

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Benoit*, 2007 NSCA 123

Date: 20071212
Docket: CA 282476
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Roland Chakono Benoit

Respondent

Judge(s): Oland, Hamilton & Fichaud, JJ.A.

Appeal Heard: November 16, 2007, in Halifax, Nova Scotia

Held: Leave to appeal granted and appeal allowed; conditional sentence set aside and a term of imprisonment of two years is imposed commencing May 29, 2007, the date sentence was originally imposed, giving Mr. Benoit credit on a one to one basis for the approximate six months he has already served on his conditional sentence, as per reasons for judgment of Hamilton, J.A.; Oland & Fichaud, JJ.A. concurring

Counsel: Mark Scott, for the appellant
Nicole M. Campbell, for the respondent

Reasons for judgment:

[1] The appellant Crown seeks leave to appeal and, if granted, appeals the conditional sentence of two years less one day imposed by Nova Scotia Provincial Court Judge William B. Digby on the respondent, Roland Chakono Benoit, after finding him guilty of robbery contrary to s.344 and resisting arrest contrary to s.129 of the **Criminal Code**, R.S.C. 1985, c. 46. If its appeal is successful the Crown asks that we vary Mr. Benoit's sentence to a term of federal incarceration.

[2] The facts are straightforward. Between 5:35 p.m. and 7:00 p.m. on December 27, 2006 Mr. Benoit robbed Evin MacLean at knife point on a public bus in Halifax. He took a knife that he had up the sleeve of his shirt, held the tip of it against Mr. MacLean's leg, and threatened to stab him to see if Mr. MacLean had ratted on him. He made Mr. MacLean take off his shoes and took his jewellery, his iPod, a \$40 gift card and \$57 cash. Mr. Benoit got off the bus before Mr. MacLean. Mr. MacLean got off the bus at his destination and reported the robbery to the police. Mr. Benoit was known to Mr. MacLean so there was no issue of identification. Mr. Benoit was also known to the police. They arrested him a short time later in a local cinema. When arrested Mr. Benoit had in his possession a knife and the stolen goods less \$27 cash. While initially cooperative with the police, Mr. Benoit tried to get away from them once outside the cinema. His efforts to escape required the police to place him face down on the ground and handcuff him.

[3] At the sentencing hearing the Crown recommended a period of federal incarceration in the range of two to three years. Defence counsel sought a conditional sentence. Both agreed Mr. Benoit had been on remand for the charges against him for three months prior to his sentencing and that his sentence should be reduced by six months from what it otherwise would be in recognition of this.

[4] When considering the range of sentence that would be appropriate for Mr. Benoit the judge stated:

Taking into account the circumstances of this offence which is just outright meanness and bullying in an attempt to humiliate another human being and the factors I've mentioned, (18 years of age, a robbery without much planning

or forethought, his time on remand and his lengthy criminal record) **an appropriate sentence would be in the range of somewhere around two years to two and a half years. Giving you credit for the time served in my view brings you under the range of two years.** The question is whether or not a conditional sentence should be imposed.

(Underlining added to summarize the factors previously mentioned by the judge) (Bolding added)

[5] This Court may only vary a sentence if the judge erred in principle, failed to consider a relevant factor, overemphasized the appropriate factors or imposed a sentence that is demonstrably unfit; **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500, ¶ 90.

[6] The Crown argued, among other things, that the judge made an error in principle by not following **R. v. Proulx**, [2000] 1 S.C.R. 61; [2000] S.C.J. No. 6 (Q.L.) and **R. v. Fice**, [2005] 1 S.C.R. 742, 2005 S.C.C. 32, the latter decision not having been brought to the judge's attention by counsel during their submissions on sentencing. It argued the judge erred when he reduced what he found to be the appropriate range of available sentence, "somewhere around two years to two and a half years," to less than two years by deducting six months for the time Mr. Benoit spent on remand, leading him to consider whether he should impose a conditional sentence.

[7] In **Fice** the Supreme Court of Canada considered its decision in **Proulx** and dealt with this issue directly. The majority held:

... A conditional sentence cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender spends in pre-sentence custody.

See to the same effect **R. v. Savard**, 2005 ABCA 432 and **R. v. L.(J.)**, (2005), 199 O.A.C. 300.

