PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Robinson*, 2020 NSPC 1

Date: January 7, 2020
Docket: 8204301
Registry: Halifax

Between:

Her Majesty the Queen

v.

JENEEN MARIE ROBINSON

DECISION ON SENTENCE

Judge:	The Honourable Judge Amy Sakalauskas
Place Heard:	Halifax, Nova Scotia
Date Heard:	November 14, 2019
Decision:	January 7, 2020
Charge:	s. 5(2) *Controlled Drugs and Substances Act*
Counsel:	Max Krüger and Michael Luba (Student at Law), for the Crown Dr. Joshua Nodelman, for the Defence

BY THE COURT:

[1] Jeneen Robinson pleaded guilty to possession of cocaine, a Schedule I substance, for the purpose of trafficking, contrary to Section 5(2) of the *Controlled Drugs and Substances Act* ("CDSA"). I reviewed helpful written submissions from both parties and heard from Counsel, and from Ms. Robinson, on November 14, 2019. I have the benefit of a Cultural Impact Assessment and a Gladue Report. The Crown asked that Ms. Robinson be incarcerated 3 years (along with a 10-year Prohibition Order, a DNA Order, and a Forfeiture Order). The Defence asked for a suspended sentence and 3 years probation.

FACTS OF THE OFFENCE AND CIRCUMSTANCES OF MS. ROBINSON

[2] Police received information that Ms. Robinson was going to travel to Toronto and bring a large amount of cocaine back to Halifax. They tracked her via a tracking device on her cell phone from Halifax, through New Brunswick, Quebec, and eventually to Ajax, Ontario, where she arrived just after midnight on March 2, 2018. At noon on March 3, 2018, she traveled to a residence in Toronto, before heading back to Nova Scotia. She was arrested at 5:50 p.m. on March 3, 2018, at Fall River, after having been surveilled from Fredericton, NB. She was alone in a vehicle rented out of the Halifax airport. Police found a 1-kilogram brick of cocaine, and 200 grams of cocaine packaged separately, in a backpack in the truck. The cocaine has a roughly estimated street value of $120,000.00.

[3] Ms. Robinson originally pleaded not guilty, set the matter for trial, and filed a *Charter* notice. She changed her plea to guilty on the trial date and sentencing reports were ordered. Ms. Robinson says this conviction is the result of her making a poor choice to do a favour for a friend. I have minimal context to her offence. She explains that she is concerned for her safety and that of her children, so has not provided more information. It is a major gap in the information before me, but one Defence counsel tells me he cannot fill. Ms. Robinson advised the Gladue Report author that an acquaintance who is a "drug dealer, drug runner, gambler, and police informant" influenced her and set her up, and she believes he informed on her for money.

[4] As explained in the Cultural Impact Assessment, Ms. Robinson identifies racially, politically, socially, and culturally as Black Nova Scotian. She reported her mother is of mixed race, namely African Nova Scotian, Indigenous, and white. Her birth father is African Nova Scotian. Ms. Robinson is 40 years old. She has no criminal record. She is the mother to two adult children in their early 20s. Her son resides with her and her Aunt and has mental health challenges and developmental delays, making him reliant on her. Her ability to work outside the home was interrupted, given her care responsibilities. After making a return to work, she had workplace accidents, and has been on Income Assistance since 2013. She has

health conditions such as diabetes, high blood pressure, migraines, COPD, allergies, arthritis, scoliosis, and needs hip replacements.

[5] The Cultural Impact Assessment, authored by Sonya Paris and Lana MacLean, explains how race and culture have impacted Ms. Robinson's life. The authors outline how she has worked hard to be a positive citizen despite a challenging upbringing that caused feelings of low self-worth. She suffered trauma from a young age, was exposed to domestic violence, sexual abuse, poverty, abandonment, and racial discrimination. Her life has been one of disenfranchisement, where she experienced violence and abuse which she did not report. She feared being judged, being mistreated by police, losing her children to child welfare, and retaliation from abusive partners. She has experienced the impact of colourism, racism, and racialized trauma over her lifetime. She was raised without the opportunity to develop racial literacy.

[6] The Cultural Impact Assessment authors recommended a "Conditional Sentence" with counselling and other supports within the African Nova Scotian Community. As a Conditional Sentence Order is not an available sentence, I will treat this recommendation as one for a community-based sentence, with conditions.

