19980604 CAC 147637

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Barnes, 1998 NSCA 16

BETWEEN:

DONALD OSCAR BARNES Applicant/ Appellant	)	Jean C. Morris for the applicant/ appellant
- and -	)	
HER MAJESTY THE QUEEN Respondent	)	Kenneth W.F. Fiske, Q.C. for the respondent
	)	Application heard: June 4, 1998
	)	Decision delivered: June 4, 1998

**BEFORE THE HONOURABLE JUSTICE DAVID R. CHIPMAN,
IN CHAMBERS**

CHIPMAN, J.A.:

This is an application for leave to appeal sentence and an application for release of the appellant pending the determination of his proposed appeal from a sentence imposed in Provincial Court following his conviction on a charge of entering a dwelling house with intent to commit an indictable offence contrary to s. 349(1) of the **Criminal Code**.

The appellant was sentenced by Judge Castor H.F. Williams on May 15, 1998, to serve a period four months of incarceration to be followed by two years probation.

The power to grant this application is dependent on leave to appeal being given; s. 679(1)(b) of the **Criminal Code**. I have the power to grant leave by virtue of s. 678(2) of the **Code**.

Section 679(4) of the **Code** provides:

> (4) In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
>
> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.

I have been provided with an affidavit by the appellant and a transcript of the remarks of Judge Williams in imposing sentence. I have had the benefit of submissions on behalf of the appellant and the Crown.

The Crown opposes the application on the ground that the appellant has not shown that the appeal has sufficient merit that in the circumstances it would cause unnecessary hardship if the appellant were detained in custody. The Crown does not take the position that the appellant has failed to meet the conditions of s. 679(4)(b) and (c). The Crown opposes the appellant's application for leave to appeal.

I am of the opinion that if the appellant establishes the condition of s. 679(4)(a), leave to appeal should be granted. Because the appeal cannot be heard until November at the earliest, the appellant would, if successful, suffer hardship because by the time his appeal was resolved in his favour he would have already served his sentence. The question then is simply whether the appeal has sufficient merit in the sense that it is arguable that Judge Williams erred by imposing a sentence that was not fit.

In his remarks, Judge Williams referred to the appellant's record as an offender. He is now 42 years of age. He has an extensive record including six previous convictions for break and enter, the first in 1977 when he was 22 years of age and the last in 1995 when he was 40 years of age. Judge Williams observed that he had been treated leniently by the courts for these offences, the maximum penalty being seven months for a break and enter in 1983.

Judge Williams noted the serious nature of the offence, which carries a maximum penalty of ten years of incarceration. The appellant was found in an apartment by its occupant. Judge Williams noted that the offence involved a violation of the private premises of a citizen, having the potential to cause great distress. Deterrence was called for in such a crime, which Judge Williams noted was " akin to home invasions" respecting which this Court has recently sent a message that they should be "dealt with seriously".

I pause to observe that just on June 2, 1998, this Court affirmed a sentence of six years incarceration for a home invasion type of robbery: **Stephenson v. R.**, CAC 144559.

Judge Williams referred to the plea on the appellant's behalf for leniency and to testimony on his behalf that he had largely mended his ways and could be given employment. He referred to difficulties that the appellant had encountered in the past. While he had considered these matters, he also had to consider the public

interest. He emphasized that he had the benefit of personal observation of the offender and that there was no precise formula in sentencing. He referred to the purpose and principles of sentencing set out in the **Criminal Code** and specifically to the request on the appellant's behalf that there be a non-custodial disposition. Judge Williams concluded that given the findings he had made, and circumstances of the offence and the offender, he was not satisfied that serving the sentence in the community would not endanger the safety of the community and that s. 742.1 of the **Criminal Code** should not be applied. He therefore imposed a sentence of four months incarceration to be followed by probation for a period of two years.

Is it arguable that the sentence imposed was not a fit sentence?

In **R. v. Cormier** (1974), 22 C.C.C. (2d) 239 (N.S.C.A.D.), Macdonald, J.A. said at p. 241:

> 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.

In **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.), Hallett, J.A. said at p. 124:

> 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. If it is a fit sentence an appeal court cannot interfere. My view, that this is the correct approach for an appeal court, is not based on the notion that a trial judge has had the advantage of seeing and hearing the witnesses. This reason is expressed in some of the older cases as being the underlying reason for non-interference; that rationale clearly does not apply to a guilty plea. 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. In reviewing a period ineligibility for parole as determined by a sentencing judge, an appeal court should consider if the period is clearly inadequate or too long.

In **R. v. Shropshire** (1995), 4 S.C.R. 227, Iacobucci, J., speaking for the Supreme Court of Canada, referred at p. 249 with approval to the approach taken by Hallett, J.A. in **Muise** and said:

> A variation in a sentence should only be made if the Court of Appeal is convinced that it is not fit. That is to say that it has found the sentence to be clearly unreasonable.

In **R. v. McDonnell** (1997), 1 S.C.R. 948, Sopinka, J. said p. 966:

> ... I believe that a Court of Appeal should only intervene to minimize the disparity of sentences where the sentence

> imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar offences.

The message from these authorities is clear. I have reviewed the detailed reasons of Judge Williams. I have considered the submissions of the appellant. The appellant has not demonstrated that it is arguable that there was any misdirection or non-direction on the proper principles of sentencing, or that the sentence was clearly excessive in relation to the circumstances and the appellant's lengthy record.

Leave to appeal is refused.

Chipman, J.A.