

pled guilty. After hearing the testimony from the respondent's wife, examining the exhibits, including a pre-sentence report and a report from a psychiatrist, and hearing counsel, the sentencing judge on June 15, 1995, suspended the passing of sentence for two years and ordered that the probation order contain terms directing community service and continued counselling. It is from that determination that the appellant now seeks leave to appeal and if that is granted appeals, alleging that the sentence inadequately reflects the element of deterrence and further, that the sentence is inadequate having regard to the nature of the offence committed and the circumstances of the respondent.

Every assault is to be condemned, particularly those of a man against a woman, as is the case here, which is spousal assault. There are degrees of seriousness of the offence, recognized by the various sections in the **Code**. That the Crown considered the assaults in this case to be much less serious than others is demonstrated by the section under which the charge was laid and that, at sentencing, the Crown recommended incarceration for only a period of three months.

The respondent is 35 years of age; he has been married for about seven years. There are two children of that marriage. He has no prior criminal record. At the time of the offences he was a member of the R.C.M. Police.

As with most such reports, the pre-sentence report has both positive and negative aspects. It is clear that at the time of the offences, the respondent was suffering from mental and emotional stresses. To his credit, with the assistance of his wife, he sought and obtained counselling from experts as treatment for those problems prior to the laying of the charge.

The report of the psychiatrist sets out the respondent's psychiatric history and notes that since the charge was laid there has been improvement in the respondent's condition as expressed by both the respondent and his wife.

In his nine page decision the sentencing judge was clearly cognizant of the relevant sentencing principles applicable to the facts of this case. He considered the factor that at the time of the charge the respondent was an R.C.M. Police officer. He properly

placed weight upon the medical evidence presented concerning the condition of the respondent and the positive effect counselling has had upon the respondent. The sentencing judge also considered the testimony of the respondent's wife and the content of her letter to the Crown prosecutor, which letter was in evidence. He remarked:

I am going to give Mr. Poirier the benefit of the doubt with respect to his mental status and assign a good deal of the blame for what happened in this family to that fact. I am not however prepared to accede to the express desire of his counsel that there be a conditional discharge. I do not frankly see that incarceration would have any particular benefit or merit either in terms of deterring the public or in terms of protecting the public, that part of the public, from further incidents by people of a like mind and nature. Partly because of the ...to a good extent because of perhaps what Mrs. Poirier said about the mental frame of mind of the accused at the time or what she said in her letter.

Mrs. Poirier is an articulate person who was an impressive witness. With conviction, she denied being the so-called typically abused wife who wishes to forgive her husband and have him return to the home. She recognized his illness and the need for counselling.

A post-sentence report has been filed before this Court. Its author, Ms. Florence A. Smith, a senior probation officer, is the same person who prepared the pre-sentence report. The respondent performed the 200 hours of community service work with handicapped people. His supervisor in that endeavour expressed pleasure with the work performed by the respondent. He continued such work beyond the 200 hours on a volunteer basis.

During this time the respondent was "involved in a comprehensive ongoing program in terms of individual, group and marital therapy". Ms. Smith remarked that the records indicate that the respondent "has actively and constructively participated in all aspects of therapy". Both the respondent and his wife partake of the therapy.

The respondent also "completed a twelve week psycho-educational group called

Personal Effectiveness Training".

Ms. Smith mentioned the helpful report of Mr. Barry Wiser, a clinical psychologist whom she interviewed.

In his report of January 12, 1996 Mr. Wiser remarked:

Mr. Poirier has made very significant changes over the course of the last two years. Both he and his wife report no reoccurrence of any abusive or violent behaviour during this time. He is a much more introspective, less rigid person. He is more in tune with his emotions and can constructively deal with them. He feels more positive about himself and does not have a strong need to be in control of others. He has handled the stressors of the last two years well.

I do not believe that any adult who has been significantly abusive and violent can ever consider themselves totally cured. Mr. Poirier, however, has made more progress during these two years than other abusive men with whom I have ever worked. I would view his risk of re-offending at this point, as being reasonably low.

