Date: 19971008 Docket: CAC134924

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Foster, 1997 NSCA 167

Pugsley, Hallett and Flinn, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Denise Smith
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Terry E. Farrell
	)	for the Respondent Foster
	)	
ROBERT JEFFREY FOSTER and	)	Kevin Coady
PHILIPPE DOMINIQUE GOUR	)	for the Respondent Gour
	)	
Respondents	)	
	)	
	)	Appeal Heard:
	)	September 16, 1997
	)	
	)	Judgment Delivered:
	)	October 8, 1997
	)	

THE COURT: Leave to appeal is granted, the appeal is allowed, per reasons for judgment of Pugsley, J.A.; Hallett and Flinn, JJ.A., concurring.

PUGSLEY, J.A.:

Robert Foster and Phillipe Gour, both 19, were found guilty by a jury, of robbery with violence of Walter Wells, 62, outside the back door of his residence in the Town of Amherst on the evening of December 5, 1995.

Each was sentenced by Justice Boudreau of the Supreme Court to imprisonment for a period of 28 months.

Messrs. Foster and Gour were also found guilty of wearing masks while committing the robbery, for which offence, Justice Boudreau imposed a concurrent sentence of 12 months.

The Crown applies for leave to appeal, and if successful, appeals from the sentences imposed, submitting that they inadequately reflect the objectives of denunciation and deterrence, and that they were inadequate having regard to the nature of the offences, and the circumstances of the offences and the offenders.

At approximately quarter to ten in the evening, Mr. Wells, in the course of carrying some plywood from his house to his back yard, was confronted by a masked man.

No objection was taken by defence counsel to the following description of events provided by Crown counsel to the sentencing judge:

> ...there was a masked man there who spoke no words but first put his arms around the neck of Mr. Wells. He could see the person's eyes. That was all he could see. He felt he was about to be thrown to the ground and he was worried about the concrete step and he managed to sidle his way onto the lawn from the back step area. He fell and the person either fell on him or pushed him down and began to punch him on the left forehead. These were hard blows. He said he could hear a crunch or crack. He estimated he was hit 10 to 20 times in the head. He says that he buried his head in the snow, turned his head and buried it after three or four times. He referred to the mask as being stocking like, the eyes of the person as being vicious. He says he reached for the mask. He got his fingers to it, got to them, that is the eye holes, but was unable to hook inside. This appeared to make the person madder and they hit harder. He says that he yelled "help" more than once loudly. He said that when he buried his face in the snow and turned his head, he was pounded on the back of the head. At some point another individual arrived and they went through his pockets and stole his billfold which contained a driver's license, hospital card, permits, Visa and other credit cards and $100.00 to $200.00 in cash and receipts. .... After the initial resistance offered by the victim ... the violence continued and indeed escalated ... When Mr. Wells at least feigned unconsciousness and turned sideways into the snow in an attempt to stop the violence he was essentially lying there to all intents and purposes unconscious and the person who apparently was Mr. Foster then approached and assisted in going through his pockets and stealing his money.

The two respondents were jointly charged in an Indictment reciting offences, contrary to the provisions of s. 351(2) and s. 344 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

Evidence was given by Derrick Terris that he acted as lookout for the two respondents.

On October 17, 1996, after a five-day trial, the jury returned verdicts of guilty against each of them on the counts in the Indictment.

Remarks of the Sentencing Judge

Justice Boudreau noted that the evidence disclosed:

> .....this was a robbery with violence, a mask was worn, it was premeditated, planned, that those are aggravating factors .... I cannot be satisfied as to exactly who's [sic] involvement was more or less. There is some indication Mr. Foster may have been the leader type personality; on the other hand, there is [sic] some inferences that have been asked to be drawn that maybe Mr. Gour was more involved in the physical violence, but overall I cannot differentiate between the involvement of these two individuals to any significant degree. Therefore, when I consider all of the circumstances I cannot find any reason to treat these two individuals differently in any material way.

Justice Boudreau went on to comment:

> This was a premeditated crime of violence clearly indicated by the masks that were worn and the lookout. It is difficult to ascertain

> exactly what degree of violence may or may not have been foreseen. Perhaps they thought that this senior citizen would be a pushover and would not resist but when one attacks a person with the intent to rob them one faces the consequences of those actions and when resistance is offered there are two alternatives; one of these is to proceed to overpower with violence and the other one is to retreat and of course that is another decision that is made at the time. In this case the decision was made to overpower with whatever force was required to do so.

Justice Boudreau concluded that the pre-sentence reports on both men "showed good prospects for full rehabilitation" and that they should be given "one more chance to show their sincerity in straightening out their futures."

