

Date: 19970605

Docket: CAC 134553

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Cooke, 1997 NSCA 130

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

Stephanie Cleary
for the Appellant

- and -

MARTIN DAVID COOKE

Respondent

Michael S. Taylor
for the Respondent

Appeal Heard:
June 5, 1997

Judgment Delivered:
June 5, 1997

THE COURT:

Leave to appeal is granted and the appeal is allowed as per oral reasons for judgment of Chipman, J.A.; Freeman and Roscoe, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

This is an application by the Crown for leave and, if granted, an appeal from a sentence imposed on the respondent by Judge Brian Gibson in Provincial Court.

The respondent pleaded guilty to 15 charges of fraud and false pretences contained in several informations in Provincial Court in Dartmouth on December 3, 1996. A sentencing hearing was held the same day. The sentencing judge imposed a conditional sentence of imprisonment of a total of twenty-one months to be followed by three years' probation on each count. The Crown proceeded summarily on some counts and by indictment on others.

The appellant applies for leave to appeal the sentences imposed on the charges where the proceedings were by way of indictment.

	<u>Offence Date</u>	<u>Charge</u>	<u>Victim</u>	<u>Amount of Risk</u>	<u>Amount of Loss</u>
1.	July 5/95	Fraud	Zellers Inc.	\$216.13	\$216.13
2.	Dec.4/95-Jan.4/96	False Pretences	Uplink Technology	\$5839.48	\$3831.96
3.	Jan. 23/96	False Pretences	Lance Electronics	\$9347.00	\$3210.00
4.	Jan. 23/96	False Pretences	Software World	\$8499.77	\$3917.48

For these offences, the sentences imposed amounted to a period of 13 months.

The respondent wrote worthless cheques for merchandise over a period of over two years. These cheques were written on various accounts both in his and his girlfriend's name, and in the name of entities purporting to be viable businesses.

There was apparently never any money in the bank accounts to cover any of these cheques.

The first cheques were written for relatively small amounts, but were never honoured. The bank accounts upon which they were written were either empty or closed.

Eventually the respondent began dealing with computer equipment suppliers. He obtained "cheques" from a company known as NEBS, supplying them with a company name, a bank name and a bank account number. In some cases the bank account numbers supplied by the respondent were simply those of old accounts which had been closed. In one case the bank account number was fabricated by the respondent. This company then issued cheques which appeared valid.

The respondent ordered computer supplies from the victims Majestic Laser, Uplink, EMJ Data Systems, Lance Electronics, and Software World. The shipments were sent C.O.D. with payment to be made by cash or certified cheque. The accused filled out the worthless cheques and used his own computer equipment to print the word "Certified" upon them. These cheques then had the appearance of valid, bank-certified documents. They were used to pay for the computer equipment. The respondent disposed of some of the computer equipment which has never been recovered.

Eventually the police became involved and conducted a search of the respondent's residence. Some computer equipment was recovered and returned to the suppliers. Some has never been recovered. The respondent gave a statement admitting to his involvement in the offence and provided assistance to the police in recovering some of the property.

The following is a chronology of the respondent's activities and contact with the court system:

- Dec. 20, 1994 Worthless cheque in the name of M&D Home and Appliance Repair to Davron Electrical Supplies in the amount of \$304.64.
- April 24, 1995 Worthless cheque in the names of Martin Cooke and Nancy King to Coastal Door and Frame in the amount of \$166.27.
- May 23, 1995 Cheque in the name of M&D Home and Appliance Repair to Dartmouth Building Supplies in the amount of \$234.80.
- June 2, 1995 Worthless cheque in the name of M&D Home and Appliance Repair to Burnside Flooring in the amount of \$1089.24.
- June 15, 1995 Worthless cheque in the name of M&D Home and Appliance Repair to Business Depot in the amount of \$676.96.
- June 16, 1995 Worthless cheque in the name of M&D Home and Appliance Repair to Business Depot in the amount of \$970.32
- June 19, 1995 Worthless cheque in the name of M&D Home and Appliance Repair to Tangrem in the amount of \$655.20.
- June 21, 1995 Worthless cheque in the name of M&D Home and Appliance Repair to Bill's Appliance in the amount of \$655.20.
- July 5, 1995 Cheque in the name of Cooke's General Construction to Zellers Inc. for purchase of a stereo in the amount of \$216.13. He had attempted to write a cheque at Zellers the evening before but was refused.
- July 17, 1995 Heritage Credit Union notifies respondent Cooke's General Contracting account closed; no deposit had ever been made into this account.
- July, 1995 Respondent arrested in relation to fraud investigations.
- Aug. 29, 1995 Cheque in the name of Cooke's General Contracting to Acadia and Quigley in the amount of \$882.01, account closed.
- Oct. 10, 1995 Respondent appears for arraignment on multi-count information charging him with fraud and false pretences. Adjourned to Oct. 31.
- Oct. 31, 1995 Respondent appears on multi-count information. Enters guilty and not guilty pleas, sentencing and trial adjourned until July 18, 1996
- Nov. 1, 1995 Suspended sentence, 18 months probation imposed for charge of fraud under \$5000.00 Condition of 40 hours of community service work, \$35 victim fine surcharge ordered.
- Dec.4/95 -
Jan. 4/96 Worthless cheques written to Uplink Technology in the total amount of \$5839.48. \$2007.52 eventually recovered for a total loss of \$3831.96.
- Dec 19, 1995 Pre-sentence report prepared by Ron P. Downey

Dec. 20/95 -
Jan. 15/96 Worthless cheque written to EMJ Data Systems. Total loss to the company \$2691.32

Jan 3, 1996 Suspended sentence, 18 months probation imposed for other charges of fraud occurring in June, 1995. Conditions of 40 hours community services work on each charge and restitution in the amount of \$1328.41 ordered.

