service. Less than four months later he committed the offences which are the subject of this appeal, thus breaching that probation order.

[21] Mr. Johnson's record was addressed by the Crown in some detail during submissions. In relatively brief oral sentencing remarks, the judge referred to several factors: Mr. Johnson was engaged in an educational upgrading program; was a youthful adult offender; was remorseful; had been doing well on house arrest since his arrest; and had been drunk at the time of the offence. She specifically noted as mitigating, his age, the "relative lack of a prior criminal adult record" and the fact that the had never before received a sentence of incarceration. The judge opined that Mr. Johnson's rehabilitation would be better accomplished through a sentence served in the community. Section 742.1(a) authorizes a conditional sentence only where the judge is satisfied that a custodial sentence of less than two years is appropriate. The judge expressed no such finding.

[22] However, assuming that she was satisfied that the condition in s.742.1(a) was met, in imposing the conditional sentence the judge made no reference to the "safety of the community". I recognize that with the significant time pressures in the Provincial Courts and the need to deliver judgments promptly and orally, judges are presumed to know the law and are not obliged in all cases to articulate each element of a legal test. In view of Mr. Johnson's extensive and continuous

criminal record; his significant pattern of breaching court orders; the fact that he had received two prior dispositions equivalent to a conditional sentence; his recent conviction for breaching a court order; and the fact that he was on probation at the time of this offence, I would conclude that the judge must have failed to turn her mind to this requirement. The serious nature of this offence and Mr. Johnson's criminal history called for some explanation as to how the community would be adequately protected should Mr. Johnson not be incarcerated.

[23] As stated above, the assessment of the "safety of the community" requires the judge to consider both the risk of the offender re-offending and the gravity of the damage that could ensue on re-offence. About the risk of re-offence, Lamer, C.J. in **Proulx**, wrote for the Court:

> 70 A variety of factors will be relevant in assessing the risk of re-offence. In *Brady, supra,* at paras. 117-27, Fraser C.J.A. suggested that consideration be given to whether the offender has previously complied with court orders and, more generally, to whether the offender has a criminal record that suggests that the offender will not abide by the conditional sentence. Rousseau-Houle J.A. in *Maheu, supra,* at p. 374 C.C.C. enumerated additional factors which may be of relevance:
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> > [TRANSLATION] ... 1) the nature of the offence, 2) the relevant circumstances of the offence, which can put in issue prior and subsequent incidents, 3) the degree of participation of the accused, 4) the relationship of the accused with the victim, 5) the profile of the accused, that is, his [or her] occupation, lifestyle, criminal record, family situation, mental state, 6) his [or her] conduct following the commission of the offence, 7) the danger which the interim release of the accused represents for the community, notably that part of the community affected by the matter.
>
> 71 This list is instructive, but should not be considered exhaustive. <u>The risk that a particular offender poses to the community must be assessed in each case, on its own facts</u>. . . .
>
> (Emphasis added)

[24] Reviewing the circumstances here in the context of the above factors: Mr. Johnson acted alone in perpetrating this very serious offence. Although the manner of committing the offence was not particularly sophisticated, the fact that he initially concealed his identity using a stocking to cover his face reflects some

level of premeditation. Of significant concern here is Mr. Johnson's history of breaching disposition orders and the fact that he committed this offence while on a very recent probation order. These elements coupled with his extensive record lead me to conclude that he presents a very real risk of re-offence. The fact that he was intoxicated when he robbed Mr. Hines does not, in my view, negate the prospect of re-offence should Mr. Johnson be released into the community.

[25] As to the second component of the safety of the community - the gravity of damage that would ensue should the offender re-offend - Lamer, C.J. continued in **Proulx**, **supra**:

> 74 Once the judge finds that the risk of recidivism is minimal, the second factor to consider is the gravity of the potential damage in case of re-offence. Particularly in the case of violent offenders, a small risk of very harmful future crime may well warrant a conclusion that the prerequisite is not met: see *Brady, supra*, at para. 63.

[26] The risk of "harm" is not restricted to danger to the physical or psychological safety of persons but includes the potential of harm to property or financial resources (**Proulx**, para. 75). Lamer, C.J. quoted with approval the comments of Finch, J.A. in **R. v. Ursel**, (1997) 117 C.C.C. (3d) 289:

> [76] . . . Members of our community have a reasonable expectation of safety not only in respect of their persons, but in respect as well of their property and financial resources. When homes are broken into, motor-vehicles are stolen, employers are defrauded of monies, or financial papers are forged, the safety of the community is, in my view endangered. We go to considerable lengths to protect and secure ourselves against the losses that may result from these sorts of crimes, and I think most ordinary citizens would regard themselves as threatened or endangered where their property or financial resources are exposed to the risk of loss.

