C.A.C. No. 133184

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Wheatley, 1997 NSCA 94

Roscoe, Matthews and Pugsley, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	
	)	James C. Martin
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	the Respondent
	)	did not appear
RICHARD ARTHUR WHEATLEY	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	March 18, 1997
	)	
	)	
	)	Judgment Delivered:
	)	April 21, 1997
	)	

THE COURT: Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Matthews, J.A. Roscoe and Pugsley, JJ.A. concurring.

MATTHEWS, J.A.:

On April 17, 1996, the respondent pled guilty to two charges: possession of cannabis resin for the purpose of trafficking and failing to comply with a probation order. On October 16, 1996 he was sentenced by a judge of the Provincial Court on the first

charge to twelve months imprisonment and one month consecutive on the second for a total of thirteen months, both to be served conditionally in the community, pursuant to s. 742.1 of the **Criminal Code**.

The appellant now appeals from the latter portion of that sentence. The thrust of the allegation is that in the circumstances of this case, a conditional sentence is excessively lenient in that it does not adequately reflect the proper principles of sentencing for such offences, in particular, general and specific deterrence and the protection of the public. It is further submitted that the trial judge "erred in principle" in the interpretation and application of s. 742.1 of the **Criminal Code**.

The terms of the conditional sentence order imposed by the trial judge are:

> (a) Keep the peace and be of good behavior;
>
> (b) Appear before the court when required;
>
> (c) Report that day to a supervisor at Correctional Services and thereafter as required;
>
> (d) Remain in Nova Scotia unless written permission of his supervisor is obtained;
>
> (e) Notify any change of address or occupation;
>
> (f) Do not possess alcohol or non-presciption drugs;
>
> (g) Submit to drug screening on demand of the supervisor;
>
> (h) Attend substance abuse assessment and counseling as directed;
>
> (i) Do not associate with anyone known to have a criminal record except family members or through his employment;
>
> (j) Perform 150 hours of community service;
>
> (k) Maintain a curfew of midnight to 6 a.m. in his residence;
>
> (l) Reside with either Michelle Silver (with whom he has two children) or his father, or at an address approved by his supervisor.

The trial judge imposed probation for a further term of two years.

At sentencing the respondent was represented by counsel.

Subsequent to the guilty plea, as the trial judge correctly emphasized in his sentencing decision, the **Criminal Code** was amended. Those amendments became law on September 4, 1996. They represent a change in the law of sentencing. In particular, in respect to this appeal s. 718.2 sets out in part:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> ...
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Section 742.1 adds flexibility in the sentencing process and sets out three prerequisites which must be satisfied before a conditional sentence may be imposed:

> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
>
> (a) imposes a sentence of imprisonment of less than two years, and
>
> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

Counsel for the Crown and for the defence each adequately and at some length addressed the court concerning the specifics of these crimes, the circumstances of the respondent and the relevant **Code** amendments. The Crown suggested a sentence of seven months for the trafficking offence and a further one month for the breach of

probation. The defence sought an intermittent sentence or a conditional sentence to be served in the community.

The pre-sentence report, prepared on November 23, 1995 for a previous offence, contains both positive and negative features. The respondent was 23 years old at the time of that report. The respondent has a previous record. The first was in November of 1994 for theft under $1000.00 for which he received a suspended sentence with probation for one year. The second, in December of 1995, was fraud. He again received a suspended sentence, and on that occasion, probation for two years. In consequence he was on probation at the time of the offences before the trial judge.

That the trial judge was alive to the recent amendments to the **Code** there can be no doubt. Any sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. The cumulative effect of the amendments is that all other reasonable and appropriate sanctions should be considered prior to imposing a sentence of incarceration in a penal institution. The amendments permit an offender to serve a sentence in the community, but only after the sentencing judge determines that imprisonment in accord with the provisions of s. 742.1 is an appropriate penalty. The concept differs from probation or a suspended sentence. Were it not for the amendments the trial judge may well have stated that the respondent serve his sentence "behind bars" rather than in the community.

The written decision is some 12 pages in length. The trial judge considered the stated objectives and principles of sentencing contained in ss. 718, 718.1 and 718.2. There is no need to list them here, other than to point in particular, as did the trial judge, to s. 718.2(d) and (e) . He correctly listed the aggravating circumstances, in particular, that the respondent has a criminal record, was on probation at the time of the trafficking offence and that the motive for that offence "was greed or gain". Trafficking is a serious offence. In mitigation he noted that the respondent pled guilty at an early stage in the proceedings;

the involvement was as a petty retailer of "soft narcotics"; he is "relatively youthful"; he was at that time "fully employed and the source of some of the financial support for your two daughters"; he was "described as an excellent father" and there was a dependency upon him both emotionally and financially by his girlfriend.

The trial judge also considered that there is "a need to place some emphasis upon rehabilitation and reformation".

The issue then became, as it is before this Court, whether the "appropriate sentence" imposed by the trial judge of a total of 13 months should, considering the amendments and in particular the provisions of ss. 718.2 and 742.1, be served in the community. The trial judge considered that he:

> must be satisfied that the serving of the sentence in the community would not endanger the safety of the community.

