

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Lounsbury 2007 NSPC 80

Date: 20070809

Docket: 1652609/1652610

Registry: Amherst

Between:

Her Majesty the Queen

v.

Kristal Irene Lounsbury

Judge: The Honourable Judge Carole A. Beaton

Oral decision: 9 August 2007 in Amherst, Nova Scotia

Written decision: 4 December 2008

Charge: THAT SHE on or about the 30th day of April 2006 at, or near Springhill, Nova Scotia, did unlawfully traffic in cannabis marihuana a substance included in schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c.19, and did thereby commit an offence contrary to section 5(1) of the said Act;

AND FURTHERMORE on or about April 30th, 2006 at, or near Springhill, Nova Scotia, did unlawfully have in her possession, for the purpose of trafficking, cannabis marihuana a substance included in schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c.19 and did thereby commit an offence contrary to section 5(2) of the said Act.

Counsel: Mr. Douglas Shatford, Q.C., for the crown
Ms. Stephanie Hillson, for the defence

By the Court (orally):

[1] Ms. Lounsbury is before the court for disposition. She was found guilty following trial of trafficking in cannabis marihuana and possession of cannabis marihuana. Both offences occurred on April 30th, 2006. I have had the benefit of reading the pre-sentence report, and the letter provided by Ms. Lounsbury's mother, as forwarded to the court by counsel. I have had the benefit of the submissions of counsel this morning, and I have reviewed briefly the case law which was referred to this morning by the crown and defence.

[2] In terms of the mitigating factors, it is clear from the pre-sentence report that Ms. Lounsbury has no prior record. She is 36 years of age and has, to this point, avoided any involvement with the criminal justice system. In terms of the aggravating features of the offence, it is clearly aggravating, and most aggravating indeed that the offences involved the trafficking of marihuana by delivering the marihuana to a federal institution, to an inmate of the federal institution, specifically at the Springhill Penitentiary.

[3] In the context of the offence itself, I bear in mind that the drug involved was marihuana, which is recognized in the criminal justice system as a so-called "soft drug", and I bear in mind as well that the quantity involved was quite small. The quantity, I don't believe there was any specific evidence at trial about the precise weighing of the quantity, in terms of the number of grams, but clearly the package was small. I determined that it was a package that was able to be held or folded inside the palm of Ms. Lounsbury's hand as she made a fist, and passed it along to Mr. Plourde, and it was found in the fist of Mr. Plourde, although he managed to then swallow the package. A small quantity was recovered as a result of the 24 hour watch placed on Mr. Plourde, when the condom containing the drug was extracted from Mr. Plourde's waste.

[4] I am cognizant of the principles set out in section 718 of the *Criminal Code*, and section 10 of the *Controlled Drugs and Substances Act* with respect to sentencing and the principles of sentencing that are to be applied. There is, perhaps it's trite to say but I think important to observe, there is no cookie cutter approach, and each individual comes before the court and is treated singularly, if you will. There are certain principles, obviously, with which counsel are well familiar that I don't need to go into here, about minimum sentences and the like. But the point I'm trying to make is that Ms. Lounsbury comes before the court as

an individual - she has her own particular circumstances, and the court has to take those into account.

[5] Having said that, I am certainly persuaded that the offences themselves call for a period of custody, and I think that that is clear based upon all that has been written about the trafficking of drugs in federal institutions. I note Mr. Shatford referred to *R. v. Bremner* 2005 NSSC 163, and specifically to the passage by Justice Moir at paragraph 31 of that decision. Justice Moir talked about the emphasis that must be placed upon deterrence because of the insult to the justice system and the insult that, or the harm that results from this kind of activity. Also in paragraph 31 he noted that:

Sentences have ranged from three months to three years, with sentences in Nova Scotia varying between four months and two years less a day...

At the end of that same paragraph Justice Moir said as follows:

It would be wrong to suggest that any range has emerged for the special case of trafficking or conspiring to traffick into a correctional facility or a penitentiary.

