Cite as: R. v. Smith, 1992 NSCA 73

S.C.C. No. 02618

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hart and Matthews, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	James C. Martin
	)	for the appellant
appellant	)	
- and -	)	Duncan R. Beveridge
	)	for the respondent
	)	
GREGORY HAROLD SMITH	)	Appeal Heard:
	)	September 24, 1992
respondent	)	
	)	Judgment Delivered:
	)	September 29, 1992

THE COURT: Leave to appeal granted, the appeal allowed and substituted as a fit sentence a term of incarceration of five years per reasons for judgment of Matthews, J.A.; Hart and Jones , JJ.A. concurring.

MATTHEWS, J.A.:

The respondent pled guilty to a charge of possession of the narcotic, cocaine, for the purposes of trafficking, s. 4(2) of the **Narcotic Control Act**. On October 30, 1991, Provincial Court Judge Frances Potts sentenced him to a period of incarceration of 2 1/2 years. The Crown now seeks leave to appeal and, if granted appeals that sentence alleging that it is "excessively lenient".

A Dartmouth police officer, on February 20, 1991, received information that the respondent was in possession of a large amount of cocaine; that the respondent was cooking up the cocaine into crack; and that the respondent had made several deliveries of crack earlier that day and would be bringing more into Dartmouth that evening for distribution.

Consequently after surveillance by the police the respondent, while operating a motor vehicle, was detained for a drug search by a member of the Dartmouth police department. The police seized the following items:

> "(1) in the accused's right hand inside jacket pocket a small nylon pouch which contained 3.5 grams of cocaine in a small plastic bag;
>
> (2) a rock of crack cocaine wrapped in tinfoil which weighed 3 grams and three (3) rocks of cocaine, each wrapped in tinfoil which weighed 1/4 gram each;
>
> (3) from the same pocket a piece of tinfoil was seized which contained 25 grams of crack cocaine;
>
> (4) from the left hand side inside jacket pocket a digital paper was seized; and
>
> (5) from the accused's left front pants pocket $135.00 in cash was seized."

The respondent was arrested and informed that he would be charged with possession of a narcotic for the purposes of trafficking. At the police station the respondent was cooperative and upon being informed that it was the intention of the police to search the residence in which the respondent's wife and children lived, in a warned statement said that the people at that residence had nothing to do with the offence and that "the rest of my coke, scales and around $5000.00 in cash" could be found in a steel box in the master bedroom. As well, he informed the police that in making crack cocaine he used a juice bottle, baking soda from the cupboard and ordinary tinfoil.

Under authority of a search warrant police officers accompanied by the respondent went to the residence. There the respondent obtained a locked metal box from under a dresser in the master bedroom. He then got a key from the dresser and gave both box and key to an officer.

One officer requested that the other look for, and seize, any paraphernalia that would be used to make crack cocaine. It was then that the respondent pointed out the following items which were subsequently seized:

> "(1) three (3) empty juice bottles which were located on the window ledge in the kitchen;
>
> (2) one (1) roll of aluminum foil which was located inside a drawer in the kitchen next to the stove;
>
> (3) a 1 kg box of baking soda opened and a full 1 kg box of baking soda, both of which were located inside the cupboard above the stove; and
>
> (4) also a package of sandwich bags which was located inside a drawer in the kitchen."

> "(1) one set of scales;
>
> (2) a plastic bag inside of which was another plastic bag which contained 3.5 grams of cocaine;
>
> (3) another plastic bag inside of which were nine (9) smaller plastic bags each of which contained 4 grams of cocaine;
>
> (4) a large plastic bag which contained 293.5 grams of cocaine;
>
> (5) five (5) bundles of money wrapped in elastics which contained $1,000.00 each;
>
> (6) another bundle of money wrapped in an elastic which contained $530.00 in cash; and
>
> (7) papers which included an envelope which contained several elastic bands, a plastic bag containing papers in the name of Greg Smith, Mary Smith and one (1) in the name of Greg Bayliss, another envelope which contained papers in the name of Greg Smith and Mary Smith and a plastic sleeve which contained an insurance brochure."

In total seized were 28.75 grams of crack cocaine and 372 grams of powder cocaine, which apparently have a street value of some $45,000.00. The Crown in submission to the trial judge stated that the cost of that cocaine to the respondent was approximately $12,000.00.

The respondent contends "that to entertain this appeal would be to countenance a repudiation of a plea arrangement freely entered into by the Crown". An addendum to the appeal book reads:

> "The following facts are agreed to by counsel for the Appellant and Respondent:

1. On February 20, 1991, the Respondent was arrested for possession of a narcotic for the purpose of trafficking. He was released from custody. An Information was sworn on February 26, 1991 containing two counts of possession of a narcotic for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act.** A true copy of the Information is attached as Schedule 'A'.

