NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Waterhouse*, 2021 NSCA 23

Date: 20210305
Docket: CAC 496747
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Lee Lonsdale Waterhouse

Respondent

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: January 29, 2021, in Halifax, Nova Scotia

Subject: Sentencing. Proportionality. Parity. Possession for the purpose of trafficking over 3 kilograms of marihuana. Whether the sentence was the result of error or manifestly unfit.

Summary: The Crown appealed the sentence imposed on the respondent of 90 days' imprisonment to be served intermittently, and two years' probation for possession, for the purpose of trafficking over 3 kilograms of marihuana. The sentencing proceeded on the basis of a guilty plea and an Agreed Statement of Facts. Additional facts presented by the respondent were accepted by the Crown. The respondent had agreed to permit an acquaintance to store a quantity of marihuana in his detached garage in exchange for a payment of $2000. The respondent was not at home when the marihuana was delivered. He did not know anyone involved with the drugs other than the acquaintance. The respondent worked full-time. He was not seen at his address on either of the two days of police surveillance. The police executed a search warrant on the

second day and found nothing in the respondent's home. The police seized 107.11 kilograms of marihuana from the garage, a vacuum sealer, packaging materials, and 12 grams of cannabis resin (shatter) from the garage. There was no evidence to establish the respondent had ever seen what had been stored in the garage.

Issues: (1) Did the sentencing judge make errors in principle that impacted the sentence he imposed?

(2) Was the sentence demonstrably unfit?

Result: Leave to appeal granted. Appeal dismissed. The sentencing judge made no errors in his determination of the respondent's sentence based on the facts before him. Those facts did not establish the respondent knew he was assisting a large-scale drug trafficking operation. They only established the respondent had agreed to allow an acquaintance to store a quantity of drugs for a $2000 payment. The judge's description of this bad decision as "impulsive" and without thought of the consequences was supported by the record. The respondent was an otherwise law-abiding first offender with full-time employment, a favourable presentence report and community support. The judge found him to be remorseful and an excellent candidate for rehabilitation. The judge described the offence as "serious" and the respondent's moral blameworthiness as "high". Accordingly, he imposed a jail sentence. His determination that the sentence carried a sufficiently denunciatory and deterrent message was entitled to deference. The cases relied on by the Crown as comparable were not. The sentence imposed was not manifestly unfit.

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Judges:	Beveridge, Scanlan, Derrick JJ.A.
Appeal Heard:	January 29, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Beveridge and Scanlan, JJ.A. concurring
Counsel:	Paul B. Adams, for the appellant Kevin A. Burke, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] Mr. Waterhouse pleaded guilty on October 10, 2019 to a single count of possession for the purpose of trafficking marihuana in excess of 3 kilograms, contrary to s. 5(2) the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"). The marihuana was seized by police from Mr. Waterhouse's detached garage. It weighed 107.11 kilograms.

[2] Mr. Waterhouse's sentencing hearing took place on January 15, 2020. The Crown sought a two-year penitentiary term. Counsel for Mr. Waterhouse argued for a 90-day intermittent sentence and two years' probation.

[3] On February 27, 2020, Justice John Bodurtha ordered Mr. Waterhouse to serve a 90-day intermittent sentence and imposed a two-year period of probation (2020 NSSC 78). He granted the ancillary orders requested by the Crown – a secondary DNA order pursuant to s. 487.05(1) of the *Criminal Code*; a ten-year weapons' prohibition order pursuant to s. 109 of the *Criminal Code*; and a Forfeiture Order pursuant to s. 16(1) of the *CDSA*. These ancillary orders are not being appealed.

[4] The Crown seeks leave to appeal Mr. Waterhouse's 90-day intermittent sentence, saying it is the result of errors in principle and manifestly unfit. This Court is asked to substitute a two-year penitentiary term.

[5] As these reasons explain, I do not agree that Mr. Waterhouse's sentence should be disturbed. I would grant leave to appeal, but dismiss the appeal and uphold the sentence imposed by Justice Bodurtha.

The Facts at Sentencing

[6] Mr. Waterhouse's sentencing proceeded on the basis of an Agreed Statement of Facts. The sentencing judge set it out in his reasons:

> 1. In the winter of 2018 Halifax Police received information that [B.Q.] was moving hundreds of pounds of marihuana and kilograms of cocaine.
>
> 2. The information received included that a Nevin Joseph Clark-Andrew was a possible "runner" for [B.Q.], driving a gold coloured Volkswagen Passat.

3. The police believed that [B.Q.] was likely using a secure location to store his product ("stash house"), as well as the runner, do [sic] avoid detection and limit his liability.

