NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Jones*, 2003 NSCA 48

Date: 20030430
Docket: CAC189642
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

David Bliss Jones

Respondent

Judges:	Roscoe, Bateman and Hamilton, JJ.A.
Appeal Heard:	April 11, 2003, in Halifax, Nova Scotia
Held:	Leave to appeal is granted, the appeal is allowed, and a term of three years incarceration is substituted for the conditional sentence as per reasons for judgment of Roscoe, J.A.; Bateman and Hamilton, JJ.A., concurring.
Counsel:	Paul Riley for the Appellant Warren Zimmer for the Respondent

Reasons for judgment:

[1] This is an appeal by the Crown from a conditional sentence imposed by Justice Robert W. Wright [2002 NSSC 247] on charges of possession of cannabis resin for the purpose of trafficking, and possession of proceeds of crime, contrary to ss. 5(2) and 8 respectively of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19.

[2] The respondent was stopped for speeding, which led to the discovery of a carton containing 4.6 kilograms of cannabis resin and $40,020 cash in the trunk of his vehicle. Justice Wright found that the respondent was ". . . acting as a courier for someone involved in the drug trade", and accepted his evidence that he was paid $1,000 to deliver the carton from Halifax to Moncton. On a *voir dire* during the trial, Justice Wright concluded that while it was not proved that the respondent knew the exact contents of the box, he knew it was related to the drug trade.

[3] Justice Wright considered the relevant sections of the **Criminal Code**, the principles of sentencing, the respondent's criminal record and his role in the venture. The respondent, who is 41 years old, had a criminal record of 11 prior convictions, five of which were for simple possession and one for cultivation of a narcotic. He claimed to be a user of marijuana for medical reasons. Justice Wright sentenced the respondent to a term of imprisonment for 18 months, to be served as a conditional sentence in the community, and subject to certain conditions, including house arrest for the first nine months, with specific exceptions, curfew of 10:00 p.m to 6:00 a.m. for the next nine months, and 80 hours of community service. A lifetime firearms prohibition under s. 109 of the **Code** was imposed, as were forfeiture orders relating to the vehicle and the cash.

[4] The rationale for the length of sentence selected is found in the following passage of Justice Wright's decision:

> ¶ 18 As referred to earlier, s. 718.1 sets out the fundamental principle that sentencing must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Without question, anyone involved in the distribution of drugs, even as a courier, and even with soft drugs, commits a serious offence. But everything is relative. Here, it can be readily inferred that the offender knew, or at least held the trust of, someone involved in large scale commercial trafficking of cannabis resin. But there is no evidence before me that the offender was a principal of such an operation himself, or had a stake in the

> profits, or even that he acted as a courier for someone else as a recurring activity. Although no excuse, nor a mitigating factor in any way, the evidence indicates that he was in a desperate financial situation at the time, trying to emerge from a personal bankruptcy, and saw this as an opportunity to make a fast buck to the tune of $1,000. He seemingly ignored the consequences of such criminal activity.
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> ¶ 19 While his degree of responsibility is not to be understated, at the same time, it does not rank as egregiously with that of a principal of a large scale commercial operation who, generating the trafficking of drugs, receives the proceeds of sale and reaps the profits in an enterprise of greed.
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> ¶ 20 Because I make this distinction, as urged by defence counsel, I reject a penitentiary term, as well as a sentence of probation, as inappropriate. I am further satisfied that the offender, having no history of drug trafficking or being a major player in the drug trade, does not present a risk of endangering the safety of the community. There is nothing in his Pre-Sentence Report or his past criminal record that persuades me otherwise. Those criteria being met, the question remains whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[5] The Crown applies for leave and, if granted, appeals the sentence, submitting that the sentence is demonstrably unfit, based on error in principle in characterization of the offences, and that the sentence inadequately reflects the principles of denunciation, deterrence and protection of the public.

