SUPREME COURT OF NOVA SCOTIA
Citation: R.v. Calder, 2011 NSSC 312

Date: 20110617
Docket: CRH 316393
Registry: Halifax

Between:

Her Majesty the Queen

v.

Anne Calder

SENTENCING

Judge:	The Honourable Justice Kevin Coady
Heard:	June 17, 2011, in Halifax, Nova Scotia
Sentencing:	June 17, 2011
Counsel:	Paul Adams, for the Federal Crown Craig M. Garson, QC, for the Defence

By the Court:

[1] On March 10, 2011 I convicted Anne Calder of three offences pursuant to the **Controlled Drugs and Substances Act**. The sentencing was adjourned until today to allow for a pre-sentence report and the filing of briefs.

[2] I want to thank Mr. Garson and Mr. Adams for their very in depth written and oral submissions. They have been extremely helpful in this very difficult case. When I first came to this job other judges would tell me that the most difficult and challenging aspect was the sentencing process and I concur that it is the hardest part of this job.

[3] On July 14, 2009 Anne Calder was a member of the Nova Scotia Barrister's Society carrying on as a sole practitioner primarily in the area of criminal defence.

[4] She regularly attended at the Central Nova Scotia Correctional Centre as a good number of her clients were on remand. She was known to the guards and staff as a result of her regular visits.

[5] The general rule is that no contact visits are allowed in a correctional centre. Family and friends and the general public must meet inmates through a glass screen. One of the reasons for this rule is to avoid drugs and other contraband from entering the facility.

[6] It is a well known fact that many drugs are smuggled into our jails right across this country. In fact it is my understanding that some of our jails have drug free units.

[7] The problems caused by drugs in jail is well known. The cause violence, threats to the safety of the guards and other inmates, intimidation and they destroy any effort at rehabilitation.

[8] Inmates have established many creative means to get drugs into correctional facilities and to conceal them once inside. One such method, relative to this case, is what is called “suitcasing” and this is the practice of creating prison packages that can be hidden in the human rectum.

[9] The three packages that support Anne Calder's convictions were "prison packages."

[10] Lawyers entering a jail enjoy a special privilege. I have been there many times myself. Lawyers are permitted contact visits with their clients and they are searched only in the most cursory way.

[11] It was during one of those contact visits that Ms. Calder got caught passing a prison package to her client, Mr. Izzard. This is a very significant aggravating factor.

[12] Anne Calder exploited the trust that was extended to lawyers, a trust that has been established over many years. She took these drugs to Mr. Izzard thinking that this trust would shield her from detection. This was an absolutely terrible error in judgment.

[13] It has ended her legal career and altered indelibly the life that she will have to live into the future. There is an old adage that says "the taller you rise the further you fall."

[14] I am confident that every person associated with this case feels sorrow and compassion towards Ms. Calder as a result of her long fall.

[15] There are a number of things that I said in my decision that I want to repeat here. At paragraph 31 I said:

> [31] The evidence satisfies me that Mr. Izzard was the engineer behind the delivery of the packages to Ms. Calder's residence/office. I do not have any concerns that Ms. Calder was a conventional trafficker in 2009. I accept her evidence that she has never been into drugs, either personally or commercially. I am also satisfied that the packages were delivered to Ms. Calder's mailbox without her knowledge.
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> [41] I accept that Ms. Calder suffered from these mental illnesses in 2009. I am satisfied that she experienced all the classic symptoms of depression as enumerated by Dr. Rosenberg. I accept that Ms. Calder's personality disorder interfered with her normal functioning. I accept that she was prone to go to excessive lengths to obtain the support and approval of others. I also accept Dr. Rosenberg's opinion that Ms. Calder was not fit to practice law in 2009.
>
> [45] On cross examination Dr. Rosenberg acknowledged that some people with depression and personality disorders can function well. He accepted that the video indicated a surreptitious transfer between Ms. Calder and Mr. Izzard. He testified that the act of avoiding attention could meant that they understood the consequences of what they were doing and were trying to hide it. Dr. Rosenberg admitted that he accepted the information provided to him by Ms. Calder and that if she is not truthful, then his opinion goes away. Consequently the weight of Dr. Rosenberg's opinion is dependent on Ms. Calder's credibility.

