COURT OF APPEAL OF YUKON

Citation: *R. v. Samson*,
2015 YKCA 7

Date: 20150303
Docket: 14-YU741

Between:

Regina

Appellant

And

Teresa Karen Samson

Respondent

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Savage

On appeal from: An order of the Territorial Court of Yukon, dated July 8, 2014
(*R. v. Samson*, 2014 YKTC 33, Whitehorse Docket No. 13-00275).

Counsel for the Appellant:	K. Parkkari
Counsel for the Respondent:	M.E.J. Campbell
Place and Date of Hearing:	Vancouver, British Columbia January 26, 2015
Place and Date of Judgment:	Vancouver, British Columbia March 3, 2015

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Mr. Justice Savage

Summary:

Sentence appeal by the Crown from a conditional discharge with one year's probation for theft over $5,000. The Crown conceded the judge did not err in principle but submitted the sentence was demonstrably unfit. Held: Appeal dismissed. Having regard to the particular circumstances of this offence and this offender, the sentence is not a substantial and marked departure from the range established by previous decisions.

Reasons for Judgment of the Honourable Chief Justice Bauman:

[1] The Crown applies for leave to appeal and, if leave is granted, appeals from the sentence imposed on Ms. Samson for theft over $5,000 contrary to s. 362(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The sentencing judge granted Ms. Samson a conditional discharge with one year's probation.

[2] The sentencing judge began his reasons for sentence by describing the circumstances of the offence. Ms. Samson was employed from 2008 to 2012 by a non-profit ambulance service in Mayo, Yukon, a small village approximately 400 kilometres north of Whitehorse. Between February 2011 and September 2012, Ms. Samson stole $8,380.78 from her employer.

[3] The judge then turned to Ms. Samson's personal circumstances. He noted that she is a member of the Na-cho Nyak Dun First Nation. She was employed by the Na-cho Nyak Dun from 2007 until she was dismissed in 2010. This took a heavy toll on her and she began to self-medicate with illicit drugs. She attributes her criminality to this breakdown. Ms. Samson has no prior criminal record.

[4] After her employer discovered the theft, Ms. Samson immediately accepted responsibility for what she had done. Less than one week later, she repaid $1,600. She cooperated with the police investigation and pleaded guilty.

[5] While awaiting sentencing, Ms. Samson was diagnosed with depression and prescribed certain medication she describes as helpful. She enrolled in a four-year First Nations Governance degree program at Yukon College, in which she has been

successful. She gained employment in the Housing and Wellness Departments of the Na-cho Nyak Dun and has expressed interest in running for its council.

[6] By the time of sentencing Ms. Samson had repaid, at considerable personal hardship, all the money she had stolen. She had been clean of illicit drugs for 18 months and had rarely consumed alcohol.

[7] The judge noted that Ms. Samson was "clearly remorseful" and recognized "it will take a lot to rebuild the trust of others" (at para. 25). He found that she was at a very low risk of reoffending.

[8] The judge then reviewed the purposes and principles of sentencing. He referred to s. 718.2(a)(iii) of the *Criminal Code*, which provides that a sentencing judge must consider it to be aggravating if "the offender, in committing the offence, abused a position of trust or authority in relation to the victim". He stated that Ms. Samson's breach of her employer's trust was an aggravating factor.

[9] The judge found the mitigating factors to include her guilty plea, her remorse and the fact that the offence occurred while she was in a period of personal turmoil and illicit drug use. He noted that she had taken steps to address her personal issues and had been clean of drugs for 18 months; she had repaid the money; and she is engaged in the Na-cho Nyak Dun First Nation and interested in pursuing a leadership role.

[10] The judge observed that it is "not at all unusual, in fact, more the norm, that this type of theft results in a jail sentence, even for first offenders" (at para. 33). However, he considered that this was "one of those rare and exceptional cases involving a breach of trust theft where a discharge is the appropriate disposition" (at para. 62).

[11] A discharge is available when the sentencing judge considers it "to be in the interests of the accused and not contrary to the public interest" (s. 730(1)). A discharge is somewhere between a conviction and an acquittal in the sense that a person who has been granted a discharge has no criminal record and has not been

convicted of a criminal offence, but has been *found guilty* of a criminal offence (Clayton Ruby, *Sentencing*, 8th ed. (Markham, ON: LexisNexis, 2008) at 414).