[7] The Gladue Report, prepared by Robin Thompson, offers insight into "Black Indians", and explains how Ms. Robinson struggled with where she belonged. Her

mother's choices, including in partners, had negative impacts on Ms. Robinson, although she benefited from the protection of other family members at times. She was raised to showcase emotional control and keep emotions in as a coping mechanism. As a result, although she tried therapy it was difficult. After being in the middle of violence in her mother's relationships, Ms. Robinson suffered the repeated cycle of violence in her own relationships. Adverse impacts of colonization noted in the Gladue Report include:

- Family deterioration
- Substance abuse in the immediate family
- Violence in the family
- Physical and emotional abuse
- Sexual abuse
- Low income and unemployment due to lack of education
- Poverty
- Overt and covert discrimination
- Contemplated or attempted suicide
- Loss of identity, culture, and ancestral knowledge.

[8] The Gladue Report author recommends that Ms. Robinson receive a community-based disposition, requiring her to reside at the Elizabeth Fry Society

property, Holly House, in Dartmouth, for support and programming. This option was not discussed by counsel, and no further information was provided to me.

[9] Ms. Robinson speaks of struggles with anxiety, depression, and suicidal thoughts. She tells me she reached out for help, but it has not been available to her. I was advised that she is waitlisted for counselling and is motivated to address her mental health issues.

PURPOSE AND PRINCIPLES OF SENTENCING

[10] The purpose and objectives of sentencing and the principles to be considered are set out in Sections 718, 718.1, and 718.2 of the *Criminal Code*, along with Section 10 of the *CDSA.* Section 718 sets out that the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a peaceful society. It also states that sentences should attempt to do one or more the following: denunciation, deterrence, separation from society where necessary, rehabilitation, reparations to victims/community, promote a sense of responsibility and acknowledge harm done to victims/community.

[11] Section 718.1 mandates that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. ***R. v. Nasogaluak,* 2010 SCC 6** reminds of the centrality of proportionality in sentencing. A sentence must not exceed what is just

and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. Judges are to take an individualized approach and use their broad discretion to formulate an appropriate sentence.

[12] Proportionality was commented on by the Supreme Court of Canada in ***R. v. Lacasse,* 2015 SCC 64**:

> *12 ... proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. . .*

[13] Section 718.2 provides further sentencing principles, including:

- aggravating and mitigating factors should be considered;
- parity;
- an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and
- all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims' community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[14] Sentencing ranges are important, from a parity perspective, but they are not everything. On parity, and the range-based sentencing used to attain it, *Lacasse* instructs sentencing judges that ranges are not straightjackets. There will always be situations that call for a sentence outside a range imposed in the past. This is because every offender is unique, and sentences must be tailored to their circumstances. Ranges are guidelines, not hard and fast rules.

[15] Section 10 *CDSA* mirrors these sentencing purposes and adds consideration to treatment for offenders in appropriate circumstances. Section 10(1) *CDSA* adds that the "fundamental purpose" of sentencing for drug-related offences, is to contribute to respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation of offenders, and treatment in appropriate circumstances, and acknowledging the harm done to victims and to the community.

[16] Our Court of Appeal has maintained for decades that denunciation and general deterrence are the primary considerations when sentencing people who traffic in Schedule I drugs. These drugs devastate our communities and this approach to sentencing acknowledges this harm. Cocaine is a drug well recognized by our courts for inflicting gross damage, often on our most vulnerable citizens. It is a "deadly and devasting drug that ravages lives", as noted in ***R. v. Butt,* 2010 NSCA 56** (at 13).

THE ROLE OF THE CULTURAL IMPACT ASSESSMENT AND THE GLADUE REPORT

[17] The decisions in ***R v. Gladue*** **[1999] S.C.R. 688** and ***R. v. Ipeelee*** **[2012] 1 S.C.R. 433**, remind me that I must give Section 718.2(e) its intended remedial impact, while applying all the sentencing principles in the *Code*. This means considering unique systemic and background factors that may have contributed to bringing Indigenous persons before the Court, as well as sentencing options that might be more appropriate considering their Indigenous heritage or connection to the community. If there is no alternative to imprisonment, I must very carefully consider the length of any jail term. This goes back to the fundamental principle of proportionality, which is the central purpose of a *Gladue* analysis, and is the Court's responsibility, as explained in *Ipeelee*.

