SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Saldanha, 2018 NSSC 169

Date: 20180605
Docket: CRH 457952
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jason Andrew Saldanha

SENTENCING DECISION

Judge: The Honourable Justice Glen G. McDougall

Sentence Hearing: April 19, 2018

Oral Decision: June 5, 2018
Written Release: July 11, 2018

Counsel: Jeffrey Moors, for the Federal Crown
Joel Pink, for Mr. Saldanha

By the Court (Orally):

[1] The purpose for this sitting of the Court is to impose a just and proper sentence on Jason Andrew Saldanha who was originally charged with four counts under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (henceforth "*CDSA*").

[2] Two of those counts involved possession for the purpose of trafficking cocaine, contrary to s. 5(2) of the *CDSA*. The remaining two counts involved trafficking in cocaine, contrary to s. 5(1) of the *CDSA*.

[3] Mr. Saldanha initially pled "not guilty" to each count. On December 7, 2017, Mr. Saldanha appeared with his counsel, Mr. Joel Pink, Q.C., and changed his plea on counts 1 and 3 to "guilty".

[4] Count 1 deals with possession for the purpose of trafficking and count 3 is trafficking. As indicated previously, the illicit drug involved is cocaine. Cocaine is a controlled substance included in Schedule I of the *CDSA*. A person cannot legally buy, sell or possess cocaine without Government authorization. Mr. Saldanha lacked such authorization and having pleaded guilty to its possession for the purpose of trafficking and with trafficking in that substance he must now be held accountable for his unlawful acts.

[5] Previously the Crown indicated that no evidence would be offered in relation to counts 2 and 4. Defence counsel then moved to have these two charges dismissed. The motion was granted.

BACKGROUND FACTS:

[6] Crown counsel in his sentencing brief provided a summary of the facts that led to the charges and subsequent guilty pleas. They are brief. I will repeat them for purposes of todays' proceedings:

> **Facts**
>
> The Crown and defence are agreed that Mr. Saldanha was involved in trafficking cocaine on two dates: May 18, 2015, and September 23-24, 2015.

> *May 18, 2015*
>
> Mr. Saldanha sold one dime bag containing cocaine to an undercover police officer. The bag weighed .42 gms. The sale took place in the downtown are of Halifax, and was facilitated by another person.
>
> *September 23-24, 2015*
>
> Mr. Saldanha agreed to sell another undercover police officer "2", meaning two dime bags of cocaine. The price to be paid was set at $160. The two arranged to meet in the lobby of 1646 Barrington Street. This was a building where Mr. Saldanha was renting an apartment.
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> At approximately 11:40pm on September 23, 2015, police followed the undercover officer to the lobby, and saw Mr. Saldanha there. They arrested him.
>
> A search incidental to the arrest disclosed two dime bags of cocaine, weighing .41 gms and .45 gms (weighed out of the bag). Mr. Saldanha had two cell phones on his person.
>
> Immediately, the police executed a search warrant in the seventh floor apartment that Mr. Saldanha rented. They located a number of other young men in the apartment and drugs in various rooms.
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> Mr. Saldanha had a bedroom in the apartment, and in that bedroom, police located 7 baggies of cocaine in a shaving bag. The weights of those bags were: .4 gms, .7 gms, .7 gms, .8 gms, .8 gms, .8 gms., .7gms. The total weight was 4.9 gms.

[7] In that bedroom police also found a wallet that contained $85.00 and two dime bags of cocaine weighing .8 gms. and .4 gms, respectively.

[8] Defence counsel earlier agreed with this summary of the facts.

[9] Crown counsel maintains that sentencing in cases involving trafficking and possession for the purpose of trafficking in cocaine emphasize general deterrence and denunciation. As a result, Crown counsel has recommended a custodial sentence. In doing so, Mr. Moors has pointed to a number of cases from the Nova Scotia Court of Appeal that send a strong message of deterrence and denunciation.

