

Date: 20101213
Docket: 10/24
Citation: *R. v. Lavers* 2010 NLCA 73

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

SCOTT JOSEPH LAVERS

APPELLANT

AND:

HER MAJESTY THE QUEEN
as represented by the Attorney General
of Canada

AND:

The Attorney General of Newfoundland and
Labrador

RESPONDENT

Coram: Welsh, White and Harrington, JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
Corner Brook

Appeal Heard: September 23, 2010

Judgment Rendered: December 13, 2010

Reasons for Judgment by Welsh, J.A.

Concurred in by White and Harrington, JJ.A.

Counsel for the Appellant: James Bennett

Counsel for the Respondent: Leonard McKay for Her Majesty the Queen
in Right of Canada
Robin Fowler for Her Majesty the Queen in
Right of Newfoundland and Labrador

Welsh, J.A.:

[1] Scott Lavers pleaded guilty and was convicted of six drug related offences together with careless storage of a firearm, possession of a firearm while prohibited, and breach of an undertaking. The focus of this appeal is whether the trial judge erred in refusing to accept a joint submission on sentencing for the drug related offences.

BACKGROUND

[2] Mr. Lavers admitted to travelling to Ontario in April 2009 with another individual for the purpose of obtaining substantial quantities of cocaine, marihuana and a substance held out to be ecstasy to be sold in this Province. After the drugs had been purchased, they were put in parcels and mailed over a two day period to individuals residing on the west coast of the Province. The police became aware of the parcels and, upon examination, found three kilograms of cocaine, about five pounds of marihuana and fifteen thousand pills. Upon delivery of the parcels, the intended recipients were arrested. They admitted to police that they were expecting the parcels to be delivered and knew they contained drugs. They were paid for their participation in cash and drugs. Two of the arrested individuals told police that Mr. Lavers had asked them to pick up their parcel, not open it, but to hide it.

[3] On June 1, 2009, Mr. Lavers was charged with five counts of trafficking and conspiracy to traffic in cocaine, marihuana and ecstasy contrary to section 5 of the *Controlled Drugs and Substances Act* and section 465 of the *Criminal Code*. The Crown proceeded by way of indictment. At Mr. Lavers' first appearance in court on September 15, 2009, he was released on an undertaking which, among other things, required him to refrain from the possession of non-prescription drugs. On January 13, 2010, at a second interview with police, Mr. Lavers claimed that his participation was minimal in obtaining and mailing the drugs, and that he had not received any significant financial benefit.

[4] On February 11, 2010, the police executed a search warrant at Mr. Lavers' residence where they found four bags containing one hundred and ten grams of marihuana together with a scale and some baggies. They also found a 410 gauge shotgun which was unsecured in the laundry room and some ammunition. As a result, Mr. Lavers was charged with possession of marihuana for the purpose of trafficking contrary to section 5 of the

Controlled Drugs and Substances Act, and with three offences under the *Criminal Code*, in particular, careless storage of a firearm (section 86(1)), possession of a firearm while prohibited arising from an order made on October 31, 2001 (section 117.01(1)), and breach of an undertaking arising from the possession of marihuana (section 145(3)). The Crown proceeded by way of summary conviction.

[5] Mr. Lavers entered guilty pleas on all the above charges. Counsel for the Attorney General of Canada (“counsel for Canada”) dealt with the drug related offences, while counsel for the Attorney General of the Province (“counsel for the Province”) addressed those related to the firearm and breach of an undertaking. This is relevant because counsel for Canada together with counsel for Mr. Lavers made a joint submission on sentence which engages special legal considerations, while counsel for the Province did not participate in that, or any, joint submission.

