NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Griffin, 2011 NSCA 103

Date: 20111122
Docket: CAC 334772
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Erica Marie Griffin

Respondent

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	April 8, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal sentence granted, appeal allowed and conditional sentence set aside, per reasons for judgment of Bryson, J.A., Beveridge and Farrar, JJ.A. concurring.
Counsel:	Mark Scott, for the appellant Peter J. Dostal, for the respondent

Reasons for judgment:

[1] The Crown appeals the sentencing of Erica Marie Griffin for robbery. His Honour Judge Castor Williams imposed a conditional sentence of two years less a day with ancillary orders (2010 NSPC 47). The Crown says that this sentence was legally unavailable to Ms. Griffin because the robbery committed by Ms. Griffin was a serious personal injury offence, as described in s. 752 of the *Criminal Code of Canada*. Such offences are excluded from the definition of "conditional sentence" in s. 742.1 of the *Code*.

[2] Ms. Griffin pled guilty to robbery and sentencing proceeded on an agreed statement of facts.

[3] When sentenced, Ms. Griffin was a 21-year old, first time offender, on monthly disability benefits who had a history of mental health and substance abuse issues.

[4] On September 3, 2008 at about 4:50 p.m., Ms. Griffin entered a local service station wearing jeans, a black hoodie pulled over her head, and sunglasses. She unfolded a 10-inch knife and tapped it on the counter. The service attendant asked her what she wanted and Ms. Griffin replied, "Cash". The attendant opened the till and asked "How much?" to which Ms. Griffin replied, "All of it." The attendant gave her some of the cash and Ms. Griffin said, "The rest." She was given the balance of the cash in the till totalling approximately $700. She then fled the scene. The attendant was able to follow Ms. Griffin to a nearby street.

[5] With the assistance of the attendant, the police located Ms. Griffin shortly thereafter. Ms. Griffin was arrested and charged with robbery under s. 344 of the *Code* and possession of a weapon dangerous to the public peace, contrary to s. 88(1) of the *Code*. The Crown did not proceed with the second charge. After considering a presentence report, the absence of a criminal record and counsels' submissions, the trial judge imposed a conditional sentence. Ms. Griffin's post sentence report indicates that she has complied with the conditional sentence order, appears to have refrained from any kind of substance abuse, has completed community service work, and is currently pursuing higher education. In other words, the conditional sentence order is working.

[6] At issue before the trial judge and this Court was whether a conditional sentence was legally available. In the result, the trial judge accepted the defendant's submissions that a display of the knife constituted intimidation but not a threat of violence. The court concluded that it was not a "serious personal injury offence", precluding imposition of a conditional sentence.

ISSUES

[7] The Crown's appeal raises the following issues:

- Was the trial judge's imposition of a conditional sentence an error of law and jurisdiction, under s. 742.1 of the *Code*?

- Did the trial judge err in ruling that Ms. Griffin did not commit a "serious personal injury offence", within the meaning of s. 752 of the *Code*?

STANDARD OF REVIEW

[8] Considerable deference is accorded to a trial judge's sentence. Barring an error in principle, failure to consider a relevant factor, or overemphasis of appropriate factors, a court of appeal will not intervene: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, para. 90, quoted with approval in *R. v. L.M.*, 2008 SCC 31.

Serious Personal Injury Offence:

[9] Ms. Griffin pled guilty to a charge of robbery. The means of committing the robbery were not specified in the indictment but are more specifically set out in the agreed statement of facts. Section 343 of the *Code* describes robbery:

> **343**. Every one commits robbery who
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> (*a*) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
>
> (*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;

> (*c*) assaults any person with intent to steal from him; or
>
> (*d*) steals from any person while armed with an offensive weapon or imitation thereof.

[10] In 2007 Parliament limited the offences to which a conditional sentence could apply. Section 742.1 of the *Code* permits a court to impose a conditional sentence following conviction for certain offences "other than a serious personal injury offence". Section 752 of the *Code* defines a serious personal injury offence:

> "serious personal injury offence" means
>
> > (*a*) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
> >
> > > (i) the use or attempted use of violence against another person, or
> > >
> > > (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
> >
> > and for which the offender may be sentenced to imprisonment for ten years or more, or
> >
> > (*b*) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

The Trial Decision:

[11] In concluding that Ms. Griffin did not commit a serious personal injury offence, the trial judge drew a distinction between s. 343(d) of the *Code* and subsections (a), (b) and (c). He found that the use or attempted use of violence was not an essential element of the crime under 343(d). He held that whether or not violence occurred was a question of fact for him to decide and he found that violence was not used in the circumstances of this case. He concluded:

