IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Nguyen, 2007 NSPC 69

Date: 23Nov2007
Docket: 1469377
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Registry: Halifax

Her Majesty the Queen

v.

Tuan Anh Nguyen

Judge:	The Honourable Judge Castor H. Williams
Sentence Decision:	November 23, 2007
Charge:	**7(1) CDSA; 5(2) CDSA; 326(1)(a) CC**
Counsel:	Marc Covan for the Crown Eugene Tan for the Defendant

Introduction

[1] Tuan Anh Nguyen, the accused, at the conclusion of his trial, was found guilty of production of marihuana, possession of marihuana for the purpose of trafficking and the unlawful diversion of electricity. The Court's decision is published as ***R.v. Nguyen*** [2007], N.S.J. No. 404, 2007 NSPC 53. This is the scheduled sentencing.

[2] A Presentence Report was presented. To the point, it says that the accused was born in Vietnam in 1963 and was raised in a poor large family. Fleeing his homeland he was sponsored to Canada from a refugee camp in Hong Kong where he had resided for three years and, in 1991 landed in Vancouver, B.C. He is married with two children one of whom lives with his spouse in the Netherlands and he is the sole provider of his other child who resides with him and his sister in B.C. Further, he has completed grade seven in Vietnam and a three-month English as a Second Language program on arrival in Canada. His work experience is limited to general labour, odd jobs and factory work and he relies upon money sent to him by his wife. At a point

in time he reported that he was addicted to cocaine but denies any current addiction issues and abstains from the use of drugs and alcohol.

Position of the Parties

[3] Essentially, the Crown submitted that the accused was a member of a criminal organization in which he played a leadership role. He was also a marihuana wholesaler who along with his cohorts came to Nova Scotia with the specific intention to produce marihuana on a commercial basis. Their combined criminal activities endangered the safety and security of the properties and lives of innocent persons who would be living in the neighbourhood of these grow operations. Consequently, his punishment should reflect denunciation and deterrence both specific and general. He recommended a term of imprisonment of six to seven years.

[4] On the other hand and succinctly, the Defence submitted that the accused should not be singled out for special punishment. Moreover, it was not the Crown's theory, at trial, that the accused was a member of any criminal organization and it also was not the trial findings. Further, it would

appear that at the sentencing hearing the Crown was attempting to “get a second kick at the cat” by introducing expert opinion evidence on Vietnamese organized crime gangs to increase the punishment for the accused. This would be “manifestly unjust” as it would lead to a disparate sentence as his other associates who have been punished were not treated in a similar fashion. Although the accused had a stale-dated similar record he was now the single father of a three-year-old son with good prospects of rehabilitation. Furthermore, because of his criminal conviction his immigrant status could be the subject of administrative proceedings. Therefore, the court should consider parity in sentencing. He recommends a sentence of two and one-half years to four years of imprisonment.

Aggravating and Mitigating Factors

[5] However, I find the aggravating factors to be that:

- the accused has four prior convictions for the possession of a narcotic for the purpose of trafficking, (designated substance offences), in British Columbia, two in 1994 and two in 1998.

- the electrical retrofitting of the residences created shock hazards to innocent persons who would be unaware of the modifications.

- the electrical modifications also created fire hazards that could endanger the property, lives and safety of innocent residents in the neighbourhood.

- commercial drug production was introduced into established neighborhoods that would have the potential to expose the general population of the neighbourhood to the risk of the attendant violence of organized crimes and criminal elements through such activities as incorrect house invasions.

- the marihuana grow operations were well funded, well planned, well organized, sophisticated, were potentially lucrative and targeted the Halifax Regional Municipality.

- the marihuana grow operations were well designed and located to avoid detection and thus augmenting the risks to the public safety.

- the offences were motivated by profit by a group of individuals that included the accused.

- a pattern that residential homes are utilized as marihuana grow operation production sites.

Mitigating Factors

[6] I find the mitigating factors to be that:

- the accused has been compliant with all court release orders and although living out of the province has returned to Nova Scotia for his many court appearances that may suggest his acceptance of his position and a readiness to make reparations to the community.

- his prior criminal record although for related offences is now somewhat dated.

- it would appear from his minimal education and language skills and court attendances he may well have good prospects for rehabilitation in a structured environment.

Analysis

[7] Pursuant to the ***Criminal Code,*** s.723, the Crown has presented Det. Constable Jim Fisher, an expert on Asian organized crime to testify as to the aggravating factor that the grow operation, here in the Halifax Regional Municipality, was probably part of a national or international crime syndicate. He outlined that the structure of Vietnamese crime groups were organized upon familial ties and shared common experiences ranging from between four persons and one hundred persons. There was a division of labour within the group where individuals of different expertise such as an electrician for the theft of electricity, a horticulturist to select and care for the plants and to ensure maximum yields, and a bookkeeper to meticulously account for all expenses, would combine their skills on an operational level.