[18] As noted by the Alberta Court of Appeal in ***R. v. Swampy,*** **2017 ABCA 134,** "It is an error to proceed on the basis that *Gladue* factors do or do not *justify departure from a proportionate sentence* . . . Instead, application of the *Gladue* analysis *achieves* a proportionate sentence" [at para 26]. *Gladue* factors are not an after-the-fact consideration in sentencing, adjusting a sentence that would have been imposed in their absence. They are integral to the process in arriving at the sentence in the first place. As per *Gladue* and *Ipeelee*, I must attempt to limit or

minimize jail time by using restorative justice approaches when and if such approaches are appropriate (***R. v. Chanalquay,* 2015 SKCA 141**).

[19] As for sentencing African Nova Scotian offenders, in ***R. v. N.W.*, 2018 NSPC 14**, Judge Buckle noted:

> *31 ... there is a growing acceptance in the adult sentencing context that, like Aboriginal offenders, African-Canadian offenders are over-represented in prison and have unique systemic and background factors that may play a role in offences (See: R. v. Perry, 2018 NSSC 16 (N.S. S.C.), R. v. Gabriel, 2017 NSSC 90 (N.S. S.C.); and, R. v. Borde, [2003] O.J. No. 354 (Ont. C.A.)). These same cases recognize that, despite the absence of a statutory duty to consider these unique circumstances for African-Canadians, in appropriate cases, a sentencing judge could take into account the impact of these circumstances using an approach similar to that provided for in R. v. Gladue, [1999] 1 S.C.R. 688 (S.C.C.), R. v. Wells , 2000 SCC 10 (S.C.C.) and R. v. Ipeelee, 2012 SCC 13 (S.C.C.).*

[20] I agree with Judge Buckle's conclusion:

> *35 In my view, the Supreme Court is not suggesting that a person's moral culpability is potentially diminished because of that person's race or cultural background. Rather, a person's moral culpability is potentially diminished because of the "constrained circumstances" which they may have found themselves in because of the operation of systemic and background factors that are connected to their race and cultural background.*

[21] Justice Campbell, in ***R. v. Gabriel*, 2017 NSSC 90**, explained that a Cultural Impact Assessment Report does not provide a justification for a lighter sentence, but it might prompt consideration of restorative justice options (much like a Gladue Report). As Justice Campbell said, "It doesn't position the offender as a helpless victim of historical circumstances" (at paragraph 90). He continued:

> *[91] It does serves to disrupt some comfortable certainties. It prompts a judge to struggle with difficult questions for which there may not really be entirely clear answers. The offender is an individual capable of exercising his free will in making decisions about his life. At the same time and like everyone else, his world view is shaped to some extent by his experiences in the community of which he is a part. There is a tension between those things and the Cultural Assessment serves as a reminder of that tension. The Cultural Assessment is a reminder that moral judgments are always complicated.*

[22] A sentencing judge must consider race and culture because we must look at the unique circumstances of each person who comes before the Court. The value of these assessments is the bridging of the broader historical and systemic context with the circumstances of the person before the Court and how it relates to their offending.

[23] I must ask myself whether, in this situation, Ms. Robinson's moral culpability is affected by race and cultural factors. Being Indigenous or African Nova Scotian is not in itself a mitigating factor on sentence. I must take the added step of considering how circumstances impacted Ms. Robinson's offending – how such might have contributed to her being before this Court. And, whether there are specific sentencing options that should be applied in recognition of this.

[24] Ms. Robinson has found her choices limited due to her family commitments, her health, her background, and her financial situation. By not providing more context, it is difficult to go much further than that. With great respect to Ms. Paris, Ms. MacLean, and Ms. Thompson, unless they had more

information, it is difficult to understand how they formulated their recommendations. Either they are making leaps, assumptions, and bridging gaps, or they know more about the circumstances than they shared in their reports. Their reports contain valuable information and explanation of Ms. Robinson's lived experience and worldview, her life context, but as the sentencing judge, I find myself regrettably constrained given the minimal information before me as it relates to her offending.

[25] Despite the missing information before me, I am mindful that the African Nova Scotian and Indigenous communities are over-represented in custody. Racism and systemic discrimination have contributed to this. I should always keep incarceration as a last resort and pay particular attention to this reality in Ms. Robinson's case.

