PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Briand, 2012 NSPC 10

Date: 20120120
Docket: 2392417
Registry: Sydney

Between:

Her Majesty the Queen

v.

Jeffery John Briand

Sentence

Judge:	The Honourable Judge Jean M. Whalen, J.P.C.
Heard:	January 20, 2012, at Sydney, Nova Scotia
Charge:	Section 267(b) *Criminal Code of Canada*
Counsel:	Andre Arseneau, for the Crown Doug MacKinley, for the Defence

INTRODUCTION:

[1] Mr. Briand appeared with his counsel, Mr. MacKinley, in Provincial Court. There was a new information before the court charging Mr. Briand with s. 267(b), assault causing bodily harm. The Crown proceeded summarily with consent of the defendant. Mr. Briand plead guilty to that charge.

[2] Both Crown and Defense counsel made submissions and put forward a joint recommendation for a Conditional Sentence Order of six months followed by Probation for 18 months (with numerous conditions).

[3] Based on what the court heard I was not inclined to follow the recommendation; I advised counsel and adjourned to give them time to prepare and make further submissions.

THE LAW:

[4] Quoting extensively from *R. v. Sinclair*, 185 C.C.C. (3d) 564 (MBCA) beginning at paragraph 4:

> It is accepted that while a joint submission cannot bind the discretion of the judge, sentencing judges should normally not deviate from a joint submission unless they have clear and cogent reasons for doing so.
>
> [5] If a sentence recommended by both counsel is outside the range of sentence established by precedent, then the sentencing judge need not follow the joint recommendation.
>
> [6] However, even in that situation, a sentencing judge should exercise caution before ignoring a sentence carefully negotiated by experienced

> counsel. As stated by the Nova Scotia Court of Appeal in *R. v. MacIvor*, 176 C.C.C. (3d) 420, 2003 NSCA 60 (N.S.C.A.) (AT PARA. 32):
>
> " Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation."
>
> [8] Plea bargaining has become a routine part of the process of handling criminal cases. The bargaining process is undermined if the joint recommendation is too readily rejected by the sentencing judge. This was recognized by Martin Committee in 1993, which suggested that the proper test for justifying departure is whether the proposed sentence brings the administration of justice into disrepute or is otherwise contrary to the public interest. The test is weighted in favor of enhancing the objective of certainty of outcome, and it has been adopted by the Ontario Court of Appeal.

The test acknowledged by them:

> [A] high threshold and is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge. [Cerasuola, at para 8, per Finlayson.J.A.]
>
> [9] Other provinces, including Manitoba, have used different language in describing the appropriate test for departing from a joint submission. In *R. V. C. (G.W*), 150 C.C.C. (3e) 513, 2000 ABCA 333 (Alta C.A.), the Alberta Court of Appeal stated that joint submissions should be accepted unless they are unfit or unreasonable. That case was adopted by the Saskatchewan Court of Appeal in *R. V. Webster*, 207 Sask, R. 257,2001, SKCA 72 (Sask. C.A.).

In Manitoba, in *Pashe*, the court stated:

> [10] Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless

> they are "unreasonable", "contrary to the public interest", "unfit", or "would bring the administration of justice into disrepute."
>
> [11].. A reasonable joint submission cannot be said to "bring the administration of justice into disrepute." An unreasonable joint submission, on the other hand, is surely "contrary to the public interest." Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the Ontario standard [i.e., that the jointly recommended sentence is contrary to the public interest and would bring the administration of justice into disrepute] departs substantially from the test of reasonableness articulated by other courts, including our own. [The] shared conceptual foundation [of these various formulations of the principle] is that the interest of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty – provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.

The court went on to state:

> [12] When deciding whether to depart from a joint recommendation, a court should consider the following factors:
>
> [13] There is a continuum in the spectrum of plea bargaining and joint submissions as to sentence. In some cases, the Crown's case has some flaw or weakness and the accused agrees to give up his or her right to a trial and to plead guilty in exchange for some consideration. This consideration may take the form of a reduction in the original charge, withdrawal of other charges or an agreement to jointly recommend a more lenient sentence than would be likely after a guilty verdict at trial.
>
> Evidence always varies in strength and there is always uncertainty in the trial process. In other cases, plea negotiation have become accepted as a means to expedite the administration of criminal justice.
>
> The clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge. See. *R. v. Broekaert*, 170 Man R. (2d) 229, 2003 MBCA 10 (Man. C.A.), At para. 29, and *Booh*, at para. 11.
>
> Recognizing that cases fall at various places in the continuum, the essence of the plea bargain or joint submission should be placed on the record in open court. The judge must have a solid

> factual basis on which to make an independent, reasoned decision. If a trial judge is not given or fails to inquire into the circumstances underlying a joint sentencing submission, then he or she will be hard pressed to determine whether there is good cause to reject that joint submission.
>
> If the joint submission is as a result of, for example, an evidentiary gap in the Crown's case or the absence of an essential witness, this is information that should be provided to the court by counsel, and particularly Crown counsel.