4. Source information provided to police indicated that [B.Q.] was associating with the Hell's Angels Motorcycle Club in obtaining his product, and surveillance was conducted on him and his associates.

5. The gold Passat was seen on March 1 and 2, 2018 at 94 XXXXXX Drive Windsor Junction, NS, stopping for about 10 minutes. The police believed, based on other surveillance and source information, that this was the new "stash house".

6. The accused was not seen during the surveillance.

7. On March 2, 2018, Halifax Police executed a CDSA search warrant at 94 XXXXXX Drive, Windsor Junction, NS. Mr. Waterhouse was located in the residence.

8. No items were seized from the residence, but in the garage police located 11 large boxes three Tupperware containers and a hockey style bag containing the following:

a) Vacuum sealer;

b) Packaging materials;

c) 12g of cannabis resin (shatter);

d) 235.9 lbs of marihuana (107.11 kg).

9. The value of the marihuana seized would range from $354,219 to $1,606,710 depending on whether it was sold on the street ($10-$15 per gram) or in bulk ($1500 - $3000 per pound). The amounts seized are clearly for the purpose of trafficking.

10. Mr. Waterhouse was released on a promise to appear.

[7] Mr. Waterhouse presented additional facts to which the Crown had no objection:

* Lee Waterhouse and B.Q. attended high school together and, while not friends, saw each other socially and attended parties together.
* After graduation Mr. Waterhouse attended NSCC and obtained a Certificate in Auto Mechanics. He subsequently repaired vehicles in his garage as a way of making extra money.
* In early 2019 he was contacted by B.Q. who wished some service work to be done on his motorcycle and subsequently some additional repairs done on his truck.

* It was during this time that B.Q. made a proposal to Mr. Waterhouse to store a quantity of marihuana in his garage in return for a payment of $2000.00. This proposal was regretfully accepted by Mr. Waterhouse.
* Mr. Waterhouse was not at home when the marihuana was delivered to his garage, nor did he know anyone involved other than B.Q. or have any contact with anyone other than B.Q.

[8] The sentencing judge described the circumstances of the offence as follows:

> [8] Mr. Waterhouse allowed his acquaintance, [B.Q.], to store a large quantity of marihuana in his detached garage for $2,000. [B.Q.] had been under surveillance by the police. Mr. Waterhouse was not seen during the surveillance. Mr. Waterhouse was not at home when the marihuana was delivered to his garage.
>
> [9] The police executed a search warrant at Mr. Waterhouse's home on March 2, 2018. No items were seized from the residence, but the police located 235.9 lbs. (107.11 kg) of marihuana, a vacuum sealer, packaging materials, and 12g of cannabis resin (shatter) in the garage. Mr. Waterhouse was subsequently charged and plead guilty to s. 5(2) of the *CDSA*.

The Sentencing Judge's Reasons

[9] The sentencing judge recited the purpose and principles of sentencing under the *Criminal Code* and the *CDSA*. He noted that s. 718.1 of the *Code* establishes proportionality as the fundamental principle of sentencing: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. He found the significant amount of marihuana was aggravating as it indicated "large scale trafficking" (para. 36).

[10] The mitigating factors taken into account by the judge were an acceptance of responsibility and expression of remorse by Mr. Waterhouse; his "relative youthfulness"; the fact he was a first offender, had pleaded guilty, was of previous good character, and had community support; his full-time employment; and a favourable presentence report. The judge viewed Mr. Waterhouse in positive terms:

> [53] Mr. Waterhouse is an excellent candidate for rehabilitation. He has excellent prospects for employment, he is a first-time offender with no prior criminal record. He accepts full responsibility for his actions. He has an extremely positive PSR and works full-time as an auto mechanic. He is a productive member of the community and has the support of his family.

[11] He also considered as mitigating Mr. Waterhouse's compliance with his bail conditions – he had been released on a recognizance in May 2017 – and the fact that he had not committed any new offences.

[12] In the sentencing judge's words, Mr. Waterhouse was, at 29 years old, a "somewhat youthful offender" (para. 40). With this in mind, he referred to Rosenberg, J.A.'s emphasis in *R. v. Priest*, [1996] O.J. No. 3369 (Q.L.) on individual deterrence and rehabilitation in sentencing youthful first offenders. He quoted Justice Rosenberg's conclusion that a "first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence…" (*Priest*, at para. 23).

[13] The judge then trained his focus on the nature of Mr. Waterhouse's offence, stating he "must look at the offence that was committed" and was "mindful" that "deterrence and denunciation are paramount" in sentencing for drug offences (para. 40).

