Date: 19980602 Docket: CAC 144559

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Stephenson, 1998 NSCA 152

CLARKE, C.J.N.S., CHIPMAN AND PUGSLEY, JJ.A.

BETWEEN:

TERRANCE LAWRENCE STEPHENSON (A/C) Appellant - and - **HER MAJESTY THE QUEEN** Respondent	)	Andrew Ionson and Lloyd Lombard for the Appellant Shaun O'Leary for the Respondent Appeal Heard: June 2, 1998 Judgment Delivered: June 2, 1998

THE COURT: Application for leave to appeal is dismissed per reasons given orally by Pugsley, J.A.; Clarke, C.J.N.S., and Chipman, J.A., concurring.

The reasons for judgment were given orally by:

Pugsley, J.A.:

Terrence Stephenson applies for leave to appeal, and if successful, appeals from the sentence of six years' imprisonment imposed on him by Provincial Court Judge John Nichols in January, 1998. Mr. Stephenson also applies for leave to appeal a lifetime ban respecting the use, or possession, of firearms imposed on him pursuant to s. 100(c) of the **Criminal Code.**

The grounds of appeal allege the sentence is excessive in light of Mr. Stephenson's limited role in the offence committed, his guilty plea, his personal circumstances at the time the offence was committed in October, 1992, and his good conduct since that time. It is further alleged that Judge Nichols erred when he applied a sentencing benchmark established by this Court in **R. v. Fraser** (1997), 158 N.S.R.(2d) 162, and **R. v. Foster** (1997), 161 N.S.R. (2d) 371, for home invasion offences.

Background

Mr. Stephenson was born in November, 1962. He left public school at the age of 15 while he was in Grade 8. He was employed as an upholsterer for about 18 years.

In October, 1992, while separated from his wife, Mr. Stephenson came in contact with one Greg Neatt.

In a statement provided to the RCMP, Mr. Stephenson wrote:

> Greg stayed with me at my place before going to Vancouver. While he was there he asked me if I knew any people with lots of money. I told him to first rob a store, and then said that Mr. Sabean had lots of money. So one night he said he wanted to go there and get it so Mitchell Wallace and Greg and I drove to Port Lorne. Greg sat in front, I in back. Greg then wrapped his head and got the money while me and Mitchell waited. He ran back to the car and said "Let's get out of here", and we did.

Mr. Stephenson elected to be tried by Supreme Court judge and jury. On the date the preliminary was scheduled to commence, he waived his right to a preliminary hearing. At the Crown's insistence, the victim, Hillard Sabean, then 90 years of age, gave evidence.

In late August a notice of re-election to Provincial Court was filed on Mr. Stephenson's behalf. On October 8, 1997, he entered a guilty plea to the offence of robbery.

Mr. Sabean testified that he lived alone in his home in the rural community of Port Lorne. At approximately 10:00 p.m. on October 22, 1992, while he was sitting in his rocking chair watching TV, a man with a "black mask down to his shoulders" broke into his house, hit him with his fist two or three times in his face, and knocked him to the floor. Mr. Sabean tried to escape, but the attacker grabbed a tea kettle and told him that he would be scalded if he "did any more". Mr. Sabean then handed over his "purse" which contained approximately $2,500 in cash. Mr. Sabean was convinced that if he had not handed over his purse the attacker would have carried out his threat to scald him. While Mr. Sabean

gave thought to tearing off the intruder's mask, he concluded that if he had taken this action "he'd have killed me". Mr. Sabean continued:

> Well I laid there awhile on the floor for awhile. So I got back on my chair again and I turned the channel off for awhile and then I scrubbed the floor, wiped the blood off the floor, and I sat there 'til morning. So my neighbour's boy came in, the little fellow came in and he seen me and he took off and he got his father to call the Mounties and they wasn't long getting there.

Mr. Sabean was taken to the hospital where he was treated for five days for injuries to his face and ribs. A photograph of him taken in the hospital, and entered as an exhibit, reveals extensive bruising with significant discolouration around both eyes, his forehead and his nose.

Although the incident occurred in October, 1992, information linking Mr. Stephenson to the offence did not come to light until 1995. He was eventually arrested in December, 1996, and once confronted with the facts, readily admitted that he'd been involved in the robbery, but denied that he had ever entered the Sabean residence.

He was released from custody on a written undertaking and remained within the community until the date of sentence. He was employed for the previous two years earning $7.00 an hour, averaging approximately 30 hours a week.

His employer advised the author of the pre-sentence report:

> Terry is a good and dependable employee. He has proven himself to me in many respects and is very loyal to the company. I know about his problem with the law and all I can say, I find him very trustworthy. In my office I have at time a considerable amount of money in a cash box. Terry knows about

> this cash box and where it is located. I have never had any money go missing.

Mr. Stephenson received a suspended sentence and probation of 18 months in 1980 for possession of a weapon contrary to s. 85 of the **Criminal Code**. He was, as well, convicted for theft over $200.00 and possession of stolen property in 1982, for which he was fined, as well as receiving 60 days' probationary sentence. He has no other criminal record.

