

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R.v. Roberts*, 2019 NSPC 27

**Date:** 20190617

**Docket:** 8191858, 8191860, 8191861, 8191862, 81910968, 8190970

**Registry:** Dartmouth

Between:

Her Majesty the Queen

v.

Anthony Douglas Roberts

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**LIBRARY HEADING**

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**Judge:** The Honourable Judge Chief Judge Pamela S. Williams

**Sentencing** April 15, 2019 in Dartmouth, Nova Scotia

**Submissions Heard:**

**Written Decision:** June 17, 2019

**Subject:** Possession for the Purpose of Trafficking Cocaine and Cannabis Marijuana pursuant to the *Controlled Drugs and Substances Act*

**Summary:** Following trial, Mr. Roberts is convicted of possession of cocaine (in excess of 12 grams) and cannabis marijuana (380 grams) for the purpose of trafficking pursuant to the *Controlled Drugs and Substances Act*.

**Issues:** Whether there is the ‘appropriate constellation of factors’ to justify a suspended sentence and long strict period of probation?

**Result:** A 3-year period of incarceration is imposed despite the presence of several mitigating circumstances – no further convictions since the offence, strong family and

community support, stable employment and community volunteer work. However, there are significant aggravating circumstances, which do not justify a community based sentence. They include – large quantity of marijuana (nearly 400 grams) and possession of a hard drug (cocaine), the presence of 2 young children in the home, a prior related but dated conviction, and the presence of ammunition. Furthermore, Mr. Roberts is neither a youthful nor a first-time offender. He has 13 prior convictions, including 5 in 2017. The offences appear to have been committed for profit.

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<b>Judge:</b>	The Honourable Chief Judge Pamela S. Williams
<b>Sentencing Heard:</b>	April 15, 2019, in Dartmouth, Nova Scotia
<b>Decision</b>	June 17, 2019
<b>Charge:</b>	Section 91(2) of the <b>Criminal Code of Canada</b> Section 145(3) of the <b>Criminal Code of Canada</b> Section 5(2) x 2 of the <b>Controlled Drugs and Substances Act</b>
<b>Counsel:</b>	Christian Girouard, for the Federal Crown Scott Brownell, for the Defence

## **Introduction**

[1] On October 18, 2018 Mr. Roberts is found guilty, after trial, of possession of cocaine and cannabis marijuana for the purpose of trafficking both contrary to section 5(2) of the *Controlled Drugs and Substances Act*. As well, he is convicted of possession of brass knuckles (a prohibited weapon) pursuant to section 91(2) of the *Criminal Code* and 3 counts of breaching his release order contrary to section 145(3) of the *Criminal Code*.

## **Position of the Parties**

[2] The Crown is seeking a global sentence of 3 years incarceration, a forfeiture order for the items seized, a DNA order and a firearms prohibition order.

[3] The Defense urges the Court to impose a suspended sentence and 3 years probation, or in the alternative, a 90-day intermittent sentence followed by 3 years probation.

## **Circumstances of the Offence**

[4] At about 10 pm on January 19, 2018, police, armed with a warrant, enter Mr. Robert's home in search of illegal drugs. Mr. Roberts is sitting on the couch in the living room watching television with his son and daughter. Upon arrest, Mr. Roberts is searched and has \$1,545.00 in cash in right front pocket.

[5] In a bedroom cabinet police find 3.2 grams of powdered cocaine, a working digital scale, and a package of sandwich bags. In a night stand they find 26 rounds of 9mm ammunition. In a red gym bag police locate 2 bags of cannabis marijuana, totalling 379.6 grams, 3 baggies of crack cocaine totalling 9.6 grams, a package of dime bags, 47.8 grams of a cutting agent and a vacuum sealer and vacuum sealer bags.

[6] A debt sheet on the back of an envelope addressed to 'Uncle Tony' is found in the kitchen cabinet.

[7] The drugs are possessed by Mr. Roberts for the purpose of trafficking. There is no evidence to suggest Mr. Roberts is trafficking drugs to support an addiction or that he has any motivation to sell drugs other than to make profit.

[8] The brass knuckles, found in a bathroom cabinet, are possessed by Mr. Roberts.

[9] At the time, Mr. Roberts is on a recognizance to keep the peace and be of good behaviour, not to have any prohibited weapon in his possession and not to possess any controlled substance as defined by the *Controlled Drugs and Substances Act*. He is found to be in breach of these conditions.

### **Circumstances of the Offender**

[10] Mr. Roberts is a 33-year-old single man. His pre-sentence report is characterized as positive. Mr. Roberts enjoyed a positive upbringing. He has an 11-year-old daughter and a 7-year-old son with whom he has regular contact. He lives with his brother and family who are supportive. Mr. Roberts also maintains a close relationship with each of his parents. Mr. Roberts has a full-time permanent position as a driller's mate. He is described as a reliable, hard-working employee. In his spare time, Mr. Roberts assists his brother who coaches a sports team and volunteers with at-risk youth. Mr. Roberts denies any history of a mental health diagnosis or any related treatment. He maintains his innocence.

