C.A.C. No. 02888

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. McPhee, 1993 NSCA 213

B E T W E E N:

HER MAJESTY THE QUEEN	)	**Kenneth W.F. Fiske, Q.C.**
	)	**for appellant**
appellant	)	
	)	
- and -	)	
	)	
EDMUND ARKELL McPHEE	)	**Respondent did not appear**
	)	
respondent	)	
	)	
	)	**Appeal Heard:**
	)	**November 30, l993**
	)	
	)	**Judgment Delivered:**
	)	**December 1, l993**
	)	
	)	
	)	

THE COURT: Application for leave to appeal is granted; appeal allowed and probation order struck out per reasons for judgment of Hallett, J.A., Chipman and Pugsley, JJ.A., concurring.

HALLETT, J.A.:

This is a Crown appeal from a sentence imposed on the respondent who had pleaded guilty to two counts of sexual touching and three counts of sexual assault. The respondent was sentenced to a total term of imprisonment of twenty-seven months and was ordered to comply with a probation order for one year following the expiration of the sentence of imprisonment.

The Crown appeals on the ground that the sentencing judge had no jurisdiction under s. 737(1)(b) of the **Criminal Code**, R.S.C. 1985, c. 46 to make the probation order as he had sentenced the respondent to a term of imprisonment exceeding two years.

Section 737(1)(b) provides:

> " (1) Where an accused is convicted of an offence, the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,
>
> (b) in addition to finding the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order; or"

While none of the sentences imposed on the respondent for the five offences exceeded two years, the sentences were to be served consecutively and totalled twenty-seven months. It is settled law that the term of imprisonment referred to in s. 737(1)(b) is the total term when sentence is imposed for more than one offence. (**R. v. Henniger** (1983), 58 N.S.R. (2d) 110; **R. v. Amaralik** (1984), 16 C.C.C. (3d) 22; **R. v. Hackett** (1986), 30 C.C.C. (3d) 159)

As noted by the Crown in its factum s. 737(1)(b) is "somewhat awkwardly worded." The question arises whether the words "two years" refer to the length of the period of probation or the term of imprisonment.

We agree with the Crown that if there is any ambiguity, it is resolved by looking at s. 738(2)(b) of the **Code** which permits a sentencing judge to impose a period of probation for up to three years from the date the probation order comes into force. For the record section 738(2)(b) provides:

> "(2) Subject to subsection (4),
>
> (b) no probation order shall continue in force for more than three years from the date on which the order came into force."

Subsection (4) is not relevant to the issue in this appeal.

Having imposed a sentence of more than two years, the sentencing judge did not have jurisdiction to make a probation order.

On a related issue we would note that this Court, in **R. v. Cox** (1987), 76 N.S.R. (2d) 185 and **R. v. Porter**, May 25, 1992 (unreported) and in a dissent in **R. v. W.M.D.** (1992), 110 N.S.R. (2d) 333, interpreted sections 737(1)(b) formerly section 663(1)(b) to mean that the maximum period of probation that could be imposed was two years. The length of the period of probation was not the main focus of those appeals. We are satisfied on a careful review of section 737(1)(b) that the interpretation of the section in those appeals was incorrect and that the error should be noted so as not to be perpetuated.

The application for leave to appeal is granted and the appeal is allowed. The probation order is struck out.

Hallett, J.A.

Concurred in: Chipman, J.A.

Pugsley, J.A.

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B E T W E E N:

HER MAJESTY THE QUEEN	)	REASONS FOR
	)	
appellant	)	JUDGMENT BY:
	)	
	)	HALLETT, J.A.
- and -	)	
	)	
EDMUND ARKELL McPHEE	)	
	)	
respondent	)	