[10] These cases include *R. v. Knickle*, 2009 NSCA 59, in which Roscoe, J.A. laid out a long list of cases from various levels of court in this Province that resulted in sentences of two years or more in a Federal penitentiary.

[11] There are exceptions, however. One such case can be found in *R. v. Jamieson*, 2011 NSCA 122, in which Sanders, J.A., in allowing the appeal, and varying the sentence from two years to two years less a day, stated, at para 38:

> [38] Before concluding these reasons let me be clear. This case is truly exceptional for the single reason that Mr. Jamieson's sentence denied him an

> avenue of appeal from his deportation, which was, for the reasons I have outlined, an unintended result of great significance. It created a situation which called for the exercise of our judicial authority to intervene so as to avoid consequences that would be patently unjust. Nothing in these reasons should be taken as signalling a softening of this Court's view towards the seriousness of trafficking in cocaine and the severity of sentences that will be imposed upon conviction. Such an approach has been consistently taken by the courts in this province for almost 35 years. See for example the inventory of cases chronicled by Roscoe, J.A. in **R. v. Knickle**, 2009 NSCA 59. Persons who seek to profit by trafficking in cocaine, or possessing it for the purpose of trafficking, will upon conviction, be virtually guaranteed a prison term in a federal penitentiary.

[12] In 2013, the Nova Scotia Court of Appeal, in *R. v. Scott*, 2013 NSCA 28, was asked to consider whether a conditional sentence order ("CSO") was an adequate sentence for possession for the purpose of trafficking. At that time CSOs were available for offences of the kind that are before this Court. In writing the decision in *Scott*, Beveridge, J.A., for the majority approved the CSO that had been imposed by the trial judge. In regard to the requirement that there be "exceptional circumstances", he wrote; at para. 53, that:

> [53] There is no question that this Court has long stressed the need to emphasize deterrence and denunciation for those that traffic in cocaine, and depending on the circumstances of the offence and of the offender, may well mean that a sentence of federal incarceration is called for. With all due respect, what I cannot accept is that these or any other cases make a federal prison term mandatory - to be avoided only if an offender can demonstrate "exceptional circumstances".

[13] Parliament later changed the **Criminal Code** to remove the possibility of allowing the courts to impose a conditional sentence for trafficking and possession for the purpose of trafficking in Schedule I drugs such as cocaine.

[14] Saunders, J.A., in *Scott, supra*, wrote a dissenting opinion. At para. 91 he clearly stated:

> [91] The blunt message which should be clearly understood by all those who seek to profit from the sale of cocaine, or who possess cocaine with the intention of selling it, is that such persons will, upon conviction, be guaranteed incarceration in a federal penitentiary unless exceptional circumstances can be shown to exist. Such a case will be rare.

[15] Justice Saunders went on to state, at para. 93, the following:

> [93] By requiring cocaine traffickers to establish "exceptional circumstances" in order to avoid a federal prison term, we have not, as suggested by the

> respondent's counsel in argument, trespassed on Parliament's domain by presuming to legislate mandatory minimum sentences. What we have said, in a host of cases, is that for certain crimes, the jurisprudence in this Province has established a well-recognized term of imprisonment as a benchmark or starting point which may be adjusted up or down to reflect both the seriousness of the crime, as well as account for aggravating or mitigating factors. In the case of trafficking in certain drugs such as cocaine or heroin, this Court has made it crystal clear that one will require exceptional circumstances before anything less than imprisonment in a federal institution would ever be warranted.

[16] In maintaining that exceptional circumstances must exist, Justice Saunders offered by way of examples, what might and might not be considered "exceptional". At para. 108, he wrote:

> [108] It may assist to offer some examples of what, in my opinion, would or would not qualify. Having a job; having a girlfriend; having a girlfriend who has your baby; avoiding arrest on other offences up to the time of this conviction; abiding by a curfew; being an alcoholic or addict and joining AA; having a temper and seeking anger management; or having a supportive family are hardly "exceptional". On the other hand, let me suggest some examples of the kinds of things which, to my mind at least, might persuade a judge to conclude that the offender has, on the evidence, shown that his or her circumstances truly qualify as being "exceptional". This list of course is not exhaustive but simply illustrative. Examples might include:
>
> * The offence is a single one-time event, completely out of character and an aberration in the offender's life, and for which the offender has taken great pains to make amends;

As an aside, that, I think, very much describes the situation that is before this Court.

