Date: 19970528 Docket: C.A.C. 135753

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Leger, 1997 NSCA 137
Hallett, Pugsley and Flinn, JJ.A.

BETWEEN:

JOSEPH DISMAS LEGER	)	
	)	Appellant in person
Appellant	)	
	)	
- and -	)	
	)	William D. Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	May 27, 1997
	)	
	)	
	)	Judgment Delivered:
	)	May 28, 1997
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THE COURT: Leave to appeal refused; appellant prohibited from possessing a firearm, for life, pursuant to s. 109(3) of the **Criminal Code** per reasons for judgment of Flinn, J.A.; Hallett and Pugsley, JJ.A. concurring.

FLINN, J.A.:

The appellant applies to this Court for leave, and, if granted, to appeal a sentence of four years imprisonment imposed upon him by Judge Cole of the Provincial Court. He claims the sentence is harsh and excessive.

On January 9th, 1997, the appellant pleaded guilty to twelve charges contained in four separate Informations. The two most serious charges involve spousal assault. He pleaded guilty to assaulting his common-law wife on April 27th, 1996, and to assault causing bodily harm, also with respect to his common-law wife on July 6th, 1996. With respect to the other charges, two were for driving a motor vehicle while disqualified, one was for wilful damage to property, three were for threatening to cause serious bodily harm to his common-law wife, one was for uttering a threat to blow up his common-law wife's car, two were for failing to comply with a probation order, and one was for failing to appear on the date set for his trial.

The circumstances of the the first assault charge were described by the Crown to the trial judge as follows::

> ...Ms. Noiles stated that she had just been severely beaten by her common-law husband, Mr. Leger, just outside the club. He had pinned her inside the vehicle and was punching her and punching -- punching her and kicking her in the face. He also had his hands around her neck and was choking her and saying that he would kill her. He finally stopped and then he stated that he was going to take her to the woods and kill her there. Noiles was able to free herself from Leger and went into the club to call for the police and Leger fled on foot. Prior to this assault on Noiles, he had assaulted a patron inside the club and he had kicked and broken a side window and windshield of Noiles's vehicle. The following morning, being April 28th, Leger contacted Noiles by phone where she spent the night with a friend to find out if she had laid any charges against him. She had indicated that she had called police and Mr. Leger was furious and stated to her that he was

> going to blow up her car. He would go to Nova Scotia and he would burn her trailer . . . .

The Crown described the circumstances of the charge of assault causing bodily harm as follows:

> Mr. Leger and Ms. Noiles had gone out to Teasers Bar. They had consumed a quantity of draft beer. Mr. Leger started to become agitated with Ms. Noiles and, therefore, she left the bar and she went to the residence of a friend, a Ms. Julia Maloney. Mr. Leger followed her there. They had coffee and spoke for a bit and then they both left at approximately nine p.m. A few minutes after they arrived at Ms. Noiles trailer, Mr. Leger grabbed her by the hair and he punched her in the right eye. He then grabbed her by the neck and was choking her. Mr. Noiles -- Ms. Noiles told Leger that he was killing her and he replied, that's the plan. While he was holding her by the neck, he grabbed a glass lamp and he smashed it against the wall. Ms. Noiles managed to get free and Leger was then -- began throwing broken pieces of the glass at her. He then, again, grabbed her by the hair, ah, pushed her down and he had a piece of broken glass in his hand. Ms. Noiles was partially conscious at this time and she believes that he was slashing at her throat. Shortly after this, she found herself bleeding down both sides of her neck and face and at this time, ah, Ms. Noiles advised Leger that she was cut and he replied, so, I'm going to piss in your mouth and jerk off in your mouth. Ah, Ms. Noiles asked Mr. Leger if she could have a cigarette. He replied that she could put a towel on her head and he let her up. She then ran from the residence and then Mr. Leger chased her outside the residence, ah, and she was caught by him in the yard and then he, again, started to punch her, ah, out in front of the residence. At this time, the police arrived .....

At the hearing of this appeal, the appellant raised another issue which was not raised in his notice of appeal, nor in his written submission to this Court dated April 22nd, 1997. He claims that the facts, related by the Crown, with respect to the charge of assault causing bodily harm, are not completely true. He denied that there were sexual overtones to the assault, and that he had broken a glass lamp, and thrown pieces of glass at his common-law wife. The appellant applied to adduce evidence from his

common-law wife to confirm his submissions in this regard. I would not grant such a request. The appellant was represented by counsel at the sentencing hearing. The Crown recited to the trial judge the circumstances surrounding the charge of assault causing bodily harm, in the presence of the appellant and his counsel. Not only was no objection taken to the Crown's description of the circumstances, counsel for the appellant said to the trial judge: "We do not take issue with the facts." It is, simply, too late for the appellant to be raising this matter. It could have been dealt with at the time of the sentencing hearing; and, therefore, the appellant's application does not meet the test, by which the Court will admit fresh evidence on appeal, as set out in **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193 (S.C.C.).

As a result of the second assault, the appellant's common-law wife had a cut on her head, a swollen right eye, bruises on her neck and arms, and a scratch on her right breast, approximately four inches long.

