IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Rushton, 2005 NSSC 360

Date: 20051230
Docket: CR. Am. 251557
Registry: Amherst

Between:

Her Majesty the Queen

Appellant

v.

Corey William Rushton

Respondent

Judge:	The Honourable Justice A. David MacAdam
Heard:	December 8, 2005, in Amherst, Nova Scotia
Final Written Submissions:	December 16, 2005
Oral Decision:	December 30, 2005
Counsel:	Bruce Carlton Baxter, for the Appellant Robert Rideout, for the Respondent

By the Court:

[1] The Respondent, Corey William Rushton, was sentenced in Amherst on July 4, 2005 on eight charges for a total of twelve months conditional sentence, followed by nine months probation. The charges for which the Provincial Court Judge sentenced Mr. Rushton included attempted theft from a vehicle, failure to appear, assault causing bodily harm, assault with a weapon, failure to comply with a probation order, misleading the police and another count of failure to comply with a probation order.

[2] On the count of attempted theft, contrary to s.334(b)/463 of the **Criminal Code** the sentence was a one month conditional sentence. On the failure to appear, contrary to s.145(5) of the **Criminal Code,** the sentence was one month, conditional sentence, concurrent. On the offence of assault causing bodily harm and breach of probation contrary to s.267(b) and s.733.1 of the **Criminal Code,** the sentence was nine months conditional sentence, concurrent in respect to the assault causing bodily harm and one month, conditional sentence, concurrent in respect to the breach of probation. In respect to the offence of assault with a weapon contrary to s.267(a) of the **Criminal Code**, the sentence was twelve months conditional sentence, concurrent and in respect to failure to comply with a probation order contrary to s.733.1 of the **Criminal Code,** the sentence imposed was two months, conditional sentence, concurrent. With respect to the offence of misleading the police, contrary to s.140(1) of the **Criminal Code,** the sentence was two months, conditional sentence, concurrent and in respect of the second offence of failure to comply with a probation order, contrary to s.733.1 of the **Criminal Code,** the sentence was three months, conditional sentence, concurrent.

[3] On the sentencing held on July 4, 2005, the Crown recommended a total of twelve months and fifteen days of secure custody. The Crown now appeals from the sentence on the grounds the sentences imposed are erroneous in principle and fail to conform with the principles and purposes of sentencing, as set out in the **Criminal Code**. Counsel references ss.718, 718.1 and 718.2 in respect to the purposes of sentencing, that the sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender, and the necessity for taking into account any mitigating or aggravating circumstances relating to the offence or the offender as well as sentences imposed on similar offenders for similar offences, and also taking into account the combined sentence should not be

"unduly long or harsh". Also referenced by the appellant, in his written submission, are s.718.2(d) and (e) which read as follows:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders

[4] Counsel's brief then refers to s.742.1, wherein the preconditions for the imposition of a conditional sentence are outlined. The section reads:

> 742.1 Imposing of conditional sentence - Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
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> > (a) imposes a sentence of imprisonment of less than two years, and
> >
> > (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,
>
> the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[5] Counsel in his brief acknowledges that the first precondition, namely a sentence of imprisonment of less than two years, was met in the present circumstance; but, continues by suggesting that what is not readily apparent is whether the sentence imposed:

> 1) would not endanger the safety of the community,
>
> **AND**
>
> 2) would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[6] Counsel refers to a number of decisions in which offences of violence have resulted in the imposition of secure custodial or institutional imprisonment of offenders. In a further supplementary submission, he refers to the decision of the Nova Scotia Supreme Court, Appeal Division in *R. v. Perlin* (1977), 23 N.S.R. (2d) 66. Justice MacDonald, on behalf of the Court, made the following observation:

> In my opinion the overriding consideration in sentencing with respect to crimes of violence must be deterrence and it is for such reason that save for exceptional cases substantial terms of imprisonment must be imposed.

[7] In *R. v. Perlin* the accused was sentenced to two and half years imprisonment for kidnapping and six months for assault causing bodily harm.

