Cite as: R. v. Nash, 1982 NSCO 10

1981 SN No. 09119

IN THE COUNTY COURT OF DISTRICT NUMBER SEVEN

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

FABIAN NASH

RESPONDENT

HEARD: At Sydney, Nova Scotia, on December 21, 1981

BEFORE: His Honour Judge Peter Nicholson, A/J.C.C.

DECISION: January 5, A.D. 1982

COUNSEL: Frank C. Edwards, Esq., for the Appellant

The Respondent not represented.

NICHOLSON, A/J.C.C.

This is an appeal by the Crown against the sentence imposed upon the accused, Fabian Nash, subsequent to his conviction for an offence under Section 312(a) of the Criminal Code. The charge to which the accused pleaded guilty was worded as follows:

> "on or about the 10th day of December, 1980, at or near Glace Bay, in the County of Cape Breton, Province of Nova Scotia, did have in his possession property: One Stelson Wrench of a value not exceeding two hundred dollars knowing that all of the property was obtained by the commission in Canada of an offence punishable by indictment, contrary to Section 312(a) of the Criminal Code of Canada."

The property which the accused was convicted of having in his possession as being stolen property was one stilson wrench of a value of $33.00, established by evidence of the Crown.

The accused is 28 years of age and resides at Glace Bay with his wife, Mrs. Christina Nash, and two children aged one and three years respectively. He is a coal miner by trade and from the Pre-Sentence Report, introduced by the Crown at the time of sentencing, there is an indication that the accused is a good family man and a hard worker who has built a home of his own about a year and a half ago in the Town of Glace Bay.

The accused was unrepresented by counsel at the time of his trial. The learned Trial Judge gave him every opportunity to get counsel but he declined to do so. After hearing evidence and after hearing from the accused himself the learned Judge convicted him of the offence of which he was charged. The defence put up by the accused was that he found the stilson wrench, which was a new one with the price tag still on it, at the foot of the lane leading up to his house and he took it on to his premises and kept it. He acknowledged that he was aware of the fact that a hardward store located approximately a half a mile from him had been burglarized some time before, with the admitted knowledge on the behalf of the accused that many of the items stolen were in the nature of hand tools. The accused alleged that he thought that someone had just thrown the wrench away and that he retrieved it, and said nothing about it to anyone.

The accused is the second of eight children and all of his brothers and sisters are gainfully employed in the Town of Glace Bay with the exception of two younger sisters, aged eighteen and fifteen, who are students at High School in Glace Bay. The Pre-Sentence Report, which met with the approbation of the accused, included some comments to the effect that the accused had been known to demonstrate some poor social behaviour in the community some years ago, but that of recent years he had "improved considerably" and had obtained stable

employment and "developed a sound family unit".

It is clear from the Transcript of Evidence that the learned Trial Judge found the accused guilty on the ground that he recklessly or willfully shut his eyes to suspicious facts in the particular case and refrained from any inquiry to the ownership or status of the wrench which he found. Significance was attached to the unused condition of the wrench and the fact that the price tag was still on it.

There was no cross-appeal against the conviction in this case. When the accused appeared before me on his own behalf during the hearing of the appeal, I asked him if he wanted to have additional time to get a solicitor to act for him on the appeal, and he declined that offer. On his own behalf, the only argument he made in the appeal was that to alter the sentence imposed by the learned Trial Judge would amount to an injustice.

The sentence of the learned Trial Judge was that the accused should serve a period of six months on probation, and during that time to keep the peace and be of good behaviour, and if at the end of the period of probation, the Probation Officer's report was favourable, then the learned Trial Judge said he would be disposed to grant the accused an absolute discharge.

