

COURT OF APPEAL FOR THE YUKON TERRITORY

ORAL REASONS FOR JUDGMENT:

CORAM: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Veale

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

AND:

JAMES GERALD BARNES

Respondents

MICHAEL COZENS

Appearing for the Appellant

GORDON COFFIN

Appearing for the Respondents

REASONS FOR JUDGMENT

[1] HALL J.A.(Oral): This is a Crown appeal in the case involving a person, now aged 30 years, who was sentenced in September of last year to a sentence of one year imprisonment, on a charge of possession of cocaine for the purpose of trafficking. At the same time, he was given a concurrent sentence of one year for being at large on his undertaking and failing, without unlawful excuse, to comply with certain conditions in the undertaking.

[2] The circumstances of the offence are that on October 24, 2001, the respondent was arrested and searched. On his person was found 5.5 grams of cocaine and eleven separately wrapped packages. The street value of the cocaine was said to be between \$100 and \$120 per gram.

[3] The respondent was born in Williams Lake on October 5, 1972, and unfortunately has a significant criminal record dating back to the year 1998. He has a substantial record including previous convictions for trafficking and possession of prohibited substances. He has spent a considerable amount of his adult life in institutions.

[4] He pleaded guilty on the morning set for his trial, June 6th 2002, and after adjournments, the matter came on for sentence in September of 2002. In the course of remarks made over the sentence proceeding, as they continued from time to time, the learned trial judge noted that he was somewhat skeptical about the likelihood that the respondent was going to be a fit candidate for a conditional sentence. However, ultimately, he did decide that a conditional sentence ought to be imposed and he sentenced Mr. Barnes, the respondent, to a one-year term of imprisonment to be served conditionally plus one year's probation and a ten-year firearm prohibition.

[5] The conditional sentence contained a number of conditions, including to seek employment and to abstain from the possession, consumption and purchase of alcohol and drugs; and to submit to a breath, urine or blood sample upon demand by a peace officer; and to take such treatment, programs or counselling as directed by the supervisor.

[6] After the sentence was imposed, I would say that he performed in what might be described as a not wholly satisfactory way and this culminated in his actually reaching the terms of the requirements imposed upon him under the conditional sentence. Early in this year, he was arrested and sentenced to a term of imprisonment from which he has just recently been released.

[7] As a general observation, it seems to me that having regard to the fact that this respondent, at the time of sentence, really did not have in place much by way of community support or by way of a viable plan to avoid further difficulty, that, coupled with his unfortunate history of offences against the criminal law, lead me to the conclusion that it was probably an inappropriate situation in which to consider a conditional sentence. If I had been the trial judge I doubt that I would have considered that this individual, having regard to his history and his prospects, would seem a fit candidate for that sort of disposition.

[8] However, that said, we, I think, must deal with the situation as it exists today, and that situation includes the circumstance that he has served a period of incarceration recently and has just been released from that period of incarceration.

[9] The Crown submits with some force and, I think, with some validity, that a conditional sentence was probably not an appropriate alternative in this case, but, as I said, time passes and one must deal with situations as they exist at the time. We are dealing with it, which is now some several months after the imposition of sentence, and when a period of incarceration has intervened as a result of his breach of the terms of the conditional sentence.

[10] The Crown submits, in the alternative, that if we were not minded to alter the sentence imposed by the learned trial judge of a conditional sentence, that as an alternative we ought to consider a period of extension of that conditional sentence in order to effect the purposes of deterrence and rehabilitation as it relates to this offender, and offenders, generally, from the perspective of a deterrent. I am attracted to that alternate submission in the particular circumstances of this case. As I observed, I doubt that I would have imposed a conditional sentence on this individual for the reasons I have expressed above.

[11] So in my judgment, the appropriate and fit disposition of this case would be to partially allow the appeal to the extent that I would order that, in place of the sentence of the one year conditional sentence ordered by the trial judge, I would order that the sentence be altered to a conditional sentence of eighteen months. I would leave in place the one-year probation order to follow that, as imposed by the learned trial judge, and, of course, also the ten-year firearm prohibition.

[12] In my judgment, that is the minimum that can be done in this case and it will hopefully address those concerns of risk that the Crown has advanced as a basis for argument on this appeal, and will provide an opportunity to see if this individual can come to terms with what seems to be a difficult problem he has in complying with the terms of the criminal law. I would allow the appeal in the terms I have indicated.

[13] ROWLES J.A.: I agree.

[14] VEALE J.A.: I agree.

[15] ROWLES J.A.: The appeal is allowed to the extent indicated by Mr. Justice Hall. Thank you, counsel.

HALL J.A.