PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: R. v. Ryan MacKinnon 2009 PECA 03

Date: 20090213
Docket: S1-AD-1140
Registry: Charlottetown

BETWEEN:

RYAN MacKINNON

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Before: Chief Justice D.H. Jenkins
Justice J.A. McQuaid
Justice M.M. Murphy

Appearances:
Brenda J. Picard, Q.C., counsel for the Appellant

David W. Schermbrucker, counsel for the Respondent

Place and Date of Hearing	Charlottetown, Prince Edward Island January 13, 2009
Place and Date of Judgment	Charlottetown, Prince Edward Island February 13, 2009

Written Reasons by:
Justice J.A. McQuaid

Concurred in by:
Chief Justice D.H. Jenkins
Justice M.M. Murphy

CRIMINAL LAW - SENTENCING - APPEAL - CONDITIONAL SENTENCE

The appellant's appeal from an 18 month term of imprisonment in a penal institution was allowed. The Court of Appeal substituted an 18 month term of imprisonment to be served conditionally in the community.

Authorities Cited:
CASES CONSIDERED: R. v. McDonnell, [1997] 1 S.C.R. 948 (SCC); ***R. v. Shropshire***, [1995] 4 S.C.R. 227 (SCC); ***R. v. M. (C.A.)***, [1996] 1 S.C.R. 500 (SCC); ***R. v. L.M.***, 2008 SCC 31; (2008), 231 C.C.C. (3d) 310 (SCC); ***R. v. Gallant*** 2008 PESCAD 1; [2008] P.E.I.J. No. 1; (2008), 228 C.C.C. (3d) 61 (P.E.I.S.C.A.D.); ***R. v. Proulx*** (2000), 140 C.C.C. (3d) 449 (SCC); ***R. v. Cody*** 2007 PESCAD 7; [2007] P.E.I.J. No. 20; (2007), 220 C.C.C. (3d) 103; ***R. v. Perry*** 2007 PESCAD 15; [2007] P.E.I.J. No. 35; (2007), Nfld. & P.E.I.R. 349; ***R. v. Kerr***, [2001] O.J. No. 5085 (Ont. C.A.)

STATUTES CONSIDERED: Controlled Drugs and Substances Act, R.S.C. 1996, Chap.19, s-s. 5(1) and s-s. 5(3)(a); ***Criminal Code of Canada***, R.S.C. 1985, C-46, s-s.465(1)(c), s-s.675(1)(b), s-s. 679(1)(b), s-s.687(1), s.718 to 718.2, s. 732.1(2), s.742.1, s-ss.742.3(1) and (2), ss. 742.4, 742.6

Reasons for judgment:
McQUAID J.A.:

BACKGROUND

[1] Ryan MacKinnon (the "appellant") entered a guilty plea to conspiracy to traffic crack cocaine contrary to s. 5(1) and s. 5(3)(a) of the ***Controlled Drugs and Substances Act***, thereby committing an offence contrary to s. 465(1)(c) of the ***Criminal Code***. He was sentenced by Orr P.C.J. to serve 18 months in the Provincial Correctional Centre and, after his release, to serve a period of probation for one year.

[2] In addition to the statutory conditions of the probation order, the appellant was ordered to perform 100 hours of community service work under the supervision of his probation officer. He was also given the option, with the consent of his probation officer, to pay the sum of $7.00 per hour for any community service work not performed. The probation order provided that he was to undergo counselling and treatment for the use of drugs and alcohol, and to refrain from contact with such persons and places as may be directed by the probation officer.

[3] The appellant sought leave to appeal and to be released from custody pending the disposition of his appeal. In accordance with the provisions of s. 679(1)(b) of the ***Criminal Code***, the appellant was granted leave to appeal, and he was released from

custody on conditions contained in an undertaking.

[4] The appellant appeals from the sentence imposed. The appellant argues the trial judge made an error in principle in passing sentence. He asks this court to set the sentence aside and order that the 18-month sentence of imprisonment be served in the community. The Crown, in response, argues the trial judge did not err in principle, that she considered the purposes and objects of sentencing, that this court should show deference, dismiss the appeal and confirm the sentence.

