Date: 19980623 Docket: C.A.C. 147790

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Chisholm, 1998 NSCA 155

Bateman, Hallett, Flinn, JJ.A.

BETWEEN:

CHET BERNARD CHISHOLM

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Joel Pink, Q.C.
for the Appellant

Denise C. Smith
for the Respondent

Appeal Heard:
June 18, 1998

Judgment Delivered:
June 23, 1998

THE COURT: Appeal dismissed per reason for judgment of Bateman, J.A.; Hallett and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

This is an application for leave and, if granted, an appeal by the offender, Chet Bernard Chisholm, of a sentence imposed by Judge John Embree of the Provincial Court.

Background:

Mr. Chisholm was charged with three **Criminal Code** offences, arising from incidents occurring in the early morning hours of March 6, 1997: aggravated assault (**s.268**), failing to stop at the scene of an accident (**s.252**) and operating a motor vehicle while impaired (**s.253(a)**). On March 24, 1998, he pled guilty to all three offences. On May 22, 1998, Judge Embree imposed a sentence of 16 months imprisonment on the aggravated assault, one month concurrent on the impaired driving and two months consecutive on the failing to stop, for a total period of 18 months imprisonment to be followed by a two-year probationary term with the usual conditions and an alcohol assessment and anger management program if so directed by his probation officer.

At the sentencing hearing the Crown attorney recounted the facts surrounding the offences. The victim, Rene MacKay, worked part time as a bouncer at Piper's Pub in Antigonish. He was not working at the Pub on the evening of March 5, 1997 but stopped by for a drink with a friend. Mr. Chisholm was at the Pub that night and appeared intoxicated. There was a commotion in the bar, apparently involving Mr. Chisholm. The manager asked Mr. MacKay to keep an eye on the situation, although

he was not working that night. There is no information as to whether Mr. MacKay had contact with Mr. Chisholm during that time.

At the end of the evening, as the bar was closing, Mr. Chisholm approached Mr. MacKay wanting to fight. Mr. MacKay ignored him. After persisting for several minutes, Mr. Chisholm was escorted out of the bar by friends.

Shortly thereafter Mr. MacKay left the bar to walk a friend to her apartment. As they approached the apartment building, Mr. Chisholm, who had apparently been following Mr. MacKay, sped in his car toward them and got out, brandishing a ski pole. He swung at Mr. MacKay who blocked the blow with his arms. He then unsuccessfully attempted to strike Mr. MacKay with a punch. Mr. Chisholm was pulled away from Mr. MacKay by a friend who had been with him in the car. Mr. Chisholm then backed his car toward Mr. MacKay in an attempt jam him against the building wall. Despite several attempts he did not succeed in striking Mr. MacKay with the car, but did hit the wall. While this was happening Mr. MacKay kicked at the Chisholm car, breaking a window. His friend then handed him a shovel which he used to smash another window in the car. Mr. Chisholm sped away.

Mr. MacKay and his companion headed back to the bar, intending to call the police. Mr. Chisholm, still in his car, intercepted them again in the IGA parking lot. This time he drove the car directly at Mr. MacKay who attempted to get out of the way but was struck in the leg and thrown into the air. Fortunately, his injuries were

relatively minor. Mr. Chisholm again sped off in his car. The next morning Mr. Chisholm told a mutual acquaintance about the events and gave him a message to pass along to Mr. MacKay: “You can tell Rene he may be stronger than me but I’m crazier than he is.” He later told another friend, a Mr. Dykers, about the evening’s events. He said that when he saw Mr. MacKay walking through the IGA parking lot he had tried to run over him, and after hitting him kept on going.

When questioned by the police Mr. Chisholm denied the events of that night.

Grounds of Appeal:

Mr. Chisholm appeals alleging that “the sentence imposed does not reflect the sentencing principles and limits prescribed by law for the offence for which the appellant was convicted.” He asserts that the sentence is clearly unreasonable and demonstrably unfit.

Analysis:

An appeal court is only to interfere with a sentence if it is clearly or manifestly excessive. (**R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.), **R. v. Pepin** (1990), 98 N.S.R. (2d) 238 (N.S.C.A.) and **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.))

The fixing of sentence is a discretionary and highly subjective exercise. In

Muise, supra, at p.123-24,Hallett, J.A. wrote:

> . . . 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 only true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive. . . .

