Cite as: R. v. Power, 1992 NSCO 34

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.R. No.: 12309

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN

-versus-

DONALD JOSEPH POWER

S E N T E N C E

BEFORE: The Honourable Judge Nancy J. Bateman

DATE: July 17th, 1992

COUNSEL: John Pearson, Esq., Counsel for the Crown
Ronald N. Pugsley, Esq., Counsel for the Defence

Mr. Power has been found guilty after trial of an offence under s. 122 of the Criminal Code, in this instance, breach of trust by a public official. While the section of the Code encompasses fraud or breach of trust, Mr. Power has not committed a fraud.

The Defence asks that Mr. Power receive an absolute discharge as is permitted under s. 736 of the Code.

The Crown opposes the motion for discharge and suggests that a more appropriate disposition would be a fine or a suspended sentence with probation and community service. The Crown is not suggesting a custodial sentence.

The goal of sentencing is protection of the public. The challenge to the court is to determine how that goal can best be achieved. As set out in R. v. Chisholm 67 N.S.R. (2d) 66:

> "protection of the public has both a subjective and an objective meaning - first, the protection of society from the particular offender and secondly, the protection of society from the commission of a particular type of offence."

As set out in R. v. Grady (1971) 5 N.S.R. 2d 264, there are no rigid rules for determining the type or length of sentence. The court must consider each individual case on its own merits.

The N.S.S.C.A.D. has repeatedly approved the following quotation from the Report of the Canadian Committee on Corrections - The Ouimet Report:

> "The overall views of the Committee may be summed up as follows: segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate." (emphasis added)

In other words, incarceration is a last resort.

Unfortunately, the public's expectation of the sentencing process does not accord with the legal requirements. Many members of the public are looking for vengeance through punishment. There is no place for vengeance in our modern concept of sentencing.

I will first consider the Defence request for an absolute discharge. It is a disposition to be used sparingly but is not limited in its application to trivial offences.

The significance of an absolute discharge is that a conviction is not entered. The offender has no record.

Before a discharge is granted the court must be satisfied that it is in the best interests of the accused

to do so and that to do so would not be contrary to the public interest.

The legal meaning of "best interests of the accused", in the context of the discharge provision, has been considered by the N.S.S.C.A.D. in R. v. Doane (1980) 41 N.S.R. (2d) 340. Then Chief Justice MacKeigan states at p. 342:

> "...it is necessary that there be evidence that the entry of a conviction will have significant adverse repercussions on the particular accused. The nature of what may be adverse repercussions will vary in various types of cases."

Mr. Power is a person with no previous criminal record. He has had, according to the evidence, a history of faithful government service and is held in high regard in the community. He is now retired.

Notwithstanding those positive factors the Defence has not put forward any evidence, unique to Mr. Power, that he would suffer the "significant adverse repercussions" required as a condition precedent to granting a discharge.

I can say it no better than did MacKeigan, C.J.C. in Doane at p. 343:

> "Here we can find no significant adverse repercussions which might arise from conviction, other than those incurred by any person convicted of any crime; certainly none which outweighs the injury to the public interest presumed to be caused whenever a person violates a criminal statute and fails to be convicted, unless the particular offence is trivial, impulsive, harmless or otherwise inconsequential."

Undoubtedly Mr. Power has suffered much embarassment arising from the charge itself and the public attention it has attracted. According to the evidence Mr. Power was not aware that in drafting the contract he was committing an offence. Breach of the public trust is not, however, a trivial matter. Not only has significant adverse interest not been demonstrated but, in my view, it would be contrary to the public interest to grant a discharge. It was the trust of that same public that was breached.

Is this an appropriate circumstance for a custodial sentence?

Referring back to the general principals of sentencing already set out, the question is "does the protection of the public require that Mr. Power be incarcerated?"

It must be understood that the circumstances of this offence did not involve dishonesty, deceit or concealment. Mr. Power, in drafting his own contract, did what he was asked to do by the most senior elected public official in this province, the former Premier. While the fact that Mr. Power acted at the request of his superior is no defence to the charge, it is relevant to sentence.

Proper conduct by those in public service, whether elected or otherwise, is essential to the public's confidence. As stated by Doherty J.A. in R. v. Greenwood & Tsinonis (1991), 50 O.R. (3d) 71 (Ont. C.A.) at p. 94:

> " Surely the appearance of the integrity of the public service is compromised where an employee receives something which a reasonable observer would regard as an advantage or benefit in that it constituted a profit from his or her employment, even though the employee may not have intended any such connection between the thing given and his or her employment."

We are here concerned with the appearance of integrity. It has not been established the public suffered any loss through employing Mr. Power, under the contract.

The circumstances of this offence and this offender do not call for a custodial sentence. Mr. Power is not a danger to the public; he is not a person disposed to reoffend; he is not in a position to again breach the public trust, even were he inclined to do so.

The only question, then, is does the need for general deterrence dictate imprisonment? In other words, can others who might be inclined to commit this type of offence be deterred only by the incarceration of Mr. Power?

A sentence emphasizing general deterrence through imprisonment is most commonly imposed when a particular offence threatens to become too common. Unlike sexual assaults, drug offences, and break and enters, breach of trust by a public official is not known as an offence of common occurrence. This is reflected by the relatively few reported cases involving this crime.

Imprisonment is not the only means of general deterrence as was recognized in R. v. Schell and Moran (1981), 32 B.C.L.R. 335 (C.A.). Crimes such as breach of trust by a public official, will commonly result in loss of employment, loss of the ability to gain positions of trust and disgrace in the community. These are significant factors which would commonly discourage other public officials from committing the crime.

I am satisfied that, in this instance, there is no conflict between the disposition appropriate to Mr. Power and the need for general deterrence. Both can be accomplished by a non-custodial sentence. It would be wrong to impose a sentence that is otherwise inappropriate simply because this matter has received much public attention.

I am satisfied that, if not clear before, this case clarifies the high standard of conduct required of our public officials. That standard may well be higher than that expected of those in private employment. The duty of public officials is to the public. The province is not the private enterprise of the Premier and his subordinates. The appearance of integrity is as important as integrity in fact.

I am left, then, with the options of imposing a probationary period with or without conditions or a fine. I do not consider a probationary period necessary or appropriate. There is no risk that Mr. Power will reoffend. His conduct need not be monitored. To impose probation would simply put an unnecessary burden upon correctional services and provide no benefit to the public.

Mr. Power is 67 years old and his wife has been ill for many years. The imposition of an order for community service is neither required nor appropriate in these circumstances.

The proper sanction where neither continued guidance nor control of Mr. Power's conduct is necessary is a fine. Having retired, he has not suffered the employment consequences which would normally flow from this offence. There is little legal guidance on the proper amount of a fine. The fine must, however, be sufficient to warn others that such activity will not be tolerated.

Taking into account the circumstances of this case, I fix the amount of the fine at $5,000.00, payable within thirty days.

Nancy Bateman

A Judge of the County Court
of District Number One