SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Arsenault*, 2020 NSSC 9

Date: 20200106
Docket: CRH No. 479648
Registry: Halifax

Between:

Her Majesty the Queen

v.

Brandon Michael Adams, Donald Francis Arsenault,
Brandon Phillip Chahine and Chelsea Evelyn Nordin

Judge:	The Honourable Justice Darlene Jamieson
Heard:	January 6, 2020, in Halifax, Nova Scotia
Oral Decision:	January 6, 2020
Written Decision:	January 8, 2020
Counsel:	Karen Bailey, Crown Counsel Jennifer MacDonald, Defence Counsel (for Adams) Ian Hutchison, Defence Counsel (for Arsenault) Brittni Deveau, Defence Counsel (for Chahine) Mark Knox, Defence Counsel (for Nordin)

By the Court:

Introduction

[1] This is a decision with regard to the sentencing of Mr. Donald Francis Arsenault ("Mr. Arsenault"). I have heard from Ms. Bailey for the Crown and Mr. Hutchinson for Mr. Arsenault. Mr. Hutchinson confirmed on the record the Defence's agreement with the joint recommendation. Mr. Arsenault chose not to address the Court when invited to do so prior to my passing sentence.

[2] Mr. Arsenault was charged on a four-count Indictment and a trial was scheduled for January 6 to 10 , 2020. On November 21, 2019 Mr. Arsenault, entered a guilty plea to count one of the Indictment, which states:

> Donald Francis Arsenault … on or about the 7th day of September 2017, at or near Timberlea in the province of Nova Scotia, did unlawfully have in his possession, for the purpose of trafficking, in excess of 3 kg, cannabis (marihuana), a substance included in Schedule II of the *Controlled Drugs and Substances Act*, SC 1996, c 19 and did thereby commit an offence contrary to section 5(2) of the said *Act*. [2017-133508]

[3] Section 5 of the *Controlled Drugs and Substances Act*, SC 1996, c. 19 ("*CDSA*") states:

> **5 (1)** No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.
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> **(2)** No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.
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> **(3)** Every person who contravenes subsection (1) or (2)
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> **(a)** if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
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> **(i)** to a minimum punishment of imprisonment for a term of one year if
>
> **…**
>
> **(d)** the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or …

[4] In advance of this sentencing the Court received the following:

1. A Crown sentencing overview letter; and
2. A Defence sentencing overview letter

[5] The following exhibits were entered at the sentencing hearing:

Exhibit	Description
S-1	Criminal Record of Donald Francis Arsenault
S-2	Consent to Forfeiture and Release – D. Arsenault
S-3	Consent to Forfeiture and Release – B. Adams
S-4	Consent to Forfeiture and Release – B. Chahine
S-5	Consent to Forfeiture and Release – C. Nordin

[6] Although a Pre-Sentence Report was ordered, Mr. Arsenault did not appear at the scheduled time and no report was prepared. Counsel for Mr. Arsenault indicated he was no longer seeking to have a Pre-Sentence Report completed and wished to proceed with sentencing in its absence. This was also confirmed by Mr. Arsenault at the sentencing hearing.

Facts

[7] A summary of the facts surrounding the commission of this offence was read into the record by the Crown and was acknowledged by counsel for Mr. Arsenault.

[8] Briefly the facts, as presented, are as set out below.

[9] Police received information from confidential informants that Mr. Arsenault was the manager in charge of Coastal Cannapy, a store that was selling marihuana, in Timberlea, Nova Scotia. The police conducted surveillance on the business and, on four occasions, they saw Mr. Arsenault at the store when it opened and closed for business. They also saw Mr. Arsenault lock the store twice. The police obtained two warrants: one to search Coastal Cannapy, located at 1920 St. Margaret's Bay Road, Timberlea, Nova Scotia, and the second to search 20 Waltham Lane, Bedford, Nova Scotia, the residence of Mr. Arsenault and his partner, Ms. Chelsea Nordin.

[10] On September 7, 2017 police conducting surveillance at 20 Waltham Lane saw Mr. Arsenault and Ms. Nordin leave the residence in their vehicle with a small child. After dropping off the child at daycare, they proceeded to Coastal Cannapy

where Mr. Arsenault got out of the vehicle (at 9:42 a.m.) and Ms. Nordin drove away.

[11] Mr. Brandon Adams, co-accused in this matter, was waiting for Mr. Arsenault. Mr. Arsenault opened the store with a key and both he and Mr. Adams went inside. At 10:10 a.m. police executed the warrant at the store. Two "bud tenders" were behind the counter, Mr. Adams and Mr. Chahine (another co-accused). Mr. Arsenault was arrested as he was coming out of the back office where the computers, marihuana and surveillance equipment were located. From this site police seized 6,991.1 grams of cannabis marihuana, 369.2 grams of cannabis resin, edible cannabis products, shatter, two digital scales, packaging, vacuum sealers and CAN$1,285.