[8] Also referenced by counsel is another decision of the Nova Scotia Supreme Court, Appeal Division, in *R. v. Delaney* (1983), 55 N.S.R. (2d) 595. The accused had entered the victim's apartment and was choking her with a chord, and brandishing a glass bottle. He was sentenced for unlawfully having in his possession a weapon, the piece of glass, for a purpose dangerous to the public peace, unlawfully breaking and entering a dwelling house with intent to commit an indictable offence and unlawfully causing bodily harm with intent to wound. Justice Cooper, on behalf of the Court, at paras 10, 11 and 13, made the following observations:

> The principles which should guide a judge in sentencing are too well known to require extended reference to them. As stated in the oft-quoted case of *R. v. Grady* (1971), 5 N.S.R. (2d) 265 the overriding consideration is the protection of the public to be achieved by deterrence in two aspects, general and special...
>
> In this case the acts committed by the respondent were acts of violence calling for emphasis to be placed on deterrence, particularly in its general aspect - see, *R. v. Perlin* (1977), 33 N.S.R. (2d) 66...
>
> In the result I am of the opinion that the proper application of the principle of deterrence in this case demands an increase in the sentences imposed and that a fit and proper sentence for each of the three offences committed by the respondent is 30 months' imprisonment to run concurrently...

[9] Also included in the Crown's Supplemental Submission is the decision of the Nova Scotia Court of Appeal in *R. v. MacNeil* (1991), 108 N.S.R. (2d) 193.

The accused attacked the victim with a knife, cutting through his jacket and shirt. The accused appealed his sentence of one year in jail followed by seventeen months probation. Justice Matthews, on behalf of the Court, at para. 11 commented:

> In innumerable cases, this Court said that in crimes of violence rehabilitation and individual deterrence must give way to general deterrence. In all of the circumstances of this case it is our opinion that the sentence was fit and should not be disturbed.

[10] These cases predate the conditional sentence regime now incorporated in the **Criminal Code.** Nevertheless, it remains clear that the necessity for deterrence in the circumstances of crimes of violence often results in sentences involving secure or institutional incarceration.

[11] However, it is now also evident that many offences involving crimes of violence result in the imposition of conditional sentences, particularly where the Court has been satisfied the safety of the community is not being endangered and the serving of the sentence in the community is consistent with the fundamental purposes and principles of sentencing. For example, in R. v. Proulx, [2000] 1 S.C.R. 61, the leading case on conditional sentencing, Lamer C.J.C. , at para. 79, stated that no offences are presumptively excluded from the conditional sentencing regime where the prerequisites of a conditional sentence are met.

[12] Examples of a number of Nova Scotia sentencing decisions in which conditional sentences were imposed or affirmed for violent offences, include:

- *R. v. McBride*, [2003] N.S.J. No. 508/218 N.S.R. (2d) 201 (S.C.). The offences included assault (s. 266(a); assault causing bodily harm (s. 267 (b)); and confinement (s. 279(2)(a)). The imposed sentence was sixteen months conditional with the first three months being house arrest.

- *R. v. K.R.D.*, [2005] N.S.J. No. 25 (C.A.)., involved an offence of sexual assault. The sentence of two years less one day, conditional sentence, was affirmed by the Court of Appeal.

- *R. v. Brown*, [2004] N.S.J. No. 133/222 N.S.R. (2d) 393 (C.A.). The offences included two assaults. The sentence of eighteen months' conditional with house arrest throughout, plus probation, was affirmed.

- *R. v. Winters*, [1999] N.S.J. No. 49/174 N.S.R. (2d) 83 (C.A.). The offence was sexual assault (s. 271) and the sentence was eighteen months' conditional sentence, affirmed on appeal, with additional conditions, including extended house arrest.

- *R. v. Bratzer*, [2001] N.S.J. No. 461/198 N.S.R. (2d) 303 (C.A.). There were three Robbery offences. The sentences of two years less one day, conditional, served concurrently, was affirmed.

