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CAC 156846

# NOVA SCOTIA COURT OF APPEAL

**[Cite as: R. v. Parsons, 1999 NSCA 156)**

**Glube, C.J.N.S.; Roscoe and Flinn, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| WALTER LARRY PETER PARSONS<br><br>Appellant | ) | W. Andrew Ionson<br>for the appellant |
| - and - | ) | |
| HER MAJESTY THE QUEEN<br><br>Respondent | ) | Alonzo Wright<br>for the respondent |
| | ) | Appeal heard:<br>November 30th, 1999 |
| | ) | Judgment delivered:<br>December 13, 1999 |

**THE COURT:** Leave to appeal granted and appeal allowed per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Roscoe, J.A. concurring.

**FLINN J.A.:**

[1] The appellant applies for leave, and, if granted, appeals a sentence imposed upon him by Judge Nichols of the Provincial Court of Nova Scotia. The appellant pled guilty to trafficking in marihuana contrary to s. 5(1) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19 and to another offence of possession of marihuana, contrary to s. 4(1) of the **Act**. The trial judge imposed a fine of $300.00 for the offence of possession, and a one year conditional sentence for the trafficking offence.

[2] The appellant submits that a one year conditional sentence, under the circumstances of this case, is demonstrably unfit. The imposition of the fine, for the possession offence, is not under appeal.

[3] The circumstances of the offence are as follows. On September 16th, 1998, at approximately 1 p.m., an RCMP officer was conducting surveillance in a wooded area near Highway 1 where that highway passes in front of the Weymouth Consolidated School. At approximately 1:10 p.m. a bell sounded and shortly thereafter a group of young people were seen leaving the school and walking to the highway. The young people gathered on a sidewalk immediately adjacent to the school grounds. The RCMP officer observed the appellant pass a cigarette amongst two other young people, ages 19 and 20, which cigarette was returned to the appellant, and was later determined to contain marihuana. Shortly thereafter the RCMP officer left his position and placed the appellant under arrest for possession of a narcotic. A subsequent search of the appellant resulted in the seizure of two “roaches” (butt ends of marihuana cigarettes)

and a plastic bag containing three “joints” (marihuana cigarettes).

[4] The appellant was 19 years of age at the time of the offence. He lives with his parents at Ashmore, Nova Scotia, and attends Weymouth Consolidated School. This incident is the appellant’s first offence. He has no prior record.

[5] Following the appellant’s arrest, on September 16th, 1998, he was released on a written undertaking. The undertaking required the appellant to refrain from the use of drugs and alcohol; to abide by a curfew at his parents’ residence between the hours of 8 p.m. to 8 a.m., and when not at home to be under the direct supervision of his mother; to attend school regularly and complete all school assignments; and to have no association or communication with anyone having a criminal or young offender record. The terms of that undertaking were complied with for nine months, from the date it was made until the appellant was sentenced in June of this year. Counsel for the appellant describes this period between arrest and sentencing as nine months of virtual house arrest. There is nothing before the Court to indicate that the appellant was a source of complaint, within the school or within the community, during this nine month period.

[6] At the sentencing hearing before the trial judge, the Crown advocated a one year conditional sentence. Counsel for the appellant requested a conditional discharge.

[7] The trial judge’s brief reasons for sentence are as follows:

> Well, I must say I have to go along with what the Crown suggests. I ... somehow

> we have to bring home to the community that drugs are not to be in and around the school property. It affects everyone. The law is there, *Thou shalt not*, and if people break the law, then it's a disrespect of the law as well as the disrespect for the community in which you reside.
>
> So, on the first charge of the possession of the joints, I'm imposing a fine of three hundred dollars or in default, ah, seven days. On the second charge, I'm going along with this conditional sentence. You'll be placed on a period of 12 months conditional sentence .....

[8] The trial judge then set out the terms of the conditional sentence, namely, that the appellant was required to keep the peace and be of good behaviour, report to his supervisor when required, remain in the jurisdiction of the Court, remain at his residence with his parents and abide by the house rules, abstain from consumption of alcohol, be at the Weymouth Consolidated School when required and regularly and abide by the school rules, not to associate with persons that he knows to have a criminal record. He was also required to perform 10 hours of community service within six months.

