C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX C.H. 7218

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

DANNY EDWARD KELLY,

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

Kevin Coady, Esq., solicitor for the appellant.
Craig R. Botterill, Esq., solicitor for the respondent.

1991, February 4, Cacchione, J.C.C.:- This is an appeal against the sentence imposed on the appellant by His Honour Judge Niedermayer of the Provincial Court of Nova Scotia. The appellant was charged

> that he at or near 101 Highway, Bedford, in the County of Halifax, Nova Scotia, on or about the 28th day of April, 1990, did have the care or control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol or a drug, contrary to s.253(a) of the **Criminal Code of Canada.**
>
> AND FURTHERMORE at the same time and place aforesaid did without reasonable excuse fail to comply with a demand made to him by a peace officer to provide then or as soon thereafter as was practicable samples of his breath suitable to enable an analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the **Criminal Code of Canada.**

The appellant was convicted of the charge pursuant to s.254(5) of the **Code** and the charge under s.253(a) of

the **Code** was stayed.

The Crown's submission at the time of sentence was that a fine in the standard range would be appropriate. The Crown pointed out that there were no prior convictions for drinking and driving.

The appellant's counsel indicated to the court that the standard fine in that particular court was in the range of $400.00 to $500.00 and that there was nothing to take this case out of that range.

The only ground of appeal argued was that the sentence imposed was harsh and excessive having regard to the nature of the offence and the circumstances of the offender.

Section 255 of the **Criminal Code** provides as follows:

> Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
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> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely
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> (i) for a first offence, to a fine of not less than $300.00,
>
> (c) Where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

Section 787 of the **Criminal Code** provides:

> (1) Except where otherwise provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than two thousand dollars

or to imprisonment for six months or to both.

The powers of a Court of Appeal on hearing sentence appeal are set out in the **Criminal Code** in s.687

> **(1)** Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive.
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> **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> **(b)** dismiss the appeal.
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> **(2)** A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

The Nova Scotia Supreme Court Appeal Division has interpreted the role of an appeal court on a sentence appeal. In **R. v. Cormier** (1974), 9 N.S.R. (2nd) 687, Macdonald, J. stated at p.694-95

> 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 members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the 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.

An assessment of what is excessive or inadequate requires a comparison to other "similarly situated"

offenders. **R.v. Rowter** (1981), 44 N.S.R. (2nd) 403 (N.S.S.C.A.D.)

The Honourable Judge Freeman, as he then was, conducted such a comparison in **R. v. Forsythe** (1988), 86 N.S.R. (2nd) 262. This comparison begins at p.266.

> [19] In **R. v. Rhodeniser** (Bridgewater, CBW 6395, December 1986 - unreported), Judge Clements reduced a fine of $1,500.00 for a first offence to $600.00 and on a second offence dealt with at the same time from $2,000.00 to $1,000.00; a probation order was struck down.
>
> [20] I am indebted to Mr. Dempsey for a most capable brief in which he compiled a comprehensive summary of cases of which Judge Clements reduced other fines imposed by the Provincial Court, in Queens and Lunenburg Counties, which I here summarize further by name, highlight facts, and results. (Citations will be omitted because most of these cases are unreported, and in some instances transcripts were not available.)
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> **Walter Scott Strum v. R.** - Previous conviction four years earlier; no consideration to economic hardship nor uniformity at trial. (This case was decided in 1981 and appears to be the first after Judge Clements conducted a computer search of sentences across Canada and concluded fines in Queens and Lunenburg Counties were the highest in Canada.) fine reduced from $900.00 to $500.00.
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> **R. v. Lawrence King Cochrane** - fine reduced from $500.00 to $250.00.
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> **John C. Oland v. R.** - First offence: readings 160 and 170; driving on wrong side of road. Fine reduced from $1,500.00 to $500.00.
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> **Joseph Stephen Nowe v. R.** - Readings of 170. Fine reduced from $1,500.00 to $500.00.
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> **David Elliot Durnford v. R.** - Fine reduced

from $1,500.00 to $400.00.

Robert J.A. Couston v. R. - Accused refused to ride home from a party an later drove his own vehicle into a ditch; poor financial circumstances of accused considered. Fine reduced from $1,000.00 to $500.00.

Donald Robert Wentzell v. R. - Fine reduced to $500.00.

Dany Gerald Croft v. R. - Fine reduced from $700.00 to $300.00.

Ellis Barry Hamill v. R. - Second offence, evidence of extreme intoxication. Fine of $1,000.00 upheld.