[14] He noted the Supreme Court of Canada discussion in *R. v. Lacasse*, 2015 SCC 64 that a sentence will be demonstrably unfit if it unreasonably departs from the principle of proportionality. He recited the full quote which included:

> Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.
>
> (*Lacasse*, at para. 53)

[15] The judge understood the sentence he fashioned for Mr. Waterhouse had to satisfy the principles of proportionality and parity. He referenced the statements from *Lacasse* that the relative importance of the various principles and objectives of sentencing "will necessarily vary with the nature of the crime and the circumstances in which it was committed" (*Lacasse*, at para. 54). Returning to what proportionality mandates, he held that: "Assessing the gravity of the offence requires me to consider both the gravity of these offences in general and the gravity of Mr. Waterhouse's specific offending behaviour" (para. 44).

[16] The sentencing judge assessed the gravity of Mr. Waterhouse's offence and his degree of responsibility:

> [47] When considering the circumstances of this particular offender and specific deterrence, the facts suggest that this was an impulsive, reckless decision made by Mr. Waterhouse. There is no evidence of any other involvement by Mr. Waterhouse with [B.Q.] and his operation, or in fact, any involvement with illegal drugs or drug activity. Regrettably, Mr. Waterhouse never considered the consequences when he accepted $2,000 to store drugs for [B.Q.]. This decision will result in significant consequences to him.
>
> [48] Next, looking at the degree of responsibility of the offender, Mr. Waterhouse has accepted complete responsibility for his actions. His age does reduce his moral blameworthiness but, as pointed out by the Crown, there were no other extenuating circumstances such as mental health issues or substance abuse issues. This was a reckless one-time decision by Mr. Waterhouse.

[17] The sentence Mr. Waterhouse received was influenced by a number of factors identified by the sentencing judge, including the aggravating and mitigating circumstances I mentioned earlier. In addition, he took into account:

- The drug involved was marihuana, a less serious substance than cocaine or heroin.
- Large scale illegal possession of marihuana "will still attract severe sentences" even though there is now the *Cannabis Act*, S.C. 2018, c. 16, certain amounts of the drug are considered legal, and "Public views on marihuana have changed" (para. 49).
- Denunciation and deterrence require a period of jail time for Mr. Waterhouse.
- Deterrence did not require Mr. Waterhouse to be punished "any longer than necessary" or to have him imprisoned "long-term in an environment that may foster a criminal career" (para. 49).
- Mr. Waterhouse's "excellent prospects for rehabilitation" (para. 50).
- The importance of rehabilitation as a relevant sentencing objective even where denunciation and deterrence are to be emphasized.

Issues

[18] The Crown's Notice of Appeal sets out the alleged errors in principle made by the judge:

a) Failing to properly interpret and apply the principle of proportionality, given the gravity of the offence and the degree of responsibility of Mr. Waterhouse.

b) Failing to give due emphasis to the applicable principles of sentencing, particularly denunciation, deterrence and protection of the public and by over-emphasizing the personal circumstances of Mr. Waterhouse.

[19] The Notice of Appeal further says the sentence imposed on Mr. Waterhouse is demonstrably unfit and/or manifestly inadequate, given the circumstances of the offence and the offender.

[20] In its factum, the Crown states the issues as follows:

> (1) Whether the Trial Judge failed to properly interpret and apply the principle of proportionality, given the gravity of the offence and the Respondent's degree of responsibility;
>
> (2) Whether the Trial Judge erred in his interpretation and application of the principle of parity;
>
> (3) Whether the Trial Judge erred by failing to properly emphasize the paramount objectives of sentencing (denunciation, deterrence and protection of the public) and by over-emphasizing the Respondent's personal circumstances and rehabilitation;
>
> (4) Whether the sentence imposed is demonstrably unfit or manifestly inadequate, given the circumstances of the offence and the offender.

[21] I would restate the issues as follows:

1) Did the sentencing judge make errors in principle that impacted the sentence he imposed?

2) Was the sentence demonstrably unfit?

Standard of Review

[22] Appellate intervention in sentencing is only warranted where the judge has committed an error in principle, including a failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor, and the error had an impact on sentence (*Lacasse*, at paras. 44, 67; *R. v. Friesen*, 2020 SCC 9, at para. 26).

[23] A variety of terms have been used to describe a sentence that is manifestly unfit: "demonstrably unfit"; "clearly unreasonable"; "clearly or manifestly" excessive or inadequate; or representing a "substantial and marked departure" from the cardinal principle of proportionality (*Lacasse*, at para. 52, citing Laskin, J.A. in *R. v. Rezaie,* (1996) 31 O.R. (3d) 713 (C.A.)).