So Justice Moir did qualify his remarks by noting that there hasn't been any particular range that has emerged.

[6] Nonetheless, I think it's clear that the circumstances demand that the appropriate emphasis on general and specific deterrence does call for a custodial sentence. In *R. v. Vandenbosch*, (2006), 207 Man. R. (2d) 142 at paragraph 27, the court stated as follows:

This problem of inmates using manipulation and coercion to force young, unsophisticated and vulnerable friends and family members to bring drugs into institutions makes this crime different from most others. If the courts sentence these offenders to a conditional sentence, they are contributing to the problem by giving the unsavoury characters another tool to use in manipulating and coercing others into this illegal activity, thus perpetuating

the cycle of criminal activity of drug trafficking into institutions and the danger from the use of illegal drugs to those working or incarcerated within the institutions. One way of helping to reduce the importation of drugs into institutions is to take a strong position by saying that this activity will attract a severe sentence, even for a first offence. I cannot help but conclude that to find otherwise is perpetuating the manipulation of these young traffickers and putting more people at risk in the long run. In this instance, general deterrence and denunciation are the important and overriding factors.

And I agree that general denunciation and deterrence are the important and overriding factors and certainly that theme is contained in the *Bremner* decision as well.

[7] Having said that, I don't accept that deterrence and denunciation, in order to receive proper emphasis, necessarily mean that rehabilitation is ignored. And while I agree with the general proposition that the paramount concern must be deterrence and denunciation, I with respect disagree with Justice Beard of the Manitoba Court of Queen's Bench in *Vandenbosch* that conditional sentences contribute to the problem by "giving the unsavoury characters another tool to use in manipulating and coercing others". With respect, I think the sentence has to consider and emphasize the offender. The sentence has to consider the message sent to the community. Whether another is going to take advantage of someone who is naive or unsuspecting, I don't accept that any person prepared to take such advantage of another person is going to consider what the sentence might be for that other person. They may well be prepared to consider what the sentence might be for themselves, but it's difficult to accept that having a court impose a conditional sentence on the person who is naive and takes the drugs into the institution is somehow going to affect the predicate decision of the person who is the poor influence. I think, with respect, that is quite a stretch. The person who is the poor influence and says "I'm going to influence this person to take drugs into the institution" - are they going to consider all of the consequences? Yes. But are they going to measure to an exact nicety the potential for the person they're taking advantage of to receive a conditional sentence versus actual custody? With respect, I think not. If the person who is taking advantage wasn't prepared to take

advantage in the first place, then there would be no problem, and to think that they're going to measure it to such a nicety, I have to question that.

[8] The decision to which defence counsel referred me in *R. v. Charlish* (2001), 151 C. C. C. (3d), 185, is a decision of the British Columbia Court of Appeal. There, a sentence of six months incarceration and two years probation was overturned and the Court of Appeal imposed a conditional sentence rather than incarceration. I note, at paragraph 16 of the decision, the court said:

In my opinion, the learned trial judge gave too much weight to general deterrence without evidence to warrant that weight. This was a non-violent crime and, in my opinion, more harm than good will be done to this applicant by locking him up. On the material before the Court, I doubt that he will ever again be so foolish as to do what he did on the occasion in question.

Clearly the Court was recognizing that while general deterrence and denunciation are paramount, it's not a case where one should overemphasize those principles at the expense of the rehabilitation of the offender. In that case, the person who received the sentence had many characteristics similar to those possessed by Ms. Lounsbury, in terms of mitigating factors, and there are also Ms. Lounsbury's own efforts at rehabilitation since this offence occurred.

