C.A.C. No. 101877

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Porter,1994 NSCA 152

Matthews, Chipman and Pugsley, JJ.A.

BETWEEN:

BARRY ROBERT PORTER Appellant - and - HER MAJESTY THE QUEEN Respondent	The appellant appeared in person Gordon S. Gale, Q.C. for the Respondent Appeal Heard: June 3, 1994 Judgment Delivered: June 29, 1994

THE COURT: Appeal of conviction dismissed, leave to appeal sentence is granted, the appeal is allowed reducing sentence to time served, per reasons for judgment of Pugsley, J.A.; separate concurring reasons by Chipman, J.A.; dissenting reasons by Matthews, J.A.

PUGSLEY, J.A.:

The appellant seeks to withdraw his plea of guilty to a charge of robbery with violence from Belinda Hoben contrary to s. 344 of the **Criminal Code**, and to enter a plea of not guilty.

He also seeks leave to appeal, and if granted, appeals from the sentence of two and one half years imposed on January 31, 1994.

The events occurred on January 26, 1994, the appellant was arrested the same day, and five days later his counsel advised the Court that he would be entering a plea of guilty.

The appellant was asked by the trial judge if there was anything he would like to say and he responded:

"No. Your Honour. I am very sorry for what happened."

Both Crown and defence counsel agreed on a joint recommendation of two years incarceration in a federal institution.

The trial judge rejected the joint recommendation, stressing the breach of trust arising out of the appellant's "special relationship" with Ms. Hoben.

The trial judge stated:

> "the violence imposed was mainly of a psychological nature, but was effective, because mainly there was such a relationship."

The information supplied by counsel to the trial judge discloses the following:

- The appellant and Ms. Hoben were in a common-law relationship which had its ups and downs for over a year;

- On January 26, 1994, she had received a social assistance cheque which she gave to the appellant to cash, out of which he was to pay her rent;

> - On the way home from cashing the cheque, the appellant, without first paying the rent dropped into a tavern, spent approximately $l0.00 on liquor and brought a friend back to the apartment;
>
> - After accepting the cash, Ms. Hoben then ejected the friend from the apartment. This action prompted an argument with the appellant. He decided to retrieve the money from her jean's pocket to pay the rent. Her jeans were too tight to permit him to extract the money so he raised her hands over her head, and commenced to pull down her pants. When she begged him not to hurt her, he stopped. The jeans were at a level permitting him to take the cash;
>
> - He left the residence. She contacted the police. The appellant was located nine hours later at a tavern, having spent $20.00 on liquor, with the balance of the rent money intact. After an appropriate police caution, the appellant admitting to "stealing the money."

The appellant was 29 years old at the time of the offence. He has a grade nine education. His criminal activities commenced in 1981 when he was a young offender. His record reveals 13 offences, mostly of a property nature, except for a conviction in September of 1988 for sexual assault and a further conviction for assault in November of 1990.

Defence counsel advised the trial judge that there was no major struggle and no blow was struck.

Unfortunately, no victim impact statement or pre-sentence report was available for the Court.

In the notice of appeal dated February 22, 1994, filed by the appellant personally with this Court, it is stated:

> "I would like an appeal because my conviction was based entirely on a lie. Apparently my common-in-law wife was under the influence of pills at the time of robbery but there wasn't a robbery

> at all. At the time I felt there wasn't any way to fight it. But I now realize that I could have won my case. If further details are required, please contact my common-in-law wife Belinda Hoben at 49 Cliff Street, Yarmouth, Nova Scotia."

Apparently on the same day, Ms. Hoben went to the office of the legal aid counsel who had represented the appellant at the sentence hearing. After receiving his advice, she went to the local detachment of the R.C.M.P. on February 25th and after the interview, she signed a seven page statement.

The statement is unsworn, but acknowledged by Crown counsel to be witnessed by a member of the Yarmouth R.C.M.P.