2. On March 20, 1991, the Respondent elected trial by judge and jury and the preliminary inquiry was scheduled for August 22, 1991 at 1:30 p.m., Dartmouth Provincial Court.

3. On August 20, 1991, counsel for the Crown (not the same counsel as on appeal) called counsel for the Respondent and inquired whether or not the preliminary inquiry was going ahead. Should the Respondent plead guilty, he would not be looking at anything less than federal time. Instructions were received from the Respondent to enter into plea discussions.

4. On August 21, 1991, discussions were held between counsel for the Appellant and counsel for the Respondent with respect to resolving factual disputes. There was also discussion with respect to making a joint recommendation on sentence in the range of 2.5 - 3 years. The Crown declined to agree to a joint recommendation. In the end, the following agreement was reached - should

the Respondent plead guilty:

- There would be one count of s. 4(2).

- The Crown would not try to allege that the respondent had any weapons in his possession.

- The value of the cocaine was agreed upon.

- The Crown would recommend a period of incarceration in a federal institution.

5. It is a well-established practice in Nova Scotia that Crown counsel (Federal or Provincial) in speaking to sentence does not usually recommend a specific period of incarceration but will use the following terms:

- Short period of incarceration in a provincial institution.

- Intermittent incarceration.

- A period of incarceration in a provincial institution.

- Lengthy or substantial period of incarceration in a provincial institution.

- A period of incarceration in a federal institution.

- A substantial period of incarceration in a federal institution.

6. These terms are well-known

> amongst practitioners of criminal law and the trial courts in characterizing the progression of the Crown's position on sentence.
>
> 7. After discussion with the Respondent, agreement was reached and he undertook to enter a plea of guilty to one count of possession of a narcotic for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act.** A new Information was sworn containing one count on August 22, 1991. The Respondent was arraigned on that date and elected trial in Provincial Court and entered a plea of guilty."

The issue on this ground is: having agreed to recommend a period of incarceration in a federal institution upon a plea of guilty and after the trial judge imposed a sentence which was one to be served in a federal institution, is the Crown precluded from appealing and recommending to this Court a more substantial period of incarceration.

The respondent says that the Crown is so precluded.

In support of his position the respondent cites authority for the proposition that when, at trial, the Crown has entered into a plea bargain with an accused, it is prescribed on appeal from altering that agreement relied upon by the accused and placed before the trial judge. See **R. v. Agozzino,** [1970] 1 C.C.C. 380 (Ont. C.A.); **Attorney General of Canada** v. **Roy** (1972), 18 C.R.N.S. 89 (Que.Q.B.); **R. v. MacArthur** (1978), 39 C.C.C. (2d) 158 (P.E.I.S.C.,A.D.); **R. v. Cusack** (1978), 41 C.C.C. (2d) 289; **R. v. Goodwin** (1981), 43 N.S.R. (2d) 106.

The respondent also says that even if leave to appeal is granted the

appeal should be dismissed, there being no error in principle committed by the trial judge and that the sentence is not so manifestly inadequate to be clearly erroneous.

In order to consider these issues it is necessary to discuss the facts, the relevant law and the reasons given by the trial judge for the sentence imposed.

The respondent at the time of the offence was 35 years old, with grade 10 education and separated from his wife. The two children of that marriage reside with her.

There is much of a positive nature in the presentence report. One of his former employers spoke of him as a good reliable worker. He was cooperative; expressed remorse, claims that he has never used non-medically prescribed drugs and attributes his involvement in the drug trade to the fact that he has been unable to find steady employment. His only one prior conviction was for an unrelated matter in 1982.

In their submissions both Crown and defence counsel were unable to direct to the attention of the trial judge any case of this Court involving crack cocaine.

The trial judge's decision demonstrates that she thoroughly understood the well known principles of sentencing. She also recognized that sentences previously imposed, including those of federal time, "did not have any effect in deterring you (the respondent) from getting involved" in the drug business. However, upon analysis of the cases cited to her, the trial judge felt constrained to impose a sentence in the range of two to three years. She should not have been so restrained. In 1989 this Court in **R. v.Byers** (1989), 90 N.S.R. (2d) 263 issued fair warning that, for good reasons, sentences for offences involving cocaine would be increased. There Hart, J.A. at p. 264 said:

> "I would point out that the courts of this country
> have repeatedly made reference in recent years

> to the need to suppress a narcotic as dangerous as cocaine. It is a highly addictive substance and unfortunately has lately dropped in price to the point where it is one of the commonest drugs marketed on the North American continent. Its ease in handling and transportation results in greatly increased profits to the traffickers who deal in cocaine and some of its derivatives. One has only to look in the daily reports in the press to observe the extent of its presence and the increase of many types of crime in the places where it is found.
>
> In my opinion the time has come for this Court to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved. Nor should the lack of a criminal record stand in the way of a substantial period of imprisonment. No one today can claim to be so naive as to think that trafficking in cocaine can be conducted without serious damage to our social structure."

