IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Nicoll, 2005 NSPC 15

Date: 20050311
Docket: 1484542, 1484544
Registry: Kentville

Between:

Her Majesty the Queen

v.

George Douglas Nicoll

Judge:	The Honourable Judge Alan T. Tufts
Heard:	March 3, 2005, at Windsor, Nova Scotia
Written release date:	May 17, 2005
Charge:	s. 5(1) Controlled Drugs and Substances Act s. 5(2) Controlled Drugs and Substances Act
Counsel:	Richard Hartlen, for the Crown Karen Armour, for the defence

By the Court: (Orally)

[1] The offender, George Douglas Nicoll, pled guilty to two offences under the **Controlled Drugs and Substances Act**, one of trafficking in a controlled substance s. 5(1), and the other possession for the purposes of trafficking in a controlled substance s. 5(2), the controlled substance in each being cannabis marijuana.

[2] On two occasions, the offender sold a one-gram bag of marijuana through two different third parties, to an undercover agent who solicited the third party for that purpose. Each sale was $10.00. Later the offender's residence was searched, and three ten-gram bags and five one-gram bags of marijuana were found, a total of 35 grams. Scales were also found.

[3] The offender was subject to a pre-sentence report which has been canvassed during submissions. He has one related minor drug record under s. 4(1) of the **CDSA**, and another unrelated criminal record. He cannot be described as having a long criminal record.

[4] The offender spent five days in custody. The Crown seeks a one-year conditional sentence. The Defence suggests either probation or a short period of conditional sentence.

[5] The Crown argues very adamantly and strongly, that the case of **Butler,** *infra* and **Ferguson,** *infra* which I will refer to later particularly apply and have been confirmed by more recent decisions of the Nova Scotia Court of Appeal.

[6] The Crown argues that conditional sentences are lenient sentences, and accordingly, this conditional sentence should be more lengthy than those suggested in **Butler**, *infra* and **Ferguson**, *infra* and have very strict conditions. The Crown suggests, among other conditions, that the police have the authority, without notice, to search the residence of the offender which he shares with his spouse and have complete authority to search their entire residence, during a proposed conditional sentence. The Crown also suggests strict house arrest provisions for a third of the conditional sentence. The defence argues that the conditions sought are out of proportion

considering the appropriate purpose, objectives, and principles of sentencing.

[7] Before I begin my analysis of determining what should be a fit sentence, I would like to start by making some comments about conditional sentences generally. There is considerable misunderstanding about the nature of conditional sentences, their import and effect.

[8] First of all, conditional sentences have been legislatively approved by Parliament, our elected officials. The Court is required and mandated to consider such sentences, and to impose same when the statutory prerequisites have been met - **R. v. Proulx**, *infra*.

[9] Those subject to conditional sentences are serving a custodial sentence albeit served in the community. They carry the stigma associated with this kind of disposition. That stigma is one of considerable import in this country in my view and certainly would affect any offender's ability to travel abroad and, particularly, to the United States of America.

[10] Those serving conditional sentences are liable to immediate arrest and can be jailed upon showing on the preponderance of evidence, the civil burden, that any of the many conditions have been breached.

[11] Those who are on conditional sentences are not free like other Canadians. Their rights to bail and liberty, generally, are significantly restricted. In a free country like Canada, this is a meaningful and severe restriction.

[12] The Supreme Court of Canada recognizes conditional sentences can provide the necessary deterrence and denunciation, an objective which is generally called for when punitive measures are appropriate, see **R. v. Proulx,** [2000] 1 S.C.R. 61.

[13] It is wrong to describe conditional sentences as lenient, out-of-hand, no matter how short such a sentence is. Clearly any sentence, including a conditional sentence, which is not sufficient to meet the principles and purposes of sentencing, if it falls short of a fit sentence, can be considered lenient. But to characterize conditional sentences out-of-hand as lenient or a slap on the wrist is not accurate and is not appropriate, in my opinion.

[14] In a country which values freedom, as this country does, any restriction on that freedom should only be reluctantly and carefully applied in accordance with law; in this case in accordance with the fundamental purposes of sentencing. Section 7 of the **Charter of Rights and Freedoms** guarantees this.

[15] Accordingly, when the state does exercise such a restriction on an individual, it should be considered to be serious, whether that restriction is jail in an institution, probation, or custody in the community. To describe penal sanctions, such as a conditional sentence, in pejorative terms undermines our parliamentary democracy and the rule of law. In the appropriate circumstances, conditional sentences are not lenient.