He remarked that:

> The distribution of drugs, in my opinion, is a danger to the safety of the community. However, the Court should look beyond that and should look at the individual before the Court. You now have full-time employment. You were involved as a petty retailer selling soft narcotics. You have a family that looks to you for support and for whom you do provide support. Perhaps most relevant is to look at your actions since February 10th, 1996.
>
> ...
>
> ...you have remained at large in the community and one would say that during that time you have not been endangering the safety of the community and if you were, I would expect that applications would have been made to change the release order or charges would have been brought against you.

The trial judge emphasized that in conjunction with the other provisions there must be read that of s. 718.2(d):

> An offender should not be deprived of liberty if less

> restrictive sanctions may be appropriate in the circumstances.

After this rather extensive review he concluded that the respondent, in "this particular case" appears to be a suitable candidate to serve his sentence in the community subject to the restrictive conditions previously set forth. He made the perceptive comment:

> The burden of proof that must be met when a complaint is made that there has been a breach is lower than the burden of proof relative to a criminal offence. Therefore, if you were to breach these conditions you may find yourself serving the balance of the unexpired sentence.

On appeal, in addition to arguing the aggravating circumstances herein set forth, the Crown cited in its factum some decisions of trial courts in other provinces and later added **R. v. Ly and Nguyen**, a judgment of the Ontario Court of Appeal released February, 24, 1997. This Court retrieved some decisions of courts of appeal including **R. v. Reid**, [1996] A.J. No. 1123, **R. v. Beardy**, [1997] M.J. No. 10, **R. v. Scidmore**, [1996] O.J. No. 4446, **R. v. Pierce**, [1997] O.J. No. 715; and **R. v. Arsiuta**, [1997] M.J. No. 89, which were brought to the attention of each party prior to hearing the appeal.

Subsequent to hearing the appeal I have read several other cases on point including **R. v. McDonald**, [1997] S.J. No. 117, a judgment of the Saskatchewan Court of Appeal.

The respondent did not appear in person or by counsel on appeal.

As this is the first appeal to this Court respecting these amendments, it is unfortunate that the respondent was not represented by counsel and consequently we do not have a factum from defence counsel. It would have been helpful if research from the defence and comment on the amendments had been received.

Did the trial judge err in the sentence imposed?

A conditional sentence is punitive. It is a sentence of imprisonment to be served

in the community for the full term with conditions as set by a sentencing judge which significantly restrict the liberty of the offender. In appropriate circumstances it is to be imposed as an alternative to the other sentencing procedures, but only if the court is satisfied that serving a sentence in the community will not endanger the safety of the community. With respect to those who may hold a contrary opinion, it should not be considered a "soft" penalty.

The Crown, in oral argument before this Court, submitted that the trial judge failed to take into consideration general deterrence when considering whether the offender serving a conditional sentence would endanger the safety of the community: s. 742.1(b). I do not agree. Reading the whole of the decision it is clear that the trial judge made no such error.

In my opinion the standard of appellate review respecting an appeal from sentence set out by the Supreme Court of Canada in **R. v. Shropshire**, [1995] 4 S.C.R. 227 have not been affected by the amendments. In particular, a sentence should only be varied if a court of appeal is convinced it is not fit, that is, if it has found the sentence is clearly or manifestly excessive or inadequate. The burden is on an appellant to demonstrate that a sentence should be varied for those reasons.

That the trial judge had a discretion in imposing a conditional sentence admits no doubt. As Twaddle, J.A. commented in **R. v. Arsiuta**, supra: "We should intervene only in cases of clear error". The trial judge after considering all of the facts and factors concluded that in serving his sentence in the community the respondent would not endanger the safety of the community. The update from the correctional officer ordered by this Court dated March 13, 1997 confirms that opinion. There the officer remarked:

> As per the conditions outlined in Mr. Wheatley's Conditional Sentence Order, this offender has been reporting to the Dartmouth Probation Office since October 16, 1996. Throughout this period of time, Mr. Wheatley has remained employed on a full-time basis with Classic Wood Floors. He reports as directed and

> has presented no compliance problems thus far.
>
> ...
>
> ...(Mr. Wheatley) has shown no objection to performing volunteer work once an appropriate placement in the community is secured.
>
> ...
>
> File documentation indicates significant progress in the areas of employment and substance abuse.

There has been no breach of the probation terms since they were imposed which has been brought to our attention. Some five months have passed since the imposition of the sentence without adverse incident.

Keeping in mind the amendments and in particular, those mandated by s. 718.2(d) and (e) and s. 742.1 I emphasize, as did the trial judge, that the conclusion reached was rendered in the particular circumstances of this case. In my opinion it is reasonable. It was an exercise of his discretion. I cannot say that the trial judge in doing

so indulged in any error in his conclusion which would cause this Court to intervene.

I would grant leave to appeal, but dismiss the appeal.

Matthews, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.

C.A.C. No.133184

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

	Appellant	
- and -		REASONS FOR JUDGMENT BY:
RICHARD ARTHUR WHEATLEY		
		MATTHEWS, J.A.
	Respondent	