

Date: 20121221
Docket: 11/16
Citation: *R. v. Fizzard*, 2012 NLCA 80

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

BETWEEN:

SABRINA FIZZARD

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, White and Harrington JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
Grand Bank

Appeal Heard: December 11, 2012

Judgment Rendered: December 21, 2012

Reasons for Judgment by Rowe J.A.

Concurred in by White and Harrington JJ.A.

Counsel for the Appellant: Marcus A. Evans

Counsel for the Respondent: Leonard J. MacKay

Rowe J.A.:

INTRODUCTION

[1] Sabrina Fizzard appeals her sentence of four months in custody for possession of marijuana for the purpose of trafficking. The appeal deals with joint submissions on sentence and with the principle of parity.

FACTS

[2] The facts were aptly summarized in the Factum for the Appellant:

1. The Appellant, Sabrina Fizzard, was arrested on May 18, 2010 following the execution of a search warrant and was charged in an information dated June 1, 2010 with a single offence under Section 5(2) of the *Controlled Drugs and Substances Act* being that she did possess marijuana for the purposes of trafficking. Also charged was her co-habiting partner, Scott Thorne.
2. The Appellant appeared in Provincial Court in Grand Bank on July 21st and August 4, 2010 and on September 24, 2010 appeared and entered a not guilty plea and obtained a trial date of December 14, 2010.
3. On December 14, 2010 she entered a change of plea of not guilty to guilty. A Pre-Sentence Report was ordered and a sentencing hearing was scheduled for February 2, 2011.
4. On February 2, 2011 defence counsel called evidence from the Appellant with respect to the contents of her Pre-Sentence Report. The Pre-Sentence Report stated in part:

“Regarding the present matters before the court, the accused stated she had nothing to do with the trafficking of drugs and, therefore, is not guilty.”
5. As the transcript of the proceedings on this date sets out, Ms. Fizzard testified that she was aware there was marihuana in the residence, with its purpose being to sell and that while she expected the marihuana to have been kept in the bedroom, on the night the search warrant was executed it was located in the kitchen. Her comments in the Pre-Sentence Report were a denial of her involvement in actually selling the marihuana but not of possession of it for the purposes of sale.
6. After hearing evidence and argument on the point, the Provincial Court allowed the guilty plea to stand and heard the facts which detailed that the search resulted in two plastic bags of marihuana, one containing 115

grams and the other 6 grams for a total amount of 121 grams of marihuana. In addition were found digital scales, two cell phones, a debt sheet, a police scanner, a safe, a pack of rolling papers, a grinder, and \$180 in cash. A conviction was entered.

7. [The Provincial Court judge] heard submissions on sentence from the Federal Crown agent, Glen Picco and defence counsel Marcus Evans as well as submissions relating to the co-accused, Scott Thorne who was convicted of the same drug offence as well as two (2) additional convictions for breach of probation and one (1) conviction for breach of undertaking, all arising from the drug conviction. After hearing submissions Judge Porter indicated that he would render his decision on sentence on February 9, 2011 but took the step of remanding both Ms. Fizzard and Mr. Thorne into custody for the seven (7) day interim period.
8. On February 9, 2011 [the judge] rendered a written decision on sentence in which he sentenced Sabrina Fizzard to four (4) months in custody, less the seven (7) days spent on remand for a warrant of committal of one hundred and thirteen (113) days in custody, as well as twelve (12) months supervised probation and waived the victim fine surcharge.

[3] Counsel for the Crown accepted the accuracy of the foregoing and added the following (which was not disputed by counsel for the Appellant):

4. The Appellant was found in the residence at the time the search warrant was executed. The co-accused, Scott Thorne returned to the residence during the search. Thorne asked if the police had found the drugs located under the stove.
5. The Appellant gave a police statement admitting knowledge of the marihuana in the residence. Thorne gave a police statement admitting that he trafficked in marihuana.
6. The Appellant testified at the sentencing hearing to clarify comments made in the Pre-Sentence Report. She stated that she knew the marihuana was in her residence and that it was for sale. She did not know the exact location of the marihuana in the residence. She did not sell the marihuana herself.
7. At the time of this offence, Thorne was bound by two court orders – a probation order and a recognizance. The Crown presented a six-page document outlining Thorne’s local criminal record, as well as documents showing other convictions. Most notably, Thorne had a recent conviction for trafficking from May 2009 for which he received “time served” in November 2009.

8. The Appellant had a theft under conviction from 1998.
9. The Crown suggested a range of sentence for the Appellant from a suspended sentence up to four months incarceration. The Crown indicated he was not opposed to a conditional sentence, and later stated, “I would submit that could be served conditionally”.
10. The Crown sought a significant or substantial period of incarceration of Thorne.
11. Defence counsel stated that the range of sentence suggested by the Crown was fair, and that “a conditional sentence of perhaps four months, as Mr. Picco mentioned, would be fair”.
12. The trial judge focussed on the principle of parity in sentencing the two accused, and on the Appellant’s different versions of whether Thorne resided with her. The trial judge concluded that the Appellant was an equal party to possession for the purposes of trafficking, as she was in actual possession.
13. The trial judge found the guilty plea of no mitigating value.