Jan. 19/96 Worthless cheque to Majestic Laser in the amount of \$2319.72. Some property eventually recovered, total loss to the company \$1748.04.

Jan. 23/96 Worthless cheques to Lance Electronics in the total amount of \$9347.00. Some property eventually recovered, total loss to the company \$3210.00.

Jan. 23/96 Worthless cheques written to Software World in the amount \$8499.77. Total loss to company \$3917.48.

Jan. 26/96 Respondent first appears on charges of offences against Majestic Laser, Software World, Lance Electronics, EMJ and Uplink. Released on recognizance.

Jan. 30/96 Respondent appears on informations charging offence against Zellers, Acadia and Quigley. Adjourned for pleas until Feb. 6 and Mar. 13, 1996.

Feb. 5/96 Offence contrary to s. 264.1(1)(a) committed.

Feb. 6/96 Respondent appears on Zellers charge. Pleads not guilty. Adjourned for trial until July 18, 1996

July 15/96 Respondent sentenced on s. 264.1(1)(a) charge to 18 months probation.

July 18/96 Respondent appears for sentencing and trial on various informations. More guilty pleas entered, some charges dismissed. Sentencing scheduled for Oct. 15/96.

Oct. 15/96 Sentencing on multi-count information adjourned until Dec. 3/96.

Nov. 29/96 Guilty pleas entered to charges involving Majestic, EMJ, Software World, Lance Electronics, and Uplink. Sentencing adjourned to Dec. 3/96.

Dec. 3/96 Respondent sentenced on matters now before this Court.

The risk of loss to the victims on the indictable matters totals \$24,207.01.

The actual loss suffered by these victims totals \$11,480.20.

The Crown contends that the sentences imposed were inadequate and that

Judge Gibson erred in law in his interpretation of s. 742.1 of the **Criminal Code** by concluding that "safety of the community" as those words are used therein was restricted to physical harm or injury.

In passing sentence, Judge Gibson said:

. . . However, in this particular case in this section, Parliament chose to use the qualify words "safety of the community". Safety, again according to the Shorter Oxford Dictionary, means exemption from hurt or injury, the quality of being unlikely to cause hurt or injury. The word loss or damage in that definition is not used. The words hurt and injury I think are distinctly different from loss and damage. Hurt and injury, I suggest and believe, refer to some harm to the person. Loss or damage are words that are more consistent with property, i.e. loss of or damage to property. Thus it's my view that Parliament must have intended that the focus should be upon only criminal offences which endanger the safety of the community. Since not all criminal offences endanger the safety of the community, a likelihood that the offender will commit a criminal offence should only deny him or her a conditional sentence if such likelihood relates to offences which would endanger the safety of the community.

Your record would indicate and the fact that these offences were committed while you were on probation, would indicate that you may be likely to commit a criminal offence. In that record, with the exception of the very dated assault charge in 1976 and the more recent threat charge, would indicate that the type of offence that you're likely to commit would not endanger the safety of the community.

In our opinion, Judge Gibson erred in his interpretation of s. 742.1(b) of the **Code**. In **R. v. Wismayer**, [1997] O.J. No. 1380 (Q.L.), (Ont. C.A.), Rosenberg, J.A. speaking for the court said:

. . . The principal factor, however, should be whether permitting the offender to serve the sentence in the community under a conditional sentence order would endanger the safety of the community because of the risk that the offender will re-offend.

See also the decisions of this Court in **R. v. Parker**, unreported C.A.C. No. 133174 dated May 5, 1997; **R. v. Frenette**, unreported C.A.C. No. 132540 dated May 13, 1997 and **R. v. Wheatley**, unreported C.A.C. No. 133184 dated April 21, 1997.

Section 742.1 of the **Code** provides:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3

Judge Gibson found that the respondent's record indicates that he may be likely to commit a criminal offence.

It is clear that Judge Gibson considered that the imposition of a conditional sentence "would not endanger the safety of the community" because he viewed those words as imparting physical danger to persons.

Such a narrow interpretation of s. 742.1(b) is not consistent with what we consider to be Parliament's intention in enacting this provision. The provision clearly contemplates the danger that the offender may reoffend as militating against the imposition of a conditional sentence. Crimes of the nature the respondent is likely to commit endanger the safety of the community.

As the sentencing judge has erred in failing to correctly interpret the statutory precondition to the imposition of sentence to be served in the community, it falls to this

Court to impose a sentence that is fit.

The circumstances which we have briefly summarized indicate that a period of incarceration is warranted.

The application for leave to appeal is granted, the appeal is allowed and we order that the respondent serve the remainder of his sentence of 13 months for these indictable offences in a Provincial Institution. All of his sentences are to be followed by probation as set by Judge Gibson. The restitution orders made by Judge Gibson will stand.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.