As a result of an internal administrative problem in the Yarmouth Detachment, the statement was never forwarded to Halifax, and consequently was not seen by counsel acting for the Crown at this appeal, until the appellant made representations requesting introduction of the statement into evidence.

After reviewing the statement at the Court's request, Crown counsel advised that he had no objection to the Court accepting the statement into evidence.

The Court accepted the document, but reserved decision with respect to the use, if any, to be made of it.

The statement of Ms. Hoben acknowledges that she initially told the police that the appellant had used force to steal her money from her and he did not live with her. On February 25th, she stated that her original complaint was made at a time when she was combining alcohol with medication for her nerves.

The statement proceeds:

> "I got my disability cheque around 2:00 p.m. and I sent Barry to cash it and to make a house payment for me and he cashed the cheque but couldn't get a ride to Starrs Road to make the payment . It was too cold to walk and he said 'never mind I'll get a cab there and back and make it' and he said 'maybe later I'll get a ride, don't worry about it I'll take care of it' like he has always done before. Then Bob Black came to the door and I don't like him so I kicked

> Bob out of the house and got mad at Barry for bringing him there and tried to kick him out for the second time this week. I told him to give me the money back and he did then I had another drink of rum along with the three pills I took and he was trying to say 'can't we talk about this' and I said 'no' I was going out to a bar and he knows I lose money because of bad vision. He said 'give me the money' and he tried to calm me down and he came over beside me and said 'is the money in your pocket' and I said 'yes' and he reached over and took the money out of my pocket and he was trying to kiss me and make up and he put the money in his pocket and I freaked and I told him to get out and he left with the money and I didn't ask for the money and I called you guys."
>
> She discloses that she "playfully" let the appellant pull her pants down.

She contacted the appellant after he was incarcerated because "I wanted to know why he pled guilty when he knew that was not really happened and he said this because if he pleaded not guilty he would have needed five thousand dollars for bail and all kinds of restrictions so he figured he may as well plead guilty and his lawyer told him he couldn't get him off, he would have to get another lawyer."

In response to questioning from this Court, the appellant advised that after his arrest on January 26th, he was required to post bail set at five thousand dollars to obtain interim release. He could not comply with the conditions. Upon being advised that he would spend the next five months in the county jail awaiting trial, he decided to plead guilty in anticipation of receiving two years federal time. He responded that, two years in the federal jail was far more acceptable than spending five months in the local county lock-up.

Should the appellant be permitted to withdraw his guilty plea, bearing in mind that he consulted with, and was represented by counsel, at trial?

The justification offered in support of the request is the appellant's assertion that "my conviction was based entirely on a lie." The lie to which the appellant refers is apparently the story originally given to the police by Ms. Hoben.

In **Adgey v. The Queen** (1975), 2 S.C.R. 426, Dickson, J. on behalf of the majority, stated at page 431:

> This Court in **Queen v. Bamsey** (1960), S.C.R. 294 at p. 298, held that an accused may change his plea if he can satisfy the Appeal Court "that there are valid grounds for his being permitted to do so." It would be unwise to attempt to define all that which may be embraced with the phrase "valid grounds".

Without intending to be exhaustive, Dickson, J. listed some of the grounds that he considered would meet the test. They include the situation where the accused never intended to admit to a fact, which is an essential ingredient of the offence, or a situation where the accused may have misapprehended the effect of a guilty plea, or never intended to plead guilty at all.

In addition, there are circumstances when pleas of guilty may be withdrawn, if there is an appearance of unfairness; (**Regina v. Stork** (1975), 24 C.C.C. (2d) 210).

Such is not the case here. The appellant does not submit that he did not understand the process, or that he was treated unfairly.

The comments of Sidney Smith, J.A. in **R. v. Sanders** (1953), 106 C.C.C. 76 are brought to mind:

> "On the face of it, there would seem something anomalous in the law if it allowed an accused person, with full understanding, to plead 'guilty' before a magistrate and then, because he found the sentence expectedly heavy, or had unexpected consequences, or for some other reason having nothing to do with the merits, allowed him to appeal to the county court and, without explanation, blandly plead 'not guilty', and thus obtain a full trial on the merits. That seems to be playing fast and loose with the administration of justice." (cited with approval, by Ritchie, J. on behalf of the Court in **R. v. Bamsey** (1960), S.C.R. 294 at p. 300).