[4] Nothing in the foregoing conflicts with the facts as set out by the Provincial Court judge in his sentencing decision.

ISSUES

[5] Did the judge err in law by failing to treat submissions of counsel as a joint submission? If not, did the judge err in the application of the principle of parity?

ANALYSIS

(1) Joint Submission

[6] Counsel for the Appellant argues that the submissions of counsel should have been dealt with by the judge as joint submissions on sentence. He further submits that the judge failed to apply the legal framework for dealing with joint submissions as set out by this Court in a series of cases, most recently *R. v. Oxford*, 2010 NLCA 45, 299 Nfld. & P.E.I.R. 327.

[7] This argument must fail. While the submissions on sentence by Crown and Defence counsel were somewhat similar, they were not the same. *R. v. Spanos*, 2007 ONCA 241 at para. 11. Nor were they the result of a

“plea bargain”; such an agreement between counsel is the foundation for a joint submission. Giving effect to plea bargains is the rationale for the special treatment of joint submissions. *R. v. Druken*, 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271 at paras. 9, 13-14 and 19.

(2) Parity

[8] While arguing (successfully) against the Defence regarding the joint submission issue, Crown counsel on other grounds urged on us that the sentence imposed on Ms. Fizzard should be varied. Crown counsel submitted that the judge erred in law in the application of the principle of parity. This principle is set out in the common law and in section 718.2(b) of the *Criminal Code*:

A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[9] In *R. v. W.E.*, 2010 NLCA 4 at para. 33, this Court referred with approval to the following passage from Clayton C. Ruby, *Sentencing*, 7th ed. (Markham, ON: LexisNexis, 2008) at page 33:

The principle of parity has developed to preserve and ensure fairness by avoiding disproportionate sentences among convicted persons where, essentially, the same facts and circumstances indicate equivalent or like sentences.

[10] In *R. v. Roche* (1990), 84 Nfld. & P.E.I.R. 1, at para. 10, this Court (per Goodridge C.J.N.) described the principle as follows:

While several persons are convicted of identical offences arising out of the same or a similar set of circumstances the sentences imposed upon them should not be disparate. There may of course be aggravating or mitigating circumstances in an individual case but subject to those factors the sentences imposed should be equal or approximately the same; the person sentenced should not be given a feeling of injustice because he has been treated more severely than a co-offender.

[11] Crown counsel submitted that the circumstances of the offence and of the offenders were markedly different. Mr. Thorne was dealing drugs; Ms. Fizzard was not. As the drugs were stored in the apartment where Mr. Thorne and Ms. Fizzard lived, both were properly convicted of possession for the purpose of trafficking. However, Mr. Thorne’s culpability was greater than was Ms. Fizzard’s.

[12] As well, while Ms. Fizzard has a 1998 conviction for theft under \$5000, Mr. Thorne has a far more extensive criminal record, including a recent conviction for possession of marijuana for the purpose of trafficking. Other convictions are for:

- (1) breaches of probation,
- (2) breach of a recognizance,
- (3) obstructing a peace officer,
- (4) assaulting a peace officer,
- (5) uttering threats,
- (6) being unlawfully at large,
- (7) failing to appear in court, and
- (8) mischief.

[13] Notwithstanding significant differences in culpability and in the circumstances of the offenders, the judge said he was compelled by the principle of parity to impose roughly similar sentences.

[14] In paragraph 29 of his sentencing decision, the judge wrote:

While this is [Ms. Fizzard's] first [*Controlled Drugs and Substances Act*] conviction, and [Mr. Thorne's] second, that distinction results in a minor difference in the length of the appropriate sentence

[15] In paragraph 31, he wrote:

I am not persuaded that this is a case where the principle of parity in sentencing co-accused should be ignored. Both accused will be sentenced to serve their respective sentences in an institution.

[16] Thus, the judge relied on parity to:

- (1) impose roughly comparable terms (four months for Ms. Fizzard, six months for Mr. Thorne); and
- (2) send both to prison, rather than imposing a conditional sentence on Ms. Fizzard, as both the Crown and Defence had agreed.

[17] This mis-application of parity constitutes an error in principle. It amounts to treating, in a similar way, offenders who have dissimilar levels of culpability and dissimilar circumstances. This turns parity on its head.

[18] Such an error in principle warrants varying the sentence imposed on Ms. Fizzard. *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at 565; *R. v. Nasogaluak*, 2010 SCC 6, 1 S.C.R. 206 at para. 46.

[19] It falls to this Court to impose a fit sentence. Crown counsel noted that Ms. Fizzard is on bail. In his submission, time served (19 days of the four month sentence, plus seven days in custody on remand), plus 12 months probation would be a fit sentence. Defence counsel readily agreed. I am content with this sentence, as it seems to me that Ms. Fizzard has good prospects not to re-offend.

CONCLUSION

[20] The appeal is granted. The sentence is varied to time served, plus 12 months probation, the terms of which are those set out in subsections 732.1(2) and (3)(a) and (b) of the *Criminal Code*.

M. H. Rowe J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.