[6] The joint sentencing submission regarding the drug related offences recommended a term of imprisonment of twenty-four months. The trial judge rejected that submission. Rather, he approached the sentencing in the ordinary manner, considering the nature of the offences and Mr. Lavers’ involvement, Mr. Lavers’ personal circumstances, precedents as to sentences for similar offences, and the principles of parity and proportionality. The judge began by imposing a sentence for each offence. In summary, for the April 2009 offences, he specified:

- Two years imprisonment for trafficking in marihuana;
- Two years for conspiracy to traffic in marihuana;
- Four years for trafficking in cocaine;
- Four years for conspiracy to traffic in cocaine; and
- One year for conspiracy to traffic in ecstasy.

Regarding the February 2010 offences, he imposed:

- Three years imprisonment for possession of marihuana for the purpose of trafficking;
- Two months for careless storage of a firearm;
- Two months for possession of a firearm while prohibited; and

- Three months for breach of an undertaking.

[7] The trial judge then concluded that, because the April 2009 offences involved a single criminal transaction, the sentences should be ordered to be served concurrently, resulting in a term of imprisonment of four years. He determined that the February 2010 offences should be ordered to be served consecutively since there was no basis in law to order that they be served concurrently. The result was a total term of imprisonment of seven years and seven months.

[8] The trial judge then applied the totality principle and imposed a total sentence of four years imprisonment by ordering that all sentences would be served concurrently. He ordered a lifetime firearms prohibition under section 109 of the *Criminal Code*, and waived the victim surcharge.

ISSUES

[9] The first issue is whether leave to appeal against sentence should be granted. If leave is granted the question is whether the trial judge erred in rejecting the joint submission on sentence for the drug related offences. If the trial judge erred, this Court must determine whether the sentence proposed in the joint submission or some other sentence should be imposed. Finally, if this Court finds that the trial judge erred, it will be necessary to consider the effect that this finding has on the sentences for the firearm related offences and the breach of undertaking.

ANALYSIS

Leave to Appeal

[10] Because this is an appeal as to sentence only, leave to appeal is required (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is “frivolous in the sense of having no arguable basis or sufficient merit” (*R. v. Jesso (H.)* (2008), 276 Nfld. & P.E.I.R. 147 (NLCA), at paragraph 13; *R. v. Perrier (P.C.)* (2009), 293 Nfld. & P.E.I.R. 92 (NLCA), at paragraph 23).

[11] It cannot be said that Mr. Lavers’ appeal against sentence is frivolous in the sense that it has no arguable basis. The appeal raises substantial questions as to whether the trial judge erred in applying the relevant principles of law where Mr. Lavers entered guilty pleas and counsel made a joint submission on sentencing. An additional consideration is the fact that,

on appeal, the Attorney General for Canada resiled from the joint submission in which he had participated at the trial level, and, instead, supported the decision of the trial judge. Accordingly, leave to appeal is granted.

The Joint Submission on the Drug Related Offences

[12] When the trial judge's decision was filed, he had the benefit of this Court's decision in *R. v. Druken (J.K.)* (2006), 261 Nfld. & P.E.I.R. 271 (NLCA), regarding principles to be applied when counsel makes a joint sentencing submission following a guilty plea. Rowe J.A, for the majority, explained:

[17] To summarize, a sentencing judge should depart from a joint submission by counsel only if accepting the submission would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

[18] In making this determination, the question of whether the sentence is unreasonable must be considered. This requires an assessment of the facts as presented to the court, normally in the form of an agreed statement. Counsel must provide sufficient facts to permit the sentencing judge to determine whether the sentence is reasonable in the circumstances. The court is bound by the agreed statement of facts; the sentencing judge cannot "find" additional facts. As well, any inferences the judge may draw must follow clearly from what is set out in the agreed statement. ...

[19] The acceptable range of sentence must be such that the accused has an incentive to plead guilty, i.e. a quid pro quo. That requires an adjustment down from the normal range of sentence to take account of the accused's agreement to forgo his right to a trial. Of course, there must be some minimum, having regard to the facts of each case, below which a proposed sentence cannot be accepted.

