C.A.C. No. 115231

NOVA SCOTIA COURT OF APPEAL

Hallett, Roscoe and Flinn, JJ.A.

Cite as: R. v. D.B.C., 1995 NSCA 195

BETWEEN:

D. B. C. Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Joseph A. MacDonell for the appellant Kenneth W.F. Fiske, Q.C. for the respondent Appeal Heard: October 3, 1995 Judgment Delivered: October 3, 1995

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Application for leave to appeal is granted and the appeal is dismissed, per oral reasons for judgment of Roscoe, J.A.; Hallett and Flinn, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

This is an appeal from sentences of thirty months for a sexual assault and three months consecutive for uttering threats imposed by a Provincial Court judge. The order also provided that the sentences be deemed to run from the date that the appellant was remanded four months prior to the sentencing.

The circumstances of the offences were described by Justice Freeman, in a decision of this court dismissing the appellant's appeal from the convictions, as follows: (see (1995), 139 N.S.R. (2d) 76)

> The complainant, born November 4, 1973, said she began living with the appellant when she was fourteen. In late August, 1989, the appellant came home late one night after drinking and doing coke with friends. After an exchange of words the appellant grabbed her by the hair, dragged her upstairs, removed her clothes, held her down by the throat and had intercourse with her. She repeatedly asked him to stop. He struck her when she screamed.
>
> She said on other occasions he threatened to shoot her with a pellet gun, threw her out in the cold for hours with no socks or coat on, and struck her frequently.
>
> "He used to bring butcher knives upstairs and tell me he was going to use them on me when I was asleep."
>
> She said she believed he would carry out the threats. She was scared of him. She did not report him at the time because, until she received counselling, she thought the incidents were her fault because she didn't keep her mouth shut. The trial judge apparently accepted her explanation for the delay and made a positive finding as to her credibility.
>
> The appellant denied the incidents happened. He accused the complainant of lying . . .

An application for leave to appeal the decision of this court to the Supreme Court of Canada was dismissed on September 28, 1995.

The appellant contends that the sentences are excessive in the circumstances and suggests a sentence in the range of twelve months would be appropriate for the sexual assault. He refers to **R. v. Russell** (1993), 118 N.S.R. (2d) 95, a case also involving an attack by a man on his wife where this court upheld a sentence of two years less a day. It is clear from that decision that the primary

mitigating factor was that Mr. Russell suffered from a serious mental illness, otherwise the sentence would have been longer.

The trial judge described the offence in this case as a "repulsive and repugnant act".

The role of this court on sentence appeals is described by Macdonald, J.A. in **R. v. Cormier** (1974), 9 N.S.R. (2d) 687 at 694:

> 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 offence committed by the appellant was a crime of violence. The victim suffered lasting psychological trauma. A sentence that reflects society's denunciation of the crime had to be imposed. The trial judge thus properly emphasized general deterrence. There is no error in principle in his reasoning nor his conclusion. The sentence is not manifestly excessive or unfit. While leave to appeal is granted the appeal is dismissed.

The Crown submits that the trial judge erred however in his direction that the sentence be deemed to have commenced on the date of conviction. We are in agreement that the direction was contrary to s. 721(1) of the **Criminal Code**. See **R. v. George** (1994), 128 N.S.R. (2d) 248 at 250 (C.A.). The direction therefore should be set aside. Two and a half years for this offence and this offender was a fit sentence.

Concurred in:

Hallett, J.A.

Flinn, J.A.