> * The offence is triggered by some significant trauma, crisis or personal hardship;
>
> * The offender has taken significant steps to reform his or her behaviour and made remarkable progress in his or her own rehabilitation, thereby managing by all accounts to turn their life around (similar to *Bratzer*);

Again, something I think that is very much characteristic of the case that is before this Court.

> * The grave hardship that lengthy imprisonment would mean to the offender and/or his or her dependants on account of their particular situation;
>
> * The offender's deteriorating health because of a serious illness which could not be adequately treated in the institution.

> Whether such circumstances are established by the evidence in such a way as to persuade the sentencing judge that they qualify as being truly "exceptional circumstances" is something to be left to the discretion of the individual judge hearing the case.

[17] Crown counsel also pointed out a 2015 decision of the Nova Scotia Court of Appeal in which Scanlan, J.A., for a unanimous panel, at para. 43, in *R. v. Oickle*, 2015 NSCA 87, stated this:

> [43] When the **CDSA** was amended with the implementation of the **Safe Streets and Communities Act** in November, 2012, it removed conditional sentences as an available option in relation to the s. 5(2) **CDSA** offences. In doing so Parliament clearly intended that prison sentences for these offences should not be served within the community. Nothing in that legislation suggests that a reasonable alternative envisaged by Parliament was to have the common law of sentencing altered by imposing even more lenient sentences through the use of a suspended sentence and probation. The legislation did not alter the common law in terms of duration of sentences. It simply eliminated the option of the sentence being served in the community.

[18] These cases serve to establish a range of sentences in cases involving trafficking and possession for the purpose of trafficking in Schedule I drugs. They do not, however, unequivocally set a minimum sentence. It is for Parliament to decide if there should be a mandatory minimum for such offences. All, of course, in accord with the *Canadian Charter of Rights and Freedoms*.

[19] What I take from these cases is that, absent certain exceptional circumstances which will depend on the circumstances of the offence and the offender, there will normally but not always be a sentence of incarceration in a Federal penitentiary. I do not interpret exceptional circumstances as meaning extraordinary circumstances. I take “exceptional” to mean something beyond simply “normal”.

[20] Counsel for Mr. Saldanha has provided a number of cases from the Provincial Court of Nova Scotia that resulted in suspended sentences with three years probation that included a host of conditions.

[21] In *R. v. Rushton*, 2017 NSPC 2, the Honourable Judge Elizabeth A. Buckle of the Nova Scotia Provincial Court, after indicating that the Federal Crown was seeking a custodial sentence of two years, whereas defence counsel was recommending a suspended sentence with probation, or, in the alternative, a period of custody to be served intermittently, followed by a period of probation, set out her task as:

> 6 In the broadest sense, my task is to determine a fit and proper sentence for Mr. Rushton. Given the principles and purposes of sentencing and the guidance provided by our Court of Appeal in sentencing those who traffic or possess Schedule I substances for the purpose of trafficking, I have to consider the following specific issues:
>
> * Is this one of those "exceptional", "rare" or "unusual" cases where the principles of sentencing can be adequately addressed by a sentence less than a period of custody in a penitentiary; and,
>
> * If so, are those principles best addressed through a shorter period of incarceration in a provincial institution or through suspending the passing of sentence and placing Mr. Rushton on probation?

