

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Jones, JJ.A.

Cite as: R. v. Ward, 1993 NSCA 98

BETWEEN:

MARK LESLIE WARD
Robert McCleave

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

)

for the Appellant

William D. Delaney
for the Respondent

Appeal Heard:
March 9, 1993

Judgment Delivered:
March 9, 1993

THE COURT: Appeal dismissed from conviction for violation of section 249(1)(b) of the **Criminal Code** and appeal granted to vary the sentence imposed per oral reasons of Clarke, C.J.N.S., Hart and Jones, 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 from his conviction and if dismissed, leave to appeal from the sentence imposed upon him.

After his trial, His Honour Judge Batiot convicted the appellant on the following charge:

"... at or near Oakfield in the County of Halifax, Nova Scotia, on or about the 5th day of October, 1991, [he] did operate a Bombardier SeaDoo Jet Ski on the internal waters of Canada to wit: the Shubenacadie River in a manner that was dangerous to the public and thereby caused bodily harm to William Gerald MARTIN and Tammy Alice WARD, contrary to Section 249(3) of the **Criminal Code of Canada.**"

The relevant provisions of the **Criminal Code** are set forth in section 249, subsections (1) and (3):

- (1) Every one commits an offence who operates
...
- (b) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;
...
- (3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

We have reviewed, re-weighed and considered the evidence, together with the written and oral submissions of counsel, as we are required to do pursuant to the directions of the Supreme Court of Canada in **R. v. Yebes**, [1987] 2 S.C.R. 168 and **R. v. W. (R.)**, [1992] 2 S.C.R. 122 at p. 131. As a result we have concluded, contrary to the contention of the appellant, that there was ample

evidence to support the conclusion reached by Judge Batiot that the appellant operated his SeaDoo Jet Ski in a manner dangerous to William Martin and Tammy Ward and thus caused them bodily harm.

The motion of the appellant to introduce fresh evidence is refused. The appeal against conviction is dismissed.

The trial judge imposed the following sentence:

- (1) Ninety days incarceration to be served on an intermittent basis in a manner that would not interrupt his hours of employment;
- (2) probation of one year thereafter;
- (3) a direction to seek counselling from a psychologist;
- (4) a victim fine surcharge of \$35.00;
- (5) restitution to Tammy Ward for damages done to her SeaDoo of \$1,235.85; and
- (6) a prohibition against operating a vessel in Canada for one year.

The appellant contends the sentence is excessive, too harsh and generally unfit in the circumstances. The trial judge recognized the seriousness of the offence which he found to be one of the appellant deliberately taking aim at the Tammy Ward SeaDoo which was stopped or almost stopped in still waters on the Shubenacadie River. Both damage to her SeaDoo and personal injuries resulted.

Upon a review of the record, we are persuaded the evidence was inadequate, in fact and law, upon which to make the order of restitution or to require the appellant to undergo psychological counselling.

The application for leave to appeal against sentence is granted. The

appeal is allowed and the sentence is varied to ninety days incarceration to be served on an intermittent basis, probation of one year thereafter without psychological counselling and an order prohibiting the appellant from operating a vessel in waters in Canada for one year. There will be no order requiring restitution. The manner by which this sentence will be served will be set forth in the order of this Court to be issued following this decision.

C.J.N.S.

Concurred in:

Hart, J.A.

Jones, J.A.

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BY:
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) JUDGMENT

CJNS

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(orally)

Respondent)
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