NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Garnett*, 2017 NSCA 33

Date: 20170428
Docket: CAC 455475
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Jacqueline Christine Garnett

Respondent

Judges:	Farrar, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	April 7, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Scanlan, J.A.; Farrar and Van den Eynden, JJ.A. concurring.
Counsel:	Suhanya Edwards, for the appellant Luke A. Craggs, for the respondent

Reasons for judgment:

[1] After a 9-day trial before Justice Jamie S. Campbell, the respondent, Jacqueline Christine Garnett, was found guilty of two offences. The offences were one count of possession of proceeds of crime contrary to s. 355(a) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46; and one count of money laundering contrary to s. 462.31(2)(a) of the *Criminal Code*.

[2] On August 15, the judge sentenced her to a conditional discharge with probation for three years. The probation order included a number of conditions including community service and a curfew. The Crown now appeals the sentence.

Standard of Review

[3] The standard of review applicable to appeal of sentence was recently discussed in *R. v. Skinner*, 2016 NSCA 54, and in *R. v. B.M.S.*, 2016 NSCA 35. In *B.M.S.* the Court stated:

> [11] Trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law: *R. v. Shropshire*, [1995] 4 S.C.R. 227 at ¶ 46, *R. v. Nasogaluak*, 2010 SCC 6 *at ¶ 43-46.* Absent an error in principle, failure to consider a relevant factor, overemphasis of the appropriate facts, or a sentence that is demonstrably unfit, a Court of Appeal should not intervene: *R. v. Proulx*, 2000 SCC 5 at ¶ 123. Any error that may be identified by an appellate Court will only justify intervention if that error had an impact on the sentence ordered: *R. v. Lacasse*, 2015 SCC 64 at ¶ 41, 43-44.

Background

[4] The respondent was a common law spouse to Sean Decker. He was the principal target in an extensive drug investigation involving wiretap evidence and police surveillance. The surveillance operation resulted in a "take-down" on October 11, 2011.

[5] Mr. Decker was arrested and charged with several drug offences. Concurrent to the drug investigation, a proceeds of crime investigation was initiated. That investigation continued after the arrest date of October 11, 2011, eventually resulting in additional charges. In August of 2012 Mr. Decker and the respondent were jointly charged with possession of proceeds of crime and money laundering for a period extending from January 1, 2003 to October 10, 2011.

[6] Mr. Decker pleaded guilty to the drug offences, the proceeds of crime offences and money laundering. Pursuant to a joint recommendation of counsel he received a global sentence of seven years imprisonment. This included two years on the possession of proceeds of crime and money laundering charges. That two years is to be served consecutive to any time imposed on the drug charges. The assets in issue were forfeited.

[7] According to the Crown's submissions on this appeal, the assets included a "condominium, a 14 karat gold diamond ring, a 2004 Acura TSX, a Breitling watch, a CMC Markets Canada Incorporated account, a 2003 Harley Davidson, a Trek Madone bicycle, $178,950 Canadian currency and $12,765 in US currency."

[8] At her trial, the respondent asserted she did not know that the money and assets Mr. Decker was bringing into the household were obtained illegally. This assertion of innocence was rejected by the trial judge. The conviction is not under appeal.

Issues

[9] The issues on this appeal are as follows:

1. Is a conditional discharge manifestly unfit in respect of the offences and the offender? and
2. Did the trial judge err in principle by fashioning a "punitive" probation order as an alternative to a conditional sentence order?

