NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Sellars*, 2013 NSCA 129

Date: 20131114
Docket: CAC 414975
Registry: Halifax

Between:

Kimberley Helen Sellars

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	October 17, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed, per reasons for judgment of Beveridge, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Mark T. Knox, for the appellant William Delaney, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] The appellant pled guilty to criminally obtaining monies from her employer's health care plan. She sought a conditional discharge. The trial judge refused. Instead, he suspended the passing of sentence and placed the appellant on probation for three years with a number of conditions. He also issued a stand-alone restitution order.

[2] The appellant seeks leave to appeal, and if granted, appeals from the trial judge's refusal to grant her a discharge. She says the trial judge erred in law by applying the wrong test. With all due respect to the trial judge, I agree. Accordingly, I would grant leave to appeal, and allow the appeal from sentence and grant the appellant a conditional discharge.

[3] To understand my conclusion and reasons for it, I will set out as much background information as is available from the record.

THE SENTENCE HEARING

[4] The hearing was on March 25, 2013. Crown counsel (not Mr. Delaney) said very little about the circumstances of the offence. A Pre-Sentence Report and a report from psychologist Dr. Andrew Starzomski fleshed out some details of the circumstances of the appellant, and made passing reference to some of the circumstances of the offence. I will refer to these later.

[5] The Crown noted that the appellant had no prior record, and from the reports, she had a history of mental health issues. The Crown did not dispute that the appellant became involved with an abusive partner who was largely responsible for the offences before the court. He was the one who submitted fraudulent claims to the appellant's employer. The claims were for health-related expenditures that had not in fact been incurred.

[6] The Crown told the judge that the appellant must have provided her partner with her password in order to submit the bogus claims, and since the money was deposited into her account, she was aware what was going on and chose to do

nothing about it. The Crown alleged that there were a number of incidents that occurred over almost two years, amounting to $12,059.93. The Crown took the position that the appellant was in a position of trust, which amounted to an aggravating factor. Without referencing as much as one case, the Crown asserted that it is typical to see some addiction or mental health issues fueling the commission of the offence, and the usual sentence would be a conditional sentence order.

[7] A few days before the sentence hearing, defence counsel filed written submissions, and tendered Dr. Starzomski's psychological report. A few additional details about the circumstances of the offence (and, of course, of the offender) are revealed.

[8] The appellant graduated from Dalhousie University in 2004. She then started employment with Manulife Financial. She did well, but was fired in 2011 when it was discovered that fraudulent claims had been submitted for re-imbursement of expenses said to have been incurred on her health plan. They were not her claims. They were those of her common-law boyfriend. Within months of meeting him in 2008, he moved in. He was emotionally and physically abusive. He introduced her to the use of cocaine. Under the influence of that drug, she felt better about their relationship. Friends counselled her against the use of such drugs and her relationship.

[9] The appellant felt used and powerless. She became more and more depressed. Her partner was entitled to claim health benefits under her plan. No receipts were required when employees submitted claims electronically. Using her password he submitted claims for health care expenses that he had not incurred. The monies were deposited into her account. Initially, she was not aware that his claims were false, but at some point became aware that they were.

[10] The fraud was detected in October 2011. The loss was quantified as being $12,059.93. Her partner left. He has not been heard from since. Meanwhile, the appellant was fired. She was able to get alternate employment with another insurer. That employment ended when they became aware of her charges.

[11] The report from Dr. Starsomski diagnosed the appellant as having had a major depressive episode, and that this strongly influenced her participation in the

fraudulent conduct of her partner. He confirmed through medical records that the appellant had been previously diagnosed, in 2006 and 2008, with depression. She had sought help, but treatment had proved ineffective.

[12] Faced with this information, there can be little wonder that at the outset of the sentence hearing, the trial judge said:

> THE COURT: I've read the Pre-Sentence Report and the report from your psychologist strikes me that this is a matter that should be referred to Dartmouth Mental Health Court.

[13] Based on the endorsements on the Information, it turned out the case was referred to the Mental Health Court, but had been turned away. In any event, no one doubted that this offence was out of character for the appellant and that her mental health caused her to become involved in this offence.

THE SENTENCING DECISION

[14] The trial judge referred to the principles of sentence. He recognized that it is appropriate to emphasize rehabilitation where there are mental health issues. He appeared to accept that, although the appellant owed a certain duty of loyalty to her employer, it was not a classic breach of trust scenario.