Mr. Foster's Background

Mr. Foster was born on January 25, 1977. He had an unsettling childhood. His parents separated when he was two. He lived with his mother until he was nine, then with his father for the next two years. He claims his father was an alcoholic. After he became eleven, the Children's Aid Society placed him in a variety of facilities, including group homes and youth centres. Prior to his 16th birthday, he was made a ward of Family and Children Services. In the summer of 1996 he moved in with his girlfriend, and her family. They advised that they have "no problems with him", that they have "a good relationship", and that they saw a "number of positive things in him".

He commenced attending Amherst Regional High School in September of 1993. The comments of counsel suggest that he usually received an "administrative" rather than an "academic" pass, and that he was "pushed on to the next grade because his serious behavioural problems couldn't be handled". He was enrolled in the Grade 12 program at the time these offences were committed. He was seen as a leader among his friends, as is evidenced by his election to the office of Presidency of the Student Council in 1995. His attendance at High School, however, was very poor. His grades during the 1995-96 academic year ranged from fairly acceptable to dismal.

Mr. Foster was under the supervision of Nova Scotia Correctional Services on three probation orders since 1993, arising out of one conviction for assault, three for theft, one for fraud, and two for violation of probation. The primary social worker spoke of his "dark side" in these words:

> He's a self sufficient individual and one of the easier youths in care, yet he gets himself into trouble. .... Somewhat of a Dr. Jekyll and Mr. Hyde type.

Background of Mr. Gour

Born on May 27, 1977, Mr. Gour enjoyed a stable and normal childhood while growing up with his family in Pembroke, Ontario. Once reaching high school,

however, he began using drugs and abusing alcohol, and was subject to "fits of depression". He was medically diagnosed as having a chemical imbalance depression, but as of December, 1996, was not taking medication. Difficulties arose with his peer group early in 1995 and he came to live at Amherst, Nova Scotia with his uncle. A relationship with a young woman in that town resulted in the birth of a child in January of 1996. While in Grade 11 he was asked to leave high school because of his "very poor attendance". He returned to Pembroke and commenced working for the family owned dental laboratory where he is presently employed. He is enrolled in an apprenticeship course that will lead, over a period of four years, to his classification as a dental technician.

Analysis

I agree with Justice Boudreau's conclusion that both respondents were intimately involved with the attack on Mr. Wells and no distinction should be made in the sentences imposed on them.

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

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.

Justice Boudreau's sentence disposition predated the judgment in **R. v. Fraser** (1997), 158 N.S.R. (2d) 162, where this Court allowed a Crown appeal of a three-year sentence for a home invasion robbery of an 83-year old widow, substituting six years' incarceration. Mr. Fraser was 19 at the time of the offence and did not have any previous criminal record.

In **Fraser**, it was said, at pp.167-8:

> This Court has approved a range of sentence between six to ten years for robberies of financial institutions and private dwellings... I consider that house invasion robbery of this type should attract a sentence greater than that imposed for armed bank robbery.

R. v. Brennan & Jensen (1975), 11 N.S.R. (2d) 84 was one of the earlier cases in this province where a range of sentence for a particular offence was suggested. Chief Justice MacKeigan, writing for the Court, used these cautionary words at p.88:

> We must, however, emphasize the danger of trying to put any specific price tag or tariff of sentence on any particular type of offence or type of offender; the best one can do, and it may be questioned whether it is wise even to try to do that, is to specify a range of sentences for a particular offence by a particular class of offender, which, in the

> type of case before us, would normally range upward from three years' imprisonment.

The emphasis placed upon the circumstances surrounding the offence, and the factors peculiar to the offender, are a critical part of this process.

Counsel for Mr. Foster submits that any attempt by this Court to establish a starting point for sentences in "home invasion" cases would contravene the clear direction of the Supreme Court of Canada in the recent case of **McDonnell v. The Queen** (1997), 114 C.C.C. (3d) 436 (S.C.C.), by removing the discretion of the sentencing judge to consider all relevant factors.

