IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. McKenna, 2010 NSSC 121

Date: 20100319
Docket: PtH 322120
Registry: Port Hawkesbury

Between:

Randall Bruce McKenna

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice N.M. (Nick) Scaravelli
Heard:	March 19, 2010, in Port Hawkesbury, Nova Scotia
Counsel:	Kevin Patriquin, Esq., for the appellant Robin Archibald, Esq., for the respondent

By the Court: (Orally)

[1] This is a summary conviction appeal from sentence .

[2] On December 10th, 2009, the appellant, who was on remand, appeared before the Provincial Court Judge on an eight count Information. After the Crown advised the Court it was proceeding summarily, Defence counsel entered pleas of guilty on four of the counts; namely, on November 25th, 2009, damage to property contrary to Section 430(4) of the ***Criminal Code***; on November 26th, 2009, assaulting a police officer contrary to Section 270(1); resisting arrest contrary to Section 129(a); and causing a disturbance contrary to Section 175(1). Following the entry of guilty pleas and withdrawal of the remaining four counts by the Crown, the Judge asked the appellant to confirm the guilty pleas which he did.

[3] Counsel advised the Court that the matter would proceed to sentencing at that time. The facts surrounding the commission of the offences were read into the read. I am reading from the transcript:

> A Mr. Sampson made a complaint of mischief as the screen door on his home, at 109 Rogers Street had been damaged by the defendant. McKenna (who is the appellant in this case) had attempted to enter the home and had damaged the screen in the

> process. The police were called to the address and located the defendant nearby. He appeared to be intoxicated and walking all over the roadway. They approached him, read him his rights. The appellant made a comment to Cst. Anthony at the time that "I should spit in your face. What are you going to do about that?" He was read his rights by Cst. Anthony who began to transport him to the Port Hawkesbury RCMP detachment. While on route, he began to complain of chest pains so he was taken to the Strait Richmond Hospital. He was placed in handcuffs at the hospital and they removed so he could be attended to by staff. As a nurse was checking Mr. McKenna he began to utter threats towards Cst. Anthony. McKenna stood up, out of his bed and said, "I'm going to drop you", and he clenched his fists, took a fighting stance. Cst. Anthony commanded him to sit back down on the bed and settle down. McKenna stated that he was going to the washroom. Anthony informed him he could if he settled down. McKenna made a motion to his fly and said, "I could piss right here". Anthony told him to place his hands behind his back and told him to hold. He took hold of Mr. McKenna in an attempt to getting him under control. Mr. McKenna then spit directly into the face of Cst. Anthony. Cst. Anthony broke contact with McKenna and responded, and repositioned to, so he wouldn't be spit on again. Anthony continued to give McKenna verbal commands to put his hands behind his back and settle down. McKenna grew more upset and angry and was hollering, yelling and swearing inside the hospital. Cst. Anthony made a call for backup to come to the hospital. McKenna became more and more out of control. This drew the attention of EHS attendants. A Barry Tracey came to the room to assist McKenna. McKenna then placed himself between the member and the hospital bed and picked up a chair and threw it across the room. Cst. Anthony warned McKenna multiple times to stop his behaviour or he would be OC sprayed. He continued to be aggressive in his behaviour. He declined to obey the officer's commands. So Cst. Anthony deployed the OC spray on McKenna in order to get compliance from McKenna. He dropped to the ground and was handcuffed and soon other members arrived. Mr. McKenna was ultimately removed to the local RCMP detachment.

[4] The Crown advised the Trial Judge at the time that there was a joint recommendation on sentencing. Both Crown and Defence counsel made submissions regarding a joint recommendation of six months incarceration (less one month credit for remand) followed by 18 months probation. Following submissions, the Trial Judge questioned the appellant about prior alcohol abuse programs as the Judge was

familiar with the appellant's previous criminal record and significant history of alcohol abuse.

[5] The Trial Judge then alerted Crown and Defence counsel of her intent to possibly deviate from the joint recommendation and adjourned the matter to the afternoon to allow counsel to make further submissions. Following the submissions, the Judge rejected the joint recommendation and imposed a sentence of three months incarceration on each of the four counts to be served consecutively for a total of 12 months (less credit for one month on remand) to be followed by 18 months probation.

[6] The appellant appeals from the total sentence of 12 months incarceration. The grounds of appeal as set out in the Notice of Appeal are as follows:

> 1. That the learned trial judge did not accept the joint recommendation on sentence as proposed by the Crown and Defence counsel.
>
> 2. That the learned trial judge did not give proper weight to the principle of totality when sentencing the accused herein.
>
> 3. The learned trial judge failed to fully inquire of the accused as to the conditions of accepting the guilty plea pursuant to Section 606(1.1) of the *Criminal Code.*

[7] The appellant as today withdrawn this last ground of appeal.

