

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Lombardo*, 2008 NSCA 97

Date: 20081017

Docket: CAC 284073

Registry: Halifax

Between:

Christopher Andrew Lombardo

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s): Bateman, Saunders and Oland, JJ.A.

Appeal Heard: October 10, 2008, in Halifax, Nova Scotia

Held: Leave to appeal sentence denied, per reasons for judgment of Saunders, J.A.; Bateman and Oland, JJ.A. concurring

Counsel: Christopher Andrew Lombardo, self-represented appellant
Peter P. Rosinski, for the respondent

Reasons for judgment:

[1] The appellant has brought two, separate sentence appeals which we agreed to hear at the same time.

[2] **CAC 283947** is an appeal from the sentence imposed by Nova Scotia Provincial Court Judge Barbara Beach on April 3, 2007.

[3] **CAC 284073** is an appeal from the sentence imposed by Nova Scotia Provincial Court Judge John G. MacDougall on June 26, 2007.

[4] The confluence between the sentences imposed which led to an aggregate result the appellant says is illegal, persuaded us that the two appeals would best be heard and decided together.

[5] Accordingly, these two matters may be considered companion cases so that the analysis and outcome in one will be seen as informed by the other.

[6] For the reasons set out below I would order the following disposition. In this case being **CAC 284073** I would deny leave to appeal. In **CAC 283947** I would grant leave, allow the appeal, and vary the sentence imposed to conform with the law.

[7] I will now briefly refer to the facts to provide context for our consideration of these two cases. To better understand the history of the matter and the issues that arise in these two appeals I will refer to the sentences as they occurred chronologically.

Background

The other appeal – CAC 283947

[8] As noted, the other case on appeal concerns the sentence imposed by Beach, Prov. Ct. J. on April 3, 2007. After taking a guilty plea on the charges facing Mr. Lombardo, and following submissions, the trial judge accepted a joint recommendation of Crown and defence counsel, and sentenced the appellant to two years in custody followed by 18 months' probation in relation to offences which

occurred on March 30, 2007. Those offences were: break and enter contrary to s. 348(1)(b); possession of break and enter tools contrary to s. 351(1); possession of a stolen motor vehicle exceeding \$5,000 contrary to s. 354; and driving while prohibited contrary to s. 259(4) of the **Criminal Code**.

[9] The circumstances surrounding Mr. Lombardo's participation in these offences were not in dispute. Counsels' submissions confirmed that responding to a theft-in-progress call the RCMP using a police dog tracked suspects into the woods near a Nova Scotia power station, resulting in Mr. Lombardo's arrest. The appellant and certain other individuals were found to be in possession of bolt cutters that were used to cut through a perimeter fence in order to gain access to the premises and steal spools of wire.

This appeal – CAC 284073

[10] In this case which is the subject of the present appeal the appellant has essentially challenged the effect of the sentence imposed by MacDougall, Prov. Ct. J. on June 26, 2007. Mr. Lombardo was alleged to have wilfully damaged his jail cell by breaking the sprinkler head resulting in water damage to the cell's mattress and bedding. After taking Mr. Lombardo's guilty plea to a charge of mischief contrary to s. 430(4) of the **Criminal Code**, the trial judge accepted a joint recommendation from Crown and defence counsel resulting in an added 30 days' incarceration, to be served consecutively to the April 3, 2007 sentence.

[11] While represented by counsel during both sentence hearings, the appellant is now self-represented.

[12] The principal objection raised by the appellant in both appeals is that he ought not to have been ordered to serve a period of probation after his custodial sentence expires. In effect, the appellant complains that the 18 months probation ordered by Beach, Prov. Ct. J. is "illegal" because the 30 day consecutive sentence imposed by MacDougall, Prov. Ct. J. resulted in an aggregate custodial sentence of 25 months (the two years in custody imposed April 3, 2007, plus the 30 days in custody imposed on June 26, 2007) which is said to violate the statutory requirements of s. 731(1)(b) of the **Criminal Code**. Accordingly, the appellant asks that the appeal(s) be allowed and the sentence varied by dropping the probation period.

Analysis

[13] This decision will be confined to the sentence imposed by Judge MacDougall in this case, **CAC 284073**.

[14] In my view we have no jurisdiction to hear this appeal. This being a sentence appeal from a summary conviction matter (involving wilful damage to property, the appellant's jail cell) Mr. Lombardo ought to have appealed his sentence directly to the Nova Scotia Supreme Court pursuant to s. 813(a)(ii) of the **Criminal Code**. In a case such as this there is no direct route of appeal to this Court. Mr. Lombardo's right to appeal sentence to this Court is derived under s. 839 which provides for an appeal, with our leave, on a question of law alone from a decision of the Supreme Court of Nova Scotia rendered on a s. 813 appeal. **R. v. Bevis**, 2000 NSCA 125. Accordingly, we have no jurisdiction to hear it. Even if the fitness of the 30 day sentence had been challenged by the appellant – which he has not – it is still an open question whether the quantum or fitness of sentence is a pure question of law. **R. v. Diggs**, [2004] N.S.J. 94 (C.A.). That is not an issue we need to address in this case.

[15] I would therefore deny leave to appeal this sentence.

Saunders, J. A.

Concurred:

Bateman, J. A.

Oland, J. A.