NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McCurdy*, 2002 NSCA 132

Date: 20021101
Docket: CAC 179949
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

James Stewart McCurdy

Respondent

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	September 27, 2002, in Halifax, Nova Scotia
Held:	Leave to appeal granted and the appeal is allowed per reasons for judgment of Roscoe, J.A.; Cromwell and Oland, JJ.A. concurring.
Counsel:	James C. Martin, for the appellant Respondent, in person

Reasons for judgment:

[1] The Crown applies for leave to appeal, and if granted, appeals from the sentence imposed by Justice Felix Cacchione of the Supreme Court, following the respondent's guilty plea to one count of conspiracy to possess cannabis marijuana for the purposes of trafficking, contrary to s. 5(2) of the **Controlled Drugs and Substances Act**. S.C. 1996, c. 19 and s. 465(1)(c) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, as amended.

[2] On April 26, 2002, Justice Cacchione sentenced the respondent to 18 months incarceration to be served conditionally. The conditions included 100 hours of community service and for the first 12 months a form of house arrest which allowed the respondent to leave his home only for work and medical emergencies, or appointments if approved by his supervisor. As well, a 10 year firearms prohibition further to s. 109 of the **Code**, and a forfeiture of the shotgun and all the growing equipment seized were ordered.

[3] The respondent was involved in a marijuana growing operation with five others. In three separate sites, one of which was a home occupied by the respondent, more than 500 plants were being cultivated in a sophisticated operation. At the respondent's residence, there were 10 growing tables, with 170 marijuana plants at various stages of maturation. Each table had its own watering system and overhead lighting on a mechanical track wired to digital timers.

[4] It was established by the Crown that Michael Patriquen was the leader or the "boss" of the group of co-conspirators. Based on intercepted wire tap evidence, it was also apparent that the respondent played an important role in the growing operation, and, as of the day before the arrests, Mr. Patriquen agreed with the respondent to split the profits "right down the middle", which for the next harvest was estimated to be $11,000 for each of them. Then, according to Mr. Patriquen, after another six weeks, they would "cut off" again and "split that down the middle and so on and so forth".

[5] The pre-sentence report indicates that the respondent is 41 years old and has extensive experience working as a framer in the construction industry. He admitted responsibility for the offence and advised the writer of the report that he knew the consequences of his actions, "however, the money outweighed the punishment at the time." The respondent has a criminal record which includes a break, enter and

theft in 1979, three impaired driving offences, in 1984, 1994 and 1998, and in 1994 he was convicted of driving while disqualified. As well, as a result of the investigation of the growing operation he was charged with, and convicted in Provincial Court, of two other offences: theft of electricity and possession of a weapon for a dangerous purpose.

[6] In his decision the sentencing judge noted that the respondent had no prior drug related offences, had complied with his previous probation order, and took responsibility for the crime. After briefly referring to the sentencing principles contained in s. 718 of the **Criminal Code**, and **R. v. Proulx**,[2000] 1 S.C.R. 61; S.C.J. No. 6 (Q.L.); 2000 SCC 5, where the Supreme Court of Canada indicated that conditional sentences are available for this type of offence, he referred to several cases where conditional sentences had been imposed or approved by Courts of Appeal, for drug offences, including: **R. v. Wheatley** (1997), 159 N.S.R. (2d) 161, **R. v. Frenette** (1997), 159 N.S.R. (2d) 81; **R. v. Kozma**, 2000 BCCA 440, **R. v. Small** 2001 BCCA 91 and **R. v. Walsh** (1999), 180 Nfld. & P.E.I.R. 306;] N.J. No. 260 (Q.L.).

[7] Cacchione, J. stated that he was not satisfied that the respondent's position in the organization was the equivalent of Mr. Patriquen's, that of "ring leader", or that there was much difference between his role and the other "tenders of the crop" or "footmen", notably Messrs. Jollymore and Hollingsworth. The sentencing judge determined that a sentence of less than two years was appropriate, given the sentences others in the conspiracy received, and that the respondent would not endanger the safety of the community.

[8] The Crown on appeal submits generally that the sentence was manifestly inadequate for the nature of the offence in that it failed to give due emphasis to the principles of deterrence and protection of the public and that the judge erred in principle in the interpretation and application of section 742.1 of the **Criminal Code**. Specifically, it is submitted that the sentence:

(a) was outside the acceptable range for offences of this nature;

(b) overemphasized the personal circumstances of the Respondent;

(c) failed to consider the need for protection of the public and deterrence, both general and specific;

(d) failed to acknowledge the harm done to the community by this type of offence;

(e) was not proportionate to the gravity of the offence and degree of responsibility of the Respondent; and

(f) failed to uphold the sentencing principle of parity.

