NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Jamieson***, 2011 NSCA 122

Date: 20111222
Docket: CAC 352641
Registry: Halifax

Between:

Faybion Omar Jamieson

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Fichaud and Farrar, JJ.A.
Appeal Heard:	November 24,2011, in Halifax, Nova Scotia
Held:	Application to introduce fresh evidence and leave to appeal granted; appeal allowed per reasons for judgment of Saunders, J.A.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	Roger A. Burrill, for the appellant Ann Marie Simmons and Jonathan Langlois-Sadubin, for the respondent

Reasons for Judgment:

[1] This case is about what a difference a day (or two) makes.

[2] After hearing counsels' submissions we recessed, and then returned to court to announce our unanimous decision that the applications for leave to introduce fresh evidence and leave to appeal sentence were granted, the appeal allowed, with reasons to follow. We also advised counsel that our draft order would be sent to them in advance for their approval to ensure that it achieved the outcome discussed during argument. These are our reasons.

[3] This is a case of first instance for our Court. The issue has not been considered in Nova Scotia, although it has been addressed in other jurisdictions at the trial and appellate level.

[4] I will start by briefly describing the background to provide context for the analysis that follows.

Background

[5] In the Fall of 2009 the appellant was involved in the commercial sale of crack cocaine and ecstasy. He made the mistake of doing business with an undercover police officer. Between September 21 - October 1, 2009, he trafficked in cocaine and ecstasy on six occasions. He was arrested on January 25, 2010, and charged with six counts of trafficking contrary to s. 5(1) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19. The matter was adjourned for the day and the appellant was remanded into custody.

[6] On January 26, the appellant appeared in Provincial Court, and elected to be tried there. A joint motion was made before the Honourable Judge Barbara Beach to amalgamate certain charges by deleting references to specific dates on two counts in the Information. Ultimately, the appellant pleaded guilty to two counts, the first that he trafficked in cocaine, and the second that he trafficked in ecstasy, between September 20 and October 2, 2009. The four remaining counts were withdrawn.

[7] Counsel for the Crown and the defence (not counsel on appeal) made a joint recommendation that the appellant be sentenced to serve a total of two years in custody. Judge Beach accepted the joint recommendation. The judge was advised by the appellant's trial lawyer that he was a Canadian citizen. In fact, he was a permanent resident.

[8] By operation of the **Immigration and Refugee Protection Act**, S.C. 2001, c. 27, the appellant has been ordered deported on the basis of these convictions. The sentence of two years' imprisonment (federal time) prevents the appellant from appealing the deportation order. Had Judge Beach imposed a sentence of two years less a day, the appellant would not be precluded from appealing his deportation.

[9] The appellant served his time in a federal penitentiary. He was released from the Springhill Institution on May 26, 2011. His warrant expiry date is January 25, 2012. Mr. Jamieson attended an admissibility hearing on January 13, 2011 and was deemed inadmissible to Canada as a permanent resident. He was issued a deportation order that same day.

[10] At the appeal hearing we were advised by counsel that since launching this appeal the appellant has been deported and currently resides in Jamaica. We were also informed that despite his deportation, he would still be able to pursue his immigration appeal before the Immigration Appeal Division, in the event he were successful in persuading us to reduce his sentence.

[11] It would appear that neither counsel nor the judge were aware of the immigration consequences of imposing a federal, rather than a provincial, sentence.

Issue

[12] The issue before this Court is whether the unanticipated immigration sanction justifies a variation in Mr. Jamieson's sentence.

[13] Not surprisingly, counsel, in their able submissions, have approached the issue from different perspectives . Mr. Burrill, for the appellant, says:

> It might be said that appellate litigators expend much time and energy attempting to assign blame and/or responsibility for what takes place in a Courtroom below. The appellant undertakes no such approach in this appeal. The prosecutor prosecuted to the best of her ability. The duty counsel provided as much information known to him at the time to the sentencing Judge. The Provincial Court Judge heard a joint recommendation, applied the law, and imposed what was, at the time, a seemingly fit and proper sentence.
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> Since then, however, information has come to light that seriously impacts the appellant's liberty interest in a way never contemplated by the sentencing Court. ...

He frames the issue:

> That the sentence imposed was unduly harsh given the unintended consequences of the disposition.

He sought our leave to admit fresh evidence in the form of an affidavit from Ms. Julie Chamagne, Executive Director of the Halifax Refugee Clinic sworn July 18, 2011, together with the transcript and other documentary evidence from the court below.

[14] Ms. Simmons, on behalf of the Crown, puts the issue this way:

> Should this Court, on the basis of fresh evidence adduced by the Appellant, vary the sentence from two years to two years less a day?