- *R. v. Burbine*, [2001] N.S.J. No. 432 (S.C.). The offence involved was aggravated assault. The sentence imposed was a conditional sentence of eighteen months plus probation and community service.

[13] In both his written and oral submission Crown Counsel refers to the nature of the offences for which the offender was sentenced and particularly, to the offences of violence involved with the assault charges. Crown Counsel notes, however, that the offence of assault causing bodily harm and the offence of breach of probation for which Mr. Rushton was sentenced to nine months conditional sentence concurrent and one month conditional sentence concurrent are not before this Court since these are offences that were prosecuted indictably and are the subject of a separate appeal to the Nova Scotia Court of Appeal.

[14] In respect to this appeal, the offence involving violence is the assault with a weapon, contrary to s. 267(a) for which Mr. Rushton received a twelve month conditional sentence. The circumstances related to this offence are outlined in the Crown's submission, to which the respondent has indicated his agreement:

> When they arrived, they were advised that the victim and a friend were walking down the street when a van pulled up and two people emerged carrying baseball bats. A co-accused (also charged and convicted) took a swing at the victim, but he avoided the blow. The Respondent struck the victim in the left knee as he was falling. Both accused said to the victim; "You're gonna die". [sic] The victim was taken to the hospital were he was treated for a bruised and swollen knee and released. The Respondent appeared in Court on August 30th, 2004 and the matter

was adjourned to October 18th, 2004, when he pled not guilty and the matter was set for trial on April 12th, 2005. On that date he changed his plea to guilty and the matter was set for sentence on July 4th, 2005.

[15] In his submission, the Crown contends "... the sentence imposed failed to pass muster on a number of points":

1) it does not contribute to respect for law;

2) it does not contribute to the maintenance of a just, peaceful and safe society;

3) it is not a just sanction;

4) it does not sufficiently denounce the unlawful conduct;

5) it does not sufficiently deter the Respondent and others who are like-minded;

6) it does not sufficiently separate the Respondent for society;

7) it does not sufficiently promote a sense of responsibility in the offender;

8) it does not sufficiently acknowledge harm done to the victim and the community;

9) it is not proportionate to the gravity of the offence and the degree of responsibility of the Respondent;

10) similar offenders in similar circumstances should expect periods of custody - it does not meet the ends of parity.

[16] In his submission counsel suggests:

> The sentencing judge was, apparently, cognizant of the need to consider specific and general deterrence, the safety of the public, the need to promote a sense of responsibility in Mr. Rushton and others, and the need to weigh that against the Respondent's need for rehabilitation.

[17] The Crown then suggests:

> Later however, it appears that the Judge lapsed into error when she appeared to state that what was "productive" for the Respondent took precedent over all of the other ends of sentencing.

[18] A review of the reasons of the sentencing judge includes the following comments:

> The Court has to consider deterrence, both specific and general. The Court must be mindful of what is best going to achieve Mr. Rushton's rehabilitation; and the Court also has to be concerned about the safety of the public and sending a message that promotes a sense of responsibility in Mr. Rushton and others.

[19] The reference by Crown to the judge lapsing into error relates to where the judge made the comment that "... to lock him up today is not going to be productive for him ...". Omitted, however, from the Crown's submission is the completion of the sentence where the judge added "... at the other end is probably counterproductive for the community". The sentencing judge was concerned both as to how the appropriate sentence would be productive for the accused but also, at the same time, what, in her opinion, would be "probably counterproductive for the community". In my view it was not correct to say the judge was only concerned with what was "productive" for the accused and that this took precedence over all the other ends of sentencing.

[20] A further issue raised by Crown is the nature of the so called "house arrest" contained within the imposed conditional sentence. Counsel, in his brief, after noting there is provision for an eight hour curfew with six exceptions, comments:

> ... one of the exceptions permitted the accused to be out at any time as long as he was accompanied by a representative of Harvest House Ministries.