The appellant was fully aware of all the relevant facts surrounding the January 26th incident. Any "lies" related by Ms. Hoben to the police could not affect the appellant's understanding of those facts. He interpreted those facts as constituting "stealing". He had, in addition, an opportunity, which he used, to seek the guidance of counsel.

In my opinion, the appellant has not met the heavy onus required to justify a withdrawal of a plea of guilty.

Accordingly, I would dismiss the appeal against conviction.

The Crown has acknowledged that while Ms. Hoben's statement of February 25th may not necessarily meet the Palmer test, (**Palmer and Palmer v. the Queen** (1980), 1 S.C.R. 759), it may be considered by this Court on sentencing. This acknowledgment is consistent with the flexibility this Court has adopted particularly when the evidence is tendered in favour of accused persons (**R. v. Hogan** (1979), 34 N.S.R. (2d) 641 at 652).

The absence of any request by the Crown for an adjournment so that steps might be taken to further verify the information, contained in Ms. Hoben's statement, is consistent with a position that the information should be treated seriously.

The new information casts a different light upon the material placed before the trial court.

If one accepts the unsworn statement of Ms. Hoben as being accurate, the situation is one in which the parties were living together for two years, that it was common practice for the appellant to cash cheques for Ms. Hoben and pay her rent out of the proceeds, that she was somewhat impaired at the time he returned to the apartment, that she did not object to the lowering of her pants, that he fully intended to pay her rent obligation the following day, and that her complaint to the police contained inaccuracies.

While joint recommendations by counsel concerning quantum of sentence are entitled to serious consideration by the Court, they are not binding, and in my opinion, should be ignored in this case.

They were based on an understanding of the facts of January 26th which does not correspond to the information disclosed in the statement.

It is, in my opinion, not unreasonable to assume that had this material been placed before counsel prior to the sentence hearing, that it would have affected any recommendation made.

The "psychological" nature of the violence imposed, a matter stressed by the trial judge, was in the light of the statement, minimal, and obviously had no lasting effect.

In light of this new information, I would grant leave to appeal, allow the appeal, and reduce the sentence to time served.

Pugsley, J.A.

CHIPMAN, J.A.:

I concur with the reasons for judgment proposed by Pugsley, J.A. I wish to add two observations.

First, but for the new information before us, I would not be prepared to disturb the disposition made by the Provincial Court judge. While in general a joint submission should be entitled to great weight a judge must, in no way, feel bound by it. It is the prerogative and duty of the judge at trial to impose the sentence he or she considers fit in accordance with the principles of sentencing. See **R. v. Lai** (1988), 69 Nfld. & P.E.I. R. 297 at 301; **R. v. Morrison** (1981), 49 N.S.R. (2d) 473 at 477; **R. v. Atwood** (1983), 60 N.S.R. (2d) 245 at 252 and **R. v. Merenick** (1991), 117 A.R. 368 at 369. A review of the record satisfies me that the Provincial Court judge did not err in the application of the principles of sentencing, nor in the length of the sentence, given the information that was before him.

Second, while I agree that the appellant has failed to satisfy the stringent test which must be met before the plea of guilty can be set aside, the fresh material is properly before us on the issue of sentence. I attach significance to the Crown's assent that it could be used, and the absence of a request by the Crown for an adjournment to further verify the information. The information now disclosed reveals that the offence was at the extreme low end of the scale. The circumstances are very unusual indeed and are sufficient to justify this court in departing from the substantial sentence given by the trial judge, which would be otherwise appropriate for such a serious crime as robbery.

I would therefore allow the appeal and dispose of it as Pugsley, J.A. has proposed.

Chipman, J.A.

