**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. Chickness*, 2011 NSSC 225

**Date:** 20110610
**Docket:** CRA 336301
**Registry:** Pictou

**Between:**

Her Majesty the Queen

Appellant

- and -

John Alfred Chickness

Respondent

| | |
|---|---|
| **Judge:** | The Honourable Justice N.M. Scaravelli |
| **Heard:** | May 20, 2011 |
| **Oral Decision:** | June 10, 2011 |
| **Counsel:** | William Gorman, for the Crown<br>Stephen Robertson, for the Defence |

**By the Court**:

[1] This is a summary conviction appeal by the Crown from sentences imposed by the Provincial Court Judge, having convicted the Respondent following trial of the offences of assault causing bodily harm, contrary to section 267(b) of the *Criminal Code* and at the same time having in his possession a weapon, a knife, for a purpose dangerous to the public peace, contrary to section 88 of the *Criminal Code*.

[2] The trial was held on January 14th, 2010. Sentencing concluded on August 20th, 2010. At the sentencing hearing the Learned Trial Judge sentenced the Respondent to a 21 month conditional sentence with respect to the assault causing bodily harm charge and a 12 month conditional sentence, to be served concurrently, with respect to the Section 88 offence. The judge imposed conditions pursuant to Section 742.3 of the *Criminal Code*, including counselling for anger management; stay away from person, premises and place of business of the victim, Mr. Voutour; be subject to electronic monitoring and supervision; house arrest and curfew provisions. The judge imposed a period of 12 months probation following the conditional sentence order, upon the same terms and conditions minus the house arrest and curfew.

[3] The relevant ground of appeal before this summary conviction appeal court is as follows:

> GROUND 1
>
> 1. *That the Learned Trial Judge erred in law in ordering an illegal sentence on both counts.*
>
> a) *Count 1, assault causing bodily harm was proceeded with summarily, which carries a maximum punishment of 18 months imprisonment. The Learned Trial Judge ordered a period of imprisonment, albeit to be served in the community pursuant to a Conditional Sentence, of 21 months;*
>
> b) *Count 2, possession of weapon dangerous to the public peace, was proceeded with summarily, which carries a maximum punishment of six months imprisonment. The learned trial judge ordered a period of imprisonment, albeit to be served in the community pursuant to a Conditional Sentence, of 12 months to be served concurrently with the Conditional Sentence ordered with respect to Count 1.*

[4] The Respondent acknowledges the Learned Trial Judge erred in law. Both sentences exceeded the maximum allowable sentence as set out in the *Criminal Code.* Inexplicably, the trial judge exceeded the statutory maximum sentences and thereby erred in law.

[5] In this appeal I am guided by section 687 of the *Criminal Code*:

> 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,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.
>
> (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.

[6] The summary conviction appeal court does not have jurisdiction to return the matter to Provincial Court to administer a proper sentence. The Appeal Court must either vary the sentence or dismiss the appeal. *R. v. Robert* [2001] O.J. No. 244 (Ont. C.A.). Normally the analysis requires consideration of the fitness of the sentence imposed. However, an illegal sentence imposed is an error in law that requires the Appeal Court to impose a sentence without deference to the sentencing judge. *R. v. Fitzgerald* [1994] N.J. No. 71 (Nfld. C.A.).

**Circumstances of the Offence**

[7] On the evening of the offence, Mr. Chickness, was at an address in Stellarton with others playing cards. He left the premises and returned within ten minutes telling his friends that he "shanked" someone. The evidence at trial was that Mr. Chickness appeared at the front door of a nearby residence where the victim was performing carpentry work that evening. The victim, Mr. Voutour, told Mr. Chickness that he was unable to access the front door—to go around to the back of the house. An altercation ensued at the back of the house between the two where Mr. Chickness cut or slashed Mr. Voutour with a knife along the jawbone of his face. The knife was described as a hunting knife with an eight inch blade. Shortly after Mr. Chickness returned to the residence of his friends, Mr. Voutour appeared brandishing a handsaw. He attacked Mr. Chickness striking him several times with the saw. Mr. Chickness and Mr. Voutour both attended the hospital. Mr. Chickness received approximately 100 stitches for his wounds.

[8] Both parties were subsequently charged by the police. Mr. Voutour pled guilty and received a 90 day conditional sentence, followed by 18 months probation. Mr. Chickness was found guilty following a trial.