[12] Police officers also followed Ms. Nordin back to her residence where they arrested her for trafficking. Police searched the vehicle and seized a backpack containing CAN$103,685, in addition to some other items. In addition, from inside 20 Waltham Lane, police seized CAN$8,115, 3.9 grams of marihuana, score sheets, a digital scale, a vacuum sealer, Zip Loc bags and other packaging. The cash and other items seized were from the ongoing sale of marihuana at Coastal Cannapy.

Offender Profile

[13] Mr. Arsenault (DOB: August 20, 1990) is 29 years of age. He is in a long-term, common-law relationship with Ms. Chelsea Nordin. He has a stepchild who is 14 years old, and a six-year-old child with Ms. Nordin.

[14] Mr. Arsenault completed grade 12. He is employed full time as the owner and operator of a vape shop and a construction company. He and Ms. Nordin, along with Ms. Nordin's mother, are the co-owners of a mortgaged property located at 208 Oceanview Drive, Bedford.

[15] Mr. Arsenault does not have any physical or mental health problems.

[16] With regard to Mr. Arsenault's family background, his father passed away when he was two years old and he has a good relationship with his mother who he sees every week. Mr. Arsenault has two brothers and two sisters and is the middle child. He grew up in public housing in Halifax and was raised by his mother, having limited family finances.

[17] Mr. Arsenault has a prior criminal record which includes two prior drug convictions under s. 5(2) of the *CDSA*, a firearm conviction contrary to s. 92(1) of the *Criminal Code*, an obstructing a peace officer conviction contrary to s. 129(a) of the *Criminal Code*, and four convictions for failing to comply with a recognizance contrary to s. 145(3) of the *Criminal Code.* These convictions range in date between 2010 and 2013, which represents an approximate four-year gap with the present offence.

[18] The Crown and Defence counsel have presented to the Court a joint sentencing recommendation of one year in custody to be served in a provincial facility. The Crown also presented the following ancillary Orders: Forfeiture, DNA and Firearms Prohibition. Defence counsel took no position with regard to the proposed ancillary DNA and Prohibition Orders. There was consent to Forfeiture (Exhibit S-2).

The Law

General Principles of Sentencing

[19] In coming to a determination as to what is a fit and appropriate sentence for Mr. Arsenault in the circumstances, I am mindful of the filed materials and comments of both Crown and Defence counsel today.

[20] In conducting my assessment of the joint recommendation, I have considered the statutory framework set out in the *Criminal Code* , RSC 1985, c. C-46 and the *Controlled Drugs and Substances Act*. With regard to the *CDSA*, I refer to s. 10 which states:

> 10. (1) Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part 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.

[21] In relation to the *Criminal Code*, I refer to the fundamental purpose of sentencing as set out in s. 718 and, in particular, to the objectives of sentencing. The purpose of sentencing in s. 718 is to protect society and to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the objectives outlined. I have considered s. 718 with regard to denunciation, deterrence and rehabilitation. Section 718.1 directs that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. I am also guided by the

other sentencing principles found in s. 718.2 including that a sentence should be reduced or increased by mitigating or aggravating circumstances relating to the offence or the offender. In addition, a sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances.

[22] In considering this joint recommendation, I have also considered the principles set out by the Supreme Court of Canada in ***R. v. Anthony-Cook,*** 2016 SCC 43. In that case, the majority of the Supreme Court of Canada recognized that joint sentencing recommendations are essential to an efficient justice system, stating: "resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently." (para. 1)

[23] The majority in ***Anthony-Cook*** held that trial judges should not depart from a joint recommendation unless the proposal would bring the administration of justice into disrepute or the sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. It is a high threshold to meet before a judge may depart from a joint sentencing recommendation.

[24] Counsel is obliged to give a full description of the facts and circumstances of the offence and the offender and explain why the proposed sentence is not contrary to the public interest. Counsel has done so today. There must be a thorough justification of the sentence put on the record so that justice may be seen to be done.