## **Principles of Sentencing**

### General

[11] Sentencing is arguably one of the most difficult, yet crucial functions of a trial judge. On the one hand, it is a very individualized process; on the other, it also requires the balancing of societal interests and the application of law.

[12] In sentencing Mr. Roberts, I must apply the principles and factors set out in sections 718, 718.1 and 718.2 of the *Criminal Code* and s. 10 of the *Controlled Drugs and Substances Act (CDSA)*.

### *Criminal Code of Canada*

[13] The overarching objectives of sentencing are to protect the public and to contribute to respect for the law and to maintain a safe society. This is to be accomplished by imposing just sanctions that have, as their goal, one or more of the following: denunciation, deterrence – both general and specific, separation of offenders from society where necessary, rehabilitation, promotion of responsibility in offenders, and acknowledgement of harm done to victims and the community.

[14] The fundamental principle of sentencing, per s. 718.1 is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] Section 718.2 requires that I consider the mitigating and aggravating factors related to the offence and the offender and the principles of parity and proportionality. An offender should not be deprived of liberty, if less restrictive sanctions are appropriate in the circumstances. And that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

*Controlled Drug and Substances Act*

[16] Section 10(1) of the *CDSA* states that the fundamental purpose of any sentence is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances of offenders and acknowledging the harm done to victims and to community.

[17] Pursuant to section 10(2), when the offence is not one which mandates a minimum punishment, I am to consider any relevant aggravating factors related to the commission of the offence, a prior related conviction or and whether he/she engaged the involvement of a person under 18 years of age. Further, if there are relevant aggravating factors, but I decide not to sentence the person to imprisonment, I must give reasons for that decision.

[18] In this case, Mr. Roberts has a prior related conviction, albeit as a youth, some 15 years ago.

#### Denunciation and Deterrence

[19] Time and again the Nova Scotia Court of Appeal has said that denunciation and general deterrence are to be the primary considerations when sentencing those who traffic in Schedule I drugs. (Examples include *R. v. Steeves*, 2007 NSCA 130; *R. v. Butt*, 2010 NSCA 56; *R. v. Scott*, 2013 NSCA 28; *R. v. Oickle*, 2015 NSCA



87). As stated by my colleague Judge Buckle in *R. v. Rushton*, 2017 NSPC 2, ‘emphasizing these objectives reflects society’s condemnation for these offences and acknowledges the tremendous harm they do to communities’.

### Rehabilitation

[20] Rehabilitation remains an important objective, despite the need to emphasize denunciation and deterrence. As noted by Buckle, J. in *R. v. Rushton (supra)*:

[65] This was recently confirmed by the Supreme Court of Canada in *LaCasse (supra)* [2015] SCC 64 where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said:

One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate. (at para. 4)

### Proportionality

[21] The principle of proportionality requires that I consider the gravity of the offence and the degree of responsibility of the offender.

[22] Trafficking in cocaine, a Schedule I substance is a very serious offence, attracting a maximum sentence of life imprisonment. It can no longer be considered for a conditional sentence of imprisonment.

### Aggravating and Mitigating Factors

[23] As set out in section 718.2 of the *Criminal Code*, I must consider the aggravating and mitigating factors related to the offence and the offender:

Aggravating Factors:

[24] The substance itself, cocaine is aggravating. The NSCA has recognized, time and again, that cocaine is a ‘deadly and devastating drug that ravages lives’ (*Butt, supra at para. 13*) and ‘is ruinous to our communities’ (*Scott, supra at para. 94*).

[25] This is a large quantity of marijuana – nearly 400 grams.

[26] There is the presence of 2 young children in the home, which as the Crown points out, risks exposing them to drugs and violence associated with the drug trade.

[27] Mr. Roberts has a prior related conviction albeit as a youth, 15 years ago.

[28] The presence of ammunition in the room where the drugs were found is also aggravating.

[29] Mr. Roberts has 13 prior convictions, including 5 in 2017.

Mitigating Factors:

[30] There has been no further offending behavior since the date of the offence.

[31] Mr. Roberts has strong family and community support as is evidenced by multiple reference letters filed on his behalf.

[32] Mr. Roberts is employed as a Driller Assistant and by all accounts, is a valued employee.

[33] Mr. Roberts is applauded for his volunteer work in the community.

#### Parity and Range of Sentences

[34] I must consider the range of sentences imposed for trafficking in cocaine and other Schedule I substances. As noted by Buckle, J. in *Rushton (supra)*, a long list of decisions from our Court of Appeal establish that cocaine traffickers should generally expect to be sentenced to imprisonment in a federal penitentiary (See: *Steeves, supra*; SCA 130; *R. v. Knickle*, 2009 NSCA 59; *Butt, supra*; *R. v. Jamieson*, 2011 NSCA 122; and *Oickle, supra*).

[35] Having said that, the Court has never said that a federal penitentiary term is mandatory. There have been cases where shorter periods of custody in provincial institutions (or in the community when conditional sentences were available) have been ordered. See for example: *Scott (supra)* and *R. v Howell*, 2013 NSCA 67.