[9] The standard of review on a sentence appeal is, as most recently articulated by Bateman, J.A. in **R. v. Bratzer** (2001), 198 N.S.R. (2d) 303; N.S.J. No. 461 (Q.L.); 2001 NSCA 166, beginning at para. 6:

> [6] In passing sentence a judge is exercising a statutorily authorized discretion under the **Criminal Code**:
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> > "718.3(1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence."
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> [7] As with other discretionary decisions, the standard of review on appeal is a deferential one. This standard has been articulated in a number of ways. It was neatly expressed by Macdonald, J.A., of this Court in **R. v. Cormier** (1975), 9 N.S.R. (2d) 687 (C.A.), at p. 694:
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> > "[20] 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.
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> [8] More recently, in **R. v. Shropshire (M.T.)**, [1995] S.C.J. No. 52; 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37, Iacobucci, J., for a unanimous court, said:
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> > "[46] . . . An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different

> order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable."

[9] Similarly, in **R. v. C.A.M.**, [1996] S.C.J. No. 28; 1 S.C.R. 500; 194 N.R. 321; 73 B.C.A.C. 81; 120 W.A.C. 81, Lamer, C.J.C., said, for a unanimous Court, at p. 565-566:

> "[90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code . . .
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> "[91] . . . The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly."

[10] This deference reflects a recognition of the unique qualifications of front line judges and is equally applied whether the sentence arises after a trial or from a guilty plea. As explained by the Court in **R. v. C.A.M.**, supra:

> "[91] This deferential standard of review has profound functional justifications. As Iacobucci J. explained in **Shropshire**, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both **Shropshire** and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess

> the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be 'just and appropriate' for the protection of that community . . .

[emphasis in original]

Analysis:

[10] In my opinion, the sentencing judge erred in principle in imposing the sentence in this case. In concluding that a term of imprisonment of less than two years was appropriate, little regard to the principles of denunciation and general deterrence was accorded. Combined with a lack of consideration for the principle of parity, the result was a sentence that is clearly inadequate and excessively lenient.

[11] The purpose and objectives of sentencing and the principles to be considered are set out in the following provisions of the **Criminal Code**:

> **718. Purpose —** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community;
>
> and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 Fundamental principle — A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles —A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, . . .

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[12] Under certain conditions, a judge may order that a sentence be served in the community:

742.1 Imposing of Conditional Sentence — Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and

(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purposes of supervising the offenders behaviour in the community, order that the offender serve the sentence in the community, subject

> to the offenders complying with the conditions of a conditional sentence order made under section 742. 3.

[13] The Supreme Court of Canada provided guidance in the application of these provisions in **R. v. Proulx**, **supra**. Commencing at para. 58, Lamer, C.J., for the court, explained how the first step in the process should be undertaken:

> [58] . . . In my view, the requirement that the court must impose a sentence of imprisonment of less than two years can be fulfilled by a preliminary determination of the appropriate range of available sentences. Thus, the approach I suggest still requires the judge to proceed in two stages. However, the judge need not impose a term of imprisonment of a fixed duration at the first stage of the analysis. Rather, at this stage, the judge simply has to exclude two possibilities: (a) probationary measures; and (b) a penitentiary term . If either of these sentences is appropriate, then a conditional sentence should not be imposed.
>
> [59] In making this preliminary determination, the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender. ...
> [emphasis in original]

[14] Section 718 sets out several objectives of sentencing including denunciation, deterrence, and rehabilitation. Although conditional sentences are available for all offences for which there is no minimum sentence, Lamer, C.J.C., in **Proulx** has emphasized that incarceration provides more deterrence than a conditional sentence (para.102), that a conditional sentence is more lenient than incarceration (para.44) and that in some circumstances the need for denunciation and punishment is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct (para.102 and para.100).

[15] This Court has indicated several times that in cases of drug trafficking, deterrence will be the primary consideration. For example, in **R. v. Ferguson**, (1988), 84 N.S.R. (2d) 255, Justice Jones stated at page 256:

> [6] This court has repeatedly emphasized the need for deterrence in the case of drug traffickers. Persons who become involved in trafficking do so deliberately with full knowledge of the consequences. The general range of sentences, even for minor traffickers, has been between six and twelve months' imprisonment. The primary element on sentencing for trafficking must be deterrence.

[16] Although it is not necessary that the length of sentence be precisely proportionate to the quantity of drugs involved, commercial distributors and growers require "materially larger" sentences than the petty retailer, as stated in **R. v. Fifield** (1978), 25 N.S.R. (2d) 407 at para.8. There was no question in this case that the respondent was motivated by financial gain and that the operation was a well established, sophisticated, large-scale commercial venture. These are all aggravating factors. See also, **R. v. Butler** (1987), 79 N.S.R. (2d) 6.

[17] Another critical aggravating factor, not mentioned by the sentencing judge, was that the respondent was on probation at the time of this offence, which according to **Proulx** (paras. 69 and 70) is a significant factor in assessing risk of re-offence and thus suitability for a conditional sentence.