THE FACTS

[5] Sentencing proceeded before the Provincial Court judge on the basis of an agreed statement of facts. The appellant was part of the police investigation of alleged trafficking activities in 2005 and 2006 of one Derek Dean Huggan and those associated with him. Huggan was moving crack cocaine from Nova Scotia for sale in Prince Edward Island. He made arrangements, although not directly, with various couriers to travel to Nova Scotia and return to Prince Edward Island with the illicit drug. The appellant was one of those couriers.

[6] He made two trips. The first was on May 8, 2006 when he travelled with Meaghan Lynn Grant who was a co-accused in the conspiracy. She met with the supplier, obtained crack cocaine, and they returned to Prince Edward Island. Grant made the arrangements with Huggan both for the pick up and the drop off. The second trip occurred on May 15, 2006. At this time, the appellant travelled with his girlfriend, and he met with the same supplier to obtain four ounces of crack cocaine with a street value of $7,200. When he returned to Prince Edward Island, he made arrangements with Grant who delivered the cocaine.

[7] The appellant had a previous record dating back to September 9, 2001. It was for one conviction for possession of marijuana.

[8] The Information which gave rise to the sentence under appeal was filed in Provincial Court on September 7, 2007. The appellant entered a guilty plea on his first appearance. A pre-sentence report was requested and sentencing submissions were made on October 24, 2007. An issue arose at this hearing as to the content of the agreed statement of facts and the hearing was adjourned. It resumed on November 13, 2007 when the sentence was passed. The appellant served eight days in the Provincial Correctional Institute before his judicial interim release.

[9] The appellant had been a cocaine user; however, he ceased use of drugs and his association with those who did, before he was apprehended and charged. The pre-sentence report filed with the sentencing judge is very positive as to the future of

the appellant.

[10] At the time of sentencing, the appellant was 26 years of age. He was in a common law relationship with his partner of three years. They had two children of that relationship, ages nine months and two years. In addition, the appellant had the custody of a child from an earlier relationship. This child was eight years old at the time of the sentencing. His common law spouse also had a child, age six years, from a previous relationship.

[11] The appellant was employed full time in the communications technology industry. He was living and working in Summerside. He had completed a Business Information Technology course at Holland College in 2005 and had been employed full time since completion of that course. His hours of work were seven a.m. to five p.m. with some work carried out at home in the evenings.

[12] Fresh evidence introduced at the appeal hearing, with the consent of the Crown, indicates that the appellant continues to be employed in the same industry but with a firm in Charlottetown. The employment in Summerside ended as the result of down sizing and, because the appellant's criminal record restricted his out of country travel, he was more expendable than some other employees. There is no indication his work performance was an issue.

[13] The appellant was married in February 2008 and, together with his spouse and four children, he now lives in the Charlottetown area. His spouse does not work outside the home. The appellant continues to be the sole financial provider for the family. The evidence from his present employer indicates he is a valued and productive employee. His employer also indicates there is employment for the appellant in the future.

DISPOSITION

[14] I would allow the appeal, set aside the sentence of 18-months imprisonment to be served in the Provincial Correctional Institute, and substitute a sentence of 18-months imprisonment, to be served conditionally in the community. I would confirm the probation order but vary its terms by the deletion of the condition to perform 100 hours of community service. I would order that the period of probation be served after the term of the conditional sentence is completed.

ANALYSIS

[15] The sole issue in the appeal is whether this court has the jurisdiction, within the scope of its appellate powers to review sentences, to set aside the sentence

imposed by the sentencing judge and substitute a conditional sentence.

[16] With leave, which has been granted in this case, the appellant does have the right to appeal from the sentence imposed by the trial judge. See: s.675(1)(b) of the ***Criminal Code***. Pursuant to s. 687(1) of the ***Criminal Code***, this court has the jurisdiction to consider the fitness of a sentence and vary the sentence or dismiss the appeal.