[36] It is worthy of note that in *Scott (supra)* at para. 53, the Court determined that it was not necessary for a sentencing judge to find ‘exceptional’ circumstances

to justify a sentence lower than two years for trafficking cocaine. The sentencing judge must consider all the relevant objectives and principles of sentence as set out in the *Criminal Code*, balancing them and arriving at a proper sentence (para. 26).

[37] As to the range in Nova Scotia for cocaine trafficking, I agree with Buckle, J.'s assessment at para. 85 and 86 of *Rushton (supra)*:

[85] ...The lower end of the range has generally been used in cases involving one or more of the following: addictions; youth; limited or no prior record; relatively small amount of the drug; some hope of rehabilitation; and, absence of aggravating factors.

[86] As was noted in *Oickle (supra)*, the range across Canada is broader and includes, in some provinces, intermittent sentences or suspended sentences with probation (see for example: *R. v. Peters*, 2015 MBCA 119; *R. v. McGill*, 2016 ONCJ 138; *R. v. Maynard*, 2016 YKTC 51; *R. v. Voong*, 2015 BCCA 285; *R. v. Carrillo*, 2015 BCCA 192; *R. v. Ferguson*, 2014 BCCA 347; *R. v. Arcand*, 2014 SKPC 12; and *R. v. Yanke*, 2014 ABPC 88).

[38] Sentence parity is important. It permits greater consistency among sentences. We as sentencing judges are reminded however that ranges of sentences ‘are guidelines rather than hard and fast rules’ and that we are permitted to go outside the established range for a given offence provided the sentence imposed is a lawful one and that it adequately reflects the principles and purposes of sentencing (*R. v Nasogaluak*, 2010 SCC 6 at para. 44).

[39] And the words of Wagner, J. in *Lacasse (supra at para. 58)* bear repeating:

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a

unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case . . .

[40] I accept that it is not strictly necessary for exceptional circumstances to be found for a suspended sentence to be granted. But there must be, as the Defense points out at page 14 of their brief, 'the appropriate constellation of factors to justify a suspended sentence and long strict period of probation.

### **Caselaw**

[41] I have considered the caselaw, some of which has been referenced above.

[42] *Rushton (supra)* and *R. v. Casey*, 2017 NSPC 55 have been cited by the Defense as authority for the imposition of non-custodial sentences for trafficking in Schedule 1 drugs. In both cases, these were youthful offenders, with little or no record, who had excellent prospects for rehabilitation.

[43] I also considered the following: *R. v. Christmas*, 2017 NSPC 48, the accused sold Percocets to support his hydromorphone addiction. As an indigenous person, he suffered much trauma during his lifetime. He pleaded guilty and was in rehabilitative counselling.

[44] *R. v. Masters*, a 2017 decision, NSPC 75, involved a youthful 1<sup>st</sup> offender who pleaded guilty to trafficking in ice pills. He was considered a petty retailer, supporting his drug addiction.

[45] In *R. v. Saldanha*, 2018 NSSC 169, the accused pleaded guilty to selling a small quantity of powdered cocaine to an undercover officer. He was considered more of a ‘delivery person’ than a petty retailer.

[46] The Defense also cites cases from elsewhere in Canada. Many, if not all can be distinguished from the case at hand as having involved youthful offenders, some of whom had no records. The others involved vulnerable accused, either drug addicted, selling to support a habit or suffering from medical difficulties.

[47] The Crown cites *R. v. Smith* an oral judgment of Hoskins, J. at [2012] N.S.J. No. 511 in asking for a federal period of incarceration. In that case Mr. Smith pleaded guilty to cocaine and marijuana for the purpose of trafficking. He was 30 years old and had no previous convictions. He provided reference letters from his family and employer. He had a normal upbringing and committed no offences in the 31 months since he was arrested. There was no evidence that Mr. Smith was an addict or that he had any motivation to sell drugs other than for profit. In sentencing Mr. Smith to two years’ imprisonment, the trial judge determined that

the offenses were planned and deliberate and conducted for profit. Although a conditional sentence of imprisonment was then available, Hoskins J. determined that such was not warranted.

### **Sentence**

[48] Mr. Roberts is neither a youthful nor a first-time offender. He has 13 prior convictions, including a related prior conviction, albeit dated. Mr. Roberts is not an addict supporting a habit and there is nothing to suggest his motivation was other than for profit. I am not able to find ‘the appropriate constellation of factors to justify a suspended sentence and period of probation in this case. Nor am I able to justify a ‘short sharp sentence’.

[49] I am persuaded that the fit and proper sentence, taking into consideration the principles of sentencing and the established caselaw in Nova Scotia is a 3-year period of incarceration in a federal institution; 2 ½ years for possession of cocaine for the purpose of trafficking and 6 months for possession of cannabis marihuana for the purpose of trafficking, to be served consecutively. As to the *Criminal Code* offences, I impose sentences of 30 days each to run concurrently to each other and concurrently to the 3 years. A forfeiture order is granted for the items seized, as is a DNA order and a firearms prohibition order.

Chief Judge Pamela S. Williams, JPC