S.C.C. No. 02663

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Jones and Roscoe, JJ.A.
Cite as: R. v. Campbell, 1992 NSCA 52

BETWEEN:

LOWELL ARNOLD CAMPBELL Appellant	)	D. Peter Mancini for the Appellant
- and -	)	Gordon S. Gale, Q.C. for the Respondent
HER MAJESTY THE QUEEN Respondent	)	Appeal Heard: December 3, 1992
	)	Judgment Delivered: December 3, 1992

THE COURT: Leave granted to appeal from sentence and appeal allowed to vary sentence for assault causing bodily harm contrary to s. 267(1)(b) of the **Criminal Code** to time served, per oral reasons for judgment of Clarke, C.J.N.S.; Jones and Roscoe, JJ.A. concurring.

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

CLARKE, C.J.N.S.;

The appellant seeks leave to appeal and if granted appeals from the sentence of eighteen months imprisonment followed by one year of probation imposed by the trial judge after finding him guilty of assault causing bodily harm contrary to s. 267(1)(b) of the **Criminal Code.**

The appellant and the victim had some arguments during the day of November 23, 1990 concerning issues surrounding allegations that each of them was keeping company with another person. After spending some time at a club during the evening, at which she consumed some drinks, the victim went to the appellant's home at Glace Bay in the early morning hours of November 24, 1990 to straighten things out.

During the course of these discussions, which lasted several hours, the arguments became heated. The trial judge found that at some point the victim scratched the appellant in the face. He further found that in walking away from the victim, the appellant struck the victim with his elbow and broke her nose resulting in a nasal deformity. She required hospitalization and medical care. The evidence was at variance as to whether the appellant struck the victim with his elbow or the back of his hand. As noted, the trial judge found it was his elbow for which there is evidence to support.

On the day that the appellant was sentenced for this offence, he was also sentenced for the theft of a motor vehicle to which offence he pled guilty. The trial judge sentenced him to six months for the latter offence, which is not before us. We refer to it only for the reason that the trial judge considered that the two consecutive sentences, totalling twenty-four months, could benefit the appellant from the instruction available at a federal institution.

The trial judge discussed the principles of sentencing described in the oft quoted **R. v. Grady** (1971), 5 N.S.R. 264. He stressed the need for deterrence, both general and specific. He spoke with special concern for the rehabilitation of the appellant and placed considerable emphasis on his criminal record. It should be noted that the

record included several dispositions imposed upon the appellant while a youth. This is his first offence where physical violence is involved. As already noted the trial judge, having decided that federal time would provide the appellant with an opportunity for instruction, appears to have fashioned the sentence in a manner that would accomplish this objective.

While it is not our function to second guess the trial judge or to condone the violence which injured this victim, we are persuaded that the sentence is excessive in the circumstances and therefore unfit. As examples, we refer to the decisions of this Court in **R. v. Durst** (1987), 79 N.S.R. (2d) 5 (6 months); **R. v. Drew** (1989), 90 N.S.R. 99 (nine months); **R. v. Lynch** (1989), 94 N.S.R. (2d) 56 (twelve months); **R. v. Thompson** (1990), 99 N.S.R. (2d) 188 (nine months).

We grant leave to appeal against the sentence and we allow the appeal. The appellant was sentenced on April 9, 1991.

Counsel informed us that in October, 1992, the appellant was released from the Federal Institution at Springhill. It is our unanimous opinion that the sentence imposed for the assault offence should be varied to the time served by the appellant. We so order. The order of probation will not be disturbed.

C.J.N.S.
Concurred in:

Jones, J.A.

Roscoe, J.A.