While not opposing the appellant's attempt to introduce fresh evidence, and seek a variation of his sentence, the respondent did urge, quite properly, that if this Court were disposed to allow the appeal, we ought to underscore the severe penal consequences that will be visited upon those convicted of trafficking or possession for the purpose of trafficking in cocaine, in Nova Scotia.

Analysis

[15] At the sentencing hearing before Judge Beach, duty counsel advised the court that Mr. Jamieson was born in Jamaica, immigrated to Canada 20 years earlier, and had been a citizen for about 10 years. In fact, the appellant was a permanent resident of Canada. He had never applied for citizenship. Counsel for

the Crown and the defence jointly recommended that Mr. Jamieson be sentenced to serve a total of two years in custody. Crown counsel advised the sentencing judge that the appellant had previously been convicted of assault in 2005 and again in 2009. Brief periods of custody and probation were imposed on each conviction.

[16] Following brief submissions by counsel, Beach, P.C.J. imposed a sentence of two years' incarceration. She also imposed a 10 year firearms prohibition pursuant to s. 109 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The court declined to imposed a DNA order which had been requested by the Crown.

[17] As Ms. Chamagne's affidavit makes clear, Mr. Jamieson attended "an admissibility hearing" on January 13, 2011, where he was "deemed inadmissible to Canada as a permanent resident and was issued a deportation order the same day".

[18] The appellant's application for a stay of the deportation order authorizing his removal to Jamaica was dismissed by the order of Justice Anne Mactavish of the Federal Court on October 5, 2011 (Docket: IMM-6772-11).

[19] The difference between a two year sentence, and a two year less-a-day sentence has a much greater impact than simply the location and type of institution in which the offender will be incarcerated. For offenders with concurrent issues under the **Immigration and Refugee Protection Act**, a sentence of two years or more has a profound impact. For the purposes of this appeal, the following provisions are relevant:

> 36. (1) **A permanent resident** or a foreign national **is inadmissible on grounds of serious criminality** for
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> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
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> (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

> (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.
>
> 64. (1) **No appeal may be made to the Immigration Appeal Division** by a foreign national or their sponsor or **by a permanent resident if** the foreign national or **permanent resident has been found to be inadmissible on grounds of** security, violating human or international rights, **serious criminality** or organized criminality.
>
> Serious criminality
>
> (2) **For the purpose of subsection (1), serious criminality must be with respect to a crime** that **was punished in Canada** by a term of **imprisonment of at least two years**.
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> 67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
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> (a) the decision appealed is wrong in law or fact or mixed law and fact;
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> (b) a principle of natural justice has not been observed; or
>
> (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.
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> (My emphasis)

[20] But for the sentence he received, Mr. Jamieson would be entitled to appeal to the Immigration Appeal Division on humanitarian grounds. However, because the disposition in his case of "at least two years", such an appeal process is statutorily prohibited. See for example, **R. v. Q.A.M.**, 2005 BCCA 615, for a useful description of the immigration process within the sentence appeal context.

[21] In effect, by agreeing to the imposition of a two year sentence on January 26, 2010, the appellant unwittingly short-circuited his statutory rights to appeal deportation proceedings on humanitarian grounds. Of course, one cannot predict the outcome of Mr. Jamieson pursuing his right of appeal to the Immigration

Appeal Division. Rather, the narrow focus in this appeal is whether the unintended/uninformed consequences of counsels' joint recommendation resulted in a sentence that is unduly harsh.

[22] Counsel agree that a slight variation of the sentence imposed, by reducing it by one day, will have the effect of changing the sentence from incarceration in a federal penitentiary, to a custodial sentence in a provincial jail, thus enabling Mr. Jamieson (as declared by Ms. Chamagne in her affidavit):

> .... to access the Immigration Appeal Division of the Immigration and Refugee Board ... Mr. Jamieson's only chance to remain in Canada, where he has family members, including seven Canadian born children, is to invoke these humanitarian and compassionate factors in front of the Immigration Appeal Division of the Immigration and Refugee Board.

[23] I would admit the materials submitted by the appellant as "fresh evidence". The respondent does not object to these materials being considered. In my view, the affidavit evidence and other records from the court below are "fit to require or receive" pursuant to s. 687(1) of the **Criminal Code** and meet the requirements for fresh evidence. See for example, **R. v. Riley** (1996), 150 N.S.R. (2d) 390 (C.A.); and **R. v. Fraser**, 2011 NSCA 70.