[21] In fact, this exception, as outlined in the reasons of the learned sentencing judge provided that there was an exception to the curfew when he was in the company of any person or persons associated with the Harvest House Ministries and their associated programs. The reasons of the sentencing judge then continued:

> That way if you are involved in outreach work and it takes you outside of your home after 10 o'clock at night, as long as you're accompanied by the folks from Harvest House, then that will be okay.

[22] The sentencing judge did not intend to give a "carte blanche" for Mr. Rushton to be out, providing only he be accompanied by some person from Harvest House Ministries. Clearly it was intended that this exception would relate to when he was involved in outreach work on behalf of the Ministry and where that outreach work extended beyond the curfew deadline.

[23] In her decision to impose a conditional sentence, the sentencing judge took into account the evidence of Cal Maskery, who identified himself as a Church Pastor and as running an outreach centre, known as Harvest House. Pastor Maskery testified to the involvement of Mr. Rushton in Harvest House. He said the outreach involves speaking to people in the streets about drugs and drinking and that Mr. Rushton was involved in sharing his story about drugs and alcohol and encouraging persons that were dabbling not to become so involved. He testified that he believed Mr. Rushton was sincere in his work in the mission.

[24] Clearly the sentencing Judge was impressed by the testimony of Pastor Maskery, noting in respect to Mr. Rushton's rehabilitation, "... he has articulated commitment to a lifestyle which is certainly much more positive then that which he was living". The sentencing judge also commented:

> I am satisfied that a conditional sentence can balance the needs of the community with those of Mr. Rushton himself in terms of his rehabilitation, and in terms of the message of deterrence; and that a conditional sentence is one which, while consistent with the fundamental purposes and principles of sentencing, will not endanger the safety of the community.

[25] The recognition by the sentencing judge of the apparent change in Mr. Rushton's lifestyle in considering the appropriate sentence is clearly permitted having regard to the comments of Justice LeBel of the Quebec Court of Appeal in *Regina v. Lemay* (1998), 127 C.C.C. (3d) 528 where he noted, in respect to an accused who was sentenced for manslaughter, that the penitentiary authorities had reported significant progress in behaviour. At page 545 Justice LeBel comments:

> This information from the penitentiary authorities is relevant to the analysis. It shows not only a start to getting involved, as the respondent argues,

> but a true step towards rehabilitation, which a court of appeal can legitimately take into account on a sentence appeal ...

[26] Justice Bateman, on behalf of the Nova Scotia Court of Appeal in *R. v. Partridge*, [2005] NSCA 159; 2005 Carswell NS 529 at paras. 13 & 14, in commenting on the relevance of positive post-offence conduct of an accused, during the period of delayed sentencing, observed:

> [13] The effect of rehabilitation during a lengthy period of pre-charge delay has been extensively considered. It arises, most often, in cases of historic sexual offences. Less common is rehabilitation occurring during an unilaterally created sentencing delay. In *R. v. Critton*, [2002] O.J. No. 2594 (Q.L.) (Ont. Sup. Ct. J.), Hill, J. reviewed cases involving both situations and summarized the emerging principles (at para. 76):
>
> > (1) the effect of delay on sentencing is a case-specific inquiry
> >
> > (2) deliberate acts to evade detection by the authorities, whether flight or contribution to delayed complaint tend to weigh against assigning mitigating impact to the fact of delay
> >
> > (3) reform and rehabilitation during the intervening period tend to eliminate the prospect of recidivism and to nullify the need for specific deterrence to be reflected in the court's disposition
> >
> > (4) certain very serious crimes require sentences with measures of general deterrence and denunciation regardless of the offender's lengthy crime-free existence subsequent to the crime(s)
> >
> > (5) objectively speaking, taking into account delay, the court's disposition should not be seen as a reward or benefit eliminating or depreciating the concept of proportionate punishment.
>
> Where a crime is one which requires a sentence emphasizing denunciation and general deterrence, as is spousal assault (*R.v. MacDonald* (1992), 173 C.C.C. (3d) 235; N.S.J. No. 99 (Q.L.) (N.S.C.A.)), a long passage of time between the commission of the offence and detection or between conviction and sentence does not lessen the need for such emphasis notwithstanding that the offender has unblemished conduct during that time (*R. v. Spence* (1992), 78 C.C.C. (3d) 451; A.J. No. 1129 (Q.L.) (C.A.) at pp. 454-55).