> [60] I find that given all the evidence surrounding the package, from the mailbox to Mr. Izzard, Ms. Calder knew that the package contained drugs. She likely did not know the kind of drugs but she knew it contained drugs. I do not accept that she believed it was tobacco.
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> [66] The next factor supporting my conclusion is found in Ms. Calder's cautioned statement. When Sgt. Kelly asked how she came into possession of the prison package, she made the following responses:
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> > "And when she opened it . . . I looked at it and said, no, don't want anything to do with that."
> >
> > "I went, ah, no, no, no, no, don't want to know about it, don't want to see it."
> >
> > "But I do remember going like, oh, no, no, no, no, I don't want anything to do with that and sort of pushed it aside."
>
> [67] Sgt. Kelly asked Ms. Calder whether she and Ms. Whitehead had any conversation about the packaging arriving at her residence. Ms. Calder replied:
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> > "The only conversation was when I went oh, no, no, no, no. I guess, essentially, I don't wanna be ... I don't wanna touch that. I don't wanna be involved with that."

[16] This last exchange between Sgt. Kelly and Ms. Calder at paragraph 66 and 67 spoke volumes to me about Ms. Calder's knowledge of what was in the "prison packages," in other words that it was more than tobacco.

[17] The Crown takes the position that the proper sentence is three to four years in a federal institution. They argue that deterrence and denunciation is paramount in these circumstances and that a conditional sentence is not appropriate.

[18] The Defence argues for the imposition of a conditional sentence, indicating that rehabilitation must be kept in mind and that there are “exceptional circumstances” at play.

[19] The principles of sentencing are codified in both the **Controlled Drugs and Substance Act** and the **Criminal Code of Canada**. It is noteworthy that the maximum sentence for trafficking in a schedule I substance is life imprisonment.

[20] Section 10 of the **Controlled Drugs and Substance Act** lists several factors that are to be considered as aggravating factors. I find that none apply in Ms. Calder’s case. Otherwise the **Criminal Code** provisions apply.

[21] Section 718 provides that the fundamental purpose of sentencing is to foster crime prevention, respect for the law and the maintenance of a just, peaceful and safe society.

[22] This section sets out the objectives that are necessary to achieve these purposes, that is:

·To denounce unlawful conduct

·To deter the offender and others (specific and general deterrence)

·To separate the offender from society where necessary

·Rehabilitation

·Accountability and responsibility

[23] I recognize that parliament enacted these provisions with conditional sentences in mind, as well as what we call conventional penal sentences, ie penitentiary sentences.

[24] *R. v. Proulx*, [2001] 1 S.C.R. 61 mandated that expanded use be made of restorative principles in sentencing because of the general failure of incarceration to rehabilitate offenders and to reintegrate them into society.

[25] Balancing that principle parliament limited conditional sentences to custody orders of less than two years.

[26] Section 718.1 requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender. This section requires me to balance the gravity of the offence and the moral blameworthiness of the offender. This principle does not proclude the imposition of a conditional sentence.

[27] Smuggling a “Schedule I” substance into a jail by a practicing lawyer calls for deterrence and denunciation first and foremost. Rehabilitation must be reflected in any sentencing but in this particular sentence it cannot be the main purpose and objective.

[28] The facts as I have found them clearly establish that the gravity of these offences are very grave and that the moral blameworthiness of Ms. Calder is substantial.

[29] Section 718.2 sets forth additional sentencing principles. It introduces the requirement to balance aggravating and mitigating factors in increasing or reducing a sentence. It lists several deemed aggravating factors and I find that most do not apply to Ms. Calder.

[30] Paragraph 718.2(a)(iii) does apply. It states that "evidence that the offender in committing the offence abused the position of trust or authority in relation to the victim." While a correctional centre may not be a conventional victim, I find that this is still a significant aggravating factor.

[31] Section 718.2 also directs that I must:

> 1) Apply similar sentences for similar offenders who commit similar offences in similar circumstances.
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> 2) Avoid unduly long and harsh sentences when applying consecutive sentences.
>
> 3) Not deprive an offender of liberty if less restrictive sanctions may be appropriate in the circumstances.