[22] After setting out the circumstances of the offence and the particular circumstances of the offender, Judge Buckle went on to talk about the principles of sentencing in ss. 718, 718.1 and 718.2 of the *Criminal Code*. She also pointed out that s. 10 of the *CDSA* incorporates these principles and specifically requires that a sentence encourage treatment of offenders in appropriate circumstances (see para. 62). At para. 63, Judge Buckle stated that:

> [63] The overarching goal of long-term protection of the public informs how I balance the principles and purposes of sentencing and apply them to the facts to arrive at a fit sentence. The common law provides me with guidance as to how I should interpret and balance these principles and how they should be applied to different categories of offences. However, the best means of addressing the principles and attaining the ultimate objective will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is a delicate and inherently individualized process (*R. v. Lacasse*, 2015 SCC 64 at para. 1 and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 91-92).

[23] While recognizing that our Court of Appeal has repeatedly stated that denunciation and general deterrence must be the primary focus when sentencing those who traffic in Schedule I drugs (para. 64), Judge Buckle went on to point out that rehabilitation continues to be a laudable objective especially in cases involving young, first-time offenders such as is the case now before this Court (paras 65-68). Judge Buckle also pointed out that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (para. 69).

[24] In discussing the need for parity in sentencing, Judge Buckle, at para 81 stated:

> [81] The Court, however, has never established that a federal penitentiary term is mandatory and has recognized that in some circumstances the principles of sentencing can be otherwise satisfied. In those cases, shorter periods of custody

> served in a provincial institution or in the community under a conditional sentence order, when those were available, have been accepted. (See for example: *R. v. Scott (supra)*; and, *R. v. Howell*, 2013 NSCA 67.)

[25] Based on her review of the case law both in Nova Scotia and elsewhere in Canada, Judge Buckle, at paras 85 and 86 noted:

> [85] Based on the majority decision in *Scott (supra)* and its interpretation of the previous cases, I would say that the range in Nova Scotia for cocaine trafficking includes incarceration in a penitentiary and incarceration in a provincial institution or a lengthy conditional sentence order (when that was an available sentence). The lower end of the range has generally been used in cases involving one or more of the following: addictions; youth; limited or no prior record; relatively small amount of the drug; some hope of rehabilitation; and, absence of aggravating factors.
>
> [86] As was noted in *Oickle (supra)*, the range across Canada is broader and includes, in some provinces, intermittent sentences or suspended sentences with probation (see for example: *R. v. Peters*, 2015 MBCA 119; *R. v. McGill*, 2016 ONCJ 138; *R. v. Maynard*, 2016 YKTC 51; *R. v. Voong*, 2015 BCCA 285; *R. v. Carrillo*, 2015 BCCA 192; *R. v. Fergusson*, 2014 BCCA 347; *R. v. Arcand*, 2014 SKPC 12; and, *R. v. Yanke*, 2014 ABPC 88).

[26] Finally, at para 88 of *Rushton, supra*, Judge Buckle stated:

> [88] Sentencing judges are permitted to go outside the established range for a given offence as long as the sentence imposed is a lawful sentence that adequately reflects the principles and purposes of sentencing (*Nasogaluak (supra)*, at para. 44). This was recently affirmed by the Supreme Court of Canada in *Lacasse (supra)*, where Wagner, J., writing for the majority, said as follows:
>
> > 58 There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. ...

[27] To me, the decision made by Judge Buckle in *Rushton, supra*, is as thorough and as comprehensive as any decision I have ever read. It reflects sound reasoning and profound good judgment by a learned trial judge who, for many years prior to

her appointment to the Nova Scotia Provincial Court, was one of the pre-eminent criminal lawyers in this Province. For many years Judge Buckle has contributed to the development and education of lawyers and judges alike throughout Canada as a member of the faculty of the National Criminal Law Program. All of her talents along with her humanity and common sense are on display in the *Rushton* decision.

[28] In addition to *Rushton*, defence counsel also referred to the decision of the Honourable Chief Judge Pamela Williams of the Nova Scotia Provincial Court in *R. v. Casey*, 2017 NSPC 55, and the decision of the Honourable Provincial Court Judge Amy Sakalauskas in *R. v. Christmas*, 2017 NSPC 48. In each of these cases, the sentence for trafficking and possession for the purpose of trafficking, respectively, resulted in a suspended sentence along with three years probation. I am grateful to both Crown counsel, Mr. Moors and Defence counsel, Mr. Pink, Q.C. for providing me these cases.