**Circumstances of the Offender**

[9] A Pre-Sentence Report was prepared for the initial sentencing conducted by the Provincial Court judge. A Supplementary to the Report was prepared for this sentencing.

[10] Mr. Chickness is currently 50 years of age. He is apparently separated and residing with his parents. He reports his father has Alzheimer's disease. He has Grade 10 education and is unemployed. Mr. Chickness is currently on disability having been diagnosed with Multiple Sclerosis a number of years ago. He takes medication for his illness and has medical marijuana access to ease his symptoms. He has a history of drug and alcohol abuse which he reports has not been an issue for at least the past five years.

[11] The Stellarton Police are familiar with Mr. Chickness. The Chief of Police indicated alcohol was involved in this offence and noted there would be no concerns regarding Mr. Chickness if he remains sober.

[12] Mr. Chickness has a prior criminal record with a number of convictions dating between 1990 and 2001. In October 2000, he was given an 18 month conditional sentence, concurrent for three counts of possession for the purposes of trafficking. In 2001, he was sentenced to 18 months conditional sentence concurrent for possession and production of a prohibited substance. He has been convicted of assaulting a police office on two occasions in 1995 and 1996. He has a 1996 conviction for assault causing bodily harm for which he served two months in a provincial facility. In 1999, he was sentenced for break, enter and theft.

[13] While bound by an Undertaking pending trial of this charge, Mr. Chickness was charged and convicted of theft of a bottle of liquor from the Nova Scotia Liquor Commission. He received a conditional sentence of 30 days consecutive to the sentences under appeal.

[14] Mr. Chickness has been serving the conditional sentence pending the appeal. He wears an ankle bracelet. The Pre-Sentence Report indicates there has been no problems with Mr. Chickness since the date of sentencing. He is currently on a waiting list for Anger Management Counselling.

[15] At the sentencing hearing before the trial judge, the Crown was seeking a period of custody to be served in jail in the amount of 15 to 18 months, followed by a period of probation of 20 to 24 months. The Defence recommended a conditional sentence would be appropriate.

[16] During sentencing, the trial judge noted the Crown proceeded summarily where the maximum sentences were less than two years imprisonment, thereby warranting consideration of a conditional sentence under Section 742.1. He considered the circumstances of the offence, Mr. Chickness' criminal record and physical disability, as well as his risk to the community. He referred to the seminal case of *R. v. Proulx* and the steps set out therein. He considered the gap in time between the current offence and the last conviction. He also considered the sentence imposed on Mr. Voutour arising from the same incident.

[17] As indicated, the trial judge erred by imposing conditional sentences that exceeded the maximum allowed for the offences. The offence of assault causing bodily harm was proceeded with summarily and carries a maximum sentence of 18 months imprisonment. Similarly, the offence of possession of a weapon dangerous

to the public peace was proceeded with summarily, carrying a maximum sentence of six months imprisonment.

[18] On appeal, the position of the Crown and Defence remained the same as at the original sentencing. The Crown acknowledges that consideration should be given to the time served under the current conditional sentence but not on a one-on-one basis.

[19] The Crown acknowledged at the sentence hearing that the offences were not serious personal injury offences, as defined in Section 752 of the *Criminal Code*, and that consideration of a conditional sentence by the trial judge was available.

[20] Section 742.1 authorizes the court to make an order for a conditional sentence when the offender is sentenced to imprisonment of less than two years. The conditional sentence can be imposed where the court 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 in Sections 718 to 718.2. An offender serving a sentence in the community is subject to conditions set out in Section 742.3.

[21] The Crown submitted on appeal that where the offence is one of violence, the emphasis is on denunciation and deterrence, requiring a period of jail time. In support, the Crown cited *R. v. Proulx*, S.C.C. With respect this case does not stand for the presumption of exclusion of a conditional sentence where violence is involved. Our Court of Appeal in *R. v. Johnson* [2007] NSCA 102 reviewed the relevant considerations in *Proulx*:

