C.A.C. No. 02848

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hallett and Roscoe, JJ.A.
Cite as: R. v. McKay, 1993 NSCA 133

BETWEEN:

ROBERT MCKAY	)	The Appellant in Person
	)	
Appellant	)	
- and -	)	
	)	Dana Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	June 15, 1993
	)	
	)	Judgment Delivered:
	)	June 29, 1993
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THE COURT: Appeal dismissed from sentence of two years for break, enter and theft contrary to section 348(1)(b) of the **Criminal Code**, per reasons for judgment of Clarke, C.J.N.S., Hallett and Roscoe, JJ.A. concurring.

CLARKE, C.J.N.S.:

This is an appeal against a sentence of two years imprisonment for break, enter and theft, contrary to section 348(1)(b) of the **Criminal Code**.

On September 12, 1991, the appellant, Mr. McKay, and two accomplices broke and entered a meat market in Antigonish. Mr. McKay loaded meat and other products in garbage bags and passed them through a window to his two accomplices. The three then removed the bags of stolen goods from the premises. The value of the meat was estimated at $960.00. Some of the stolen product was later recovered. Mr. McKay claimed he and his accomplices needed the stolen goods for food. He pled guilty to the offence.

The principal ground of Mr. McKay's appeal is that the sentence is excessive. With that, he advances a number of other complaints which he alleges combined against him so that in the end he was ill-served by the justice system.

These include a falling out with his Legal Aid lawyer when he was unable to be in Antigonish for the sentencing hearing resulting in it being delayed and him being unrepresented at the later proceedings. This arose after he and a friend drove to Halifax the day before his sentencing and he was unable to get back to Antigonish. There are two versions of reasons for this. One is that the car broke down: the other is that he and his friend had a disagreement while in Halifax so that return transportation was not available. It appears that he tried by telephone to explain his problem to his lawyer during which their disagreement arose, resulting in Mr. McKay hanging up on his lawyer.

He says the owner of the meat market, where the offence occurred, promised to come to give evidence at Mr. McKay's sentencing but the owner's house burned the previous day and he was unable to be there. He says a deal

was struck between counsel in return for a guilty plea and the Crown defaulted. He claims that his failure to appear three times for the preparation of a pre-sentence report was due to the fact that winter storm conditions made it impossible for him to travel from where he was working (not far from Antigonish) to the probation office in Antigonish and that he telephoned his regrets, with reasons. He alleges that there was inequity in the sentences between him and his accomplices, the latter having received lighter sentences. He asserts that a correctional officer informed him he overheard a conversation between the Crown counsel and the judge, in advance of his sentencing hearing, at which time they agreed on what the sentence would be. He claims the record of his prior convictions, certified by the Royal Canadian Mounted Police and offered by the Crown to the Court, is wrong. And there are others.

Through all of this one important and significant fact remains constant: he pled guilty to this serious offence and he reaffirmed his admission of guilt during his lengthy oral submissions to this Court on appeal. It is for this Court, pursuant to section 687 of the **Criminal Code**, to determine "the fitness of the sentence appealed against".

At the time the offence was committed, Mr. McKay was a trifle short of twenty-two years of age. He had been living in a common law relationship to which three children were born. Prior to the time of the offence he separated from his common law companion and he was living with the two gentlemen who became the accomplices, and later two accused, in this misadventure. Afterward, he resumed his relationship with his common law companion and before his sentencing, a fourth child was born.

Mr. McKay's record, as certified by the R.C.M.P. and advanced by the Crown as being correct, reveals that on October 23, 1986, he was found responsible, in youth court, for six charges of break, enter and the commission

of an indictable offence contrary to then section 306(1)(b) of the **Code**. The disposition was twenty-four months open custody on each count, to be served concurrently.

On June 19, 1989, he was charged, again in youth court, with one similar offence of break and enter together with the commission of an indictable offence. The disposition was one year of open custody. Mr. McKay confirms these charges and dispositions but he says they occurred while he was a youth and should not now be taken into account. Respecting the first six charges, he says he was thirteen years old when they were committed but dispositions were not imposed upon him by the youth court until he was fifteen years old, thereby making the first six even more stale for present purposes.

It is appropriate for this Court to consider the youth record by relying on the dates the dispositions were imposed. In these circumstances, there was an insufficient lapse of time between the dates of the completion of the dispositions in youth court and the time of this sentencing in adult court to erase the earlier dispositions from his record.