[16] I would also add that the degree of supervision clearly affects the consequential effect of such a sentence. This is in the complete control of the Province. The Province chooses what resources it wishes to devote to this purpose, or whether or not such resources are going to be employed or deployed.

[17] The Court should not be influenced, in my opinion, by the Province's decision not to properly supervise or, to the extent necessary, to give better effect to a conditional sentence. It is the Parliament of Canada which has the constitutional authority to legislate in the area of criminal sentences which it has done in s. 742.1 and following sections in the **Criminal Code** and it is those principles and the other common law principles of sentencing by which the Court should be guided.

[18] All sentences start with the consideration under sections 718, 718.1, 718.2 of the **Criminal Code** and s. 10 of the **CDSA.** These sections simply provide that the purpose of sentencing is the protection of society and respect for the law and are to be achieved by the imposition of sanctions which have various objectives.

[19] The principles to be followed when applying these sanctions are proportionality, parity and restraint. The authorities, with respect to drug offences, clearly and repeatedly declare that denunciation and deterrence, particularly general deterrence, need to be emphasized.

[20] Much was said during submissions about reliance on pre-1996 sentence decisions. Those decisions referred to particularly were the **Butler**, *infra* and **Ferguson**, *infra* cases and a brief review of those cases would be appropriate.

[21] **R. v. Ferguson** (1988), 84 N.S.R. (2d) 255, involved two counts of trafficking, one ounce of marijuana - a $15 transaction - and 130 grams of marijuana, a $1200 value. Sentence imposed was three months in the first instance, and nine months on the second for a total of 12 months. Deterrence was emphasized.

[22] **R. v. Butler** (1987), 79 N.S.R. (2d) 6 the Nova Scotia Court of Appeal, dealt with an offence of possession for the purpose of trafficking of hashish. There was 8.8 pounds of hashish - a $40,000 value. The offender was considered to be a wholesaler. A period of one year in custody was imposed.

[23] Other decisions in that period were **R. v. O'Toole** (1992), 110 N.S.R. (2d) 359 (C.A.), and **R. v. Fifield**, (1978), 25 N.S.R. (2d) 407 , the latter is referred to in many of the older decisions. Both of these cases, and the other cases referred to above, show that drug trafficking is a planned and deliberate activity which was emphasized quite ably by the Crown attorney during his submissions. Where the offender knows, or ought to know, the consequences of his actions deterrence needs to be emphasized.

[24] In **R. v. Longaphy**, 2000 NSCA 136, Justice Oland makes the point that pre-1996 cases must be read with great care and awareness that the 1996 sentencing principles, particularly those in s. 718.2(d) and (e), now apply.

[25] She says at para. 30 of that decision quoting from Justice Roscoe on a previous decision in **R. v. S.C.** (1999), 175 N.S.R. (2d) 158

> Sentencing cases which predate those provisions are subject to and limited by the legislative directions in s. 718.2(d) and (e) that an offender not be deprived of liberty if less restrictive sanctions may be appropriate and that all available sanctions that are reasonable in the circumstances should be considered for all offenders.

[26] In my opinion, the earlier cases can no longer be regarded as establishing rigid starting points or ranges against which sentences decided after these legislative changes came into effect must be measured. They are to be read with great care and awareness of the sentencing principles which now apply, particularly those applying to incarceration as a last resort and the focus upon individualized sentencing.

[27] The Crown refers the Court to various decisions since 1996 which refer to, and the Crown argues, confirms the principles set out in **Butler** and **Ferguson**. In particular, in **R. v. McCurdy** 2002 NSCA 132, which refers to **Butler** and **Ferguson**, **R. v. Collette** (1999), 177 N.S.R. (2d) 386 (C.A.) which refers to **Ferguson**, **R. v. Jones** 2003 NSCA 48, which refers to **Butler**, and **R. v. Parsons** 1999 NSCA 156, which refers to **Ferguson**. The Crown argues that where **Butler** and **Ferguson** have been relied upon that the ranges of sentence in these decisions still apply.

[28] In my opinion, reference to these older cases in the more recent decisions simply confirms the principle that deterrence and denunciation need to be emphasized in drug cases. It does not relieve the need for the Court to consider
s. 718.2(d), a provision not statutorily in force when **Butler** and **Ferguson** were decided. Accordingly, the application of **Ferguson** and **Butler** and the other older cases should be done carefully.