[15] If, after being provided with that information and those submissions, the judge is still considering departing from the joint recommendation, he or she should advise counsel of that fact and provide them with an opportunity to make further submissions, if they so wish. Counsel may be able to respond to concerns the sentencing judge may have for departing from the recommended sentence. See. *R. v. Thomas*, 153 Man. R. (2d) 98, 2000, MBCA 148 (Man. C.A.), at para 7, *Broekaert* at Paras. 10 -11, *Booh*, at para. 13, and *R. v. Hatt*, 163 C.C.C. (3d) 552, 2002 PESCAD 4 (P.E.I.. C.A.), at para . 15.

[16]) If after those submissions, the sentencing judge remains of the view that the joint submission is unfit or unreasonable, the judge may impose a different sentence, but must give clear reasons for doing so.

[17] Thus, the law with respect to joint submissions maybe summarized as follows:

(1) While the discretion ultimately lies with the court, the Proposed sentence should be given very serious consideration.

(2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

(3) In determining whether cogent reasons exist (i.e. in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain,

> evidentiary consideration, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
>
> (4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.
>
> (5) The sentencing judge must then provide clear and cogent reasons from departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2,considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

[5] In *R. v. Cromwell*, 202 C.C.C. (3d) 340 the NSCA discusses "Resolution Agreements" and "Fitness of Sentence." Beginning at para 18:

> **"Resolution Agreements**:
>
> In *R. v. MacIvor*, this Court approved with particular emphasis, the following comment by Fish, J.A. (As he then was), writing for the Court in *R. c. Verdi-Douglas* (2002), 162 C.C.C. (3d) 37 (Que. C.A.):
>
> [51]...the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.
>
> [19] There are many situations in which it is in the public interest for Crown and defence counsel to enter into negotiations which result in a guilty plea and a joint sentence recommendations. There may be uncertainties in evidence which induce both counsel to prefer a compromise. Avoidance of a trial may save

substantial public expense and spare prosecution witnesses the trauma of testifying. A negotiated resolution, which shortens the time between the charging of the offence and disposition, protects the public from those who would re-offend while on a pre-trial release and spares victims of crime the long ordeal of awaiting trial of the perpetrators. Offenders sometimes provide the police with critical information leading to the solution of other crimes. This can serve as a *quid pro quo* for a sentence somewhat reduced from what would otherwise be appropriate. Heavy criminal caseloads resulting in court backlogs can also be alleviated through consensual resolution, in the proper circumstances. Such resolutions are more likely to be achieved where it is probable that the sentencing judge will accept the recommendation of counsel.

[20] Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject The joint submission (*R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); *R. v. Dorsey* (1999), 123 O.A.C. 342 (Ont. C.A.); *R v. C. (G.W.)* (2000), 150 C.C.C. (3d) 513 (Alta. C.A.)).

[21] A trial judge may decline to give effect to a joint recommendation, not simply because she would have imposed a more severe Sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

Fitness of Sentence:

[22] In *R. v. Shropshire*, [1995] 4 S.C.R. 227 (S.C.C.) an "unfit" sentence is described as one that is "clearly unreasonable" (at para. 46 *per* Iacobucci, J., for a unanimous Court), in other words, "clearly excessive or inadequate" (see also *R. v. Muise (No.4)* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.)). An unreason-

> able sentence is one falling outside the range (*Shropshire* at para, 50 and *MacIvor, supra* at para. 31).
>
> [23] In evaluating a joint submission the judge must determine the acceptable range of sentence for the offence before the court. A fit sentence is one that falls within that range. Fixing the range requires a consideration of the general sentencing principles and, for purposes of this case, those of conditional sentencing.
>
> [24] Where there is a joint submission, the judge considers the record before him - the admitted facts of the offence, information about the offender; the victim impact statements and submissions of counsel. It is counsels' obligation to provide sufficient detail to justify the joint submission. (*R. v. G.P., supra* at para. 20 and *R. c. Verdi-Douglas, supra* at para. 45). There are occasions when all relevant factors prompting the joint submission cannot be disclosed to the judge. The offender may have provided useful but confidential information about other crimes, disclosure of Which would endanger his safety or compromise an on-going investigation. For that reason, even where a joint submission falls outside the range, it should be given serious consideration (*MacIvor, supra* at para. 37).