[13] In *Druken*, Rowe J.A. went on to identify circumstances when it would be appropriate for a judge to reject a joint submission. Two of these, identified in paragraph 29 of *Druken*, are summarized in more general language in *R. v. Oake (B.)* (2010), 296 Nfld. & P.E.I.R. 79 (NLCA). In that decision, after quoting paragraph 29 from *Druken*, Rowe J.A. continued:

[22] There are, of course, other ways in which a sentence that is jointly submitted might be contrary to the public interest or might bring the administration of justice into disrepute. However, the two identified in the foregoing passage warrant repeating:

(1) Is the sentence so light as to undermine the deterrent effect of the ordinary expectation of a sentence for this offence; or

(2) Is the sentence so inordinately lenient and markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system?

[14] In conducting the assessment, it is important to recognize that where there has been a guilty plea, the trial judge has a more limited basis on which to assess the relevant circumstances than if there had been a trial. During a trial the judge will acquire a personal knowledge and understanding of the evidence and issues. By contrast, where there is a guilty plea, the judge must rely upon a statement of facts provided by counsel. This puts the judge in a less advantageous position and has resulted in this Court cautioning trial judges to exercise restraint in rejecting a joint submission by counsel (*R. v. Newman (S.J.)* (2009), 286 Nfld. & P.E.I.R. 176 (NLCA), at paragraphs 46 to 49). Further, as noted in *R. v. Oxford* (2010), 299 Nfld. & P.E.I.R. 327 (NLCA), counsel will be “more familiar with the detailed factual underpinning of the case, its evidentiary strengths and weaknesses as well as other factors impinging on a successful prosecution or defence” (paragraph 78).

[15] The appropriate test to be applied in assessing whether a joint submission should be accepted was again stated, this time in a decision by the Court, in *R. v. Oxford, supra*. Considerations stated in that decision, particularly at paragraphs 59 to 78, bear repeating. Fundamentally, a bargain between counsel cannot remove the obligation and right of the judge to sentence an offender. Nonetheless, a joint submission must be given substantial deference “if the purposes underlying the plea bargaining process are not to be undermined” (*Oxford*, at paragraph 59). A degree of certainty is required to induce accused persons to waive their right to a trial. The Court clearly stated:

[61] In Newfoundland and Labrador, the test is as stated in **Druken**: to reject a joint submission, the sentencing judge must be satisfied, on proper grounds, that the acceptance of the proposed sentence would “bring the administration of justice into disrepute” or would otherwise be “contrary to the public interest”. Absent one or other of those findings, properly supported, the joint submission should be accepted. ...

[16] In applying the test, the Court explained:

[63] The applicable test for determining whether a joint submission should be accepted therefore requires the sentencing judge to focus, not on general sentencing questions such as fitness, proportionality and range of sentence but on the much more discrete inquiries of whether the imposition of the recommended sentence will, in the circumstances of the case, bring the administration of justice into disrepute and whether the sentence is contrary to the public interest. This is different from simply considering whether the sentence is “fit” or falls within the range of sentences for offences of the type in question. In **Druken**, the trial judge had asserted the theory that if the proposed sentence was not fit and did not fall within the range, he was entitled not to accept it. On appeal, this Court rejected that view. ...

[17] Consideration of fitness, proportionality and range of sentence are relevant only “to provide a screen, along with other considerations, to analyze the appropriateness of the joint submission in the context of the circumstances leading to the guilty plea and the “bargained” proposed sentence but always for the purpose of determining whether, if the proposal is accepted, the administration of justice would be brought into disrepute or it would be contrary to the public interest” (*Oxford*, at paragraph 68). It is an error in principle to equate bringing the administration of justice into disrepute with the trial judge’s view as to the sentence he or she would have imposed in the absence of a joint submission.

[18] The trial judge in the case now before this Court erred by failing to properly apply the relevant principles of law. He assessed the proposed sentence by applying ordinary sentencing principles as if no joint submission had been made, as if he had had the benefit of a full trial, and without regard to other relevant factors that could have provided a basis for the agreement of counsel.

