C.A.C. No. 101876

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. L.S.M.,1994 NSCA 151
Hallett, Freeman and Roscoe, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant	)	Kenneth W. F. Fiske, Q.C. for the Appellant
- and -	)	Joel E. Pink, Q.C. for the Respondent
L. S. M. Respondent	)	Appeal Heard: June 7, 1994 Judgment Delivered: June 21, 1994

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal dismissed per reasons for judgment of Freeman, J.A.; Hallett, and Roscoe, JJ.A. concurring.

FREEMAN, J.A.:

The issue in this appeal is whether four years incarceration is a fit punishment for a 21-year-old accused who pleaded guilty to manslaughter after beating to death a man who had just engaged him in a homosexual act. The Crown has appealed seeking a longer sentence and a period of parole ineligibility, chiefly as a result of its concerns arising from the shocking violence of the beating.

The respondent, L. S. M., was visiting Nova Scotia from Saskatchewan. He encountered the victim, G. G. J., 35, to whom he had been introduced previously, in a tavern in Wolfville, N.S. Both men had been drinking. J.'s blood alcohol level, established after his death, was about 239 milliliters per 100 milligrams of blood, or three times the legal driving limit. J. invited the respondent to a party where they continued drinking. J. asked M. to walk home with him. Their path led through an area of bushes. The trial judge, Justice Hall of the Supreme Court of Nova Scotia, described what happened there:

> It is clear and undisputed that there were sexual overtures made by the deceased toward the accused. At some point, whether it was from the beginning or later, it is apparent that the accused rejected further sexual activity with the deceased. This, however, apparently was at or after the point when the deceased attempted to have or succeeded in having anal intercourse with the accused. Following this it is again undisputed that the accused became enraged and commenced to violently strike the accused with his fists and by kicking him. In simple terms he put an extremely severe beating on Mr. J., in the course of which injuries were received by him which resulted in his immediate death.

The respondent wandered around Wolfville for a while, then phoned his grandparents in Saskatchewan. They advised him to notify police and he did so. He cooperated with police by giving a detailed statement with two versions of the event preceding the beating. In the first he said he fell asleep and woke up to find Mr. J. sodomizing him. In the second he said Mr. J. overpowered him; Justice Hall accepted the second version.

The respondent does not have a history of violent offences, and has not been previously incarcerated. His record includes two break and enter

convictions in Saskatchewan since he became an adult which were dealt with together and treated leniently. He was originally charged with second degree murder but his plea to the included offence of manslaughter was consented to by the Crown.

Section 232 of the **Criminal Code** provides:

> 232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
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> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
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> (3) For the purposes of this section, the questions
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> (a) whether a particular wrongful act or insult amounted to provocation, and
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> (b) whether the accused was deprived of the power or self-control by the provocation that he alleges he received,
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> are questions of fact, but no oneshall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
>
> . . .

The last provision of s-s. (3) was not an issue. While Mr. M. may not have offered vigorous resistance to Mr. J.'s initial advances, there is no evidence suggesting he consented to the act of sodomy, and certainly none to indicate he incited the act to give himself an excuse for beating Mr. J..

The minimum sentence for second degree murder is life imprisonment with no parole eligibility for ten years. The maximum sentence for manslaughter is life imprisonment, but there is no minimum. The Crown argued that provocation gave Mr. M. a double benefit: it resulted in a reduced charge, and then it was considered in mitigation of his sentence. While this is true, the Crown

was able to cite no authority suggesting it is objectionable. Once a conviction is entered for manslaughter, all relevant circumstances including provocation must be considered in imposing the sentence. At the sentencing the Crown asked for 12 to 15 years with no parole eligibility for half of that time. In passing sentence Justice Hall found as a fact that Mr. M. had been raped. He found the first blows struck by Mr. M. to have been in self defence. He considered that provocation was the overriding factor in mitigation of sentence:

> There is no question, however, that the conduct of Mr. J. did not justify the response. Mr. M. I think acknowledges that in his brief statement. He said himself, I think his very words after having the experience of being previously sexually assaulted as a child, it always stayed with him and when Mr. J. did to him what he did, his words were "I lost it." In my view, that is exactly what happened in that he completely lost control of himself, that he was in a frenzy and that what he did to Mr. J. took place under circumstances when he had completely lost control of himself and his judgment.

