C.A.C. No. 126997

NOVA SCOTIA COURT OF APPEAL

Freeman, Pugsley and Flinn, JJ.A.

Cite as: R. v. Fraser, 1997 NSCA 210

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - SCOTT ALEXANDER FRASER Respondent	)	Dana Giovanetti for the Appellant Robert Gregan for the Respondent Appeal Heard: November 19, 1996 Judgment Delivered: January 7, 1997

THE COURT: Crown's application for leave to appeal is granted, appeal allowed, respondent's application for leave to cross-appeal is dismissed, per reasons for judgment of Pugsley, J.A.; Freeman and Flinn, JJ.A. concurring.

Pugsley, J.A.:

The primary issue in this appeal is the fitness of a three-year sentence imposed on a 19-year-old male, with no previous criminal record, for the offence of what is commonly referred to as "home invasion".

On February 18, 1996, Scott Fraser pled guilty to four offences:

- stealing $52.00 in January, 1996, contrary to s. 334 of the **Criminal Code**, R.S.C. 1985 c. C-46. The Crown elected to proceed summarily on this offence;
- taking a motor vehicle on February 14,1996, contrary to s. 335(1) of the **Code**; this is a summary offence;
- robbery on February 16, 1996, contrary to s. 344 of the **Code**;
- having his face masked, on February 16, 1996, with intent to commit an indictable offence contrary to s. 351(2) of the **Code**.

On March 11, 1996, a Provincial Court judge imposed a total of four years' imprisonment apportioned as follows:

1. robbery - three years
2. mask - six months concurrent to the robbery
3. theft - one year consecutive to the robbery
4. joy riding - six months concurrent to the theft

The Crown seeks leave to appeal, and if granted, appeals from the sentences imposed in respect of the proceedings by indictment, submitting that they inadequately reflect the element of deterrence and that the total sentence is inadequate having regard to the nature of the offences committed.

Mr. Fraser has filed an application for leave to cross-appeal, and if granted,

cross-appeals from the sentence imposed for the indictable offences, submitting that the total sentence is harsh and excessive, having regard to the nature of the offences committed, his circumstances, and the principle of totality.

Both the Crown, and Mr. Fraser's counsel agree that the one year sentence for theft is erroneous, because it exceeds the maximum six months imposed for a summary offence. This issue has been resolved and is not before us. The parties have further agreed that Mr. Fraser should be prohibited from possessing any firearm, or any ammunition, or explosive substance, for a period of ten years from March 11, 1996, pursuant to the provisions of s. 100(1) of the **Code**. Such a prohibition had been requested by the Crown, but the Provincial Court judge in the course of his disposition, omitted to consider the application.

The Crown further points out that the sentence for joy riding ought to have been consecutive, there being no nexus with any of the other charges. The Crown has not, however, applied for leave to appeal this sentence.

Description of the Summary Offences

During the month of January, 1996, Mr. Fraser and a friend, went to the apartment of an elderly women at a senior citizens' residence in Springhill on the pretext of selling tickets for some worthwhile cause. The lady was apparently confused and initially offered to buy ten tickets for $1.00 each, but was persuaded to purchase sixty, for a total of $60.00.

Mr. Fraser, obviously seeing an easy mark, returned the next day and showed

the senior citizen some "medals" which he was wearing about his neck. While she was occupied in attempting to locate a jewellery box to store the medals, Mr. Fraser stole $52.00 from her purse.

On February 14, 1996, Mr. Fraser, and two friends, stole a 1995 Volkswagen sedan from the parking lot of the Springhill Arena at approximately 9:30 p.m. The group had the intention of driving to Ontario. The car broke down in Amherst and was abandoned.

February 16, 1996

Elspeth Brown, an 83-year old widow, lived alone in her house in Springhill. She was knitting at her kitchen table at about 2:30 in the afternoon when two masked men entered the kitchen through the back door and came over to her. Fraser, the taller of the two, was carrying a red-handled plastic knife, approximately ten inches in total length. Fraser had been advised by a friend some days earlier that he had performed chores for Mrs. Brown and been "well paid".