[24] The focus of an inquiry into whether a sentence is manifestly unfit is on the principles and objectives of sentencing. The gravity of the offence, the offender's degree of culpability, and parity must be reconciled in the crafting of a fit sentence (*Lacasse*, at para. 53).

Analysis

Proportionality – Gravity of the Offence

[25] The Crown submits the sentencing judge "failed to properly account for the gravity of [Mr. Waterhouse's] offence and unjustifiably diminished his moral culpability in a number of ways". The Crown says the quantity of drugs places Mr. Waterhouse in the higher tiers of the *Fifield*[1] hierarchy of drug traffickers. In the Crown's submission this should have categorized Mr. Waterhouse as facilitating, in the same manner as a courier, the illegal enterprise of a "large retail or small wholesale" drug trafficking operation.

[26] The Crown says the judge, in his assessment of the gravity of the offence, should have:

- Emphasized the gravity of marihuana trafficking. Instead, the judge was distracted by the *Cannabis Act* as evidenced by his referring to the *Act* and his comment that, "[p]ublic views on marihuana have changed" (para. 49).

- Foregrounded denunciation and deterrence as the primary considerations for sentencing in the context of a large-scale commercial drug-trafficking operation with a profit motivation.

- Recognized the seriousness of Mr. Waterhouse's conduct, which the Crown describes as including: a willing agreement to use his residential

[1] *R. v. Fifield*, (1978) 25 N.S.R. (2d) 407 set out categories of drug traffickers: "the isolated accommodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator" (at para. 10, QL).

garage as a "stash house" for a "massive quantity of marihuana (over 107 kg) worth hundreds of thousands, if not millions of dollars".

- Found that Mr. Waterhouse had to have known he was facilitating the operations of a significant criminal operation. In the Crown's submission: "One look in his garage would have dismissed any doubt in that regard".

[27] The Crown's arguments in support of Mr. Waterhouse receiving a federal term of imprisonment rest on a characterization of his offending that the sentencing judge was entitled to reject. I will explain.

[28] He properly assessed the seriousness of the offence, based on the facts before him. Those facts did not include any evidence that Mr. Waterhouse knew how much marihuana had been stored in his garage. As his counsel before us, Mr. Burke said, all the evidence shows is that Mr. Waterhouse knew what was to be delivered to his garage was worth more than $2000. His guilty plea was nothing more than an admission he had agreed to allow more than 3 kilograms of marihuana to be delivered to his garage.

[29] There is no evidence that Mr. Waterhouse ever looked in his garage after the marihuana was delivered. Indeed, there is no evidence he knew the drugs had been delivered. The Agreed Facts do not tell us when they arrived. We know that Mr. Waterhouse was not seen at the house either on March 1 or on March 2, the day the police executed the search warrant and seized the marihuana and paraphernalia.

[30] The Agreed Facts indicate Mr. Waterhouse knew and had contact only with B.Q., an acquaintance. There is no evidence Mr. Waterhouse knew he was assisting an associate of the Hells Angels. The evidence the sentencing judge had did not permit him to sentence Mr. Waterhouse on the basis of him being a knowing participant in a commercial drug-trafficking operation of a criminal organization.

Proportionality – Degree of Mr. Waterhouse's Moral Culpability

[31] The Crown says the judge's assessment of Mr. Waterhouse's moral culpability should have included:

- A recognition of Mr. Waterhouse's actual responsibility in the context of a proportionality analysis. It was an error for the judge to have focused on Mr. Waterhouse's acceptance of responsibility.

- A recognition that Mr. Waterhouse was a mature 29 year old, not a "somewhat youthful offender" to be compared with the 18 and 19 year old offenders in *Priest*[2], *R. v. Bratzer*, 2001 NSCA 166[3] and *R. v. Rushton*, 2017 NSPC 2[4].

[32] The Crown says the judge's characterization of Mr. Waterhouse's agreement to allow drugs to be stored in his garage as "impulsive" and without consideration for the consequences was unreasonable and unsupported by the evidence. The Crown describes Mr. Waterhouse's involvement as deliberate, knowing, and driven by greed:

> An "impulsive" action is generally considered to be one taken suddenly without thinking or forethought. Here, the Respondent agreed with a suspected Hell's [*sic*] Angel's associate to "stash" an enormous quantity of marihuana worth potentially in excess of $1,000,000. The Respondent had to have known that he was thereby agreeing to participate in a high level commercial drug trafficking enterprise run by a criminal organization. One look in his garage would make that readily apparent.
>
> When interviewed for the PSR [pre-sentence report], the Respondent admitted to agreeing to "hold product". That is not the language of a neophyte. The Respondent knew exactly what he was doing and who he was doing it with. He was not an addict trafficking drugs to support an addiction, nor was his offence the result of any unfortunate social or financial circumstances. His employment provided very good income. Rather, his only motivation was greed.