[19] For example, the trial judge drew inferences without a factual basis regarding the extent to which Mr. Lavers was an active participant in the conspiracy and how valuable his testimony would be in identifying and prosecuting co-conspirators. The trial judge’s failure to take account of considerations beyond ordinary sentencing principles is clear from his summary:

[92] The length of this period of imprisonment is obviously well beyond that suggested in the joint submission. As pointed out earlier, the law in relation to joint submissions is well known and the Court’s discretion is significantly limited when such a submission is presented. However, I have concluded that the joint submission offends the sentencing principles of deterrence, parity, totality, denunciation, and proportionality. I have concluded that endorsement of the joint

submission would bring the administration of justice into disrepute because of the nature of the drugs involved; the number of offences committed; the presence of the firearm and ammunition; and Mr. Lavers' criminal record. I have concluded that acceptance of the joint submission will have a negative impact on deterring the commission of serious [*Controlled Drugs and Substances Act*] offences in the Province, and thus I must respectfully decline to endorse it.

[20] Because the trial judge erred by failing to undertake the proper analysis, his decision must be set aside. It is necessary, then, for this Court to determine whether the joint submission should be accepted or whether, after undertaking the proper analysis, an alternate sentence should be imposed.

[21] I begin by expressing concern with the fact that, on appeal, the Attorney General for Canada resiled from the bargain entered into with Mr. Lavers. Before agreeing to a joint submission in exchange for a guilty plea, it is incumbent on the Crown to ensure that it is satisfied with and can validly support the agreement. Although the court may ultimately reject a joint submission, the court should, nonetheless, be entitled to rely on counsel having entered into the bargain with the accused in good faith and in accordance with what the Crown has diligently assessed to be an appropriate sentence. Absent special circumstances such as the discovery of evidence that would vitiate the "bargain", is not acceptable for the Crown to enter into a joint sentencing agreement with an accused which it subsequently fails to support.

[22] In this case, the joint sentencing submission regarding the drug offences was for twenty-four months imprisonment. The five April 2009 offences, in fact, constituted one criminal transaction involving a significant amount of three types of drugs. Mr. Lavers' participation was to assist in importing the drugs from Ontario to this Province using the post office, and to oversee packages distributed to co-conspirators for purposes of trafficking. Mr. Lavers agreed to plead guilty to the charges and to assist the Crown by providing statements to police and an undertaking to testify in prosecutions against co-conspirators. It was of benefit to the Crown to avoid having to prove Mr. Lavers' guilt beyond a reasonable doubt at a trial, and to garner testimony for the purpose of obtaining convictions of, or guilty pleas from, co-conspirators. The situation is not unlike that of an informer who agrees to assist the prosecution. In *R. v. John Doe* (2000), 142 C.C.C. (3d) 330 (Ont. Sup. Ct. J.), at paragraph 26, Hill J. set out several public policy

reasons for a reduced punishment in appropriate circumstances. In summary, relevant considerations may include:

- (1) The offender may assist in the apprehension and conviction of upper-level criminals in a conspiracy;
- (2) The known availability of a sentence reduction for meaningful assistance to the police would encourage others involved in criminal activity to come forward;
- (3) The “spectre” of substantial sentencing leniency for meaningful assistance would encourage criminals to have less confidence in each other;
- (4) An offender who assists the prosecution will often serve a particularly severe sentence in prison due to factors such as fear of reprisals in prison or incarceration in a facility far from family;
- (5) The offender may have to be placed in solitary confinement for his protection;
- (6) Danger to the offender and his family may continue even after his release from prison.