Analysis

[10] The trial judge found that over a period of up to nine years Mr. Decker was "a significant supplier of illegal drugs in Nova Scotia" and at a high level in the distribution chain for drugs in Nova Scotia. The trial judge's comments are indicative of the level of Mr. Decker's involvement. He stated:

> [46] The inference that Sean Decker had been dealing in illegal drugs for some considerable time before October 2011 is a strong one. It is based on the nature of the illegal drug trade and the otherwise unaccounted for income. The eventual takedown on 11 October 2011 shows just how high level a drug trafficker Sean Decker actually was. One seizure that day involved 6.146 kilograms of cocaine. The price paid for cocaine was $42,500 per kilogram. At the same time as the cocaine was being brought in from Hamilton Ontario Mr. Decker was arranging for the delivery of a significant shipment of marijuana,

> hash and ecstasy from western Canada. One seizure that day involved 167.20 pounds of marijuana, 2.395 kilograms of hash in bricks and 1.898 kilograms of cannabis resin in oil form. There was also 1.039 kilograms of powdered ecstasy (MDMA).

[11] During the time relevant to the investigation and the charges (2003-2011), the respondent earned between $14,700 per year and $21,500 per year as a receptionist at a spa. In that same period, Mr. Decker reported an income loss of $7,100 in one year and earned as much as $24,900 per year from his excavation business. Their combined incomes were nowhere near sufficient to afford the assets and lifestyle the couple enjoyed.

[12] Forensic accounting suggested that between 2003 and 2011 the documented expenditures by the couple revealed an unexplained income of between $284,000 and $725,000, or an average of between $32,000 to $82,000 per year, above what their legitimate incomes could afford. This analysis was limited to seized records, primarily bank accounts. The analysis did not include any cash expenditures made by the couple.

[13] The appellant noted that the records suggest there were probably cash purchases. For example, the bank records show only $45.81 per week for food and groceries. Bank records do not disclose how other costs for groceries and food would have been paid for through non-legitimate sources.

[14] The respondent did all of the banking for the couple, depositing in excess of $245,000 into their three main accounts. She suggested to the trial judge that Mr. Decker's money was a reason for her to stay with him. I have already noted that the trial judge did not accept the respondent's assertions that she did not know the monies she was depositing into the bank accounts were generated through illegal activities. Mr. Decker had previously been convicted as a cigarette smuggler and, according to the trial judge, he had "a history of illegal money-making schemes" that the respondent had been aware of.

[15] Mr. Decker's illegal activities, as the trial judge noted, financed the appellant's somewhat extravagant lifestyle: her custom-made engagement ring that cost $13, 225 and a condominium that she expected to sell for $424,900.

[16] The sentencing judge was keenly aware of the havoc drug dealing and addictions cause in society. He referred to drug dealing with the types of drugs involved in this case as creating "untold misery in this city" and "that the bundles

of money actually came from people who were suffering as a result of addictions". He said: "…some people would call it "blood money"."

[17] The judge suggested the respondent's circumstances were "quite different from many others", saying she was "not someone who wanted to hook up with a dope dealer, but she did and now she has to pay the consequences for that and those consequences are serious."

[18] The sentencing judge noted that Mr. Decker had extensive involvement with criminal law and had been sentenced to incarceration on a number of prior occasions. The respondent was aware of these convictions and at least some of his illegal activity for many years. Although the respondent left him at various times, she always returned to him. For the purposes of the present offence she knew he continued to be involved in criminal activity. The conviction makes it clear that the trial judge was satisfied beyond a reasonable doubt that she knowingly assisted him in that endeavor by laundering at least some of his proceeds of crime. She, like Mr. Decker, was also in possession of items acquired through the proceeds of crime. The respondent returned to live with Mr. Decker on a number of occasions after he had been involved in ongoing criminal activities and was sentenced to imprisonment. The sentencing judge noted:

> Jacqueline Garnett does not need to be taught a lesson, everyone agrees that. She doesn't need to be deterred from doing further crimes. Her story, I'm quite satisfied, is not going to deter any other naïve young woman from getting into a relationship with someone and not asking the right questions. It's not going to deter them from going along for the ride with a person who they know quite realistically is a drug dealer. It's not that kind of crime. This was not one that was carefully planned, she was not a mastermind or even a planner in all of this, she was just the partner who was doing what partners do. And in that sense I mean spousal partner, not drug dealing partner.
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> So I'm not satisfied that her story is going to be really a lesson for anybody. And she's not likely to offend again. Nobody thinks Jacqueline Garnett is going to go out and find another drug dealer who she can ruin her life with again. It's highly unlikely that she's going to get back with Sean Decker. That's a possibility and I have to bear that in mind, but I hope she's smarter than that and I have some confidence that she is. ….