MATTHEWS, J.A.: (Dissenting)

On January 31, 1994 the appellant pled guilty in Provincial Court to a charge that he at Yarmouth, Nova Scotia did steal $380.00 from Belinda Hoben, and at the time used violence to her: s. 344 of the **Code**. He now appeals from that conviction and seeks leave to appeal and if that is granted, appeals from the sentence imposed of 30 months incarceration.

His ground of appeal from conviction is:

> I would like to appeal because my conviction was based entirely on a lie. Apparently my common law wife was under the influence of pills at the time of the robbery. But there wasn't a robbery at all. At the time I felt there wasn't any way to fight it. But I now realize that I could have won my case. If further details are required please contact my common law wife Belinda Hoben at 94 Cliff St., Yarmouth, N.S.

He applied to adduce fresh evidence before us. That evidence is an unsworn statement of Ms. Hoben purportedly given to a police officer in Yarmouth. Crown counsel had not seen the statement until it was produced before this Court. The effect of the statement is that she now says that her first story given to the police was untrue; no criminal act occurred; and that she is in love with the appellant. Interestingly, in many respects the statement is not in accord with what the appellant stated to this Court. It is also contrary to the information she gave to the police on the day of the offence.

At trial the appellant was represented by counsel. He appeared before this Court without counsel.

When the case was called at trial his counsel said:

> Yes, Your Honour. I am here in relation to the Barry Porter matter. It's a robbery charge. I can indicate that we'd be waiving the reading of the charge. We'd be electing trial by this Court and entering a guilty plea to the matter.

In his factum before this Court Crown counsel commented:

> The facts were related by [Mr. Scovil] and were not disputed by the Appellant or his counsel. Those facts are that on January 26 Ms. Hoben gave the Appellant her welfare cheque to cash and then pay her rent. When the appellant returned in the company of some friends he told Ms. Hoben he had purchased some liquor. Ms. Hoben demanded the remainder of the money and was given $380.00 which she put in a pocket in her jeans. The Appellant's friends left and then the Appellant held Ms. Hoben's hands above her head, pulled down her jeans, took the money and left. Later that evening the Appellant was arrested and taken into custody. He contacted Mr. Scovil at the police detachment.

Both counsel at sentencing addressed the issue of violence. Evidently the appellant had tried to take the money from the pocket of Ms. Hoben's jeans but could not because the jeans were too tight. On two occasions Crown counsel referred to the fact that the appellant put Ms. Hoben's arms above her head and then tugged on her jeans until they dropped. She begged him not to hurt her. He then took the money from one of the jeans' pockets.

Appellant's counsel put it this way:

> There's some aspect of violence, in the sense that he - he tried to get the money away. She didn't want him to take it, and he - he couldn't get into her pocket. There was no major struggle. There was no - no assault in the sense of any blows. It's just that struggle. He pulled down her pants and took the money, and there was very little struggle from what I understand from both the Crown Sheet and from talking to the accused. [Emphasis added]

That there was an aspect of violence and a struggle, there can be no doubt. Neither can there be doubt that appellant's counsel obtained that information from the appellant.

The trial judge asked if there was a victim impact statement, to which appellant's counsel replied:

> I don't believe so, Your Honour. Although, I know that the victim is quite upset over the incident, and - and does not want to see Mr. Porter again."

The trial judge then asked the appellant if there was anything he would like to say, to which the appellant replied:

> No, Your Honour. I'm very sorry for what happened.

It would appear that we have the somewhat analogous situation of a battered wife who justifiably complains and later seeks to have her assailant returned to her.

As Crown counsel pointed out: the appellant has a substantial criminal record and thus it may be presumed that he has some familiarity with the court process. The appellant, under caution by the arresting officer, admitted stealing the money from Ms. Hoben. The appellant has not established that his counsel was not acting contrary to his instructions or that he did not understand the consequences of the guilty plea. Indeed from the representations of his counsel respecting sentencing it is clear that he intended to plead guilty and reach some agreement with the Crown respecting a joint submission on sentence. In addition, when given the opportunity to speak, his only comment was that he was "very sorry for what happened". The only reasonable conclusion is that the appellant intended to plead guilty and is guilty as charged.

