S.C.C. No. 02754

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke,C.J.N.S., Hart and Matthews, JJ.A.

Cite as: R. v. Crossan, 1993 NSCA 53

BETWEEN:

HER MAJESTY THE QUEEN	)	James C. Martin
	)	for the appellant
appellant	)	
	)	David Iannetti
	)	for the respondent
- and -	)	
	)	Appeal Heard:
GRANT CROSSAN	)	January 19, 1993
	)	
respondent	)	Judgment Delivered:
	)	January 19, 1993

THE COURT: Leave to appeal granted, the appeal allowed and each sentence increased to a term of incarceration for 4 1/2 years to be served concurrently per oral reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Hart, J.A. concurring.

MATTHEWS, J.A.:

This is a Crown appeal against sentence.

The respondent was apprehended as a result of a stake-out of an inn at North Sydney by

the R.C.M. Police drug section on January 16, 1992. The respondent was observed leaving the inn with a duffle bag and then enter a motor vehicle. The police gave chase; the respondent's vehicle suddenly stopped, the respondent ran from the vehicle with the duffle bag and was caught after a three block chase.

The duffle bag contained 2032 grams (4 1/2 pounds) of hashish and 116 grams of 97.1% pure cocaine. The street value of the hashish was $50,800.00 and that of the cocaine $16,240 before being cut.

On July 14, 1992, subsequent to a preliminary inquiry, the respondent pled guilty to two counts:

> 1. having in his possession cocaine for the purpose of trafficking and,
>
> 2. a similar count respecting the hashish,

contrary to s. 4(2) of the **Narcotic Control Act**.

On that day, after hearing submissions from counsel, the trial judge sentenced the respondent on each count to a term of 2 1/2 years in a federal penitentiary to be served concurrently.

It is from those sentences that the Crown now appeals.

We must determine if, in our opinion, the sentences are fit, in accordance with s. 687(1) of the **Code** and in so doing consider, in respect to this appeal, whether they are clearly inadequate.

The respondent at time of sentencing was about one month short of 21 years of age, had grade 7 education, was living in a common-law relationship and had two children. He has a stale conviction for possession of stolen cigarettes and on January 23, 1992 he pled guilty to a charge of obstructing justice for which he was fined $350.00. That fine is outstanding due to the fact, according to the respondent, he is unemployed. The respondent urged that his involvement in the present crime was for but a few minutes; that he was to receive a joint of marijuana to deliver the bag and that he did not know its contents.

In his thoughtful decision, the trial judge commented upon the respondent's "admirable

personal qualities". He cited two judgments of this Court where the drug involved was cocaine. The trial judge did not believe the respondent's story. He said in part:

> "...Mr. Crossan says that his involvement was not for commercial gain, and its been pointed out that his involvement in this particular transaction went over a period of about twenty minutes. That is indeed the case. There is also no doubt, based on what I've heard today and having heard the preliminary hearing, that he was part of a much larger scheme. He was tied in, to what extent knowingly is not certain, but he was tied in with others with much deeper connections in the drug trade, others who escaped conviction. And Mr. Crossan, of course, should not be punished today for the crimes of others, and the Court has to bear that in mind. I nevertheless have considerable difficulty accepting the suggestion that he was entrusted with between sixty and seventy thousand dollars worth of a drug unless he was known to the people who were doing it. One can think of that bag as though it contained sixty-six thousand dollars in cash, and it stretches the credulity of the Court to think that you would be given that much in return for a joint of marijuana. It shows that you were an integral part, at least, of that operation, and it may even suggest, and I don't think its an unreasonable inference to suggest that it wasn't the first time you would have been entrusted with that type of a task. You were, indeed, left holding the bag in a figurative and a literal sense as well, and that is, perhaps, tragic, but the drug trade cannot function unless there are people who perform precisely that task. Being a courier is not in itself an excuse."

After referring to another case, the trial judge continued:

> "He, also, had a family, also had many admirable qualities, but the crime itself called out for that severity of punishment. Mr. Crossan, I think it does, in your case as well, given the nature of the drug, given the quantity of the drug, given the fact that I cannot accept that your involvement was as transitory as has been suggested it's my view that a period of federal incarceration is called for here, and I'm imposing a sentence of two and a half years in a federal institution in relation to the offence."

The trial judge did not refer to **R. v. Carvery** (1991), 108 N.S.R. (2d) 284, and **R. v. Smith**, S.C.C. No. 02618, unreported, dated September 29, 1992 had not been decided at that time.

In **Smith**, this Court repeated the warnings contained in **R. v. Byers** (1989), 90 N.S.R.

(2d) 263, **R. v. Smith** (1990), 95 N.S.R. (2d) 85, **Carvery** and others that terms of sentencing for trafficking in drugs, particularly cocaine, would be increased.

As in **Smith**, 1992, the respondent's motive for involvement in drug trafficking was undoubtedly profit; unemployment cannot be accepted in mitigation of this serious offence; the respondent was one of a necessary link in the chain of distribution. Here two narcotics were involved, hashish and cocaine. The amounts of the drugs and their value denotes involvement in a scheme which undoubtedly involved planning and connections with both wholesalers and retailers and a recognition of the risks involved. Parliament has considered that this crime is of such magnitude that the maximum penalty of life imprisonment may be imposed.

A study of the trial judge's reasons for sentencing reveals, in our opinion, that if he had relied upon **Carvery** and had the advantage of reading **Smith**, 1992, undoubtedly, he would have imposed longer sentences. They are not fit.

We grant leave to appeal, allow the appeal and increase each sentence to a term of incarceration for 4 1/2 years to be served concurrently.

J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.