THE IMPACT OF RELEASE CONDITIONS

[26] The defence pointed to Ms. Robinson's conditions as worthy of consideration. Ms. Robinson has been on a curfew since she was released from custody shortly following her arrest. ***R. v. Knockwood*, 2009 NSCA 98**, explains that release conditions can be "put into the mix", together with other mitigating factors, in arriving at a fit sentence. The Court of Appeal wrote:

> *[34] Assuming that to be so, I would conclude that the impact of the particular conditions of release upon the accused must be demonstrated in each case. That is, there*

> *must be some information before the sentencing court which would describe the substantial hardship the accused actually suffered while on release because of the conditions of that release. See for example Irvine, supra at paras. 27-30.*
>
> *[35] Here, the submissions made by both Crown and defence were brief. On this issue Mr. Knockwood's lawyer emphasized that the appellant had "already served 19 months on those house arrest type conditions .... He's only able to leave the house, essentially, for employment purposes."*
>
> *[36] In my view, this falls far short of identifying legitimate, substantial hardship. Aside from a recitation of the terms of Mr. Knockwood's pre-trial release, nothing further was put on the record. The sentencing judge was asked to infer from the conditions themselves, without more, that the appellant had suffered hardship, which then ought to be taken into account as a mitigating factor. In my opinion the mere reference to the terms of pre-trial release will not satisfy the onus to demonstrate actual hardship as a result of those pre-trial conditions. I see no error on the part of the sentencing judge.*

[27] Similarly, ***R. v. Lever [2014] S.J. No. 266*** (Saskatchewan Court of Appeal) contains the following helpful principles:

1. *Pre-sentence release should not be seen as the necessary equivalent of pre-sentence custody and it obviously does not automatically reduce what would otherwise be a fit sentence;*

2. *Pre-sentence release does not generate sentencing "credits" in the same was as pre-sentence custody, but is one of many potentially mitigating factors to consider when formulating an appropriate sentence;*

3. *The harsher and more burdensome the pre-sentence release conditions, the more likely they are to have a valid mitigating effect; and,*

4. *Speaking generally, time spent on pre-sentence release can reduce an otherwise appropriate sentence <u>only if it involves meaningful hardship or important limitations on the offender's liberty</u>. [my emphasis]*

[28] Defence counsel told me that her curfew, initially 8:00 p.m. until it was varied to start at 10:00 p.m. in August 2019, prevented Ms. Robinson from

partaking in community activities that were of benefit to her. Like the judge in *Knockwood*, I do not know a lot about the impact of the release conditions on Ms. Robinson. It was a curfew, as opposed to house arrest. She had opportunity for treatment, employment, and indeed rehabilitation, during her release. No evidence of hardship nor any contextual information on the impact was provided to me.

[29] Ms. Robinson was subject to liberty restrictions on her release, and I will keep that in mind. She has not breached during this period, which is positive. I have no indication of any substantial hardship for Ms. Robinson and the mitigating impact of these conditions is therefore not high.

[30] **Aggravating Factors** include the nature of the substance, cocaine, and the amount of it (1.2 kilograms). There are no statutory aggravating factors. However, this is an offence that required great planning. Ms. Robinson traveled in a rented car, across four provinces and back.

[31] **Mitigating Factors** include Ms. Robinson's guilty plea (even if on the date of trial) and acceptance of responsibility. Ms. Robinson is a first-time offender with strong family support. She has abided by her bail conditions.

SENTENCING RANGE

[32] The maximum sentence for this offence is life. There is no mandatory minimum. Neither a discharge nor a conditional sentence order is available, highlighting how seriously Parliament views this offence.

[33] The defence relies on ***R. v. Rushton*, 2017 NSPC 2**. Judge Buckle granted a suspended sentence and 3 years probation to a youthful offender with a limited youth record who turned 18 a few months before the offence. He admitted his responsibility upon being arrested and pleaded guilty to possession of cocaine and cannabis for the purpose of trafficking, along with simple possession of methamphetamine, and two failures to comply. This young man made a tremendous change in his life, showcasing his rehabilitative potential. The Court heard from many supporters in his community and from family. The amount of substance involved was 6 grams plus 2 dime baggies of cocaine and 2.5 pounds of marijuana. Mr. Rushton was a drug addict.

[34] The defence also relies on ***R. v. Christmas***, **2017 NSPC 48**, in which I granted a suspended sentence and 3 years probation on two counts of possession for the purpose involving 152 Percocet tablets and 28 Hydromorphone pills. Mr. Christmas was a 33-year-old addict, selling to friends to support his habit, Indigenous and living on reserve, with prevalent *Gladue* factors. He had a dated

and minimal criminal record. He had turned his life around since being charged and had strong family and community support.