[12] The judge had "no difficulty" concluding a discharge would be in Ms. Samson's interest. He noted that the Na-cho Nyak Dun is self-governing and its *Elections Act* precludes a person with a criminal record for theft from running for council. A discharge would allow Ms. Samson to run for council. Moreover, specific deterrence was not necessary.

[13] The judge also found a discharge to be not contrary to the public interest. In this regard he highlighted several factors a fair-minded member of the public would consider (at para. 66):

> - Ms. Samson has no prior criminal history and appears to be of previous good character;
> - She has pled guilty and accepted responsibility for this offence;
> - She committed this offence, which involved numerous transactions and was not a minor offence, while in a period of personal turmoil and increased illicit drug use, while suffering from undiagnosed depression;
> - She has taken significant steps to address her depression and underlying grief issues and her illicit drug use, and has been drug-free for 18 months with respect to illicit drugs;
> - She has repaid all the monies, something that placed an increased financial burden on her and her family;
> - There is no indication that the [employer] suffered any hardship or was deprived of any necessary equipment or other items, and I say this only to distinguish it from the cases which noted, as an aggravating factor, such hardship or deprivation suffered by the victim;
> - She is an active and contributing member of her community;
> - She has experienced considerable shame for her actions, with such shame being highlighted by the small size of her community[.]

[14] The judge took judicial notice of the systemic factors affecting Aboriginal persons generally and observed that a discharge would allow Ms. Samson the greatest opportunity to contribute to the Na-cho Nyak Dun community. By way of conclusion, he indicated he was "mindful of the need for denunciation and general

deterrence" and stressed that Ms. Samson "wears her offence every day before her community" (at para. 71).

[15] The Crown applies for leave to appeal and submits the sentence is unfit. The Crown concedes the judge did not err in principle but says the sentencing range established by the jurisprudence entails that a term of imprisonment or conditional sentence order (a "CSO") was required.

[16] It is trite law that, "absent an error in principle, … a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit" (*R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 92, *per* Chief Justice Lamer). As no error in principle is alleged, the question is whether a conditional discharge in this case is demonstrably unfit.

[17] Sentencing ranges are the practical application of the concept of parity enshrined in the *Criminal Code*: a sentence "should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (s. 718.2(b)). However, the *Criminal Code* also provides that a sentence "*must* be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1, emphasis added). The sentencing judge is best placed to assess these individualized factors. Accordingly, courts of appeal should show deference even when reviewing a sentence for parity, as Chief Justice Lamer explained in *C.A.M.* (at para. 92):

> 92 Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. … But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. … Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. … [A] court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes. [Emphasis added.]

[18] In other words, “while the range of sentences emerging from earlier cases provides guidance, it is not conclusive of an appropriate sentence in a given case” (*R. v. Peynado*, 2011 BCCA 524 at para. 27, *per* Madam Justice Neilson). “Only substantial disparity that cannot be justified by reference to differences in offenders and the circumstances of their offences will lead to appellate intervention” (*R. v. Payne*, 2007 BCCA 541 at para. 25, *per* Mr. Justice Smith).

[19] For its sentencing range the Crown relies upon *R. v. Hanifan*, 2001 YKSC 27; *R. v. Zenovitch*, 2001 YKSC 52; *R. v. Everitt*, 2010 YKSC 91; *R. v. Kohlhauser*, 2008 YKTC 68; *R. v. Reid*, 2004 YKCA 4; *R. v. Curtis*, [1995] Y.J. No. 125; *R. v. Smith*, [1991] Y.J. No. 224; *R. v. Walker*, [1989] Y.J. No. 135; and *R. v. Trerice*, [1988] Y.J. No. 89.

[20] *Everitt* and *Kohlhauser* are readily distinguishable on the basis of the offence. Mr. Everitt misappropriated approximately $38,000 of public money while he was Mayor of Dawson City, Yukon. Mr. Kohlhauser fraudulently obtained almost $50,000 by filling out and cashing several blank cheques that a business had discarded and he had found. Neither of these offences is sufficiently comparable to Ms. Samson’s to be of any meaningful assistance.

