

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Lively, 2006 NSSC 274

Date: 20060906
Docket: CR 257676
Registry: Halifax

Between:

Her Majesty the Queen

v.

Michael Christopher Lively

Judge: The Honourable Justice David W. Gruchy

Heard: May 24, May 30, May 31 and June 7, 2006, in Halifax,
Nova Scotia

Written Decision: September 19, 2006

Counsel: James Whiting, for the Crown
Donald C. Murray, Q.C., for the Defendant

By the Court: [Orally]

- [1] On June 7th, 2006 I convicted the offender of (a) possession of marijuana in excess of 30 grams contrary to s.4(1) of the *Controlled Drugs and Substances Act* and (b) possession for the purpose of trafficking cocaine contrary to s.5(2) of that Act. In my decision I set forth a partial list of the items seized from the accused. It is apparent that I omitted a number of those items from that list including especially 15 grams of crack cocaine, cash and a pellet gun. For greater clarity I now refer to the court's exhibit log on file.
- [2] In preparation for the imposition of this sentence I received and considered the pre-sentence report dated July 31st, 2006 which quite frankly I found to be of limited value as the sources relied upon were the offender's mother, an aunt, and a friend; hardly persons who would be expected to give an unbiased opinion of Mr. Lively. The report's remarks concerning the possibility of further training in the offender's choice of trades may, however, be somewhat helpful.
- [3] In submission before the Crown has referred to *R. v. Dawe*, [2002] N.S.J. No. 504, para. 6, a case in which the offender was sentenced to three 15 month concurrent sentences for possession for the purpose of trafficking. The sentence was appealed and for the purposes of this decision I will simply read the head note of the appeal as it accurately reflects the contents of the decision.

Appeal by the accused, Dawe, from sentences imposed on convictions for three counts of possession of cocaine, hashish and marijuana for the purpose of trafficking. The drugs were seized from Dawe's home. Dawe was sentenced to 15 months on each charge, to be served concurrently. She argued that the sentence was too long and that she should have been allowed to serve her time in the community. She argued that the trial judge overemphasized certain factors and failed to give due consideration to her medical condition.

- [4] That appeal, however was dismissed in the following terms:

A conviction for possession of cocaine for the purpose of trafficking typically resulted in a sentence of two years or more, so if anything the sentence imposed on Dawe was unduly lenient. The trial judge did not give undue weight to Dawe's record and did not err in failing to mention her medical condition based on the limited extent to which her counsel mentioned it. The judge appropriately considered that the community would not have found it acceptable to sentence Dawe to house arrest when her house was used as the base of her operations.

- [5] In *R. v. Sparks* [1993] N.S.J. No. 448, Justice Chipman referred to the opinion by Mr. Justice Hart in *R. v. Byers*, (1989) 90 N.S.R. (2d) 263 when he said:

I would point out that the courts of this country have repeatedly made reference in recent years to the need to suppress a narcotic as dangerous as cocaine. It is a highly addictive substance and unfortunately has lately dropped in price to the point where it is one of the commonest drugs marketed on the North American continent. Its ease in handling and transportation results in greatly increased profits to the traffickers who deal in cocaine and some of its derivatives. One has only to look at the daily reports in the press to observe the extent of its presence and the increase in many types of crime in the places where it is found.

In my opinion the time has come for this court to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved. Nor should the lack of a criminal record stand in the way of a substantial period of imprisonment. No one today can claim to be so naive as to think that trafficking in cocaine can be conducted without serious damage to our social structure.

Considering the drug involved, the increased incidence of the offence, the seriousness of the offence for which a maximum of life imprisonment is provided by the Code, the fact that those like the appellant who traffick in cocaine, do so with knowledge of the consequences, and the urgent need to protect the public, we are unanimously of the opinion that the sentence imposed by the trial judge was fit and proper under the circumstances.

- [6] He referred to *R. v. Huskins*, (1990) 95 N.S.R. (2d) 109 and 113, when Justice MacDonald said:

No one can seriously dispute that cocaine is an extremely dangerous drug and that society demands that those who are involved in selling it must be dealt with severely. Rare indeed will be the case where less than federal time should be considered as a proper sanction for such offence.

- [7] The question therefore that I must address is in accordance with these reported cases, is: Is this case one of those rare cases where a sentence of less than two years should be imposed? The Crown has, pursuant to *R. v. McCurdy*, [2002] N.S.J. No. 459 at para. 15, emphasized that deterrence of both the offender and the others from the commission of these offences is the primary consideration.