[27] Although, Mr. Hines did not suffer physical damage he was threatened with physical harm. The crime has left him with lasting psychological effects as detailed in the victim impact statement. His sleep is disrupted as a result of which he is unable to focus. He is now unduly concerned about his personal safety as a consequence of which he has curtailed his social activities. His schoolwork has been affected.

[28] Mr. Johnson has been convicted of eight property related offences, not including the recent robbery. Twice he was convicted of assault with a weapon. There is no indication in the March 2006 pre-sentence report (prepared for the most recent breach of probation) that he has undergone any particular therapy to address whatever issues drive him to offend. That report does say that Mr. Johnson understood and was concerned at that time that he would now have an adult criminal record which could impact his future prospects. Notwithstanding that professed insight, Mr. Johnson went on to re-offend within months. His criminal activity has now escalated from break and entry to robbery, with Mr. Johnson confronting and intimidating his victim. While Mr. Johnson did not "shank" Mr. Hines, he had no reason to think that Mr. Johnson would not act on his threats. It is my view that there is a real risk of significant harm both to property and person should Mr. Johnson re-offend.

[29] A finding of the potential for some risk to the safety of the community does not absolutely preclude a conditional sentence, where the judge is satisfied that the risk can be adequately addressed through conditions attached to the sentence. As Lamer, C.J. wrote in **Proulx**, **supra**:

> 72 The risk of re-offence should also be assessed in light of the conditions attached to the sentence. Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence: . . .

[30] I am not satisfied that the significant risk to community safety posed by Mr. Johnson can be managed within the conditional sentencing regime. The Court said in **Proulx**, **supra**:

> 73 This last point concerning the level of supervision in the community must be underscored. As the Alberta Court of Appeal stressed in *Brady, supra*, at para. 135:
>
> > A conditional sentence drafted in the abstract without knowledge of what actual supervision and institutions and programs are available and suitable for this offender is often worse than tokenism: it is a sham.
>
> Hence, the judge must know or be made aware of the supervision available in the community by the supervision officer or by counsel. If the level of

> supervision available in the community is not sufficient to ensure safety of the community, the judge should impose a sentence of incarceration.

[31] In large measure, the success of a conditional sentence depends upon the offender's willingness to abide by its conditions. Supervision is not and cannot be constant. Mr. Johnson has a history of failing to comply with sentencing conditions. Notwithstanding the high level of appellate deference to the discretionary decisions of sentencing judges, where there is error in principle or failure to consider a relevant factor or an overemphasis on appropriate factors, an appellate court may intervene. Respectfully I would find that the judge did err in principle by failing to consider whether the community would be endangered should a conditional sentence be imposed. Had she done so, for the reasons set out above, she could not have concluded that a conditional sentence was an available sanction here.

[32] I would find, as well, that the judge erred, more fundamentally, in implicitly determining that a sentence of less than two years would be fit for this offender and this offence (s.742.1(a)).

[33] The usual starting point for the offence of robbery is three years. In **R. v. Longaphy**, 2000 NSCA 136, [2000] N.S.J. No. 376 (Q.L.), Oland J.A., for the Court, summarized the applicable law:

> ¶ 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 [paragraph] 8.
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> ¶ 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 [paragraph] 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.
>
> . . .
>
> ¶ 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 [paragraph] 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.

[34] Here the sentencing judge referred to the fact that Mr. Johnson is a youthful offender; was intoxicated when committing this offence; had a "relative lack of a prior criminal adult record"; had not previously been incarcerated and had abided by house arrest while awaiting trial. She then said:

> Given all of that and bearing in mind the guideline of three years federal incarceration for an offence of robbery, I think that in this situation the guideline is not so rigid that it cannot take into account the mitigating circumstances of a youthful offender and the need and the hope that rehabilitation will better serve the community in the long run than a punitive sentence that may result in the foisting of another hardened criminal into society.
>
> So for that reason, I am prepared to sentence you to custody to be served in the community by way of a conditional sentence order. It will be for a period of two years [in the order this was corrected to two years less a day, as is required by s. 742.1(a)] . . .