MITIGATING FACTORS

[32] Ms. Calder's greatest mitigator is found in her past, in everything she has accomplished in her life up to July 14, 2009. This includes the fact that she has never been in conflict with the law.

[33] That is not say that her life has been without challenges professionally and in terms of her own mental health. In fact, it would appear as if her mental health has led to the many set backs in her professional life.

[34] I must say, however, that Ms. Calder's mental health issues can be found in the history of many offenders that I've sentenced for these types of offences.

[35] Ms. Calder has excelled as a student and she has been able to earn several degrees while at the same time working full time. She has a history of solid employment in positions of authority; journalism, airline industry, law - both as a crown and a defence lawyer. She has owned her own home, she has travelled the world, and she has earned the respect of her peers and her friends and her family and she has avoided, as I have said, any kind of conflict with the law.

[36] A lot of good was achieved until 2009 but that large series of mitigating factors was tragically compromised by the events of July 14, 2009.

[37] The smuggling of drugs flew in the face of all her accomplishments. It certainly did not rob Ms. Calder of her past but it seriously blemished it.

[38] The reaction of Ms. Calder's supporters, as set forth in the pre-sentence report, highlight this point. Ms. Hogan stated she "would not have expected it in a million years."

[39] Ms. Malone stated she was "stunned" when she learned about Ms. Calder's ordeal.

[40] Another mitigating factor is the family and community support enjoyed by Ms. Calder. These relationships speak well for rehabilitation. This support is rooted firmly in Ms. Calder's past. The family and friends just cannot imagine Ms. Calder committing these offences. In fact they have accepted her version of the events of that day. They are standing by Ms. Calder through thick and thin. That is what family and friends do and that support is sufficiently solid to help her move on.

[41] Another mitigating factor is that Ms. Calder has no issues with alcohol or drugs and that is a very positive rehabilitative factor and not usually the case with many convicted of these offences.

[42] Another mitigating factor is Ms. Calder's mental state at the time of the offence. The totality of the evidence indicates that she was very vulnerable in the summer of 2009. The comments in the pre-sentence report of Dr. O'Neill confirm this. Dr. O'Neill said "Ms. Calder has great difficulties setting boundaries or limits and has a lack of clarity into roles and responsibilities."

[43] Dr. O'Neill noted that Ms. Calder "has high moral and ethnical standards but has difficulty with how she deals with it."

[44] Betty Calder stated that she sometimes went too far in helping people. While I do accept that Ms. Calder was in a vulnerable state at the time of the offence, this does not detract from my finding that she knew what she was doing and she knew that it was wrong.

[45] Another mitigating factor is the fact that Ms. Calder was not trafficking for any kind of material gain, only for her own personal psychological gain.

[46] Another significant mitigating factor is the cost of these offences and the convictions on her future. She has lost her legal career, she has lost all of her savings in defending herself, she is unable to find work, and maybe she will lose her home. These are punishments that started before conviction and will likely continue into the future.

[47] I accept that these punishments are severe and I understand from Ms. Calder's comments that they are real.

AGGRAVATING FACTORS

[48] The aggravating factors may number less than the mitigating factors but cast a large dark cloud over all the mitigating factors.

[49] Ms. Calder was a practicing lawyer who used her position of trust to smuggle a Schedule I narcotic to a client housed in a correctional facility. That says it all.

[50] It brings into focus the ultimate question on this sentencing hearing. That question is whether the principles of sentencing require a penitentiary term or a community based sentence.

[51] A starting point is that parliament has recognized the seriousness of Schedule I narcotics by allowing for a penalty up to life imprisonment. Related to that is the fact that this drug is very powerful and its impact on users is most always devastating.

[52] Another factor is that dilaudid is comparable to crack cocaine and oxycontin. Our Court of Appeal has consistently stated that even the sale of small amounts on the street require a sentence of two years plus, out of the range of conditional sentences.