[23] These kinds of factors must be considered along with the circumstances of the offences. The trial judge concluded that the April 2009 charges involved a single criminal transaction, and, for that reason, it would be appropriate to order sentences for those offences to be served concurrently. I agree. The most serious of these offences were conspiracy to traffic and trafficking in cocaine, for which the trial judge imposed four year terms of imprisonment. The joint submission on sentencing proposed a sentence of twenty-four months. Given the particulars of Mr. Lavers’ involvement in the conspiracy and his cooperation with the police, a sentence of twenty-four months for the cocaine offences, while minimal, would not, in the circumstances, bring the administration of justice into disrepute or be contrary to the public interest as discussed in *Druken, Oake* and *Oxford*. The sentence is not “so light as to undermine the deterrent effect of the ordinary expectation of a sentence for this offence”, or “so inordinately lenient and markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system” (*Oake*, at paragraph 22). In appropriate circumstances, a sentence

of two years less a day to be served conditionally has been imposed for trafficking in cocaine. (See, for example: *R. v. Byrne (M.E.)* (2009), 281 Nfld. & P.E.I.R. 353 (NLCA).)

[24] With respect to the subsequent charge of possession of marihuana, the Crown proceeded by way of summary conviction, indicating that, although this offence occurred while the other charges were outstanding, the amount of the drug was small, and it was not seen to be serious. Ordinarily, the sentence for this offence would have been ordered to be served consecutively. However, in the circumstances, where the Crown had entered into an agreement in exchange for a guilty plea, a sentence of twenty-four months to be served concurrently would not bring the administration of justice into disrepute or be contrary to the public interest.

[25] In light of the above considerations, applying a proper analysis in accordance with relevant legal principles, there is no basis on which to reject the joint sentencing submission of twenty-four months imprisonment for the drug related offences.

Sentences for the Non-Drug Related Offences

[26] There was no joint submission regarding sentences for the offences of careless storage of a firearm, possession of a firearm while prohibited, and breach of an undertaking under the *Criminal Code*. These offences were prosecuted by the Provincial Crown by way of summary conviction. Mr. Lavers pleaded guilty. The trial judge imposed sentences of two months imprisonment for each of the firearm related offences and three months for breach of an undertaking. These sentences were to be served consecutively for a total of seven months, to be served consecutively to the sentence for the drug related offences. However, applying the principle of totality, the trial judge reduced the sentence of seven years and seven months to a global sentence of four years.

[27] Since the trial judge's decision has been set aside and a sentence of twenty-four months, consistent with the joint submission, imposed in respect of the drug related offences, the application of the totality principle has been rendered nugatory. The effect on the firearm and breach of undertaking offences is to restore the original sentences, totaling seven months, imposed by the trial judge.

[28] The position of the Provincial Crown was ambiguous. Before the trial judge and at the hearing of the appeal, counsel recommended sentences of thirty days to be served consecutively for each of the three offences for a total of ninety days. On the other hand, in its factum, the Province indicated that “the Respondent Provincial Crown does oppose the appeal of the sentences” as to those three offences. I would take that to mean endorsement of a sentence of seven months as imposed by the trial judge.

[29] In any event, this Court will defer to a sentencing judge’s decision subject to the criteria clearly stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500:

[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. ...

[30] Counsel provided no basis on which to conclude that any of these criteria is satisfied when applied to the sentences imposed with respect to each of the three offences. Further, a total sentence of seven months for these offences is not such as to engage consideration of the totality principle. This was acknowledged by counsel for Mr. Lavers at the hearing of the appeal.

[31] Accordingly, the sentence imposed by the trial judge, that is, two months for each of the firearm offences and three months for the breach of undertaking, for a total of seven months, to be served consecutively, is affirmed.

Firearms Prohibition

[32] Mr. Lavers was convicted of an offence under section 5 of the *Controlled Drugs and Substances Act*. As a result, section 109(1)(c) of the *Criminal Code* requires the court to “make an order prohibiting the person from possessing any firearms, cross-bows, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance”. The trial judge made the required order of prohibition, but in determining the duration of the order, he proceeded on the basis that this was Mr. Lavers’ first offence to which section 109 applied. This was in error.

