NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Howell*, 2013 NSCA 67

Date: 20130528
Docket: CAC 400319
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

William Frederick Howell

Respondent

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	March 27, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is dismissed, per reasons for judgment of Beveridge, J.A.; Farrar and Bryson, JJ.A. concurring**.**
Counsel:	Jeffrey S. Moors and James C. Martin, for the appellant Matthew Darrah, for the respondent

Reasons for judgment

INTRODUCTION

[1] An experienced trial judge sentenced the respondent to two years less one day imprisonment, and ordered the imprisonment to be served by way of a conditional sentence order; that is, somewhere other than in a prison.

[2] The offence was possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *CDSA*. The Crown appeals on the basis that this Court has said that, absent exceptional circumstances, the sentence for this type of offence is one of at least two years in a federal prison. A conditional sentence is not an available option for any sentence of two years or more. It says there are no exceptional circumstances, and hence the trial judge erred in law in imposing a sentence of less than two years.

[3] A contextual analysis of the trial judge's reasons reveal a clear path why she thought a sentence of less than two years was appropriate. I see no error in law or principle in her selection of that sentence. While it is disappointing that the trial judge did not engage in a more explicit analysis of why that sentence should be served by way of a conditional sentence order, I am not convinced that in these circumstances, the sentence is unfit. I would grant leave, but dismiss the appeal.

ISSUES

[4] The appellant's notice of appeal complained that:

1. The sentencing judge erred in principle in emphasizing compassion and rehabilitation, and characterizing the offender as exceptional, falling outside the considered range of sentence established by this Court.
2. The sentence was manifestly unfit.

[5] The appellant's factum repeated these complaints. I will address them collectively.

DID THE TRIAL JUDGE ERR?

[6] There is no specific complaint that the trial judge committed legal error in her analysis that underpinned the sentence she imposed of two years less a day, to be served by way of a conditional sentence order. Instead, the appellant repeats the same arguments it made in *R. v. Scott*, 2013 NSCA 28.

[7] The Crown had argued in *Scott* that absent exceptional circumstances a sentence of less than two years was not available as a fit sentence for an offence of trafficking or possession for the purpose of trafficking of cocaine. They repeat, verbatim, the same argument in their factum in this case:

> 46. There is only one range for cocaine traffickers, regardless of their position in the *Fifield* categories, and it starts at two years. A person may be given a sentence outside the range, and even a CSO, if they find themselves in exceptional circumstances.
> (see para. 13 *R. v. Scott*)

[8] The Crown says there were no exceptional circumstances in this case, and that the trial judge erred in following the decision of Judge Tufts in *R. v. Scott*, 2012 NSPC 6. Part of the problem for the Crown is that Judge Tuft's decision has since been affirmed by this Court (2013 NSCA 28).

[9] In *R. v. Scott*, the majority judgment of this Court emphasized that deference is owed to a trial judge's determination of sentence via the usual and appropriate balancing of the objectives and principles of sentence. And that determination is not to be supplanted by a new paradigm about whether or not there are exceptional circumstances. I there wrote:

> [26] What sentence is to be imposed is informed by the trial judge considering all of the relevant objectives and principles of sentence as set out in the *Criminal Code*, balancing those and arriving at what that judge concludes is a proper sentence. Absent some error of law or imposition of sentence that is not fit, deference must be accorded to such a sentence.
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> …
>
> [53] There is no question that this Court has long stressed the need to emphasize deterrence and denunciation for those that traffic in cocaine, and depending on the circumstances of the offence and of the offender, may well mean that a sentence of federal incarceration is called for. With all due respect, what I cannot accept is that these or any other cases make a federal prison term mandatory – to be avoided only if an offender can demonstrate "exceptional circumstances".

[10] In my opinion, while the trial judge's reasons could have been more fulsome, I am not convinced that she committed an error in principle in deciding that for this offender, and in these circumstances, an appropriate sentence was two years less a day, to be served by way of a conditional sentence order.

[11] What then were the circumstances of the offender and the offence, and what principles did the trial judge apply? A jury found the respondent guilty of possession of two small packets of powder cocaine. Each weighed .5 grams of that drug. The respondent also had in his possession a modest amount of cash ($210) and a cell phone. Messages to and from that phone provided cogent evidence that the respondent was involved in trafficking cocaine. But the evidence before the trial judge, which she appeared to accept, was that the offender was the lowest of petty retailers – selling small amounts to support his drug habit.

[12] The Crown acknowledged that the respondent had a positive Pre-Sentence Report. At the time of the offence, three years before being sentenced, he had reached the low point in his life. He was a drug addict. For two years he had maintained sobriety, took counselling, secured full-time employment, and was in a committed relationship with a new family.

[13] The Crown relied on the usual handful of cases from this Court in support of a recommendation for a sentence of federal incarceration: *R. v. Byers,* [1989] N.S.J. No. 168 (C.A.); *R. v. Butt,* 2010 NSCA 56; *R. v. Jamieson*, 2011 NSCA 122; *R. v. Knickle*, 2009 NSCA 59. As rightly observed by Crown counsel at trial, the trial judge was familiar with these cases, having dealt with a petty retailer of cocaine in her oral decision of January, 2012 in *R. v. Carvery,* 2012 NSSC 49 (where she sentenced the offender to two years' incarceration in a federal penitentiary).