[15] The trial judge accepted that the appellant did not involve herself in the offence for material gain, nor that she was anything but a follower in an offence committed by her abusive partner.

[16] The trial judge had no difficulty accepting that a conditional discharge was in the best interests of the appellant. With respect to the second aspect of the test, he said:

> [10] The more difficult test to meet is whether or not it's in the public interest to grant a conditional discharge.

[17] The trial judge reasoned that the appellant made a choice to defraud her employer in order to buy or bribe her common-law partner to stay with her. Having made that choice, it was not in the public interest to grant a discharge. Instead, he ordered probation for three years with conditions and a stand-alone restitution order.

[18] Although the appellant worded her ground of appeal that the trial judge erred in applying the requirements of s. 730 of the *Criminal Code* to the facts of the case, her real complaint of error, and it was argued as such, was that the trial judge erred in law by applying the wrong test.

[19] I would therefore re-frame the issues as follows.

ISSUES:

[20] Did the trial judge err in law in applying the wrong test; and if so, what is the result?

THE TEST

[21] The sentencing option of granting an offender an absolute or conditional discharge was introduced by Parliament in 1972 (S.C. 1972, c.13) as s. 662.1. Forty years later, the substantive requirements are unchanged. The authority to grant a discharge is now found as s. 730(1) of the *Criminal Code*. It provides:

> 730.(1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[22] The Crown acknowledges that the trial judge addressed the issue as to whether a discharge was in the public interest and not whether a discharge was "not contrary to the public interest". It argues that the appellant's complaint is little more than a semantic quibble. It relies on *R. v. Gill*, 2011 BCCA 372 in support of its argument. In the circumstances of this case, with respect, I disagree.

[23] I do not doubt that there may be cases where a trial judge may stray from the exact words of a legal test, but the slip may be harmless. This could be because an appellate court is satisfied, when the reasons are read as a whole, the trial judge did apply the correct test, or where the inexact words do not cloud the legal accuracy of the test applied. In my view, the latter is what happened in *R. v. Gill.*

[24] In that case, an offender was found guilty of possession of heroin. A conditional discharge was sought. The trial judge declined because "The circumstances of your possession and the nature of the drug in my view make it contrary to the interests of the community to grant you a discharge, so I decline to do so." The appellant argued that the trial judge used the wrong test: "community's interests" was too narrow a filter when compared to the statutory language of "public interest" (¶11). Garson J.A., on behalf of the Court, disagreed. She wrote that the difference between the words in the section and the judge's similar language was semantic only (¶13).

[25] But in the case at bar, the trial judge said he needed to consider whether or not it is in the public interest to grant a discharge. This seemed to impose on the appellant an obligation to demonstrate that a discharge for her would have to be in the public interest; not that such a sentence not be contrary to the public interest.

[26] Any doubt that the trial judge placed an obligation on the appellant to demonstrate a positive impact on the public interest is removed by his application of the test he announced. He ruled as follows:

> [12] Under these circumstances, I don't think it's in the public interest to grant a conditional discharge.

[27] A discharge does not have to be in the public interest. It is available so long as the offence is not punishable by fourteen years, or life, it is in the best interests of the offender, and *not contrary to the public interest*. The difference between requiring a positive impact on public interest and demonstrating the sentence would not be contrary to the public interest is well expressed by LeBlanc J. in *R. v. D'Eon*, 2011 NSSC 330 where he wrote:

> [25] If the Sentencing Judge did apply a test requiring that a conditional discharge be "in the public interest" rather than being "not contrary to the public interest," this would be the wrong test. There is a substantive difference between the two phrases; the correct "not contrary" test simply means that a conditional discharge would not be deleterious. It is not required to be have actual positive effect on the public interest.

(See also *R. v. A.M.M.*, 2010 ABQB 514)

[28] That is not to say that there may well be cases where an offender may actually be able to establish that a discharge is in the public interest. It would, then of course, be axiomatic that a discharge is not contrary to the public interest.

[29] In this case, in my opinion, the trial judge erred in law by imposing too high a burden on the appellant by requiring her to demonstrate that a discharge would have a positive effect on the public interest. What then flows from this conclusion?

[30] Originally, the position of the Respondent was that even if the trial judge erred in law, the error did not result in an unfit sentence, and hence the appeal should be dismissed. However, at the hearing of the appeal, the Crown conceded that if we were to find an error in law, deference was no longer owed to the trial judge's sentencing decision. The concession is appropriate (See: *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.); *R. v. Hawkins*, 2011 NSCA 7 at para. 94; *R. v. Bernard*, 2011 NSCA 53, leave denied [2011] S.C.C.A. No. 381).