[17] The principle that appellate courts in exercising the jurisdiction conferred by the ***Criminal Code*** should show a high degree of deference to the sentence imposed by a sentencing judge, is well established by many decisions of the Supreme Court of Canada. See: ***R. v. McDonnell***, [1997] 1 S.C.R. 948; ***R. v. Shropshire***, [1995] 4 S.C.R. 227; ***R. v. M. (C.A.)***, [1996] 1 S.C.R. 500. Recently, in ***R. v. L.M.***, 2008 SCC 31; (2008), 231 C.C.C. (3d) 310, the Court repeated the principles upon which the approach to deference is shown by an appeal court to the sentence imposed by a trial court. See: ***R. v. L.M.*** at paras. 14 and 15.

[18] The Court continued in ***L.M.*** (at paras. 35 - 37) to point out that an appellate court should not designate priority to the principle of parity in sentences over the principle of deference to the trial judge's exercise of discretion unless the sentence imposed by the trial judge is "vitiated" by an error in principle; or the trial judge imposed a sentence that was clearly unreasonable as the result of the trial judge's failure to adequately consider certain relevant factors; or to improperly consider the evidence. This is so because the sentencing process is an individualized one. The sentence imposed is to fit both the individual circumstances of the offender and the offence. It must be proportionate to the gravity of each offence and the responsibility of each offender. Inevitably, the circumstances of each offence and each offender, as well as the gravity of each offence and the degree of responsibility assumed by each offender, will be different in almost every case.

[19] The deference owed to trial judges in exercising their discretion to impose a certain sentence applies in like fashion to the exercise of discretion in deciding whether to impose a conditional sentence. A simple difference of opinion with the sentencing judge over the objectives to be applied in a particular case will usually not be the basis on which an appellate court should interfere. See: ***R. v. Gallant*** 2008 PESCAD 1; [2008] P.E.I.J. No. 1; (2008), 228 C.C.C. (3d) 61 (P.E.I.S.C.A.D.) at para.9.

[20] In the case at bar, however, the sentencing judge, with respect, erred in principle when she failed to consider and apply all the purposes and principles of sentencing when deciding whether the 18-month term of imprisonment she had concluded was a fit sentence should be served conditionally in the community. As a

result, the sentence she imposed did not fit the individual circumstances of the offender. It was disproportionate to the degree of responsibility which was accepted by the appellant. Because the sentence was based on an error in principle, this court has the jurisdiction to review the sentencing judge's exercise of discretion.

[21] Sections 718 to 718.2 as well as s. 742.1(as it read at the time the appellant was sentenced) provide as follows:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental

or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

. . . . .

742.1 IMPOSING OF CONDITIONAL SENTENCE — Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and

(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and

> would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 and 718.2,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[22] Pursuant to s. 742.1 of the ***Criminal Code***, the court must consider four factors in deciding whether to impose a conditional sentence. They are

(1) the offence for which the offender has been convicted must be one which is not punishable by a minimum jail sentence;

(2) an adequate sentence for the offence and the offender is a term of imprisonment of less than two years;

(3) the court must conclude the safety of the community would not be endangered if the offender should serve the sentence in the community; and

(4) the court must also conclude that the imposition of a conditional sentence is consistent with the fundamental purposes and principles of sentencing as provided for in sections 718 to 718.2 of the ***Criminal Code.***

[23] The sentencing judge found that two of the three pre-requisites to the imposition of a conditional sentence were met in this case. The sentence for the offence was not one punishable by a minimum jail sentence, and a fit sentence was a term of imprisonment of less than two years. The sentencing judge did not specifically address whether the appellant would pose a risk to the community if he served his sentence of imprisonment, conditionally in the community; however, there does not appear to be any such risk. The appellant is gainfully employed, and no longer has any association with drugs either as a user or a courier. I would accept that the three pre-requisites to the imposition of a conditional sentence have been met.

[24] In accordance with ***R. v. Proulx*** (2000), 140 C.C.C. (3d) 449 (SCC), this was the first step in the consideration of the imposition of a conditional sentence. The

second step is to consider whether the imposition of a conditional sentence would be consistent with the fundamental principles and purposes of sentencing as set out in s. 718 to s.718.2 of the ***Code***. See: ***R. v. Proulx*** at paras. 58 to 60, and ***R. v. Cody*** 2007 PESCAD 7; [2007] P.E.I.J. No. 20; (2007), 220 C.C.C. (3d) 103 at paras. 19 to 21.