Only when valid grounds exist will this Court permit a guilty plea to be withdrawn. No such grounds exist here. It is of importance to repeat: the appellant was represented by counsel before the trial judge. See **R. v. Paiero** (1986), 71 N.S.R. (2d) 268 (C.A.) and the comments in **Adgey v. R.**, [1975] 2 S.C.R. 426.

I would refuse to permit Ms. Hoben's statement to be introduced into evidence.

I would dismiss the appeal from conviction.

As previously mentioned, counsel made a joint recommendation to the trial judge: incarceration for two years in a federal institution. It is trite to say: a judge at sentencing is not bound by such a recommendation. After considering all of the circumstances the trial judge sentenced the appellant to imprisonment for 30 months.

At time of trial the appellant was 29 years old. No pre-sentence report was prepared for the trial judge. Counsel preferred to proceed immediately with sentencing after the guilty plea. His criminal record reveals 13 offences between

February of 1981, when the appellant was a young offender, and November of 1990. He was on probation when he committed some of these offences. He was released on mandatory supervision in April of 1991. While most of the offences are property related, it is of importance that in September of 1988 he was convicted of sexual assault and convicted of assault in November, 1990.

A study of the reasons for sentence reveals that the trial judge considered all of the relevant facts, including those of a mitigating nature, which led him to remark:

> There is some glimmer of hope in that you have recognized quickly the - your error, and you have entered a plea of guilty about five days after the offence, and I am told that you have also cooperated with the police. Whether this is a sign of growing - growing maturity on your part or a early recognition of an impossible situation, I don't know, but I will give you the benefit of the doubt on this one.

He considered the applicable law and took into consideration the joint recommendation of counsel. He then commented:

> ...This is not a case of a sexual assault by an adult against a child, but there was a special relationship between you and Miss Hoben, and this you breached; and so even though the relation...the recommendation is not unreasonable to my mind, it is not a high enough sentence. In imposing a sentence I do, however, keep in mind that the violence that was imposed was mainly of a psychological nature, but was effective because mainly there was such a relationship.

Is the sentence excessive?

The appellant, seeking the assistance of the statement of the victim of his robbery, now wishes to have his sentence reduced. He says it is excessive. In essence his plea is that the sentence should be reduced because there was no robbery. Taking into consideration that he appeared before us without counsel his position may be altered to that of a plea that the robbery did not take place in the manner explained to the trial judge by his counsel, which version his counsel obtained "from talking to the accused". That, in my opinion, is an unacceptable proposition.

When this Court questioned him, he would have us believe that he simply asked for the money and it was given to him. Contrary to the facts before the trial judge he did not hold the victim's hands above her head, pull down her pants and extract the money from one of the pants' pockets. It was only after pressing him that he reluctantly agreed that he pulled down her pants. He would not agree that he held her hands above her head and importantly denied there was any struggle. He asserted that he simply took the money for the well being of the victim: he wanted to help her because he was concerned that if she had the money she would spend it on drugs to which she had become addicted. Not only are those assertions contrary to the facts adduced before the trial judge, they are, in logic, contrary to the statement at trial, that in the first instance, the victim gave him the money to pay the rent; when he returned to the apartment with a bottle of liquor and a friend, not having paid the rent, the victim became annoyed and demanded the money from him. He would now have us believe that he purchased the liquor for her with his money, not hers. While the facts at trial were that, acting on the complaint of the victim, the police searched for him and

arrested him at a tavern at 10:55 p.m. the same day, he now says the time was about 7 p.m. and that he did not spend her money at the tavern, it was his.