Justice Hall was referring to Mr. M.'s words to the court before the passing of sentence:

> ". . . I honestly did not know Mr. J. was a homosexual. I did not want to have a sexual encounter with him. I myself am not a homosexual ... .When I was approximately nine years old I was sexually assaulted and it's had a lasting impression on me and when J. assaulted me I lost it. . . ."

The post mortem report shows that Mr. J.'s injuries included multiple bruises and abrasions of the face, neck, chest, right side of abdomen and penis; hemorrhage from nose and mouth; lacerations above and below right eye; fracture of lower jaw, right and left side; multiple fractures of ribs, bilateral; subarachnoid hemorrhage; contusion of neck muscles and soft tissues, fracture of hyoid bone and thyroid cartilage; contusion of left supraclavicular fossa, contusion of mediastinal tissues above aorta and at roots of lungs; contusion of posterior aspect of heart; laceration of right atrium (two) and laceration of superior vena cava; hemorrhage into pericardium, 200 mls.; contusion of pancreas and peripancreatic fat; contusion of retroperitoneal tissues about aorta below renal arteries; contusions of ileum (3); contusion of right kidney; laceration of left lobe of liver, upper surface; hemorrhage under capsule of testes and within testes.

The report, by Dr. M. A. MacAulay, pathologist, concludes:

> The cause of death is multiple blunt trauma with the principal traumatic effects in the chest, neck, abdomen and head. The chest injury and heart injury by themselves are rapidly fatal; this type of heart injury leads to death in a few moments.

The beating was obviously merciless and protracted. In his statement to police Mr. M. exhibited a blow-by-blow recollection of it.

This Court was referred to **Sentencing** (3d Ed.) by Ruby at 416, in which the author remarks at the bottom of 416:

> However, irrational heterosexual panic in the face of traditionally denounced sexual orientations still appears to be a possible mitigating factor in the sentencing of violent offenders, a situation which will probably continue as long as fear and revulsion are regarded as normal and understandable reactions to homosexuality.

While the evidence suggests trauma from the sexual assault, there is little to justify characterizing Mr. M.'s reaction as "heterosexual panic."

Justice Hall said he would have imposed a five-year sentence but took into account the equivalent of a year Mr. M. had spent in prison awaiting trial.

Section 687 of the **Criminal Code** states:

> 687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
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> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> (b) dismiss the appeal.
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> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

I agree with the Crown's summary of the law:

> This Court may vary the sentence imposed by a trial Judge when the sentence is based on a misdirection or non-direction of the proper principles of sentencing or when the sentence is clearly excessive or inadequate.

In **R. v. Cormier** (1974), 9 N.S.R. (2d) 687 Macdonald, J.A. speaking for this Court stated at page 694-695:

> Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused.

In **R. v. Grady** (1973), 5 N.S.R. (2d) 265 McKinnon, C.J.N.S. speaking for this Court stated at page 266 as follows:

> It has been the practice of this court to give primary consideration to the protection of the public, and then to consider whether this primary objective could be best attained by (a) deterrence, or (b) reformation and rehabilitation of the offender, or (c) both deterrence and rehabilitation.

In **R. v. Perlin** (1977), 23 N.S.R. (2d) 66 Macdonald, J.A. in delivering the judgment of this Court said at page 68:

> In my opinion the overriding consideration in sentencing with respect to crimes of violence must be deterrence and it is for such reason that save for exceptional cases substantial terms of imprisonment must be imposed.