[21] The remaining decisions are more comparable. All involve theft from the offender’s employer. The sentences range from a 20 month CSO to a single day’s imprisonment.

[22] Ms. Zenovitch received a 20 month CSO for stealing $37,000 from her employer, with whom she also had a romantic relationship. In addition to theft over $5,000, she was convicted of 25 counts of fraud. She did not accept full responsibility for her actions and had not repaid the money before sentencing. She pleaded not guilty.

[23] Ms. Reid stole approximately $212,000 from her employer over three years. She did not express remorse, nor did she repay any of the money. A Territorial Court judge gave her an 18 month CSO. The Crown appealed. While the appeal was

pending, Ms. Reid breached her CSO and spent one month in prison. This Court allowed the appeal and imposed a sentence of an additional 14 months' imprisonment. Mr. Justice Hall for the Court said (at para. 15):

> [15] In a case like this where the sums involved are significant, the time period of the embezzlement was lengthy, there is little hope of restitution and there is found to be an absence of remorse on the part of an accused, it seems to me that generally such circumstances would militate in favour of a substantial period of incarceration.

[24] At the other end of the range of decisions cited by the Crown, Ms. Smith was sentenced to 21 days' imprisonment for stealing $6,675 from her employer. She pleaded guilty but did not repay the money. Ms. Curtis was sentenced to a single day's imprisonment for stealing $16,000 from her employer. She pleaded guilty and expressed remorse for her action, though she too did not repay the money.

[25] Though not cited by the Crown, there have been decisions in which a conditional discharge was granted to an offender who stole from his or her employer.

[26] In *R. v. Carnelly*, 2008 BCSC 1882, Mr. Justice Savage (then of the Supreme Court) conditionally discharged an offender who had stolen approximately $1,600 from her employer on the grounds that she had committed the theft during a period of personal turmoil, pleaded guilty, expressed remorse and repaid the money before sentencing.

[27] Similarly, in *R. v. Sunczyk*, 2009 BCSC 101, Mr. Justice McEwan allowed Mr. Sunczyk's appeal from a two month CSO and substituted a conditional discharge. He had stolen approximately $280 from his employer but had made full restitution.

[28] Thus, the established sentencing range for theft from the offender's employer does extend to conditional discharges.

[29] The question before this Court is whether, having regard to the circumstances of each of these decisions, Ms. Samson's conditional discharge is a "substantial and marked departure" from the established range. In my opinion, it is not.

[30] Ms. Samson's circumstances differ significantly from those of Ms. Zenovitch and Ms. Reid. Ms. Samson immediately took responsibility for her actions, quickly repaid the money she had stolen and expressed remorse that the sentencing judge found to be genuine. Specific deterrence is simply not an issue. The breach of trust was much worse in *Zenovitch* and the sum of money was 25 times greater in *Reid*. Ms. Reid's theft also took place over a longer period of time, three years compared with one year and a half. Thus, none of the factors enumerated by Mr. Justice Hall in *Reid* obtain in respect of Ms. Samson.

[31] Ms. Samson is closer to Ms. Smith and Ms. Curtis, but here too there are distinguishing features. Unlike Ms. Smith and Ms. Curtis, Ms. Samson repaid the entire sum before sentencing, at considerable hardship. She committed her offence while in a time of personal turmoil and illicit drug use, but the sentencing judge found she had addressed her personal difficulties and was clean of illicit drugs.

[32] Ms. Samson's circumstances are closest to Ms. Carnelly's. I note that the amount of money involved here was greater ($8,400 compared with $1,600). However, in my opinion this difference alone did not require the sentencing judge to impose a more onerous sentence on Ms. Samson than was imposed on Ms. Carnelly. A conditional discharge was well within the margin of deference afforded by this Court and does not represent a "substantial and marked departure" from the established range.

[33] I have reached this conclusion without reference to the fact that, under the Na-cho Nyak Dun *Elections Act*, Ms. Samson would be disqualified for running for council if she had a criminal record for theft. (As noted, a conditional discharge entails a finding of guilt but does not give rise to criminal record.) However, I note that I do not agree with the Crown's submission that it was improper for the sentencing judge to consider this fact. Collateral consequences can be taken into account when crafting a sentence (*R. v. Pham*, 2013 SCC 15 at para. 11).