[53] In fact in *R. v. Robbins*, [1993] N.S.J. No. 152, Chief Justice Clarke stated at paragraph 1:

> The position of this court, repeated in many of our decisions since Byers, is that there are no exceptional circumstances where cocaine is involved. We are persuaded that general deterrence must be prominently addressed if the public is

> to be protected from the nefarious trade that has developed in this drug that is so crippling to our society."

[54] I have not found that this position has softened over the past 15 years. If anything it has gone the other way. The fact that Ms. Calder was a lawyer, and the smuggling was into a jail, does nothing to ameliorate that position.

[55] As recently as 2009, the Court of Appeal in *R. v. Knickle*, 2009 NSCA 59 stated as follows:

> "Numerous other sentencing decisions from this Court repeatedly and consistently emphasized that persons involved in trafficking in cocaine will be subject to sentences of incarceration. This has been absolutely clear since the very first case heard by this court involving trafficking in cocaine."

[56] Our Appeal Court has continued to state that there are no exceptional circumstances when it comes to cocaine and I would say the same applies to diluadid.

[57] Any effort to distinguish between cocaine and dilaudid in these circumstances would be fruitless. They are both substances that cause much

devastation in the community and they are highly addictive. They also spurn great violence in our community.

[58] In the text "Sentencing Drug Offenders" the author stated at page 1-74:

> "A particularly serious form of drug trafficking is the smuggling and distribution of controlled substances into a correctional facility. Smuggling drugs into a correctional institution can create a potential hazard for inmates and staff in the facility and it can fuel the growth of the drug economy within the institution. Some courts have even suggested that one of the causes of violence in prison is the presence of drugs. For those reasons, courts have usually approached sentencing cases which involve smuggling drugs into correctional facilities with a focus on deterrence and denunciation and treated the circumstances as an aggravating feature on sentence.

[59] I have read the case of *R. v. Li*, [2004] O.J. No. 6269 (Ont. S.C.J.) involving a defence lawyer bringing marijuana and heroin into the Don Jail in large quantities. He received a sentence of four years and counsel have addressed that in their submissions today.

[60] The Court described the facts of that case as follows:

> 4 The facts as I found them were as follows: Mr. Li is a lawyer, a criminal lawyer, a member of the defence bar in Toronto. On November 21st, 2001, he attended at the Don Jail to meet with an inmate. The inmate and Mr. Li were placed in an interview room at the jail. Mr. Li and the inmate were observed by a prison guard with their hands touching underneath the table. It appeared to that

> guard that something passed from Mr. Li to the inmate. After the interview, the inmate was strip-searched and found attached to his leg by an elastic band was a package of Players tobacco in its cellophane wrap apparently unopened.

[61] The circumstances of the offender, Mr. Li, were described as follows at paragraph 8:

> 8 There are obviously many favourable and mitigating aspects or circumstances in Mr. Li's favour: His age. He is first time offender. He has a good background. He is well educated. He has the support of his family. He has the support of many friends and colleagues all of whom speak very favourably of him. He has been described as dedicated and committed. He gave advice and offered assistance freely. He was generous, contributing greatly to the well-being of the Chinese community, engaged in volunteer activities in his community, and this occurrence is inconsistent with his background. He has been helpful to neighbours and strangers. He is intelligent, well read, and the other aspects that I have already mentioned.

[62] It is very obvious that Justice Caputo did not displace deterrence and denunciation as a result of those exceptional circumstances.

[63] On the issue of trust in the case of *Li*, *supra*, the following appears at paragraph 7-8:

> Lastly, there is the very serious aggravating factor and that is Mr. Li using his position of trust as a barrister and solicitor to facilitate this offence. But for his privileged status, Mr. Li would never have been able to commit this crime and that status in many other respects made Mr. Li a privileged member of our

> society, a member of an honourable profession which allowed him to earn a very good living, help others, and realize his dreams.

[64] There is another aspect at play in this sentencing hearing and that relates to the public's perception that when lawyers commit crimes they pay the same price as other offenders.