[33] In the Crown's submission, the transaction that led to Mr. Waterhouse receiving $2000 for housing B.Q.'s drugs, "required a significant trust relationship

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[2] Mr. Priest was a 19 year old first offender who pleaded guilty to having broken into a convenience store and stolen $2700 worth of goods. His one-year sentence of imprisonment was overturned on appeal. A sentence of time served (approximately five weeks) and one year of probation was substituted. (The Ontario Court of Appeal noted the Crown at sentencing had recommended a sentence of 30 to 60 days with probation.)

[3] Mr. Bratzer was an 18 year old diagnosed with Attention Deficit Disorder and a learning disability who was sentenced for three robberies. He received a conditional sentence of two years less a day, upheld on appeal (2001 NSCA 166).

[4] Mr. Rushton had just turned 18 and had been experiencing serious mental health and substance abuse issues when he was charged with drug offences including possession of cocaine and cannabis for the purpose of trafficking. He received a three-year suspended sentence.

between the parties and an appreciation on both sides as to the nature and extent of the crime to be committed".

[34] The Crown says Mr. Waterhouse's moral culpability should have been seen as comparable to that of a courier or other subsidiary functionaries in a drug-trafficking operation. The Crown describes Mr. Waterhouse as having played "an important role in facilitating a large-scale commercial marihuana trafficking operation" that assisted a criminal organization. Mr. Waterhouse was an essential cog in the drug-trafficking wheel, providing support similar to the services rendered by couriers.

[35] Such facilitators can expect federal penitentiary sentences of two to five years. Later in these reasons I set out the sentencing judge's discussion of *R. v. Withrow*, 2019 NSSC 270 (30 months) and *R. v. Jones*, 2003 NSCA 48 (three years), cases he was referred to by the Crown that involved offenders who were part of the machinery of large-scale drug trafficking operations.

[36] I agree it was an error to view Mr. Waterhouse's moral culpability through the lens of his acceptance of responsibility. That acceptance of "complete responsibility" (para. 48) was a mitigating factor. It didn't belong in the judge's proportionality analysis. That said, it did not improperly dilute the analysis.

[37] The facts agreed to at sentencing entitled the judge to find that Mr. Waterhouse's degree of responsibility could be characterized as impulsive and reckless. It was the consensus of Mr. Waterhouse's references for the presentence report that his offending was completely out of character. Mr. Waterhouse told one of his references, Ms. MacKenzie, a close family friend, he just thought of the arrangement as "easy money".

[38] There was no evidence presented to the sentencing judge that showed any greater involvement on Mr. Waterhouse's part than allowing access to his detached garage. The presentence report indicates Mr. Waterhouse described himself to Ms. MacKenzie as embarrassed and disappointed in himself and believing that he "looks stupid". This supports a view of his agreement with B.Q. as impulsive. It suggests Mr. Waterhouse was naïve; that he wasn't aware of, and didn't recognize, what he was facilitating. Ms. MacKenzie told the author of the presentence report that Mr. Waterhouse's experience has been a very traumatic way to learn a lesson.

[39] Mr. Waterhouse was arrested after the police, over two days, conducted surveillance on his home and garage. Mr. Waterhouse was not seen during the

surveillance. The Agreed Facts indicate a vehicle associated with a possible "runner" for B.Q. was observed making brief stops at the address. The additional facts presented by Mr. Waterhouse at sentencing indicate he was not at home when the drugs were delivered to his garage. When Mr. Waterhouse's house was searched nothing of relevance to the investigation was found.

[40] While it is fair to say, as the Crown does, that "one look" in Mr. Waterhouse's garage would have dispelled any doubt about the involvement of a significant criminal organization in the stashing of the drugs, the sentencing judge did not have any evidence that Mr. Waterhouse took that "one look".