[6] The applicable standard of review of the sentence is, as stated by Justice Oland in **R. v. Longaphy**, [2000] N.S.J. No. 376 (C.A.) at § 20:

> [20] A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx** (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at § 123-126.

[7] I agree with the submission of the Crown that the sentence is outside the acceptable range for offences of this nature, and that the trial judge erred in principle in his characterization of both the offence and the respondent's degree of

involvement in the drug trade, and in failing to give sufficient weight to the criminal record of the respondent.

[8] Sentences for possession of narcotics for the purposes of trafficking imposed by this court over the last 25 years have consistently been largely influenced by the quantity of drugs involved and the function or position of the offender in the drug operation. Other factors considered either more or less relevant, depending on the circumstances, are the criminal record and age of the offender, whether he was on probation at the time of the offence, and the sophistication and scope of the enterprise. This approach was emphasized in **R. v. Fifield** (1978), 25 N.S.R. (2d) 407, where MacKeigan, C.J.N.S. said at p. 410:

> In the various categories one cannot find or expect to find any uniformity of sentence. The cases above are merely random samples to illustrate the apparent categories. Certainly sentences are not, and should not be, closely proportionate in their length to the quantity of marihuana involved. The quantity is important in helping show the quality of the act or the probable category of trafficker - - the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator. The categories respectively have broad and overlapping ranges of sentence into which the individual offender must be appropriately placed, depending on his age, background, criminal record, and all surrounding circumstances.

[9] I would agree with the trial judge that the respondent's role was not equal to that of the "principal of a large scale commercial operation". The trial judge appeared to have found that since the respondent was simply or merely a courier, he was not a significant player in the drug trade, and therefore equivalent to a petty retailer. However, it is indisputable that a courier is an integral part of the distribution system in the drug business. Drugs and money have to be delivered from the importation or cultivation location to the dealers and the users. Couriers provide that critical link between the wholesalers and retailers, often shielding the major stakeholders from detection. In Nova Scotia, couriers have not traditionally been regarded as less culpable or treated more leniently than other middlemen in the organization.

[10] An examination of possession for the purposes cases, reveals that the typical range of sentences for small wholesalers or large retailers, the people on the third of the four rungs of the ladder identified in **Fifield**, is two to five years incarceration. It also appears from this survey that the quantity of cannabis resin

necessary to categorize a person at this level is two to ten kilograms, with values in the tens of thousands of dollars range. The presence of exceptional mitigating circumstances, such as youth, or previous unblemished character, may, of course, take an offender out of the normal range. Some of the cases, illustrative of these points, in chronological order are:

- **R. v. Butler** (1987), 79 N.S.R. (2d) 6 (C.A.): This was a courier case involving 8.8 pounds (or 4 kg.) of cannabis resin. The court increased the 90 day sentence to one year custody. The offender was young, 25 years old, and had no previous record.

- **R. v. Boudreau** (1987), 81 N.S.R. (2d) 382 (C.A.): The facts are very similar to the matter under appeal. The offender was found to have 6 kilograms of cannabis resin and $34,000 cash in his vehicle. He was 30 years old and had a prior record including three drug offences. This court decreased the sentence to three years.

- **R. v. O'Toole** (1992), 110 N.S.R. (2d) 359 (C.A.): The sentence was increased to 2 years custody for offences involving possession of 2.04 kilograms of cannabis resin, one-half gram of cocaine and a loaded hand gun. The offender had a minor record and was 31 years old. The quantity of drugs involved was said to be ". . . far in excess of that which would classify the respondent as a petty retailer."

- **R. v. Crossan** (1993), 116 N.S.R. (2d) 352 (C.A.): The 21 year old offender with one previous conviction was apprehended with 2 kilograms of cannabis resin and 166 grams of cocaine. Concurrent sentences of four and one half years were imposed on appeal.

- **R. v. Collette** (1999), 177 N.S.R. (2d) 386 (C.A.): The offender, found to be a courier of 10 kilograms of cannabis resin who was also involved in the arranging of the transaction, on appeal had his sentence increased to 3

> years, in addition to the 5 months served on the conditional sentence.