[24] The sentencing process is profoundly contextual. In **R. v. L.M.**, 2008 SCC 31, LeBel, J. characterized the sentencing process as follows:

> [17] ... To arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender, the judge must weigh the normative principles set out by Parliament in the *Criminal Code*:
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> - the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders, and acknowledgment of and reparations for the harm they have done (s. 718 *Cr. C.*) ...;
>
> - **the fundamental principle that a sentence must be proportionate** to the gravity of the offence and the degree of responsibility of the offender (s. 718.1 *Cr. C.*); and

> - the principles that a sentence should be increased or reduced to account for aggravating or mitigating circumstances, that a sentence should be similar to other sentences imposed in similar circumstances, that the least restrictive sanctions should be identified and that available sanctions other than imprisonment should be considered (s. 718.2 *Cr. C.*).
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> (My emphasis)

[25] The standard of review in a sentence appeal is well-settled. Great deference is paid to the sentence under appeal. Absent an error in principle, a failure to consider a relevant factor, or an over-emphasis of appropriate factors, we will only vary a sentence imposed at trial if we are convinced that the sentence is demonstrably unfit. See, for example, **R. v .M.(C.A.)**, [1996] 1 S.C.R. 500; **R. v. L.M.**, 2008 SCC 31; **R. v. Knockwood**, 2009, NSCA 98; and **R. v. A.N.**, 2011 NSCA 21.

[26] In the unique circumstances of this appeal, we are not dealing with the fitness of sentence, per se. Rather, we are faced with a situation where the sentencing judge (and counsel) failed to consider a relevant factor which, in this case, invites an inquiry into the proportionality of Mr. Jamieson's sentence.

[27] Ms. Simmons, for the respondent, puts the point well in her factum:

> 27. The sentencing judge made her decision based upon incorrect information relating to the appellant's immigration status. As a result, she did not have the benefit of submissions from counsel relating to the relevance of deportation consequences in fixing the appropriate sentence. The sentence imposed was viewed by all parties as a fit sentence. This Court is now asked to vary the sentence in light of the unintended collateral impact upon the appellant's immigration status. The appellant correctly points out that other provinces have wrestled with the issue in a variety of contexts.

[28] I agree with Mr. Burrill that the jurisprudence in this country where other courts have addressed the issue, seems to fall into three groups.

[29] First, there is the situation where the sentencing judge is fully aware of the deportation consequences and sentences an accused to something considerably greater than two years. Examples would include: **R. v. Belenky**, 2010 ABCA 98, and **R. v. Dhaliwal**, 2010 BCCA 50. In such cases the question often asked is

whether the sentencing judge failed to address the principle of deterrence and placed too much emphasis on the collateral consequence of deportation, as a mitigating factor. That is not what happened here.

[30] The second group of cases address the situation where the sentencing judge is not aware of the deportation consequences and still sentences an accused to something considerably greater than two years. In those cases appeal courts refuse to intervene because to do so would effectively allow deportation sanctions to justify what would otherwise be an unfit sentence. Examples would include **R. v. Martinez-Marte**, 2008 BCCA 136 and **R. v. Polio**, 2010 ONCA 769. That is not what happened here.

[31] Finally, there is a third group of cases, where the trial judge is not aware of the deportation consequences, and imposes a sentence in the range of two years. This case falls into that category.

[32] Here, the appellant argues that it is reasonable to infer Judge Beach would have sentenced Mr. Jamieson to something less than two years, had she been aware of the deportation consequences. While I am not prepared to go that far in divining what Beach, P.C.J. would have done had the issue been raised, I am certain that she would have addressed the matter and sought counsels' submissions. In my respectful view, it was a relevant factor which the court failed to consider, thus inviting our review on appeal. At the hearing we were assured by counsel that this whole question of potential immigration consequences is now part of the lexicon for lawyers and trial judges and has been added to everyone's checklist during sentencing.

[33] In my opinion, this oversight has had enormous consequences for Mr. Jamieson in that it precludes him from exercising his immigration appeal rights and is, therefore, a disproportionately severe collateral sanction. Given the unique circumstances in this case, I endorse the approach taken by Donald, J.A. , writing for the British Columbia Court of Appeal in **R. v. Kanthasamy**, 2005 BCCA 135:

> 14 The question of fitness in this case relates not to the quantum of the sentence, in the ordinary sense, but to a serious but unintended collateral effect of the penalty. The matter of a single day, two years rather than two years less a day, is inconsequential in terms of denunciation, retribution and deterrence, although it

> determines the availability of a probationary order and it also designates which corrections system, Federal or Provincial, is engaged.
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> 15 But, in relation to the appellant's immigration status and his personal safety, the difference of one day carries potentially enormous consequences. For that reason Mr. Holloway, counsel for the appellant (not counsel at trial), submitted that a two year sentence lacks proportionality. I agree with this submission.
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> ...
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> 23 In my view, the substitution of a term of two years less a day does no violence to the sentence imposed by the trial judge and avoids an unintended consequence of great significance. I am persuaded by the appellate authority to which I have referred that the adjustment in the sentence is within our review power and should be exercised to prevent the disproportionate ramifications of a single day of imprisonment.

and Rowles, J.A. for the same court in **R. v. Leila**, 2008 BCCA 8 at para. 23:

> 23 I agree with appellant's counsel that the loss of the appellant's immigration appeal rights is a disproportionately severe collateral sanction, which was unforeseen by the appellant and his counsel at the sentencing hearing and apparently unintended by the sentencing judge. In the circumstances of this case, reducing the appellant's sentence to one which will allow him to preserve his immigration appeal rights is inconsequential to the sentence principles relied upon by the sentencing judge.