[8] Likewise, although there was no overarching hierarchy or central direction, crime groups, cooperated with each other and even engaged in subdivision of labour with some concentrating on the financing of the illicit trade, while others would concentrate on the production, packaging, transportation, smuggling or selling of marihuana. Furthermore, Vietnamese crime groups were the largest producers of marihuana in Canada. They specialized in purchasing a network of houses in established residential areas and convert them into grow operations. In purchasing these homes and in their subsequent operations, they would use pseudo names and would also utilize their language and ethnicity in an attempt to create confusion concerning their true identities. Also, at an operational level, they would have national and international connections as Canada has become a major exporter of marihuana.

[9] However, this Court has some concerns that new allegations were being raised at the sentencing hearing that properly should have been canvassed and presented during the trial and before the Court pronounced its finding of facts and guilt. I grant that the evidence is relevant to the context in which the crimes may have been committed and that it amplifies the rational inferences

that could have been made. However, in my view, no foundation was laid at the trial nor was it even suggested for me then and now to conclude beyond a reasonable doubt that there existed a conspiracy to produce marihuana or that the accused was connected to a national or international crime organization.

[10] Nonetheless, the Court did find that he was part of a group consisting of five persons of Vietnamese descent who had familial ties. This group of Vietnamese purported to want to relocate to Nova Scotia from Ontario and, using false names, purchased several homes in an established residential neighbourhood which they converted into marihuana grow operations. Huu Hai Nguyen, who was a member of this group and is the accused father-in-law, on his own testimony that I accepted as credible and trustworthy, arranged for the theft of electricity and the police seized the applied equipment and complimentary products from the apartment. The group also used specialized fertilizers to produce maximum yields of marihuana and kept meticulous records concerning the expenses of the operation. Thus, sufficient evidence was adduced at trial for me, with this expert evidence, now to be satisfied contextually of the nature of the venture.

[11] Recall that this Court did find that the accused only source of income was from the grow operations (para. 79). Moreover, the Court also found that there was a “commercial grow operation with shared income and expenses and . . . the existence of a group of persons who participated in this grow operations . . . ”(para. 80). Likewise, the Court had no reservations in concluding that “the accused and his associates were employing their etymological diversity, comprehension and knowledge as a stratagem to create doubt and to confuse.”

[12] In further context, the evidence also indicated that this group of Vietnamese persons came to Nova Scotia and with large cash deposits, purchased residential properties but did not live in them. Instead, they made extensive internal structural modifications that included electrical and ventilation changes and, as a result, converted these residences into sophisticated commercial marihuana grow operations. It was noted that the electrical and ventilation systems were similar in nature suggesting a system, pattern and expertise in installation and operational knowledge.

[13] Furthermore, the accused, his wife, child and others who were involved in the unlawful enterprise, lived in an apartment complex other than at the

compromised residences. The accused had no known source of employment income yet had large bank account balances and a motor vehicle. These factors suggest that either the accused was well-funded from the profits of the grow operations or obtained monies from his affiliation with others or both.

[14] The size and magnitude of the grow operation can be deduced from its planning and organization and can be inferred from the large volume of grow related equipment and supplies obtained for the initial setup and the ongoing related purchases. This included the purchase and storage of expensive specialized chemical fertilizers designed to maximize crop yields and the purchasing of replenishing soils to ensure healthy crop propagation. When these factors are combined with the overall financial investment in the grow equipment valued at $43,500.00, (Hudson Drive $19,500.00 and Kenneth Drive $24,000.00), the operational design and sophistication of the residential modifications, and the large amount of cash seized, it is reasonable to conclude that the accused was not involved in any short-term venture.

[15] Furthermore, the documents that were seized in either the accused actual or constructive possession, as I have found, demonstrated the high level of organization and sophistication of his group involvement. The financial

record keeping was meticulous and suggested that the accused was accountable to others for his involvement. The inclusion of names of others in his accounting records who were involved in similar grow operations in the Halifax Regional Municipality suggested a connection between them and the accused, at least financially, or that he, the accused, may have had a supervisory role in these operations as is now being suggested.

[16] Even so, the exact role that the accused played in these activities is unclear and vague and therefore he must be given the benefit of the doubt. However, the evidence suggests that he did play a role. After all, the record keeping documents were found in his constructive possession. He was found in possession of a large amount of cash and the real estate agent described him as having a “leadership role” when purchasing the homes. However, the evidence was that the production of marihuana and the other illicit activities were a group participation and the Court did not find that any one person’s role was more significant than the others. It may well be, as noted by Det. Constable Fisher, that the structure of the group was such that leadership was intentionally diffused to avoid the consequences of detection. However, it was unclear whether this may indicate their level of sophistication or whether there was some other rational explanation.