> **35** Consistent with this line of reasoning and bearing in mind the enactment of s.343(d), I think that there is a dichotomous divide between threats of violence

and acts of intimidation. In my opinion, and in the context of s 343, a threat of violence would be any conduct or a declaration of intention that was immediately and objectively discernible and which outcome would most likely result in bodily harm or injury to a person or property. On the other hand, an act of intimidation would be conduct that subjectively had the potential for serious consequences but which outcome was unclear. As such, it is conduct that inspires fear in order to influence a desired outcome. Although all conduct that involved threats of violence would include the perception of intimidation, an act of intimidation, by itself, however, does not necessarily involve threats of violence. A finding of violence or threat of violence is determined on the facts.

36 Consequently, on the facts, as presented and agreed upon, I conclude and find, on the above analysis, that the conduct of the accused did not constitute an act of violence or the threat of violence. Here, she merely tapped the knife on the counter without any further acts or gestures. She neither directed the knife toward the attendant nor held it to her body to prevent any resistance while she took the money. See for example: **R. v. Trudel** (1984), 12 C.C.C. (3d) 342 (Que. C.A.) Likewise, she did not say any words that contextually could be construed as threatening violence. The attendant's statement of the encounter to the police is sparse in details. There is no evidence that the attendant felt threatened and that she had reasonable and probable grounds for her fear or that physical injury may be reasonably apprehended. See for example: **R v. Sayers and McCoy** (1983), 8 C.C.C. (3d) 572 (Ont. C.A.) Moreover, she has filed no victim impact statement and her interaction with the accused, as could be gleaned from her statement, revealed no hint of severe psychological impact or fear of her life or safety. Thus, on the facts as presented and agreed upon, I would interpret the accused conduct as an act of intimidation. I find that she stole money from the attendant while she was armed with an offence weapon - the knife. **Criminal Code** s.343(d). See also for example: **Tremblay v. Quebec (Attorney General)** (1984), 43 C.R. (3d) 92 (Que. C.A.).

37 I have found that, here, it has not been proved that either actual violence or threats of violence were used. Further, as it is not clear, from the presented and accepted facts, what contextually could have been the likely outcome if other possibilities had arisen, in my opinion it is not possible, here, to sustain a finding, beyond a reasonable doubt, that the attendant's life and safety or that of any other person was endangered. Similarly, in my opinion, it is not possible to sustain a finding, beyond a reasonable doubt, that the accused conduct inflicted or was likely to inflict severe psychological damage upon the attendant or any other person. Thus, I conclude and find that the accused conduct, on the facts before me and on the above analysis, does not constitute a serious personal injury offence.

[12] Having decided that no personal injury offence occurred, the trial judge went on to impose a conditional sentence. Whether a conditional sentence was available in this case turns on whether Ms. Griffin committed a "serious personal injury offence".

Did the respondent commit a serious personal injury offence?

[13] Ms. Griffin's position is straightforward. She says that whether violence was used was a matter of fact for the trial judge. He made no palpable and overriding error so his decision is unassailable in this Court. Robbery can occur without violence so that violence cannot be inferred from the guilty plea. The Crown has the onus of proving that a serious personal injury offence occurred, and did not do so.

[14] In response, the Crown argues that the trial judge:

(a) artificially restricted the facts to the means of robbery as described in s. 343(d) of the *Code*, rather than including s. 343(a);

(b) artificially distinguished between "intimidation" and "threats of violence" where a knife was used;

(c) erroneously found there was no evidence of reasonable apprehension of physical harm by the victim.

[15] The Crown says that the use of violence and a threat of violence are subcategories of violence. The display of a knife alone constituted a threat of violence. Contrary to the judge's conclusion, the facts necessarily involved a reasonable apprehension of physical harm. It also followed that a reasonable apprehension of physical harm makes it likely that the victim's safety was endangered.

[16] What the *Code* means by "serious personal injury offence" is a question of interpretation and therefore a matter of law (*R. v. Mahoney*, [1982] 1 S.C.R. 834, p. 12 of 15). The Court must read the word or words "...in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell Express Vu Limited*

Partnership v. Rex, 2002 SCC 42 at 26, quoting from Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) p. 87; *R. v. C.D.*, *R. v. C.D.K.*, 2005 SCC 78, at 27; *MacPhee Chevrolet Buick GMC Cadillac Ltd. v. S.W.S. Fuels Ltd.*, 2011 NSCA 35, at 30).