[34] The Crown also says "the sentencing judge has circumvented the Na-cho Nyak Dun *Elections Act*, and denied the First Nation the ability to control their

election process". I disagree. The *Elections Act* refers only to a person who has a criminal record for theft. On its plain language, the Na-cho Nyak Dun did not intend to prevent from running for council a person who has been found guilty, but does not have a criminal record. If the Na-cho Nyak Dun was unaware of the distinction between findings of guilt and criminal records, it is of course at liberty, as a self-governing nation, to amend its *Elections Act*.

[35] The Crown further submits that, even if a conditional discharge is within the acceptable sentencing range, Ms. Samson cannot meet the 'personal interest' criterion for a discharge. As noted above, a discharge is available only if the sentencing judge considers it "to be in the interests of the accused and not contrary to the public interest" (s. 730(1), emphasis added).

[36] Citing *R. v. Shortt*, 2002 NWTSC 47, the Crown submits that this criterion requires that, if the discharge is not granted, the accused will suffer a negative consequence beyond those incurred by every person convicted of the offence. The Crown submits that *Shortt* mandates a finding that disproportionate consequences will result from a criminal conviction. Mere possibility is insufficient.

[37] Mr. Justice Vertes says this in *Shortt* (at para. 32):

> 32 A review of the case law reveals that in many cases a discharge was granted where a conviction would result in an accused losing his or her employment, or becoming disqualified in the pursuit of his or her livelihood, or being faced with deportation or some other significant result. These are examples of highly specific repercussions unique to the specific accused. But, such specific adverse consequences are not a prerequisite. In my opinion, it is sufficient to show that the recording of a conviction will have a prejudicial impact on the accused that is disproportionate to the offence he or she has committed. This does not mean that the accused's employment must be endangered; but it does require evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime (unless the particular offence is itself harmless, trivial or otherwise inconsequential): see *R. v. Doane* (1980), 41 N.S.R. (2d) 340 (C.A.), at pages 343-344; and *R. v. Moreau* (1992), 76 C.C.C. (3d) 181 (Que. C.A.).

[38] The Crown submits that notwithstanding Ms. Samson's pursuit of a degree in First Nation's governance and her announced desire to possibly run for a position on

the Na-cho Nyak Dun council, it is purely speculative to conclude that she will indeed suffer disproportionate consequences if she is convicted of this offence.

[39] I do not read *Shortt* as requiring a finding, effectively on a balance of probabilities, that Ms. Samson will suffer disproportionate consequences.

[40] Mr. Justice Vertes cited the leading cases on the conditional discharge option including *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.). The Court in *Fallofield*, a *per curiam* decision, said this of the first condition precedent to the exercise of the discharge jurisdiction (at 454-455):

> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

[41] The Court concluded that *Fallofield* was an appropriate case for a discharge where the accused, a Corporal in the Canadian Armed Services, was convicted of a minor theft-related offence. The only evidence of adverse consequences for the accused on conviction was that a conviction "could very possibly affect his future career in the Navy" (at 451).

[42] In *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (O.N.C.A.), also cited by Mr. Justice Vertes in *Shortt*, Mr. Justice Arnup for the Court interpreted the criterion in the same way, to require only that the accused "be a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions" (at 59).

[43] This continues to be the view expressed in more recent decisions (see e.g., *R. v. Jones*, 2014 BCSC 131 at para. 27; *R. v. McCavour*, 2012 NBCA 81 at para. 9; *R. v. Edmunds*, 2012 NLCA 26 at para. 20).

[44] In the case of Ms. Samson, the sentencing judge was convinced that the entry of a conviction against her may have significant adverse repercussions in light of the possibility of her running for a position on her First Nation's council. That

possibility was sufficiently real in the circumstances to satisfy the first condition for a discharge. I would not accede to this ground of appeal.

[45] In conclusion, the Crown has not shown that Ms. Samson's sentence is demonstrably unfit. It has not shown that a conditional discharge represents a substantial and marked departure from the sentencing range established by previous decisions. It has not demonstrated that Ms. Samson cannot otherwise bring herself within s. 730(1) of the *Criminal* Code. For these reasons, I would grant leave to appeal but dismiss the appeal from sentence.

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Savage"