[9] A conditional sentence cannot be imposed in isolation. Section 742.1 of the **Criminal Code** provides as follows:

> 742.1 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 to 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.

[10] Before the trial judge could order a "twelve month conditional sentence" in this case he must, firstly, have made a determination that a term of imprisonment for a

period of less than two years was an appropriate sentence, considering the circumstances of the offence and the circumstances of the offender. He must, also, have imposed such sentence on the appellant, and then proceeded to the second step; that is, order that it be served in the community, assuming the conditions of s. 742.1(b) were met.

[11] Further, s. 726.2 of the **Code** clearly requires the trial judge to provide reasons for imposing the sentence and to state the term of the sentence, which term and reasons are to be included in the record:

> 726.2 When imposing a sentence, a court shall state the term of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.

[12] Prior to making the conditional sentence order, the trial judge did not impose any sentence of imprisonment on the appellant. Further, it is not possible to determine, from the record, what the trial judge may have considered to be an appropriate sentence of imprisonment for the appellant.

[13] In **R. v. Parker** (1997), 159 N.S.R. (2d) 166 (N.S.C.A.), Justice Bateman said the following at p. 178:

> It is important to emphasize that a conditional sentence is only considered where the judge has decided that no disposition other than incarceration is a fit sentence.

[14] It is an error in principle for the trial judge to have ordered a conditional sentence in this case without first having determined that a term of imprisonment of less

than two years was an appropriate sentence, and without having imposed such a sentence. That being the case, this Court should impose the sentence it thinks fit (see **R. v. Shropshire**, [1995] 4 S.C.R. 277 and **R. v. C.A.M**, [1996] 1 S.C.R. 500).

[15] In addition to the provisions of the **Criminal Code** with respect to sentencing, the provisions of s. 10 of the **Controlled Drugs and Substances Act** set out further principles to be taken into consideration in imposing a sentence on the appellant for this trafficking offense:

> 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.
>
> (2) Where a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider as an aggravating factor that the person
>
> (a) in relation to the commission of the offence,
>
> (i) carried, used or threatened to use a weapon,
>
> (ii) used or threatened to use violence,
>
> (iii) trafficked in a substance included in Schedule I, II, III or IV or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years, or
>
> (iv) trafficked in a substance included in Schedule I, II, III or IV, or possessed such a substance for the purpose of trafficking, to a person under the age of eighteen years;
>
> (b) was previously convicted of a designated substance offence; or
>
> (c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, a designated substance offence.
>
> (3) Where, pursuant to subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in that subsection, but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.

(emphasis added)

[16] Clearly this offence took place “on or near school grounds”. That is an aggravating factor under s. 10(2)(a)(iii). Therefore, if the Court decides not to sentence the appellant to imprisonment, the Court must give reasons for that decision. While the combined effect of s. 10(2)(a)(iii) and s. 10(3), as they relate to this case, do not mandate that imprisonment be imposed on the appellant, they do suggest a presumption in favour of imprisonment.

[17] In supporting the 12 month conditional sentence imposed by the trial judge (and on the assumption, by the Crown, that the trial judge had considered a sentence of imprisonment for 12 months to have been appropriate in this case), the Crown relies on the decision of this Court in **R. v. Ferguson** (1988), 83 N.S.R. (2d) 255. The Crown submits that this case establishes a general range of sentence for an offence of the type committed by the appellant.

[18] The facts in **Ferguson** are somewhat different than in this case. Ferguson pled guilty to two charges of trafficking in cannabis resin. On the first occasion, undercover agents of the RCMP purchased one ounce of cannabis resin from a third party for $15.00. The third party obtained the drug from Ferguson. On the second occasion, the officers went directly to Ferguson’s residence. After negotiations with him they purchased 130 grams of cannabis resin for $1,200.00. Ferguson’s wife was present at the time of the sale. A subsequent search of the premises produced

$2,991.00 in cash and a radio scanner. The trial judge sentenced Ferguson to one month imprisonment for the first offence and two months for the second offence to run consecutively. He also ordered the cash and radio scanner forfeited. Justice Jones, writing for the Court, said the following at p. 256:

> This court has repeatedly emphasized the need for deterrence in the case of drug traffickers. Persons who become involved in trafficking do so deliberately with full knowledge of the consequences. The general range of sentence, even for minor traffickers, has been between six and twelve months' imprisonment. The primary element on sentencing for traffickers must be deterrence.