[18] The cases relied upon by the sentencing judge as authority for the imposition of a conditional sentence are, in my opinion, distinguishable from the circumstances here. Two of the cases where drug traffickers received conditional sentences are from this Court, **Wheatley, supra** and **Frenette, supra**. In **Wheatley**, the offender had a criminal record consisting of two prior unrelated offences and was on probation at the time of the offence. The significant distinguishing feature is that the offender was described as a petty retailer. Although in **Frenette**, the quantity of drugs involved was greater than in **Wheatley**, at 178 plants, it was still less than half the number of plants involved here, and the offender had only one prior unrelated previous offence and was not on probation at the time of the offence. In **Walsh**, **supra**, although the amount of marijuana involved was substantial, 18 pounds, the Newfoundland Court of Appeal found that the offender was a "warehouseman" and considering that he had no prior record and an excellent pre-sentence report, substituted an 18 month conditional sentence for a fine. In **R. v. Small**, where the amount of drugs involved was again substantial, more than 30 pounds, the Crown recommended a conditional sentence of four months. The offender was growing marijuana for sale at a rate substantially less than its illicit market value to the Compassion Club, a non-profit group which supplies marijuana for medical purposes to persons with AIDS, cancer and multiple sclerosis. The appellant had no previous criminal record and had donated hundreds of hours of work on behalf of the Club. The British

Columbia Court of Appeal set aside a sentence of a fine and probation and substituted a conditional discharge.

[19] The other case referred to by the sentencing judge, **R. v. Kozma**, **supra**, is in my view not particularly comparable, since it was a case involving four counts of trafficking in cocaine. I would note however that Kozma was not on probation at the time of the offence. Furthermore, it seems that because he had completely changed his life style in the three years between conviction and appeal that the British Columbia Court of Appeal was of the view that had the trial judge had the benefit of the Supreme Court's decision in **Proulx** that "he would have concluded that a conditional sentence was indicated."

[20] I would agree with Crown counsel on appeal that the circumstances of this offence and this offender require a sentence of incarceration and that this case is more analogous to cases such as **R. v. Collette**, (1999), 177 N.S.R. (2d) 386 (C.A.) in which this Court described the offender as a wholesaler or large retailer and increased the sentence to three years' custody for possession of 10 kilograms of cannabis resin for the purpose of trafficking, and **R. v. Shacklock** (2000), 188 N.S.R. (2d) 303;N.S.J. No. 338 (Q.L.)(C.A.); 2000 NSCA 120, in which a sentence of 18 months imprisonment was upheld for possession for the purpose of trafficking involving the cultivation of 214 marijuana plants. **R. v. Su**, [2000] B.C.J. No. 1816 (Q.L.); 2000 BCCA 480 (C.A.) is another case of comparable circumstances. For a first offender involved in a marijuana growing operation of 300 plants the British Columbia Court of Appeal imposed a sentence of imprisonment for 12 months stating that deterrence and denunciation were to be emphasized and therefore a conditional sentence was not appropriate.

[21] As noted above, s. 718.2(b) of the **Code** specifies that a sentence should be similar to sentences imposed on offenders for similar offences committed in similar circumstances. This principle of parity of sentence is an important consideration where more than one person is involved in the same criminal operation. (**R. v. Collette**, **supra** at para.14 and **R. v. C.A.M., supra**, at para. 92) Here there were six co-conspirators, sentenced at different times by different judges. Mr Patriquen, admittedly the leader, was sentenced after the respondent to a total of six years imprisonment for his involvement in this operation and a conspiracy to traffic in

Newfoundland. Mr. Murray, who was said to be a runner for both the Nova Scotia and the Newfoundland operations, received a sentence of three years' incarceration. Mark Trembley who, according to the Crown, was an occasional courier of the drugs for the group received a 2 year sentence in a federal institution. Mr. Jollymore received a 2 year conditional sentence for his role in this offence. Mr. Jollymore had no prior record, was ill, was to receive a smaller share of the profits and took instructions from the respondent. Finally, Mr. Hollingsworth, also sentenced by Cacchione, J., who appeared to have joined the organization much later than the respondent also received a conditional sentence of 12 months. The record before us does not indicate whether he had a criminal record or was on probation at the time of the offence.

[22] While there are differences in the personal circumstances of the co-conspirators, I am satisfied on the basis of the record before this Court that the respondent was much more than a tender of the crop and that it is reasonable to characterize his involvement as the second-in-command, based on the undisputed evidence, that with the exception of Mr. Patriquen, the others reported to and took their direction from him, and that he would share profits equally with the "boss".

[23] In all the circumstances, including the sentences imposed on the co-conspirators, the previous record of the respondent, the fact that he was on probation at the time of the offence, his position of authority within the conspiracy, the commercial nature and size of the venture, the length of time he was involved, and the sophistication of the operation, it was essential that denunciation and deterrence, both specific and general, be emphasized in determining the appropriate sentence. This is, to reiterate the statement in **Proulx**, (para. 106), a case "in which the need for denunciation is so pressing that incarceration is the only suitable way in which to express society's condemnation of the offender's conduct". A community based sentence is not an appropriate alternative. The totality of the circumstances require a sentence in excess of two years. The sentence imposed was not "fit", in that it was excessively and manifestly lenient, and did not appropriately reflect denunciation and general and specific deterrence.

[24] I would grant leave to appeal, allow the appeal, and substitute a term of incarceration of three years, and give credit for the six months served pursuant to

the conditional sentence, so that the balance remaining as of this date is 30 months. I would affirm the prohibition and forfeiture orders and revoke the order for community service imposed by the sentencing judge.

Roscoe, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.