C.A.C. No. 116870

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Saccary, 1995 NSCA 199
Hallett, Roscoe and Flinn, JJ.A.

BETWEEN:

DANIEL THOMAS SACCARY	)	David R. Campbell, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Dana G. Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	October 3, 1995
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	)	
	)	Judgment Delivered:
	)	October 4, 1995
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THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Hallett and Roscoe, JJ.A. concurring.

FLINN, J.A.:

The appellant was convicted, after trial before a Supreme Court judge and jury, of sexual assault with a weapon, contrary to s. 272(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

At the time of sentencing, by agreement with the Crown, the appellant pleaded guilty to an outstanding, and unrelated, offence of break and enter of commercial premises with intent to commit an indictable offence contrary to s. 348(1)(a) of the **Criminal Code**.

Each offence is an indictable offence, and under the terms of each offence the appellant is liable to imprisonment for a term not exceeding 14 years.

The trial judge imposed a sentence of nine (9) years for the offence of sexual assault with a weapon, and, to run consecutively, a nine (9) month sentence for the offence of break and enter.

The following is a review of the circumstances of each offence:

Sexual Assault with a Weapon

On July 9th, 1993, the appellant, an acquaintance of the victim, went to the victim's home to wait for a female person whom he dated occasionally. During the course of the next hour the appellant and the victim each had one or two beer. The appellant had brought beer with him, and had been drinking before arriving.

At approximately 8:15 p.m. the victim went in to her bathroom to get ready to go out. The appellant, taking a knife from her kitchen, followed the victim into the bathroom. The appellant grabbed the victim by the hair, threatened her with the knife - placing it just behind her left ear where at some point a small cut was inflicted - and took her by force to the bed sitting room. Over the course of the next one and one-half hours the appellant

repeatedly forced the victim to perform oral sex on him and, for a brief period, had intercourse with her by force.

The victim testified before the jury that the appellant always had the knife in his right hand and would scrape it along her. She further testified that from the time the appellant took her from the bathroom up until the time of his eventual arrest, she feared for her life, and several times during that period the appellant had threatened her life.

A neighbour, in the same building, hearing the noise, telephoned the victim and asked her if she wanted to have the police summoned. She answered with a simple yes. The police were summoned and the appellant was arrested at the scene.

The police evidence confirmed that the appellant was intoxicated at the time.

Break and Enter into Commercial Premises with Intent

This offence occurred approximately seven months after the incident which gave rise to the sexual assault charge, and before the appellant's trial on that charge.

On February 11, 1994, Sonny's Pizza Shop, a restaurant in Dominion in the County of Cape Breton had been broken into. When the police arrived at the scene the front door was unlocked, the cash register was missing and a poker machine was lying on the floor. The police eventually recovered the cash register, behind a nearby premises. Information which the police had led to the appellant and he was eventually charged. Thirty dollars was stolen from the cash register. There was another party involved in the commission of this offence.

The Appellant's Prior Record

The appellant has no prior record of any sexual offence; however, in 1987 he was sentenced to thirty (30) days intermittent plus two years probation for theft over $1,000. Later in 1987 he was convicted of driving a motor vehicle while impaired and also driving

a motor vehicle while disqualified for which he was fined $500. In 1990 he was convicted of possession of a narcotic and fined $250. In 1992 he was convicted of another impaired driving offence for which he was sentenced to ninety (90) days in the Correctional Centre plus two years probation.

Pre-Sentence Report

In a pre-sentence report prepared by Correctional Services of the Department of Justice it is revealed that the appellant is 37 years of age. Since 1990 he has been separated from his wife and four children. He has a Grade 8 education. He is not employed, and has been in receipt of Canada Pension since 1990 due to a back injury.

According to the pre-sentence report the appellant has a longstanding history of alcohol and drug abuse. This problem is clearly recognized by members of his family; however, it is apparent that the appellant does not consider the problem as serious as everyone else does. As the senior probation officer said in his report:

> "The offender seems to be the type of person who has paid lip service to the fact he has a substance abuse problem, but he has never really come to grips with it nor made a serious commitment to treatment."

