NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacKenzie***, 2013 NSCA 109

Date: 20131002
Docket: CAC 411710
Registry: Halifax

Between:

Daniel John MacKenzie

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Farrar and Bryson, JJ.A.
Appeal Heard:	September 30, 2013, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Saunders, J.A.; Farrar and Bryson, JJ.A. concurring.
Counsel:	Luke Craggs, for the appellant Mark Scott, for the respondent

Reasons for Judgment:

[1] The only issue in this case is whether the trial judge had the legal authority to do what he did. That is a pure question of law reviewable on a standard of correctness.

[2] The Crown supports the appellant's appeal on the single but important ground that the sentencing judge did not have the authority to impose a weapons prohibition order under s. 109 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 because the statutory requirements for making such an order had not been established, with the result that this aspect of the sentence was unlawful and should be quashed. We agree.

[3] The facts are straightforward. The appellant was convicted of unlawfully entering a dwelling house with intent to commit an indictable offence therein contrary to s. 349(1) of the **Criminal Code**. The maximum punishment for this offence when prosecuted by Indictment is 10 years' imprisonment.

[4] Section 109(1)(a) of the **Code** requires a mandatory weapons' prohibition order provided a convicted person's offence meets the following preconditions:

> (a) The maximum punishment for the offence is 10 years imprisonment or more; and
>
> (b) In the commission of the offence violence against a person was used, threatened or attempted.

[5] In this case the first precondition was established on its face by the fact that the charge was prosecuted by Indictment leading to a potential term of imprisonment for a term not exceeding 10 years.

[6] However, the second prerequisite was not met. Violence, per se, is not an incidental or presumed element of the offence of unlawfully entering a dwelling house. Neither did the facts of this case disclose that violence was used, threatened or attempted. The trial judge made no such finding. All he said was that the appellant's actions were a "violation and intrusion" and "opportunistic".

[7] Respectfully, the factual basis or foundation for a weapons prohibition order under s. 109 did not exist. The judge erred. The appeal is allowed but only insofar as the weapons prohibition order is concerned. In all other respects and especially considering the appellant's lengthy criminal record for similar crimes, the sentence of 2 years' imprisonment in a Federal penitentiary remains in full force and effect.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.