In support of the appeal which asserted that

the learned Trial Judge, in granting the probation and affording the accused the opportunity of applying for a conditional discharge, had failed to consider the principles set out in Section 662.1 of the Criminal Code, which reads as follows:

> "662.1(1) Where an accused, other than a corporation, 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, in the proceedings commenced against him, by imprisonment for fourteen years or for life, the court before which he 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 upon the conditions prescribed in a probation order. 1972, c. 13, s. 57; 1974-75-76, c. 105, s.20.
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> (2) Subject to the provisons of Part XIV, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XIV pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by him continues in force, subject to its terms, until a disposition in respect of him is made under subsection (1) unless, at the time he pleads guilty or is found guilty, the court, judge or justice orders that he be taken into custody pending such a disposition.
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> (3) Where a court directs under subsection (1) that an accused be discharged, the accused shall be deemed not to have been convicted of the offence to which he pleaded guilty or of which he was found guilty and to which the discharge relates except that
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> (a) the accused may appeal from the direction that the accused be discharged as if that direction were a conviction in respect of the offence to which the discharge relates;
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> (a.1) the Attorney General may appeal from the direction that the accused be discharged, as if that direction were a judgment or verdict of acquittal referred to in paragraph 605(1)(a); and

(b) the accused may plead autrefois convict in respect of any subsequent charge relating to the offence to which the discharge relates.

(4) Where an accused who is bound by the conditions of a probation order made at a time when he was directed to be discharged under this section is convicted of an offence, including an offence under section 666, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 664(4), at any time when it may take action under that section, revoke the discharge, convict the accused of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the accused be discharged. 1972, c.13,s.57; 1974-75-76, c. 93, s. 80."

Crown counsel cited to me the two Nova Scotia cases of the R. vs. Doane where the Crown successfully appealed against the imposition of a conditional discharge following the conviction of the accused of an offence under Section 186(1)(e) of the Criminal Code respecting bookmaking. The facts of that case were very much different from the case at bar. There the accused was making book on various sporting events such as football and hockey, and large amounts of money were clearly involved during the course of this illegal activity. The Court found that in this case there was no evidence that the entry of a conviction would have a significant adverse repercussion on this particular accused and observed that the nature of what may be adverse repercussions will vary in the various types of cases.

The Court also cited with approval R. vs. Sanchez-Pino (1973) 11 C.C.C. 53, a decision of the Ontario Court of Appeal in which it was said by Arnup, J.:

> ".....In some cases, the trival 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."

While I do not wish to imply that in this case the offence was trivial, it was surely not an offence that could be measured against the one that the Court was considering in R. vs. Doane. Furthermore in the case at bar there was definite evidence that the accused had established a sound family unit for himself and that his family was a respected one in the community with two young sisters still in High School, and other members of the family have responsible positions. Surely a recorded criminal conviction would have adverse repercussions upon the accused in the sense that he would be bringing a certain degree of shame on his family, particularly where neither he nor any member of his family had any criminal record.

The Crown also referred me to the decision of the Nova Scotia Court of Appeal in R. vs. Joseph 46 N.S.R. (2d) at page 23. In that case MacDonald, J.A., said that the two conditions precedent to the exercise of discretionary discharge jurisdiction to which a Trial Judge must direct his mind are:

> "(1) whether a discharge is in the best interests of the accused; and
>
> (2) whether the granting of such discharge is not against the public interest."

I have dealt with the condition (1) as it was considered in the Doane Case. As to consideration (2) I observed that in the Joseph case the Court was considering an appeal by the Crown against the conditional discharge imposed by the Trial Judge following the conviction of the accused that he had in his possession goods of a value exceeding $200.00 contrary to Section 312(a) of the Criminal Code, on the face of it a more serious offence than the case at bar.

Mr. Justice MacDonald quoted with approval the case of R. vs. Fallofield (1973) 13 C.C.C. (2d) at 450. As follows "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".

Looking at all of the facts of this case, taking into account the situation of the accused, the nature of the crime with which he was charged and all of the other factors I cannot find that the Trial Judge committed any error in principle in imposing and ordering a conditional discharge. There is nothing I can find in the case, or in the appeal, that would lead me to believe that the sentence was not a fit and proper one under all circumstances. The punishment was not inordinately low and as a result the appeal of the

Crown is dismissed. There will be no order as to costs.

DATED at Annapolis Royal, Nova Scotia, this 5th day of January, A.D. 1981

A/J.C.C. OF DISTRICT NUMBER SEVEN

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