S.C.C. No. 02781

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Hallett, JJ.A.

Cite as: R. v. Boucher, 1993 NSCA 56

BETWEEN:

JOHN CHARLES BOUCHER	)	Terry E. Farrell
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Gordon S. Gale, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	February 4, 1993
	)	
	)	
	)	Judgment Delivered:
	)	February 5, 1993
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THE COURT: Appeal allowed and sentence varied for break and enter with intent contrary to s. 348(1)(a) of the **Criminal Code**, per reasons for judgment of Clarke, C.J.N.S., Hart and Hallett, JJ.A. concurring.

CLARKE, C.J.N.S.:

If leave is granted, this is an appeal from a sentence for break and enter with intent imposed on October 13, 1992, by His Honour Judge Archibald

in the Provincial Court.

The appellant pled guilty to three charges arising out of an incident at Springhill on June 28, 1991. The first is that he broke and entered the dwelling house of Shirley Matchett and Ronald Martin with intent to commit an indictable offence contrary to s. 348(1)(a) of the **Criminal Code**. He was sentenced to serve two and one-half years in a federal institution. The second was that he committed an assault on Ronald Legere and the third that without legal justification or excuse he committed mischief at the dwelling house of Matchett and Martin by damaging property. For each of these he was sentenced to serve one month concurrently with the first sentence. As noted earlier, it is only the sentence for the break and enter with intent that is under appeal.

It appears from the somewhat brief record that after the appellant and his wife consumed some drinks at the local Legion, the appellant went home while his wife went to the Matchett and Martin house where the party continued. In due course someone at the house made two telephone calls to the appellant to come and get his wife who had become drunk and was involved in exchanges of abusive language. Somehow, somewhere, the appellant came in contact with his friend Beaton. It appears that they had difficulty getting into the Matchett and Martin residence during which a door and its casing were smashed. A fight broke out with several participating and several, including the appellant and Beaton, being later charged with various offences.

Mr. Beaton was charged with the break and enter with intent of the Matchett and Martin residence contrary to s. 348(1)(a) of the **Code**, a charge of mischief similar to that of the appellants and two separate counts of assault on Martin and Harry Davis. He pled guilty to three of the four charges and the Crown withdrew the fourth. He appeared before his Honour Judge Stroud on September 9, 1991 and was sentenced to three concurrent six months custodial

sentences to be served consecutive to time already being served.

The appellant contends the trial judge erred by failing to take into account the circumstances of the appellant, sentences imposed for similar offences, the principles of sentencing and especially the sentence imposed on the co-accused, Beaton.

Judge Archibald placed great stress on the principle of general deterrence. He said:

> "The Grady case says that the matter of deterrence is important; in this particular case, it is probably not the specific deterrence of Boucher which must be emphasized, but in my view the aspect of general deterrence must be underlined - people have a right, the public has a right to feel secure in their homes and not have to worry about people breaking in. People who are inclined to break in under these circumstances must be dissuaded by seeing, reading about, or hearing about the sentences that other people get when other people are so bold as to commit offences such as this."

He considered the circumstances of the appellant and then added:

> "... But the aspect of general deterrence and general protection of the public in my view as I have already indicated, must be underlined."

The earlier sentence upon Beaton, having been brought to his attention, the trial judge concluded his remarks by saying:

> "... I have considered the principle of totality in regard to these sentences, and I have considered as well the sentence which I have been told by counsel was imposed on another accused."

This Court is required under the provisions of the **Criminal Code** to determine whether the sentence is fit in all the circumstances. While we agree that general deterrence is a primary consideration where an unlawful break and entry of a dwelling house occurs, it appears to us that in this instance the trial judge overemphasized the need for general deterrence. General deterrence is intended to protect the public and warn potential offenders from such untoward

conduct. Here the appellant was twice telephoned and asked to come to the house to take delivery of his wife. He responded to the invitation. He did not come to the Matchett and Martin residence as a trespasser. Upon his and Beaton's arrival a brawl broke out. The circumstances are hardly those requiring general deterrence to be the paramount consideration.

Counsel for the appellant argues that the length of the sentence imposed upon Beaton by Judge Stroud on a similar charge arising out of the same set of circumstances lends weight to the appellant's appeal.

It is not a matter of determining whether Judge Archibald's sentence was too heavy and Judge Stroud's was too light. The circumstances of each offence and each offender may differ. Each was heard by a different judge. This Court in **R. v. Lockhart** (1976), 14 N.S.R. (2d) 262, at p. 264, para. 15, stated:

> "We adopt the principle expressed in **Regina v. Hunter** (1972), 16 C.R.N.S. 12 (Ont. C.A.), which involved an appeal against a ten-year sentence for conspiracy to rob and robbery. Chief Justice Gale, in giving the judgment of the Court dismissing the appeal, commented upon arguments that had contrasted sentences of five years' imprisonment and two years' imprisonment for co-conspirators of Hunter imposed by courts other than the one appealed from. He emphasized that the excessive leniency by one court towards an accused does not bind a second court to repeat the error with a co-accused."

See also **R. v. Tobin** (1976), 14 N.S.R. (2d) 534, at p. 538; **R. v. Dunlop** (1981), 44 N.S.R. (2d) 281.

A significant positive factor in these circumstances is the effort being made by the appellant, apparently with success, to rehabilitate himself from his addiction to alcohol which to a large extent was the underlying cause of this unfortunate incident. The evidence of this was accepted by Judge Archibald who said:

> "... I have heard what has been said by counsel in regard to his remorse. I have heard what he has said himself and I

> accept that, I accept that he was cooperative with the police and to a large extent has been rehabilitated..."

We grant leave to appeal and we allow the appeal. Having regard for all the circumstances it is our opinion that the sentence imposed upon the appellant for the break and enter with intent is excessive and therefore unfit.

We order that the sentence for this offence be varied to twelve months.

C.J.N.S.

Concurred in:

Hart, J.A.

Hallett, J.A.