R. .v. Skinner - First offence. Fine reduced from $500.00 to $300.00 and probation order disallowed.

R. v. Chave - Second offence three years after first. Fine reduced from $800.00 to $500.00.

R. v. Lohnes - Second offence. Two month jail sentence reduced to $600.00 fine.

[21] Defence counsel referred to the cases of **R. v. Zwicker and Robar** but had little further information beyond the reduction of fines respectively from $1,500.00 and $1,000.00 to $500.00.

[22] Also cited were two decisions in this District by Hall, C.C.J.: **Joan Beverly Bake v. R.** Readings of 210 and 230. Fine reduced to $500.00. **R. v. Karl Contant.** Nineteen year old first offender. Readings of 220, single car accident. Fine reduced from $2,000.00 to $500.00.

[23] In **R. v. Derek Wamboldt,** Chief Judge Palmeter, sitting in this District, reduced the fine for a first offender driving a loaded wood truck with readings of 180 and 190 from $1,500.00 to $700.00.

[24] The decisions mentioned above cover a time period from 1981 through to recent months. In two of his last decisions, **R. v.**

> **McCarthy** and **R. v. Haughn**, decided on November 24, 1987, Judge Clements reduced fines of $1,500.00 for first offences to $600.00 less costs and $400.00.
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> [25] In cases he commented:
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> "...It is only in this one small area of Canada that fines of the magnitude of $1,500.00 have been imposed on first offences. And with the number of sentence appeals that are coming before me now, I find that what the learned trial judge is doing in these matters is imposing a standard fine with simply no hesitation. If a man pleads guilty or is found guilty, first offence is automatically a fine of $1,500.00. There is something very, very wrong about that."

Although the above noted quote is not an exhaustive list of similar cases to the one at Bar it does indicate a range of fines for first offenders.

In the case of **R. v. Tyre** (1986), 74 N.S.R. (2nd) 221, the late Judge Clements of the County Court of District Number Two reduced fines of $1,500.00 for first offences to $600.00. He stated at p.222

> I had occasion to address this matter some years ago in the case of **R. v. Strum** and **R. v. Llewellyn** and at that time I took the opportunity to canvas the range of sentences across Canada through the computer set-up in Halifax, and that computer search revealed that the range of fines across Canada at that time was pretty much in line in all the Provinces - very rarely did you get fines in excess of five, six hundred dollars, and only in unusual cases. I think there was one case, one case alone, that it came across that a fine in a first offence case was $800.00 in that research that I did and circumstances there were quite unusual.

It is trite law to say that the punishment imposed

for an offence should be proportionate to the gravity of the offence and not excessive. As was stated by Wilson, J. in **Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)** (1985), 63 N.R. 266; 23 C.C.C. (3rd) 289, at p. 325

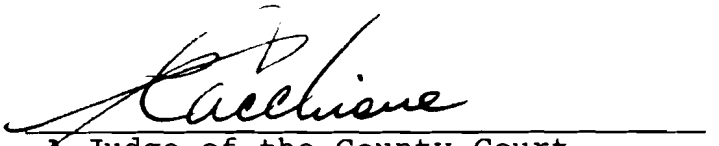
> It is basic to any theory of punishment that the sentence imposed bare some relationship to the offence; it must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserved the punishment he received and feel a confidence in the fairness and rationality of the system.

Since the **Criminal Code** is a law of national application it stands to reason that what is fit or deserved in one part of the Country is **prima facie** fit and deserved in every other part. A sentence which is this proportionately harsh or lenient in comparison with sentences being imposed across the Country will not be seen to be fit nor deserved.

In the case at Bar the learned trial judge was dealing with a normal "refusal" case. It was the submission of both Crown and defence that a fine in the standard range be imposed. The fine imposed was some two to three times what would normally be imposed for such an offence committed by a first offender and as a result it is quite clear that the sentence imposed was clearly excessive in relation to the offence proven and to the circumstances of the offender.

I would therefore allow the appeal and vary the sentence to one of a fine of $750.00 together with a victim sur-charge of $75.00. In default of payment the appellant

will serve forty-five days in the Halifax County Correctional Centre. The appellant has six months to pay the fine.



A Judge of the County Court
of District Number One

IN THE COUNTY COURT OF DISTRICT NUMBER ONE

ON APPEAL FROM

THE PROVINCIAL COURT

BETWEEN

DANNY EDWARD KELLY,

Appellant

-and-

HER MAJESTY THE QUEEN,

Respondent

HEARD BEFORE: His Honour Judge P. Niedermayer

PLACE HEARD: Bedford,Nova Scotia

DATE HEARD: September 24, 1990