In particular, counsel relies upon the following words of Justice Sopinka speaking on behalf of the majority, at p. 453-454:

> In any event, in my view it can never be an error in principle in itself to fail to place a particular offence within a judicially created category of assault for the purposes of sentencing. There are two main reasons for this conclusion. First, *Shropshire* and *M.(C.A.)*, two recent and unanimous decisions of this Court, clearly indicate that deference should be shown to a lower court's sentencing decision. If an appellate court could simply create reviewable principles by creating categories of offences, deference is diminished in a manner that is inconsistent with *Shropshire* and *M.(C.A.)*. In order to circumvent deference and to enable appellate review of a particular sentence, a court may simply create a category of offence and a "starting point" for that offence, and treat as an error in principle any deviation in sentencing from the category so created. ... If the categories are defined narrowly, and deviations from the

> categorization are generally reversed, the discretion that should be left in the hands of the trial and sentencing judges is shifted considerably to the appellate courts.
>
> Second, there is no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing. As has been true since *Frey v. Fedoruk*, [1950] S.C.R. 517, 97 C.C.C. 1, [1950] 3 D.L.R. 513, it is not for judges to create criminal offences, but rather for the legislature to enact such offences. By creating a species of sexual assault known as "major sexual assault" and by basing sentencing decisions on such a categorization, the Alberta Court of Appeal has effectively created an offence, at least for the purposes of sentencing, contrary to the spirit if not the letter of *Frey*.

In **McDonnell**, Justice McLachlin, writing on behalf of the four dissenting judges, described the starting point approach, in these words, at page 462:

> The starting-point approach to sentencing involves two steps. First, the judge determines the range of sentence for a typical case. Using that range for a starting-point, a trial judge then adjusts the sentence upward or downward on the basis of factors relating to the particular offence and offender: ... This approach is distinguished from the tariff approach to sentencing which takes no account of the individual circumstances of the offender: ... The tariff approach looks only at the nature of the offence. In contrast, the starting-point approach mandates consideration of specific aggravating and mitigating factors directly relevant to the individual accused. In this way, the starting point approach combines general considerations relating to the crime committed with personalized considerations relating to the particular offender and the unique circumstances of the assault. ... every case has its own unique characteristics, and every offender his or her own unique history.

Justice McLachlin noted that the Courts of Appeal of Alberta, Nova Scotia, Manitoba, British Columbia, Saskatchewan, as well as the English Court of Appeal,

"have applied the starting point approach to sentencing to deal with marked disparities in sentences for certain crimes." (at 466)

I do not agree with counsel's submission that the use of a starting point offends the direction of the majority in **McDonnell**.

This point was made clear by Justice Sopinka at p. 458:

> I add that I do not disagree with McLachlin, J. that appellate courts may set out starting-point sentences as guides to lower courts. Moreover, the starting point may well be a factor to consider in determining whether a sentence is demonstrably unfit. If there is a wide disparity between the starting-point for the offence and the sentence imposed, then, assuming that the Court of Appeal has set a reasonable starting point, the starting-point certainly suggests, but is not determinate of, unfitness. In my view, however, the approach taken by McLachlin, J. in the present case places too great an emphasis on the effect of deviation from the starting-point. Unless there otherwise is a reason under **Shropshire**[[1995] 4 S.C.R. 227] or **M.(C.A.)** [[1996] 1 S.C.R. 500] to interfere with the sentence, a sentence cannot be altered on appeal, notwithstanding deviation from a starting-point. ... (Emphasis added)

I am satisfied that the benchmark set for home invasion cases by this Court in **Fraser** is reasonable and is generally consistent with the sentences imposed by this Court over the last 20 years for this type of crime.

In **R. v. Greely** (1978), 26 N.S.R. (2d) 122, this Court affirmed a sentence of 10 years imposed on a 43-year old accused, who, in company with another man, entered the home of an older couple in a rural part of the province. The accused, who was convicted of robbery, had a lengthy record but did not employ excessive violence in his dealings with the wife who was home alone at the time of the offence. The sentencing judge emphasized the necessity for a severe sentence stating that it was a case "of criminals preying on individual people in their own house and it is to be regarded, in my opinion at least, as one of the most serious crimes possible for anyone to commit".

This Court also affirmed a nine-year sentence after the accused pleaded guilty to theft and using a firearm, while committing an indictable offence, in the invasion of a home of a 93-year old widow at Avonport. (**R. v. Graves** (1979), 31 N.S.R. (2d) 469.

In **R. v. Johnson** (1984), 61 N.S.R. (2d) 357, this Court affirmed a sentence of 12 years after the appellant, 42, with a lengthy criminal record, broke into a rural residence. The Court agreed that there were a number of aggravating factors in that

weapons were involved, physical violence and injury occurred, threats were made, and a substantial sum of money was stolen and not recovered.

See also **R. v. Canning** (1984) 65 N.S.R. (2d) 326 - eight years; **R. v. Miller** (1985), 66 N.S.R. (2d) 356, sentence of nine years affirmed. In **R. v. Leet** (1989), 88 N.S.R. (2d) 161, Chipman,J.A., on behalf of the Court said at p. 164:

> In the more serious robberies, including those committed in financial institutions and private dwellings, the range has generally been from six to ten years.

