IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Kutappan, 2008 NSSC 61

Date: 20080228
Docket: CR. No. 288576
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Haresh Kutappan

Sentencing Decision

Judge: The Honourable Justice Robert W. Wright

Heard: February 27 and 28, 2008 in Halifax, Nova Scotia

Oral Decision: February 28, 2008

Written Decision: March 3, 2008

Counsel: Crown - Tim McLaughlin
Defence - Brad Sarson

Wright J. (Orally)

[1] Mr. Haresh Kutappan is being sentenced today after having changed his plea to guilty on February 27, 2008 on four counts of possession of controlled drugs for the purposes of trafficking (namely, marijuana, psilocybin, cocaine and ecstasy respectively). That change of plea occurred after the offender's application for exclusion of evidence pursuant to ss. 8 and 24(2) of the Charter was dismissed at the outset of the trial.

[2] The facts surrounding the case can be briefly summarized as follows. Upon the execution of a CDSA warrant on October 5, 2007 (the validity of which was upheld in the court's ruling made yesterday), the offender was found in possession in his apartment of large quantities of controlled drugs. More specifically, he was found in possession of approximately 1100 grams of cannabis marijuana, 85 grams of powdered cocaine, 15 grams of psilocybin and 281 ecstasy pills. Along with those drugs, the accused was found to be in possession of a considerable supply of packaging materials, measuring devices, score sheets and other drug paraphernalia.

[3] The admission of this physical evidence was determinative of the outcome of the trial, resulting in the change of pleas being entered as aforesaid.

[4] Neither the Crown nor defence counsel sought a pre-sentence report to be prepared. The court is informed by counsel in the sentencing submissions made, however, that the offender is a 30 year old native of Malaysia who, after obtaining his high school equivalent in that country, came to Canada in or about 1997 on a

student visa. After furthering his studies in British Columbia, and eventually obtaining a computer science degree, he moved to Halifax where he took up various jobs, including employment in a call centre and in computer related work. Eventually, however, he became both jobless and homeless and began selling drugs to support himself. That quickly came to an end on October 4, 2007 when Mr. Kutappan was arrested, initially on an outstanding immigration arrest warrant issued in 2004 when Mr. Kutappan remained in Canada illegally after the expiration of his student visa. That arrest in his apartment lead to the police obtaining a CDSA telewarrant pursuant to which the drugs aforesaid were seized.

[5] The purpose and objectives of sentencing of drug offenders is set out in s. 10 of the **Controlled Drugs and Substances Act** in conjunction with the more general principles of sentencing codified in ss. 718, 718.1 and 718.2 of the Criminal Code. Under the former, the stated fundamental purpose in the sentencing of drug offenders is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community. Section 718 of the Code similarly sets out a number of sentencing objectives to be attained, namely, (a) denunciation, (b) deterrence (both specific and general), (c) separation of offenders from society where necessary, (d) rehabilitation, (e) reparation to victims and the community, (f) the promotion of a sense of responsibility in offenders.

[6] As I recently stated in the sentencing decision in *R. v. Lively* 2008 NSSC 45, the courts have repeatedly emphasized the need for deterrence as a sentencing

objective in drug trafficking cases in the pursuit of the ultimate goal of protection of the public (see, for example, *R. v. Steeves*, 2007 NSCA 130 and *R. v. Carter*, 2004 NSSC 256). Judges at all levels of court in this province have regularly spoken out about the scourge of cocaine upon our society, which need not be repeated at length here. Those who traffic in it can expect the denunciation of the court and the imposition of federal time as a deterrent.

[7] In stressing deterrence as the primary consideration in sentencing for drug trafficking offences, the Nova Scotia Court of Appeal recently affirmed in *R. v. Dawe* (2003) 210 N.S.R. (2d) 212 that a sentence of two years or more will typically result. As the Nova Scotia Court of Appeal also recently observed in *R. v. Jones* (2003) 214 N.S.R. (2d) 289 (at para. 8), sentences for possession of narcotics for the purpose of trafficking imposed by that court over the last 25 years have consistently been largely influenced by the quantity of drugs involved and the function or position of the offender in the drug operation.

[8] As noted by Justice Cacchione in *R. v. David*, 2004 NSSC 241, barring exceptional circumstances the usual sentence for trafficking in a substantial quantity of cocaine is generally in the range of two to five years incarceration. The appropriate sentence within that range is driven in large part by the nature and quantity of the drugs involved, with paramount consideration to be given to the sentencing objectives of denunciation and deterrence, both specific and general.

[9] The large quantities of controlled drugs involved in the present case indicates that Mr. Kutappan is in the category of a large retailer who carried on a

fairly sophisticated commercial enterprise with all the tools of the trade. The sophistication and scope of that enterprise, along with the nature of the drugs involved, are significant in assessing the quality of the criminal acts of the offender and here serve as an aggravating factor.

[10] The only mitigating factor to be taken into account is that the offender has no prior criminal record whatsoever. Nonetheless, the courts must continue to send the message that there will be serious penal consequences for those who choose to engage in such a nefarious trade which inflicts such widespread damage to our communities.

[11] All things considered, the Crown submits that the appropriate sentence in this case should fall toward the high end of the two to five year range above mentioned. Defence counsel, on the other hand, acknowledges that federal time is in order here, but suggests that the sentence ought to fall within the range of three to four years (with double credit for the time already spent on remand). More specifically, defence counsel asks for a sentence of three years incarceration, less double credit for the five months that the offender has already spent on remand.

[12] After consulting with an immigration officer in attendance today for this sentencing, defence counsel further informs the court that because of this conviction, once the offender has served his sentence, he will automatically be deported from the country. Moreover, because of the immigration situation, the court is informed that the offender will not be eligible for day parole but will only be released once he is eligible for full parole, and then immediately deported from

Canada. In the result, he is therefore certain to serve more time than what otherwise might be the case.

[13] Balancing the scope and sophistication of the offender's criminal enterprise against the absence of any prior criminal record, and the fact that he cannot be released from prison until eligible for full parole, I conclude that a fit and proper sentence to be imposed on Mr. Kutappan is a term of 4 years imprisonment on each of the four counts of possession of controlled substances for the purpose of trafficking, all to be served concurrently. He is also to be given double credit for the time already served on remand which means that his term of incarceration from this day forward is 38 months.

[14] The Crown also seeks as part of this sentencing a forfeiture of the cash seized from Mr. Kutappan at the time of his arrest in the amount of $11,150. Defence counsel makes no objection to this and the forfeiture of that cash amount is hereby ordered as well.

[15] The Crown further seeks a secondary DNA order under the recently amended s.487.051 of the Criminal Code as it relates to three counts in the indictment (excluding the first count given the quantity of marijuana involved). Where this is a secondary designated offence, the court is required under s. 487.051(3) to consider the criminal record of the offender, the nature of the offence and the circumstances surrounding its commission, along with the impact such an order would have on the person's privacy and security of the person. In my view, the latter interests trump the general interest of law enforcement where the court is

satisfied that Mr. Kutappan is certain to be deported from Canada as soon as he has served his sentence. I therefore decline to make such an order for a DNA sample to be taken.

[16] I will also await from Crown counsel the mandatory s. 109 prohibition order for a first time offender. Lastly, in view of the length of Mr. Kutappan's incarceration, to be followed by deportation, the victim surcharge payment will be waived.

J.