[17] The words "serious personal injury offence" without more, focus on the effect on a victim rather than on the conduct of the offender. The word "offence" is modified by the words "serious personal injury", and "injury" is what happens to the victim. But Parliament went further and provided a definition of personal injury offence which, broadly stated, involves violence or attempted violence or conduct endangering or likely endangering the life or safety of another, including psychological or likely psychological injury. A second definition refers to sexual assaults or attempts to commit them. It is clear that the definition of serious personal injury offence broadens the natural meaning of those words, moving as it does from a focus on the effect to both effects and conduct of the offender (ie., *attempted* use of violence: *conduct* endangering or likely to endanger). The language of "attempt" and "conduct endangering" or "likely to endanger" shows that there may be no actual adverse impact on a victim physically or psychologically and yet a serious personal injury offence has occurred.

[18] It is noteworthy that Parliament chose to assimilate the definitions of serious personal injury offence and sexual assault. In other words, sexual assault or attempted sexual assault are in themselves so serious that they are included in the definition of serious personal injury offence. Violence is inherent in such cases. But no such assimilation occurs in the first two categories of the definition, which refer to both the offender's conduct and its effects or potential effects. Parliament could have included certain other crimes in the definition automatically – such as robbery – but did not do so.

[19] In terms of the scheme of the legislation, it is important that the definition of a serious personal injury offence is the threshold for excluding certain sentencing consequences where a crime has been committed. This language does not define an offence under the *Code*, nor does it assist in determining guilt or innocence. It relates to sentencing outcomes.

[20] With respect to the object and scheme of the *Code* and intention of Parliament, I would endorse the comments of Epstein J.A. in *R. v. Lebar*, 2010 ONCA 220 at paras. 47, 48 and 49:

> **47** Based on this history, I conclude that the object and scheme of the relevant provisions of the *Code*, as well as Parliament's intention in enacting them, was to reduce judicial sentencing discretion by eliminating the availability of conditional sentences for crimes of violence within a certain set of criteria. This is significant in the light of the trial judge's conclusion that the reduction of judicial discretion was an "undesired result".
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> **48** To be true to Parliament's intention, the concept of violence must be given a broad interpretation.
>
> **49** In my view, the meaning of "violence" in this definition must be informed by the entirety of the definition of a serious personal injury offence. A serious personal injury offence is defined, in part, either as an offence involving the use or attempted use of violence against another person, or "conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person." Taken together, and especially taking into account the far-reaching meaning of the word "safety", these two clauses point to the legislature's intention to cover a very expansive range of dangerous behaviour with the term "serious personal injury offence".

[21] To similar effect is the Alberta Court of Appeal in *R. v. Arcand*, 2010 ABCA 363, at paras. 42 and 43:

> **42** Then, in 2007, Parliament again stepped in and amended the *Code*, removing from the courts any power to grant a conditional sentence of imprisonment for any sexual assault and for a number of other serious offences. Minister of Justice Vic Toews linked this amendment directly to what was considered to be the inappropriate use of conditional sentences in certain circumstances, particularly for crimes of violence. During second reading of what was then Bill C-9, Minister Toews stated:
>
> > ....[w]hen the previous government introduced the sentencing option [for conditional sentences], it gave assurances that it would not be used for serious or violent offences.
> >
> > These relatively lenient sanctions, especially when compared to incarceration, have been extended to serious and violent offenders. This

> has caused a great deal of concern in the communities where the offenders have ended up serving their sentences. [Words in brackets added.]
>
> **43** As the Bill proceeded through Parliament, various options to restrict the availability of conditional sentences were considered, as were opposing presentations. In the end, Parliament decided to exclude from the conditional sentencing regime any offence defined as a "serious personal injury offence" (which includes all sexual assaults) and certain other offences. Although a number of options were considered, the point is that once again, Parliament's concerns about erosion of public confidence led to legislative reform and further limits on conditional sentences. ...

[22] Violence itself is not defined in the *Criminal Code* but has been the beneficiary of argument in many cases (for example: *R. v. C.D.*; *R. v. C.D.K.*, 2005 SCC 78, paras. 26-33). In this case, the trial judge has purported to make a finding of fact that violence was not used in the commission of the offence. He relies on *Lebar* at para. 50. With respect, *Lebar* does not support this conclusion. Amongst other things, *Lebar* involves an extensive review of what violence means in the contextual setting of the *Code*. In my view, *Lebar* preserves the well known distinction between a legal definition or concept and its existence in a particular set of circumstances. The former is a legal question, the latter a factual one. This is obvious from a comparison of paras. 49 and 50 of *Lebar*. Paragraph 49 begins with a discussion of the meaning of violence arising from the definition of a serious personal injury offence. Paragraph 50 states the obvious that "A finding that violence was used remains a matter of factual determination for the trial judge." The distinction between concept and reality – between law and fact – is clearly preserved in *Lebar*.

