

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Carvery*, 2012 NSSC 49

Date: 20120118

Docket: CRH 343275

Registry: Halifax

Between:

Her Majesty the Queen

v.

Tirrell Shane Carvery

Judge:

The Honourable Justice M. Heather Robertson

Heard:

January 18, 2012, in Halifax, Nova Scotia

**Written Release
of Decision:**

February 16, 2012 (**Sentencing - January 18, 2012**)

Counsel:

Shaun O'Leary, for the Crown
Lee Seshagiri, for the Accused

Robertson J.: (Orally)

[1] This is the sentencing of Tirrell Shane Carvery who has been found guilty of trafficking in cocaine and possession of cocaine for the purposes of trafficking contrary to sections 5(1) and 5(2) of the *Controlled Drugs and Substances Act*.

[2] This trial took place in Halifax over five days during June and September 2011. The facts surrounding the case were set out in my oral decision of September 15, 2011, which will be released in written form dated January 18, 2012, which is today's date.

[3] It would be correct to characterize Mr. Carvery as a petty retailer. The cocaine in question weighed 4.41 grams and was packaged as 22 individually wrapped pieces of cocaine, with a street value of \$450. This would place him within the *Fifield* ([1978] 25 N.S.R. (2d) 407) range.

[4] The Crown suggests that the appropriate sentence is between two and a half and three years incarceration in a federal penitentiary. Defence counsel say the appropriate range is between two and two and one-half years incarceration. Defence counsel urges the court to consider the onerous house provisions of Mr. Carvery's recognizance of April 4, 2011.

[5] Mr. Carvery was arrested on April 8, 2010, although he breached two earlier recognizances, on the latest recognizance dated April 4, 2011, he has been in full compliance and virtually under house for two hundred and twenty-eight days.

[6] I am entitled to consider these stringent conditions. I have reviewed a myriad of cases: *R. v. Hickey*, 2011 NSSC 186; *R. v. Leblanc*, 2010 NSSC 347; *R. v. Knockwood*, 2009 NSCA 98; *R. v. Downes*, [2006] 205 CCC (3d) 488; and *R. v. Voeller*, 2008 NSCA 37. As stated in this latter case the pre-trial bail conditions must not be treated as "credit" in determining a fixed sentence, but rather something "to put in the mix" along with other potential mitigating factors.

[7] I have also reviewed the *Irvine* case (*R. v. Irvine*, 2008 MBCA 34) in particular the references to the treatment of house arrest in paras. 30 and 31, "Bail is not jail."

[8] However, it depends on the particular conditions and exemptions that may affect the life of the accused.

[9] I note that Mr. Carvery is unlike *Knockwood, supra.*, where there was an employment exception and *Irvine, supra.*, where the offender benefited from “flexible and extensive” exceptions. Mr. Carvery actually did not have the benefit of any exceptions to his house arrest except that of a medical emergency. He has also checked in with Halifax police during his recognizance. Exhibit No. 1 to the sentencing is an agreed statement of facts in relation to the time he spent on his house arrest and its effect on his life.

[10] Therefore, I am inclined to consider this two hundred and twenty-eight days of house arrest by placing it in the mix in crafting this sentence. Mr. Carvery was indeed personally responsible for his heightened restrictions on his recognizance. It appears that finally he has come to understand the seriousness of the situation and has become compliant with court orders.

The issue of prior offences

[11] I noticed that in the pre-sentence report indicated that there was no adult prior criminal record. The pre-sentence report was otherwise I thought unremarkable.

[12] Mr. Carvery is twenty-three years of age.

[13] The Crown has however tendered his record Exhibit 2 today revealing a prior conviction for a 5(2) *Controlled Drug and Substance Act* offence in trafficking as a youth in cocaine. This occurred on February 13, 2006. The Crown introduces this record pursuant to s. 119(9) of the *Youth Criminal Justice Act*.

[14] I have considered the purposes and objectives of sentencing as set out in s. 10 of the *Controlled Drug and Substances Act* and the general principles of sentencing codified in ss. 718, 718.1 and 718.2 of the *Criminal Code of Canada*.

[15] Under s. 10 of the *Controlled Drug and Substances Act* the fundamental purpose of sentencing drug offenders is to contribute to the respect of the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation and treatment of offenders where necessary. I am also mindful of the

harm done to victims and the community as a result of trafficking in cocaine. It is a serious offence for which denunciation and deterrence is so often addressed as the primary focus of the courts in attempting to protect the public from this awful trade.

[16] Section 718 of the *Code* similarly reminds me that there are a number of other sentencing objectives including the separation of offenders from the society where necessary, rehabilitation, reparation to victims and the community and the promotion of a sense of responsibility in the offender.

[17] Lastly, I have considered all the cases where sentencing is in the low to mid range for low level trafficking offences and these include, I am not going to review each of the conclusions of these cases, but this includes those cases that have been recited by counsel: *R. v. Sampson*, 2009 NSSC 165; *R. v. Talbot*, [1999] N.S.J. No. 18; (1999) 176 N.S.R. (2d) 316 (S.C.); *R. v. Coombs*, 2005 NSSC 90; *R. v. Provo*, 2001 NSSC 189; *R. v. Glasgow*, 2007 NSSC 370; *R. v. Keizer*, 2003 NSSC 128; *R. v. Conway*, 2009 NSCA 95; *R. v. Dunbar*, 2008 NSPC 57; *R. v. Steeves*, 2007 NSCA 130; *R. v. L.C.*, 2011 NSPC 35; *R. v. Tolliver*, 2011 NSSC 54; *R. v. Pitts*, 2011 NSPC 60; *R. v. Lively*, 2006 NSSC 274; *R. v. Tokic*, 2002 NSSC 54; *R. v. Gray*, 2001 NSSC 195; *R. v. Sparks*, 2005 NSSC 175; and *R. v. Knickle*, 2009 NSCA 59.

[18] While I consider Mr. Carvery's prior conviction as a youth as an aggravating factor, I also consider the two hundred and twenty-eight days of house arrest to be mitigating. I will say I have considered and rejected any possibility of a non custodial sentence for this offence.

[19] In the circumstances I believe a fit and a proper sentence is two years and I therefore sentence you Mr. Carver to serve a two-year sentence concurrent on both counts in a federal penitentiary.

[20] I would hope that you could conclude your high school education as you have expressed a wish to do so and then prepare yourself for proper employment. You are at a crossroad in your life today. You are fortunate, you have the support of your family and I have observed that your father has been here with you every day during this trial and at every court appearance. Today you will be incarcerated, but you can determine a better future for yourself by taking advantage of more education and committing yourself to a future of employment. So, I hope

you succeed and I guess I can just say Mr. Carvery it is really time to grow up, this is the day.

[21] With respect to other matters that the Crown and defence counsel have both addressed I know the Crown will be seeking the s. 109 prohibition of weapons for a ten-year period, the Court will sign that order. The Court will also sign the DNA order as this is appropriate and a forfeiture order which will seize the drugs involved, the cash involved and the LG cell phone that was involved in this transaction. So I will complete those orders and sign the orders relating to Mr. Carvery's incarceration.

Justice M. Heather Robertson