Docket: CAC 163451
CAC 163452

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Shacklock, 2000 NSCA 120]

Glube, C.J.N.S.; Roscoe and Bateman, JJ.A.

BETWEEN:

GREGORY PETER SHACKLOCK

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

BETWEEN:

BRIAN WAYNE MUNDLE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: Kevin A. Burke, Q.C. for the Appellants
James C. Martin for the Respondent

Appeal Heard: October 17, 2000

Judgment Delivered: October 25, 2000

THE COURT: The appeals are dismissed as per reasons for judgment of Roscoe, J.A.; Glube, C.J.N.S. and Bateman, J.A. concurring.

ROSCOE, J.A.:

[1] On April 27, 2000 the appellants were sentenced by Justice J. E. Scanlan to incarceration for a period of 18 months, to be followed by one year probation, after pleading guilty to possession of cannabis marijuana for the purposes of trafficking. The appellants had been apprehended while tending 214 marijuana plants growing in a field in Whitenburg, Colchester County.

[2] The appellants were granted leave to appeal and bail pending appeal on May 2, 2000.

[3] It is submitted on appeal that the sentencing judge did not adequately consider the principles of sentencing, particularly those set out in s. 718.2(d) and (e) of the **Criminal Code**, and that he erred by failing to give serious consideration to the imposition of a conditional sentence.

[4] In his decision, the sentencing judge accepted expert evidence respecting the value of the plants and found that $100,000 was a conservative

estimate. He referred to the excellent pre-sentence reports of the appellants, whom he treated as first offenders, and determined that they were motivated by greed. Mr. Mundle, aged 32, is a regularly employed plumber, and married with two small children. At the time of his arrest, Mr. Shacklock, aged 28, had recently lost a job and was dealing with the financial burden of home ownership. At the time of sentencing he had regained employment.

[5] After reference to s. 718, s. 742.1, **R. v. Collette** (1999), 177 N.S.R. (2d) 386, and **R. Proulx**, [2000] 1 S.C.R. 61, the sentencing judge concluded that in order to express denunciation and to clearly emphasize general deterrence in this case, it was necessary to impose a custodial sentence.

[6] As expressed by the Supreme Court of Canada in **R. v. Shropshire**, [1995] 4 S.C.R. 277(1995), and repeated by this court on numerous occasions, it is not the role of this court to modify a sentencing order simply because we feel that a different order ought to have been made. A variation in the sentence should only be made if the Court of Appeal is convinced it is not fit, that is, that we are satisfied that the sentence is clearly unreasonable in the circumstances.

[7] The deference required to be shown to the sentencing judge was reiterated in **R. v. C.A.M.,** [1996] 1 S.C.R. 500 where Chief Justice Lamer, for the Court, said at para. 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*. . . .

[8] The Chief Justice described the reason for the deferential standard of review on sentence appeals at para. 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. 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.

[9] Most recently, the Supreme Court of Canada has stressed the deference owed to the sentencing judge and the limited role of an appeal court in the context of conditional sentences, in **R. v. Proulx**, **supra**, where Lamer, C.J., for the Court said, commencing at para. 124:

> [124] Several provisions of Part XXIII confirm that Parliament intended to confer a wide discretion upon the sentencing judge. As a general rule, ss. 718.3(1) and 718.3(2) provide that the degree and kind of punishment to be imposed is left to the discretion of the sentencing judge. Moreover, the opening words of s. 718 specify that the sentencing judge must seek to achieve the fundamental purpose of sentencing "by imposing just sanctions that have *one or more* of the following objectives" (emphasis added). In the context of the conditional sentence, s. 742.1 provides that the judge "may" impose a conditional sentence and enjoys a wide discretion in the drafting of the appropriate conditions, pursuant to s. 742.3(2).
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> [125] Although an appellate court might entertain a different opinion as to what objective should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress <u>that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit</u>.
>
> (emphasis added)

[10] In **Proulx**, the trial judge emphasized general deterrence and

denunciation and imposed a sentence of 18 months incarceration on an 18 year old who pled guilty to offences of dangerous driving causing death and dangerous driving causing bodily harm. The appeal court had allowed the appeal and substituted a conditional sentence, which is exactly what we have been asked to do in this case. In concluding that the appeal court had erred, Lamer, C.J. concluded his judgment by saying:

> [129] While Keyser J. [the sentencing judge] seems to have proceeded according to a rigid two-step process, in deviation from the approach I have set out, I am not convinced that an 18-month sentence of incarceration was demonstrably unfit for these offences and this offender. I point out that the offences here were very serious, and that they had resulted in a death and in severe bodily harm. Moreover, dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: [citations omitted]
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> [130] I hasten to add that these comments should not be taken as a directive that conditional sentences can never be imposed for offences such as dangerous driving or impaired driving. In fact, were I a trial judge, I might have found that a conditional sentence would have been appropriate in this case. The respondent is still very young; he had no prior record and no convictions since the accident; he seems completely rehabilitated; he wants to go back to school; he has already suffered a lot by causing the death of a friend and was himself in a coma for some time. To make sure that the objectives of denunciation and general deterrence would have been sufficiently addressed, I might have imposed conditions such as house arrest and a community service order requiring the offender to speak to designated groups about the consequences of dangerous driving, as was the case in **Parker**, **supra**, at p. 239, and **R. v. Hollinsky**, (1995) 103 C.C.C. (3d) 472 (Ont. C.A.).
>
> [131] However, trial judges are closer to their community and know better what would be acceptable to their community. Absent evidence that the sentence imposed by the trial judge was demonstrably unfit, the Court of

> Appeal should not have interfered to substitute its own opinion for that of the sentencing judge. The trial judge did not commit a reversible error in principle and she appropriately considered all the relevant factors. Although the Court of Appeal's decision is entitled to some deference (see the companion appeal **R. v. R.A.R.**, 2000 SCC 8, at paras. 20-21 [*post*, p. 523]), in my opinion it erred in holding that the sentencing judge had given undue weight to the objective of denunciation. I see no ground for the Court of Appeal's intervention.
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> (emphasis added)

[11] For the same reasons, these appeals must be dismissed. In these circumstances, it has not been shown that Justice Scanlan failed to appreciate or apply the proper principles of sentencing. He did not commit a reversible error in principle and he appropriately considered all the relevant factors. Although there is no specific citation of s. 718.2(e), after reviewing the entire sentencing reasons, I am satisfied that the trial judge seriously considered whether all available sanctions other than imprisonment were reasonable in the circumstances of these offenders and this offence. The suitability of a conditional sentence was forcefully urged upon him in the oral argument and the reasons for rejecting that alternative are adequately addressed in the decision. The conclusion that incarceration was necessary to denounce the conduct of cultivating marijuana in that community and deter others from similar operations is not one with which we can interfere and substitute our opinion. Although this court has upheld conditional sentences for similar

offences in **R. v. Frenette** (1997), 159 N.S.R. (2d) 81 and in **R. v. Wheatley** (1997), 159 N.S.R. (2d) 161, it cannot be said that the sentences here were unfit or clearly excessive or unreasonable.

[12] The appeals should therefore be dismissed.

Roscoe, J.A.

Concurred in:

Glube, C.J.N.S.

Bateman, J.A.