[27] In the present instance, including on the hearing of oral submissions, there has been no suggestion the offender has breached the conditions of his sentence or has not effected the lifestyle change commented on by the sentencing judge.

[28] Although several of the offences for which he has been sentenced involved failure to appear and failure to comply with probation orders, it is clear the sentencing judge perceived his apparent rehabilitation as indicating a more positive lifestyle. The effect of a breach of a conditional sentence, with the very real risk of immediate incarceration, may very well have been a factor taken into account in imposing a conditional sentence, in the circumstances of his breaches of probation and failure to appear.

STANDARD OF REVIEW

[29] In *R. v. Rideout*, [2005] N.S.J. No. 9, Justice S.J. MacDonald outlined the scope of appellant review in relation to sentences for summary conviction offences. At paras. 12 - 14 Justice MacDonald stated:

> The scope of appellate review in relation to sentence begins with s. 687(1) of the **Criminal Code** (applicable to summary conviction sentence appeals by virtue of s. 822(1) of the **Criminal Code**), which states as follows:
>
> > 687(1) Powers of court on appeal against sentence - Where an appeal is taken against sentence the court of appeal shall, unless a 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,
> >
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.
>
> In **R. v. Shropshire (M.T.)**, [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37; 102 C.C.C. (3d) 193, the Supreme Court of Canada adopted our Court of Appeal's position on sentencing appeals, as enunciated by Hallett, J.A., in **R. v. Muise (D.R.) (No. 4)** (1994), 135 N.S.R. (2d) 81; 386 A.P.R. 81; 94 C.C.C. (3d) 119 (C.A.) at p. 124:

> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere ..... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgement taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can expected of a sentencing judge is to arrive at a sentence that is within acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is adequate or excessive .....

In the recent case of **R. v. MacDonald (C.V.)** (2003), 213 N.S.R. (2d) 344; 667 A.P.R. 344; 2003 NSCA 36, confirmed and elaborated upon the above where Bateman, J.A., speaking on behalf of the court stated at para. 15 and 16 as follows:

> More recently, in **R. v. Shropshire**, [1995] 4 S.C.R. 227; [1995] S.C.J. No. 52 (Quicklaw) (S.C.C.), lacobucci J., for a unanimous Court, said:
>
> > An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

Similarly, in **R. v. M. (C.A.)**, [1996] 1 S.C.J. No. 28 (Quicklaw) (S.C.C.), Lamer, C.J.C., said, for a unanimous Court, at pp. 565-566:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the

> appropriate degree and kind of punishment under the **Criminal Code** ...
>
> ... The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

On appeal to Nova Scotia Court of Appeal, reported at (2005), N.S.J. No. 374, Justice Cromwell at paras. 12 - 13, on behalf of the Court stated, that Justice MacDonald had "... fully and correctly set out the principles which apply to appellant review by the SCAC of a sentence imposed by the trial Court".

[30] The Nova Scotia Court of Appeal in *R. v. G.A.M.* [1996] N.S.J. No. 52 at paras. 28-30, also focussed on the role of the Court on a sentence appeal, in commenting:

> In the course of determining the "fitness" of the sentence, this Court does not have a free rein to change a sentencing order simply because it would have imposed a different sentence.
>
> Our task is to determine whether the sentencing judge applied wrong principles, or whether the sentence was clearly, or manifestly, excessive or inadequate.
>
> The following comments of Hallett J.A., on behalf of this Court in **R. v. Muise** (1994), 135 N.S.R. (2d) 81; 386 A.P.R. 81; 94 C.C.C. (3d) 119 (C.A.), were specifically approved by the Supreme Court of Canada in **R. v. Shropshire (M.T.)** (1995), 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37 (S.C.C.)**:**
>
> > The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts ... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgement taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a