[41] The sentencing judge was entitled to view Mr. Waterhouse as "relatively young" as he put it when addressing him in the concluding statement of his reasons. Mr. Waterhouse was "relatively young" when he agreed to make his garage available to B.Q. The sentencing judge recognized this in situating Mr. Waterhouse's first criminal conviction in the context of his future:

> [75] Mr. Waterhouse, you are still relatively young, and the Court has shown you leniency today based on the facts before it. You will have choices to make in the future. You are fortunate that you have a supportive family and employment. You can continue to make something of yourself and lead a long and productive life or, you can disappoint all of us who believe this was an impulsive, reckless, one-time decision and return to illegal drug activity. That will be your choice, but the next time you are before the Court, I can assure you that the sentence will be significantly different. The choice going forward is yours. Choose wisely.

[42] I find the judge's description elsewhere in his decision of Mr. Waterhouse as "a youthful first offender" did not represent a reliance on an irrelevant factor. The judge used this terminology in the context of considering the objectives to be emphasized when sentencing a first offender. He noted those objectives – individual deterrence and rehabilitation – being relevant to "youthful first offenders" and referred to the *Priest* decision. As he embarked on this discussion in his decision, he identified Mr. Waterhouse as having "excellent prospects for rehabilitation" (para. 37). While the language of "youthful first offender" is more properly applied to younger offenders, such as Messrs. Priest, Bratzer and Rushton, taking Mr. Waterhouse's age into account as a mitigating factor in the manner in which he did, was appropriate.

[43] As for the judge's reference to the *Cannabis Act*, I find this played an inconsequential role in his sentencing of Mr. Waterhouse. It was other factors that he considered and weighed. His reasons do not indicate the *Act* caused him to

minimize Mr. Waterhouse's moral responsibility or had an influence on the sentence he decided was appropriate.

[44] The *Cannabis Act* was a casual reference in the course of the sentencing judge's decision. He made no suggestion that large-scale drug trafficking is any less serious an offence since the *Act*'s enactment. High-level, sophisticated commercial marihuana trafficking and production continue to attract significant penalties (see, for example, *R. v. Strong*, 2019 ONCA 15, at para. 4; *R. v. Coffey*, 2020 BCCA 195, at para. 35).

[45] Mr. Waterhouse's moral culpability had to be based on the agreed-upon facts: that Mr. Waterhouse knew he stood to make $2000 for allowing B.Q. to store an unspecified quantity of drugs in his garage. The sentencing judge appreciated this and did not minimize the extent of Mr. Waterhouse's moral culpability. The judge described the offence as "serious" and Mr. Waterhouse's moral blameworthiness as "high". He found that a sentence emphasizing denunciation and deterrence was "warranted in the circumstances" (para. 71). The judge's determination that a 90-day intermittent sentence carried a sufficiently denunciatory and deterrent message is entitled to deference.

Parity

[46] The Crown says had the sentencing judge not minimized the gravity of Mr. Waterhouse's offence and the significance of his involvement, he would have properly applied the parity principle. In the Crown's submission, the proper application of the parity principle would have led to the judge sentencing Mr. Waterhouse to a federal penitentiary term.

[47] The Crown referred the sentencing judge to *R. v. Withrow*, 2019 NSSC 270 and *R. v. Jones*, 2003 NSCA 48. I find the judge's determination that these cases were not comparable on their facts to Mr. Waterhouse's was reasonable and supported by the evidence before him.

[48] The sentencing judge examined *Withrow* and *Jones* in considerable detail:

> [60] In *Withrow*, the investigation established that the accused played a critical role in the conspiracy to traffick marihuana. He would meet couriers at the airport and collect suitcases of cannabis for delivery to the purchasers. He then would collect suitcases of cash and would drive the courier and cash back to the airport (para. 7). The conspiracy would not have worked without Mr. Withrow's role on the ground (para. 9). Justice Coady established the range for this kind of case to

be from 1 to 4.5 years' incarceration (para. 16). He sentenced Mr. Withrow to 30 months' imprisonment.

[61] In this case, the surveillance and tracking of [B.Q.] continued for several months but did not include Mr. Waterhouse. Nothing came to the attention of the police that Mr. Waterhouse was involved in the drug operation. There are clear distinguishing features from Mr. Withrow who was a primary target of the police. Mr. Withrow's vehicle was tracked for a number of months. He was a vital member of the organization and the Court felt obligated to sentence him to a federal sentence of 30 months because of his vital role in the organisation.

[62] Mr. Waterhouse's situation is nowhere near analogous to Mr. Withrow based on the facts before me. There is no evidence that he had any prior involvement in the drug trade other than this one-time incident where he accepted cash to store marihuana in his garage. The evidence is that the police found no cash or drug paraphernalia when they conducted their search of Mr. Waterhouse's house. The drugs were found in his garage. This would indicate to me that he was not involved in the movement of the drugs or involved in illegal drug activity. There is no evidence before me that he had any other involvement in illegal drug activity.

