NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Best*, 2012 NSCA 34

Date: 20120403
Docket: CAC 345701
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Clarence Arthur Best

Respondent

Judges:	MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A.
Appeal Heard:	February 1, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A. concurring.
Counsel:	Mark Scott, for the appellant Stephen M. Robertson, for the respondent

Reasons for judgment:

[1] This is a sentencing appeal brought by the Crown.

BACKGROUND

[2] In late June of 2009, Ms. Rose Geddes hosted a family reunion at her home in Eureka, Pictou County. It started during the day and went into the evening. There were many guests and an abundance of liquor, especially as the evening approached and the children had gone. The respondent Clarence Arthur Best was an invited guest. A neighbour, Mr. Robert Robson, was not.

[3] It seems that Mr. Robson and Ms. Geddes were friendly neighbours (before Ms. Geddes' husband died) but by late June 2009, their relationship was strained. In any event, that day Mr. Robson was drinking alone in his home and heard the Geddes party going on. He decided to make his way over, uninvited. He was not there long before he was sent on this way with a "sucker punch", at the hands of another invited guest.

[4] The party continued without Mr. Robson, who had gone home to bed. Then, for reasons that remain unclear, Mr. Best and another guest, Mr. Michael Wright, went over to Mr. Robson's home. They walked in uninvited and attacked Mr. Robson who was still in bed. Mr. Best knew Mr. Robson, although Mr. Wright apparently did not. While Mr. Best swung at Mr. Robson, he landed no blows. However, Mr. Wright certainly did as they fought throughout the house. In the end, Mr. Robson suffered serious injuries including a cervical fracture and injuries to his jaw requiring it to be wired shut. Both intruders were charged with break and enter, and aggravated assault. Judge Robert A. Stroud of the Nova Scotia Provincial Court, in a separate indictment, found Mr. Best guilty and this decision has not been appealed.

[5] In sentencing Mr. Best, the judge explained that he would be reading from a prepared text:

> ... I have a decision here I'll hand out to counsel after I've gone through it. I'm not going to read it all, but I'll read certain portions of it to try and make it clear at this point what I'm saying.

[6] The judge then sentenced Mr. Best to a 12-month term of incarceration to be served in the community followed by probation. He then recessed to allow counsel an opportunity to discuss the appropriate terms for the conditional sentence and probation orders:

> I'll let counsel discuss the terms of the Conditional Sentence Order and perhaps prepare the usual document that we use. And same thing with the Probation Order. I would think at least six months of the conditional sentence should be subject to house arrest. So I'll leave that with counsel for a few minutes. Just let me know when you're ready.

[7] Then during this recess, the judge realized that he was unable to order a conditional sentence because such dispositions are recently no longer available for "serious personal injury" offences (s. 742.1 of the *Criminal Code*):

> THE COURT: Mr. Best, stand up, please. It's come to my attention that the sentence I indicated earlier is inappropriate because of the relatively new section of the *Criminal Code* that treats this as a serious bodily injury case and requires a period of incarceration.

[8] Then, based on Mr. Best's "secondary involvement" in the assault (not landing any blows), his positive pre-sentence report and the apparent spontaneity of the attack, the judge instead ordered a 90-day intermittent sentence to be followed by a 2-year term of probation:

> However, based upon my assessment of your situation and my comments earlier about your Pre-Sentence Report and our lack of record and your secondary involvement in this offence, I'm going to change that decision to a period of 90 days incarceration that you can serve on an intermittent basis, so you can serve it on weekends, followed by two years of probation with strict conditions which counsel have agreed to, I understand. And I'll read them into the record.

[9] It is from this disposition that the Crown appeals.

ISSUE AND STANDARD OF REVIEW

[10] The Crown raises two substantive grounds of appeal:

1. The sentence ordered inadequately reflects the objectives of denunciation and deterrence.

2. The sentence ordered is inadequate having regard to the nature of the offence committed and the circumstances of the offence and the offender.

[11] Turning to the appropriate standard of review, the first ground suggests that the judge either ignored or at least paid insufficient heed to the principles of denunciation and deterrence when sentencing Mr. Best. This involves a question of law, which we would review on a correctness standard. In other words, if the judge applied a wrong principle of law that affected the outcome, we would have no choice but to correct this error and impose an appropriate disposition.