[14] At trial, counsel for the respondent relied on *R. v. Scott*, 2012 NSPC 6, arguing that Mr. Howell's case presented exceptional circumstances, if such a finding were required for a conditional sentence.

[15] The trial judge immediately delivered oral reasons, later revised (only by the addition of some case authorities). Her reasons are now reported as: 2012 NSSC 264. She found there were exceptional circumstances. She reasoned as follows:

> [2] Now, I will say, I recognize that cocaine is a serious offence and that deterrence is a primary principle. We need to keep traffickers off the street and discourage this conduct in our society. It hurts people desperately. There are far too many victims. I recognize the Court of Appeal has consistently said this is a serious offence for which there should be minimum incarceration of two years in a federal penitentiary, with rare exception. **However, conditional sentences are imposed in exceptional circumstances and principles of rehabilitation must be considered along with deterrence. Occasionally, an exceptional circumstance arises where people who are victims themselves rise up above their own circumstances, cure themselves of their own addictions and reform themselves. It is important and imperative that the courts**

> **have the capacity to recognize this event and to say "Okay this is an exceptional circumstance and rehabilitation trumps deterrence." This is such a case.**
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> [3] I have carefully read Mr. Howell's pre-sentence report. I know that he has been on virtual house arrest for a couple years. He has a common-law relationship and he has two children. He has a good and supportive family. He is off drugs. He is off alcohol. He has done everything he can in his life to become a useful citizen at the age of 41 years. I am not going to prevent him from continuing on that path by imposing incarceration in a federal institution. **This is an exception. Every now and then somebody gets out from under their addictions and they become a reformed person – a winner. They overcome their demons. Mr. Howell has done this and I recognize it. So it is an exceptional case, it happens rarely but we have virtually seen this man live under house arrest, work, look after his family and beat his demons. I want him to have that opportunity to become a good and productive citizen in our community and I am going to sentence him to a conditional sentence of two years less a day**, comprised of nine months house arrest but he will be able to continue to work, then a period of six months on a curfew following that house arrest, from 10:00 p.m. to 6:00 a.m. And his conditional sentence will be completed in two years less a day.

[16] I do not endorse the trial judge's turn of phrase that "rehabilitation trumps deterrence". All principles and objectives of sentence are in play in arriving at what is an appropriate sentence. The trial judge expressly recognized that the usual emphasis is on deterrence, but also said that other principles need to be considered.

[17] The trial judge was obviously impressed with the respondent's sincerity and the progress he had made. She decided that a sentence that let him continue on that path would best protect society and further the maintenance of a just, peaceful and safe society (see s. 10(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended).

[18] As has been repeatedly stated by this and other courts, including the Supreme Court of Canada, a lengthy conditional sentence can still have a significant deterrent effect (*R. v. Proulx* , [2000] 1 S.C.R. 61; *R. v. Frenette*, [1997] N.S.J. No. 205; *R. v. Wheatley*, [1997] N.S.J. No. 173). The Crown acknowledges this to be so.

[19] While not raised in its factum, nor before the trial judge, the Crown now says there were two errors in principle by the trial judge: first by not following s. 10(3) of the *CDSA* that mandates reasons if a judge does not impose a sentence of imprisonment if one or more aggravating factors listed in subs. (2) are present; second, by failing to follow the two-step process directed by *R. v. Proulx* in order to determine if a conditional sentence order is appropriate. I will consider each of these matters in turn.

[20] First, there was no failure to follow the dictates of s. 10(3). The trial judge was aware of the aggravating fact that the respondent had previously been convicted of a designated substance offence. It was fully discussed before her. She mentioned his criminal record in her decision. Furthermore, s. 10(3) of the *CDSA* is simply a direction to a court to provide reasons if it "decides not to sentence the person to imprisonment". The trial judge sentenced the respondent to a sentence of imprisonment. Section 742.1 then permits a sentence of imprisonment to be served in the community if the sentence is less than two years, and other criteria are satisfied.

[21] Second, the trial judge said she accepted and considered the principles of sentence set out in *R. v. Proulx*. She did not set them out in her decision. However, they are well known. The appropriate two-step approach from *Proulx* was properly set out and applied in *R. v. Scott*, 2012 NSPC 6, a case that the trial judge here considered and followed. Unfortunately, there were no submissions made to the trial judge by either the Crown or the defence about the second step; the focus was on the first – was the sentence to be imposed one that would exclude a conditional sentence order (probation or a term of imprisonment of two years).

[22] The reasons of the trial judge, read in light of the record, and the circumstances, do not permit this court to intervene (see *R. v. Poulin*, 2002 NSCA 91). Deference is owed to a trial judge's determination of sentence, which includes a ruling that a sentence of imprisonment is to be served by way of a conditional sentence order (see *R. v. Proulx* at paras. 123-126).

[23] I am not convinced that the sentence is tainted by legal error, or is demonstrably unfit. I would grant leave, but dismiss the appeal.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.