He reiterated those comments in **R. v. Smith** (1990), 95 N.S.R. (2d) 85 at p. 86:

> "In our opinion, however, the seriousness of present-day trafficking in cocaine requires more substantial emphasis on deterrence than has been recognized in the past. The ease of dealing with and distributing this very dangerous drug caters to those who succumb to the temptation to make quick and easy money in the trade."

Had the trial judge the opportunity of reading **David Bruce Carvery v. The Queen**, S.C.C. Nos. 02504 and 02525, a judgment of this Court delivered December 10, 1991, that is, subsequent to her decision, undoubtedly from the comments contained in her decision she would have imposed a much more severe sentence. There Freeman, J.A.

remarked at p. 8:

> "Trafficking in crack cocaine is a crime so corrosive to the social fabric that sentences must reflect deterrence above all other considerations, even when the offender, like Mr. Carvery, has no previous record."

The Court there held that a three year sentence for trafficking in crack cocaine was manifestly inadequate and a "more fit and proper sentence of five years" was substituted.

As the trial judge commented it is clear that the respondent's motive for his involvement in drug trafficking was profit. Defence counsel informed the trial judge "that Mr. Smith had been involved in this a very short time". However, his excuse, unemployment, cannot be accepted in mitigation of this serious offence. Commiseration for his economic situation cannot be confused with condonation of crime. Using the figures placed before us, it is estimated that the respondent purchased the seized drugs for approximately $12,000.00 and would probably sell them at the street level for $45,000.00, a profit of some $33,000.00. And that was simply in respect to the drugs seized. Further, there can be no doubt that the respondent was on the upper end of the scale as a retailer. His was no petty business.

In numerous cases this Court has, with strong language, denounced the drug trade with its disastrous effect upon users, many of them young, and those near to them. This crime is known to breed crime. Often money used to buy drugs is obtained from crimes of theft and robbery. People, otherwise free of crime, are lured into this detestable business, because of the quick, easy money, willing to accept the odds because of relatively

light sentencing. That attraction is, no doubt, the reason for the existence of importers, wholesalers and retailers, every one a necessary link in the chain of distribution. Crimes of this type are conducted with planning, connections with wholesalers and purchasers, and a recognition of the risks involved. The gravity of the offence is such that the maximum penalty of life imprisonment may be imposed.

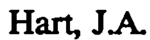
The Crown said nothing at sentencing which infringed the agreement reached with the respondent. Had the trial judge imposed a sentence significantly greater than 2 1/2 years, the respondent could not have complained on the basis of that agreement. The Crown in appealing the sentence imposed by the trial judge has not repudiated its original position. The issue then was, as it now is, the fitness of the sentence: s. 614 of the **Code.** Simply put, the trial judge did not impose a fit sentence; she imposed one to which she thought she was restricted because of the precedents considered. In doing so, she erred. In consequence I cannot agree with the respondent's contention respecting the plea bargain. It simply has no application on the facts of this case.

To be an effective deterrent, a sentence must not be one that this offender and others of similar inclination view simply as a cost of doing business or as a license to conduct this nefarious and lucrative enterprise. The sentence imposed is not fit. It is manifestly inadequate.

I would grant leave to appeal, allow the appeal and substitute as a fit sentence, a term of incarceration of five years. In doing so, I am cognizant of the fact that the respondent was, on August 28, 1992 released on full parole in respect to the sentence.

J.A.

Concurred in:

Hart, J.A. 

Jones, J.A.

12

CANADA
PROVINCE OF NOVA SCOTIA

1992

APPEAL
CASE # 255096

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

ON APPEAL FROM

THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

GREGORY HAROLD SMITH

HEARD BEFORE: Her Honour Judge Fran Potts

PLACE HEARD: Dartmouth, Nova Scotia

DATE HEARD: August 22, 1991

CHARGE: On or about the 20th day of February, 1991, at or near Dartmouth, Halifax County, Nova Scotia, did unlawfully have in his possession a narcotic, to wit., Cocaine, for the purpose of trafficking, contrary to Section 4(2) of the Narcotic Control Act.

Mr. James Martin, for the Prosecution

Mr. Duncan Beveridge, for the Defence

S-E-N-T-E-N-C-E O-N A-P-P-E-A-L