[12] The second ground attacks the appropriateness of the sentence. This involves an exercise of the judge's discretion to which we would normally defer, interfering only if we found the sentence to be demonstrably unfit. See: **R. v. Solowan**, [2008] 3 S.C.R. 309, 2008 SCC 62; **R. v. A.N.**, 2011 NSCA 21; **R. v. Bernard**, 2011 NSCA 53; **R. v. Conway**, 2009 NSCA 95, and **R. v. Markie**, 2009 NSCA 119.

ANALYSIS

Did the sentence Adequately Reflect Denunciation and Deterrence?

[13] In both his oral and subsequent signed decision, the judge downplayed the need to emphasize denunciation and deterrence. For example, in his oral decision he said:

> For the reasons stated, I do not believe that this is a case where denunciation and deterrence are particularly pressing.

[14] Then, in his signed version, the judge repeated:

> ... I do not believe this is a case where denunciation and deterrence need to be emphasized. ...

[15] Respectfully, this reflects error. Simply put, for Mr. Best to enter Mr. Robson's home while he is sleeping and to participate in an assault that results in serious injury, deterrence and denunciation must be emphasized. There is no way

around this despite the fact that Mr. Best did not land any blows or despite the fact that he had a positive pre-sentence report. This is just too serious a crime. This and other appellate courts have made it clear that, save very exceptional circumstances which do not exist here, such conduct must be seriously denounced with a message to other would-be offenders that serious jail time will result. See: **R. v. Foster**, [1997] N.S.J. No. 392 (C.A.), at para. 39; **R. v. Goulette**, 2009 NBCA 49, at para. 44; **R. v. Joyce**, [1998] N.B.J. No. 312 (C.A.), at para. 37; **R. v. Peciukaitis**, 2008 ONCA 672, at para. 11; **R. v. Pakoo**, 2004 MBCA 157, at para. 49; **R. v. Wright** (2006), 218 O.A.C. 215, at paras.13-15; **R. v. Morash**, 2006 SKCA 59, at para. 16; **R. v. Sharphead**, 2004 ABCA 338, at para. 10.

[16] Furthermore, as noted, deterrence and denunciation must be emphasized despite Mr. Best's apparent "secondary" role. For example, in **R. v. Stephenson**, [1998] N.S.J. No. 237, an elderly man was robbed and attacked in his own home by a co-accused, who was driven to the scene by the appellant Stephenson. Pugsley, J.A. of this court described the attack:

> ¶8 Mr. Sabean testified that he lived alone in his home in the rural community of Port Lorne. At approximately 10:00 p.m. on October 22, 1992, while he was sitting in his rocking chair watching TV, a man with a "black mask down to his shoulders" broke into his house, hit him with his fist two or three times in his face, and knocked him to the floor. Mr. Sabean tried to escape, but the attacker grabbed a tea kettle and told him that he would be scalded if he "did any more". Mr. Sabean then handed over his "purse" which contained approximately $2,500 in cash. Mr. Sabean was convinced that if he had not handed over his purse the attacker would have carried out his threat to scald him. While Mr. Sabean gave thought to tearing off the intruder's mask, he concluded that if he had taken this action "he'd have killed me". ...

[17] The appellant downplayed his role in the affair by highlighting that he took no part in the assault and understood that there would be no violence. In confirming a 6-year sentence, the court was not sympathetic to Mr. Stephenson's purported secondary involvement:

> ¶21 The role played by Mr. Stephenson was a critical one; without his direction, this attack would never have occurred. He knew from making deliveries to Mr. Sabean's home, that he was elderly, lived alone, and was rumoured to "have lots of money" at home. Mr. Stephenson arranged for a driver to take Mr. Neatt and himself to the Sabean residence. Although he did not enter the victim's

> home, Mr. Stephenson remained outside the residence at the time of the robbery. He received $400.00 as his share of the joint criminal venture.
>
> ¶22 While Mr. Stephenson claimed that there was an agreement that "there was to be no violence", he was not in a position to take any steps should Mr. Neatt resort to violence. There is a risk that some elderly people, accustomed to living alone, might be oblivious of their own safety when their home is invaded by a stranger demanding money and might take aggressive steps to protect themselves.
>
> ¶23 Even in the absence of excessive physical violence, the traumatic effect of a masked man breaking into the home of a man of 86, and demanding money, could have irreparable consequences. At the time Mr. Stephenson testified, almost five years after the attack, he still experienced substantial stress over the invasion of his home.