[35] In ***R. v. Saldanha*, 2018 NSSC 169**, the accused pleaded guilty to possession of cocaine for the purpose of trafficking and to trafficking in cocaine. Mr. Saldanha participated in drug deals with undercover police officers on two dates. A small amount of cocaine was involved. Like Mr. Christmas and Mr. Rushton, he was classified as a petty retailer, the lowest rung of the drug dealing ladder. He was selling to support his habit and made remarkable progress after being charged. He was a young university student. He received a suspended sentence and 3 years probation.

[36] In ***R. v. Terris*, 2019 NSPC 11** (under appeal), Judge Atwood completed a trilogy of cases in which he imposed a suspended sentence and probation for possession of a Schedule I substance (52 grams of cocaine) for the purpose of trafficking. Mr. Terris was 28 years old. He cooperated with police, pleaded guilty, complied with bail, and had good family support.

[37] The offender in ***R. v. Casey*, 2017 NSPC 55,** received a suspended sentence and probation for trafficking, given mitigating factors. He was 21 years old and sold an undercover police officer .23 grams of crack cocaine for $40.00. Chief Judge Williams noted, " Although I do not have the benefit of a cultural impact

assessment, I do take judicial notice of pervasive historical systemic and institutional racism which has plagued this province for hundreds of years as well as the over-representation of young African Nova Scotian males in our jails".

[38] An addicted 23-year-old first-time offender in ***R. v. Masters*, 2017 NSPC 75,** received 90 days in jail, followed by probation. The substance involved was 198 tablets of methamphetamine, another Schedule 1 substance. The street value was approximately $800.00. and Mr. Masters was classified as a petty retailer. In his decision, Judge Hoskins reviewed the first offender principle and discussed various situations calling for sentences below the usual range.

[39] Our Court of Appeal commented on suspended sentences and probation for drug trafficking offences in ***R. v. Chase*, 2019 NSCA 36**. Judge Murphy sentenced Mr. Chase to 90 days intermittent custody for possession of 6 grams of cocaine for the purpose of trafficking. He was also placed on probation for 3 years, with a curfew in the first year. The Crown appealed, saying it was too lenient. Although the Court of Appeal said it was a "close call", it upheld the 90-day sentence. Mr. Chase was in his late 20s with a criminal record. There were Gladue factors in his life as an off-reserve Indigenous man. He turned his life around since being charged.

[40] In *Chase*, the Court of Appeal confirmed that denunciation and deterrence remain the primary objectives when sentencing in these matters, with a federal prison term being the norm. However, they also re-iterated that parity does not force trial judges to conduct a pointless search for a perfect facsimile or uniform sentence. Parity does not require that sentences handed down to persons who committed the same crime always be the same.

[41] Chief Judge Pamela Williams imposed a 3-year sentence in ***R. v. Roberts,* 2019 NSPC 27** (decision and sentence under appeal). This was 2.5 years for cocaine possession for trafficking (about 13 grams) and 6 months for the same offence in relation to marijuana (nearly 400 grams). Mr. Roberts was convicted after trial, along with a weapons offence and several breaches of his release order. He had a criminal record and was 33 years old.

[42] Judge Ross sentenced a first-time offender for possession of 59 grams of cocaine for the purpose of trafficking (street value $6000) in ***R. v. Morrison*, 2019 NSPC 38.** The accused sold to a small number of people for a short period of time. He received a sentence of 8 months in jail, followed by probation.

[43] In ***R. v. Fifield*, [1978] N.S.J. No. 42 (N.S.C.A.),** the court described three categories of drug traffickers: the young user sharing marijuana with a companion, the petty retailer who is not shown to be involved full-time or in a large-scale

commercial distribution, and the large-scale retailers and commercial wholesalers. Our Courts have consistently used these classifications and associated ranges as a sentencing starting point.

[44] Justice Rosinski sentenced two co-accused for cocaine trafficking in ***R. v. LeBlanc*, 2019 NSSC 192**. This case involved 210 grams of cocaine, which was characterized as a mid-level trafficking operation. Justice Rosinski reviewed how Nova Scotia drug trafficking sentences are heavily influenced by the quantity of drug involved, as categorized in the well-known *Fifield* categories. He concluded that for medium scale retailers/ small wholesalers (distributing more than 1/3 kilogram and up to lower single digit kilograms) the range of sentence is 5 – 8 years.

[45] In ***R. v. Chevrefils*, 2019 NSPC 16**, