NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Melvin,* 2003 NSCA 142

Date: 20031215
Docket: CAC 191562
Registry: Halifax

Between:

James Bernard Melvin

Appellant

v.

Her Majesty The Queen

Respondent

Judge(s): Glube, C.J.N.S.; Saunders and Fichaud, JJ.A.

Appeal Heard: December 3, 2003, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Glube, C.J.N.S.; Saunders and Fichaud, JJ.A. concurring.

Counsel: Warren K. Zimmer, for the Appellant
James C. Martin, for the Respondent

Reasons for judgment:

[1] On December 6, 2002, James Bernard Melvin pled guilty to a charge of conspiracy to traffic in cocaine. He was sentenced to three years (consecutive to any time being served) by the Honourable Judge William B. Digby. The maximum penalty for this offence is life imprisonment. The appellant seeks leave to appeal the sentence. At the conclusion of the appeal hearing, leave to appeal was granted but the appeal was dismissed with reasons to follow. These are our reasons.

[2] Briefly, the facts are that Mr. Melvin, while serving a sentence of 2 years and 6 months in the penitentiary for possession of a substance for the purpose of trafficking, assault, uttering threats, failure to comply with a recognizance and possession of a weapon, arranged by telephone to have drugs delivered to another party outside of the prison who was then to deliver them to Mr. Melvin in prison. Mr. Melvin was 20 years old at the time of the current offence. He has a lengthy juvenile record (20 offences) dating back to 1995 including one for possession of a controlled substance in addition to the offences listed above which he committed as an adult.

[3] In his sentencing remarks, Judge Digby considered the appropriate sections of the **Criminal Code,** R.S.C. 1985, c. C-46, as amended (s. 718), and s. 10(2) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19. He expressed concerns about drugs being brought into a prison. In his opinion, Mr. Melvin's lengthy record showed he was persistently involved in anti-social behaviour with no regard or interest in abiding by periods of probation. Although Mr. Melvin was a young man, the sentencing judge did not see that rehabilitation could justifiably be emphasized.

[4] The standard of review of a sentence on appeal under s. 687(1) of the **Criminal Code** is a deferential one. In order to vary a sentence, it must be demonstrably unfit. (See **R. v. McCurdy,** [2002] N.S.J. No. 459, ¶9, 2002 NSCA 132.) In **R. v. C.A.M.** (1996), 105 C.C.C. (3d) 327 (S.C.C.), Lamer, C.J.C. sets out the required deference as follows:

> ¶90 Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a *discretion* to determine the appropriate degree and kind of punishment under the **Criminal Code**.

. . .

> ¶91 This deferential standard of review has profound functional justifications. As Iacobucci J. explained in **Shropshire**, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both **Shropshire** and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

(Also note in **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193.)

[5] The appellant appeals the length and fitness of his sentence and argues that the trial judge erred by failing to appreciate that there was no evidence of any intent to traffic on a commercial, profit-driven basis, and further by speculating about the use to which such contraband drugs might be put within the institution. The appellant says Judge Digby misinterpreted and misapplied **R. v. Thompson,** [1994] O.J. No. 2855 (Ont. Gen. Div.) and failed to take into account Mr. Melvin's guilty plea as a mitigating factor. For the reasons set out below, we reject the appellant's submissions and dismiss his appeal.

[6] In **Thompson**, the accused, while incarcerated, tried to have drugs delivered to him to sell to the inmates. He had a fairly long criminal record. He was found guilty of one count each of conspiracy to traffic in cocaine, and trafficking in

cocaine, and just before the end of his trial, pled guilty to conspiracy to traffic in marijuana and trafficking in marijuana. He was sentenced to four years on the first count with lesser concurrent sentences on the other three counts. General and specific deterrence were the paramount considerations. The trial judge in **Thompson** considered that trying to have drugs delivered to him in prison while serving time was "the aggravation factor". Although Judge Digby referred to **Thompson,** he acknowledged that Thompson had not pled guilty, and that he did not know the quantity of the drugs involved which might be greater, but in his opinion the sentence set an upper range and justified a lesser sentence for Mr. Melvin.

[7] There is nothing in the record or Judge Digby's judgment which suggests to us that he misunderstood or misapplied **Thompson**. There is nothing in the record or his judgment to suggest that Judge Digby based his decision on Mr. Melvin being involved in a commercial or profit-driven enterprise while in prison. In any event, and no matter how one interprets the circumstances in the **Thompson** case, we need not look to it in order to address the question before us on this appeal, which of course is the fitness of the sentence imposed upon Mr. Melvin.

[8] Both sides submitted a number of cases with a variety of sentences. Although helpful, no two cases will have identical facts and the sentence imposed must deal with the particular case. The burden is on the appellant to show that the sentence is demonstrably unfit. He has not done so. We see no error in Judge Digby's disposition that would warrant our intervention.

[9] In our opinion, considering the facts, Judge Digby's decision appropriately emphasized the aggravating features of a prisoner trying to bring drugs into prison for trafficking (even if not for profit), the background of the accused which shows he has failed to respond to previous periods of probation, and his previous convictions, including drug convictions. On the other hand, Judge Digby acknowledged the guilty plea by Mr. Melvin and found there were no threats of violence to bring into consideration as an aggravating factor s.10(2) of the **Controlled Drugs and Substances Act.**

[10] We find the sentence of three years is a fit sentence. Leave to appeal is granted, but the appeal is dismissed.

Glube, C.J.N.S.

Concurred in:

Saunders, J.A.

Fichaud, J.A.