[18] Furthermore, Mr. Stephenson, like Mr. Best, also had a positive pre-sentence report along with other mitigating factors. Nonetheless, the court responded:

> ¶15 Counsel for Mr. Stephenson urges that his client:
>
> > . . . specifically sought the assurance of Mr. Neatt that no violence would be used, and was satisfied that he was not armed when he left the vehicle. Significantly, [Mr. Stephenson] did not enter Mr. Sabean's home or act in any fashion to intimidate the victim. [Mr. Stephenson] did not interfere in the police investigation and, when arrested, he readily co-operated with the police and provided an inculpatory statement. While he did not enter a guilty plea at the first available opportunity, [Mr. Stephenson] did plead guilty to the offence charged and co-operated in the preparation of a pre-sentence report. . . . The report was very favourable, and the remorse he felt was demonstrated clearly in the record and in the letter of apology penned to Mr. Sabean.

[19] Thus, the court saw no reason to reduce the 6-year sentence:

> ¶27 There are no compelling factors which should cause this Court to reduce the six-year sentence imposed by Judge Nichols:
>
> - While the guilty plea is a factor, it was only negotiated after preliminary inquiry, re-election, and plea bargain, pursuant to which Mr. Stephenson escaped prosecution on theft and forgery charges;

- The absence of a recent criminal record, and the prospects of rehabilitation, are factors which should not materially lessen the length of the sentence. These objectives 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);

- While one can sympathize with the difficulties experienced by Mr. Stephenson in his personal life, they do not, in our opinion, provide any justification for mitigation of the sentence imposed;

- We have no reason to question the genuineness of Mr. Stephenson's remorse, but while this may point to a reduced concern for specific deterrence, it does not address the paramount need for deterrence for home invasion robberies.

[20] Now I realize that here Mr. Robson was not a vulnerable elderly man minding his own business, as was the case with Stephenson. Nor was he the victim of a robbery. Instead he was a nuisance, obviously drawing the ire of Mr. Best and Mr. Wright earlier that evening. However, when he was attacked, he was asleep in his own home and he was seriously injured. In these circumstances, the judge did not have the option of effectively ignoring denunciation and deterrence. This represents an error in principle that (as I will explain in my analysis of the next issue) resulted in a demonstrably unfit sentence. See **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500.

The Fitness of the Sentence

[21] Breaking and entering and assaulting a homeowner is a serious crime. In fact, Parliament has given special attention to this type of offence. Specifically, the fact that the intruder knows that the home is occupied is deemed to be an aggravating circumstance in sentencing:

> 348.1 If a person is convicted of an offence under section 98 or 98.1, subsection 279(2) or section 343, 346 or 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,
>
> (a) knew that or was reckless as to whether the dwelling-house was occupied; and

(b) used violence or threats of violence to a person or property.

[22] This court as well has recognized the seriousness of such crimes. For example, in **R. v. Harris**, 2000 NSCA 7, we considered the appeal of an intruder who robbed and seriously attacked an unsuspecting elderly couple. The violence was horrific, as the court described:

> ¶9 Although the Delaneys regularly retired at 11:00 p.m., because of what occurred earlier that night, they stayed awake later. At 11:30 p.m., Mrs. Delaney went to close the kitchen window which was habitually left open to allow air to flow into the house. When she entered the kitchen in the dark, she felt a large gush of wind. As this seemed odd to her she opened the venetian blinds to secure the window at which time Harris and XYZ jumped through the open window into the kitchen. Mrs. Delaney turned and ran toward the inner hallway, screaming for her husband. XYZ pushed Mrs. Delaney and she broke her hip as she hit the floor. Harris ran past Mrs. Delaney and XYZ and came upon Mr. Delaney who had reached the bottom of the stairs holding a small handsaw. Mr. Delaney was waving the hand saw and he struck the knuckles of Harris causing him to bleed. After being struck by the handsaw, Harris disarmed Mr. Delaney. Harris then kicked, punched and struck Mr. Delaney with his own wooden walking stick until the stick shattered. Mr. Delaney collapsed at the bottom of the stairs leading up to the bedrooms. From then on he was in and out of consciousness.
>
> ¶10 After both the Delaneys were immobile on the floor, XYZ pulled the phone off the wall rendering it inoperable. At some point apparently, one of the two invaders cut the exterior phone lines. Mr. Delaney was lying at the foot of the stairs; Harris and XYZ had to walk over him in order to get up the stairs to complete stealing the Delaneys' belongings. They remained in the house for approximately an hour to an hour and a half, with XYZ checking on the Delaneys periodically.