[29] I will now move on to look at both the circumstances of the offence and the offender, Mr. Jason Saldanha. I have already referred to the facts that underpin the guilty pleas entered by the accused thus avoiding the need for a trial.

[30] Although the nature of the drug involved is serious, it was being sold in a powdered form rather than the more addictive "crack" derivative.

[31] The amount of drugs sold or found in Mr. Saldanha's possession was relatively small in quantity. Mr. Saldanha was a small operator or as defence counsel referred to him "a petty retailer".

[32] Mr. Saldanha was more of a delivery person than a trafficker. He appears to have been catering more to his own personal consumption habit than an active supplier motivated by profit.

[33] Mr. Saldanha had only been introduced to the party scene a brief few months before he was charged. Up until then he was a clean-cut, clean-living, God-fearing respectful young man. He was attending university and excelling in his academic pursuits.

[34] He comes from a loving and caring family. The entire family is closely affiliated with their church and the community in general. Like his parents, Jason Saldanha shared his many talents with those who were less fortunate and in need.

[35] Since being charged in September, 2015 Mr. Saldanha has had to abide by various and onerous conditions of release. These conditions were changed from time to time to allow Mr. Saldanha to continue his university studies and

subsequent to his graduation from the Engineering Program at Dalhousie University, to pursue a career.

[36] At the time of graduating, Mr. Saldanha was awarded the Albert Swan Award "in recognition of (his) contribution to the promotion of class activities and spirit". This was voted on by his fellow classmates of the Class of 2017. Clearly, Mr. Saldanha is a leader and is recognized by his peers as a caring and helpful individual.

[37] Mr. Saldanha was able to achieve academic success because he decided to stop using drugs. He has done this with the help and support of his family and his many friends and admirers.

[38] He has continued his abstinence from drugs and has successfully launched a career where he continues to excel as a leader and motivator in a supervisory capacity.

[39] Mr. Saldanha's supervisor, Mr. Arnold San Juan, travelled from Toronto to testify on behalf of his young protégé. By all accounts, Mr. San Juan described Mr. Saldanha as excellent worker, a dedicated employee, a remarkable supervisor, and an individual who has tremendous potential if given the opportunity.

[40] The Court also heard from Jason's father, Mr. Jeevan Saldanha. It is apparent from listening to Jason's father just how supportive he and his wife are of their children. There can be no doubt that Jason will continue to be the beneficiary of his family's love. They will always be there for him. Jason, you are a very lucky young man to have the parents you have been blessed with. If given the opportunity, I know you will not deviate from the path you are now on. The one that you were previously on save for the few short months when you veered off course in a misguided effort to become a part of the so-called in-crowd. I believe you have learned from that mistake.

[41] Certainly, everything you have accomplished since you were charged in 2015 proves that. You have managed to turn things around. If you maintain that focus you will continue to excel. You will prove to yourself that you do not have to be the life of the party to be accepted. You are already accepted for who you are, you are accepted because you care for others. You are accepted because you are who you are. Caring for others starts with knowing that you have something worthwhile to offer. Your family, especially your parents, see that in you. Your engineering classmates saw that in you and so do the people you now work with.

If I can be permitted to offer some advice, I would simply say "keep doing what you are doing".

[42] If you look back from time to time, do not dwell on the mistake that has brought you before me today. I am not suggesting you should ignore it or forget about it, you should learn from it and resolve never to do something like that ever again.

[43] You have done many more good things in your life, many more good things than bad. We all make mistakes, it is an inevitable consequence of living one's life. The challenge is in learning from those mistakes and trying harder to do better.

[44] Jason, I should also mention the over-whelming letters of support that have been filed all of which attest to your many good qualities and to your caring and compassionate nature. They come from such a broad assortment of people, Law school professors, former court administrators, parish priest, church leaders of other churches not of your own faith. They all attest to the fact that you come from a good family and that, like your parents, you have many, many good qualities that you are prepared to share with others who may be in need of your help.