[63] The second case the Crown provided me was *Jones, supra.* This case involved a courier, who had a significant criminal record (11 prior convictions).

[64] In *Jones,* Mr. Jones was a courier and the Crown appealed the sentence imposed on him for a possession for the purpose of trafficking cannabis (marihuana) offence and a possession of proceeds of crime offence. The accused was convicted of the offences after the police discovered 4.6 kg of cannabis resin and $40,020 in the trunk of his vehicle. The sentencing judge imposed an 18-month conditional sentence.

[65] On appeal, the Nova Scotia Court of Appeal substituted a sentence of three years' incarceration. The Court found that in view of the seriousness of the offence, the events, the amount of cannabis involved, and the accused's criminal record, the conditional sentence that had been imposed by the trial judge was not a fit and proper sentence. The Court of Appeal said at paragraph 8:

> [8] Sentences for possession of narcotics for the purposes of trafficking imposed by this court over the last 25 years have consistently been largely influenced by the quantity of drugs involved and the function or position of the offender in the drug operation. Other factors considered either more or less relevant, depending on the circumstances, are the criminal record and age of the offender, whether he was on probation at the time of the events, and the sophistication and scope of the enterprise.
>
> ...
>
> [10] An examination of possession for the purposes cases, reveals that the typical range of sentences for small wholesalers or large retailers, the

> people on the third of the four rungs of the ladder identified in **Fifield**, is two to five years incarceration. It also appears from this survey that the quantity of cannabis resin necessary to categorize a person at this level is two to ten kilograms, with values in the tens of thousands of dollars range. The presence of exceptional mitigating circumstances, such as youth, or previous unblemished character, may, of course, take an offender out of the normal range. ...
>
> [66] The Court then conducted a review of some cases that were illustrative of these points.
>
> [67] The only similarity between the *Jones* decision and the case before me is that Mr. Jones, like Mr. Waterhouse, saw the opportunity to make a fast buck. The similarities end there. Mr. Waterhouse stored the marihuana for [B.Q.]. His involvement in the illegal drug activity is much different from Mr. Jones. The Court described Mr. Jones's situation at paragraph 13:
>
> > [13] There are no mitigating factors in this case which would remove the respondent from the normal range. He is not youthful and he has a significant criminal record. In fact, he was convicted of another drug offence while awaiting trial for this offence. He was not only paid $1,000 for transporting drugs, but was also entrusted with $40,000 cash by whomever was in charge of this inter-provincial transaction. Although the trial judge accepted that the respondent did not necessarily know the exact contents or quantity of drugs in the box he was delivering, he obviously must be taken to have known that the package was of significant value. It is fair to infer that he would not have been paid $1,000 to deliver a minor quantity of drugs. ...
>
> [68] Mr. Waterhouse has the mitigating factors that were not present in *Jones*.
>
> [69] However, *Jones* is significant because it tells me that I must look at the quantity of the drugs and the position of the offender. Mr. Waterhouse made an impulsive decision when he agreed to store the drugs. He was not under any surveillance by the police and when they searched his residence nothing was found in the house. All the drugs were found in the garage. He allowed the product to be kept in his home [*sic*] which aided and abetted the criminal organization but there is no evidence before me that he held any position within the organization or had any involvement with it other than this one-time occurrence.

[49] The statement by the sentencing judge that Mr. Waterhouse "aided and abetted the criminal organization" is based on the Agreed Facts that indicated the police believed B.Q. was associating with the Hells Angels and engaged in high-level drug trafficking. The amount of marihuana seized from Mr. Waterhouse's garage supports the police intelligence that, as the Agreed Facts stated, B.Q. was "moving" very significant quantities of the drug. However, given the additional

facts before him and the conclusions he reached, the sentencing judge's statement cannot be taken to mean Mr. Waterhouse knew he was facilitating the operations of a criminal organization. The facts do not establish that Mr. Waterhouse was operating a "stash house" which, like couriers, are a necessary component of a large-scale trafficking operation (*R. v. Hobeika*, 2018 ONSC 1293, at para. 81; *R. v. Shields*, 2014 NSPC 21, at para. 76; *R. v. Field*, 2013 NSPC 51, at para. 21). Stash house operators, like couriers who knowingly support large-scale drug trafficking, can expect to receive significant penalties.

[50] What the facts establish is that in the course of servicing B.Q.'s motorcycle and doing repairs on his truck, B.Q. made a proposal to Mr. Waterhouse – $2000 as payment for storing "a quantity of marihuana" in his garage. Mr. Waterhouse "regretfully accepted" this proposal. Additional facts accepted by the Crown stated that Mr. Waterhouse did not know anyone involved with the drugs other than B.Q. and had no contact with anyone other than B.Q.