[35] It is true that the three year starting point is not an absolute from which sentencing judges cannot depart. This is evidenced in our decision in **R. v. Bratzer**, 2001 NSCA 166; [2001] N.S.J. 461 (Q.L.)(C.A.) where, in truly exceptional circumstances, we upheld a conditional sentence for a youthful offender who had committed three robberies.

[36] In **R. v. Quesnel** (1984), 14 C.C.C. (3d) 254; O.J. No. 133 (Q.L.) (Ont. C.A.) the Crown successfully appealed seemingly lenient sentences imposed on two youthful offenders following their conviction for the breaking and entering and mischief. In finding that the sentences were unfit the Court discussed the role of leniency in the sentencing process. Leniency, said the Court, must be based upon information that underpins a reasoned belief that such will serve the goal of protection of the public through reformation and rehabilitation of the offender. I find the remarks of Thorson, J.A. (at p. 255, C.C.C.) apposite here:

> In sentencing the respondents as he did, the trial judge acknowledged that the sentences "will undoubtedly be considered lenient in the circumstances". After indicating that he was not satisfied that the respondents were incorrigible, the trial judge explained that he was proceeding on the basis that "a chance for rehabilitation remains" and in "the hope that something good" could come of the sentences thus imposed. Clearly he regarded the sentences as a last chance being offered to the respondents to turn their lives around.
>
> There can, of course, be no quarrel with the proposition that from time to time a judge sentencing a convicted person, particularly a youthful one as in this case, should indeed "take a chance" on such person by exercising leniency in circumstances where leniency might not otherwise appear to be called for. <u>In our opinion, however, there must be some factor present in the case before the sentencing judge that is sufficient to warrant a reasonable belief on his part, going beyond a mere hope, that the leniency proposed to be extended holds some prospect of succeeding where other dispositions available to him may fail</u>.
>
> Whether the factor present is an indication of remorse, a glimpsed change in attitude on the part of the convicted person, or some other sign or signal that the convicted person may have learned something beneficial from his or her past and present encounters with the criminal justice system, there must be something positive weighing in his or her favour which can be looked to to support the judge's chosen course of action.
>
> (Emphasis added)

[37] Clearly driving the judge's imposition of the conditional sentence was her concern that introducing this relatively youthful offender to an antisocial prison subculture would reinforce rather than reform his criminal behaviour. This is a legitimate consideration (**R. v. Parker**, [1997] N.S.J. No. 194 (Q.L.)(C.A.) at paras. 55 and 56). On the other hand, I am satisfied that she focussed on this concern to the exclusion of other important sentencing objectives including the

need here for specific deterrence, denunciation of Mr. Johnson's criminal conduct and promotion of his sense of responsibility.

[38] In discussing the danger to the community I have reviewed Mr. Johnson's extensive record; his repeated breaches of court orders; and the fact that he committed this offence while on probation. These are all aggravating factors which should have been considered by the judge in determining a fit sentence. It is particularly relevant that prior community based sentences have not motivated Mr. Johnson to reform.

[39] In these circumstances I would find that a sentence of two years less a day is manifestly inadequate and cannot stand.

[40] On consent of the parties, this Court received a post-sentence update. Mr. Johnson was sentenced for the within offences on February 5, 2007. Conditions restricted him to his residence, save for educational, medical or other approved absences. On May 15, 2007, Mr. Johnson while walking in his neighbourhood holding three cans of beer and with a marijuana cigarette tucked behind his ear, saluted a passing undercover police car. He was stopped by the police who learned that he was on his way to a party at the home of a person known to have a criminal record. He pled guilty and was sentenced to 45 days custody for breach of the terms of his conditional sentence. He has served that time and is again in the community under the terms of his conditional sentence.

**DISPOSITION**

[41] I would grant leave and allow the appeal. In my view, the circumstances of this offence and of this offender, considered in light of the purpose, principles and objectives of sentencing call for a sentence of three years. While Mr. Johnson is a youthful offender, his is also an experienced one. In view of the aggravating factors here, but for Mr. Johnson's youth and the hope that this period of incarceration will finally bring home to him the consequences of his predatory criminal activity, I would have imposed a sentence in excess of three years.

[42] I would set aside the conditional sentence and the order of probation and impose a term of imprisonment of three years commencing February 5, 2007, the

date sentence was originally imposed. Mr. Johnson is to be given credit for the 9 months he has already served on his conditional sentence.

Bateman, J.A.

Concurred in:

Roscoe, J.A.
Hamilton, J.A.