[25] The decision as to whether the sentence to be imposed is one that is less than two years imprisonment will involve a consideration of the purposes and principles of sentencing. However, as pointed out by Lamer C.J.C. in ***R. v. Proulx***, they are considered only to the extent which is necessary to assess the range of sentence and determine it is not within the range of various probationary measures or within the range of a term of imprisonment in a federal institution. It is when the sentencing judge is satisfied the three pre-requisites of a conditional sentence have been met, that the sentencing judge proceeds to the second stage of the analysis. At the second stage, it is the duty of the sentencing judge to assess whether service of the term of imprisonment in the community is consistent with the fundamental purposes and principles of sentencing set forth in s. 718 to 718.2 of the ***Criminal Code***.

[26] In passing sentence in the case at bar, the sentencing judge reviewed the principles and purposes of sentencing in coming to the conclusion that a period of imprisonment was warranted. In other words, she addressed the principles and purposes of sentencing in reaching a conclusion as to the general range of sentence to be imposed. When the sentencing judge turned her mind to the imposition of a conditional sentence, and whether the sentence of imprisonment could be served conditionally in the community, she addressed only the principles of deterrence and denunciation without addressing the other principles and purposes of sentencing. With respect, this was in error.

[27] The sentencing judge isolated her consideration to the sentencing purposes of deterrence and denunciation without considering the other purposes and principles of sentencing in the context of a conditional sentence. It is not a question of whether the sentencing judge gave these purposes of sentencing paramountcy over the others. The question is whether she considered the other purposes of sentencing, as well as the principles of sentencing, in assessing whether a conditional sentence was in accord with them. At this stage of the sentencing process, the sentencing judge should consider all the purposes, objectives and principles of sentencing and then determine which ones take priority in the circumstances of the particular case. See: ***R. v. Gallant, supra*** at para. 20.

[28] This court has previously stated that emphasis on the sentencing purposes of deterrence and denunciation, as well as the attainment of those purposes by incarceration in a penal institution is not misplaced when sentencing an individual for trafficking in cocaine. However, the court pointed out that the sentencing judge must

consider all the purposes and principles of sentencing and how service of a term of imprisonment in the community may or may not be consistent with them. See: ***R. v. Cody*** at paras. 24 to 30. Also see: ***R. v. Perry*** 2007 PESCAD 15; [2007] P.E.I.J. No. 35; (2007), Nfld. & P.E.I.R. 349 at para. 13.

[29] In ***R. v. Kerr***, [2001] O.J. No. 5085 (Ont. C.A.), the court allowed an appeal from a sentence of imprisonment to be served in a penal institution and substituted a conditional sentence. The offender was 27 years of age and had pleaded guilty to three counts of trafficking in heroin. At para.10 the court found that the trial judge had over-emphasized the sentencing objective of general deterrence and had appeared to create a presumption against the imposition of conditional sentences for such an offence.

[30] The sentencing judge in the case at bar did not state there was a presumption against a conditional sentence for trafficking in cocaine; however, reliance exclusively upon the sentencing objectives of deterrence and denunciation at the sentencing stage of considering whether a conditional sentence is in accord with the principles and purposes of sentencing, in effect, leads to such a presumption. This is so because it is generally accepted that while a conditional sentence may serve these objectives, they are more emphatically addressed by serving the term of imprisonment in a penal institution because of the greater restriction on the offender's liberty.

[31] In the circumstances of the case at bar, a sentence of imprisonment served conditionally in the community would not be inconsistent with the purposes and principles of sentencing. It would not be disproportionate to the gravity of the offence and the degree of responsibility accepted by the appellant.

[32] Trafficking in cocaine and/or crack cocaine has been recognized as a very serious offence in this jurisdiction, and it will usually result in a sentence of imprisonment to be served in a penal institution. See: ***R. v. Cody, supra*** and ***R. v. Perry, supra***. In ***Cody*** at paras. 38 to 46 the court discussed and affirmed the reasoning of the sentencing judges where imprisonment was imposed and the option of a conditional sentence was rejected. As well, in ***Cody*** at paras. 26 and 27, the court recognized that the option of a conditional sentence does exist and cannot be automatically ruled out for trafficking in cocaine.