[23] Whether certain words constitute a "threat" within the meaning of the *Criminal Code* is a question of law, not fact. Once the factual context is found, it is a question of law whether a threat is made out: *R. v. McDonald* (1981), 64 C.C.C. (2d) 415 (Man. C.A.); *R. v. Morris*, 2001 O,J. No. 1474, at 15; *R. v. Felteau*, 2010 ONCA 821, at 5. Whether robbery is made out on facts as found by the trial judge, is a question of law: *R. v. Bourassa*, 2004 NSCA 127, at para. 12 and following.

[24] Similarly, in *R. v. McCraw*, [1991] 3 S.C.R. 72, at para. 25, the court had to determine whether certain words constituted a threat to cause serious bodily harm within the meaning of s. 264.1(1)(a) of the *Code*. Since the facts were not in

dispute, the question was one of law. So it is here, where the parties presented agreed facts to the trial judge.

[25] Ms. Griffin concedes that the use or attempted use of violence includes most offences involving "threats of violence" but that not all threats rise to a use of violence (respondent's factum, para. 45). Certainly the case law recognizes this. For example, in *R. v. Ponticorvo*, 2009 ABCA 117 at para. 16:

> **16**. ...We are not saying that every threat with a weapon involves the use or attempted use of violence. For instance, it may be that the act of brandishing a weapon at a person *from a distance, with no immediate apparent danger to the victim*, does not fall within the phrase, violence or attempted use of violence. That was not the case here. [Emphasis added]

[26] Ms. Griffin seized on this to argue that the robbery she committed did not involve violence. She cited subsection (d) of Section 343 as supportive of her argument:

> 343. Every one commits robbery who
>
> > (d) steals from any person while armed with an offensive weapon or imitation thereof.

With respect, this debate really misses the point. The question is not whether robbery can be committed without violence, but whether this robbery was committed with violence.

[27] The trial judge determined that Ms. Griffin did not commit an act of violence because she did not use any threatening words or take any threatening steps towards the employee she was robbing, "[she] merely tapped the knife on the counter without any further acts or gestures". As a matter of law, overt threats are not necessary to constitute robbery under s. 343(a) of the *Code*. All that is required is an implied threat accompanied by reasonable apprehension of physical harm on behalf of the victim (*R. v. MacCormack*, 2009 ONCA 72, paras. 85-88; *R. v. Pelletier* (1992), 71 C.C.C. (3d) 438 (Que.C.A.), at pp. 3-5; *R. v. Bourassa*, 2004 NSCA 127, paras. 12-15).

[28] The trial judge distinguished between “threat” and “intimidation” to conclude that no violence had occurred. But in the circumstances of this case, that was a distinction without a difference. The application of that distinction to undisputed facts, was an error of law.

[29] Ms. Griffin tapped a large knife on the counter. She then demanded money. The use of the knife was an implied threat of violence because a knife is inherently dangerous. It can readily injure, even in the hands of an inept assailant. For the trial judge to conclude that Ms. Griffin’s conduct did not constitute an act of violence because she did not direct it “toward the attendant” or hold it to “her body to prevent any resistence”, or say anything “threatening violence” (para. 36 of the decision), ignores the consequence clearly implied for non compliance. Why else use a knife? Ms. Griffin did not tap a pen on the counter. She was not a block away when she made her demand. To say that Ms. Griffin only “...stole money from the attendant while she was armed with an offence weapon**[sic]** ...” (para. 36) equally ignores the use to which Ms. Griffin put the knife.

[30] In the result, I agree with the Crown’s submission that the display of the knife in the circumstances of this case – the wearing of disguise; the demand for money – all constitute a threat of violence. Moreover, I agree that the threat of violence in the circumstances of this case, was itself an act of violence. In similar circumstances, the Ontario Court of Appeal observed in *Lebar*:

> 32 . . ."I find it difficult to accept that the offence committed by [the respondent] did not involve violence as submitted by the Defence. The very nature of using a knife as a threat to induce a desired result, whether implied or real is an act of violence." ...

[31] Likewise, in *R. v. MacDonald* (1989), 91 N.S.R. (2d) 133 (C.A.), the appellant was seeking a reduction of sentence because he alleged that there was no violence or threats of violence involved in his robbery of a store. The Court of Appeal did not agree:

> [6] As to the first ground, the agreed statement of facts shows that both violence and threats of violence were involved. The appellant entered the store with his face masked, knife in hand and demanded all the cash. The display of the knife when the demand was made is clear evidence of the threatening nature of the encounter. The trial judge made no error on the facts when he stated:

> In this case the accused had a knife, covered his face, had a cohort and in my opinion it was a very dangerous occasion on that night.