[19] I am concerned that these comments could be interpreted to suggest that spousal partners somehow have a licence to be involved in the laundering or possession of proceeds of crime. Drug dealers are often involved in drug dealing

for two reasons: the money and what it can buy, or to finance the purchase of drugs through the sale of drugs.

[20] In Mr. Decker's case it is obvious that he was motivated by both the money and the drugs. The respondent was motivated by money and what it could buy. That was money referred to by the trial judge as "blood money". Money that was obtained through the misery of an untold numbers of users, addicts, families and the community-at-large. Persons who assist in drug operations through the laundering of the proceeds of crime must be deterred. Others who hear about these cases must understand that there will be serious consequences arising from their involvement in money laundering or possession of proceeds of crime. General deterrence and denunciation are significant considerations in cases such as this.

[21] The sentencing judge referred to the serious consequences the respondent endured prior to the sentence hearing. For her to have lost her ill-gotten gains through forfeiture can hardly be described as a negative consequence of being involved in these offences. The fact is, but for her involvement through the laundering operations and Mr. Decker's involvement in trafficking in drugs and narcotics, there would be no expensive rings, expensive vacation trips, expensive condos and large sums of cash. The respondent would be like other hardworking, law-abiding citizens, working to support themselves in a manner that their modest incomes afford. That lifestyle would have been much less extravagant than what was being enjoyed by Ms. Garnett and her partner, Mr. Decker. The loss of this ill-gotten gain is not a consequence to be considered as a punishment. She lost what she should not have possessed in the first place.

[22] There is no evidence on the record to suggest what, if any, harm would result from the respondent having a criminal record. In the absence of any such evidence, it appears that the sentencing judge's desire to ensure that the respondent not have a criminal record was a substantial factor in imposing a sentence of probation and discharge. In terms of garnering respect for the administration of justice, I am satisfied that persons who hear of an offender who enjoyed the jewelry and trips and other possessions given to her through this so-called "blood money", would not be so concerned about her having a criminal record. I am convinced that few hard working, law abiding citizens would feel well-served by the administration of justice if the sentence in this case were guided by the issue of whether the respondent has a criminal record. As I said, there is no evidence as to the extent, if at all, a criminal record would impact the respondent in the future.

[23] The sentence as imposed by the sentencing judge begs the question: if a case involving this couple involved in the money laundering aspect of the drug trade at such a high degree does not cry out for something more than a conditional discharge, then what will it take? This case is one that requires a sentence that addresses both general deterrence and denunciation.

[24] The sentencing judge referred to Ms. Garnett saying she was: "…in my view, in the moment in these matters and while she was not deprived of her free will in the sense of being an abused spouse. She was acting on emotion and not acting with a calculator." I agree with the comments of the appellant that it is difficult to understand how a person could be "in the moment" for nearly nine years. This was not a momentary lapse in judgment. It was a lifestyle choice. The sentencing judge was pre-occupied with Ms. Garnett's love for Mr. Decker, somehow concluding it was an explanation for her involvement. I dare say if it was just for love she could have turned down the ring, the jewelry, the trips, the condominium, the cash, etc. She didn't.

[25] A message must be sent to others, whether they be business partners, relationship partners, or just someone wishing to simply make a quick dollar. If you're going to be involved in laundering or possessing proceeds of crime to the extent that the respondent was involved, then you can expect serious consequences whether you did it for love or for the money. This case is to be distinguished from cases where there was evidence that a person was involved out of fear or as a result of abuse.