[11] All of these cases involved possession of a sufficient quantity of cannabis resin to place the offenders in the commercial sector, to use the **Fifield** terminology as either a large retailer or a small wholesaler. At the top end of the range, there were other aggravating factors, such as possession of cocaine or large sums of money. **Butler**, at one year custody, was outside the range because of youth and lack of a criminal record. Absent exceptional circumstances, a person involved in a small wholesale or large retail operation, such as this, should generally attract a sentence in the range. His placement within that range will take into account factors personal to the offender and his degree of involvement. Any suggestion that there is a separate and lower range of sentence for couriers within a commercial operation is rejected.

[12] Other possession of narcotics cases that may, at first blush, seem atypical of this range are cases where the offenders were either petty retailers (**R. v. Wheatley** (1997), 159 N.S.R. (2d) 161(C.A.)), or had a minor marijuana growing operation (**R. v. Frenette** (1997), 159 N.S.R. (2d) 81(C.A.)). The issue in those specific cases, among the first to consider the conditional sentence legislation, was whether the sentences, conceded by the Crown to be in the less than two years range, should be served in the community. Those offenders were not found to be operating in the commercial arena.

[13] There are no mitigating factors in this case which would remove the respondent from the normal range. He is not youthful and he has a significant criminal record. In fact, he was convicted of another drug offence while awaiting trial for this offence. He was not only paid $1,000 for transporting drugs, but was also entrusted with $40,000 cash by whomever was in charge of this inter-provincial transaction. Although the trial judge accepted that the respondent did not necessarily know the exact contents or quantity of drugs in the box he was delivering, he obviously must be taken to have known that the package was of significant value. It is fair to infer that he would not have been paid $1,000 to deliver a minor quantity of drugs. The comments of Pace, J.A., in **R. v. Butler, supra**, are applicable to the respondent:

> [10] In the present appeal the trial judge found the respondent's motivation for trafficking in drugs was to make money and, although he may have in the past used some of his own product, there is no indication that he was addicted or the

> profits would be used to satisfy his own habit. Thus I can only conclude that greed and the quest for easy money quite overcame any thought in the respondent's mind of the great and, in many cases, the irreparable harm he might inflict on others. Clearly, to carry out an operation of this magnitude required premeditation and planning which is an aggravating factor which must be considered in sentencing. See: **R. v. Tellum and Zablaska** (1979), 29 N.S.R. (2d) 145; 45 A.P.R. 145.

[14] I also agree with the submissions in the Crown's factum in this respect:

> Drug trafficking offences involve considerable planning and deliberation. In deciding to take a chance by breaking the law in hopes of making easy money, drug dealers engage in a rudimentary form of cost-benefit analysis, weighing the chances of getting caught and the possible consequences against the financial gains they will reap if successful. This is the very kind of thought process that the Respondent embarked upon when, to paraphrase the pre-sentence report, he chose to avail himself of an opportunity to make $1,000, being aware of the consequences and in spite of his own better judgment. In making decisions like this, drug dealers should know that they are likely to receive substantial penalties if caught. This is the type of conduct which is amenable to the deterrent force of the law.

[15] The circumstances of this offence and this offender require a sentence in the usual range, that is a penitentiary term, and is not within the eligibility range for a conditional sentence. The circumstances are commensurate to those in **R. v. Collette**, **supra,** and **R. v. Boudreau**, **supra**. The sentence was unfit in that it is outside the range of sentence and does not appropriately reflect denunciation and general and specific deterrence.

[16] I would grant leave to appeal, allow the appeal, and substitute a term of incarceration of three years, and give credit for six months served pursuant to the conditional sentence, so that the balance remaining as of this date is 30 months. I would affirm the prohibition and forfeiture orders and revoke the order for community service.

Roscoe, J.A.

Concurred in:

Bateman, J.A.