S.C.C. No. 02682

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Chipman and Freeman, JJ.A.

Cite as: R. v. Ferguson, 1992 NSCA 27

BETWEEN:

HER MAJESTY THE QUEEN Appellant	)	Robert C. Hagell for the Appellant
- and -	)	Milton J. Veniot, Q.C. for the Respondent
ARTHUR GRAHAM FERGUSON Respondent	)	
	)	Appeal Heard: November 17, 1992
	)	Judgment Delivered: November 17, 1992

THE COURT: Appeal against sentence allowed for an offence (mischief) contrary to **Criminal Code** s. 430(2) and the sentence varied by deleting a probation order and adding a firearm prohibition order, per oral reasons for judgment of Clarke, C.J.N.S.; Chipman and Freeman, JJ.A. concurring.

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

CLARKE, C.J.N.S.:

This is an appeal by the Crown against sentence.

On January 13, 1992 the respondent Ferguson was convicted, following his trial before a judge and jury, that at or near Pictou Island he committed:

> "mischief by wilfully damaging without legal justification or excuse and without colour of right the boat of Harold Hayne by ramming same with his boat and did thereby endanger the lives of Harold Hayne, Wilfred Underwood and Francis Underwood contrary to s. 430(2) of the **Criminal Code."**

Both Mr. Ferguson and Mr. Hayne are engaged in the lobster fishery. They had been engaged in an ongoing dispute about fishing boundaries. While at sea on June 13, 1991 Ferguson observed Hayne tugging at his (Ferguson's) trawl line. He assumed Hayne was pulling his traps or attempting to damage them. Hayne alleged he had become entangled in Ferguson's trawl line. Ferguson, in anger, directed his boat toward Hayne's. He collided with it at a weak point on its side. Ferguson disengaged his boat from Hayne's and left. Great damage was done to Hayne's boat. It was left in a sinking condition. Fortunately, Hayne and his two crew members were rescued by the occupants of another boat fishing nearby.

The trial judge imposed a sentence of thirty days imprisonment to be served on an intermittent basis, a fine of $3,000.00 and a probation order of
three years duration which included as a condition that Mr. Ferguson provide three hundred hours of community service.

The Crown contends that in the circumstances the sentence is inadequate. There can be no doubt but that this was a serious offence inspired by anger and fraught with the potential for life threatening consequences.

We have carefully reviewed the record and we have studied the lengthy and considered remarks of Mr. Justice Gruchy in his reasons for sentence. The trial judge applied all the right principles of sentencing that have been stated from time to time by this court beginning with **R. v. Grady** (1971), 5 N.S.R. (2d) 264. He emphasized and applied the principle of deterrence, both general and special. He gave careful consideration to the rehabilitation and reform of the offender. In the evidence before him, the respondent is a man of good character, no criminal record, highly regarded in the community and deeply remorseful for his actions in this instance which in the opinion of the trial judge were an "abberation" in a career that otherwise is without blemish.

As noted earlier, the trial judge imposed imprisonment, a fine and a probation order on Mr. Ferguson. Under s. 737(1)(b) of the **Criminal Code**, a probation order may be imposed where the accused is either fined or sentenced and not where there is both a fine and a sentence. We refer to the decision of this court in **R. v. Lindsay** (1987), 76 N.S.R. (2d) 361, where this point is discussed by
Mr. Justice Hart at p. 374, para. 49. Accordingly the sentence should be varied by deleting the probation order directed by the trial judge.

So far as the sentences of imprisonment and fine are concerned, we find no error in principle was made by the trial judge nor are they manifestly inadequate. They should not be disturbed.

The Crown has brought to our attention the fact that no firearm prohibition order was issued. In our opinion s. 100(1) of the **Criminal Code** applies to this offence and makes such an order mandatory. Accordingly we order that the respondent is prohibited from having in his possession any firearm or any ammunition or explosive substance for five years from the date of his release from imprisonment.

Leave to appeal is granted. The appeal is allowed by varying the sentence only to the extent of deleting the order of probation and adding a firearm prohibition order as described above.

C.J.N.S.

Concurred in:

Chipman, J.A.

Freeman, J.A.

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	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Milton J. Veniot, Q.C.
	)	for the Respondent
ARTHUR GRAHAM FERGUSON	)	
	)	

Respondent) Appeal Heard: November 17, 1992

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ERRATUM

On page 2, the second sentence of the last paragraph should read:

Under s. 737(1)(b) of the **Criminal Code**, a probation order may be imposed where the accused is either fined or sentenced to imprisonment, and not where there is both a fine and a sentence to imprisonment.