[9] Finally, counsel referred me to the decision of *R. v. C. B.* 2006 ABPC 167. That's an Alberta Provincial Court decision, not particularly binding on this court, but a helpful illustration of the potential for this kind of offence to attract a conditional sentence. In that case, the individual received a conditional sentence of two years less a day and 12 months probation. There were a number of mitigating factors: a guilty plea and a consent to a body search when the drugs were detected. The aggravating factors were a record for a single, unrelated offence and the fact that the accused, who was the sole caregiver to her two sons had as the destination for the drugs the federal penitentiary. The headnote references that the court noted the accused would benefit from rehabilitative and restorative measures afforded by a conditional sentence. There's no doubt here that custody is required. The only question is: is Ms. Lounsbury a candidate for a conditional sentence, and is a conditional sentence warranted, keeping in mind the principles in *R. v. Proulx* [2000] 1 S.C.R. 61?

[10] In *R. v. Cromwell* (2005) 238 N.S.R. (2d) 17, a decision of our Court of Appeal, the court had to consider whether the sentencing judge had been justified in rejecting a joint recommendation for a conditional sentence with respect to the offence of impaired driving causing bodily harm, and some other companion offences, the particulars of which escape me at the moment. At paragraph 38 the court enumerated the factors that the sentencing judge should consider when conducting the so-called *Proulx* analysis. The first question to be asked is whether the sentence will protect the community. What I heard crown and defence say this morning, while they are in disagreement, addresses this question of whether a conditional sentence would adequately protect the community. Mr. Shatford, on behalf of the federal crown, advocates so-called straight time, a custodial sentence, and Ms. Hillson, on behalf of her client, advocates a conditional sentence, or in the alternative, intermittent time.

[11] In *Cromwell* at paragraph 38 the court said as follows:

In *Proulx*, the Court, drawing on the judgments of the Alberta Court of Appeal in *R. v. Brady* (1998), 121 C.C.C. (3d) 504 and the Quebec Court of Appeal in *R. v. Maheu* [1997] R.J.Q. 410, 116 C.C.C. (3d) 361 (C.A.), listed a number of factors which would guide a case by case assessment of the risk the offender poses to the community (at paras. 69 and 70):

the risk of the offender re-offending;

the gravity of the damage that could ensue in the event of re-offence;

whether the offender has previously complied with court orders;

whether the offender has a criminal record that suggests that [she/he] will not abide by the conditional sentence;

the nature of the offence;

the relevant circumstances of the offence, which can put in issue prior and subsequent incidents;

the degree of participation of the accused;

the relationship of the accused with the victim;

the profile of the accused, that is, his [or her] occupation, lifestyle, criminal record, family situation, mental state;

his [or her] conduct following the commission of the offence;

the danger which the interim release of the accused represents for the community, notably that part of the community affected by the matter.

[12] The history of Ms. Lounsbury clearly shows that she has no prior record. She has no documented difficulty of compliance with court orders. There's nothing about her prior history that says that she wouldn't abide by the conditions of a conditional sentence. She has engaged in a number of efforts aimed at her own rehabilitation since the offence occurred. She no longer has any relationship with Mr. Plourde, who clearly had a role to play in influencing her in this matter. There were difficulties after the offence occurred, involving Ms. Lounsbury and her involvement with illicit drugs, clearly while she was continuing under the influence of Mr. Plourde, and since that time she has taken a number of steps to extract herself from that kind of activity, and to engage in ongoing counseling.

[13] Under all of the circumstances, mindful as I am of the need for deterrence and the appropriate message to go to Ms. Lounsbury and others, nonetheless I am persuaded, in terms of applying the principles enunciated in *Proulx*, that she is a candidate for a conditional sentence. I am not convinced that requiring Ms. Lounsbury to serve a custodial sentence inside the jail at this point in time is going to do anything more in assisting with her rehabilitation, or in assisting with sending the message to the community. I have had occasion to say it before, and I guess I'll say it again; those members of the community who would operate under the impression that a conditional sentence is a slap on the wrist are, in my view, operating under a serious misconception. The court views a conditional sentence

as a sentence of custody because that's what it is. The court views the conditions associated therewith as no different than the rules and regulations that might be imposed inside the correctional facility. The court intends in imposing a conditional sentence that it would be held with the same regard by the offender and by the community as a sentence served inside a custodial facility. Certainly the court is cognizant of the provisions of the *Criminal Code* that contemplate that a breach of a conditional sentence will trigger the presumption that it will result in a very quick trip to the institution itself.

