Date: 19990915
Docket: C.A.C.

154614

NOVA SCOTIA COURT OF APPEAL

Freeman, Hallett, Pugsley, JJ.A.
[Cite as: R. v. King, 1999 NSCA 103]

BETWEEN:

DALE WAYNE KING	)	Mark R. Donohue
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Dana Giovannetti, Q.C.
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	September 14, 1999
	)	
	)	Judgment Delivered:
	)	September 15 1999
	)	
	)	

THE COURT: Leave to appeal is allowed but the appeal is dismissed as per reasons for judgment per quorum.

Per Quorum:

[1] The appellant Dale Wayne King grew intoxicated while drinking in a tavern but left peacefully when he was escorted outside. When the taxi which had been called for him was slow in arriving he got in a fight with Frank MacDonnell, another patron who was also waiting outside for a cab. He drew a knife and slashed the bartender who tried to break up the fight and stabbed Mr. MacDonnell through the hand.

[2] Mr. King pleaded guilty to a charge of aggravated assault on Mr. MacDonnell and assault with a weapon on the bartender, David Starr. He was sentenced to four years incarceration on the first charge and one year consecutive on the second, plus a lifetime ban against possessing firearms. The Crown did not proceed with a number of other charges arising from the same incident. He seeks leave to appeal the sentence as manifestly excessive and not in accordance with proper sentencing principles.

[3] At the time of the offences Mr. King was a 26 year old unemployed casual labourer with a grade seven education and a common law wife and baby. His criminal record included two assaults on police officers and a previous aggravated assault charge which involved a stabbing in 1995. He admitted problems with alcohol and anger management, for which he had sought counseling but did not follow through.

[4] An appeal court is justified in varying a sentence only if the sentencing judge applied wrong principles or it is clearly excessive or inadequate. See **R. v. Shropshire** (1996), 102 C.C.C. (3d) 193 (S.C.C.). The fitness of a sentence is to be considered in

the context of ss. 718, 718.1 and 718.2 of the **Criminal Code**.

[5] There were two victims and convictions on two charges, although the incidents were closely related as to time and place. It was within the discretion of the trial judge whether the sentences should run consecutively or concurrently. The appellant has not shown that discretion was exercised in error, and this court should defer to it.

[6] In **R. v. MacDonnell** (1997), 114 C.C.C. (3d) 436 at p. 459 (S.C.C.) Sopinka J., writing for the 5-4 majority of the court, stated:

> In my opinion, the decision to order concurrent or consecutive sentences should be treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered. The rationale for deference with respect to the length of sentence, clearly stated in both **Shropshire** and **M. (C.A.)**, applies equally to the decisions to order concurrent or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her first-hand knowledge of the case; it is not for an appellate court to intervene absent an error in principle, unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit. ...

[7] The appellant has not demonstrated that the sentence of five years for the two offences is, in its entirety, unfit. Given the appellant's record and personal problems, carrying a knife which he showed himself quick to use in an altercation, is a serious aggravating factor, and the incident called for a sentence emphasizing general and specific deterrence for the protection of the public. The appellant argues that the trial judge erred in not considering rehabilitation. However examination of the trial judge's brief remarks suggests he had all relevant factors in mind in crafting the sentence which he imposed.

[8] In our view, considering both the offence and the offender, the combined sentences are within the customary and reasonable range.

[9] The Crown has informed the court that six days after the sentencing in issue the appellant was sentenced to two additional concurrent three year sentences for offences involving a firearm and a machete, which are to be served consecutively to the five year sentences under appeal. Such evidence is relevant and admissible and can be informally received if not challenged. (See **R. v. Riley** (1996), 150 N.S.R. (2d) 390**; R.v. Scanlon** (1995), 107 Man. R. (2d) 190 (Man. C.A.)).

[10] Leave to appeal is granted but the appeal is dismissed.

Freeman, J.A.

Hallett, J.A.

Pugsley, J.A.