[26] The sentencing court is required to consider the seriousness of the offence and the importance of general deterrence and denunciation. I refer to *R. v. Fallofield*, [1973] B.C.J. No. 559 (B.C.C.A.) and *R. v. Waters*, [1990] S.J. No. 39 (S.K.Q.B.) where the courts referred to the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effect of enforcement of the criminal law taking into account both the offender and the offence.

[27] I am satisfied that in the case at Bar the sentencing judge ignored or at least failed to give the proper weight to the requirement to denounce the respondent's involvement and provide general deterrence to other persons who may consider becoming involved in the laundering of drug money or possession of proceeds of crime. That error impacted the sentence imposed.

[28] I am satisfied that a conditional discharge is manifestly unfit in respect to the offence and this offender.

[29] In view of the conclusion as stated above, I am satisfied that it is not necessary to deal with the second issue as raised in the Crown appeal.

Disposition

[30] I am guided by the submissions of the Crown on appeal. Those submissions are consistent with the position the Crown took at the sentencing hearing where they had asked for a sentence of two years less one day. The sentence they suggest would be served in the community. The respondent now reaps the benefit of what I consider a lenient Crown recommendation.

[31] I am satisfied the case cries out for a sentence that includes a significant element of general deterrence.

[32] In *R. v. Pavao*, [1995] M.J. No. 295 (C.A), the sentencing judge imposed 30 months in jail and this was reduced to 20 months on appeal. The Court suggested that "the major concern in imposing sentence was to deter others in the community who might be tempted to participate in this less tainted aspect of the drug trade."

[33] In *Pavao*, the offender was a brother of a drug dealer. He appealed his sentence of 30 months imprisonment for "money laundering". The drug dealing brother fled the country and the appellant got the drug money and arranged to get it to his brother outside of Canada. On appeal, the sentence was reduced to 20 months with the court noting the major concerns in imposing the sentence was to deter others who might be tempted to participate in this aspect of the drug trade.

[34] If I were to distinguish *Pavao*, it would be to say that the respondent in this case didn't just transfer money, she shared in the enjoyment of the profits. That is not a distinction that benefits the respondent here.

[35] The Crown requests that this Court set aside the sentence and impose a conditional sentence of two years less one day. That is an appropriate recommendation considering the amounts involved and the extensive time over which these offences occurred. The sentence will be altered so that I would now impose a conditional sentence on each offence, to be served concurrently. The conditional sentence will remain in effect until August 24, 2018. The conditional sentence order will include the regular statutory conditions. I accept the original

Crown recommendation that the first one-third of the sentence should be served with total house arrest. Much of that has been served under the probation order and I give Ms. Garnett credit for the time already served; that is from August 15th until the date of this decision. For the next eight months of the conditional sentence Ms. Garnett will be subject to a curfew requiring Ms. Garnett to be in her house from 10 in the evening until 6 the next morning with the usual exceptions for medical emergencies. For the entire conditional sentence term ending on August 24, 2018, Ms. Garnett will not consume or possess any alcohol and will not take, use or consume any substances defined under the *Controlled Drug Substances Act*, S.C. 1996, c. 19 except in accordance with a medical prescription. She shall have no direct or indirect contact or communications with Sean Decker. She shall make reasonable effort to locate and maintain employment or education programs as directed by her sentence supervisor.

[36] When attending at regularly scheduled employment, Ms. Garnett will travel to and from her place of employment by the most direct route. She will keep her sentence supervisor advised in advance as to all employment and education programs, as well as any medical treatment appointments. For counselling appointments or regularly scheduled medical appointments, other than emergencies, she shall advise the sentencing supervisor in advance and obtain written approval to attend. In addition, she is required to present herself at the entrance to her residence when any sentence supervisor or peace officer attend there for the purpose of checking for compliance. She shall provide her sentencing supervisor with her regular residential address and must reside at that residence unless she obtains prior permission from her sentence supervisor to reside at an alternative residence.

Scanlan, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.