[8] As the judge's words quoted above in ¶ 4 indicate, this is exactly what he did. At the first stage of his analysis when he was considering the appropriate range of sentence he did not exclude a penitentiary term as evidenced by his

statement; “an appropriate sentence would be in the range of somewhere around two years to two and a half years.” Nonetheless and in error he then reduced the range of available sentence to under two years by giving Mr. Benoit six months credit for the time he spent on remand causing him to consider and order a conditional sentence; (**Proulx**, ¶ 58, 59, **Fice**, ¶ 2, 4 and 13 and s.742.1(a)).

[9] Mr. Benoit argued that we should treat this as a technical breach by the judge not warranting interference by this Court because reading the whole of the sentencing decision indicates the judge wanted to impose a conditional sentence. I am not aware of any authority supporting this argument and Mr. Benoit was not able to point to any.

[10] On the basis of this error I would grant leave to appeal and allow the appeal.

[11] The question then is what sentence should be imposed on Mr. Benoit. In first determining the appropriate range of available sentences we must determine if a probationary or penitentiary term is appropriate by considering the purpose, objectives and principles of sentencing set out in s.718, 718.1 and 718.2 of the **Code** and the circumstances of the offender and the offence. It is only if we determine that a probationary or penitentiary term is not appropriate that we consider whether a conditional sentence is appropriate under s.742.1 (**Proulx**, ¶ 8,59, **Fice**, ¶ 2, 13 and **R. v Johnson**, 2007 NSCA 102, ¶ 11,12).

[12] Wright, J. stated in **R. v Johnson**, [2004] N.S.J. No. 427, 2004 NSSC 221:

¶ 9 The offence of robbery is a serious one. By its very definition, it includes a component of violence, or threat of violence for the purpose of stealing. The courts in this province have stated on numerous occasions that the sentencing objectives to be emphasized for robbery offences, with the goal of the protection of the public, are denunciation and deterrence, both general and specific. The citizens of this community should be able to walk the streets in their everyday activities without fear of being robbed or mugged. Robbery is far too prevalent a crime in our society and all too often is a spinoff crime from the use of drugs, as appears to be the case here. I hasten to add, however, that a problem with drugs or alcohol should not be considered a mitigating factor (see **R. v Emmerson** (1993) 121 N.S.R. (2d) 252). The message has to get out from the courts not only to Mr. Johnson, but to anyone who engages in this type of unlawful activity, which is of considerable gravamen, that they will be dealt with severely. Emphasis must be

placed on general deterrence in particular. Granted, how effective the objective of general deterrence has been is a matter of study and controversy, but the Criminal Code spells it out as an objective to be sought and the courts have emphasized it as a sentencing objective in crimes that include a component of violence.

I agree.

[13] Considering the importance of denunciation and deterrence when imposing a sentence for robbery and considering this robbery at knife point on a public bus at supertime by an 18 year old with a substantial and serious criminal record described hereafter in ¶ 14 I am satisfied the appropriate range of available sentences is a penitentiary term of 2 to 3 years; **R. v. Izzard (B.W.)** (1999), 175 N.S.R. (2d) 288; 534 A.P.R. 288, ¶ 17 and **R. v. Longaphy**, 2000 NSCA 136, ¶ 27, 28 and 29. This precludes consideration of a conditional sentence.

[14] The question is how long should Mr. Benoit's incarceration be. On the one hand Mr. Benoit was 18 at the time of the offence suggesting a sentence at the lower end of the range. On the other hand his serious and substantial criminal record together with the fact he had warrants outstanding for his arrest at the time this offence was committed as a result of having gone to Ontario and failing to appear in court for the earlier charges against him, suggest his sentence should be at the higher end of the range. His youth criminal record began in 2005. He was convicted of a robbery committed on October 8, 2005, possession of stolen goods, dangerous driving and mischief on July 4, 2006 and failure to comply with conditions also in July 2006. As an adult he has been convicted of breach of undertaking, assault with a weapon, theft under \$5,000 committed on September 26, 2006 and possession of illegal drugs on December 27, 2006, the same day as the robbery which is the subject to this appeal.

[15] Reconsidering the principles, objectives and purposes of sentencing and the circumstances of this offence and of this offender, I would set aside the conditional sentence and impose a term of imprisonment of two years commencing May 29, 2007, the date sentence was originally imposed. I arrived at this two year sentence by starting at two and one-half years and deducting six months for the time Mr. Benoit spent on remand.

[16] Backdating this two year sentence to May 29, 2007 gives Mr. Benoit credit on a one for one basis for the approximate six months he has already served on his conditional sentence.

Hamilton, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.