The Crown states in its factum:

> In relation to manslaughter where the range is from a suspended sentence, as in the **Cormier** case, to a period of 20 years incarceration in a prison, as in **Julian** (1973), 6 N.S.R. (2d) 504, it is difficult to arrive at an appropriate range of sentencing for manslaughter by simply looking at the manslaughter cases and taking an average of the

sentences. The difficulty with manslaughter cases was recognized by Macdonald, J.A. in **Cormier** where he stated at page 692 as follows:

> Manslaughter is a serious offence and is so recognized by the courts. This Court, differently structured and constituted, in **The Queen v. Gregor** (1953), 31 M.P.R. 99 said:
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> > It may be said of manslaughter, differing in that respect from other crimes, that the legal limits of possible sentences is very great. There are cases of manslaughter where the line between crime and accident is narrow and where a sentence of a few months' imprisonment is appropriate. On the other hand, there are cases where the proper sentence approaches or reaches the legal limit of imprisonment for life. Different cases involve different facts, as varied as are the actions and the thoughts of man and it is always difficult to determine the punishment appropriate under the circumstances. No one case can be an exact guide for another.

60. It is the submission of the Appellant that the sentence of four years' imprisonment imposed by the learned trial Judge in the present case is manifestly inadequate.

The Crown referred to the following four cases as general precedents with respect to manslaughter sentences:

In **R. v. Myette** (1985), 67 N.S.R. (2d) 154 this Court in February of 1985 affirmed a sentence of six years incarceration in relation to a conviction for manslaughter. The 22-year-old accused was unemployed with a background of a severe addiction to alcohol and drugs and a prior criminal record consisting of three counts for non-violent offences of theft and break and enter. The accused, while highly intoxicated, beat to death his friend. An expert testified that at least nine blows had been struck.

In **R. v. Slaney** (1986), 75 N.S.R. (2d) 93 the victim died from what this Court described as "deplorable acts of extreme and excessive violence." This

Court affirmed a seven year sentence, stating that "The sentence imposed upon the respondent is not so lenient that this Court should revise it upwards."

In **R. v. Jacobs** (1990), 93 N.S.R. (2d) 359 this Court upheld a term of incarceration of seven years in relation to a manslaughter charge. The 42-year-old accused stabbed and killed a man whom he felt had grabbed his wife indecently. In the circumstances, the Court did not treat this as provocation in mitigation of sentence. He had a problem with alcohol. He had three convictions relating to drinking and driving. The Court stated the range for sentences for manslaughter was four to ten years.

In **R. v. Black** (1989), 94 N.S.R. (2d) 59 this Court altered a sentence of four years' incarceration in relation to a manslaughter charge, increasing it to eight years. The accused was 30 years old with a severe alcohol addiction. In an intoxicated state after a fight, she returned with a knife and stabbed the victim.

These cases are of limited assistance because they lack the element of provocation and other mitigating circumstances that characterize this unfortunate case.

In reviewing the outstanding features, it must first be noted that there is no evidence Mr. M. had a history of violent behaviour. There is no reason to doubt what he told the Court: "I had no intention of getting in trouble when I came down to Nova Scotia or when I went out that night." He and Mr. J. had been companions for only a few hours and appeared to be on the best of terms before the incident. Prior to that they had hardly known each other. The events that unfolded were not coloured by any previous history of grudges or resentments, nor does the evidence suggest Mr. M. was motivated by homophobia. His extreme reaction was in response to an extreme violation of the integrity of his body.

It is established that a sexual incident initiated by Mr. J. and culminating in non-consensual anal intercourse took place in a secluded area on the way to Mr. J.'s home. The trial judge found Mr. M. had been raped. Medical evidence established that penetration occurred. Given Mr. M.'s demonstrated capacity to defend himself, it is puzzling that matters advanced as far as they

did before he succeeded in fighting off Mr. J.. The men were of roughly equal height, although Mr. J. was a little heavier. Mr. M. had had some marital arts training and had been an amateur boxer five years earlier. If he had fought off the initial advances as strenuously as he conducted the beating, the incident would not have developed. Short of actual consent, of which there is no evidence whatsoever, the degree of resistance, or lack of it, offered by Mr. M. to the sexual assault is immaterial. What matters is whether a crime was committed upon him that amounts to provocation at law.