[14] So I take the view that the conditional sentence is appropriate here, for the reasons that I have set out. In large measure, I do so because of Ms. Lounsbury's own efforts at rehabilitation to date. I would not want to leave anyone with the impression that I am imposing a conditional sentence because Ms. Lounsbury is the mother and caregiver to two young children. As I have had occasion to say before, and say again this morning, the court's application of the principles of sentencing can't be held to ransom by the needs of the children who might unfortunately be left in a very vulnerable position by the very unwise actions of their parents.

[15] The sentence also has to address parity under section 718.2(b). I am cognizant that there are a number of decisions referred to in the *Bremner* decision relied upon by the crown. It seems to me that in a number of those decisions where sentences of custody were imposed, the individuals had a record, or the quantity of drugs involved was much greater than what is involved here. That may not distinguish each and every decision referred to in *Bremner*, but it certainly does with respect to a number of them. It is clear that Ms. Lounsbury was an unsophisticated and naive participant. She certainly participated; but it is clear that Mr. Plourde had a considerable role to play in the matter. That doesn't excuse her involvement, but it certainly places it in context.

[16] I am not left in any doubt by the contents of the pre-sentence report that Ms. Lounsbury has, to a large extent, if I can use the phrase, learned a lesson. I am not persuaded by anything I have read or heard that the general public runs the risk that Ms. Lounsbury, if returned to the community today, might present a danger to the public or the safety of the public, or that she might compromise the principles of sentencing or the best administration of justice, and accordingly she will be permitted to serve her sentence of custody in the community.

[17] Would you stand please, Ms. Lounsbury? In relation to the offences of trafficking and possession of marijuana, both occurring on April 30th of 2006, there will be a conditional sentence in relation to each count, concurrent, bearing in mind the principle of totality, as the offences occurred at the same time. The sentence will be a conditional sentence of six months on each count, followed by a period of 18 months probation on each count.

[18] I'm just going to get you to have a seat for a moment. I apologize. I may have gotten off track. I want to speak again about parity. Although it's probably not of much assistance to counsel, I did want to make mention of a sentencing that occurred in Halifax. I imposed a sentence in the summer of 2003 in courtroom number 1. Mr. McLaughlin was the federal crown. I am sorry I can't remember the name of the accused, but that was a gentleman who had no prior record. He was in his late fifties. He had a very positive pre-sentence report. He had the responsibility for the care of his elderly, aging and ill parents. He had a sterling work record of over 30 years in the restaurant industry, and a number of positive collateral contacts from the community who offered glowing reports to the court. He was involved in the smuggling of somewhere between one and five condoms filled with hard drugs and pills into the federal institution in Renous, and he was the subject of a search following detection by the sniffer dog. It was clear from all of the circumstances surrounding the offence that he was the most naive and perhaps unwitting victim, as the result of a liaison with an individual whom he had known while they were on the outside, who was a person who subsequently received a federal sentence. That individual received a conditional sentence, if my memory serves me correctly, of two years less a day. I bear that in mind as well, in terms of the sentence imposed on Ms. Lounsbury today.