[23] In dismissing the appeal of a 15-year sentence, Glube, C.J.N.S. highlighted the need to emphasize denunciation and deterrence:

> ¶81 These types of offences (home invasion) require denunciation by society, deterrence of the accused and others from committing this type of offence, and protection of the public as the primary considerations of sentencing those who choose to invade the sanctity of the home of another and do violence through intimidation, terrorism or actual assault.

> ¶82 In my opinion, the sentencing judge made no error in principle, he considered all relevant factors, he did not place undue emphasis on any factor, and the sentence is not "demonstrably unfit" or "clearly unreasonable" considering the horrific nature of the assault and the circumstances surrounding the whole robbery. Protection of the public and deterrence are paramount and absolutely necessary in this case. I would find the sentences imposed were within the range, were not manifestly excessive and were fit sentences.

[24] Then more recently in **R. v. Best**, 2006 NSCA 116, the intruders went on a crack cocaine-fueled crime spree that included an invasion into the home of a mentally challenged man. They robbed him and fractured his skull with a pipe. In dismissing an appeal of a 13-year sentence for one of the intruders, this court again emphasized denunciation and deterrence:

> ¶36 In situating this sentence it is instructive to review this Court's decision in **R. v. Harris** (2000), 181 N.S.R. (2d) 211. There, Harris, who was 20 years old at the time of the offence, appealed a 15 year sentence for robbery running concurrently with a 14 year sentence for assault. The offender and an accomplice broke into an elderly couple's home. The wife suffered a broken hip when knocked to the floor. The husband was beaten with a cane. Harris pled guilty at the first opportunity. *In dismissing the appeal, this Court commented that home invasion offences require a focus upon denunciation, general and specific deterrence and protection of the public.* The Court found that sentence to be neither demonstrably unfit, nor clearly unreasonable.
>
> ¶37 In addition to citing **R. v. Harris**, *supra*, the judge, carefully reviewed the facts of the offences, the principles and purposes of sentencing and addressed both proportionality and parity. He was especially aware of the totality principle and noted that the he might have to modify the total that would result from fixing sentence for each of the five individual offences if the resulting sentence would be unjust. ...
>
> [Emphasis added.]

[25] Now I realize that the facts in our case are not nearly as gruesome as those in **Harris** and **Best**. Furthermore, no case is ever the same and it would be dangerous to generalize. However, while the specifics of each case must be assessed, serious jail time for this type of offence is generally required. For example, in **Wright**, *supra*, the Ontario Court of Appeal explained:

> ¶24 In my view, however, "home invasion" cases call for a particularly nuanced approach to sentencing. They require a careful examination of the circumstances of the particular case in question, of the nature and severity of the criminal acts perpetrated in the course of the home invasion, and of the situation of the individual offender. Whether a case falls within the existing guidelines or range – or, indeed, whether it may be one of those exceptional cases that falls outside the range and results in a moving of the yardsticks – will depend upon the results of such an examination. I agree with the British Columbia Court of Appeal in *A.J.C.* (at para. 29), however, that in cases of this nature the objectives of protection of the public, general deterrence and denunciation should be given priority, although of course the prospects of the offender's rehabilitation and the other factors pertaining to sentencing must also be considered. Certainly, a stiff penitentiary sentence is generally called for.

[26] In this light, it becomes clear that the 90-day intermittent sentence for Mr. Best's offence was demonstrably unfit.

The Appropriate Sentence

[27] Therefore, having deemed the sentence under appeal to be unfit, our role is to identify the appropriate sentence by applying the relevant principles of sentencing set out in the *Criminal Code* to the circumstances of the offence and the circumstances of the offender. In the process, we are guided by the relevant case law.