The respondent continues to see Mr. Wiser and remains involved in group therapy.

In addition, in January, 1996, the respondent became involved with a Fresh Start Program. The post-sentence report describes this program which offers group counselling for men who have verbally, mentally or physically abused a woman in a relationship. The person in charge of that program reported that the respondent actively participates in the group counselling and is described in a positive light.

The "Evaluation and Assessment" as set out in the Fresh Start Program states:

Mr. Poirier enrolled in the "Fresh Start" program as its first participant in the Yarmouth group. Upon initial assessment during his intake interview, he advised me that his participation was voluntary and that he was going to do "whatever it takes to help me continue to change". That initial statement proved to be exactly what Mr. Poirier meant as the group facilitators observed a high level of motivation to both attend and participate.

I have found Mr. Poirier to be open and honest with the facilitators as well as with other members of the group, often sharing from his own experiences to help others in the group to commit to change as well.

Mr. Poirier's willingness to confront and change destructive family behaviors which he had learned in his own family of origin was evidenced by the level of vulnerability he exhibited on a regular basis in the group.

In part of Mr. Poirier's past participation in the program, as well as involvement in the Yarmouth group, it is my opinion that Mr. Poirier has made significant enough strides in addressing both the behavioral conditions as well as the underlying causes of his behaviors and attitudes to be welcomed as a co-facilitator of a group of male abusers under the direction of a trained facilitator.

This is not something that I would be able to say about any of the other twenty men currently in our programs two groups in Yarmouth at the present time.

While it is true that no individual could ever be "cured", if such a claim would ever be warranted, I do believe however, that if confronted with the levels of stress and family conditions that he failed to deal with appropriately in the past, he would be a very negligible low risk and be unlikely to abuse again.

Ms. Smith again interviewed the respondent, his wife and his mother-in-law.

Each of the latter two are positive in respect to the respondent and consider that he is at low risk to re-offend due to his participation in therapy.

She reported:

In terms of probation supervision, the Offender is one who reported regularly to this service and has participated in all counselling as requested by this writer and any counselling suggested by other sources such as mental health. Serge Poirier is one who has proved most cooperative and open in terms of discussion with this writer.

In sum, this report and the reports of Mr. Wisser and Fresh Start are more positive than the pre-sentence report and reassure the comments of the judge at time of sentencing.

The primary consideration at time of sentencing is protection of the public. That

protection may be attained by rehabilitation of the offender. Ten months have now passed since sentencing. The respondent appears to be progressing toward rehabilitation. He was suffering from both mental and emotional stresses. Prior to sentencing he sought psychological counselling and continues to receive such counselling for those problems which counselling has had positive results.

Properly administered, as it appears is the case here, a suspended sentence can be rigorous for, if the person convicted does not adhere to the conditions set out in the probation order, he or she will be charged and punished, not only for the violation of the order but as well, sentenced on the original charge.

Section 687(1) of the **Code** dictates that a court of appeal consider the fitness of the sentence imposed. An appellate court is not given free rein to alter a sentence simply because it would have imposed a different one. A variation of the sentencing order may only be made if the appellate court is convinced it is not fit, that is, if the sentence is clearly unreasonable. See **R. v. Shopshire** (1995), 102 C.C.C. (3d) 193.

General deterrence is an important consideration in cases such as this. The sentencing judge considered that principle. In the particular and unique circumstances here where the respondent suffers from an illness, recognized it, and sought remedial counselling, the trial judge placed greater emphasis on the rehabilitation of the respondent which was being achieved due to continued counselling.

Taking into consideration the positive improvement the respondent has accomplished in respect to his mental health and the necessity for continuing the counselling which resulted in improvement to date, it appears that a custodial sentence may well destroy any progress he has made and would serve no genuine societal interest.

In my opinion protection of the public, upon the particular facts of this case, can be best served by a combination of a suspended sentence with the probation conditions imposed by the sentencing judge.

While I would permit leave to appeal, I would dismiss the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Flinn, J.A.