> sentence that is within an acceptable range. In my opinion, that is the only basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive." (Emphasis added)

[31] Justice Bateman in *R. v. Partridge*, supra, at paras. 9 & 10 outlined the standard of review of a sentencing decision:

> In *R. v. Longaphy (J.F.)* (2000), 189 N.S.R. (2d) 102 at para. 20 (C.A.), Oland, J.A. summarized the standard of review, which calls for a high level of deference to sentencing judges:
>
> > A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": *R. v. Shropshire (M.T.)*, [1995] 4 S.C.R. 227, 188 N.R. 284, 65 B.C.A.C. 37, 106 W.A.C. 37, 102 C.C.C. (3d) 193 at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": R. v. C.A.M., [1996] 1 S.C.R. 500, 194 N.R. 321, 73 B.C.A.C. 81, 120 W.A.C. 81, 105 C.C.C. (3d) 327 (S.C.C.) At p. 374. The Supreme Court of Canada reiterated this standand of appellate review in reviewing a conditional sentence in *R. v. Proulx* (J.K.D.), [2000] 1 S.C.R. 61, 249 N.R. 201, 142 Man. R. (2d) 161, 212 W.A.C. 161, 140 C.C.C. (3d) 449 at § 123-126.
>
> (Emphasis added)
>
> Key to the defence, however, is the absence of error in principle. Where there is error the court's right to intervene is not limited to sentences which are found to be "demonstrably unfit" (*R. MacAdam* (2003), 171 C.C.C. (3d) 449; P.E.I.J. No. 20 (Q.L.) (S.C. (A.D.)); *R. v. Reazaie* (1996), 112 C.C.C. (3d) 97; O.J. No. 4468 (Q.L.) (Ont. C.A.); *R. v. Gagnon* (1998), 130 C.C.C. (3d) 194; A.Q. No. 2775 (Q.L.) (Que. C.A.) At 198).

[32] In the present circumstance, it is not the length but rather the manner of the sentence that is contested by the Crown. In fact, the Crown's recommendation to the Court, including the offence under s. 267(b), was for a total sentence of twelve months and fifteen days whereas the sentence imposed by the sentencing judge was for a total period of twelve months. Counsel, in oral submission, acknowledged the issue is with the manner of detention imposed by the sentencing judge, being

"House Arrest" rather than the secure or institutional incarceration recommended by the Crown. The second issue focussed on by the Crown is the extent which exceptions from the curfew imposed under the conditional sentence would permit the accused to be at large at any time, provided only he was accompanied by a representative of Harvest House Ministries.

[33] Responding counsel in both his oral and written submission suggests the sentence was appropriate in the circumstance and not to be interfered with. Counsel addressed the positive aspects of the updated pre-sentence report, particularly as it related to the offender's involvement with ministering to children who have had a difficult upbringing. Counsel's written submission suggests the sentence imposed by the sentencing judge reflected a balancing of deterrence and rehabilitation and having regard to 718.2 of the **Criminal Code**, the sentencing judge was entitled to conclude that under the circumstances of the case, secure or institutional incarceration was not required. Counsel's brief continues:

> The Respondent submits, the court should not interfere with finding of facts and inferences drawn by the Judge at the sentencing hearing, because her findings were not clearly wrong, nor were they unsupported by the evidence the Judge heard at the sentencing hearing, or were otherwise unreasonable.
>
> That considering all of the evidence of the hearing, the sentence was not unreasonable or demonstrably unfit in the circumstances.

[34] Having regard to the comments of the Nova Scotia Court of Appeal in *R. v. G.A.M.,* supra, that the Court does not have a free reign to change a sentencing decision simply because it would have imposed a different sentence, I am satisfied the sentencing judge did not apply wrong principles, and the sentence was not "clearly, or manifestly excessive or inadequate". Whether, I, as a sentencing judge, would have imposed a similar form of incarceration, as did the sentencing judge in this case, is irrelevant on this appeal.

