NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Jones***, 2008 NSCA 99

Date: 20081022
Docket: CAC 286990
Registry: Halifax

Between:

Robert Paul Jones

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Roscoe, Bateman & Hamilton, JJ.A.
Appeal Heard:	September 12, 2008, in Halifax, Nova Scotia
Held:	Leave to appeal granted, but appeal dismissed per reasons for judgment of Hamilton, J.A.; Roscoe and Bateman, JJ.A. concurring
Counsel:	Christopher Manning, for the appellant Susan Y. Bour, for the respondent

Reasons for judgment:

[1] The appellant, Robert Paul Jones, applies for leave, and if granted, appeals his ten year sentence that was imposed following his guilty pleas. Of his ten year total sentence, he received six years concurrent on each of the drug offences, conspiracy to traffic in cocaine (s.465(1)(c) **Criminal Code)**, conspiracy to traffic in ecstasy (s.465(1)(c) **Criminal Code**) and possession of cocaine for the purpose of trafficking (s.5(2) **Controlled Drugs and Substances Act**), three years for living off the avails of prostitution (s.212(1)(j) **Criminal Code**), consecutive, and one year for assault (s.266 **Criminal Code**), consecutive. The ten year sentence was reduced by eight months in recognition of four months he spent provincially on remand.

[2] The facts relating to this appeal are set out in the decision of Cacchione, J., reported at 2007 NSSC 309, [2007] N.S.J. No. 428, 258 N.S.R. (2d) 339. Briefly, the appellant and Cecil Hatch roughly shared the spot of second in command in a 24/7 dial-a-dope and crack house operation headed by Richard Bonin. The judge found their function in the operation was to ensure a vehicle was available to transport the drugs, that persons were available to man the vehicle and the phone that went with the vehicle. The appellant arranged for others, including his girlfriend, a young person and an older woman with no prior criminal record, to sell, transport, deliver and hide drugs and money for him. The judge found the appellant was not an addict and was involved in the well planned business solely for profit.

[3] The appellant's girlfriend was actively employed as a prostitute in Niagara Falls under the direction of the appellant. She deposited money directly into his bank account. The assault charge arose from an event where he struck her on the head with a gun which caused her injuries that required medical attention at the hospital.

[4] Mr Hatch was sentenced prior to the appellant and Mr. Bonin was sentenced subsequently. Mr Hatch was sentenced for the same three drug offences among other offences. He received five years incarceration concurrent for each drug offence. Mr. Bonin was sentenced for conspiracy to traffic cocaine and possession for the purpose of trafficking cocaine among other offences. He received concurrent sentences of ten and one-half years for each of these drug offences.

[5] In reaching his decision the judge considered the purpose and principles of sentencing set out in the **Criminal Code** and the **Controlled Drugs and Substances Act,** including the relevant mitigating and aggravating factors, and concluded that the factor to be stressed in sentencing the appellant was the protection of the public given the nature of these offences and the length and nature of the appellant's criminal record.

[6] The appellant argued: (1) that his sentence should be reduced because the judge erred by failing to properly apply the sentencing principles of parity and totality; or (2) that his sentence should be vacated and a new sentencing ordered because a reasonable apprehension of bias arose from the judge's sentencing him after he had heard a bail application involving Mr. Bonin over one and one-half years earlier.

[7] I will first deal with the alleged errors.

[8] Section 687(1) of the **Criminal Code** sets out the jurisdiction of this Court with respect to sentence appeals:

> s.687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive:
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> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> (b) dismiss the appeal.

[9] Appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned and should only intervene where the sentence imposed is demonstrably unfit; **R. v. L.M**., [2008] S.C.J. No. 31, 2008 S.C.C. 31, ¶ 14 and 15.

[10] Justice Bateman recently explained the standard of review on sentence appeals in **R. v. Metzler**, [2008] N.S.J. No. 124:

> [24] Sentences are afforded a deferential standard of review on appeal. This has been articulated in a number of ways. In **R. v. C.A.M.**, [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), Lamer, C.J.C., for a unanimous Court, said:
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> > [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.

[11] This is the standard I will apply in considering the appellant's argument that the judge erred by failing to properly apply the sentencing principles of parity and totality.

[12] The appellant pointed to Mr. Hatch's five year sentences for the same offences, as compared to his six year sentences, in support of his argument that the judge failed to properly apply the parity principle embodied in s.718.2(b) of the **Criminal Code** requiring similar sentences to be imposed on similar offenders for similar offences committed in similar circumstances.