[17] Nonetheless, the evidence does tend to show that the accused had an important if not an established leadership role in a sophisticated, well planned and well organized marihuana production operation. Nevertheless, there was no arguments at trial, nor was it then intimated that this group of Vietnamese persons constituted a "criminal organization" as defined in the ***Criminal Code,*** s. 467.1. Likewise, the accused was neither prosecuted as participating in such activities nor were he and his associates alleged to have an association to any form of organized crime.

[18] In any event, this Court did find in its decision at para. 84:

> 84 As a consequence, I conclude and find that there is uncontradicted evidence of a common criminality. Also, I conclude and find that there is uncontradicted evidence, consistent with the fact and inconsistent with any other rational conclusion, that the accused did acts that were consistent and compatible with accomplishing the common criminal objective of producing, possessing and selling marihuana. Likewise, I conclude and find that there is incontrovertible evidence that the diversion of electricity to power the grow operation was a necessary activity and that anyone who was involved in the grow operation, reasonably, would also have knowledge of the electricity diversion. Finally, I conclude and find that there is uncontradicted evidence that is consistent with the fact and inconsistent with any other rational conclusion but that the accused was an active participant in the grow operation, as alleged.

[19] Thus, from this finding, I can say that there was sufficient evidence to show that the group's unlawful activities, *prima facie*, could fall ostensibly

within the ambit of the ***Criminal Code***, s. 476.1 as now intimated by the Crown. However, I should reiterate that, at trial, the Crown then did not articulate this factor as part of as its theory and as a result it did not afford the accused with the opportunity of full answer and defence on that point. Furthermore, the Court was not requested to make an authoritative finding on that issue and, on the evidence before the court, that issue was not proved beyond a reasonable doubt.

[20] Even so, in ***R.v. Payne*** [2007], B.C.J. No. 2391, 2007 BCCA 541, enlisted in support by the Crown, the sentencing judge found that the appellant was a member of a criminal organization and that he committed the aggravated assault for which he was convicted, on the facts, was "for the benefit of, at the direction of or in association with a criminal organization." In separate concurring reasons, Chiasson J.A., propounded at para. 60:

> 60 The appellant was not charged under s. 467.12 of the ***Criminal Code*** - committing an offence for the benefit of a criminal organization. Section 718.2(a)(iv) of the ***Criminal Code*** is engaged when there is evidence that an offence was committed for the benefit of, at the direction of or in association with a criminal organization. In this case, there clearly was such evidence.

[21] However, the court in ***R.v. Marsden***, 2004 MBCA 121, 187 Man. R. (2d) 298 (Man. C.A.), held at para. 13:

> 13 There was no evidence before the sentencing judge that the robbery and death of Pritam Deol was gang sanctioned or was related to membership in a gang as required by s. 718.2(a)(iv) of the Code before the fact may be taken into account as an aggravating circumstance. The fact of Marsden's gang membership at all (whether or not the offence was committed for the benefit or direction of or in association with a criminal organization) was disputed and not formally proven. It was an error in law to take it into account and it did affect the judge's sentence.

[22] Thus, it would appear that ***Marsden***, *supra.*, stands for the proposition that to be an aggravating factor the impugned activity must be gang sanctioned or be related to gang membership. Moreover, while hearsay evidence is permitted at sentencing, along with its relevancy, it must be credible, trustworthy and reliable. ***R.v. Gardner*** (1982), 68 C.C.C.(2d) 477 (S.C.C.). Here, the finding of guilt was not predicated upon the assumption that the crimes were carried out in concert and association with an organized network of the criminal underground. The findings were that it was a local group activity and no more. Thus, in my view, any submission of aggravating circumstances, must comply with the same evidentiary rules as facts proved beyond a reasonable doubt and supporting the conviction. See: ***R.v. Ly,*** [1992] N.J. No. 354 (Nfld. C.A.), ***Criminal Code***, s. 724(3)(e).

[23] Hence, in the circumstances, as I have found, there was no evidence that established, beyond a reasonable doubt, a pattern common to Nova Scotia and other places; that the crimes were committed by the same group of individuals in other places with an association with any identified criminal group; an inextricable link between the group's activity in Nova Scotia and other national or international crime groups; or that the accused crimes were committed in the company of members of a crime organization known to the police to specialize in marihuana grow operations. Therefore, I do not think that it is sufficient, at a sentencing hearing where the evidential rules are relaxed to present some opinion evidence that the accused activities, without proof beyond a reasonable doubt, falls within the ambit of the ***Criminal Code***, s. 467.1 and therefore engages the ***Criminal Code***, s. 718.2 (a) (iv). All the same, in my opinion, the testimony of Det. Constable Fisher, at the sentencing hearing is relevant only to the extent that it suggests some context to an otherwise presented vacuous and bland activity and it has amplified, from his experience and knowledge, some of the Court's trial findings and conclusions, and no more.