[8] The appellant seeks variation of the sentence to be in accordance with the joint recommendation as presented to the Trial Judge.

[9] The Crown's position on appeal is that the Trial Judge did not err in rejecting the joint recommendation on sentencing. That the Judge did appropriately deal with totality in imposing the consecutive sentences which were not unduly harsh.

Standard of Review

[10] In terms of Standard of Review on a summary conviction sentencing appeal it is a principle that sentencing judges are entitled to a high level of deference. In ***R v. Longaphy*** (2000), N.S.C.A., Justice Oland stated:

> 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. Absent in error and 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".

Joint Recommendation and Totality of Sentence

[11] In terms of the grounds of joint recommendation and totality of sentence, a Trial Judge is not bound by a joint recommendation on sentencing. Where there is a joint recommendation the Trial Judge is to determine whether it is within an acceptable range. If so, the Trial Judge should give substantial weight to the recommendation even if it were not the same sentence the Judge would have imposed. An unreasonable joint submission is one that is not within the appropriate range of sentencing and is contrary to the public interest. (***G.P. v. R*** (2004), N.S.C.A. 154).

[12] In the present case, the Trial Judge notified counsel of the possibility of deviating from the recommendation and allowed an adjournment and further submissions. Further submissions by Defence counsel focussed on factual information regarding rehabilitation of the appellant, the principle of totality and the reasonableness of a sentence of six months given the appellant's last sentence was four months incarceration for similar offences. Defence counsel also referred the Court to case law regarding joint recommendations. The Crown made no further submissions regarding the joint recommendation.

[13] In sentencing the appellant, the Trial Judge referred to the purposes and principles of sentencing as set out in Section 718, 718.1 and 718.2 of the ***Criminal Code***. She referred to the duty of the Court to impose a sentence that protects the public through a combination of deterrence and rehabilitation. The Trial Judge was most disturbed by the previous criminal record of the appellant. The appellant had 82 prior ***Criminal Code*** convictions which the Judge noted increased to 86 as of the date of sentence. There are also in excess of 14 ***Liquor Control Act*** infractions as well as other ***Motor Vehicle Act*** infractions. The Judge noted that the appellant had been on probation almost continuously for the past eight years. That the probation orders, for the most part, dealt with issues involving alcohol. The Judge noted that the current offences occurred two days after the appellant was released from his last five-day alcohol program.

[14] She stated in her decision:

> I certainly take to totality into account, that is, that you are being sentenced in relation to four matters on the same date. But your record is just abysmal, Mr. McKenna. You cannot continue to come back here. These offences today that you're being sentenced for, they're not the first time. You've got several of each of these on your record.

> Rehabilitation has been tried over and over with you, Mr. McKenna and it's not seeming to work. The focus of the Court has to be on rehabilitation as well, but today the primary focus is the protection of the public.

[15] The Judge went on to say:

> I do have a joint recommendation, and the Courts, and this Court in particular, and counsel here know I pay heavy weight to joint recommendations. And this is from counsel who have being criminal work for many, many years. A sentence has to be all of those things that I've said it has to be, and it has to be within the range. Given the record, given what happened, given its recency it's not in the range. I reject the joint recommendation.

[16] I find the Trial Judge properly considered the relevant factors in sentencing the appellant including the principles and purposes of sentence and totality of sentence. I also find that the Trial Judge gave serious consideration to the joint recommendation of counsel. The Trial Judge did not overemphasize the primary concern of deterrence and protection of the public in rejecting the joint recommendation as not being within a reasonable range of sentencing. The Trial Judge clearly had a public interest concern. As a result I find the Trial Judge did not err in rejecting the joint recommendation in terms of the range as well as the public interest concern.

[17] It was open for the Trial Judge to impose concurrent sentences given the relationship of the offences. However, the Judge was equally entitled to impose consecutive sentences when imposing several periods of incarceration.

[18] The principle of totality operates when there are a number of consecutive sentences for different offences and the total sentence is excessive. In that case, individual sentences must be adjusted.

[19] The appellant was convicted of summary conviction offences. The offence of assaulting a police officer under Section 270 carries a maximum sentence of 18 months. The appellant here has a significant criminal record including two prior convictions for assaulting a police officer in 2008 and 2009. In addition, there were two other assault convictions.

[20] Under the present circumstances, I am not satisfied that the total sentence of 12 months incarceration was clearly unreasonable or demonstrably unfit. It is not for this Court on appeal to substitute a sentence that it may determine as reasonable.

[21] As a result, I dismiss the appeal.

J.