[13] He also argued that the principle of parity was not properly applied because Mr. Bonin, the head of the operation, will spend less time post-sentencing in jail than he will because of the credit Mr. Bonin received for the time he spent in jail on remand prior to his sentencing.

[14] These arguments have no merit. As the appellant acknowledged, differences in the level of involvement of the various offenders and differences in their criminal records can justify different sentences even if they have been convicted of the same offences; **R. v. Price** (2000), 144 C.C.C. (3d) 343 (Ont. C.A.), ¶ 55.

[15] There were significant differences between the criminal records of the appellant and Mr. Hatch. The appellant had thirty-nine prior convictions including possession for the purpose of trafficking in 2003. Mr. Hatch had thirteen prior convictions most of which were property offences. In addition the sentence imposed on Mr. Hatch was the result of a joint recommendation after a very early guilty plea and before preliminary inquiry which was not the case for the appellant. The difference in the sentences imposed are rationally explicable and do not offend the principle of parity.

[16] With respect to Mr. Bonin, it is the ten and one-half year sentences that are to be compared, not the time he will spend in jail post-sentencing as a result of the substantial time he spent on remand prior to sentencing. Considering that Mr. Bonin's sentence was four and one-half years longer than the appellant's in recognition of his being the head of the operation, that six of his ten prior criminal convictions were for drug offences and that his sentence was also the result of a joint recommendation, the difference in the sentences is supportable and does not offend the principle of parity.

[17] The appellant also argued that the judge erred by failing to properly apply the principle of totality provided for in s.718.2(c) of the **Criminal Code**:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> . . .
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> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

[18] The appellant argued that while his sentences for each individual offence were fit, they were at the high end of the range and taken together in light of the totality principle should have resulted in a lower sentence.

[19] In **R. v. C.A.M.**, [1996] S.C.J. No. 28, [1996] 1 S.C.R. 500, the Supreme Court of Canada stated:

> 42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders

an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing, supra*, at pp. 44-45:

> The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

[20] It is clear the judge considered the totality principle in sentencing the appellant. He referred to it three times in his decision:

> [18] As I said, I do give you the benefit of the doubt that this contact with your daughter has perhaps opened your eyes a little and that you do hope to change your ways. **So I have reduced the sentence based on this fact and the totality principle.** But there still must be a message sent to others and a message must be sent to you as well so that you do not lose sight of it that this type of behaviour just will not be tolerated.
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> . . .
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> [23] The common assault, although it is a common assault, at least a plea was entered, there is evidence before me that it was a serious assault, an assault that required some degree of hospitalization. Not a lengthy stay, but some degree. The fact that this was your girlfriend or common law partner and the fact that you used a weapon, a pistol to beat her, shows the severity of that particular offence.

> **There will be a one year consecutive sentence for the assault on Diane Acker. And I have said, I have considered totality.**
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> [24] **I told you before the sentence I had in mind was lengthier, but given the principle of totality, your pleas of guilty, I have decided that the fit and proper sentence for all of these offences is a global sentence of ten years incarceration.** (Emphasis added)

[21] The appellant has not satisfied me that the judge erred in applying the totality principle. His decision makes it clear he considered it and reduced the total sentence he imposed based on that principle. The cumulative sentence is not substantially above the normal level of a sentence for the most serious of the individual offences involved, nor is its effect such as to impose on the appellant "a crushing sentence" not in keeping with his record and prospects.

[22] The appellant's final argument was that his sentence should be vacated and a new sentencing ordered because a reasonable apprehension of bias arose from the judge sentencing him after the judge had conducted Mr. Bonin's two day bail application one and one-half years earlier and denied bail, which was unknown to the appellant at the time of sentencing.

[23] He argued that a reasonable apprehension of bias arose from the fact he was not told that the judge had heard Mr. Bonin's bail application, that he did not know what intercepted communications were heard by the judge at Mr. Bonin's bail hearing, what might have been said about him at that bail hearing or what use the judge made of information before him at the bail hearing in sentencing him.