[35] However, Mr. Rushton has, during the period of his appeal, on two occasions, failed to attend Court as directed. He explained, in respect to the first occasion, that he had recorded the wrong date for the Court hearing. In respect to the second, which was to hear the reasons and decision on the Crowns appeal of his sentence, he again failed to appear. At the re-scheduled decision date, the Court

was again advised he had mixed up the date this time for the hearing of the decision.

[36] In *R. v. Partridge*, supra, the Court of Appeal, on another Crown appeal of a sentencing decision imposing a conditional sentence, observed in considering the Crowns submission for incarceration that "when a conditional sentence is varied to incarceration on appeal the offender is generally given 1:1 credit. The Court noted that there will be circumstances where the offender receives more or less credit, citing as an example ... "where there have been particularly onerous or unusually lenient conditions". Here, as in *R. v. Partridge*, supra, I can see no reason to recognize other than a 1:1 credit.

[37] In *R. v. Partridge*, the Court of Appeal having decided the "sentence imposed inadequately reflects denunciation and general deterrence", and was "useful giving Mr. Partridge's past record of offending and non-compliance with Court orders", nevertheless , found re-sentencing him "troublesome". The Court increased the conditional sentence a further six months, with the house arrest portion increased from the existing nine months to twelve months.

[38] I am even in the troubling circumstances of Mr. Rushton's failure to appear as directed and recognizing that a number of the offences also involved failure to comply with Court orders, not inclined to vary the sentence to one of institutional incarceration like in *R. v. Partridge*, supra. The present circumstance requires some modification to the sentence imposed.

[39] As observed earlier, the Appeal Court is entitled to take into account the offenders conduct prior to the initial sentencing as well as prior to the hearing of a sentencing appeal. In doing so, I have considered both the negative as well as the positive aspects of his conduct. His failure to attend Court, as directed, is certainly one of the negative aspects.

[40] The conditional sentence shall be extended for a further four months to run consecutive to the twelve months conditional sentence imposed on the offence of assault with a weapon. The sentence for failure to attend Court, and breaches of probation are varied by adding the four months conditional sentence herein imposed, but again to run concurrent to the sentence on the offence of assault with a weapon.

[41] The house arrest imposed by the sentencing judge is extended for the four additional months herein imposed, on the same terms and conditions imposed by the sentencing judge, except only the exception “when in the company of any persons associated with Harvest House Ministries and their Associated Programs” shall be amended. I am satisfied that in drafting the conditional sentence order the provision permitting Mr. Rushton to be at large outside the stipulated curfew, providing he is in the company of any person or persons associated with Harvest House Ministries and their associated programs, is either ambiguous or not in accordance with the decision of the sentencing judge. The conditional order shall, therefore, be amended by adding to clause (9)(f) a provision that Mr. Rushton may only be away from his residence, outside the curfew, when he is in the company of a person or persons associated with the Harvest House Ministries and is involved in completing outreach work that takes him outside his residence after 10:00 o’clock at night.

[42] This addition is intended to reflect the decision of the sentencing judge and to clarify any ambiguity in clause 9(f) as to whether Mr. Rushton may be away from his residence simply on the basis that he is in the company of any persons associated with Harvest House Ministries. This exception from the curfew is only for the purpose of completing outreach work that commenced prior to the curfew period and which requires some period after that time in order to be completed. However, in view of his failure to abide by Court orders, for attendance at Court, and to ensure no ambiguity or lack of clarity as to when he is permitted to be away from his residence outside of the curfew, this exception shall only permit him to be outside his residence for a maximum of thirty minutes after the curfew of 10:00 o’clock at night. Otherwise, the curfew ordered by the sentencing judge remains in full force and effect as set out in her decision, and as extended by these reasons and decision. The sentence is, therefore, varied to sixteen months conditional to be followed by nine months probation.

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MacAdam, J.