[32] A misapplication of the law to the facts is an error of law (*MacDonald*, para. 24 above). The judge erred in law when he found that no violence was used and therefore no serious personal injury offence occurred. It follows that a conditional sentence was legally unavailable to Ms. Griffiths and the judge erred in imposing one.

A fit and proper sentence:

[33] Having established an error of law, s. 687 of the *Code* authorizes this court to decide sentence as if it were the trial court.

[34] The Crown suggests that it is not "unsympathetic" to the respondent and proposes that a proper sentence would ordinarily be in the range of 18 to 24 months incarceration followed by probation. On the other hand, the Crown recognizes the principle of restraint expressed by this Court in *R. v. Butler*, 2008 NSCA 102 and indicates that it would not object if the Court came to the conclusion that it would be contrary to the interest of justice to incarcerate Ms. Griffin now.

[35] In *R. v. Butler, supra*, the trial judge imposed a 23-month conditional sentence for robbery with a knife. The Crown argued that the sentencing judge erred by impermissibly using remand credit to reduce the sentence into the conditional range. This Court found that 30 months incarceration before credit for remand time would have been appropriate. But in view of Mr. Butler's successful completion of his drug addiction program and rehabilitation progress, it would not be in the interest of justice to commit him to prison.

[36] This Court has recognized robbery is a serious offence requiring emphasis of deterrence and denunciation. A first offender may expect a term of three years (*R. v. Johnson*, 2007 NSCA 102, at para. 37). However, in exceptional cases, less onerous sentences have been imposed. For example, in *R. v. Benoit*, 2007 NSCA 123, an 18-year old with an extensive record received a sentence of two and a half years less remand time (also see *R. v. Bratzer*, 2001 NSCA 166). In my view, the circumstances of the offender and the offence in *Benoit* were more serious than in this case.

[37] In *R. v. Hamilton* (2004), 186 C.C.C. (3rd) 129, the Ontario Court of Appeal said:

> [165] The ultimate question is, however, should these respondents be sent to jail now? They have served close to 17 months of their conditional sentences. There is no suggestion that they have not complied with the terms of those sentences or that they have committed any further offences. This court has recognized both the need to give offenders credit for conditional sentences being served pending appeal and the added hardship occasioned by imposing sentences of imprisonment on appeal. The hardship is readily apparent in these cases. Had the respondents received the appropriate sentences at trial, they would have been released from custody on parole many months ago, and this sad episode in their lives would have been a bad memory by now.
>
> [166] This was a significant appeal for the administration of justice. The decision of the trial judge raised important issues that required the attention of this court. Appeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event. The administration of justice would not be served by incarcerating the respondents for a few months at this time. They have served significant, albeit, inadequate sentences. To impose now, what would have been a fit sentence at trial, would work an undue hardship on the respondents. The administration of justice is best served by allowing the respondents to complete their conditional sentences.

The foregoing comments were endorsed by this Court in *R. v. Partridge*, 2005 NSCA 159.

[38] Likewise in *Lebar*, the Ontario Court of Appeal concluded:

> **72** I would allow the appeal and set aside the sentence. I would replace it with a custodial sentence of six months. Having regard to the fact that the respondent has served approximately 13 months of his conditional sentence without incident, I am of the view that justice would not be served by his being incarcerated at this stage. The time the respondent has served under the conditional sentence should be applied against the six-month sentence I would impose such that the six-month sentence is considered to have been fully served.

[39] In the context of sentencing, the interest of the public and the offender need not be opposed. Sentencing is not a zero sum game. Ms. Griffin had no prior

criminal record. The robbery was motivated by her drug addiction, which she has addressed through successful rehabilitation. She pleaded guilty. Her post-sentence report is complimentary and optimistic. Sometimes the best interest of the offender is also in the public's best interest. So it is here.

[40] In my view, a period of incarceration now would adversely affect Ms. Griffin's rehabilitation and would not be in the public interest. In the unique circumstances of this case, I would impose a sentence of 16 months incarceration. Ms. Griffin's time served under the conditional sentence will be applied against that 16-month sentence, so that it is considered to have been fully served. I would impose a probation order in identical terms to that ordered by the trial judge, except that it will commence as of November 23, 2011 to and including July 22, 2014 (i.e., when the trial judge's probation order would have concluded).

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.