

NOVA SCOTIA COURT OF APPEAL

Jones, Hart and Chipman, JJ.A.

Cite as: R. v. Devanney, 1993 NSCA 221

BETWEEN:

HER MAJESTY THE QUEEN)	James C. Martin
)	for the Appellant
Appellant)	
)	
- and -)	The Respondent
)	appeared in person
)	
GARY NEIL DEVANNEY)	
)	
Respondent)	
)	
)	Appeal Heard:
)	November 23, 1993
)	
)	Judgment Delivered:
)	December 16, 1993
)	
)	

THE COURT: Appeal allowed and sentenced varied to 13 years for conspiracy to traffic in a narcotic contrary to **s. 465(1)(c)** of the **Criminal Code** and 13 years for possession of a narcotic for the purpose of trafficking contrary to **s. 4(2)** of the **Narcotic Control Act** per reasons for judgment of Hart, J.A.; Jones and Chipman, JJ.A. concurring

HART, J.A.:

Gary Devanney of Halifax was charged that he did unlawfully conspire with Howard James Smith of Halifax, Ronald Roy Hallett of Halifax, James Edwin Melvin of Halifax, Kirk Edward Peters of Halifax, Robert Richards of Lawrencetown Road in the County of Halifax, David Bruce Cotter of East Green Harbour, Scott Samuel Bussey of Halifax, William Derek Whitehead of Harrietsfield, and Clifford Alexander Matchem of Halifax to traffic in a narcotic, to wit: cannabis resin, contrary to s. 4(1) of the **Narcotic Control Act** and did thereby commit an offence against s. 465(1)(c) of the **Criminal Code**. The conspiracy was alleged to have taken place between October 21 and October 28, 1991. He was further charged that at or near East Chester in the County of Lunenburg on or about the 27th day of October, 1991, he did unlawfully have in his possession a narcotic, to wit: cannabis resin for the purpose of trafficking, contrary to s. 4(2) of the **Narcotic Control Act**.

A jury trial presided over by Mr. Justice Gruchy commenced on May 10, 1993, and on May 19, after 32 witnesses had been heard and Sergeant Martin of the R.C.M.P. was about to testify, Mr. Devanney discharged his counsel and entered pleas of guilty to both counts. Mr. Devanney immediately retained new counsel to represent him before Mr. Justice Gruchy at the sentencing which was set for July 23, 1993.

The charges against Mr. Devanney arose out of a very large drug smuggling operation which involved the transportation by sea of drugs from the Middle East to the shores of Nova Scotia and the off-loading of those drugs for landing in this country. During the course of the off-loading, apparently ten tons of the cannabis resin were jettisoned into the sea but three tons made its way to shore at East Green Harbour at a wharf located on the property occupied by Mr. Cotter. It was then transported by a large dump truck owned and operated by Mr. Whitehead towards Halifax and was stopped by the police at East Chester. Two other vehicles travelling in convoy with the dumpster were an Oldsmobile, driven by Clifford

Matchem and occupied by Messrs. Peters, Richards, Bussey and Devanney, and a brown van driven by Ronald Roy Hallett and occupied by Howard James Smith.

At the time the dumpster was stopped it contained three tons of cannabis resin packaged in about thirty bales wrapped in various layers of plastic. Mr. Whitehead tried to claim sole ownership of the drugs but did not know that he and his truck, the Oldsmobile and the van, and all members of the conspiracy had been under surveillance for the past week and the police were familiar with all of their meetings and trips to East Green Harbour and elsewhere in preparation for the arrival of the drugs.

In addition to the drugs, the R.C.M.P. also seized from the vehicles portable radios, \$5,020.00 in Canadian currency, and some small amounts of cannabis resin. At East Green Harbour they seized \$9,800.00 in Canadian currency, a loaded .44 calibre handgun, a loaded 12 gauge double-barrelled shotgun, a marine radio and an antenna. The radio equipment had been purchased by Matchem and picked up by Melvin and Whitehead. A shed on the Cotter property where the drugs were off-loaded and where the radio and antenna were found, had all of its windows covered by garbage bags. There were also tire tracks down towards the wharf which were positively identified as having been made by the dump truck.