- [8] Before addressing the offender's position I want to review certain various other cases which I have considered in preparation for the task which I must perform today.
- [9] I refer to the case of *R. v. Cargill*, [1999] O.J. No. 5158 a decision by the late Madam Justice Caswell a judge for whom I have the greatest respect who sentenced a young lady with no previous record who was found attempting to import two kilograms of extremely high value of cocaine from Jamaica and was sentenced to 42 months. I do recognize that importing hard drugs into Canada appears to attract far greater sanctions than otherwise.
- [10] In *R. v. Laporte*, [1998] O.J. No. 3554: in that case the court imposed a jointly recommended sentence of five years or three and a half years custody giving credit for dead time for various counts of trafficking in cocaine.
- [11] *R. v. Penny*, [1996] N.J. No. 114, is a decision of the Newfoundland Court of Appeal which on its facts is not especially helpful here, but which does once again recognize the range for trafficking in cocaine as five to eight years. It did, however, deal with a large quantity of cocaine, a kilogram, and an offender with a drug trafficking record. The court approved a sentence of five years.
- [12] Mr. Justice Goodfellow in *R. v. Gray*, [2001] N.S.J. 553 sentenced an offender to two years and three months for trafficking in cocaine. Despite a positive pre-sentence report and strong mitigating factors Mr. Justice Goodfellow said:

Trafficking cocaine is a despicable crime that has far-reaching consequences. The trafficker places his greed for the easy almighty dollar above all other considerations. The trafficker is a retailer of poison. Cocaine destroys lives and breeds crime. In addition, cocaine is known to foster theft, robbery, embezzlement and often it results in people who are exposed to it becoming involved in a the drug trade itself. Often the initial victims are the young and other vulnerable members of society, their families and friend. It is an evil trade. The consequences to society in both human and financial terms are substantial. Many consumers lose all dignity and ability without help to stay away from cocaine. Traffickers are an essential link in this evil trade and by making cocaine available they help to sustain, if not expand, the cocaine consumer market. While I am very much influenced by the considerable mitigating circumstances of this case, I view the many statements from the Church, employers and others to the effect that you are a caring, responsible person, is an indication that is strong hope for your rehabilitation. But, I must make note that a caring, responsible person is not a person who participates motivated by greed in this evil trade. I do not consider that a conditional sentence can in all circumstances adequately meet the

need for general deterrence. A conditional sentence would in my view bring the administration of justice into disrepute. The circumstances here demand a sentence in a federal penitentiary.

[13] Mr. Justice Goodfellow imposed a sentence of two years and three months.

[14] In *R. v. Robbins*, [1993] N.S.J. No. 152 the Nova Scotia Court of Appeal raised a sentence of eight months to eighteen months for trafficking in 23.57 grams of cocaine. The trial judge had been impressed by the mitigating circumstances of the offender. Chief Justice Clarke said:

. . . There are no exceptional circumstances where cocaine is involved . . . general deterrence must be prominently addressed.

[15] In July 2005 Chief Justice Kennedy in this Court in *R. v. Clarke*, [2005] N.S.J. No. 358 reviewed many of the relevant sentences and concluded the appropriate range was two to five years. He sentenced the offender, a 36 year old woman and mother to a total of 24 months in penitentiary.

[16] The offender has referred me to a number of trafficking cases and precisely and objectively set forth some of the background facts in this case as follows:

It was apparent from the evidence at trial that Mr. Lively was an active user of both marijuana and crack cocaine. He testified that his addictive use of both drugs was a consequence of unresolved pain and discomfort from two motor vehicle accidents in the late 1990s and early 2000s, and for which civil litigation had still not been completed.

Although Mr. Lively testified that all drugs found were for personal use or for sharing with another individual who was residing with Mr. Lively at the time, the Court accepted the evidence of Cpl. Blair Hussey that while the marijuana was consistent with personal use, the quantity of crack cocaine, and the related paraphernalia and cash resources, indicated that the crack cocaine was at least partly possessed for the purpose of sale. The sale profile did not indicate street level dealing, but rather indicated a level or retailing a step above street level without being in the category of a wholesaler of the drug. The materials found at the time of the search did not indicate that Mr. Lively was carrying on any manufacture of crack cocaine from powder cocaine.