[45] The pre-sentence report that was prepared, again, I think if the presentence report had me in it's sights it would not be nearly as favourable as the one that I read about you. It was certainly if not the best, one of the very best pre-sentence reports that I have every had the chance to read.

[46] I recall hearing from your good friend, Kiran Persaud, who testified here on your behalf. I also recall quite vividly hearing from your uncle, Dr. Stephen Pereira, who spoke again very, very glowingly of the type of person you are. He, like Mr. San Juan, travelled a considerable distance to speak on your behalf. Your uncle Steven impressed me with his keen observations and his assessment of your behaviour and the likely severe effects incarceration would have on your rehabilitation. I accept Dr. Pereira's opinion that sending you to prison even for a short period of time could set back, if not totally undo, the progress you have made in the past 2.5 years or so.

[47] As mentioned previously, you have had to abide by some rather significant restrictions on your freedom since you were first released on a recognizance. You have abided by those conditions.

[48] Mr. Saldanha, I have also had the benefit of hearing from you personally. I have had the benefit of reading on several occasions now the written statement that you had prepared explaining to me and giving me some insight into the type of man you are. A man I am very, very impressed with. Allow me to say how impressed I am with how you have learned from your mistake. Involvement in the drug culture nearly always spells disaster. Clearly, you have avoided that outcome. By strength of character and with the tremendous support of your family and friends you have truly turned things around.

[49] Given the exceptional circumstances of this case I believe that the most appropriate resolution would not involve incarceration. The principles of sentencing can best be achieved by suspending sentence and ordering that you be placed on probation for three years. This sentence will run concurrently for each of the two offences for which you have pled guilty.

[50] While on probation you shall abide by the compulsory conditions of probation set out in s. 732.1(2)(a), (b) and (c) of the **Criminal Code**. You shall also be required to abide by the following additional conditions:

- Report to a probation officer within 3 days of today's date;
- Thereafter, when required by the probation order and in the manner directed by the probation order;
- Remain within the jurisdiction of the court until you get written permission from the probation officer to go outside the jurisdiction in order to resume work with your current employer in Ontario;
- Not possess or consume alcohol or other intoxicating substances;
- Not possess or consume a controlled substance as defined in the *CDSA* except in accordance with a physician's prescription or other form of legal authorization;
- Attend for, participate in, and complete any assessment, counselling or treatment as directed by probation including mental health counselling and substance abuse counselling;
- Submit to urinalysis or other screening to determine the presence of alcohol or drugs in your system;
- Not associate with or be in the company of any person known to you to have a **Criminal Code** record, *CDSA* record, or *Youth Criminal Justice Act* record, unless you have the written permission of your probation officer

to associate with such an individual or unless your association with any such individual is incidental to your attendance at employment or at a program of counselling or education which you are participating in and which your probation officer has recommended or permitted you to be involved in.

- Make all reasonable efforts to remain employed or to participate in any education program permitted by your probation officer;

- For the first 12 months of this probation order to abide by a curfew from 10 p.m. to 6 a.m. daily, seven days a week EXCEPT when dealing with a medical emergency or while at work and to prove compliance with this curfew condition by presenting yourself at the entrance of your residence should a peace officer attend there to check compliance and within 10 minutes of the police first attending at the residence.

[51] You are also required during the course of this three year probation period to perform up to 40 hours of community service which is to be approved by your probation officer. I would hope that some of that is involved with speaking with students about the perils of getting involved with drugs and urging anyone who may have an inclination or a desire to experiment with drugs to perhaps refrain from doing so.

[52] The requested ancillary orders, which include a mandatory victim fine surcharge at $200.00 per indictment count, (s. 109 firearm / weapons prohibition for 10 years; DNA sample and, forfeiture of the items seized at the time of your arrest) are also granted. You shall have six months to pay the mandatory victim fine surcharge.

McDougall, J.