C.A.C. No. 103707

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Roscoe, JJ.A.

Cite as: R. v. Richard, 1994 NSCA 242

BETWEEN:		
ROBERT ALLAN RICHARD		William B. Digby, Q.C. for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Robert C. Hagell for the Respondent
	Respondent	
		Appeal Heard: November 22, 1994
		Judgment Delivered: November 23, 1994

THE COURT: Leave to appeal is granted, the appeal is dismissed of the sentence and the order made pursuant to s. 741.2 is set aside as per reasons for judgment of Roscoe, J.A.; Hallett and Chipman, JJ.A., concurring.

ROSCOE, J.A.:

The appellant was convicted after trial by Justice Nunn of committing a sexual assault on N.L. contrary to s. 271(1)(a) of the **Criminal Code** and of uttering a

threat contrary to s. 264.1(10)(a) of the **Criminal Code**. He was sentenced to seven years imprisonment for the sexual assault and one year concurrent on the threat charge. In addition, the trial judge ordered that the appellant serve one half of his sentence before being eligible for parole pursuant to s. 741.2 and imposed a ten year weapons prohibition order pursuant to s.100.

The appellant now applies for leave to appeal and, if granted, appeals against the sentence. He contends the trial judge imposed a sentence that is harsh and oppressive and therefore erroneous.

The complainant, a 23 year old student, testified that as she was leaving a cabaret on October 24, 1991 just after 3:00 a.m., she was approached by the appellant. Having on three previous occasions had brief, unpleasant encounters with the appellant, she attempted to move away from him. He followed her and grabbed the back of her neck under her hair and steered her away from the area telling her to go with him quietly or he would slit her throat. Keeping a tight grip on her neck, and making continuous threats to kill her, he steered and pulled her from Brunswick Street, down through the Grand Parade, up Barrington Street, past Scotia Square, down to Lower Water Street and then back up to Barrington Street to a gas station where he pulled her to the ground between two parked cars. He repeated the threats that he would kill her, restrained her hands, pushed and pulled her clothing and undergarments aside, undid his trousers, laid on top of her, bit her breasts and forcibly performed both vaginal intercourse and fellatio on her. When he pulled off of her to ejaculate, she managed to break free of his grasp and run out onto Barrington Street. He chased after her until a passer-by stopped his car and picked her up. The whole incident lasted approximately an hour.

The trial judge considered the lengthy record of the appellant, a pre-sentence report, the victim impact statement, the representations of counsel and the circumstances of the offence which he described as vicious, brutal and serious. He stated that the sentencing principle that had to be emphasized in this case was general deterrence. He took into account the numerous terrorizing threats in passing the sentence on the sexual assault and therefore ordered that the sentence on the threat charge run concurrently.

The offence committed by the appellant was a barbarous crime of violence. The victim was terrified for her life and viciously defiled over a prolonged time. The trauma suffered by her is long lasting and profound. A sentence that reflects society's denunciation of the crime had to be imposed. The trial judge thus properly emphasized general deterrence. He considered all the relevant factors, including the long prior record and concluded that a fit and proper total sentence was seven years. There is no error in principle in his reasoning nor his conclusion. The sentence is not manifestly excessive or unfit. While we would grant leave to appeal, we would dismiss the appeal of the sentence.

The appellant also appeals the order made pursuant to s. 741.2 that requires him to serve half of his sentence before being eligible for parole. Section 741.2 provides as follows:

> "741.2 Notwithstanding subsection 120(1) of the **Corrections and Conditional Release Act**, where an offender is sentenced,after the coming into force of this section, to a term of imprisonment of two years or more on conviction for one or more offences set out in Schedules I and II to that Act that were prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offences and the

> character and circumstances of the offender, that the expression of society's denunciation of the offences or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less."

Section 741.2 was proclaimed in effect on November 1, 1992, a year after the offence in this case. The appellant submits that the operation of s.11(i) of the **Charter** prevents the application of s. 741.2. Reference is made to **R. v. Boone**, unreported, September 13, 1993 (Man.C.A.); **R. v. Cory** (1993), 18 C.R.R.(2d) 340 (Man.C.A.) and **R. v. Lambert**, unreported, September 26, 1994 (Nfld.C.A.) where in each case it was determined that the trial judge erred by applying s. 741.2 in instances where the offence took place prior to the effective date of the section. A similar conclusion was reached by the Ontario Court of Appeal in **R. v. Schweir**, unreported, September 16, 1994. We agree that it would be a breach of s. 11 of the **Charter** to apply the section in this case. Therefore the order made pursuant to s. 741.2 is set aside. The warrant of committal should be so altered.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.