In **R. v. C.A.M.**, (1996), 105 C.C.C. (3d) 327 (S.C.C.) Lamer, C.J.C. commented upon the deference due to the decisions of sentencing judges. He recognized those judges' "unique qualifications of experience and judgement from having served on the front lines of our criminal justice system". He wrote at paragraph 91:

> . . .Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. 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.

And at paragraph 92:

> . . . 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 crimes.

The pre-sentence report revealed that Mr. Chisholm was twenty four years old, from a stable background, had completed grade 12, had taken training in heavy equipment operation and was planning to complete his training in that trade. He had one previous conviction from March 1995 for a property offence under **s.430(4)** of the **Criminal Code**. Judge Embree acknowledged these positive factors and also Mr. Chisholm's guilty pleas.

The judge noted, however, that the circumstances of this aggravated assault were extremely serious and, but for good fortune, could have had fatal consequences. This, he said, was a crime of violence which called for denunciation and an emphasis on general deterrence. He rejected the Crown's request for a period of federal incarceration, but concluded that "a significant term of imprisonment" was required.

The appellant says that the trial judge placed undue emphasis on general deterrence at the expense of Mr. Chisholm's need for rehabilitation. He submits that the range for an aggravated assault of this nature runs from the suspension of sentence to imprisonment for a term of 15 months. The mitigating factors, here, he says, dictate a sentence at the lower end of that range.

The decision of the sentencing judge reveals no obvious error in principle, nor that he failed to consider an appropriate factor. Contrary to the submission of the Appellant, the sentence does address rehabilitation in that it directs both an alcohol

assessment and an anger management program. Any error, then must arise from an overemphasis of an appropriate factor or because the sentence is manifestly excessive.

In **R. v. Coleman** (1992), 110 N.S.R. (2d) 65 (N.S.S.C.A.D.), Hallett, J.A. reaffirmed the accepted principle that crimes of violence require an emphasis on general and specific deterrence most commonly reflected by a significant period of incarceration in a provincial institution.

The appellant has cited a number of cases of sentences of lesser duration than the term imposed here, for what he categorizes as similar offences. He focuses upon the short duration of the assault and the relatively minor nature of Mr. MacKay's injuries. The Crown has cited several cases supporting a higher sentence. The range of sentence for aggravated assault is much broader than that suggested by the defence, and runs from the suspension of the passing of sentence to several years incarceration.

I agree with Judge Embree that circumstances of this offence are most serious. Mr. Chisholm exhibited chilling deliberation in his pursuit of Mr. MacKay, obviously intending to cause him serious harm if not death. This was not a momentary act of anger. His efforts escalated in intensity with each encounter. Although intoxication may have aggravated Mr. Chisholm's conduct, his passion had not cooled by the following day when, presumably in a sober state, he threatened Mr. MacKay

through a common acquaintance. Aware that he had struck Mr. MacKay, in driving off he exhibited appalling indifference to the injuries that he might have caused. While he was separately sentenced for the crime of leaving the scene of an accident, the fact that he did so sheds light upon his character. All of the events preceding and following the successful attack upon Mr. MacKay, while they do not form part of the charge, are relevant to an assessment of the circumstances of both the offence and the offender. The determination with which Mr. Chisholm pursued his goal of harm to Mr. MacKay is a significant aggravating factor, as is the use of an automobile as his weapon of choice. This was not a case where the violence was an unfortunate but unintended result of a driving offence. The motor vehicle was used purposely by Mr. Chisholm to cause harm to Mr. MacKay.

In deciding not to order a period of federal incarceration Judge Embree expressly acknowledged the favorable information about Mr. Chisholm, including the positive steps taken by him since the offence. The sentence imposed by Judge Embree was within the range taking into account the circumstances of this offence and this offender. As stated above by Hallett, J.A., sentencing is not an exact science. I am not persuaded that the sentence was manifestly excessive, nor the result of an overemphasis on general deterrence.

Disposition:

Accordingly, while I would grant leave, I would dismiss the appeal.

Bateman, J.A.

Concurred In:

Hallett, J.A.

Flinn, J.A.

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REASONS FOR JUDGMENT BY:

Bateman, J.A.