Mrs. Brown's description of the event, which is substantially corroborated by Fraser's later admission, is as follows:

> The other fellow came in directly behind the tall fellow and both came over to me while I was sitting down. The fellow carrying the knife was carrying it in his right hand and he said to me "give me your money". I said I haven't any money. My son looks after me. The tall fellow with the knife was holding the knife extended towards me about 1 1/2 feet away from me. I got to my feet. The tall fellow asked me to stand over there and pointed towards the cupboard and I walked over to the cupboard to the left of the back door. I stood with this fellow and the shorter fellow went into the dining room and started to search drawers in a china cabinet. The tall fellow standing with the knife locked the kitchen door. I stood

with this fellow with the knife in close proximity to me for about 15 minutes while the shorter fellow was searching the dining room. While I was standing there the fellow with the knife asked me if I had any liquor and I said, no. He also asked me for cigarettes and I said, I don't smoke. The shorter fellow after he searched the dining room came out carrying my brown leather purse, also a billfold. I asked him if I could have my birth certificate from the billfold and he ripped the purse apart. My identification cards falling to the floor. The shorter fellow ripped the billfold part off of my purse and I noticed this fellow put his hand down the front pocket of his pants. The shorter fellow then went over to a knife case on my kitchen wall and took a large white handled knife and walked into the hallway and pulled some phone wires out from the wall and cut them with the butcher knife. The shorter fellow then went upstairs. The taller fellow who was standing to my left was wearing a mask. The left part of the mask fell from his face and he immediately pulled it back up. I at this time asked him "if they were boys from town" and this fellow said "I answer no questions". The tall fellow standing beside me stood with me for about 10 minutes until the shorter fellow came downstairs. The shorter fellow came into the kitchen and the tall fellow told me to sit down and I said, "no, I'll stand here". Each one of the fellows went to my right and left side and each took an arm and started walking me towards the dining room. When I was at the entrance to the den both of them said, we'll put her in this room. Both of the fellows pushed me up against the freezer in the den. The shorter fellow went to the dining room and took out a dining room chair and left [it] in front of the den entrance. The taller fellow took a kitchen chair and piled [it] in front of the room entrance. Approximately 4 to 5 chairs were piled in front of the den entrance. The tall fellow said to me, don't you come out. The two fellows then left by the back door. Two fellows were carrying, or the tall fellow was carrying a gray plastic shopping bag which contained a pair of binoculars which he took from the den wall. I estimate I stayed in the den between 5 to 7 minutes and then I pushed a round kitchen stool and a chair from the dining room over a small distance and stooped down enough to get out of the room. I then blacked out for 2 to 3 minutes. I then saw the light from the kitchen window and realized where I was. I hobbled to the back door and out into the porch area and locked this door and then the kitchen door. I walked out to the front of the house and looked out the windows facing McFarlane Street. I then wondered if the phone upstairs had been tampered with and I went upstairs to my bedroom. The dresser drawers were all pulled out. The phone was on a stand between the dresser and my bed and I picked up the phone and it was working. I then called my son who lived on

McFarlane Street. The police arrived there shortly after.

Mr. Fraser's Background

Mr. Fraser was born at Amherst, N.S. on April 28. 1976. After his parents separated in 1977, he continued to live with his mother who remarried in 1983. Mr. Fraser claims that he was abused by his step-father both "mentally and physically". His mother denies this claim. She ordered him out of her home in the summer of 1995 as he was "hanging out with a bad crowd and had gotten involved with drugs".

Mr. Fraser repeated Grade 11 on two occasions, but left school permanently in October, 1995, because he "wanted to smoke dope". His attendance at school had been sporadic between 1992 and 1994, but had improved in the 1994-95 school year.

Mr. Fraser's employment history is limited to off-season casual work.

The interview for the pre-sentence report was conducted at the Cumberland Correctional Centre. The probation officer noted that:

> He appeared dishevelled and he was distraught and preoccupied. . . . He appeared to be disinterested in the information gathering process; rather he was focused on his feelings of ill health and concerned at the positive ramifications of these charges. . . . He has been preoccupied with suicidal thoughts. The offender acknowledged a serious dependency problem, however his understanding of addiction is questionable. He noted that, in the future, "I am only going to drink".

Mr. Fraser voiced significant concerns about his general health stating "I think I'm dying . . . my heart hurts . . . terrible dreams . . . voices suspicion that he was dying of cancer".

With respect to the robbery, Mr. Fraser stated that it was committed "as a means to get high". He told the probation officer that he was "scared himself during its

commission and stressed that he had no intent to inflict physical harm. He expressed that he felt guilty for his actions and stated "you gotta take what you got coming".

Remarks of the Sentencing Judge

The sentencing judge noted Mr. Fraser's "unfortunate background", that he was a very disturbed, and upset young man who committed a very serious robbery solely based on his need for drugs. While recognizing that Fraser had no previous criminal history, the sentencing judge concluded that the public must be protected, and imposed the sentences described earlier.

Analysis

The primary objective in sentencing for this type of offence is protection of the public and that can best be obtained by imposing sentences that emphasize deterrence.

The extent to which Parliament considers these offences to be serious is reflected in the penalties applicable - 10 years for wearing a mask with intent, and life imprisonment for robbery.

This Court has approved a range of sentence of between six to ten years for robberies of financial institutions and private dwellings (**R. v. Brewer** (1988), 81 N.S.R. (2d) 86, **R. v. Leet** (1989), 88 N.S.R. (2d) 161).