The estimated street value of the cannabis resin seized by the R.C.M.P. at East Chester was between \$40,000,000 and \$60,000,000.

On May 4, 1993 before the trial commenced, William Derek Whitehead changed his plea to guilty on the charge of conspiracy to traffic in a narcotic and the Crown withdrew the charge of possession for the purpose of trafficking. Also on May 4, 1993, Scott Samuel Bussey changed his plea to guilty on the charge of conspiracy to traffic in a narcotic and was sentenced to four years.

After the trial was well under way, on May 17 Ronald Roy Hallett and Howard James Smith changed their pleas to guilty of the conspiracy charge and Hallett was sentenced to 5.5 years, while Smith received four years imprisonment.

The Crown has not appealed the Bussey, Hallett or Smith sentences.

The sentencing of Whitehead and Devanney took place on July 23, 1993. At that time the Crown took the position that Whitehead played a more important role in the conspiracy as the owner and operator of the dump truck and should receive a longer sentence than Bussey and Peters who had earlier been sentenced to four years. These two participants were described as muscle men only. By making his truck available and by transporting the drugs, Whitehead was considered to have played a greater role in the conspiracy than many of the others and the trial judge imposed a sentence of five years for his participation in the scheme. The Crown has appealed the Whitehead sentence and that matter will be dealt with in a separate decision to be handed down concurrently with the decision on this appeal.

At the time of his sentencing, Gary Neil Devanney was 42 years of age. He was born and raised in Halifax in a stable home environment and after completing his high school education took a degree in commerce at university. He lives in a common-law relationship but has no children. He rents an apartment in an apartment building owned by his father and helps with the repairs and maintenance of the building. He claims to have always made a good living in his own business as a small contractor, although business was slack recently. He does not abuse drugs or alcohol and has no previous criminal record.

There would have been little to distinguish the role played by Mr. Devanney in this conspiracy from that of the others had it not been for the evidence of Sergeant Jean Martin, called by the Crown to testify at the sentencing hearing. Sergeant Martin was an undercover R.C.M.P. officer

who spoke with Mr. Devanney while he was in Halifax investigating a 40 ton drug off-loading operation planned for the Halifax area. He had contact with Mr. Devanney on many occasions between October 5, 1991 and June 23, 1992. Shortly after his arrest Mr. Devanney revealed to Martin that he had only become involved in the drug scheme at the last minute to help out a friend and that the whole affair was very poorly organized. In a later conversation, however, in May of 1992 at Point Pleasant Park, Devanney confided to Martin that he had been in on the conspiracy from the beginning. He told Martin, whom he obviously considered to be a drug dealer in the upper echelons of the trade, that there were four of them in on the deal. They had gone to New Brunswick in October of '91 to make arrangements with the person who had contact with the people who financed their operation. He figured that one of his associates had ratted on him and that was his explanation for why he had been arrested and the conspiracy had failed. He obviously at this time did not know that Sergeant Martin was an underground member of the R.C.M.P.

After hearing this evidence and considering all of the appropriate principles of sentencing, the trial judge found that Mr. Devanney had been "a planner in this matter - a ringleader, a foreman". He held that he had shown no signs of remorse or shame but had exhibited a smart-alec attitude during his trial. He considered him to be a local leader of the operation and had totally failed to cooperate with the authorities in their attempt to curtail the drug trade. His plea of guilty had only come after thirty-two witnesses had been examined at his trial and could not, therefore, be considered much of a mitigating factor.

Mr. Justice Gruchy sentenced Mr. Devanney to a term of seven years on the conspiracy charge and a further term of seven years to run concurrently on the possession charge. From these sentences the Crown now appeals. They allege that the sentences were manifestly inadequate for a conspiracy of this magnitude.

Mr. Devanney appeared on his own behalf at the appeal and it became apparent at the outset that he wished to have the sentences lowered, alleging that the evidence of Sergeant Martin should not have been accepted and that he should not have been found to have played a leading role in the conspiracy.

No cross-appeal had been filed but the Crown had received notice of his intention prior to the hearing.

