Docket: CAC 163244
Date: 20001221

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Brown, 2000 NSCA 146]

Roscoe, Chipman and Oland, JJ.A.

BETWEEN:

BERNARD JOHN BROWN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Appellant appeared in person Peter Rosinski for the Respondent
Appeal Heard:	November 28, 2000
Judgment Delivered:	December 21, 2000

THE COURT: The appeal from conviction is dismissed; leave to appeal from sentence is granted, but the appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Chipman and Oland, JJ.A., concurring.

ROSCOE, J.A.:

[1] Following a trial in the Provincial Court before Judge Claudine MacDonald, the appellant was convicted of the indictable offence of assault contrary to s. 266 (a) of the **Criminal Code**. He was sentenced to incarceration for a period of 15 months, followed by two years probation.

[2] The appellant appeals from conviction and submits that the trial judge:

> 1. . . . erred in law when she applied a different standard to the Complainant than to the Appellant's evidence, or to the evidence of the Appellant's witnesses.
>
> 2. . . . erred in law when she failed to give the benefit of doubt to the Appellant.

[3] The appellant also appeals from his sentence claiming that it is excessive.

[4] The trial took place only 11 days after the alleged offence. The complainant testified that when she met with the appellant, her former boyfriend, at approximately 4:30 p.m. on March 5, 2000, he punched and choked her causing bruises and cuts on her face and neck. Photographs taken by the police later that night confirmed the injuries she described. In

addition to his own evidence denying all the allegations, the appellant presented the evidence of his mother, his sister and his sister's boyfriend who all testified that the appellant was with them during the time the offence was alleged to have taken place.

[5] In her decision, Judge MacDonald extensively reviewed the evidence of all the witnesses, and specifically noted numerous inconsistencies in the evidence of the alibi witnesses. The trial judge also commented upon the lack of notice of the intention to call alibi evidence. She correctly stated that the defendant did not have to prove his alibi and that the burden remained on the Crown to prove beyond a reasonable doubt all of the elements of the offence. Furthermore, she instructed herself that if the alibi evidence raised a reasonable doubt, the defendant would be acquitted.

[6] After reviewing the evidence and correctly articulating the law, the trial judge "rejected" the evidence of the defence witnesses and found it "not capable of belief". She found that in consideration of all the evidence, the defence evidence did not raise a reasonable doubt, and that she was satisfied that the Crown had proved each element of the offence beyond a reasonable doubt.

[7] The appellant's grounds of appeal relate to the reasonableness of the verdict. In reviewing a verdict for unreasonableness, this court is not to substitute itself for the trier of fact, but to decide whether the verdict is one which a properly instructed jury could reasonably have rendered. (See **Corbett v. The Queen** (1974), 14 C.C.C. (2d) 385 (S.C.C.)). In doing so, we must reexamine and to some extent reweigh and consider the effect of the evidence. (See **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.) and **R. v. Biniaris** (2000), 143 C.C.C. (3d) 1 (S.C.C.)). In **R. v. W. (R.)**, [1992] 2 S.C.R. 122; 74 C.C.C. (3d) 134, the Supreme Court of Canada cautioned appellate courts with respect to showing deference to findings of credibility made at trial. McLachlin, J., as she then was, stated at p. 131:

> . . . This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility . . . The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses . . .

[8] After carefully reviewing, reexamining and reweighing the evidence, and after considering the written and oral submissions of the appellant and counsel for the Crown, it is my opinion that the verdict is reasonable and supported by the evidence. It is a verdict that the trial judge could reasonably have reached. Furthermore, I am also satisfied that Judge MacDonald made no wrong decisions on questions of law.

[9] In coming to the decision that 15 months incarceration was an appropriate sentence, Judge MacDonald considered the violence of the offence, the appellant's lengthy criminal record which included several drug offences, and a recent assault conviction, the fact that he was on parole at the time of the offence and subject to a condition to have no contact with the victim of the assault, and his poor pre-sentence report. She determined that specific and general deterrence were the sentencing principles that should be emphasized.

[10] The appellant submits that the sentence is excessive and suggests that a sentence of six months would be more appropriate. In support of his position, he cites **R. v. Delaney** (1982), 50 N. S. R. (2d) 693 (C.A.), a case in which this court imposed a sentence of six months for an assault causing bodily harm.

[11] The role of this court on an appeal from sentence requires consideration of the fitness of the sentence appealed from. We cannot modify a sentence simply because it is thought that a different order might have been made. A sentence should only be varied if the sentencing judge applied wrong principles or if the sentence is clearly excessive or inadequate.

[12] The sentence of 15 months is not manifestly excessive given the appellant's prior record and the brutality of the assault. The factors distinguishing this case from **Delaney** are the appellant's lengthy record and the further aggravating fact that within two weeks of his release on parole, he blatantly violated the no contact condition of his release. In all the circumstances, I consider the sentence to be a fit one.

[13] Accordingly, I would dismiss the appeal from conviction. I would grant leave to appeal from sentence but dismiss the appeal.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.