Date: 19991008
Docket:

C.A.C.155920

# NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Hill, 1999 NSCA 118]

**Freeman, Flinn, Cromwell, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| HER MAJESTY THE QUEEN<br><br>Appellant<br><br>- and -<br><br>ROGER HILL<br><br>Respondent | ) | Marian Fortune-Stone<br>for the appellant<br><br>Philip J. Star<br>for the respondent<br><br>Appeal Heard:<br>September 28, 1999<br><br>Judgment Delivered:<br>October 8, 1999 |

**THE COURT:** Appeal allowed; conditional sentence varied to a sentence of incarceration for fifteen months consecutive to the three months incarceration imposed by the trial judge, per reasons for judgment of Freeman, J.A., Flinn and Cromwell, JJ.A., concurring

**Freeman, J.A.:**

[1] The respondent sold one pound of cannabis marijuana for $2,600 and one kilogram of cannabis resin or hashish for $11,000 to a police undercover agent in two distinct transactions. He pleaded guilty to trafficking in less than three kilograms of each substance in separate counts under s. 5(1) of the **Controlled Drugs and Substances Act** S.C. 1996 Chap. 19 which carries a maximum sentence of five years incarceration.

[2] At the same time he pleaded guilty to two counts under s. 8(1) of the same **Act**, one in reference to each transaction, of possessing property or the proceeds of property valued at more than $1,000, knowing it was obtained by the commission of an offence under the **Act**.

[3] Judge John Nichol of the Provincial Court sentenced him to three months incarceration in a provincial institution for trafficking in the hashish and three months concurrent for possession of the proceeds of the sale. He sentenced him to fifteen months to be served consecutively as a conditional sentence at his place of residence for the marijuana transaction and a similar sentence to be served concurrently for possession of the proceeds. The Crown notes that some of the judge's words are omitted as to the sentence for the marijuana trafficking because of a break in the recording of the court record but, as the respondent suggests, his intention is unmistakable from the context.

[4] The Crown has appealed on grounds that "the trial judge did not give due emphasis to the principles of sentencing for such offences, particularly as they relate to deterrence, protection of the public and conditional sentences," and that the sentence is "excessively lenient." It seeks an order that the respondent serve a sentence of three to 3 ½ years in a federal institution. No issue has been raised as to the convictions under s. 8(1) under the **Kienapple** principle, nor have we been directed to any authority to suggest that concurrent sentences may not, in the discretion of the sentencing judge, be available.

[5] Apart from the issues of deterrence and leniency raised by the Crown, this appeal also raises the question of the lawfulness of a custodial sentence combined with a conditional sentence in these circumstances.

[6] In **R. v. Hirtle**, [1999] N.S.J No. 165 (Q.L.) this court has held that an intermittent sentence, available only when the period of incarceration is 90 days or less, cannot be blended with a sentence of fifteen months, the balance of which was to be served in the community. That case drew on the authority of the Ontario Court of Appeal in **R. v. Alfred** (1998), 122 C.C.C. (3d) 213, [1998] O.J. No. 70 (Q.L.) in which the trial judge in sentencing the accused on a number of counts imposed a sentence of nine months incarceration on some offences and two years less a day to be served in the community on others.

[7] The court held in **Alfred** at p. 215:

> ...The trial judge assumed that the conditional sentence order would be suspended pursuant to s. 742.7 of the *Criminal Code* while the respondent served the nine-month custodial sentence. In theory, the respondent was sentenced to a total sentence of 33 months, of which a period of only nine months was to be served in prison.
>
> We need not resolve, in this case, the difficult issue of interpretation presented by s. 742.7. The trial judge erred in principle by, in effect, imposing a penitentiary sentence, a portion of which was to be served as a conditional sentence. In our view. this clearly violates the spirit if not the express wording of s. 742.1(a) of the *Criminal Code* which provides that a conditional sentence can only be made where, *inter alia*, the court "imposes a sentence of imprisonment of less than two years.

[8] In Alberta, blended sentences were being imposed in the Provincial Court until the decision of McFadyen J.A. in **R. v. Wey,** [1999] A.J. No. 957 (C.A.) (Q.L.), who cited **R. v. Hirtle** to vary a sentence for three charges of trafficking in cocaine totalling two years less one day, 180 days of which were to be served on weekends in a "secured correctional facility."