However it would appear from the following passage from Mr. M.'s statement that his blind fury reached full development only during the beating and may not have been present when the assault began. At that point, possibly surprised and confused by Mr. J.'s sudden aggressiveness, he seems to have tried to protect himself chiefly by yelling. In his statement to police Mr. M. says Mr. J. first tried to persuade him, then made aggressive sexual contact with his hands, then managed to pin him on the ground while he sat over him trying to engage Mr. M. in oral sex.

> ". . . We got to these bushes and we stopped and he asked me if I was interested in having sex and he asked me if I ever had sex with another guy before and I said no on both accounts. We were in the bushes now. He said you should try it you'd enjoy it, and he started grabbing for my crotch and my behind. I told him to stop and that I wasn't that kind of person and I told him I was leaving and he grabbed me and forced me to the ground. He started grabbing me in my crotch and we started struggling and he managed to get on top and he started unbuckling my pants. He had my arms pinned and his crotch was over my face. He unbuckled his pants and he stuck out his penis. He tried to get me to take it into my mouth. Then he put his head down and started taking my pants down and my shorts down. He started licking my nut sack and my penis. He got up but he was still pinning me down and said "see didn't you enjoy that." I said "No" and told him to get off me. I tried to get him off me and I was yelling at him to get off me. He stuck his penis in my mouth as I was yelling at him. I moved my head very quickly and got his penis out. He was still holding me down and he swung around and he grabbed my arm with his hands and I was kicking and yelling at him to get off me. Then he grabbed me THEN HE GRABBED ME . . . . . and turned me over and shoved his penis into my rectum. He was doing the act. I managed to get an arm free and I elbowed him and knocked him off me. Then I got up and tried to put my pants and shorts back on. At the same time he got up and said, "I'm going to get you you little bastard."

> He came at me and I kicked him in the groin. I was pulling my pants back up and I was buckling it. And he came at me again. Then I kicked him in the groin again. This is when I got really mad and I kicked him in the chest, knocked him out of wind and kicked him in the chest again and he started to stagger and I started punching him in the face. That's when I really gave it to him. I just kept punching and kicking him. He fell to one knee and I kicked him in the chest and he fell over and I gave him another kick in the head. That's when I grabbed him by the shirt and just started pounding on his face. That's when I let him go and I noticed he wasn't moving. He seemed lifeless. He looked very lifeless and he wasn't breathing. That's when I panicked and ran.
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> Q. Why did you not leave when you had the wind knocked out of him and he was down on one knee?
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> A. Cause I was very angry. Like I said I was very mad and I just wanted to beat him.
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> Q. Didn't you realize you were killing him?
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> A. I didn't know. I didn't realize I was killing him and I had no intention of killing him. I wanted him to pay for what he had done. I just wanted to beat him real bad but I didn't want to kill him."

I have no doubt that a sexual assault involving anal penetration, in the words of s. 232(2) is "a wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self control." If necessary I would take judicial notice of the voluminous literature dealing with the traumatizing effects of sexual assaults, but the matter is sufficiently covered by the evidence of Nurse Doris Jenkins and Doctor Roger David Hamilton both at the preliminary hearing and the sentencing, which was capably brought to the attention of the sentencing judge. In my view the sexual assault constituted provocation within the strict meaning of s. 232 and not merely in the more generalized sense in which it may be considered for sentencing purposes. By sodomizing Mr. M., Mr. J. robbed him of his ability to control the violent fury that resulted in his own death.