[29] I will now return to the principles of sentencing applied to in this case. The gravity of this offence should be measured against the amount and type of drugs, the extent of the offender's activity shown, and what can be said about the sophistication, if any, of his activity. It is not clear how extensive his activity was. It is not known whether the third parties were close friends or he was making some kind of accommodation for them. There is simply no evidence to suggest he was known or well-known as a drug dealer. The amounts of drugs were clearly suggestive of drug trafficking, but are relatively small. The presence of the scales is aggravating. But no other paraphernalia such as score sheets or other packaging containers or cash were said to be present.

[30] Also, while the ages of the individuals were not mentioned, it was not suggested that any were under the age of eighteen. Finally, the activities were not at or near a school nor did it involve the use of weapons or threats of violence such that s. 10 of the **CDSA** applies.

[31] I have had an opportunity now to review the numerous authorities of the Nova Scotia Court of Appeal and the Nova Scotia Supreme Court cases dealing with drug offences. There are, of course, a wide range of sentencing commensurate with the seriousness of the circumstances.

[32] A cursory review of these cases is useful. These cases are all post-1996 and after the **Criminal Code** amendments. I will not go into length in these cases, as many of them are much further along the scale than the case at hand but they do demonstrate how there is some kind of a parallel between the sentence imposed and the circumstances.

[33] **R. v. Collette,** *supra* which is relied upon by the Crown. That case involved 10 kilograms of hashish - a value of $77,000 and a street value of $200,000. A three-year sentence was imposed and a conditional sentence was rejected.

[34] **R. v. Wheatley** (1997), 159 N.S.R. (2d) 161 is a decision of the Court of Appeal. It involved possession for the purposes of hashish and breach of probation. The offender was described as a petty retailer of soft drugs and had a record of theft and fraud. A 13-month conditional sentence was imposed.

[35] **R. v. McCurdy**, *supra* is a marijuana grow operation case - 500 plants - a sophisticated operation. A three-year sentence was imposed.

[36] **R. v. Frenette**, *supra* is, again, a case of possession for the purposes - $74,000 worth of marijuana. The Appeal Court described the offence as a planned and deliberate and sophisticated operation. A 14-month conditional sentence imposed was upheld on appeal.

[37] **R. v. Shacklock** (2000), 188 N.S.R. (2d) 303;N.S.J. No. 338 (Q.L.)(C.A.); 2000 NSCA 120 was a case of possession for the purposes - marijuana -

$100,000 in value - 214 marijuana plants. Eighteen months jail was imposed by the Court of Appeal. A conditional sentence was rejected.

[38] **R. v. Parsons**, *supra* was a case of trafficking in marijuana - a 19-year-old - no record. The offence occurred near a school. Six months conditional sentence was imposed. **Fifield**, **MacArthur**, **Eisan**, **Fitzgerald** and **McLay** were all referred to. This is a 1999 decision of the Nova Scotia Court of Appeal.

[39] **R. v. Connolly** [1998] N.S.J. No. 375, was a case of possession for the purposes of, again, marijuana - a related record. The offender was on probation. It was a large indoor grow operation - over $1-million in value. Fourteen months jail imposed was upheld on appeal.

[40] **R. v. Downey**, 2000 NSCA 110, involved trafficking in cocaine. Three years jail was imposed.

[41] **R. v. Hill**, 1999 NSCA 118, involved two counts of trafficking - one pound of marijuana, a value of $2600, and a kilogram of hashish of $11,000 and trafficking in marijuana. A fifteen month conditional sentence was varied on appeal to a term in jail.

[42] **R. v. Jones**, 2003 NSCA 48, was a case of possession for the purposes - hashish, and a proceeds of crime offence - four kilograms of hashish and $40,000 in cash was involved. Three years in jail was imposed. A conditional sentence was rejected.

[43] **R. v. Provo,** 2001 NSSC 189 involved trafficking in cocaine. A two years less a day conditional sentence was imposed. There were 16 prior offences.

[44] **R. v. Talbot** [1999] N.S.J. No. 187, involved trafficking in cocaine - small amounts - one transaction. Sixteen months conditional sentence was imposed.