If the events were as given to us by the appellant now considered in mitigation of sentence, why did he plead guilty? On arrest, why did he admit to the police officer, under caution, that he stole the money from Ms. Hoben? Why did the complainant call the police? Why did she lay a complaint? Why did she say, as recounted by counsel to the trial judge, that she was upset over the incident and did not want to see him again?. When given the opportunity by the trial judge to speak on his own behalf, why didn't he then, at that most appropriate time, inform the trial judge that the facts as presented by counsel were wrong? Why did he not object to the joint submission of counsel and state that the agreed sentence of two years was excessive?

As previously mentioned, Crown counsel had not seen Ms. Hoben's statement until it was produced before this Court. When questioned as to whether the statement could be considered for purposes of reviewing sentence, Crown counsel replied in the affirmative. With respect, in my opinion, it should be rejected for that purpose as well. In the past we have considered post-sentence reports but only to consider the then position of the appellant or the condition of a victim. Here it is suggested that we consider the impact of the statement in respect to its relation to the events which led to conviction and sentence based thereon, an entirely different concept. Also here the statment is in essence a denial that any criminal act occurred. I suggest that it is not logical then to permit the events as recounted in the statement denying the criminal act to be used in mitigation of sentence.

It would have been helpful to the trial judge (and to this Court) had a victim impact statement been prepared. The trial judge accepted that "there was a

special relationship between you and Miss Hoben, and this you breached". He continued:

> In imposing a sentence I do, however, keep in mind that the violence that was imposed was mainly of a psychological nature, but was effective because mainly there was such a relationship.

Undoubtedly that remark was based upon the submission to him by appellant's counsel that:

> She was upset and did not want to see Mr. Porter again.

It was because of the relationship between the appellant and Ms. Hoben that the trial judge imposed the sentence of 30 months rather than the recommended two years.

In all probability neither a victim impact statement nor a pre-sentence report was prepared because counsel agreed to make a joint recommendation respecting sentence. That omission cannot now be used to the advantage of the appellant.

Without regard to the statement of Ms. Hoben - is the sentence excessive?

Robbery is a serious crime; so serious that the perpetrator is liable to be imprisoned for life: s. 344 of the Code. The appellant was found guilty of that offence. An integral part of the offence is the use of violence. The appellant pled guilty to stealing money from the victim and using violence in order to do so.

The particular circumstances here do not place the offence at the high end of the scale. However we must take into consideration that not only has this

offender a dismal record but that record includes a conviction for assault and one for sexual assault. He was in a position of trust in respect to Ms. Hoben when the offence was committed. Unfortunately actions to obtain the result he desires, even though they entail criminal acts, are not unknown to him.

Sentencing is the prerogative of a trial judge. The judge need not accept a joint submission. Such submissions are normally determined after discussions and negotiations between counsel who are in possession of all of the relevant facts. More often than not the complete reasons for reaching a submission are not disclosed to the court. Joint submissions are to be of value for they tend to shorten argument and the length of hearings. Full regard should be given to them. In my opinion such submissions should only be rejected in unusual circumstances. With deference to the trial judge it does appear that counsel took into consideration in arriving at their joint submission that a "special relationship" existed between the appellant and Ms. Hoben, the issue relied upon by the trial judge to increase the sentence over that suggested in the joint submission.

While a joint submission is not binding on the trial judge or this Court, nonetheless it is an important factor to keep in mind in considering a fit sentence.

After reviewing the material before us and hearing the appellant and Crown counsel, with respect, it is my view that the sentence suggested in the joint recommendation should be imposed. We have been given no persuasive reasons for rejecting it and imposing a lesser sentence. The fact that counsel did not set out full reasons for the recommendation or produce a pre-sentence report or victim impact statement which may have disclosed more complete reasons, cannot in these circumstances now be used in order to mitigate the sentence from that recommended.

I would permit leave to appeal from sentence, allow the appeal and reduce the sentence to two years incarceration in a federal institution.

J.A.

C.A.C. No. 101877

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

BARRY ROBERT PORTER Appellant - and - HER MAJESTY THE QUEEN Respondent	)	REASONS FOR JUDGMENT BY: PUGSLEY, J.A.