Cite as: R. v. Porter, 1992 NSCA 91

S.C.C. No. 02590
S.C.C. No. 02588

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hallett and Matthews, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant/Sentence Respondent/Conviction	Denise C. Smith for the Appellant/Sentence Respondent/Conviction
- and -	Cameron S. McKinnon for the Respondent/Sentence Appellant/Conviction
ERIC LAYTON PORTER Respondent/Sentence Appellant/Conviction	Appeal Heard: May 25, 1992
	Judgment Delivered: May 25, 1992

THE COURT: Appeal from conviction dismissed; appeal on sentence allowed as to term of probation only per oral reasons for judgment of Hallett, J.A.; Jones and Matthews, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

HALLETT, J.A.

This is an appeal from a trial judge's finding that a written statement given by the appellant was voluntary and , therefore, admissible. The learned trial judge found the appellant's testimony on the voir dire, that he had lied to the police in giving the statement, was not credible. After reviewing the law and, in particular, the decision of this court in **R. v. Nugent**, (1988) 63 C.R. (3d) 351 and the evidence and relating the evidence to the law the learned trial judge stated at pp. 22-23 of his decision:

> " In my respectful submission, there are a number of circumstances in this case which distinguish it from Nugent. As Mr. Justice Jones said, all the facts must be considered and in particular I would note:
>
> 1. Nugent's rights under the Charter were clearly infringed when the police continued questioning after he several times asked for legal counsel. I refused to permit a statement on the same facts in R. v. Nickerson before the decision of the Appeal Division in Nugent came down.
>
> 2. There were no threats or ill treatment of the accused or no inducements. In Nugent, when being questioned, he was obviously sick and had not eaten for 2 days. In Nugent there were inducements in the form of illustrations of light sentences which were received in previous cases for co-operation with the police.
>
> 3. Here the written statement can clearly be separated from that which went on previous to it. Not only were new warnings given, but a different police officer took the statement from the one who conducted the polygraph test. It is clear from the evidence that I have read that it was obvious that a different procedure was being adopted.
>
> 4. The tape reveals in several places that the accused was relieved to give the statement and at the end he said he was, "so glad that it's all out."

5. The distress that is evident when the accused cried during the interview emanates from his own remorse upon realizing the magnitude of the acts committed against his son.

6. The confusion referred to by Mr. Justice Jones in the Nugent case is not present in this case.

For all of the foregoing reasons, I deem that the statement should be admitted in evidence."

We would note that the appellant voluntarily took the polygraph test despite being advised by his counsel not to do so. We agree that the facts of this case are different from the facts in **Nugent** and therefore agree with the trial judge in this respect. We are satisfied the trial judge considered the appropriate legal principles and considered and applied the relevant facts to those principles in determining that the statement given by the appellant was voluntary. We would dismiss the appeal from conviction.

We grant leave to the Crown to appeal sentence. The sentence appeal is allowed as to the term of probation only. The sentence of 15 months incarceration is within an appropriate range. It is not manifestly inadequate. The learned trial judge considered the appropriate principles in imposing sentence. However, s. 737(1)(b) of the **Criminal Code** provides for a maximum period of two years probation, not three as ordered by the trial judge. The order shall be amended accordingly.

J.A.

Concurred in:

Jones, J.A.

Matthews, J.A.