The appellant has a lengthy criminal record which was before the trial judge. Prior to the convictions which give rise to this appeal, the appellant was convicted of 59 other offences. His record includes four convictions for assault causing bodily harm, seven convictions for assault, seven convictions for threats or intimidation, two weapons convictions and eight offences of driving a motor vehicle while disqualified.

The trial judge sentenced the appellant to a term of imprisonment of

three years with respect to the charge of assault causing bodily harm, and to a period of six months imprisonment, to be served consecutively, with respect to the charge of assault. With respect to the remaining ten charges the appellant was sentenced to six months imprisonment on each charge, to be served concurrently to one another, but consecutive to the six month sentence for the charge of assault.

The appellant's argument, that the sentence is excessive, is summarized as follows:

> (a) the offences would not have been committed had the Appellant not been drinking at the time;
>
> (b) the Appellant's common-law spouse did not want him charged and was suffering because of his sentence of incarceration;
>
> (c) this was a domestic dispute;
>
> (d) in a number of other cases of assault causing bodily harm shorter sentences of imprisonment were imposed. The Appellant regards the assault causing bodily harm committed on July 6, 1996 as minor in comparison to some of these other assaults.

In **R. v. Shropshire** (1996), 102 C.C.C. (3d) 193 the Supreme Court of Canada adopted this Court's position on sentencing appeals, as is enunciated by Hallett J.A. in **R. v. Muise** (1994), 94 C.C.C. (3d) 119 at p. 124:

> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere. . . . . My view is premised on the reality that 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 acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.....

Further, this Court has stated on numerous occasions that

sentences for offences involving spousal violence must be based primarily on the principle of general deterrence. In **R. v. Desmond** (1992), 109 N.S.R. (2d) 174 (N.S.C.A.) Clarke C.J.N.S. stated:

> This Court has been saying in decision after decision that sentences for crimes of spousal assault must emphasize general deterrence if we are going to try to reduce the increasing number coming before the courts. One example, of many, are the words of Mr. Justice Hallett in **R. v. Thompson** (1991), 99 N.S.R. (2d) 188, 270 A.P.R. 188 (C.A.), at p. 190:
>
> > '...The learned trial judge erred in that he put undue emphasis on the rehabilitation of the respondent and insufficient consideration of deterrence. The need to deter this offender and others of a like disposition must be given primary consideration when sentencing for an assault causing bodily harm in a domestic situation. A sentence as light as that imposed on the respondent sends out the wrong message to the respondent and others who may be inclined to similar conduct which is all to prevalent in our society.'

The trial judge, in imposing sentence, considered the victim's attitude, and the appellant's guilty plea, as mitigating circumstances. With respect to aggravating circumstances, the trial judge said:

> Aggravating factors, of course, would be the abusive language, the total degradation of treating this woman in a sexual way like an animal while violating her physically, sexually, emotionally and many other ways during the July incident, which is what he did.

The trial judge then considered the principle that an offender "should not be deprived of liberty if less restrictive sanctions may be appropriate". He then said:

> I don't think, given the accused's record and the nature of this case, that other alternatives are appropriate. They can be considered but having considered them, I find them inappropriate. So I think imprisonment is what must prevail in this particular case.

With respect to the willingness of the appellant's common-law spouse to forgive him, and continue their relationship, the trial judge said the following:

> When you take may of those purposes of sentencing and put them together, they override the very subjective interest in the victim here in maintaining an unbroken and continued relationship with the accused. Her forgiveness and the fact that she is willing to take her chances of further abuse and humiliation from this degradation, I might add, from this individual do not take away from the fact that he has committed a crime against the community as well as the victim and the whole community, to the mechanism of deterrence, must understand that not only is this wrong, it will not be tolerated.

Having reviewed the record of this proceeding and the appellant's submissions, as well as those of the Crown, I am satisfied that the trial judge, in sentencing the appellant, applied correct principles, and considered all relevant facts.

The spousal assault offences, to which the appellant pleaded guilty, are very serious offences and, in these circumstances, abusive, humiliating and degrading. The past criminal record of the appellant shows that he is prone to crimes of violence, and that he has not taken advantage of past opportunities to change his criminal behaviour. Considering the nature of these offences and the appellant's criminal record, a sentence representing, in total, four years of incarceration is not clearly excessive, and, since correct principles were applied by the trial judge, it is a fit sentence.

The appellant's submissions, that the sentence is harsh and excessive, have no merit. I would refuse leave to appeal.

Counsel for the Crown pointed out, at the hearing of this appeal, that the trial judge, inadvertently, failed to make the mandatory firearm prohibition order required under s. 109 of the **Criminal Code of Canada**, R.S.C. 1985, c.C-46. Since the charge of assault causing bodily harm, which proceeded by way of Indictment, carries a maximum sentence of ten years imprisonment, the trial judge was required under s. 109(1)(a) of the **Code** to "make an order prohibiting the person from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substances during the period specified in the order".

Further, since the appellant has several other convictions for the same offence, the prohibition should be for life pursuant to the provisions of s. 109(3) of the **Code**. I would so order.

E.J. Flinn

Concurred in:

Hallett, J.A.

Pugsley, J.A.

C.A.C. No. 135753

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JOSEPH DISMAS LEGER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.