The raid that occurred on September 10, 2003, found approximately 15 grams of crack cocaine, and over 30 grams of marijuana.

[17] Based partly on these facts the offender's counsel posed the following questions: (a) how long a period of imprisonment is appropriate for purposes

- of general and specific deterrence, and for the protection of society? and (b) how should this term of imprisonment be served?
- [18] Appellant's counsel has referred me to the well known case of *R. v. Fifield* (1978), 25 N.S.R. (2d) 407 for the categorization of various kinds of trafficking cases.
- [19] Judge Tufts of the Nova Scotia Provincial Court reviewed a large number of trafficking cases in his helpful decision of *R. v. Nicoll* (2005) 233 N.S.R. (2d) 6 in which he sentenced a marijuana trafficker to three months conditional and nine months probation.
- [20] Appellant's counsel also referred me to *R. v. Cover*, [2004] O.J. No. 3379, *R. v. Andrews*, [2005] O.J. No. 5708, and *R. v. G(J.M.)*, 2005 BCPC 333, and *R. v. Walker*, [1993] N.S.J. No. 336. I have reviewed all of those cases.
- [21] I have also considered *R. v. Talbot*, [1999] N.S.J. No. 187 in which Mr. Justice Kelly of this Court imposed a 14 month sentence on a 23 year old offender with no record for the sale of .22 grams of crack for \$40.00. The offender intended to return to university and apparently Mr. Justice Kelly was greatly impressed by the offender.
- [22] In *R. v. Cameron*, [2005] N.S.J. No. 81, Mr. Justice Saunders, as he then was, of this Court reviewed many decisions with competing results and in particular endorsed Mr. Justice Kelly's decision in *R. v. Talbot*. The offender was a drug addict who only sold to support his addiction and had a very favourable pre-sentence report. The sentence imposed was two, nine month consecutive with house arrest.
- [23] *R. v. Nault*, 59 O.R. (3d) 388 is an Ontario case of the Ontario Court of Appeal which dealt with an elderly ill offender and in which the trial judge rejected a joint recommendation because he felt there would be a lack of surveillance to enforce house arrest. The Appeal Court overturned that decision and as the offender had already served time in custody, he sentenced the offender to 14 months to be served conditionally plus probation as imposed by the trial judge.
- [24] Madam Justice Roscoe of our Court of Appeal in *R. v. Jones*, [2003] N.S.J. No. 146; 2003 NSCA 48 reviewed a conditional sentence imposed on an offender with a considerable criminal record. The offence concerned a large amount of cannabis resin. She referred to the various classifications of drug offenders established by Chief Justice MacKeigan in *Fifield* and it was clear, I believe, she was dealing with what was considered to be a small wholesaler. Justice Roscoe reviewed various cannabis resin cases and

concluded that a three year sentence of incarceration with credit for six months served was appropriate.

- [25] I note that there is a major difference in that case and the case now before me in that it dealt with cannabis or cannabis resin which is a distinctly less serious drug than cocaine.
- [26] In *R. v. Crann*, [1999] N.S.J. No. 206, a decision by Associate Chief Justice MacDonald, as he then was, he sentenced an offender for three years for various offences including trafficking cocaine, assaults, etc. With respect to his cocaine counts he said:

In the case at bar general deterrence is the foremost consideration for the Court. Trafficking in drugs, particularly trafficking in crack cocaine, whatever the amount, is a horrible crime. Its consequences have a devastating effect not only for drug users, but for society generally. It screams for a disposition that emphasizes general deterrence. Our Court of Appeal has confirmed this principal on numerous occasions.

- [27] Chief Justice MacDonald considered various mitigating factors and with respect to the various consecutive sentences considered the overall disposition and sentenced the offender to two and a half years for the drug related offences.
- [28] In *R. v. Morris*, [2000] N.S.J. No. 70, a case which concerned a case of a petty retailer of cocaine and heroin (three offences), Justice Goodfellow sentenced the offender to three years for each offence to be served concurrently.
- [29] In *R. v. Coombs*, [2005] N.S.J. No. 158, Mr. Justice Cacchione found exceptional circumstances for the trafficker and gave a condition of two years less one day.
- [30] I also refer to the case of *R. v. Dawe*, [2002] N.S.J. No. 504, a case to which I referred above our Court of Appeal, rendered by Madam Justice Hamilton. The offender had being sentenced to two and half years and appealed that sentence. She said:

The appellant has not satisfied us that the sentence is demonstrably unfit. To the contrary, the sentence, if anything, unduly lenient. Possession of cocaine for the purposes of trafficking typically results in sentences of two years or more, as the judge pointed out.