> [11] In *R. v. Proulx*, [2000] 1 S.C.R. 61; S.C.J. No.6 (Q.L.), the Supreme Court of Canada detailed the procedure to be followed by a judge when considering a conditional sentence.
>
> [12] At the first stage, the judge, must conclude that neither probationary measures nor a penitentiary term would be suitable taking into account the circumstances of the offender and the offence before the court. In other words, the judge must be satisfied that the appropriate sentence is a custodial one of less than two years (*Proulx*, paras. 58 and 59; s. 742.1(a)).
>
> [13] Even should the sentence meet the above criteria, the judge may not impose a conditional sentence unless satisfied that having the offender serve the sentence in the community would not endanger its safety (*Proulx*, para. 63; s. 742.1(b)). Only if so satisfied may the judge go on to consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 (*Proulx*, para. 65; s. 742.1(b)).
>
> [14] "Safety of the community" refers to the specific threat posed by the offender before the court (*Proulx*, para. 68). This requires an assessment of both the risk of the offender re-offending and the gravity of the damage that could ensue on re-offence (*Proulx*, para. 69).

> [15] In *Proulx,* the Court rejects the proposition that certain offences are presumptively excluded from the conditional sentencing regime. However, neither is there a presumption in favour of a conditional sentence once the prerequisites are met. The particular circumstances of the offence and the offender must be considered in each case (*Proulx*, para. 85).

[22] Both Crown and Defence counsel agree that the appropriate sentence is a custodial one. Each offence carries a maximum penalty of less than two years.

**Safety of the Community**

[23] The injury to the victims face was a result of a swipe with the blade of Mr. Chickness' knife during an altercation. The victim was left with a permanent scar along his jaw line. Although an unprovoked attack, there was no finding of premeditation by the trial judge. Mr. Chickness committed an offence of theft of a bottle of liquor while awaiting trial on these charges. This was not a crime of violence. He has an extensive prior criminal record. His most recent offence involving drugs was in 2001, a gap of seven years. Conditional sentences were imposed on Mr. Chickness on two prior occasions where he complied with the conditions. He has complied with the conditions imposed by the sentencing judge in August 2010. Mr. Chickness is in the advance stages of Multiple Sclerosis, as stated by the trial judge.

He is on disability pension and takes medication for his illness. He resides with his parents.

[24] Mr. Voutour, the victim, was charged and sentenced to a conditional sentence for his retaliation on Mr. Chickness. Mr Voutour had a prior criminal record.

[25] I have reviewed the authorities provided by the Crown and Defence. These cases serve to highlight the statement in *Proulx,* that the particular circumstances of the offence and the offender must be considered in each case.

[26] *R. v. Metzler* was a 2008 decision of NSCA. The accused was convicted of assault causing bodily harm. He was a party to an unprovoked, random assault on the victim. Alcohol was involved. The accused had no prior criminal record, however, he committed a further act of violence while intoxicated and awaiting sentencing for the assault charge. The trial judge imposed 22 months incarceration despite a conditional sentence recommendation by the Crown. The trial judge determined that the offender was a real risk to re-offend and, therefore, a danger to the community. The Appeal Court applied a standard of review of deference to the sentencing judge and found the

judge did not err in considering the relevant factors in determining a conditional sentence was not available.

[27] In *R. v. Rushton*, a 2005 summary conviction appeal, the court upheld a 12 month conditional sentence for assault with a weapon. The accused also received a nine month conditional sentence concurrent for assault causing bodily harm. In that case the accused attacked the victim with a baseball bat threatening death. Following the sentencing hearing and prior to hearing the appeal, the accused failed to appear before the court as ordered on two occasions.

[28] In the present case I am of the view that there is a low risk of Mr. Chickness re-offending and that the risk to the community is low and can be managed by the imposition of appropriate conditions to a custodial sentence. I conclude that a conditional sentence is consistent with the fundamental principles of sentencing.

[29] Based on the consent of Crown and Defence, the appeal against sentence is allowed.

[30] The sentence imposed by this court is a conditional sentence of 15 months for the offence of assault causing bodily harm. A conditional sentence of three months concurrent for possession of a weapon. Mr. Chickness will receive full credit for the time served since August 20th, 2010, with his sentence to expire on November 20, 2011.

[31] Mr. Chickness will be subject to the same conditions, including house arrest as imposed by the sentencing judge. The existing curfew provisions do not apply.

[32] Following the expiration of the conditional sentence, there will be probation for a period of 18 months upon the same conditions, with the exception of house arrest.

[33] The court will order a firearms prohibition order and DNA Analysis order.

J.