[24] The respondent dealt with this issue in it's factum:

> 61. There is a strong presumption that judges will carry out their oath of office to render justice impartially. The fact that a trial judge may have previously heard prejudicial evidence in a similar proceeding, such as a bail hearing or a *voir dire*, does not in itself result in a reasonable apprehension of bias. ***R. v. S.(R.D.)***, *supra* at paras. 117. ***R. v. Perciballi*** (2001) 154 C.C.C. (3d) 481 (Ont. C.A.), aff'd (2002) 164 C.C.C. (3d) 480 (S.C.C.) 51.
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> 62. In ***R. v. Perciballi***, *supra*, the defence alleged that there was a reasonable apprehension of bias after a wiretap authorization was granted by a judge who had previously presided over an unsuccessful bail review brought by

one of the accused parties five weeks earlier. The defence argued that the judge was biased because he had earlier heard "*prejudicial evidence*" on the bail review that was not part of the authorization package, and that he had made "*strong comments*" about the strength of the case in his reasons for dismissing the bail review. The application, characterized as a ***Charter*** application, failed. Justice Charron (as she then was) explained the principles of the law:

[17] There is no allegation of actual bias in this case. The issue is one of reasonable apprehension of bias. The onus of demonstrating bias is on the person who alleges it. The Supreme Court of Canada recently affirmed the test for finding a reasonable apprehension of bias in *R. v. S. (R.D.)* [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353 (S.C.C.) at para. 111 [pp. 530-31 S.C.R.]. Cory J., in writing the majority judgment for the court, stated as follows:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394, [68 D.L.R. (3d) 716]:
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> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude."
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra,* at pp. 54-55; *Gushman, supra,* at para. 31. Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the

> traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.J.), at para. 14. See also *Stark, supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34 [summarized 27 W.C.B. (2d) 199].
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> [18] Cory J. also stated that there is a presumption that judges will carry out their oath of office. He noted at para. 117 [P. 533 S.C.R.] that "[t]his is one of the reasons why the threshold for a successful allegation of perceived juridical bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

Charron J.A. then rejected the defence argument:

> [21] **In my view, there is no reason to interfere with the trial judge's decision on this *Charter* application. The mere prior involvement of the authorizing justice in an earlier proceeding does not, without convincing evidence to the contrary, displace the presumption of judicial integrity and impartiality. Hence, the bare allegation that Hamilton J. heard "prejudicial evidence" on the bail review that did not form part of the authorization package is meaningless. Trial judges routinely exclude evidence that they have heard on a *voir dire*, or hear confessions or guilty pleas by co-accused, and go on to preside over the trial of an accused.**
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> [22] Further, there is nothing inherent in the nature of the decision that must be made on either application - the bail review or the wiretap authorization - that gives rise to a reasonable apprehension of bias where the same justice presides over both proceedings. Although it is necessary in each proceeding to make an assessment of the evidence presented by the prosecution, the tests are very different and their application does not require any determinative findings on the guilt or innocence of an accused person. **The allegation of bias must be based, rather, on what actually transpired during the specific proceedings**. (Emphasis in respondent's factum). ***R. v. Perciballi***, supra at paras 17-22.

> 63. **Even where an accused has appeared before the same judge in previous cases, and where adverse findings of credibility have been made against the accused, there may be no reasonable apprehension of bias**; See ***R. v. Novak*** (1995) 59 B.C.A.C. 152 (B.C.C.A.) at paragraphs [7] to [10]. ***R. v. Bolt*** [1995] A.J. No. 22 (Alta. C.A.). ***R. v. G.H.*** [2002] O.J. No. 3635 (Ont. C.A.) at paragraphs [6] to [8]). (Emphasis added)

[25] Mr. Bonin's bail application took place more than one and one-half years prior to the appellant's sentencing. The sole focus of the judge at the bail application was whether Mr. Bonin should be released from jail pending trial. He would not have made any other findings with respect to him. The sentencing followed the appellant's guilty plea and was based on the statement of facts in the respondent's brief and viva voce evidence to supplement it. The judge made no comments at the sentencing hearing about credibility or the strength of the case. If the judge remembered Mr. Bonin's bail hearing after such a long time, he made no mention of it or of any extraneous matters at the appellant's sentencing.

[26] The case law is clear that the mere fact that a judge heard another related matter is not sufficient to disqualify a sentencing judge. The appellant has not met the threshold of presenting cogent or substantial evidence required to establish a real likelihood of a reasonable apprehension of bias. There was nothing but bare speculation that the sentencing judge's prior dealing with Mr. Bonin would have had any effect on his impartiality and ability to preside fairly and impartially over the sentencing hearing. There is nothing requiring the intervention of this Court.

[27] I would grant leave but dismiss the appeal.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.