[28] Here then are the relevant statutory principles (in addition to s. 348.1 cited above):

> Purpose
>
> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;

> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> . . .
>
> Fundamental principle
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> Other sentencing principles
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> . . .
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[29] I have already detailed the circumstances of the offence, so I now turn to Mr. Best's personal circumstances.

[30] At the time of sentencing, Mr. Best was 30 years old. He was separated and living with his parents. There he helped care for his ailing father and worked intermittently cutting wood. He has a grade 10 education.

[31] Mr. Best's pre-sentence report was positive as the judge noted (in his oral decision):

> The Crown also suggested that the offender's Pre-Sentence Report was at best neutral. I completely disagree with that conclusion. He had a normal upbringing as a teenager. He was active in athletics, and was a relatively good student.
>
> His main problem was that he was ... more interested in partying than going to school and quit after grade 10. That was clearly what led to his problem with an addiction to alcohol which Mr. Best has recognized by voluntarily attending Alcoholics Anonymous meetings for the past nine months.
>
> Mr. Best has maintained intermittent employment for various employers over the years. And at the time the Pre-Sentence Report was prepared was awaiting employment in the woods with James MacLeod who he has worked for on and off during the past year or so.
>
> Sergeant Cornett of the Stellarton Police Services reported he has dealt with Mr. Best in the community, and he has never posed any serious concerns, and has generally been cooperative with the police. Moreover, following the incident before the Court, Mr. Best reported to the RCMP on his own when he heard they were looking for him.
>
> He is currently living at home, and spends most of his time helping out his ailing father.

[32] Turning then to the relevant case law, I accept the following summaries prepared by the Crown in its factum as helpful guidance for the particular circumstances we face:

> ¶55 The Crown offers the following examples to assist this Court in determining whether ninety days' incarceration to be served intermittently was manifestly inadequate in these circumstances:
>
> (i) *R. v. Campeau*, 2009 SKCA 4: Two accused knocked at the victim's front door at 1:30 a.m. Victim #1 tried to close the door. The co-accused barged in. Victim #1 anticipated harm and barricaded himself in the washroom. Both

accused kicked at the door and threatened him. Victim #2 tried to call 911. The co-accused wrestled her to get the phone while the accused continued to kick the bathroom door exhorting victim #1 to come out. The accused called victim #1 a rat and never harmed victim #2. The co-accused struck and pulled victim #2's hair. The assault resulted in a hairline fracture to her nose, bruises, and psychological trauma. The accused had thirty priors including four break and enters. On appeal, his sentence was increased to forty months' incarceration;

(ii) *Goulette*: The victim awoke to being beaten by the accused. He suffered a broken nose and bruises, as well as $2,000.00 damage to his computer. Accused's record had a ten year gap. He was sentenced to nine months' incarceration, after twenty-one months' credit for remand. The provincial Crown brought a fresh evidence application, as it was unaware of a possession for the purpose of trafficking conviction just preceding this conviction. Regardless of the fresh evidence, the sentence was adjusted to sixty-six months' incarceration. Thirty months as the aggregate sentence was considered too low for a home invasion to properly address denunciation and deterrence;

(iii) *R. v. Oulton*, 2004 NBCA 21: Two co-accused disguised with weapons entered the house of the victim. They put a gun to the head of the victim and uttered threats. There were no injuries. Six years' incarceration was confirmed on appeal;

(iv) *Joyce*: The victim was asleep when two masked intruders entered his home, beat him, and stole $200.00. In an attempt to escape, he suffered a severe wound to his thigh at the hand of the accused. The co-accused, who pleaded guilty early and had a less significant role and record, received six years' incarceration. The accused received eleven years;

(v) *McCowan*: The accused and his wife were substance abusers. His wife had a relapse and began a sexual relationship with the victim. The accused broke into the victim's home, entered the bedroom, and struck the victim eight to ten times with his fists. Severe injuries [including traumatic brain injury] resulted in permanent disabilities. Offender had a very good Post-Sentence Report. An effective sentence of five and one-half years' incarceration, due to the positive Post-Sentence Report, was affirmed on appeal;

(vi) *Morash*: The accused was part of a group who had a bad encounter with others. A fight broke out at a crashed party. Victim #1 was struck with a bottle. He and victim #2 were badly beaten. The accused had served the equivalent of one year in remand. He was sentenced to a period of incarceration of six years and eleven months. This was affirmed on appeal;