Victim Impact Statement

The victim of the sexual assault submitted a Victim Impact Statement dated February 20, 1995, approximately 18 months after the offence of July 3, 1993. The statement reads in part:

> "**PHYSICAL IMPACT**:
>
> I received a cut on my neck, a cut on my thumb as well as some bruising. At the hospital I was given a tetanus shot as well as the morning after pill - in case of pregnancy. From the time this happened I have lost at least 3 months of work. There are still days I miss because of depression related to this.
>
> **PSYCHOLOGICAL/EMOTIONAL IMPACT**:

> Everything has changed for me. I've become very withdrawn, overly emotional, afraid to go out, afraid of people. I worry constantly, not a day goes by I don't think about this. I'm extremely depressed, I've lost my trust and my faith in people, I am suspicious and nervous of everyone. I've become a recluse, I will not answer my door or let anyone in. People begin to avoid you because this subject always comes up and they get tired of hearing about it. I don't sleep or eat properly. I jump at every sound. I still sleep with knives in the door and chains against them, nightmares are driving me crazy, I can't sleep in the room where it happened. I see a counsellor once a month which is not enough. I begin seeing a psychiatrist in March. I am a frequent caller to the help and sexual assault line. I am no longer confident and trusting and I've become very cynical."

The Trial Judge's Decision

As is the focus of this appeal, the focus of the trial judge was on the offence of sexual assault with a weapon. The trial judge stated:

> "Mr. Saccary has to get his substance-abuse problem under control. I have considered the time he has spent on remand since the trial and also the fact that his record is unrelated except that most of it was generated by alcohol and drugs. Alcohol was a contributing but not a mitigating factor here.
>
> In sentencing an offender, the protection of the public is the court's paramount concern. How that protection might best be achieved is the problem the court has to balance. The court has to take into consideration the need to specifically deter Mr. Saccary from ever again committing this type of crime. It has to emphasize the need to deter others from committing this type of crime. The sentence has to reflect society's repugnance for this violent and degrading offence. I must also have regard to the prospect for the rehabilitation of the offender, and as I indicated, that will best be achieved if he comes to grips with his problem with alcohol."

The trial judge referred to the circumstances surrounding this offence as a "dangerous and brutal situation".

He further said:

> "There is no doubt that this was a night of abject terror for the victim, that she feared for her life, and that she was humiliated and traumatized by the degrading acts she was forced to perform."

He further said:

> "It is a crime of violence. It evidences a profound disrespect for the victim, a denial that she is entitled to a minimum of human dignity or self-worth. The only consolation here is that fortunately the victim's physical injuries were not more serious. That is more a function of luck than good management in this situation."

For the offence of sexual assault with a weapon the trial judge sentenced the appellant to 9 years in a federal institution. The trial judge then continued:

> "On the charge of break and entry into Sonny's Pizza; that was committed at a different time and place. On the mitigating side it was not a break and enter into a dwelling house, which the law considers much more serious than breaking into a business establishment. However, that is not to minimize the seriousness of the break and enter into a business establishment. That still carries a maximum of 14 years in jail.
>
> In this situation, however, I feel that a sentence of 9 months consecutive to the sentence I have just imposed would be an appropriate sentence."

Grounds of Appeal

The appellant asks this Court to intervene, and impose a lesser sentence than 9 years imprisonment, for the offence of sexual assault, arguing that the 9 year sentence is manifestly excessive.

Counsel for the appellant points to the following, which he suggests are factors that distinguish this case from other recent cases involving lengthy prison terms for sexual assault:

1. The appellant was intoxicated, he was at the victim's residence with her permission, he did not bring a weapon with him, which factors, he argues, tend to show the offence as one of impulse rather than stealth.
2. The prior criminal record of the appellant is not that of a hardened criminal. There are no previous sexual

> offences; and the appellant has only spent two previous periods of imprisonment, namely, 30 days (intermittent) and 90 days.
>
> 3. The lack of physical harm to the victim.
>
> 4. A lesser sentence would offer both a general and specific deterrent to the appellant.

Section 687(1) of the **Criminal Code** provides as follows:

> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> > (b) dismiss the appeal."

In **R. v. Cormier**, (1975) 9 N.S.R. (2d) 687, Macdonald J.A. said at p. 694-695:

> "Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused."

The trial judge reviewed various cases referred to him by counsel. That is proper because a practical guide to what is fit and not excessive, is the range of sentences imposed for similar offences within a period reasonably contemporaneous with the commission of the offence (**R. v. Sonier** (1986), 70 N.S.R. (2d) 425 (N.S.C.A.)).

In **R. v. Murray** (1986), 86 N.S.R. (2d) 361 the accused was convicted of sexual assault. There was no weapon involved. He was sentenced to four years and nine months.

The sentence was sustained on appeal.

In **R. v. Beaton** (1991), 118 N.S.R. (2d) 341 the accused was one of three men charged with sexual assault. No weapon was involved however because it was "gang rape" situation the accused was sentenced to six years imprisonment.

