Date: 20030526
Docket: C.A. 02-YU496
Registry: Whitehorse

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:

CHRISTOPHER RONALD SWERHUN

Respondent

PETER CHISHOLM — Appearing for the Appellant

CHRISTOPHER SWERHUN — On his own behalf

REASONS FOR JUDGMENT

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[1] HALL J. (Oral): This is a case in which the Crown appeals against a sentence imposed in a case involving possession of cocaine for the purpose of trafficking.

[2] The learned trial judge imposed a sentence of eight months incarceration and a probation order, that I would describe as a quite rigorous probation order, in

February of 2003.

[3] The offence occurred quite some time ago and it occurred in another province, namely Alberta.

[4] The charge was waived from Alberta to the Yukon at the request of the respondent and was disposed of in the Yukon by way of a plea arrangement.

[5] The Crown has relied, in this case, in part on a recently decided British Columbia case in which I gave the judgment, the citation of the case being *R. v. Lister*, [2003] B.C.J. No. 1078, judgment delivered on May 8th of this year.

[6] The substantial ground on which the Crown suggests error in the disposition by the learned trial judge is that the disposition did not give sufficient regard to the circumstance that a co-accused had pleaded guilty in Alberta and had been sentenced to two years for substantially the same factual matter, although it may be that the actual charge to which the plea was entered in Alberta was a simple possession.

[7] The case of *Lister*, *supra*, that the Crown refers to was a case that I would not consider as particularly governing in the instant case and I say that because of the following circumstance. In *Lister, supra*, the facts were that the appellant Lister had been charged in June of 2002 in Saskatchewan with possession of a large quantity of cannabis marihuana. As the case indicates, the appellant Lister suggested that he had entered upon the enterprise to assist a relative who owed money to some criminals, apparently. Whatever the truth or the untruth of that, the fact was that he was importing a large quantity of the drug into the province of Saskatchewan and he

was found out.

[8] He wished to have the matter transferred to British Columbia for disposition, largely because members of his family, including elderly and infirm parents, were in British Columbia. It was his wish that he would be able to serve a period of incarceration, which he anticipated being imposed, in British Columbia. As a condition of the waiver or the transfer of the charge from Saskatchewan to British Columbia, the prosecution authority in Saskatchewan required that the appellant Lister agree that there would be a joint submission made to the court sentencing him in British Columbia for a stipulated period of incarceration which amounts to 18 months, although that was subject to some reduction by virtue of the fact that he had already spent some time in custody in Saskatchewan, for which he was given credit by the judge sentencing him in British Columbia.

[9] The difference and considerable distinction that I see between the case at bar and the case of *Lister, supra,* is that I do not perceive on the facts of the instant case that there was any such agreement as existed in *Lister, supra,* present in the instant case. It seems to me that that is a significant distinguishing fact or circumstance of the *Lister, supra,* case and for that reason I am not persuaded that *Lister, supra,* is a case that has a particularly governing authority in the circumstances of the present offence.

[10] Now to return to the present case, it should be noted that the respondent here is going to be 29 years of age in the next week. He has a record, commencing about ten years ago when he was 19 years of age, for property related offences, drinking and driving offence, and a conviction from 1998 for trafficking in cocaine and a breach of a recognizance. He did receive the benefit of a conditional sentence on

that drug offence where he apparently breached some of the terms of the order and was committed to prison for a time. He has been convicted of a break and enter offence in Whitehorse and also for being unlawfully at large. He has been under a community supervision order and I would simply say that although he performed, he did not perform entirely to the satisfaction of the authorities in fulfilling his obligations.

[11] He was raised in the Whitehorse area by parents who, apparently, have been diligent in doing what they can for him but he has had, unfortunately, some difficulties.

[12] He has worked in the restaurant industry. He has hopes, apparently, to upgrade himself and perhaps carry on to study science at university, but whether or not that is a realistic hope, I am not certain, having regard to the fact that he has not always performed in a diligent manner in the past.

[13] He has siblings who, apparently, have done all right, and his parents remain very much involved and interested in his welfare. But of course when one reaches the age that he is at, one is, to some extent, going to have to look after their own interests and make some decisions in regard to their own life.

[14] The Crown argument at bottom comes down to the fact that, it is said, that the learned trial judge here failed to have sufficient regard to the range of sentence both in British Columbia and particularly in Alberta applicable to this class of offence. The Crown particularly points to the apparent disparity between the sentence imposed on the co-perpetrator in Alberta and Mr. Swerhun in this jurisdiction.

[15] It is always difficult to precisely compare offenders because circumstances

vary so greatly. What I would say here, is that although this sentence seems to be what I would describe as perhaps in the low area and in the low range, I would note that a sentence of incarceration has been imposed as opposed, say, to a conditional sentence. As I noted at the outset of my comments, a very stringent probation order was also imposed to follow the sentence of incarceration. I do not believe that it is irrelevant in the present case to consider that the respondent does have, in this jurisdiction, the family members who are involved and who are a resource to him.

[16] It is, as I said, the fact that he is no longer what I would describe as a very young offender but he is a person who has shown some capacity to make progress and, as I say, I think the trial judge was entitled to take cognizance of the support that he does have in the community.

[17] I am simply not persuaded in this case that there has been demonstrated the necessary precondition for interference by this court, namely the conclusion that this sentence is one that is unfit in all the circumstances. Having reached that conclusion, I am therefore of the view that I would dismiss this appeal by the Crown from the sentence imposed on this respondent.

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

[19] VEALE J.A.: I agree. And I would just like to reiterate, Mr. Chisholm, that Judge Lilles did ask that the matter be brought back before him within four weeks of his release date, and I trust that you will ensure that that happens.

[20] MR. CHISHOLM: I will. I will endeavor to do so, My Lord.

[21] VEALE J.A.: Thank you.

[22] ROWLES J.A.: The appeal is dismissed.

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HALL J.A.