C.A.C. No. 114986

NOVA SCOTIA COURT OF APPEAL

Freeman, Jones and Pugsley, JJ.A.
Cite as: R. v. Helpard, 1995 NSCA 194

BETWEEN:

ELIAS NATHANIEL HELPARD Appellant	The Appellant in person
- and -	
HER MAJESTY THE QUEEN Respondent	Dana W. Giovannetti for the Respondent
	Appeal Heard: September 13, 1995
	Judgment Delivered: October 10, 1995

THE COURT: Leave to appeal refused, per reasons for judgment of Pugsley, J.A., Freeman and Jones, JJ.A. concurring.

PUGSLEY, J.A.:

Elias Helpard, 20 years of age, while represented by counsel, and after five court appearances, pleaded guilty to robbery of a branch of the Hong Kong Bank of Canada in Dartmouth, on October 27, 1994, contrary to s. 344 of the **Criminal Code**, as well as the unlawful use of a handgun employed during the course of the robbery, contrary to s. 85(1) of the **Code**.

He was sentenced, on February 10, 1995, to a total of six years' imprisonment, five years for the robbery, and one year consecutive for the firearms offence.

He applies for leave to appeal and, if successful, appeals the sentence.

Section 85(1)(c) of the **Code** provides that:

> "Everyone who uses a firearm... whether or not he causes or means to cause bodily harm to any person as a result thereof, is guilty of an indictable offence and liable to imprisonment
>
> > (c) in the case of a first offence, except as provided in paragraph (d) for not more than fourteen years and not less than one year...". [emphasis added]

The appeal then is confined to a consideration of whether the sentence of five years for robbery is manifestly excessive.

Mr. Helpard was unrepresented and conducted his own appeal.

The following issues were stressed by him during the course of his submissions:

1. He is a first-time offender, is impulsive by nature, and his involvement in the subsequent activity was the result of a "spur of the moment" decision. The sentencing judge failed to give appropriate consideration to these considerations, as well as the importance of rehabilitation.

2. The sentencing judge failed to give appropriate weight to the factor that "need" rather than "greed" compelled him to commit the offence.

3. The sentencing judge failed to give consideration to his remorse for the commission of the offence.

It is helpful to review the facts:

- At 1:55 p.m., on October 27, 1994, one Webber, carrying a sawed-off shotgun, and Mr. Helpard, carrying a handgun, entered the bank, then occupied by two clerks and a customer;
- Helpard's face was covered so that only his eyes were visible, and Webber wore dark glasses;
- Upon entry, Webber ordered the three within the bank premises to "hit the floor and give us your money". He then ordered one of the clerks to place the cash in her till in a bag which he threw at her. The clerk cleaned out the cash drawer, placing approximately $6,000 (including marked money) in the bag;
- Mr. Helpard approached the other clerk and, referring to her desk, demanded: "open your drawers". The clerk complied;

  As the duo left the bank, one of them stated: "Don't (expletive) follow me or you're dead";

- The intrusion into the bank lasted less than three minutes. A car and driver were waiting for the two and immediately departed the scene. Webber and the driver were arrested shortly thereafter, and strong circumstantial evidence led to Helpard's arrest the following day;
- The shotgun, when recovered by the police, was loaded. The handgun was never recovered but defence counsel represented that it was unloaded at the time of the robbery;
- Webber, who had robbed the same branch a month earlier, was sentenced to a total of twelve years' imprisonment for the two robberies.

This conviction is Mr. Helpard's first in which violence has been involved and also his first as an adult.

During the course of his submissions on sentence, Crown Counsel advised the trial judge that Mr. Helpard had been convicted of thirteen offences under the **Criminal Code**, mostly for theft-related matters.

Six of these convictions occurred prior to 1991.

Defence Counsel made no objection to the reference to Mr. Helpard's complete criminal record as a young person, indeed, Counsel agreed with the details stated.