[31] This Court is therefore at liberty to decide the sentence we think is most appropriate having regard to the principles of sentence, the circumstances of the offence and those of the appellant.

WHAT THEN IS THE RESULT?

[32] There is no dispute that the appellant is eligible to be considered for a discharge, nor that such a disposition would be in her best interests. The only hurdle left is the issue: would a discharge be contrary to the "public interest".

[33] "Public interest" is not statutorily defined. In my opinion, it is not possible, nor even desirable, to try to arrive at an all-encompassing definition of the myriad factors that may impact the inquiry. There are helpful guides to be found in the appellate decisions that followed the enactment of the discharge provisions.

[34] For example, in *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, [1973] O.J. No. 1903 (Q.L.), Arnup J.A., for the Court, wrote:

> 18 Obviously the section is not confined to "simple cases of possession of marijuana". It is not confined to *any* class of offences except to the extent I have noted. On the other hand, it is only common sense that the more serious the offence, the less likely it will appear that an absolute discharge, or even a conditional one, is "not contrary to public interest". In some cases, the trivial nature of the offence will be an important consideration; in others, unusual circumstances peculiar to the offender in question may lead to an order that would not be made in the case of another offender.
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> 19 To attempt more specific delineation would be unwise, and might serve to fetter what I conceive to be a wide, albeit judicial, discretion vested in the trial Court. That Court must consider all of the circumstances of the accused, and the nature and circumstances of the offence, against the background of proper law enforcement in the community, and the general criteria that I have mentioned.

[35] In *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450, the British Columbia Court of Appeal canvassed a number of authorities and set out a list of conclusions drawn from them. With respect to "public interest", the Court wrote:

> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
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> p.455

[36] More recently, in *R.v. Elsharawy* (1997), 119 C.C.C. (3d) 565, [1997] N.J. No. 249, Green J.A., for the Newfoundland Court of Appeal, commented:

> [3] …The second condition involves a consideration of 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 effective enforcement of the criminal law. See *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) and *R. v. Waters* (1990), 54 C.C.C. (3d) 40 (Sask. Q.B).

[37] In my opinion, what factors are in play, and the weight to be put on them, in determining if a discharge would be "not contrary" to the public interest, will vary depending on the circumstances of the offence and of the offender.

[38] In this case, the Crown points to no factors that persuasively suggest a discharge would have a deleterious impact on the public interest. I recognize that the offence was hardly trivial, as the total loss admitted was in excess of twelve

thousand dollars. On the other hand, the moral blameworthiness of the offender is ameliorated by the fact she was not the prime mover of this offence. Her fault was that she became aware of the misuse of her electronic password permitting her co-vivant access to a portal, and submit false claims. Her moral blameworthiness is also deflated by the fact that it was her mental illness that contributed to her involvement in the offence (See: *R. v. Edmunds*, 2012 NLCA 26 at para. 22)

[39] It was apparent that people who knew her said she would be incapable, on her own, of committing such a dishonest scheme. The trial judge accepted that her crime was one of silence – that is, complicity by letting the scheme continue. What she did was out of character for her. It was the unchallenged opinion of a psychologist that it was the presence of major depression that served to maintain her inertia and not take steps to solve her personal issues with her common-law partner. This was not a made up condition. Her difficulties with depression were fully documented. Unfortunately, prior treatment had been unsuccessful.

[40] Other relevant circumstances are that: the appellant pled guilty, and was very remorseful for her conduct; she did not benefit monetarily from the offence; she was a first time offender, who was bright and had considerably better prospects for her future if not convicted, and she was willing to make restitution.

[41] We live in a compassionate society; one that recognizes that for some offenders, the full weight of a criminal conviction is not necessary. I cannot help but think that a reasonable observer, with full knowledge of the documented psychiatric history of the appellant, the role that it played, and the other circumstances, would be moved to say a discharge is not contrary to the public interest.

[42] Accordingly, I would grant leave to appeal, allow the appeal and order that the appellant be discharged, conditional on her successful completion of the current three year probation order. That probation order, in addition to the usual statutory conditions, requires her: to report to and be under the supervision of a probation officer; attend for such mental health assessment and counselling as directed by her probation officer.

[43] I would amend the optional conditions by adding the requirement that she make full restitution to Manulife Financial in the amount of $12,059.93 no later than the end of her probationary period. In all other respects, the order remains.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.