Date: 19971127 Docket No. CAC 138007

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Johnson, 1997 NSCA 201

Chipman, Hart and Hallett, JJ.A.

BETWEEN:	)	
	)	
ANTHONY VINCENT JOHNSON	)	Howard J. MacKinnon
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	November 25, 1997
	)	
	)	
	)	Judgment Delivered:
	)	December 2, 1997

THE COURT: Leave to appeal is granted and the appeal is dismissed as per reasons for judgment of Chipman, J.A.; Hart and Hallett, JJ.A., concurring.

CHIPMAN, J.A.:

This is an application for leave and, if granted, an appeal from sentences imposed by Scanlan, J. in Supreme Court and from an order pursuant to s. 743.6(1) of the **Criminal Code**.

Following a two day trial the appellant was convicted of (1) robbery while armed with an offensive weapon; (2) possession of a weapon for a purpose dangerous to the public peace; and (3) operating a motor vehicle in a manner dangerous to the public, thereby causing bodily harm.

The circumstances giving rise to the commission of these offences were summarized accurately by Crown counsel at the trial as follows:

> . . . the accused was drinking in a local tavern by the name of Teazers. That he either went there with a knife or took a knife from that place, what's commonly described as a butcher knife, which I think was tendered as an exhibit in the trial, and that after some period of drinking in that location he went into a taxi. That he put the knife up to the throat of the taxi driver and told the taxi driver that he was taking him to Moncton. The taxi driver drove a short distance and then slammed on the brakes and used that opportunity to escape from the motor vehicle. The accused then slid over into the driver's side and continued to drive the vehicle. Went out a side road onto the main street of Amherst and hit a truck which contained a man, woman and their young child and in so doing injured the or caused the injury of the female passenger. She had severe injuries to her lower jaw area which involved losing six of her lower front teeth and her jaw bone being made, I think the word she described was, spongy and that she had to have corrective surgery involving the removal of a piece of her hip bone to be grafted into her jaw and as of the date of the trial almost a year after the event happened she still had not had her, advanced to the point where her teeth could be replaced. The defence advanced at trial was that the accused was simply too impaired

> to have a full understanding of what he was doing as I recall the evidence.

The appellant was 61 years of age, and has spent more than 30 years in prison since 1962. His lengthy record consists of several violent offences such as rape and robbery and reveals many violations of conditions upon which he had been released from custody. At the time of the three offences in question, he was on probation, having recently been released from imprisonment for assault. The appellant has a serious drinking problem. He advised the author of the presentence report that he had no interest in stopping his drinking altogether. The appellant was not, in the probation officer's view, a suitable candidate for community supervision.

Following submissions at the sentencing, Scanlan, J. rejected a plea on behalf of the appellant for a suspended sentence. After reviewing fully the circumstances of the offences and the offender and noting that he was taking into account the fact that the appellant had spent one year in pre-trial custody, he imposed a term of incarceration of 15 years on the first count and three years and two years concurrent on the other two counts respectively. He then referred to s. 743.6 of the **Code**, and to the violent nature of the offences committed by the respondent in the past, and the number of supervision violations committed by him. He granted an order requiring that the appellant serve at least one-half of the sentences in custody before being eligible for full parole.

As to the sentence, the appellant contends that the trial judge showed an inflexible approach, and failed to give due consideration to such matters as the appellant's age, the injuries sustained by him while committing the offences, the absence of premeditation, pre-trial custody, and the range of sentences imposed in somewhat similar

cases.

On sentence appeals this Court is governed by s. 687.1 of the **Criminal Code**:

> 687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

We are also governed by what Iacobucci, J. said on behalf of the Supreme Court of Canada in **R. v. Shropshire** (1995), 188 N.R. 284 at 311:

> The question, then, is whether a consideration of the "fitness" of sentence incorporates the very interventionist appellate review propounded by Lambert, J.A. With respect, I find that it does not. An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

A review of his reasons for judgment demonstrates that the trial judge gave full consideration to the proper principles of sentencing as enunciated in **R. v. Grady** (1973), 5 N.S.R. (2d) 264. He recognized that the appellant was a violent person who committed violent offences and that numerous efforts in the past to offer rehabilitation to

him in the sentencing process had failed. In particular, the appellant had made no material progress in addressing the long standing drinking problem which undoubtedly played a role in many of his offences, as it had done here.

The trial judge was obliged to craft a disposition that had as its primary objective the protection of society through deterrence and, in particular, specific deterrence. We are satisfied that in doing this he did not err.

As to the order pursuant to s. 743.6(1) of the **Criminal Code**, that section provides:

> 743.6 (1) Notwithstanding subsection 120(1) of the **Corrections and Conditional Release Act**, where an offender is sentenced, after the coming into force of this section, to a term of imprisonment of two years or more on conviction for one or more offences set out in Schedules I and II to that Act that were prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offences and the character and circumstances of the offender, that the expression of society's denunciation of the offences or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

We quote with approval the following passages from the decision of Griffiths, J.A. in **R. v. Goulet** (1995), 97 C.C.C. (3d) 61 (Ont. C.A.) at p. 67 where he refers to this section as it was then numbered:

> In my view, s. 741.2 should only be invoked as an exceptional measure where the Crown has satisfied the court on clear evidence that an increase in the period of parole ineligibility is "required". There should be articulable reasons for invoking s. 741.2 and, as suggested in **R. v. Dankyi, supra**, the trial judge should give clear and specific reasons for the increase in parole ineligibility.

. . .

> The distinguishing characteristics of the offender may provide more fruitful grounds for invoking s. 741.2 as an exceptional measure. Where the Crown has adduced clear evidence that the offender will not be deterred or rehabilitated within the normal period of parole ineligibility, an order under s. 741.2 will be appropriate. A history of prior parole violations, or violations of other forms of conditional release, or evidence that significant prior custodial sentences have had little impact would be appropriate factors to consider in applying s. 741.2.

Here the appropriate factors existed. The trial judge specifically referred to the violent nature of the offences committed by the appellant over many years, their frequency and the number of violations by the appellant of the terms on which he had been on release. It has not been shown that the trial judge erred in the application by him of s. 743.6(1) of the **Code** to this disposition.

Leave to appeal is granted and the appeal is dismissed.

Chipman, J.A.

Concurred in:

Hart, J.A.

Hallett, J.A.