(vii) *R. v. Forrester*, 2004 BCSC 1310: Two accused went to the victim's house in a dispute over a bicycle. They were armed with bats and disguised with balaclavas. They assaulted the occupants. The accused received five years' incarceration for aggravated assault, and two years' concurrent for break and enter. The accused was of aboriginal heritage with no record at the time. He was gainfully employed and made use of his pre-trial time to further his education. Rehabilitation and specific deterrence, however, given the level of violence, took second place to denunciation and deterrence;

(viii) *R. v. Ross*, 2009 BCSC 1831: A twenty-three year old aboriginal offender with no record broke into a house with three others and assaulted the occupants with bats. The offenders pleaded guilty. The accused participated in persistent counselling and was of otherwise good character. But for the remand for which he received thirty-three months' credit, the Court would have sentenced him to forty-five months' incarceration. The net sentence was one year's incarceration on a go forward basis;

(ix) *R. v. Mack*, 2001 BCCA 688: A twenty year old native suffering from fetal alcohol syndrome, with a record, used an iron to beat a female victim when he broke into her house. He was high at the time. He spent twenty-three months on remand. The Court of Appeal took the view that a nine year period of incarceration as a starting-point was not outside the range. After a proper reduction of the net sentence following a recalculation of remand credit, he received five years' incarceration. Notably, Justice Esson would have dismissed the appeal; and Justice Huddart, while agreeing with the net result, would have started at a higher point;

(x) *Sharphead*: There were few clear findings of facts. What could be gleaned was that the accused was one of three who broke in and knifed a victim. The accused did not testify. He did admit his involvement to the police. The PSR was mixed, and included expressed remorse and efforts to stay positive. He was a First Nations offender with alcohol issues. The Court of Appeal adjusted the sentence to three years' incarceration for break and enter and commit aggravated assault, concluding that the trial Judge erroneously overemphasized the youth and lack of record of the offender. Consequently, he ignored the host of aggravating features which cried out for denunciation and deterrence.

[33] These cases depict a range of 3 to 11 years' imprisonment. Of course, all are fact specific. Here the following considerations would lead me to the three-year mark:

- Mr. Best's positive pre-sentence report;

- his cooperation with the authorities to date, including turning himself in when he heard he was being investigated;

- his strong family support;

- the fact that he has no criminal record to speak of;

- his post-sentence report confirming his apparent abstinence from both drugs and alcohol;

- the fact that he is awaiting further counselling.

[34] However that does not end the matter. Instead, in my view, this is one of those rare cases where, despite the initial inadequate sentence, it is no longer in the interests of justice to re-incarcerate Mr. Best. I say this because he has completed his term of incarceration and is well into his period of probation. Furthermore, by all accounts he is doing well. In these exceptional circumstances, I am convinced that sending him back to jail would not serve the interests of justice.

[35] I realize that this represents an exceptional form of relief. However it is not unique. For example, in **R. v. Butler**, 2008 NSCA 102, the Crown appealed a community sentence for armed robbery (robbing a taxi driver at knife point by an offender suffering from addictions). This court found this disposition to be demonstrably unfit in the circumstances and declared a 30-month sentence to be appropriate:

> ¶18 Mr. Butler spent the five and one half months between his arrest and sentencing on remand. In that period he made what efforts he could at rehabilitation, successfully completing the short term drug rehabilitation course available to him in the institution. It was while on remand that he learned of the Salvation Army program, which he brought to his counsel's attention. Mr. Butler maintained that he was determined to overcome his addiction to drugs. He accepted responsibility for the offence and expressed remorse.
>
> ¶19 The judge made several factual findings which are supported by the record:
>
> - Mr. Butler has a significant and chronic addiction to both powder and crack cocaine;

- he has an attachment to the work force;

- in the past he has not had any significant intervention with respect to his substance abuse;

- were it not for his chronic addiction he would not be involved in the criminal justice system.

¶20 It is clear that in crafting this sentence the judge had determined that the public could best be protected if Mr. Butler's drug addiction were successfully addressed. This, he determined, should be accomplished through a sentence which facilitated Mr. Butler attending the Salvation Army program.

. . .

¶38 The appropriate sentence, before credit for remand time, would have been 30 months. But it is important here to consider Mr. Butler's considerable progress since sentence was imposed.