Judge Nichols noted that:

> ...one of the primary pursuits of the Court has to be the protection of the people of our community and . . . you assisted and directed them to the place and you advised them that Mr. Sabean may have had monies simply because of your association with him in the years gone by when you knew he kept money at home. The man suffered injuries . . . I realize you were not in there at the time, but . . . this never would have taken place if you hadn't directed him to that home. You are considered certainly a party to the offence. . . . It's despicable that the persons, the older persons in our community cannot live at home safely and the Courts . . . must protect the older people who have the health and the means to live alone if they wish to live alone and here you have jeopardized that . . . general deterrence is the primary matter and for the protection of the public we have sent out the message that people who live alone are protected by our police forces, are protected by our Courts and other members of the community. ...I'm sentencing you to six years at the Federal Institution, subject to the rules and regulations thereof. It's a sentence that'll go out to the community, to indicate to them that no way are you to participate, assist to direct other people to go into other people's homes and possibly cause injury to them.

Submissions

Counsel for Mr. Stephenson urges that his client:

> . . . specifically sought the assurance of Mr. Neatt that no violence would be used, and was satisfied that he was not armed when he left the vehicle. Significantly, [Mr. Stephenson] did not enter Mr. Sabean's home or act in any fashion to intimidate the victim. [Mr. Stephenson] did not interfere in the police investigation and, when arrested, he readily co-operated with the

> police and provided an inculpatory statement. While he did not enter a guilty plea at the first available opportunity, [Mr. Stephenson] did plead guilty to the offence charged and co-operated in the preparation of a pre-sentence report. . . . The report was very favourable, and the remorse he felt was demonstrated clearly in the record and in the letter of apology penned to Mr. Sabean.

These factors, it is argued, should have led Judge Nichols to conclude it was appropriate to impose a sentence below the "benchmark".

Counsel further submitted that Judge Nichols erred by failing to give any consideration to rehabilitation.

Disposition

Section 687(1) of the **Code** requires this Court to consider the "fitness" of the sentence. In the course of making this determination we do not have a free reign to change a sentencing order simply because we would have imposed a different sentence, but rather the sentence should not be varied unless it is "clearly unreasonable" or was "demonstrably unfit" (**R. v. Shropshire** (1996), 188 N.R. 284 (S.C.C.); **R. v. C.A.M.**, [1996] 1 S.C.R. 369).

The 1996 sentencing amendments to Part XXIII of the **Code** have not affected the standard of appellate review (**R. v. Wheatley** (1997), 159 N.S.R. (2d) 161 (CA)).

The **Criminal Code** mandates by s. 718.1 that:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The role played by Mr. Stephenson was a critical one; without his direction, this attack would never have occurred. He knew from making deliveries to Mr. Sabean's home, that he was elderly, lived alone, and was rumoured to "have lots of money" at home. Mr. Stephenson arranged for a driver to take Mr. Neatt and himself to the Sabean residence. Although he did not enter the victim's home, Mr. Stephenson remained outside the residence at the time of the robbery. He received $400.00 as his share of the joint criminal venture.

While Mr. Stephenson claimed that there was an agreement that "there was to be no violence", he was not in a position to take any steps should Mr. Neatt resort to violence. There is a risk that some elderly people, accustomed to living alone, might be oblivious of their own safety when their home is invaded by a stranger demanding money and might take aggressive steps to protect themselves.

Even in the absence of excessive physical violence, the traumatic effect of a masked man breaking into the home of a man of 86, and demanding money, could have irreparable consequences. At the time Mr. Stephenson testified, almost five years after the attack, he still experienced substantial stress over the invasion of his home.

As noted in **Fraser**, at p. 168,

> It is as well appropriate to consider the profound effect a robbery of this kind will have on the victim. One's home, particularly for the elderly, is a place of

> security . . . Such a traumatic event could irrevocably destroy the sense of security she associated with her home . . .

The benchmark referred to in **Fraser** and **Foster** was one of six to ten years for robbery of financial institutions and private dwellings. House invasion robbery should, however, attract a sentence "greater than that imposed for armed bank robbery" (**Fraser** at p. 167-8).

The factors urged by counsel for Mr. Stephenson presumably were taken into account by Judge Nichols when he decided on a sentence of only six years.

There are no compelling factors which should cause this Court to reduce the six-year sentence imposed by Judge Nichols:

- While the guilty plea is a factor, it was only negotiated after preliminary inquiry, re-election, and plea bargain, pursuant to which Mr. Stephenson escaped prosecution on theft and forgery charges;
- The absence of a recent criminal record, and the prospects of rehabilitation, are factors which <u>should not materially</u> lessen the length of the sentence. These objectives must, in cases of this kind, yield to the primary object of protection of the community (**R. v. Helpard** (1996), 145 N.S.R. (2d) 204 at 207);

- While one can sympathize with the difficulties experienced by Mr. Stephenson in his personal life, they do not, in our opinion, provide any justification for mitigation of the sentence imposed;
- We have no reason to question the genuineness of Mr. Stephenson's remorse, but while this may point to a reduced concern for specific deterrence, it does not address the paramount need for deterrence for home invasion robberies.

Justice Hallett for the majority in **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.) expressed the view at p. 124 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.

It is our view that Judge Nichols arrived at a sentence that was well within "an acceptable range".

Conclusion

We dismiss the application for leave to appeal the sentence of six years.

Crown counsel agrees that the lifetime firearms prohibition order imposed pursuant to s. 100 of the **Criminal Code** ought to have been limited to ten years as this conviction was a first offence within the meaning of that section. We would, therefore, modify the firearms prohibition to a period of ten years.

Pugsley, J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

C.A.C. No. 144559

NOVA SCOTIA COURT OF APPEAL

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	)
- and -	)
	)
HER MAJESTY THE QUEEN	)
	)
Respondent	)
	) REASONS FOR
	)JUDGMENT BY:
	)
	) **PUGSLEY, J.A.**
	) (Orally)