[9] Philip J.A. of the Manitoba Court of Appeal in **R. v. Monkman** (1999), 132 C.C.C. (3d) 89, [1998] M.J. No. 565 (Q.L.) considered concurrent sentences of eighteen months for 14 offences of break, enter and theft to be served in custody for five months and thereafter in the community. He said at p. 90:

> Counsel for the Crown argues, and counsel for the accused concedes, that the blended sentence of imprisonment to be served in custody and in the community is not authorized by s. 742.1 of the **Code**. We agree. The sentence is an illegal one.

Similarly, Philip J. found a conditional sentence the first thirty days of which were to be spent in custody to be an illegal blended sentence in **R. v. Maynard,** [1999]

M.J. No. 8 (Q.L.).

[10] In **R. v. Kopf,** [1997] A.Q. No. 795 (Q.L.) the Quebec Court of Appeal found two concurrent sentences totalling twelve months for growing and possessing marijuana for purposes of trafficking to be illegal because they were to be served ninety days in prison and the remainder in the community.

[11] In none of those cases is the issue precisely similar to that in the present appeal. Here the trial judge imposed a conditional sentence on one set of counts and a custodial sentence on the other, rather than imposing a total sentence for the two sets of counts and purporting to divide it into custodial and conditional components. This confronts us with the difficulties of interpreting s. 742.7 alluded to by the Ontario Court of Appeal in **Alfred**.

[12] That section provides in ss. (1):

> If an offender who is subject to a conditional sentence is imprisoned as a result of a sentence imposed for another offence, whenever committed, the running of the conditional sentence is suspended during the period of imprisonment for that other offence.

[13] That provision, and in particular the term “whenever committed” should be read in conjunction with s. 742.6(9) which provides that when a condition of the conditional sentence order is breached, as by the commission of a new offence, a court can order that the offender serve in custody a portion of the unexpired sentence and that the conditional sentence resume on the offender’s release.

[14] While the **Criminal Code** does not provide authority for blending a custodial and a conditional sentence for the same offence, ss. 742.6(9) and 742.7 make it clear that in some circumstances it is not illegal for an offender to be subject to a custodial sentence and a conditional sentence at the same time, the effect of the conditional sentence being suspended until the custodial sentence is served. A literal interpretation might suggest that the sentences imposed by the trial judge here could have been valid if the conditional sentence had been imposed on the appellant immediately before the custodial sentence. In my view that puts too fine and technical a construction on what Parliament must have intended, and cannot be justified in the present case on a more practical basis.

[15] The respondent was sentenced on the same day for two trafficking offences which are virtually indistinguishable for sentencing purposes in the present circumstances. It cannot be said that considerations present or absent in the one case were not present or absent in the other. The sentencing judge concluded that a fit sentence was eighteen months in total, but he was obviously of the view that the circumstances of the offence and the offender demanded a term of incarceration. I would agree with that conclusion. Therefore, in the identical circumstances at the identical time, it cannot be said that incarceration was not required. The considerations prerequisite to a conditional sentence pursuant to s. 742.1 could not have been met.

[16] The principle the sentencing judge should have followed was expressed by the Ontario Court of Appeal in **Alfred**:

> Once the trial judge concluded that a sentence of immediate imprisonment was required he should not have imposed a conditional sentence. Rather he should have imposed the appropriate [custodial] sentence, leaving it to the parole authorities to determine the portion, if any, of the sentence the respondent should serve in the community.

[17] With respect to the Crown's concerns as to the fitness of the length of the sentence, in my view an eighteen month custodial sentence for a wholesaler dealing in quantities of less than three kilograms of so-called "soft" drugs, and receiving the substantial proceeds of the sale, is lenient but in an appropriate range. It should not be disturbed. See **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193.

[18] The sentence appealed from is erroneous in principle and cannot be allowed to stand. I would vary the conditional sentence to a sentence of incarceration for fifteen months consecutive to the three months incarceration imposed by the trial judge. The respondent is to be appropriately credited with the time he has served in the community since the date of his release from the custodial sentence in the same manner as if he were subject to reincarceration pursuant to s. 742.6(9)(d). If necessary a warrant will issue for the arrest of the respondent.

Freeman, J.A.

Concurred in:

Flinn, J.A.

Cromwell, J.A.