PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Jamael, 2012 NSPC 50

Date: 20120528
Docket: 2352878
2352936
2352875
Registry: Sydney, N.S.

Between:

Her Majesty the Queen

v.

Stephen Jamael
Patrick Whiffen
Garfield Carey

DECISION

Judge:	The Honourable Judge Jean M. Whalen
Heard:	May 10, 2012, in Sydney, Nova Scotia
Oral Decision:	May 28, 2012
Written Decision:	June 19, 2012
Charge:	s. 367(b) CC (Jamael) s. 397(1) CC (Whiffen) s. 397(1) CC (Carey)
Counsel:	Andre Arseneau, for the Crown Vince Gillis, Counsel for Stephen Jamael Tony Magliaro, Counsel for Patrick Whiffen Jillian MacNeil, Counsel for Garfield Carey

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By the Court:

[1] FACTS

[2] Mr. Jamael bought a car at an auction in Quebec that had been in a previous accident in the State of Georgia. He had a buyer lined up but the deal fell through. Rather than absorb the loss or attempt to recoup through legal recourse he, along with Mr. Whiffen and Mr. Carey, came up with or participated in, a scheme to recoup the loss.

[3] Mr. Jamael created and supplied a false towing invoice, Mr. Whiffen falsified a vehicle registration certificate, and Mr. Carey falsified a motor vehicle inspection certificate.

[4] Then Mr. Whiffen reported the car had been in an accident and falsified an insurance claim for damages.

[5] Mr. Jamael received $1,511.68 for “towing”, and Mr. Whiffen had the benefit of a rental car for several weeks, amounting to $724.50.

[6] The claim was investigated but not paid out. The insurance company incurred $8,311.00 in costs.

[7] STEPHEN JAMAEL

[8] Mr. Jamael’s pre-sentence report indicates the accused is a hard working and productive member of his community. His family and friends are surprised and supportive, and say it is out of character for him.

[9] Mr. Jamael was running a successful towing business. This offence has had a detrimental affect on his operations; he has lost business with the RCMP and Cape Breton Regional Police for towing services.

[10] The Victim Impact Statement supplied by Pem-Bridge Insurance requests restitution from all three defendants.

[11] Aggravating factors to be considered:

i) There was some planning, but this scheme was certainly not sophisticated.

ii) The accused's motivation was simply greed.

[12] Mitigating factors to be considered:
i) Change of plea.
ii) No criminal record.

[13] PATRICK WHIFFEN

[14] Mr. Whiffen's pre-sentence report indicates the accused may have had some issues a few years ago but worked hard to become a contributing member of society. He has a family that, although upset and surprised by this turn of events, are supportive of the accused. He is gainfully employed and his employer only has good things to say about him.

[15] Aggravating factor to be considered:

i) Motivation, the accused was to get money.

[16] Mitigating factor to be considered:

i) Change of plea to guilty.

[17] GARFIELD CAREY

[18] Mr. Carey's pre-sentence report indicates the accused is a hard working individual; his family was disappointed and shocked, but are supportive. The individuals interviewed stated this was out of character for the accused. He is self-employed; he lost his licence to inspect motor vehicles for six months beginning May 3, 2012, which has had an impact on his business.

[19] Aggravating factors to be considered:

i) Placing a motor vehicle inspection sticker on a car that says it's road worthy, the car was not.

ii) The accused said he didn't learn about the impact of this incident until it was brought forward to court. The court doesn't accept that explanation. The accused has been a mechanic for 20 years, he knows what a motor vehicle inspection sticker means, and he knew what Mr. Jamael and Mr. Whiffen were doing. He was a part of the scheme.

[20] Mitigating factors to be considered:

i) Change of plea to guilty.

ii) No criminal record.

[21] THE LAW

[22] Mr. Jamael and Mr. Carey are seeking a conditional discharge. Mr. Whiffen is not eligible because of a previous record, thus fails the first ground of the test.

[23] Upon review of the case law, it is evident that a conditional discharge has been granted for various types of offences, so it appears that these offences are not precluded and none has a mandatory minimum sentence.

[24] In *R. v. Capstick*, 2006 CarswellNS 39, 2006 NSSC 33, 240 N.S.R. (2d) 315, 763 A.P.R. 315, J. Cacchione states at para 18:

> 18 The purpose and objective of sentencing and the principles to be considered are set out in ss. 718 to 718.2 of the Criminal Code. The sections read as follows:
>
> > 718 Purpose - The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> >
> > (a) to denounce unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;

c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 Fundamental principle — A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles — A court that imposes a sentence shall also take into consideration the following principles;

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(I) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction

> of or in association with a criminal organization, or
>
> (v) evidence that the offence was a terrorism offence
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

19 Section 730(1) of the Criminal Code allows a sentencing judge to grant a conditional discharge instead of entering a conviction against an accused. Section 730(1) reads as follows:

> Conditional and absolute discharge - Where an accused, other than an organization, 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 by imprisonment for fourteen years or for life, the court before which the accused 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 on the conditions prescribed in a probation order made under subsection 731(2).

20 Section 730(1) sets out two conditions precedent to the exercise of the court's jurisdiction to impose a conditional

discharge. The first is that a discharge is "in the best interests of the accused" and secondly the granting of the discharge is not "contrary to the public interest". Once the sentencing court determines that a discharge is in the best interest of the accused it must then proceed to consider whether the granting of a discharge is not "contrary to the public interest".

21 The seminal case on the application of the discharge provisions is the British Columbia Court of Appeal decision in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C. C.A.). That court at page 454 noted that

> (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
>
> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
>
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
>
> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
>
> (6) 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.