Finally, the record advanced by the Crown as certified by the R.C.M.P. at Ottawa on January 21, 1993 records that on July 17, 1990 Mr. McKay was convicted at Halifax on one count of theft over $1,000.00, contrary to section 334(a) of the **Criminal Code** for which he was sentenced to five months in jail. Mr. McKay disputes this recording. Instead, he says that while he was charged with this offence, it arose out of circumstances where it was thought he had stolen a car which a female friend rented, but loaned him. He claims that when the Crown discovered the true facts, the charge which is shown on his record was withdrawn. In its place, he says he was charged with four counts of dangerous driving causing bodily harm and sentenced to serve from four to fourteen months on these four charges. The sentences were concurrent with the

result that he was sentenced, in total, to fourteen months. After serving nine months and ten days, Mr. McKay says he was released from the Sackville Correctional Centre on mandatory supervision. In spite of these assertions, Crown counsel appearing before the Court on appeal offered the official record as being accurate and reliable.

Whichever version one adopts, Mr. McKay was sentenced for a serious offence or offences on July 17, 1990. If it be as the Crown asserts, it becomes the eighth offence in this young man's career with connotations of theft related circumstances. If it be as Mr. McKay asserts, it represents serious violations of the criminal law for which he served a longer time in jail than the Crown record reflects.

The end result is that Mr. McKay does not have a good record. It is one that the trial judge could, and did, take into account.

Mr. McKay alleges that his accomplices received lighter sentences and as a result he suffered discrimination in the sentencing process. The position taken by this Court on such a submission is reflected in **R. v. Lockhart** (1976), 14 N.S.R. (2d) 262, where MacKeigan, C.J.N.S. stated at p. 264:

> "The other cases are not before us and we cannot suggest, since we are not familiar with all the circumstances, that the sentences imposed were wrong as to quantum, ... We have to consider only whether the sentences imposed upon the appellant Lockhart are fit sentences. We cannot be influenced, assuming for present purposes that the other cases may be similar, by the fact that lesser sentences were there imposed."

To the same effect, Macdonald, J.A., wrote in **R. v. Tobin** (1977), 17 N.S.R. (2d) 534 at p. 538:

> "I would but add that assuming the same court sentenced both the appellant and his accomplice, and assuming that the accomplice was treated with excessive leniency, such does not bind this Court to repeat such error with the appellant. The function of this Court is to consider the fitness of the sentence imposed upon an appellant

> having regard only to proper sentencing principles, excessive leniency in sentence on accomplice or co-accused has no place in such consideration."
>
> (See also **R. v. Dunlop** (1981), 44 N.S.R. (2d) 277)

It is to this offence, this offender and the fitness of this sentence that this Court must direct its attention. That it is a serious offence is evidenced by the fact that parliament has prescribed a maximum penalty of fourteen years imprisonment (**Criminal Code**, section 348(1)(e)).

In **R. v. Zong** (1986), 72 N.S.R. (2d) 432, which also involved a break and entry of a commercial establishment, this Court observed at p. 433:

> "[7] This court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years' imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant."

In determining an appropriate sentence in circumstances such as exist here, the trial judge must consider, in addition to the facts related to the commission of the offence, that which is likely to deter the offender from repeating this offence another time, how best the public can be protected from an unwarranted invasion of their property by this and other like-minded offenders, and how the personal circumstances of the offender can best be addressed. The difficult judicial function involved in sentencing obliges the trial judge to fashion a sentence that displays an acknowledgment and concern for all these factors.

This Court is one of review and not retrial. Recent decisions of this Court on appeals from sentences imposed for offences contrary to s. 348 of the **Criminal Code** indicate that while the sentence imposed on Mr. McKay may be at the higher range, it is not excessive considering the pronouncements of this Court and the fact that the offender has a related record. The challenge to Mr.

McKay, from this unfortunate experience, is to become a law abiding citizen.

Having reviewed the record in these proceedings and having considered the submissions of Mr. McKay on his own behalf, and counsel on behalf of the Crown, the sentence imposed on Mr. McKay satisfies the test of "fitness" described in the **Criminal Code.** Therefore, after granting leave to appeal, I would dismiss the appeal.

C.J.N.S.

Concurred in:

Hallett, J.A.

Roscoe, J. A.