[25] The justice system benefits from proper joint recommendations in terms of appropriate use of resources and securing certainty of outcome in cases where the result following trial is unclear. The majority of the Court in ***R. v. Anthony-Cook, supra,*** stated:

> 32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest…
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> …
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> 34 In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the

> offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason, as I shall explain.
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> …
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> 42 Hence, the importance of trial judges exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.
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> …
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> 44 Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power,* 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

[26] In terms of similar cases, I have reviewed the submitted transcript of the unreported case of ***R. v. John Eric Turnbull and Derek Johnson*****,** NSPC, April 9, 2019, (although I understand Mr. Turnbull's sentence is currently on appeal) as well as the Crown's reference to ***R. v. Shirley Martineau*** ("Aunties" dispensary) where the proprietor received a two-year, less a day Conditional Sentence Order in November, 2017 after a joint recommendation. That case involved just over one kilogram of cannabis inside the store and about a half-kilogram of cannabis at her residence. I have reviewed ***R. v. Jones,*** 2003 NSCA 48, concerning ranges of sentences where our Court of Appeal said:

> 8 Sentences for possession of narcotics for the purposes of trafficking imposed by this 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. Other factors considered either more or less

> relevant, depending on the circumstances, are the criminal record and age of the offender, whether he was on probation at the time of the offence, and the sophistication and scope of the enterprise. This approach was emphasized in *R. v. Fifield* (1978), 25 N.S.R. (2d) 407 (N.S. C.A.), where MacKeigan, C.J.N.S. said at p. 410:
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> > In the various categories one cannot find or expect to find any uniformity of sentence. The cases above are merely random samples to illustrate the apparent categories. Certainly sentences are not, and should not be, closely proportionate in their length to the quantity of marihuana involved. The quantity is important in helping show the quality of the act or the probable category of trafficker - - the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator. The categories respectively have broad and overlapping ranges of sentence into which the individual offender must be appropriately placed, depending on his age, background, criminal record, and all surrounding circumstances.

[27] In the ***Jones*** case, the Court identified the range of sentences and stated:

> … Absent exceptional circumstances, a person involved in a small wholesale or large retail operation should generally attract a sentence in the range that will take into account factors personal to the offender and his degree of involvement… (para. 11)

[28] I have also reviewed the case of ***R. v. Withrow*,** 2019 NSSC 270. While not a cannabis dispensary case, it was a commercial cannabis trafficking case involving a large quantity of cannabis. Justice Coady said in that case, "the range for this kind of case is from one to 4.5 years' incarceration -- cases the courts have described as "significant cannabis trafficking cases." (para 16)

[29] These above cases were helpful in determining that the proposed sentence of one year in custody in the present circumstances is appropriate.

[30] In the circumstances of the present case, I am satisfied that the joint sentencing recommendation of one year in custody would not bring the administration of justice into disrepute nor is it otherwise against the public interest. In my view the parties submissions are sound and in keeping with the caselaw. I adopt their joint recommendation and, in so doing, refer to the nature of the events and the following mitigating and related circumstances which include: the non-violent circumstance of the events, the fact a trial was avoided as a result of Mr. Arsenault's acceptance of responsibility, and the support he has from his family. Aggravating factors are Mr. Arsenault's significant role in the operation, his prior record, the large quantity of illegal cannabis products and large quantity

of cash seized. As the Crown said in submission, deterrence and denunciation are primary considerations when sentencing offenders involved in commercial cannabis operations: ***R. v. Banfield***, 2011 NSSC 56.

[31] With the above principles and penalties in mind, I am satisfied that the proposed sentence for Mr. Arsenault is in keeping with the general range of sentences for this type of offence. The quantity of illegal cannabis products seized, the large quantity of cash seized and the fact that Mr. Arsenault has two previous convictions for possession of a controlled substance for the purpose of trafficking contrary to s. 5(2) of the *CDSA* requires a period of custody.

Disposition

[32] In the circumstances as set out above, I hereby impose the following sentence:

1. Incarceration of 12 months in a provincial facility;
2. Weapons prohibition for life pursuant to s. 109 of the Criminal Code (mandatory);
3. Order for a DNA sample pursuant to s. 487.051 of the Criminal Code (secondary designated offence); and
4. Forfeiture of the items seized from 1920 St. Margaret's Bay Road, Nova Scotia and 20 Waltham Lane, Bedford, Nova Scotia and the other items as indicated on the Forfeiture Orders pursuant to s. 16 of the CDSA.

[33] Being mindful of the Supreme Court of Canada's decision in ***R. v. Boudreault***, 2018 SCC 58, and the fact that the new victim surcharge provisions do not apply here as they apply to an offender who is sentenced for an offence that was committed after the day on which the provisions came into force being on or after July 22, 2019, I hereby waive the victim fine surcharge.

[34] The Crown offered no evidence on the remaining charges in the Indictment.

[35] The Defence made a motion for dismissal of the remaining charges against Mr. Arsenault which was granted by the Court.

Jamieson, J.