> (7) the powers given by s.662.1 should not be exercised as an alternative to probation or suspended sentence.
>
> (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

> 22 The Ontario Court of Appeal in *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (Ont. C.A.) noted that one element brought into play when considering whether a form of discharge would be contrary to the public interest is the necessity or otherwise of a sentence which will be a deterrent to others who may be like-minded. That court did not indicate that it is the only element to consider when addressing the question of whether a discharge would be "contrary to the public interest".
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> 33 The words "contrary to the public interest" contained in s.730(1) of the Criminal Code do not equate solely with the deterrence of the offender or of others. The public interest concept is broad enough to encompass a factor such as the impact of having a family put on social assistance as the result of the offender losing his employment because of a criminal conviction and the effect of that on the social fabric of that family.

[25] In *R. v. Butler*, 165 N.S.R. (2d) 39, 495 A.P.R. 39, [1998] N.S.J. No. 56, J. Carver stated at para 12:

> 12 The offence with which Ms. (Chisholm) Butler has been convicted is a serious one. The maximum penalty is ten years imprisonment. The purpose of sentencing is to protect the public from criminal conduct. In formulating a sentence, the court must concern itself with deterrence, both special and general. Special, to deter the present offender from any such future activity and general, to deter others.

[26] In *R. v. Auclair*, 165 NSR (2d) 39, Vauclair J., stated at paras 24 and 25:

> 24 The Court is not of opinion that general deterrence and denunciation can only be accomplished by the imposition of a criminal record. Processing the matter through the criminal justice

> system is in itself a strong signal that violence is not accepted. A well-informed observer knows that a discharge does not condone the offence but is a measured response to an offence, committed by a particular offender, in a particular set of circumstances.
>
> 25 It must not be forgotten that, similarly to the suspended sentence, a discharge may be revoked and a conviction entered if the offender is convicted of any new offence, including a breach of the probation order[FN15].

[27] In *R. v. Choi*, 2012 CarswellMan 177, 2012 MBPC 38, Mary Kate Harvie Prov. J., states at para 26:

> 26 The more significant issue rests with the question of whether the imposition of a discharge is "not contrary to the public interest". Crown counsel submits that the nature of the offence is such that general deterrence is the paramount sentencing principle. To that end, I am mindful of the fact that while the infractions this legislation seeks to prevent are significant, across the country the actual number of prosecutions is quite limited. Defence counsel provided the decision of *R. v. Foianesi*, [2011] M.J. No. 115; (2011), 262 Man.R. (2d) 312 (Man.C.A.) in which a fine was overturned in favour of a conditional discharge for the offence of keeping a common gaming house. The Court ruled that the sentencing judge erred in placing too much weight on the principle of general deterrence given the nature of the offence. Chartier, J.A. analyzed the circumstances where a discharge can be considered, accepting at the outset that "discharges should not be available when general deterrence is the paramount sentencing principle", (see paragraph 10). He then went on to note:
>
> "Typically, general deterrence will be brought to the forefront of the sentencing principles in two situations. The first arises when the sentencing judge is dealing with a crime which is particularly heinous (murder, home invasion, crimes involving children or the vulnerable, etc). Such crimes must always be deterred.
>
> The second situation arises when general deterrence can become a paramount consideration when sentencing an accused for a crime which, although not as serious as the ones stated above, is so prevalent in the community that it must be deterred in order to bring it under control." See paragraphs 12 and 13.

[28] In *R. v. McSween* 208 NSR (2d) 377, at para 11:

> 11 The Court adopted the approach set out by our Court of Appeal in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 (N.S. C.A.), and *R. v. Muise* (No. 4) (1994), 135 N.S.R. (2d) 81 (N.S. C.A.):
>
> In *Pepin*, at [paragraph 44], it was held that:
>
> > ... in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.
>
> Further, in *Muise* it was held at [paragraphs 78 and 81] that:
>
> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate....
> >
> > The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts .... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which courts of appeal review sentences when the only issue is whether the sentence is inadequate or excessive. [Emphasis Added]

[29] Mr. Whiffen comes before court with (2) previous criminal code convictions. Mr. Jamael and Mr. Carey come before the court as first time

offenders. Their serious lapse in judgement has had significant consequences. Besides loss of business, or loss of licence, they have had to appear in court on numerous occasions, see articles in the newspaper about these charges, and face their families and other members of the community to their shame and embarrassment.

[30] The offences committed by the defendants, without minimizing the seriousness of the particular offences, do not, at this point in time, appear to be offences that "must be deterred in order to bring it under control" by way of the principle of general deterrence.

[31] A suspended sentence and probation with conditional discharge with proper terms and conditions can provide a sentence commensurate with the wrong done and meet all the principles of sentencing (for Jamael and Carey). Entering a conviction would not add much and create problems if the accused cannot work and support their families. Then the public, *per se*, would have to support them.

[32] For Mr. Whiffen, a fit and proper sentence in his circumstances is a suspended sentence and probation. He is not in jeopardy of losing his job/income.

[33] All three will pay restitution in varying amounts. The cost of this fraudulent scheme should not be passed on to the public through increased insurance premiums because of the actions of the defendants.

[34] <u>DECISION</u>

[35] Mr. Jamael received a suspended sentence with 18 months probation and a conditional discharge. He was ordered to pay $1,511.68 in restitution within 60 days of the Probation Order. He also received a Stand Alone Restitution Order in the amount of $2,024.94.

[36] Mr. Whiffen received a suspended sentence with 18 months probation. He was ordered to pay $724.50 within 60 days of the Probation Order. He also received a Stand Alone Restitution Order in the amount of $2,2024.94.

[37] Mr. Carey received a suspended sentence with 18 months Probation and a conditional discharge. He was ordered to pay a Stand Alone Restitution Order in the amount of $2,024.94.

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The Honourable Judge Jean M. Whalen