[33] There is no question that in the case at bar the appellant has committed a serious offence. He transported into the Province a significant amount of cocaine with a substantial street value. There are, however, some mitigating circumstances surrounding circumstances of the offence that distinguish his offence from those where the conditional sentence option was found not to be fit sentence.

[34] The appellant's involvement was restricted to two isolated incidents of involvement over a two-week period. He was not paid for the work directly and he did not act as a courier in exchange for drugs. He discontinued his involvement in the drug trade and culture long before he was apprehended at which time he took steps to right his direction in life.

[35] It is trite law that a conditional sentence, particularly one where the conditions restrict the liberty of the offender, can serve the sentencing purposes of deterrence and denunciation. In the case at bar, the specific deterrence of the appellant is not necessary. Separation of the appellant from society in a penal institution is also unnecessary.

[36] The general deterrence of like minded individuals must be addressed. In the circumstances of this offence and this offender, it will be adequately addressed by a conditional sentence with meaningful restrictions on the appellant's liberty. Such a sentence will send a message to these individuals that trafficking in cocaine warrants punishment consistent with the circumstances of the offence and the offender.

[37] The circumstances of this offender also dictate that this is a case which calls out for the application of the principle of sentencing that, where sanctions less restrictive than that of imprisonment in a penal institution are appropriate, the offender should not be deprived of his liberty. The appellant is the sole financial provider for his spouse and four children. He has taken the steps necessary, after the commission of the offence and before he was apprehended, to attain the skills which equip him to provide for them by way of steady and gainful employment. The restriction of his liberty and his removal from society by way of a sentence to be served in a penal institution would negate these efforts and leave his family in a financially precarious situation.

[38] A more appropriate sanction and one consistent with all the purposes and principles of sentencing is a sentence which would restrict the liberty of the appellant while at the same time allowing him to provide financially for his spouse and family. A conditional sentence achieves this purpose.

[39] Accordingly, I allow the appeal and vacate the sentence imposed by the sentencing judge. I order that the appellant be sentenced to serve a term of 18 months imprisonment which term shall be served conditionally in the community.

[40] The conditions shall include the statutory conditions prescribed by s. 742.3(1) of the ***Criminal Code*** as well as the following conditions prescribed by s. 742.3(2) of the ***Code***: (1) to remain within the boundaries of his residential property at all times, except, for the purpose of going to work, going for work related or educational

training or instruction, going to church, going for groceries for himself and his family, going for necessary medical treatment, taking his children or spouse for necessary medical treatment; (2) to provide to his Supervisor in advance his schedule and any material change thereto; (3) to refrain from associating with persons and frequenting places which may from time to time be prescribed by his Supervisor; (4) to keep telephone access available as much as possible so that his Supervisor can monitor the appellant's compliance with the terms of the conditional sentence order; (5) to abstain from the consumption of alcohol and all drugs except those taken in accordance with a medical prescription; and (6) to attend a treatment program approved by the Province of Prince Edward Island.

[41] Following the completion of the term of the conditional sentence, the appellant shall be placed on probation for one year on the conditions contained in s. 732.1(2) of the ***Criminal Code***. I have decided to remove from the probation order imposed by the trial judge the condition that the appellant perform 100 hours of community service work free of charge. With his employment and his responsibilities as the father of four children, it would not be reasonable to expect the appellant will have the time to perform the community service. Furthermore, such a condition is not necessary in the circumstances of this offender.

[42] Finally, I would direct that counsel provide the appellant with copies of the conditional sentence order, and I direct the appellant to appear before the Prothonotary forthwith and to have the Prothonotary explain to him the substance of sections 742.4 and 742.6 of the ***Criminal Code*** as well as the procedure for applying under s. 742.4 for a change in the optional conditions of the orders made pursuant to s. 742.3(2).

_____
Justice J.A. McQuaid

I AGREE: _____
Chief Justice D.H. Jenkins

I AGREE: _____
Justice M.M. Murphy