[65] The principles involved in the sentencing of lawyers who have committed crimes in the course of their legal practice was stated by Justice Bastarache in *R. v. Bunn,* [2000] 1 S.C.R. 183 at paragraphs 33 and 34:

> "It is well established that the focus of the sanction for criminal breach of trust is denunciation and general deterrence. In the past this has required that, absent exceptional circumstances, lawyers convicted of criminal breach of trust have been sentenced to jail. This emphasis on denunciation and general deterrence is, for a number of reasons, particularly important when courts punish lawyers who have committed criminal breach of trust. First, the criminal dishonesty of lawyers has profound effects on the public's ability to conduct business that affect people far beyond the victims of the particular crime. Second, as officers of the court, lawyers are entrusted with heightened duties, the breach of which brings the administration of justice into disrepute. Thirdly, judges are drawn from the legal profession and there is a duty of ensure public confidence in the pool from which members of the bench are selected.
>
> Finally, judges must be particularly scrupulous in sentencing lawyers in a manner that dispels any apprehension of bias. A lawyer should receive, and be seen to receive, the same treatment as any other person convicted of a similar crime. While they are not to be singled out for harsher penalties than others convicted in comparable circumstances, any perception that a lawyer might receive more lenient consideration by the Courts must be guarded against."

[66] There is another quote from the Newfoundland Court of Appeal in *R. v. Sweezey*, [1987] N.J. No. 295 where the Newfoundland Court of Appeal approved the trial judge's statement that:

> "The Canadian justice system relies on the honesty and integrity of counsel who practice within it. To that end, every lawyer is made an officer of the Courts in which he will practice...
>
> In dealing with criminal behaviour of this kind, factors of deterrence and protection of the public must take precedence over consideration of rehabilitation and reform, all of which call for an adequate custodial sentence."

[67] The Defence has requested a conditional sentence based on exceptional circumstances. I accept that a conditional sentence addresses both punitive and rehabilitative objectives.

[68] I also accept that trafficking Schedule I substances and possession of same for the purpose of trafficking are not precluded from conditional sentences.

[69] *R. v. Proulx*, supra, establishes a two step process in deciding whether to impose a conditional sentence.

[70] That case also dictates that I not proceed by way of a “rigid” two step process where I fix the length and then decide whether to impose a conditional sentence.

[71] It tells me that at the first step I consider is whether to exclude the possibility of a penitentiary term or a non-custodial term.

[72] In answering that first question I need only consider the fundamental purpose and principles of sentencing to the extent necessary to narrow the range of sentence.

[73] There is no suggestion before me that these convictions call for a non-custodial sentence. The circumstances of the offence and the circumstances of the offender dictate otherwise.

[74] The next question is whether I can exclude a penitentiary sentence. If I conclude that a sentence under two years is within the range then I can go on to consider section 742.1 of the **Criminal Code of Canada**.

[75] If I conclude that a sentence above two years is required then that brings to an end any consideration of a conditional sentence.

[76] Unfortunately for Ms. Calder, I must conclude that these convictions call for a sentence in excess of two years. I find that the range is two at the lowest and four at the highest.

[77] All the cases stress that denunciation and deterrence must be paramount. *R. v. Li, supra*, is a case that is similar in many ways and that called for a four year sentence.

[78] The prosecution in Nova Scotia of cases like *R. v. Knickle* clearly articulate that trafficking in these types of drugs requires at least two years and that remains the case even when there are exceptional circumstances.

[79] Ms. Calder's case is so much more serious than the typical street transaction because of the trust factor and the fact the correctional centre was involved. That

is exacerbated by the administration of justice factor ie maintaining the confidence of the public by guarding against any impression that we take care of our own.

[80] I do feel that Ms. Calder should receive some credit for the mitigating factors that I canvassed earlier in this decision. Especially the fact that she has lost so much.

[81] On Count #1 - Trafficking in hydromorphone - I sentence Ms. Calder to 30 months.

[82] On Count #2 - Possession for the purpose trafficking, hydromorphone - I sentence Ms. Calder to 30 months concurrent to count #1.

[83] On Count #3 - Possession for the purpose of trafficking, marihuana - I sentence Ms. Calder to 3 months concurrent to count #1.

[84] Given Ms. Calder's circumstances I see no merit in following the 30 months with a period of probation.

[85] I will order a weapons prohibition for a period of 10 years.

J.