- [31] I am governed of course in sentencing by the provisions in s.718 and 718.1 and 718.2 of the Code. Although counsel are fully familiar with these provisions I feel I should highlight some aspects of them.

- [32] Section 718 requires in these circumstances to denounce the unlawful conduct of the offender. I must find a way to deter the offender or other persons from committing such offences. I must, if necessary, separate the offender from society. I have to consider some means of rehabilitating the offender if that is possible. I have to find some way of providing reparation for harm done to victims or to the community and finally to promote a sense of responsibility in the offender.
- [33] Section 718.1 is very simple and very straight forward. The sentence must be proportionate to the gravity of the offence and to the degree of responsibility of the offender.
- [34] I will not read s.718.2 in full, but I have to consider that the sentence should be similar to sentences imposed on similar offenders or some other offences committed in similar circumstances. I have given a range of those sentences already.
- [35] I finally must consider that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and I must consider all other available sanctions.
- [36] The *Controlled Drugs and Substances Act* in s.10 also gives me sentencing considerations and in particular subsection 2 of that section outlines the circumstances to take into consideration. It says that if a person is convicted of a designated substance offence the court imposing sentence on the person shall consider any relevant aggravating factors including the effect whether he was trafficking in a controlled substance such as cocaine and secondly whether he was previously convicted of a designated substance offence.
- [37] As is apparent from a review of a decision cited above by the Crown and Defence, personal and general deterrence are of great importance. What then is to be deterred? Recently a judge of this Court remarked to me that hard drugs are the greatest threat today of civilization as we know it. He pointed out to me that even the situation in Afghanistan is fed and fostered by the drug trade. Every day in our courts, our prisons and hospitals and in many other institutions we see the results of drug trafficking and especially the results of cocaine and other so-called hard drugs. Within the past few months I have seen coming before me poor people who are so addicted they have become physically ill to the point almost of death; so mentally ill that they have become uncontrollably paranoid; so desperate for the drugs that they have turned to any kind of crime to obtain money to feed their addictions. Frequently these young people turn to prostitution. In many cases such addiction is virtually a death sentence. That is what must be

- deterred. And the trafficking of cocaine is but a step in this terrible process. That step is what I must sentence the offender for. He possessed drugs which would give a few hours of euphoria and a lifetime of torment.
- [38] During submissions I was greatly attracted to the possibility of imposing a sentence of less than two years incarceration to be served conditionally and under electronic monitoring. At my request I have heard evidence concerning such monitoring and have been greatly impressed by this developing means of supervision of offenders. But I must return to a central question. Is this one of those rare cases where federal incarceration should not be imposed? If a conditional sentence were imposed in this case, the only way it could be effective would be to require that the offender continue to live in the same residence as his mother. In my view that would impose a burden on her which I consider to be unacceptable despite the fact that she would be willing to accept it. The offender has a record of drug offences and other lesser offences. That fact supports the Crown's position that federal incarceration is necessary.
- [39] The defence claims in mitigation that the accused became addicted to the use of drugs because of pain arising from an injury. The accused himself, however, testified he is not addicted to drugs. His counsel has urged that in the circumstances of this case I may conclude that he was so addicted, but the onus is on the offender to establish addiction and a causal connection of that addiction to the criminal activity. See for example *R. v. Andrews*, [2005] O.J. No. 5708 and various cases cited therein by Hill, J.
- [40] I am required to consider the maximum which would be five years for possession of marijuana and life imprisonment for cocaine.
- [41] Mr. Lively, would you please stand. I sentence you to 25 months for the possession of cocaine to be served concurrently with one month for possession of marijuana. I sincerely hope that it will be an institution where you can obtain further training, particularly in auto mechanics.
- [42] I will grant the firearms prohibition order and I will grant the forfeiture order.
- [43] On a very personal level, Mr. Lively, and to you Mrs. Lively, I feel very sorry, yet I am bound by the law. That is my duty. I wish you every success and hope you get along well. I hope you will be able to serve most, if not all, of your sentence at Springhill which is closer to your home and closer to your family.
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Gruchy, J.