The Court should not consider Mr. Helpard's record as a young person before 1991 as his prior record is deemed to have expired, ss. 36 and 45 of the **Young Offenders Act**, R.S.C. (1985), c. Y-1, (**R. v. B.F.R**. (1995), 139 N.S.R. (2d) 215 (N.S.C.A.)).

The trial judge, in the course of his sentencing remarks, made no comment concerning Mr. Helpard's record.

The post-1990 record of convictions, in my opinion, has some relevance and could appropriately be considered by this Court.

Mr. Helpard's age, while a factor, should not materially lessen the length of the sentence. The Court must, of course, consider the importance of reclaiming the individual when fashioning a sentence but that laudable objective must, in cases of this kind, yield to the primary object of protection of the community.

Chief Justice MacKeigan, on behalf of this Court, stated in **R. v. Hingley**, [1977] 19 N.S.R. (2d) 541, at 544:

> "We must begin with the premise that armed robbery and robbery with violence require strongly deterrent sentences

> of imprisonment. Only where such an offence is isolated, minor, and committed, perhaps impulsively or drunkenly, by a very young person or one of previously good character, should sentences as low as two or three years' imprisonment be considered."

Chief Justice MacKeigan cited with approval the following comments of Tysoe, J.A., in **R. v. Nutter, Collishaw and Dulong** (1972), 7 C.C.C. (2d) 224 (B.C.C.A.):

> "I do not think the age of a person makes much difference when they are committing these violent crimes. Young men who persist in committing crimes of this sort cannot expect that their ages will be regarded as mitigating circumstances... Crimes of this sort will not be stopped if men who commit them run the risk of only comparatively short terms of imprisonment. The judges owe a duty to the community and to the vast majority of law-abiding citizens who comprise it to protect it as best they can and to impose sentences that will constitute real deterrents. I stress the word "real" deterrence not only to the persons who have committed the crimes, but to persons who might tend or be disposed to think about committing them."

A review of the cases reveals that bank robbery attracts some of the highest sentences imposed for the offence of robbery. Even when committed by first offenders, they attract penalties of from six to ten years (**R. v. Leet** (1989), 88 N.S.R. (2d) 161 N.S.C.A.).

Banks, by necessity, as is well known, carry large amounts of currency. The media have reported a substantial increase in bank robberies in the Halifax-Dartmouth area in the past year. The courts should play their part to discourage this type of activity by the imposition of significant sentences, expressive of general deterrence.

Mr. Helpard acknowledged that he was an "active participant" in the crime.

The evidence bears out that admission. Even if one assumes that the handgun that he carried was unloaded, Mr. Helpard used it in such a manner as to convey the impression to the staff and customer that it was

loaded. The sense of peril to the members of the public must have been both immediate and real.

It is a reasonable inference that Mr. Helpard knew that Mr. Webber had successfully robbed the same branch a few weeks earlier and that the shotgun which Webber carried was loaded. Helpard, in my opinion, played an integral role in an escapade that had the potential to result in serious injury or death to a number of innocent persons.

Mr. Helpard submits that he was the sole support of his four siblings, that in order to provide the necessities of life for his and their survival, he sold off his car, his tools, and other possessions; that they survived without heat or water for two weeks prior to the offence, and that he has a promise of a job to assist him in providing for his family, including his girlfriend, who was four months pregnant at the time the offence was committed.

Mr. Helpard, who appeared both articulate and poised in his submissions to this Court, referred to Ruby, Sentencing, Fourth Edition, 143. He presumably was relying upon the following comment by that author:

> "Crimes motivated by certain personal circumstances of a temporary nature are often viewed as mitigating. Financial difficulties, marital and family problems, emotional problems, medical problems, all have been accepted in mitigation of sentence. Of particular importance are the "twin plagues" of domestic misfortune and sorry economic conditions."