[19] This Court varied Ferguson's sentence to three months imprisonment for the first offence and nine months for the second offence, to run consecutively, for a total term of 12 months imprisonment.

[20] In my view the circumstances of this case are similar to those referred to by MacKeigan, C.J.N.S. in the case of **R. v. Fifield** (1978), 25 N.S.R. (2d) 407. Mr. Fifield was found guilty of two charges of possession of hashish and marihuana for the purposes of trafficking. Large quantities were involved, indicative of an intention to distribute on a commercial scale. The trial judge had sentenced Mr. Fifield to two months on each offence to run concurrently.

[21] In comparing the circumstances of Mr. Fifield with other trafficking cases, Chief Justice MacKeigan said the following at p. 409:

> These sentences obviously must be materially increased. <u>This is not the case of a young user sharing marihuana with a companion or accommodating another user with a smaller quantity; such cases are technically trafficking but are only slightly more serious than mere possession of marihuana, where no previous record is involved.</u> In this category are cases such as:

> *R. v. MacArthur* (1975), 9 N.S.R. (2d) 353. (19 years old - two small sales of marihuana - 2 months and 4 months)
>
> *R. v. Eisan* (1975), 12 N.S.R. (2d) 34; 6 A.P.R. 34. (approximately 1 ounce of marihuana - 90 days intermittent)
>
> *R. v. Fitzgerald* (1976), 14 N.S.R. (2d) 638; 11 A.P.R. 638. (20 years old - 4 capsules of hashish sold - prior record - 6 months)
>
> *R. v. McLay* (1977), 17 N.S.R. (2d) 135; 19 A.P.R. 135. (19 years old - $5.00 worth of hashish sale - suspended sentence).
>
> (emphasis added)

[22] Clearly, the case before this Court resembles more the “young user sharing marihuana with a companion” than it does **Ferguson** which could be described as a case involving a petty retailer.

[23] I do note that **Fifield** was decided before s. 10 of the **Controlled Drugs and Substances Act** came into force, which requires this Court to consider, as an aggravating factor, the fact that the appellant’s “trafficking” offence took place at or near school property. I believe that fact has particular relevance here. Weymouth is a small community in the area over which the trial judge presides. The trial judge was clearly concerned in this case that he “bring home to the community that drugs are not to be in and around the school property. It affects everyone.”

[24] In coming to a conclusion on the appropriate sentence to be imposed on this case I have considered:

1. the circumstances of the offence. While all drug trafficking offences are serious, the circumstances here of the young appellant sharing marihuana, with two companions, puts this case on the low end of the scale of seriousness for the purpose of considering what sentence should be imposed.
2. the circumstances of the offender. The appellant is now 20 years of age. This is his first offence. He is attending school and resides with his parents. There is no evidence that he cannot be rehabilitated and take his proper place in society to contribute to respect for the law.

[25] In these circumstances, a lengthy period of imprisonment is not warranted.

[26] I must, however, consider the aggravating factor associated with the case, and the concerns which the trial judge expressed about drugs on school property in this small community.

[27] As of December 10th, 1999, the appellant has served six months of the conditional sentence which the trial judge imposed upon him. While, in my opinion, the circumstances of this offence, and those of the offender, require that I impose a sentence of imprisonment on the appellant, that sentence would not exceed six months imprisonment. Further, I would conclude, as the trial judge obviously did, that the appellant would not endanger the safety of the community if his sentence were served in the community. Therefore, I would order that the appellant serve the sentence imposed upon him, in the community; subject to the same terms and conditions which

the trial judge imposed upon him.

[28] That being the case, the appellant has already served his sentence.

[29] In summary, I would grant leave to appeal and I would allow the appeal. I would set aside the sentencing decision of the trial judge, with respect to the trafficking offence, and vary that sentence to one of six months imprisonment, to be served in the community, and subject to the same conditions as imposed by the trial judge, which sentence the appellant has now served.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.