[33] An order for a ten year prohibition was made on October 31, 2001, also based on an offence under section 5 of the *Controlled Drugs and*

Substances Act, possession of a controlled drug or substance for the purpose of trafficking. Section 109(3) provides that a lifetime prohibition must be ordered other than for a first offence. For purposes of this case, Mr. Lavers was convicted of the same predicate offence in relation to the February 11, 2010 charge. It follows that a lifetime prohibition order is required under section 109(3).

Victim Surcharge

[34] The trial judge waived the victim surcharge given the imposition of the four year term of imprisonment. He did not inquire into Mr. Lavers' financial position. In *Oxford*, the Court considered the effect of section 737 of the *Criminal Code*:

[119] The payment of a victim fine surcharge is, by s. 737(1) of the **Criminal Code**, mandatory, except where the offender establishes that undue hardship would result and applies for an exemption. ...

In ordering payment of the victim surcharge, the Court noted there was no indication on the record that counsel had taken a position regarding the surcharge. The trial judge waived the surcharge on the basis of the length of imprisonment he had imposed, that is, a further two years after the nine months already served. The judge in that case commented that the court had not been provided with information regarding Mr. Oxford's financial situation.

[35] In the case now before this Court, there is no indication Mr. Lavers applied for an exemption. The only apparent reason for the trial judge's decision not to order the surcharge is the length of sentence.

[36] In his comments to the court prior to sentencing, Mr. Lavers expressed his remorse and his commitment not to become involved in similar criminal activity in the future. He also indicated he has a wife and two young children, and has the support of family. He said he has been employed and could work in the future. There is no basis on which to determine that the imposition of the victim surcharge would result in undue hardship. Given these factors and the reduced term of imprisonment, I am satisfied that the mandatory surcharge would apply in this case.

[37] The *Criminal Code* specifies a surcharge of \$50 for a summary conviction offence and \$100 for an indictable offence. Mr. Lavers was convicted of five indictable and four summary conviction offences.

Accordingly, the amount of the surcharge is \$700. Mr. Lavers may pay this amount at the rate of \$50 per month commencing six months after his release from prison. If he requires a change in any of these conditions under section 737(8)(d) of the *Criminal Code*, he may apply to a Provincial Court judge.

SUMMARY AND DISPOSITION

[38] In summary, leave to appeal is granted. The trial judge erred in rejecting the joint sentencing submission in respect of the drug related offences. On a proper analysis, that submission should have been accepted. I note that, absent special circumstances such as the discovery of evidence that would vitiate the “bargain”, it is improper for the Crown to resile from a joint sentencing agreement.

[39] Finally, since counsel for the Province did not participate in a joint sentencing submission regarding the non-drug related offences, the deference generally accorded to the sentencing decision of the trial judge applies in respect of those offences. In the result, there is no basis on which to alter the sentence of seven months, to be served consecutively, in respect of the firearm and breach of an undertaking charges. With the reduction of the sentence on the drug related charges to twenty-four months, the principle of totality is not engaged.

[40] As to the firearm prohibition, the trial judge erred in failing to apply section 109(3) of the *Criminal Code*, requiring a lifetime prohibition for an offence other than a first offence.

[41] Regarding the victim surcharge, there is no indication Mr. Lavers applied for an exemption or that there is a basis on which such an exemption would be ordered. However, given the period of imprisonment, terms for payment of the surcharge are appropriate.

[42] Accordingly, a sentence of twenty-four months imprisonment is imposed for all the drug related offences. A sentence of seven months imprisonment, to be served consecutively, is imposed for the firearm and failure to comply with an undertaking offences. This results in a total sentence of thirty-one months imprisonment.

[43] Mr. Lavers shall be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for life.

[44] Mr. Lavers shall pay a victim surcharge of \$700. This amount may be paid at the rate of \$50 per month commencing six months after his release from prison. If he requires a change in these conditions under section 737(8)(d) of the *Criminal Code*, he may apply to a Provincial Court judge.

B.G. Welsh, J.A.

I concur: _____
C.W. White, J.A.

I concur: _____
M.F. Harrington, J.A.