[34] Counsel concede that the sentencing judge was unaware of the consequences and based her decision on incorrect information relating to Mr. Jamieson's immigration status. The judge was told that the appellant was a Canadian citizen when in fact he was a permanent resident of this country who had never applied for citizenship. She sentenced Mr. Jamieson to prison for two years based on a joint recommendation of counsel when, had counsel and the judge been aware of the consequences, the issue would have undoubtedly been given serious consideration before sentence was imposed. In my view we ought to exercise our authority to relieve against such an unintended and disproportionately severe collateral sanction, by reducing Mr. Jamieson's sentence to one which will allow him to exercise his immigration appeal rights.

[35] During argument at the hearing we were advised by counsel of the approach taken by immigration authorities in calculating time. On this record, Mr. Jamieson was taken into custody on January 25, 2010. He pleaded guilty the next day. We were told that the one day spent in custody would be considered as "added" to the two year sentence imposed by Beach, P.C.J. As a result, counsel urged that if we were inclined to allow the appeal, the sentence be varied by reducing it to "two years less two days" which would ensure that the appellant would still be able to pursue his immigration appeal rights.

[36] I recognize that the sentencing process cannot be used to circumvent the provisions of the **Immigration and Refugee Protection Act**. Parliament has legislated its policy decision by enacting the sections under the **Act** which give rise to this appeal. Nonetheless, immigration consequences is an important consideration among a host of factors which may be taken into account in crafting a proper sentence, tailored to fit the offence and the offender. As Justice Sharpe observed in **R. v. B.R.C.**, 2010 ONCA 561:

> 8 This court has held that "the certainty of deportation may justify some reduction in the term of imprisonment for purely pragmatic reasons": *R. v. Hamilton* (2004), 72 O.R. (3d) 1 at para. 156. While the sentencing process should not be used to circumvent the provisions of the *Immigration and Refugee Act*, the calculation of the appropriate sentence is not an exact science. Where there is a range of possible sentences, the fact that an offender will face deportation under one possibility "is one of the factors which is to be taken into consideration ... in conjunction with all of the other circumstances of the case" in choosing the appropriate sentence and tailoring the sentence to fit the crime and the offender: *R. v. Melo* (1975), 26 C.C.C. (2d) 510 at p. 516.
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> 9 I recognize that most cases in which an appellate court has reduced a sentence on account of the risk of deportation have involved modest reductions, often from two years to two years less a day. However, when I assess the unusual circumstances of this offence and this offender with the benefit of knowing what has transpired since that sentence was imposed, I conclude that a 30 months sentence is not fit and that the interests of justice would be served if the sentence were reduced to two years less a day.
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> ....

> 14 The sentencing process must retain "a human face". *Hamilton, supra,* at para. 158; *R. v. Iamkhong* 2009 ONCA 478, at para. 60. Appellate courts appropriately exercise their powers in exceptional cases to avoid unintended penalties and consequences that would be patently unjust and unfair. The cumulative effect of the factors I have mentioned makes this such a case. The appellant has effectively served his time. It would be unfair and unjust to leave in place a sentence that would have the unintended effect of condemning the appellant to exile in a country with which he has no meaningful connection.
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> 15 Accordingly, the appeal from conviction is dismissed as abandoned. I would grant leave to appeal sentence, allow the appeal, and reduce the custodial portion of the sentence to one of two years less a day, plus six months probation.

[37] There can be no question that the sentence imposed by Beach, P.C.J., based on the joint recommendation of counsel, sentencing Mr. Jamieson to two years' imprisonment in a federal institution was a "fit" sentence. The *only* issue in this case was whether the unintended deportation consequence, to which neither the judge nor counsel had turned their minds, qualified as a sufficient reason to warrant our intervention. It did.

[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.

[39] For all of these reasons the applications for leave to introduce fresh evidence and leave to appeal sentence are granted. The appeal is allowed. Mr. Jamieson's sentence is varied by reducing it to "two years less two days" so that the appellant's ability to exercise his immigration appeal rights, is preserved.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.