S.C.C. No. 02790

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Pugsley

Cite as: R. v Emmerson, 1993 NSCA 105

BETWEEN:

HER MAJESTY THE QUEEN	
Appellant	Robert E. Lutes for the Appellant
- and -	
LYNDON EUGENE EMMERSON	Anne M. Copeland for the Respondent
Respondent	Appeal Heard: April 14, 1993
	Judgment Delivered: April 14, 1993

THE COURT: Leave to appeal permitted, the appeal allowed, the sentence set aside and in its place the respondent is sentenced to two years in a federal institution to be followed by probation for one year on the terms and conditions as set out in the probation order of the trial judge per oral reasons for judgment of Matthews, J.A.; Chipman and Pugsley, JJ.A. concurring.

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

MATTHEWS, J.A.:

The respondent pled guilty to a charge that on October 21, 1992, at Lower Sackville he stole a sum of money from Angela Murray when armed with an offensive weapon, a tire iron, contrary to s. 344 of the **Code**.

On October 23, 1992 his sentence was suspended for three years. A probation order was imposed. The Crown now seeks leave to appeal and if that be granted, appeals from that sentence.

The robbery took place at a Green Gables convenience store at about 1 a.m. $23.00 was taken of which $14.00 was recovered.

In suspending sentence the trial judge said:

> "Mr. Emmerson, I am going to suspend sentence. I think, despite what happened that night and despite what the Court of Appeal has said regarding the bench mark for this type of robbery, this is your first offence and I am going to give you a chance, but by suspending sentence, don't think you are getting off lightly, because I am going to suspend it for three years and you are going to be on probation for all of that period of time, and if you get in any more trouble with the law, you can be brought back to this court and you can be sentenced on not only whatever trouble you get into then but on this offence, as effectively then as I could today. So, in other words, this is your one chance. If you get involved in any more trouble with the law, you will be going to jail not only for what you do then but for what you have done today...or you certainly could be."

At the time of the offence the respondent was celebrating his 21st birthday. He started off the evening on alcohol and ended up on cocaine. He craved more of the drug. As his counsel said at sentencing "It took him three times of going into the store to work up the nerve to do what he thought he would do to get some money". Events went downhill for the respondent after that. He only obtained $23.00 for his efforts; his crime was recorded by a video camera in the store; his get away car ran out of gas; when walking back to his car after obtaining gas from a service station he lost his way and sought directions from two men in a parked vehicle. They were police officers. After his arrest he gave an inculpatory statement and expressed remorse. He has grade 11 education, was unemployed and has an

admitted drug problem with crack cocaine. This is his first offence. It was not the work of a sophisticated professional criminal. He informed the trial judge that he wanted help for his addiction problem.

This court on many occasions has stated that crimes such as break and enter, theft and robbery to obtain funds to satisfy a drug problem must be dealt with severely. A problem with drugs or alcohol should not be considered as a mitigating factor. We are cognizant of the fact that armed robberies of convenience stores late at night or early in the morning are all too prevalent and many of these are perpetrated by persons seeking money with which to purchase drugs.

We do recognize that there are special circumstances which may take a case out of the ordinary. A suspended sentence, properly administered, is rigorous. As the trial judge remarked, should there be a violation of the conditions of probation or if the offender is convicted of another crime, then not only is the offender sentenced for the new offence but for the one which had been suspended.

This was a crime of violence. As such the overriding consideration must be deterrence, both specific and in particular, general. As this court said in **R. v. Perlin** (1977), 23 N.S.R. (2d) 66, "... save for exceptional cases substantial terms of imprisonment must be imposed". In **R. v. Hingley** (1977), 19 N.S.R. (2d) 514, Chief Justice MacKeigan remarked at p. 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."

While a suspended sentence may possibly assist in the reformation and rehabilitation of the respondent, there is no indication on the facts of this case that this

desired goal may be so achieved. Certainly this disposition will not deter others from committing similar offences.

With deference, the trial judge recognized that her disposition was "... despite what happened that night and despite what the Court of Appeal has said...".

The Crown had recommended two to three years incarceration and defence concurred with a federal sentence if there was to be a choice between "a long provincial term or a short federal time".

Sentencing must reflect the individual nature of the offence and the offender. In our opinion although there are some mitigating circumstances here they are not such as to call for a suspended sentence considering the serious nature of the offence and its prevalence. The sentence is not fit.

We permit leave to appeal, allow the appeal, set aside the sentence imposed and in its place sentence the respondent to two years in a federal institution to be followed probation for one year on the terms and conditions as set out in the probation order of the trial judge.

In addition a prohibition order under s. 100(1) of the **Code** should have been imposed by the trial judge. We order that the respondent be prohibited from having in his possession any firearm or any ammunition or explosive substance for a period of time commencing on the day the order is made and expiring five years after the time of the respondent's release from imprisonment.

J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.

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Appellant	)	
- and -	)	R E A S O N S
FOR	)	JUDGMENT
BY:		
LYNDON EUGENE EMMERSON	)	
	)	MATTHEWS,
	)	
	)	J.A.
Respondent	)	
	)	
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