Mr. Fraser's age, and his previous unblemished record, while factors, should not materially lessen the length of the sentence. The Court must always consider the

opportunity to reclaim the individual when fashioning a sentence, but that objective, 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).

In **R. v. Hingley** (1977), 19 N.S.R. (2d) 541, this court sentenced a 16 1/2 year old male, who had robbed an individual as well as three banks, to a total of 15 years' imprisonment.

Chief Justice McKeigan stated at 545:

> The principle of going lightly with first offenders of tender years to facilitate rehabilitation has here little relevancy. Such serious crimes require substantial emphasis on deterrence even if rehabilitation possibilities are thus not improved but reduced.

The Court, in **Hingley**, approved the following remarks of Tysoe, J.A. in **R. v. Nutter, Collishaw & Dulong** (1972), 7 C.C.C. (2d) 224 (B.C.C.A.) at 228:

> I do not think the age of persons makes much difference when they are committing these violent crimes. Young men who persist in committing crimes of this sort cannot expect that their ages will be regarded as mitigating circumstances.
>
> . . .
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> Crimes of this sort will not be stopped if men who commit them run the risk of only comparatively short terms of imprisonment. The judges owe a duty to the community and to the vast majority of law abiding citizens who comprise it to protect them as best they can and to impose sentences that will constitute real deterrence. I stress the word "real" deterrence as not only to the persons who have committed the crimes, but to persons who might tend or be disposed to thinking about committing them.

I consider that house invasion robbery of this type should attract a sentence greater than that imposed for armed bank robbery.

This was a premeditated, planned attack on a vulnerable victim conducted in

an atmosphere of violence and intimidation. In a town the size of Springhill it would be common knowledge that Mrs. Brown lived alone. The wearing of masks, and the time of day of the invasion, leads to the reasonable inference that Fraser and his accomplice expected her to be at home to assist them in their search for money or valuables.

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. The ransacking of her house, including her bedroom, by two violent strangers, is an interference with her person akin to physical assault.

I do not view the absence of more aggressive physical assault to be a mitigating factor. If it had occurred, it would be a substantially aggravating factor.

The targeting of elderly people in rural areas of this Province by criminals seeking money for drugs, or other vices is, unfortunately, an increasingly common phenomenon. Like-minded individuals must understand that if they are involved in such an offence they will be dealt with severely.

Mrs. Brown was forced to stand in her kitchen facing a masked stranger brandishing a 10-inch knife for close to half an hour while his accomplice plundered her house trashing her personal items in search for valuables. Such a traumatic event could irrevocably destroy the sense of security she associated with her home.

I agree with the following comments of the Alberta Court of Appeal in **R. v. Matwiy** (l996), 105 C.C.C. (3d) 251, at p. 263:

> We are of the view that the home invasion robbery merits a higher starting-point sentence than the armed robbery of a bank or commercial institution. While offences of violence are abhorrent wherever they occur, offences which strike at the right of members of the

> public to the security of their own homes and to freedom from intrusion therein, must be treated with the utmost seriousness. Individuals in their own homes have few of the security devices available to commercial institutions. They are often alone, with little hope that help will arrive. Such offences, whether they arise in injuries or not, are almost always terrifying, traumatic experiences for the occupants and the residents, often leaving them with a total loss of any sense of security.

As I have indicated, this Court has placed a bench mark of six to ten years for robberies of financial institutions and private dwellings. While I consider an invasion of a private dwelling of this type should attract a sentence greater than that for robbery of a financial institution, Mr. Fraser's plea of guilty, his remorse, and the other circumstances detailed in the pre-sentence report, are factors to be considered.

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" (**R. v. Shropshire** (1996), 188 N.R. 284 (S.C.C.) or it was "demonstrably unfit" (**R. v. C.A.M.** (1996), 1 S.C.R. 369).

I conclude that the sentencing judge erred in that he imposed a sentence that was demonstrably unfit, that was excessively and manifestly lenient, and was clearly unreasonable in that it did not appropriately reflect general deterrence.

Conclusion

I would grant leave to appeal, allow the appeal, and substitute a term of incarceration of six years for the robbery. I would affirm the six months' concurrent

sentence imposed for the offence under s. 351(2). I would impose the prohibition under s. 100(1) of the **Code** for a period of ten years. Finally, I would dismiss Mr. Fraser's application for leave to cross-appeal.

Pugsley, J.A.

Consented to:

Freeman, J.A.

Flinn, J.A.

C.A.C. No. 126997

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	)	JUDGMENT BY:
	)	
	)	PUGSLEY, J.A.
SCOTT ALEXANDER FRASER	)	
Respondent	)	
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