[36] However, despite this conclusion, the court resolved not to incarcerate Mr. Butler:

¶39 Although I have concluded that the sentence imposed by the trial judge, notwithstanding the need for rehabilitation, inadequately reflects denunciation and general deterrence, in view of the sentence served and the post-sentence update, I am not persuaded that it is in the interests of justice to now substitute incarceration for the conditional sentence. (See, for example, **R. v. C.S.P.** 2005 NSCA 159, [2005] N.S.J. No. 498 (Q.L.) (C.A.); and **R. v. Hamilton**, [2004] O.J. No. 3252 (Q.L.) (C.A.) and **R. v. Edmondson**, 2005 SKCA 51, [2005] S.J. No. 256 (Q.L.) (C.A.); leave to appeal refused [2005] S.C.C.A. No. 273).

¶40 Mr. Butler has successfully completed the six month addiction program at Booth Centre. He is pursuing an upgrading program with a view to entering Community College for which he has funding in place. It would not be in the interests of justice to now commit him to a prison environment which may adversely affect his rehabilitation (**R. v. Bratzer**, **supra**, at para. 47 and **R. v. Parker** [1997] N.S.J. No. 194 (Q.L.) (C.A.)). I have considered, as well, the fact that Mr. Butler, having spent five and one half months on remand, prior to trial, is now aware of the realities of prison life. Indeed, that experience may well have motivated him to get his life in order and will hopefully keep him moving forward on that path. (**R. v. C.S.P., supra**; **R. v. Hamilton, supra; R. v. Edmondson,**

> **supra**; **R. v. Symes**, [1989] O.J. No. 528 (Q.L.) (C.A.); **R. v. Shaw**, [1977] O.J. No. 147 (Q.L.) (C.A.); **R. v. Boucher**, [2004] O.J. No. 2689 (Q.L.) (C.A.); **R. v. Hirnschall**, [2003] O.J. No. 2296 (Q.L.) (C.A.); **R. v. Fox**, [2002] O.J. No. 2496 (Q.L.) (C.A.); and **R. v. G.C.F.**, [2004] O.J. No. 3177 (Q.L.) (C.A.)).

[37] A similar approach has been taken by other Canadian appellate courts. For example, in **R. v. Shaw**, [1977] O.J. No. 147, two respondents were convicted of "serious drug trafficking offences" for which the trial judge gave them no jail-time, but rather, strict probation for two years. The sentences were imposed ten months after the offence, and at the time of the appeals the two respondents had carried out four months of their two-year probation order. Post-sentence reports meanwhile indicated that their work records were exemplary, and that their community involvement was providing needed services in the community. The Ontario Court of Appeal observed: "[i]t is apparent that the rehabilitation program directed by the trial judge is working" and "[t]o impose a custodial term now would be a sentence far more crushing than it would have been if it had been imposed at the time of trial". The court moreover stated:

> ¶15 Although as I have observed this was a case in which an appropriate sentence should have included the imposition of a custodial term, in the circumstances which now confront this Court general principles of sentencing are not paramount.

[38] Then in **R. v. Boucher**, [2004] O.J. No. 2689, the respondent was sentenced to two years (less one day) plus two years of probation for attempting to murder his estranged wife. The Ontario Court of Appeal held that this sentence was unfit and that a term of six years less time on remand was more appropriate. However, the sentence at trial was varied only to increase the probation period to three years. The court stated:

> ¶33 … [A]t the time this appeal was heard, [the respondent] had been out of custody for several months. On the record before us, there is no indication that the [respondent] has made any attempt to contact the complainant, or otherwise repeat his previous misconduct, since being released. This court has commented on other occasions about the potentially deleterious impact of re-incarceration, particularly in relation to its effect on rehabilitation. ... In all of the circumstances, I do not consider that it would be in the interests of justice to re-incarcerate the appellant at this time.

See also: **R. v. C.S.P.**, 2005 NSCA 159 and **R. v. G.C.F.**, [2004] O.J. No. 3177 (ONCA).

DISPOSITION

[39] Therefore, despite the judge issuing a sentence that was demonstrably unfit, it is no longer in the interests of justice to re-incarcerate the respondent. In the result, I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Beveridge, J.A.

Farrar, J.A.