Fitness of the Proposed Sentence:

At paragraph 26 the Court of Appeal stated:

> [26] ...the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("...sentences imposed upon similar offenders for similar offences committed in similar circumstances..." *per* MacEachern, C.J.B.C. in *R v. Mafi* (2000), 142 C.C.C. (3d) 449 (B.C.C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

<u>CONDITIONAL SENTENCE</u>:

[6] *R. v. Rushton*, 2005 NSSC 360 at para 9 quotes the CA from *R. v. MacNeil* (1991), 108 NSR (2d) 1993 (NSCA) [J. Matthews at para 11]:

> "In innumerable cases, this Court said that in crimes of violence rehabilitation and individual deterrence must give way to general deterrence. In all of the circumstances of this case it is our opinion that the sentence was fit and should not be disturbed."
>
> [10] These cases predate the conditional sentence regime now incorporated in the *Criminal Code*. Nevertheless, it remains clear that the necessity for deterrence in the circumstances of crimes of violence often results in sentences involving secure or institutional incarceration.
>
> [11] However, it is now also evident that many offences involving crimes of violence result in the imposition of conditional sentences, particularly where the Court has been satisfied the safety of the community is not being endangered and the serving of the sentence in the community is consistent with the fundamental purposes and principles of sentencing. For example, in *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.), the leading case on conditional sentencing, Lamer C.J.C., at para. 279, stated that no offences are presumptively excluded from the conditional sentencing regime where the prerequisites of a conditional sentence are met.
>
> [12] Examples of a number of Nova Scotia sentencing decisions in which conditional sentences were imposed or affirmed for violent offences, include:
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> • *R. v McBride*, [2003] N.S.J. No. 508, 218 N.S.R. (2d) 201 (N.S.S.C.). The offences included assault (s. 266(a); assault causing bodily harm (s. 267(b)); and confinement (s. 279(2)(a)). The imposed sentence was sixteen months conditional with the first three months being house arrest.
>
> • *R. v. D.(K.)*, [2005] N.S.J. No. 25 (N.S.C.A.), involved an offence of sexual assault. The sentence of two years less one day, conditional sentence, was affirmed by the Court of Appeal.
>
> • *R. v. Brown*, [2004] N.S.J. No. 133, 222 N.S.R. (2d) 393 (N.S.C.A.). The offences included two assaults. The sentence of eighteen month's conditional with house arrest throughout, plus probation, was affirmed.

- *R. v. W. (M.A)*, [1999] N.S.J. NO 49, 174 N.S.R. (2d) 83 (N.S.C.A.). The offence was sexual assault. (S. 271) and the sentence was eighteen months' conditional sentence, affirmed on appeal, with additional conditions, including house arrest.

- *R. v. Bratzer*, [2001] N.S.J. No. 461, 198 N.S.R. (2d) 303 (N.S.C.A.). There were three Robbery offences. The sentences of two years less one day, conditional, served concurrently, was affirmed.

- *R. v .Burbine*, [2001] N.S.J. No. 432 (N.B.S.C.). The offence involved was aggravated assault. The sentence imposed was a conditional sentence of eighteen months plus probation and community service.

ANALYSES:

[7] Upon further submission it is now known by this court that:

1. The crown's case had some significant flaws or weaknesses;

2. Mr. Briand gave up his right to a trial and plead guilty in exchange for some consideration. Here it was a reduction in the original charge and a jointly recommended conditional sentence order;

3. It is clear that there was a "*quid pro quo*" between the parties;

4. I now have a solid factual basis on which to make a final decision;

5. The joint recommendation is for a 10 month jail sentence to be served in the community by way of a Conditional Sentence, by all appearances a more appropriate range of sentence.

[8] Taking into consideration:

1. the admitted facts of the offence;

2. the information about the offender;

3. the Victim Impact Statement and the submissions of counsel.

[9] I will consider the test set out in s. 742.1.

1. Is jail appropriate, and if so, should it be less than 2 years? The Crown went summarily so the maximum sentence is 18 months in jail. So the first part of the test is made out procedurally. Mr. Briand is eligible for a conditional sentence order.

2. Is the court satisfied serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes and principles of sentencing?

(a) I have to consider the risk posed by the specific offender including his risk to re-offend and this includes the risk of "any" criminal activity and;

(b) the gravity of the damage that could ensue from any further offence.

[10] In general a conditional sentence achieves the restorative objectives of sentencing better than incarceration, which is preferable where denunciation and deterrence are especially important. A conditional sentence may provide sufficient denunciation and deterrence, however, it depends upon:

(i) the nature of the conditions imposed;

(ii) the duration of the sentence;

(iii) the circumstances of the offender and the community.

[11] Mr. Briand:

(1) has not been in trouble since 2007;
(2) he has been working for the last 3 or 4 years and intends to go to work in May in the fishing industry;
(3) he has a common law spouse;
(4) he has the support of his family;

(5) he has been on conditions since he was charged and there have been no breaches or charges.

[12] Therefore given all of the above including the facts, Mr. Briand's record and all of the circumstances I am prepared to follow the joint recommendation of counsel:

(1) 10 month jail (Conditional Sentence Order);
(2) 14 months probation with conditions;
(3) DNA order;
(4) Firearms prohibition order s. 109.

Dated at Sydney, Nova Scotia, this 20th day of January 2012.

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Jean M. Whalen, J.P.C.