In **R. v. Benoit** (1990), 95 N.S.R. (2d) 113, this Court dismissed an appeal brought by a 19-year old who was convicted of robbery and sentenced to four years imprisonment. The assault on a senior citizen was considerably less aggravated than the attack on Mr. Wells.

In **R. v. Leger** (1994), 125 N.S.R. (2d) 154, the Court also dismissed an appeal brought by Mr. Leger after conviction for robbery involving a home invasion. The trial judge sentenced Mr. Leger to five years' imprisonment for the robbery offence and two years for each of four other offences to which he had pled guilty. In the

course of ordering that each of the four-year terms would be served concurrently, but consecutively to the five years for the robbery offence, the trial judge said:

> I have to consider also at this time, the fact that there is before me guilty pleas with respect to four other offences and I have to take into consideration the totality of the sentences that I mete out.

The Court dismissed Mr. Leger's appeal from conviction, granted leave to appeal against sentence, but dismissed the sentence appeal. While the circumstances surrounding the home invasion were aggravated, and Mr. Leger's previous record considerable, I note that no application was filed by the Crown to increase sentence.

Following the two-step analysis suggested by Justice McLachlin in **McDonnell** ("the sentence must be individualized to the particular crime and the particular offender before the Court" - p. 464), it is now necessary to examine the facts peculiar to the present case, and the two respondents:

- They did not break into a private residence; however, they concealed themselves in the yard, and pounced on Mr. Wells as soon as he ventured outside his back door. It is a reasonable inference in view of the time of night, the positioning of the look out, as well as the use of masks, that both respondents intended to break into Mr. Wells' home. These offences are, in my

view, similar to the home invasion cases, and the fact that no forceful entry was made into the house should be given minimum weight;

- There was a premeditated decision, at least on the part of Gour, not only to rob, but to specifically harm, a vulnerable, elderly man at his residence. The beating administered by Mr. Gour went on for a lengthy time, with no opportunity given to Mr. Wells to escape the attack by handing over his wallet. Mr. Foster made no attempt to intervene;
- Mr. Wells' calls for help were not only ignored, the attack escalated. His attempts at resistance were met with additional, and more severe, blows to the head;
- After he was beaten into a state of "apparent" unconsciousness, he was robbed and left in the snow, on a cold night in December, unable to assist himself;
- His injuries were entirely predictable, in view of the ferocity, and frequency, of the blows directed to his head. One year after the incident, Crown counsel advised Justice Boudreau at the sentencing hearing:

> . . .he's been taking continuing medical treatment. It was . . . two weeks . . . before the swelling went down . . . there may be some nerve damage and he continues to suffer pain and discomfort as a result of this attack. . . .

- The age of the respondents (both were 18 at the time the offence was committed) and lack of any previous criminal record (at least as far as Gour is concerned) are mitigating factors, but should not materially lessen the length of sentence for this kind of offence where the primary object is the protection of the community (**R. v. Helpard** (1995), 145 N.S.R. (2d) 204).

This crime, by any measure, was a serious one, and the remarks of MacKeigan, C.J. in **R. v. Hingley** (1977), 19 N.S.R. (2d) 541, at 545, are apposite:

> 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.

Justice Sopinka reminds us that a sentence should only be overturned if there is an error of principle, failure to consider a relevant factor, overemphasis of the appropriate factors, or if the sentence is demonstrably unfit (**McDonnell** at 448).

The disparity between the starting point referred to in **Fraser**, and the sentence imposed by Justice Boudreau, in light of the factors peculiar to the present case and the two offenders, is sufficiently wide to convince me that the sentence of 28 months is demonstrably unfit.

The Crown further submits that Justice Boudreau overemphasized the factor or rehabilitation (particularly with respect to Foster).

Foster had an almost continual criminal record since 1991. Joella McKiel, with whom Foster boarded for two years, advised the author of the pre-sentence report, that Foster initially:

> ...seemed to get along very well in her home. However, as time went by ... [she] did not find [him] trustworthy... [she] described the subject as 'a real con'.

Support for this comment is found in Mr. Foster's representations to Justice Boudreau at the sentence hearing on December 16, 1996:

> Who I was last year and who I am now are two completely different people. Like, I've gone through a long struggle. I've pretty much, like, raised myself through my upbringing. But during the past year since I've moved into my girlfriend's home with her parents they have been very supportive of the whole situation and I feel I've developed myself back into a family and right now I am so worried that I'm going to lose all that. So, I have showed remorse for what I have done.

It is relevant that after initially denying any involvement in the incident to the author of the pre-sentence report, Foster returned on November 13, 1996, to the probation officer and stated:

> I wasn't straight the first time about my involvement. I think it's time it came out. It has been bugging me for awhile.