In the emotional turmoil created by the sexual assault leading directly into the physical confrontation Mr. M. "lost it", to use a term he introduced and which was adopted by his counsel and adopted by the trial judge. That is, he was deprived of the power of self control. It is not the provocative event in itself but the loss of control that results from it that is material in the mitigation of

sentence. Once self-control is lost, a person is beyond the constraints imposed by rational thought until it is regained. Mr. M.'s self control returned only when he realized Mr. J. was not breathing and seemed lifeless. If the loss of self control referred to in s. 232(2) is to have practical effect, a person deprived of it must be held accountable only to a diminished level of responsibility. That is why it is a basis for reducing murder to manslaughter; and that is why it is relevant to sentence. It was during Mr. M.'s period of lost control, triggered by the sexual assault that Mr. J. received his fatal injuries. The severity of the beating, which the Crown asserted to be the chief aggravating factor, was a circumstance of the period of time when Mr. M. was out of control. Mr. M.'s loss of control was properly taken into account by the trial judge as a mitigating circumstance in passing sentence. While the nature and severity of the injuries resulting in death must properly be considered in sentencing, their very extensiveness, and the fact they were inflicted by a person without a history of violence, supports the inference that Mr. M. was genuinely out of control in the sense contemplated by s. 232(2).

Events prior to the fatal incident were not the only mitigating factors. Mr. M.'s behaviour immediately following it was not only mitigating in itself but consistent with that of a person who, returning to reason after the trauma of a criminal assault has deprived him of control, realizes that he himself has committed a terrible crime.

After the incident he wandered about the streets of Wolfville, then called his grandfather, [...] of [...], Saskatchewan, and apparently spoke as well with his grandmother M.R. and his mother, M. M.. They advised him to report the incident to the police. He told the friend at whose house he was staying in Wolfville, K.O., and her parents accompanied him to the police station. He was thoroughly co-operative with the police and voluntarily gave them a statement that enabled them to complete their investigation. He expressed remorse in that and in his remarks to the Court.

Justice Hall noted that his ready admission of responsibility and his guilty plea following the preliminary inquiry

> . . . saved the public a good deal of money and inconvenience as well, and also I would expect that it did at least save Mr. J.'s family from some further emotional

> trauma. The accused has expressed remorse apparently from the very outset and he again did so today, in fact he apologized to the J. family for what had happened. The accused is a very young person, just now 21 years of age. He really has his whole life ahead of him. . . .

Justice Hall had the advantage of seeing the respondent before him. He was in a better position than this Court to assess the sincerity of his remorse from his demeanour.

This case is a most unfortunate and troubling one. A careful review of the record makes it clear that Justice Hall considered all of the factors that were relevant to the sentencing of Mr. M., including the circumstances of the offender as well as of the offence. He was mindful that Mr. M. is a young man with a potential for rehabilitation, and it would appear that Justice Hall was seeking to protect the public by crafting a sentence that balanced reform and deterrence. Deterrence is always a major factor in crimes of violence, but it is most effective when there is an element of deliberation, not when the offence is one committed by a person beyond the reach of reason. Justice Hall did not misdirect himself as to the principles of sentencing nor with respect to any relevant factor. The sole issue is fitness. As counsel noted, each manslaughter sentence is dictated by its own facts and can run from a suspended sentence to life imprisonment, although the longest sentence imposed in Nova Scotia is said to have been twenty years. The general range of sentences as Justice Jones noted in **Jacobs**, is four to ten years. Mr. M.'s sentence is at the low end of the range, but not at the bottom because, allowing for time spent in jail prior to disposition, it is the equivalent of five years. The question is whether it is manifestly inadequate.

It could only be increased to seven or eight years, bringing it in line with the sentences in **Myette**, **Slaney**, **Jacobs** and **Black**, if no effect were to be given to provocation as a mitigating factor.

Taking all the circumstances into account, I am not satisfied that the sentence imposed of four years, in addition to the one year credit, is so manifestly inadequate that interference by this Court would be warranted, either with respect to the sentence or with respect to a period of parole ineligibility. Whether Mr. M. has found a means of restraining the mindless ferocity with

which he lashed out in response to a provocative event will be a concern of any parole board considering his release. However, I am not persuaded the public would be better protected, in the circumstances of a sentence reflecting both a concern with rehabilitation and deterrence, by fettering the discretion of a parole board with a period of parole ineligibility.

I would dismiss the appeal.

J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.