The personal economic difficulties experienced by Mr. Helpard are no justification for the commission of the offence of armed robbery. While they may constitute a factor to be considered, they are not entitled to much weight in view of the circumstances surrounding the commission of this crime. (See comments of Nemetz, C.J., on behalf of the Court in **Regina v. Belmas, Hansen and Taylor** (1986), 27 C.C.C. (3d) 142 at 153 (B.C.C.A).)

Mr. Helpard knew that he was associating with an experienced and

sophisticated bank robber who had personal experience with the branch in question. The details of the robbery were well planned as is evidenced by the very short period of time that the participants were required to spend on the bank premises.

At the sentencing hearing, Mr. Helpard stated in part:

> "I wish I had another chance to take back what I have done. I know I have hurt people unnecessarily. I have never hurt anyone intentionally in my life and I feel angry with myself knowing what I have done. Almost every night I lay in my bed wishing I could go see the people I have hurt and apologize to them. Even though they would probably not forgive me, it might give me some satisfaction knowing I tried."

On the hearing of this appeal, Mr. Helpard introduced a letter addressed to the employees of the bank expressing his remorse.

One cannot help but view this communication with scepticism. The letter was prepared shortly before the matter was heard by the Court and almost ten months after the commission of the offence.

Genuine remorse is of course an appropriate factor to be taken into account but the remorse expressed by Mr. Helpard should not have been a major factor affecting sentence by either the trial judge, or the review by this Court.

While Mr. Helpard's guilty plea is a matter that should have some mitigating effect, it should be borne in mind that it was entered on the fifth court appearance when it was clear that the circumstantial evidence linking Mr. Helpard to the crime was compelling. The plea might be characterized as a "recognition of the inevitable". (**R. v. Faulds** (1995), 20 O.R. (3d) 13).

In the course of his argument, Mr. Helpard directed the attention of this Court to a decision of the Newfoundland Court of Appeal (**R. v. Meadus, King, Hoffman** (1986), 60 Nfld and P.E.I.R., 65). Three female

accused were sentenced to four months' imprisonment plus two years' probation for armed robbery. The Newfoundland Court of Appeal allowed the Crown's appeal and increased the term of imprisonment to nine months for each of the offenders.

The case, in my opinion, is clearly distinguishable. The respondents were aged 18, 19, and 20, had no previous records, and no firearm was used in the course of the robbery.

The comments of Mifflin, C.J. on behalf of the Court are pertinent to the present case:

> "Like any other case the sentence imposed in armed robbery cases must depend on the circumstances of each case, and the several principles governing sentences must be applied.
>
> The trial judge referred to the principles of deterrence and reformation and rehabilitation, and stated that in the case of young people who were first-time offenders, that appeal courts say that rehabilitation has to be emphasized. If by that the trial judge means that rehabilitation and reformation must transcend the principle of general deterrence in armed robbery cases where youthful first offenders are involved, then, with respect, I must disagree. In the case of first offenders the principles of rehabilitation must always be taken into consideration as well as individual deterrents. However, in my respectful opinion, in the case of armed robbery, general deterrence must be the principal consideration and a term of imprisonment of sufficient severity must be imposed to reflect society's abhorrence of this crime and to warn like-minded people of the grave consequences of such criminal activity."

Mr. Helpard has been incarcerated at Springhill penitentiary since October of 1994. He read to the Court a progress report prepared by one of the supervisors at that institution which indicates that he has excellent motivation, is conscientious in his work, and is trying to maintain a positive attitude.

It is obvious from his presentation and appearance before us that he is intelligent and has potential. His progress at Springhill is to be

commended and, hopefully, he will use his talents, upon release, to enhance society.

The sentence imposed, in my opinion, was, if anything, lenient, and most certainly, not manifestly excessive.

I would decline to grant leave.

Pugsley, J.A.

Concurred in:

Freeman, J.A.

Jones, J.A.

C.A. 114986

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ELIAS NATHANIEL HELPARD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY: PUGSLEY, J.A.