A reasonable inference to be drawn from his conduct is that feelings of self-interest prompted his actions.

The Crown also argues that the sentencing judge failed to consider the following relevant factors which, it is submitted, support the conclusion that the sentences imposed were demonstrably unfit:

- the failure to consider the frequency of home invasion attacks targeted against the elderly in rural areas of this province and the importance of sending a message from the Court to those contemplating such a venture that perpetrators will be dealt with severely;

- the failure to consider the strong attachment of the elderly to their homes, and the resulting adverse effect when their place of security is violated.

Crown counsel at the sentence hearing directed Justice Boudreau's attention to the issue in these words:

> I think it was commented on in one of the cases I quoted by the Court of Appeal that the incidents of robbery either of this type or in stores

> is certainly an offence which is on the increase in this province and country wide and it seems to be that break and enter is just too much work and, because you have to fence the goods, but that robbery is so much quicker and large amounts of cash, sometimes not so large, can be obtained usually for purposes of purchasing drugs. So I think the prevalence of the crime in the community has to be a concern.

Neither counsel for the respondents addressed the issue, nor was it mentioned by the sentencing judge.

The Ontario Court of Appeal in **R. v. Priest** (1996), 110 C.C.C. 289 at 293, unanimously endorsed the following words of Justice Arnup, for the Court, in **R. v. Sears** (1978), 39 C.C.C. (2d) 199 (Ont. C.A.) :

> We agree with the statement that in considering the appropriate sentence to be imposed in cases of shop-lifting or related offences, it is appropriate to consider whether in that particular community, at that particular time, there appears to be an unusual amount of that type of crime, which therefore calls for a sentence which will reflect a degree of deterrence to others.

While no evidence was called by the Crown in support of its submission, the Supreme Court of Canada has determined that the strict rules of evidence which govern at trial do not apply at a sentencing hearing, in particular, if the facts are undisputed. If the facts are contested, then evidence should be called and the issue resolved "by the ordinary legal principles governing criminal proceedings" (**R. v. Gardiner** (1982), 2 S.C.R. 368).

In this case, no objection was taken by counsel for the respondents to the Crown's submission concerning the increasing prevalence of this type of crime in rural areas.

While this is a factor that should have been taken into account by the sentencing judge, it is only one of the factors, ["The paramount question of course always being: what should this offender receive for this offence, committed in the circumstances under which it was committed?" (Arnup, J.A. in **R. v. Sears** at p. 200).]

On the second issue, the Crown, before this Court, submits that Justice Boudreau failed to consider the strong attachment of the elderly to their homes, and the consequent adverse effect which must inevitably follow when the home has been violated.

No evidence was adduced by the Crown on this issue, although it is clearly a factor of which judicial notice can be taken. (See comments of Cory, J. on behalf of the Court in **R. v. McCraw** (1991), 66 C.C.C. (3d) 517 (S.C.C.) respecting the taking of judicial notice of the effects suffered by victims of sexual assault.)

The Supreme Court of Canada, in a case involving entry into a home under the authority of a search warrant, (**R. v. Colet**, [1981] 1 S.C.R. 2), referred at p. 7, to the common law principle expressed in **Semayne's** case (1604) 77 E.R. 194:

> That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose...

The consequences that can reasonably be suffered by the elderly after a home invasion, were addressed by this Court in **Fraser**, at 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..."

Justice Boudreau, at the sentence hearing, was not requested to give consideration to this issue. It would, in these circumstances, have been inappropriate for him to have considered this factor without granting counsel an opportunity to be heard on the issue.

Conclusion

I conclude that the sentences imposed by the trial judge were demonstrably unfit, were clearly unreasonable and did not appropriately reflect general deterrence.

I have reached this conclusion because of the wide disparity between the sentence imposed, and the benchmark set in **Fraser**, for this type of crime, considered in light of the circumstances surrounding the robbery and the "personalized considerations" (see McLachlin, J. at 463) relating to the respondents.

I would grant leave to appeal, allow the appeal, and substitute a term of incarceration of six years on the respondents for the robbery. I would affirm the 12-month concurrent sentence proposed for the offence under s.351(2) of the **Code**, as well as the prohibition under s.100(1) of the **Code**.

Pugsley, J.A.

Consented to:

Hallett, J.A.

C.A.C. No. 134924

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN	)	
Appellant	)	
- and -	)	
	)	REASONS FOR
ROBERT JEFFREY FOSTER and **PHILIPPE DOMINIQUE GOUR**	)	JUDGMENT BY:
	)	PUGSLEY, J.A.
Respondents	)	