

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. K.J.O., 1996 NSCA 205
Clarke, C.J.N.S., Jones and Pugsley, J.J.A.

BETWEEN:

K. J. O.)	Allan F. Nicholson
)	for the Appellant
)	
Appellant)	
)	
- and -)	
)	Denise C. Smith
)	for the Respondent
HER MAJESTY THE QUEEN)	
)	
)	
Respondent)	Appeal Heard:
)	October 15, 1996
)	
)	
)	Judgment Delivered:
)	October 15, 1996
)	

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal allowed and sentences varied per oral reasons for judgment of Jones, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

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

JONES, J.A.:

The complainant, L. M., and the appellant are former partners and have one child together, aged sixteen months. The couple had been together four years.

In June of 1995, the appellant moved from Cape Breton to Ontario, returning in November for a short time. Alleged difficulties between the complainant and the appellant caused the complainant to make application for a peace bond. The couple were also involved in a dispute over the custody of the children.

The appellant returned to Cape Breton again in December for the Christmas holidays. On December 30, 1995 at approximately 11:50 p.m., the appellant arrived at the complainant's apartment on [...] Street in Glace Bay, Nova Scotia. The complainant reluctantly allowed the appellant into the apartment, although she was fearful of him.

Shortly after his arrival, the appellant began to call the complainant names and hit her. He removed a knife from the kitchen and waving it around, told the complainant that he could kill her. The appellant threatened to rape the complainant's four year old son, and threatened to cut the throat of the couple's sleeping sixteen month old.

An argument ensued, and the appellant kicked the complainant about the abdomen. The appellant stated that he could kick her hard enough to kill her.

The appellant forced the complainant out of the apartment and would not allow her back in to get the children. The complainant arrived, hysterical and with

her shirt torn, at her neighbour's apartment, where the police were called.

After three or four attempts to gain entry, the appellant opened the door to the police. He was noted to be slightly impaired.

The appellant was taken into custody. He continued to make threats in the presence of the police.

The appellant was charged in an information sworn January 2, 1996, that he:

"At or near [...] Street, Glace Bay, in the County of Cape Breton, Province of Nova Scotia, did on December 31st, 1995 at [...], Glace Bay knowingly utter a threat to cause death to L. M. contrary to Section 264.1(1)(a) of the **Criminal Code of Canada**.

Did on December 31st, 1995, at [...], Glace Bay knowingly utter a threat to cause death to M. A. L. (age 4) by raping and then cutting his throat, contrary to Section 264.1(1)(a) of the **Criminal Code of Canada**.

Did on December 31st, 1995 at [...], Glace Bay knowingly utter a threat to cause death to G. J. M. (age 16 months) by cutting his throat, contrary to Section 264.1(1)(a) of the **Criminal Code of Canada**.

Did on December 31st, 1995 at [...], Glace Bay commit an assault on L. C. M. by striking her and kicking her about her head and abdominal area, contrary to Section 266(b) of the **Criminal Code of Canada**.

The appellant appeared in Provincial Court at Glace Bay, Nova Scotia on January 2, 1996. He consented to a remand until January 4, 1996 for a bail hearing. Following the show cause hearing, at which the complainant and the appellant both

gave evidence, the appellant was denied bail by Judge D. Lewis Matheson. The appellant then entered a plea of guilty on all counts and sentencing was adjourned to February 8, 1996 for the purposes of preparing a pre-sentence report.

On February 8, 1996, the Honourable Judge Matheson sentenced the appellant to a total term of imprisonment of four years for the four offences, being one year consecutive on each of the counts.

Pursuant to s. 830 of the **Criminal Code**, the appellant appeals to this Honourable Court against the sentence imposed on him by the Honourable Judge Matheson.

The main ground of appeal is that the sentences were too harsh and excessive.

The appellant was thirty years of age at the time of sentencing. He has a serious alcohol problem that causes violent outbursts when under the influence of alcohol. He has a substantial criminal record dating back to 1982 including convictions for assault and escaping lawful custody. All of the charges were summary conviction offences. The maximum sentence for each of the first three offences is 18 months imprisonment. The maximum for the assault is six months imprisonment.

Counsel for the appellant has submitted that the trial judge failed to take into account the totality principle and that the sentence on the fourth count was illegal. This court has found that it has no jurisdiction to hear an appeal against sentence under s. 830 of the **Code** where the sole issue is that the sentence is

excessive and therefore does not raise a question of law or jurisdiction. See **R. v. Carvery** (1990), 97 N.S.R. (2d) 328 and **R. v. Redden** (1992), 110 N.S.R. (2d) 348.

However the court has jurisdiction to deal with the matter of sentence where a question of law or jurisdiction is raised. See Ewaschuk **Criminal Pleadings and Practice in Canada**, 2d ed., Vol. 2, Paras 24:2100 and 24:3030.

As noted appellant's counsel has argued that the trial judge failed to consider the totality principle and that the sentence on the assault charge was illegal. These issues raise questions of law and the appellant is granted leave to amend the notice of appeal to raise these issues. Nevertheless these were serious offences. The appeal is allowed and the sentence is varied as follows:

The sentences on the second and third count are made concurrent to each other but consecutive to the sentence of twelve months on the first count. The sentence on the fourth count of assault is varied to six months consecutive to counts two and three for a total term of thirty months imprisonment.

Jones, J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.