S.C.C. No. 02743

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S ,Chipman and Freeman, JJ.A.

Cite as: R. v. Rogers, 1993 NSCA 49

BETWEEN:

ROBERT CHARLES ROGERS	)	the appellant appeared in person
	)	
appellant	)	Dana W. Giovannetti
	)	for the respondent
- and -	)	
	)	Appeal Heard:
HER MAJESTY THE QUEEN	)	January 26, 1993
	)	
respondent	)	Judgment Delivered:
	)	January 29, 1993

THE COURT: Appeal dismissed from sentence of two years for break, enter and theft (s. 348(1)(b) and appeal allowed and acquittal entered on a conviction for contempt of court per reasons for judgment of Clarke, C.J.N.S.; Chipman and Freeman, JJ.A. concurring.

CLARKE, C.J.N.S.:

This appeal is against the sentence imposed for a break and enter and the conviction for contempt of court and the sentence imposed for that latter offence.

The appellant pled guilty to breaking into a dwelling house and committing therein theft contrary to s. 348(1)(b) of the **Code**.

The facts are not in dispute. On November 4, 1991, the appellant broke into a dwelling house by kicking in the front door. The occupants were not home at that time, they were "running errands". Various items, including several firearms were stolen with a total value of $8,250.00. For some unexplained reason the appellant discharged a shotgun in the home. None of the items stolen were recovered with the exception of a hunting knife seized by the police from the appellant at the time of his arrest for a later armed robbery. Although the appellant informed the police he knew who was in possession of the other items, he refused to divulge the name of that person.

Taking the principle of totality into consideration Crown and defence counsel jointly recommended a sentence of one year to be served consecutively to the total sentence of 6 years and 9 months that the appellant began serving in December 1991, for numerous other offences.

In his factum before us, Crown counsel points out that the proper calculation of the total of the previous sentences is 7 years and 3 months.

The sentencing judge refused to accept that joint recommendation. He imposed a sentence of "incarceration for a period of twenty-four months consecutive to any other sentence he is presently serving".

It is from that sentence that the first appeal is taken.

The appellant is 29 years of age. He has a dismal criminal record since February, 1982: some thirty-two prior convictions, eight of which took place after the commission of this offence. They include fourteen break and enters, two robberies, several theft related charges, two for possession of a weapon, one unlawfully at large, three escapes from lawful custody and two for possession of narcotics. The appellant was armed at the time of the commission of this offence. His has been a life of crime since he was nineteen years old.

Parliament has considered this offence to be so grave that the maximum sentence which may be imposed is life imprisonment. This court in **R. v. Zong** (1986), 72 N.S.R. (2d) 432

established a bench mark for this serious offence at three years from which a sentence may be decreased or increased as the circumstances dictate. The totality principle is important. Some consideration must be given to it. The gravity of this offence, all of the facts surrounding it and the circumstances of this offender are such that were it not for the totality principle a sentence much in excess of two years could have been imposed. The trial judge did not err in exercising his discretion not to accept the joint recommendation of counsel. In these circumstances I do not accept that the sentence was not fit.

While I would grant leave to appeal, I would dismiss the appeal from sentence.

After sentence was pronounced, the appellant indulged in a vulgar outburst. The judge said:

> "Contempt of Court, six further months consecutive to the sentence previously imposed and previous to any other sentence he is serving."

The reaction of the judge is understandable. Provincial court judges are confronted daily with criminals, many of whom have little or no regard for the judicial system or those who serve in it. These judges and their courts are in the busy front line of criminal trial proceedings. They must be protected in every sense of that word, including protection from intemperate outbursts. The conduct of this offender would be condemned by any right thinking person.

Section 10 of the **Code** provides for an appeal against conviction and also sentence when a Provincial Court judge summarily convicts a person for a contempt of court, committed in the face of the court and imposes punishment in respect thereof. The provisions of Part XXI of the **Code** apply.

Although understanding the sentencing judges' immediate reaction to the offenders improper and inappropriate comments, the Crown in its factum says:

> "The Respondent Crown takes the admittedly unusual position that the contempt conviction ought to be overturned and an acquittal entered."

In **R. v. S.M.** 81 N.S.R. (2d) 27 this court considered a conviction and sentence imposed

immediately following the impugned conduct. It was there held that in such circumstances a judge, prior to decision respecting the offence, is required to advise the offender of his right to counsel under the **Charter of Rights and Freedoms** and that failure to so advise prevented the offender from making full answer and defence. The court allowed the appeal and set aside the conviction and sentence imposed.

In consequence, although I hesitate being critical of the sentencing judge, I would allow the appeal from conviction respecting the contempt charge, set aside the conviction and enter an acquittal.

As stated earlier, the appeal from the sentence for the offence contrary to s. 348(1)(b) of the **Criminal Code** is dismissed.

C.J.N.S.

Concurred in:

Chipman, J.A.

Freeman, J.A.