[51] To return to *Withrow* and *Jones*, as the sentencing judge found in his extensive review of those cases, those offenders and their offences are not comparable to Mr. Waterhouse and his crime. Mr. Waterhouse cannot be characterized as Mr. Jones was – "an integral part of the distribution system in the drug business". He was not a courier providing a "critical link" between wholesalers and retailers. He was not one of the "middlemen" (*Jones*, at para. 9). He was not like Mr. Withrow, " a critical player" in a conspiracy that "would not work without his role on the ground" (*Withrow*, at para. 9). He took $2000 in exchange for permitting marihuana to be parked in his garage for a day or two. This may have been convenient for the drug-trafficking operation that was to be fueled by the 107 kilograms of marihuana the police seized, but it is not evidence that establishes a knowing, critical role by Mr. Waterhouse.

[52] The judge was alive to the sentencing range for sentences imposed on offenders who facilitate and support drug trafficking operations. Taking account of Mr. Waterhouse's circumstances, he exercised his discretion to impose a sentence of imprisonment that fit the offender and the offence:

> [72] Having considered all of the aggravating, mitigating, and other factors identified in this case, and recognizing that the normal range of sentence for trafficking marihuana is 1 to 4.5 years, or more, I am of the view that a 90 day intermittent custodial sentence is warranted, followed by a significant period of probation of two years.

> [73] Considering Mr. Waterhouse's mitigating circumstances and prospects for rehabilitation this is a fit and proper sentence for Mr. Waterhouse. This may not be within the general range for this offence in Nova Scotia but I must look at the circumstances of each offender and after applying the applicable sentencing principles, I am satisfied that this is a fit and proper sentence for this individual.
>
> [74] This sentence takes into account the primary factors of deterrence and denunciation. Spending any time in an institution for a youthful, first time offender is a significant deterrent. The protection of the public is served by a short, sharp, period of incarceration.

[53] Although the sentencing judge described the "normal" range of sentence as 1 to 4.5 years, I find it difficult to say there is a range into which Mr. Waterhouse's offending fits. I have already explained what distinguished cases relied on by the Crown where there was knowing and active facilitation of a drug trafficking operation. The circumstances of Mr. Waterhouse's case are also quite unlike the cases he presented to us, many of which involved marihuana production, including for personal use. In any event, when considering the issue of sentencing ranges, it must be kept in mind that while they are important to the task of determining what constitutes a fit sentence, they are "guidelines rather than hard and fast rules" (*R. v. Nasogaluak*, 2010 SCC 6, at para. 44). Appellate intervention does not automatically follow when a sentence does not conform to a sentencing range (*R. v. Suter*, 2018 SCC 34, para. 25).

A Fit and Proper Sentence

[54] Throughout his analysis, the sentencing judge focused his attention on the gravity of the offence and the degree of Mr. Waterhouse's responsibility for it, paying careful attention to the facts he had before him.

[55] Mr. Waterhouse's personal circumstances and prospects for rehabilitation were also important considerations at sentencing. The sentencing judge did not overemphasize them or fail to balance them with other applicable principles and objectives of sentencing (*R. v. Kleykens*, 2020 NSCA 49, at para. 76).

[56] This was not a case that indicated "a pre-meditated and prolonged course of action that suggests entrenched involvement in the illegal drug trade" (*Kleykens*, para. 81). Mr. Waterhouse made a grave error of judgment. He veered off his otherwise socially responsible path. The sentencing judge took appropriate account of the fact that Mr. Waterhouse had been law-abiding prior to the offence and had continued to demonstrate pro-social behaviour during his release. (In contrast, Mr.

Jones was convicted of another drug offence while awaiting trial for the offences that led to his sentencing.)

[57] Mr. Waterhouse did not get away with a slap on the wrist. He paid a steep price for his "easy money". His accommodation of B.Q.'s proposal has had real consequences for him. He went to jail and continues to be subject to the supervision of the state under a probation order. He has a criminal record for a serious offence. As the sentencing judge noted, Mr. Waterhouse will bear the repercussions of his actions, "should he wish to travel internationally, and it may hamper his employment prospects" (para. 50). The sentence Mr. Waterhouse received fit the gravity of the offence he committed and the degree of his responsibility for it.

Disposition

[58] Mr. Waterhouse's sentence is neither the product of error nor manifestly unfit. I would grant leave to appeal and dismiss the appeal.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.