[19] Ms. Lounsbury, could you stand please? The conditions of your conditional sentence are as follows: you will keep the peace and be of good behaviour and appear before the court when required to do so. You will report to a sentence supervisor at 30 Church Street before 3:00 o'clock this afternoon and thereafter as you may be directed to do. You will reside in the province of Nova Scotia unless you have written permission to reside elsewhere, obtained from your sentence supervisor in advance. I recognize that you live in New Brunswick and that's why you need to go see the sentence supervisor right away. I'm sure they'll be making plans to transfer your sentence to the province of New Brunswick. You will notify your sentence supervisor promptly of any change in your name, address, employment, occupation or telephone number as those changes may occur from

time to time. If I didn't say so a moment ago, you will report to the supervisor after today as and where you may be directed to do from time to time. You will not take or consume alcohol or any other intoxicating substances. You will not take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* unless you have a physician's prescription or a legal authorization to do so. You will not own, possess or carry any weapons, ammunition or explosive substances. You will attend for and participate in any and all counseling, assessment, treatment or programming that may be directed to you by your sentence supervisor. You will have no direct or indirect contact or communication whatsoever with Daniel Plourde. You will not be on or within ten metres of the premises known as any federal or provincial correctional facility. You will abide by house arrest, which means that you will remain in your usual and ordinary residence at all times, commencing at 8:00 o'clock this evening, and expiring at 11:59 p.m. on the date of expiration of your conditional sentence. The exceptions to the house arrest provision are as follows: when you attend at regularly scheduled employment, of which your supervisor is aware in advance, and travelling to and from by the most direct route; when you attend at a regularly scheduled education program, of which your supervisor is aware in advance, and travelling to and from by the most direct route; when you deal with a medical emergency involving you or a member of your household, and travel to and from by the most direct route; when you attend a scheduled appointment with your legal counsel or your sentence supervisor, travel to and from by the most direct route; when you attend court at a scheduled appearance or under subpoena, travel to and from by the most direct route; when attending a counseling appointment or a treatment program, provided that you have advised your sentence supervisor in advance of your date and time of attendance at such programs, and provided that your attendance at such program has been approved by your sentence supervisor; when attending a regularly scheduled religious service, with the advance permission of your supervisor, and travelling to and from by the most direct route; when making application for employment or attending a job interview, provided that you have the advance permission of your sentence supervisor to do so; or when attending...if I didn't mention this, I intended. I may be repeating myself. Did I mention employment, Ms. Hillson?

MS. HILLSON: Yes you did, Your Honour.

THE COURT: Okay. Or for a period of not more than three consecutive hours per week, as approved in advance by your sentence supervisor, for the purpose of

attending to your own personal needs and errands; or at any other period of time and for the specific period of time as approved by your sentence supervisor in writing, provided that you shall carry that written permission on your person at all times when you are absent from the home. For the purposes of this order, your home is defined as your usual and ordinary residence and the lands surrounding it within five metres of the dwelling. You will prove your compliance with the house arrest condition by presenting yourself at the entrance of your residence in the event that your supervisor, a peace officer or any other authorized personnel should attend there to check on your compliance. Do you understand the conditions of the conditional sentence, ma'am? You should understand as well that if you fail to abide by them, you may be brought into custody and required to serve the balance of the sentence inside the institution.

[20] Following the expiration of the conditional sentence, there will be a period of 18 months probation. The terms of the probation order are that you will keep the peace and be of good behaviour. You will appear before the court when and if required to do so. You will report to a probation officer within seven days following the expiration of the conditional sentence, and thereafter at such times and in such manner as you may be directed to do from time to time by the probation officer. You will have absolutely no contact directly or indirectly with Daniel Plourde. You will not be present at or within ten metres of any federal or provincial correctional institution. You will abstain from the use or possession of any drugs as defined in the *Controlled Drugs and Substances Act* unless you have a physician's prescription or a legal authorization to do so. You will abstain from the use or possession of any alcohol. You will abstain from the use or possession of any weapons, firearms or explosive devices. You will attend for and participate in any and all counseling, assessment, treatment or programming that may be recommended to you by your probation officer. Do you understand the terms of the probation order? You should understand as well that if you fail to abide by them, you may be subject to another charge. You will need to sign some paperwork this morning. Please don't go until that's done.