The case of **R v. Boudreau** (1992), 105 N.S.R. (2d) 15 (N.S.C.A.) more closely resembles this case under appeal than any other. In **Boudreau** the accused had offered a drive home to a lady he met at a local club playing darts. Instead of driving her home he drove to a secluded spot and, threatening her with a knife, forced her to have intercourse and oral sex over a prolonged period of time. When the accused got out of the car to urinate, the victim locked the car doors, put the car in gear and drove to get help. The accused had no prior convictions of any sexual offences but did have three prior convictions for theft over $50, a breathalyzer offence, and an offence for failing to remain at the scene of an accident. The accused was sentenced to eight years imprisonment, taking into account ten months pre-trial custody.

Macdonald J.A. of this Court, in upholding that sentence on appeal, said at p. 22 of the case report:

> "The predominant consideration in sentencing for sexual assault must, of course, be deterrence, the object being to deter the accused and others from emulating such conduct. I have considered the circumstances of the offence, the previous record of the accused and the remarks of the learned trial judge. Although the sentence can be considered as being at the high end of the range of sentencing for sexual assault, it is not manifestly excessive. It cannot be said that the eight years' imprisonment was not a fit sentence in this case."

R. v. Patey (1992), 114 N.S.R. (2d) 434 and **R. v. Wadden** (1986), 71 N.S.R. (2d) 253 are also cases of sexual assault. **Patey** involved aggravated assault, **Wadden** involved sexual assault causing bodily harm. In each case a term of 12 years imprisonment was imposed, and upheld on appeal. In both of these cases the criminal records of the

accuseds were far more extensive than in this case on appeal.

Is the nine year sentence imposed on the appellant, in this case, manifestly excessive?

The trial judge presided over this trial before a jury. He heard testimony from both the victim and the appellant, and he would have formed impressions as that testimony was given. I cannot find in his decision that he applied any wrong principles or was influenced by improper considerations. The trial judge did emphasize the need for general deterrence, and that is proper in a case like this.

As Macdonald J.A. said in **Murray** (supra) at p. 369-370:

> "The sentence imposed here gives more emphasis to the element of deterrence than to that of rehabilitation. To my mind that is as it should be."

(See also **R. v. O'Brien** (1992), 117 N.S.R. (2d) 48 per Chipman J.A. at p. 52, para. 21)

It is difficult to imagine the terror which the victim must have felt, as she feared for her life, while the appellant - wielding a knife - degraded, abused and violated her.

To say that her physical injuries are not serious, in my view, says nothing in mitigation of these senseless acts. The victim's physical injuries will, no doubt, heal relatively quickly. The psychological and emotional damage done to the victim here, as evidenced by the victim impact statement, will be a long time healing, if ever completely.

The psychological and emotional injuries to the victim are precisely those kinds of injuries of which the Supreme Court of Canada has recently taken judicial notice. In **R. v. McCraw** (1992), 66 C.C.C. (3d) 517 Mr. Justice Cory, writing for a unanimous Court, said at p. 527:

> "The psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self-esteem. It is a crime committed against women which has a dramatic, traumatic

> impact . . . To ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law."

Under the circumstances therefore, while a sentence to nine years imprisonment is a harsh penalty, and probably at the high end of the scale, in my opinion it is not so manifestly excessive as to warrant intervention by this Court.

It was quite proper, in view of the "dangerous and brutal" circumstances of this sexual offence, for the trial judge to impose a lengthy prison term. The trial judge took into account the appellant's previous record and the fact that he was intoxicated at the time of the commission of the offence. He, quite properly, did not consider the intoxication as a mitigating factor.

Further, in reviewing this matter, this Court has to keep in mind the total term imposed in consecutive sentences.

In addition to the nine year sentence for sexual assault with a weapon, the trial judge sentenced the appellant to nine months for the break and enter offence, to be served consecutively. The total term imposed, therefore, is nine years and nine months.

I agree with counsel for the appellant that in sentencing the appellant to nine months for the break and enter offence the trial judge gave most generous allowance for the totality principle.

I would grant leave to appeal but I would dismiss this appeal.

Further, since the appellant was convicted of an indictable offence, in the commission of which violence against the person was used; and, since that offence carries a maximum penalty of 14 years imprisonment, it is mandatory, under s. 100 of the **Criminal Code**, that an order be made prohibiting the appellant from possessing any firearm or any ammunition or explosive substance for a period of 10 years after the appellant's release from

prison. I would issue such an order.

Flinn J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.

C.A.C. No. 116870

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DANIEL THOMAS SACCARY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

R E A S O N S FOR JUDGMENT BY:

FLINN, J.A.