[24] Further, in my view, this opinion evidence did not establish, beyond a reasonable doubt, a connection between the accused and any known national or international criminal groups. It also did not establish beyond a reasonable doubt that the group in which the accused was found to be associated was known to the police as a criminal group or network that had established a pattern of operation across the nation or internationally. Therefore, given the principle of parity in sentencing for similar offences and offenders, Fisher's opinion evidence, in my view, cannot be given the weight in order to magnify unduly the gravity and serious nature of the same offences committed in the same set of circumstances by similar offenders.

[25] This Court is mindful of the provisions of the ***Criminal Code***, ss. 718 to 718.2 and the ***Controlled Drugs and Substances Act***, s. 10, concerning the purposes and objectives of sentencing and the aggravating and mitigating factors. These include the provisions for general and specific deterrence, rehabilitation of the offender and promoting in him a sense of responsibility and a respect for the law. In addition, to the deemed aggravating factors, this Court is also mindful of the principle of proportionality that propounds that a sentence should be in the range of those contemporaneously imposed for

similar offences and the appropriate penalty should not be distorted unduly by other considerations. See: ***R.v. Mellstrom*** (1975), 22 C.C.C. (2d) 472 (Alta. S.C. App. Div.)

[26] In Nova Scotia, our courts have held consistently that punishment for the crimes for which the accused were found guilty demand both specific and general deterrence and denunciation. See for example: ***R.v. Jones*** [2003], N.S.J. No.146, 2003 NSCA 48, ***R.v. Creelman*** [2006], N.S.J. No. 305, 2006 NSSC 232.

[27] In ***R.v. Dung van Tran*** (unreported), Tran was a cohort of the accused in the same group of activities. On an early resolution and joint recommendation he received three years imprisonment. He had no prior criminal record.

[28] Also, in ***R.v. Van Ut Nguyen*** (unreported), who was a cohort of the accused, was apprehended for the same set of activities and circumstances. On an early resolution and a joint recommendation, he received three and one-half years' imprisonment. He had one prior conviction.

[29] Likewise, in ***R.v. Binh Tran*** (unreported), another cohort of the accused, on a joint recommendation and an early resolution, received five years imprisonment. This penalty included a conviction for a grow operation in Ontario. He had no prior convictions.

[30] Additionally, in ***R.v. Huu Hai Nguyen*** (unreported), another criminal cohort of the accused, received on a joint recommendation and an early resolution three years' imprisonment. He had no prior criminal record.

Disposition

[31] Before me for sentencing stands a man who grew up in poor circumstances in a foreign land and who has limited education, job experience and marketable skills. A man who was once addicted to cocaine; who fled his homeland and for three years lived in a refugee camp; who has limited ability to communicate in English and who came to Canada to seek opportunities to better himself and kin.

[32] However, it appears that his life's experiences and social affiliations were inescapable fatal attractions that submerged him in a sordid criminal lifestyle that now may inevitably deny him the reality of his idyllic Canadian dream. He may well face administrative penalties in the form of immigration proceedings as intimated by his counsel. The fact that he may be deported upon the expiration of his sentence may also be a mitigating factor that would be given some consideration. Nonetheless, in the absence of any contrary mitigating evidence, it would appear that he must have made a cost-benefit analysis where, for him, the lure of profits trumped his respect for the law.

[33] There may be more to Mr. Nguyen than what has been disclosed. But the crimes for which I found that he committed and for which he is now to be punished are indeed very serious. All important, in my view, is that these offences strike at the very heart of the community's safety and security and at its social fabric and stability and can spread misery and death for its vulnerable citizenry. Illegally obtained drugs such as marihuana whether considered as "hard" or "soft," their use can destroy lives through addiction with the attendant social and health care costs to the community; breeds violence through turf rivalries and control for profit; fosters and spawns the

committing of other violent and nonviolent crimes such as theft, assault, robbery and prostitution in order to obtain the drugs thus leading to a vicious cycle of collateral criminal activities.

[34] However, sentencing is an individualized process. Here, I have set out aggravating and mitigating factors, considered and assessed the accused profit motive, his Presentence Report, the lack of criminal records of his cohorts, his prior criminal record and the submissions of counsels. Having instructed myself on the principles and purposes of sentencing and the cases submitted by both counsels, in my opinion, the sentence that I will impose will protect the community, denounce his unlawful conduct, promote in him a sense of responsibility and respect for the law. Hopefully, it will deter him and others of similar inclination and it will not be too disparate. Thus, in my view, the just and appropriate sentence will be four years in a federal penitentiary.

J.