[45] **R. v. Tokic,** 2002 NSSC 54 was a case of trafficking in cocaine - four sales - seven and a half grams - value $700. Cocaine was described as an extremely dangerous drug. A two year federal sentence was imposed.

[46] Another case referred to in Court this morning was **R. v. Dann**, 2002 NSSC 237 involving 300 grams of cocaine. A sentence in excess of four years custody was imposed.

[47] **R. v. MacIvor** , 2002 NSSC 255 involved 79 marijuana plants and three kilograms of dried marijuana. A four month sentence in jail was imposed. A conditional sentence was rejected.

[48] This provides the Court with some sense of the range of sentencing depending on the seriousness or gravity of the offence. Clearly many of these offences referred to above were much more serious than the case at bar and conditional sentences were imposed.

[49] Finally, the principle of restraint requires the Court to impose the least restrictive sentence which meets the principles and purposes of sentencing.

[50] I am satisfied that a period of custody in the community is required. I say this principally because of the need for deterrence. This need stems from the planning and deliberate aspects of drug trafficking which the Crown attorney quite ably emphasized and which was clearly pointed out repeatedly by the authorities. Those features and the other aggravating features present here - the scales and the number of transactions and the packaging also emphasize the need for deterrence.

[51] However, even if the offender is described as a petty retailer it is difficult to place him much above the lowest end of that scale. The principal dispute here is the length of the sentence to be served.

[52] As I mentioned at the outset, a conditional sentence, even a short one, is not "a slap on the wrist". A conditional sentence can provide deterrence and denunciation as pointed out in **Proulx**, *supra*.

[53] In my opinion, given the gravity of the circumstances, considerations that I outlined above, a period of three months of conditional sentence together with nine months probation would be an appropriate disposition in this matter.

[54] I am going to endorse many of the conditions recommended by the Crown attorney. I recognize that the offender lives in a somewhat remote area of the province, it is a rural area, but much of Nova Scotia is in a rural area.

[55] I recognize that the offence was committed in the offender's home. However, as I described above, the stigma attached to custodial sentences, albeit served in the community, and the consequences that follow from it, and the restriction on one's liberty and freedom are all meaningful in my opinion.

[56] I am not going to include the provision for the search. Obviously the police have the authority to search residences if there are proper grounds to do so. The offender will be required to present himself at random periods and times when the police or his supervisor require him to present himself at his home, and he will be subject to notification by telephone.

[57] The conditions will be as follows - The usual conditions which are included in the form of the order. He will be under house arrest for the entire three months. He is not to consume alcohol or drugs.

[58] It is not necessary, in my opinion, to include attendance at a residential treatment centre but he is to submit to urinalysis testing and substance abuse assessment and counselling. He is not to associate with those known to him to have a criminal or drug record except for employment purposes and he is specifically not to have any contact with Mr. MacDonald or Mr. Galley whose names are in the draft which was presented to the Court.

[59] I am simply going to provide that he not possess a cellular telephone during the period of his conditional sentence, and that he is required to have a so-called “land line” telephone. It is not necessary, in my opinion, for him to provide his telephone bills as he lives with another person.

[60] He is to carry a copy of the order with him at all times when he is out of the residence and in accordance with the recommended provision. The house arrest provisions are as recommended by the Crown attorney including the restriction on the number of visitors as the Crown attorney has recommended.

[61] He is to make himself available to the supervisor by telephone at a number to be provided. He is to make himself available at his door when and if his supervisor calls upon him.

[62] Following the conditional sentence, there will be a period of probation with conditions as follows: to keep the peace and be of good behaviour, not to have in his possession or consume any alcohol or alcoholic beverages, non-prescribed drugs, and to take prescription drugs in strict accordance with medical direction; not to associate with those known to him to have a criminal drug record, and in particular Mr. MacDonald and Mr. Galley, and he is not to be, as recommended in both orders, not to be in the presence of anyone using or consuming or possessing non medically-prescribed drugs. The Court cannot make orders with respect to his spouse but can certainly make orders with respect to what other substances may be in the home.

[63] You will be subject to probation for the balance of a year, for a period of nine months following that, sir, for the terms and conditions that I set out. All this will be reduced to writing. It will be further explained to you, sir, and once you have signed that, you will be required to go to your residence.

[64] There is also a s. 109 order that is required and that will be for ten years and three months.

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ALAN T. TUFTS, J.P.C.