Date: 19980924 Docket: CAC 148973

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Connolly, 1998 NSCA 190

Glube, C.J.N.S.; Chipman and Pugsley, JJ.A.

BETWEEN:	)	
	)	
DAVID FRANCIS CONNOLLY	)	Warren K. Zimmer
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Raymond A. Mitchell
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	September 24, 1998
	)	
	)	
	)	Judgment Delivered:
	)	September 24, 1998

THE COURT: Leave to appeal is granted and the appeal is dismissed as per oral reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Pugsley, J.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

The appellant pled guilty to a charge of possession of cannabis marijuana for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act**. As a result of a search carried out pursuant to a warrant, a large indoor marijuana operation was discovered in the appellant's home, complete with high wattage bulbs, potting soil, balance boxes, timers, buckets, ventilation systems, and other paraphernalia used for cultivating marijuana. The plants were found in various stages of growth. There was a large number of them in the basement and in one of the upstairs bedrooms there was a cloning room which contained additional plants. The estimated expected yield of this crop was over $1,140,000.

The appellant has a criminal record. On February 28, 1992, he was convicted of possession of a narcotic for which he was fined $600.00 and mischief for which he received a suspended sentence of one year, together with probation for one year. On September 28, 1995, he was convicted of driving over 80, for which he was fined $800.00 and lost his driving privileges for one year. On the same date, he was convicted of failure to appear for which he received a fine of $100.00. The presentence report reveals that he was on probation when charged with the offence at issue.

The respondent appeared in Provincial Court before Judge D. W. MacDonald on June 17, 1998 for sentencing. Counsel for the Crown briefly recited the circumstances of the offence and the offender and then made the following terse submission:

> I am sure Your Honour is familiar with the **Ferguson** case, which sets out a range of sentence of six to twelve months for

> petty retailers. The Crown is recommending a sentence, a combined sentence, total of 18 months, and those would be the Crown's submissions, Your Honour.

Counsel for the appellant then addressed the court at length, concentrating upon the appellant's fitness to serve his sentence in the community. He referred to the appellant's activities as a coach in Little League baseball, to the fact that he had not caused a problem while released pending his trial, and to a letter from a police officer expressing the view that the appellant was a good candidate for community supervision. Counsel for the appellant also referred to two recent cases from this Court on the subject of conditional sentences, **R. v. Wheatley** (1997), 159 N.S.R. (2d) 161 and **R. v. Frenette** (1997), 159 N.S.R. (2d) 81.

Judge MacDonald, in brief reasons, given immediately following submissions of counsel, stated that he had considered them along with the presentence report and what the appellant had said on his own behalf. He referred to the fact that the defence had asked that time be served conditionally. He then said:

> I have . . . I have concerns about the need to give emphasis to general deterrence. I also have concerns about long sentences served in provincial institutions where there is programming, but it is limited programming. Mr. Connolly may be a candidate for a release program. He's . . . he's professionally certified as an electrician. He's been able to obtain employment from time to time, including employment with his father's company. I don't know what prospects that may give him, but in the end, I think the sentence of imprisonment is one which must be served in the Correctional Centre.
>
> So, what I will do here is direct a sentence of 14 months' imprisonment in the Halifax Correctional Centre to be followed by probation for a period of one year . . .

On this appeal, counsel for the appellant contends that Judge MacDonald

failed to instruct himself in accordance with the principles of sentencing including those found in ss. 718-718.2 of the **Criminal Code** and failed to consider whether or not the prerequisites for a conditional sentence order set out in s. 742.1 of the **Code** had been met.

It would have been preferable had the trial judge referred to the relevant provisions of the **Code** to which his attention had been drawn and related them to the facts before him. However, it must be kept in mind that just before delivering his brief reasons, the trial judge had the benefit of the able presentation by counsel for the appellant which fully set out his case for a conditional sentence order. In **R. v. Burns**, [1994] 1 S.C.R. 657, McLachlin, J. said at p. 664:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see **R. v. Smith**, [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and **Macdonald v. The Queen**, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.

In these circumstances, it has not been shown that Judge MacDonald failed to appreciate or apply the proper principles of sentencing and in particular, those principles governing a conditional sentence, all of which were thoroughly canvassed by this Court in **Wheatley, supra**, and **Frenette, supra**.

Having considered the circumstances of the offence and the offender, and the record of the proceedings before Judge MacDonald, we are not satisfied that the

sentence was unfit by reason of not being in accord with the principles of sentencing or clearly excessive or unreasonable. See **R. v. Cormier** (1974), 22 C.C.C. (2d) 239 at 241 (S.C.A.); **R. v. Muise** (1994), 94 C.C.C. (3d) 119 at 124 (S.C.A.); and **R. v. Shropshire**, [1995] 4 S.C.R. 227 at 249.

Leave to appeal is granted and the appeal is dismissed.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Pugsley, J.A.