The Court agreed to permit Mr. Devanney to seek a reduction in his sentence upon the authority of **Hill v. The Queen** (No. 2) (1975), 25 C.C.C. (2d) 6, where it was stated by Ritchie J. at p. 8:

" Parliament having fixed the Court of Appeal with the obligation to 'consider the fitness of the sentence', it would, in my view, require clear statutory language to limit that consideration to the question of whether the sentence was too severe while precluding any consideration of whether it was severe enough. There is no such language in the **Criminal Code**, and I am of the opinion that the opening paragraph of s. 614(1) constitutes a mandatory direction to the Court of Appeal to consider both aspects of the question.

In the result, where an appeal against sentence is taken by the person convicted seeking to have the sentence reduced, the Court may see fit to increase the sentence and this is a risk to which all such persons are exposed whether or not the Attorney-General has appealed. Conversely, where an appeal is taken against sentence by the Attorney-General seeking to have the sentence increased, the Court may consider it fitting to reduce the sentence and is empowered so to order without any appeal having been asserted by the convicted person."

The essential part of Mr. Devanney's attack against the evidence of Sergeant Martin is that his counsel failed to interview some witnesses that he suggested should be called for the hearing and did not call those witnesses to testify on his behalf before the sentencing judge. Nor was Mr. Devanney put on the stand to testify on his own behalf.

I have reviewed what Mr. Devanney suggests these witnesses may have been able to say and, in my opinion, whether they should have been called or not was a matter of discretion which had to be exercised by counsel for the accused. Mr. Burke, who had been retained for the sentencing hearing, is a lawyer with a great deal of experience in the conduct of criminal cases and I can see nothing which would indicate that he improperly exercised his discretion in this matter. To present any of these witnesses or the accused and subject them to cross-examination might very well have exposed Mr. Devanney to a greater sentence that was in fact imposed by the Court without undermining the evidence of Sergeant Martin. The evidence would have shown that Mr. Devanney had regular contacts with people in the drug trade and was not merely an innocent bystander who participated in the arrangements at the last minute to help out a friend.

I will turn now to a determination of whether the sentences handed out by the trial judge were in fact too lenient as claimed by the Crown or excessive as claimed by Mr. Devanney.

The trial judge considered all of the usual factors that are necessary to take into account when sentencing for drug offences. He placed the predominant emphasis on general deterrence as has been so often directed by this Court. He correctly found that Mr Devanney was a leader among this group of conspirators. He did not in my opinion, however, appreciate the magnitude of this conspiracy to import and distribute drugs and the sentences imposed were inadequate to deter others from giving in to the desire to make large amounts of money from such schemes. It can be seen from this and other drug related cases coming before the courts of this province that the people behind the lucrative drug trade are still able to entice others who have not been involved in lives of crime to fulfil the various roles necessary to successfully bring the illegal drugs from their source to the customers on the street. The bosses who finance the trade use various techniques to prevent their own arrest but once they have suckered another person to participate in their schemes it is virtually impossible for that person to

escape their clutches in the future. There is no such thing as a one-shot gamble to make big bucks.

The value of the amount of hashish successfully brought ashore as a result of this conspiracy is estimated at between 40 and 60 million dollars when distributed on the street. With this type of return from only a partially successful landing, it is easy to see how the original purchase in the Middle East and the transportation by sea to this country could be paid for by those who finance large drug operations. With this kind of financial resource, people can be persuaded to take on tasks that otherwise they would never consider and it is this sort of person who normally has no previous criminal record, who must be deterred by the sentences imposed by the courts on those who are caught in such a crime. This was a massive commercial operation which required extensive premeditation.

In my opinion, a fit and proper sentence for a person who participated in this conspiracy at the level of Mr. Devaney would be thirteen years imprisonment. I would therefore allow the appeal by the Crown and vary the sentences to thirteen years for the conspiracy offence and thirteen years for the possession offence to run concurrently with the first count.

I might add that if this type of case continues to come before the courts of this province, it must be remembered that the maximum sentence is life imprisonment and sentences may have to increase until such time as their deterrent effect becomes effective.

J.A.

Concurred in:

Jones, J.A.

Chipman, J.A.

S.C.C. No. 02919

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

GARY NEIL DEVANNEY

Respondent

REASONS FOR
JUDGMENT OF:

HART, J.A.