

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Gale, 1996 NSCA 163

Freeman, Bateman and Flinn, JJ.A.

BETWEEN:

DOUGLAS MICHAEL GALE)	Leonard MacKay
)	for the Appellant
)	
Appellant)	
)	
- and -)	
)	Dana Giovannetti
)	Kirsten Craven
)	for the Respondent
)	
HER MAJESTY THE QUEEN)	
)	
)	
Respondent)	Appeal Heard:
)	June 17, 1996
)	
)	
)	Judgment Delivered:
)	June 17, 1996
)	

THE COURT: Leave to appeal is granted but the appeal is dismissed per oral reasons for judgment of Bateman, J.A.; Freeman and Flinn, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

BATEMAN, J.A.:

The appellant, Douglas Michael Gale, applies for leave and, if granted, appeals his sentence on two charges.

The appellant, under the influence of alcohol and marijuana, assaulted his wife on the evening of January 24, 1996. There were two episodes of assault that evening. Between these two assaults, the appellant, standing at close range, pointed a 22-calibre rifle at his wife and pulled the trigger. Fortunately, the weapon was unloaded. The last assault was terminated by the arrival of members of the victim's family.

The appellant, pled guilty to one count of common assault (**s. 266(a), Criminal Code**) and one count of pointing a firearm without lawful excuse (**s. 86(1)(a), Criminal Code**). These offences, as charged, are each punishable by a maximum of five years' incarceration. Judge Embree imposed a 6-month term of imprisonment for the common assault concurrent to a 15-month term for the firearm's offence. He ordered the appellant to serve two years' probation, with conditions; imposed a 6-year firearm's prohibition pursuant to **s. 100(2) Code** and ordered forfeiture of a weapon pursuant to **s. 491 Code**. A third charge, breach of probation, was dismissed as the Crown offered no evidence.

The appellant contends that the sentence was harsh and excessive.

In considering whether a sentence should be altered, we must determine if the sentencing judge applied wrong principles or if the sentence is clearly or manifestly excessive. (**R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.) approving **R. v. Pepin** (1990), 98 N.S.R. (2d) 238 (C.A.), and **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.))

The sentencing judge correctly identified the relevant principles. He

acknowledged the need to emphasize general deterrence in crimes of violence. He noted the breach of trust involved in a spousal assault of this nature. That these offences were committed while the appellant was on probation for a prior assault on his wife, committed less than six months before was a significant, aggravating, factor. On that occasion the appellant was fined and a probationary period imposed. Attached to that probation order are conditions requiring counselling for drug abuse and anger management. The favourable treatment that the appellant had received from the court on the last assault had apparently not had the desired impact. Taking into account the circumstances of this offender and this offence, the sentence imposed was well within the range.

The Crown has raised one issue, not addressed by the appellant. Two guns had been entered as exhibits on the sentencing. The sentencing judge ordered forfeiture of Exhibit C-1. That gun, however, had not been "used in the commission of the offence", a prerequisite to a forfeiture order pursuant to **s. 491(1)** of the **Code**. Accordingly, the forfeiture order is set aside in relation to trial Exhibit C-1. The appellant remains, however, subject to the firearm's prohibition.

Leave is granted but the appeal is dismissed, with the exception of the disposition regarding the forfeiture order.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.

C.A.C. No. 126727

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REASONS FOR
JUDGMENT BY:

BATEMAN,
J.A.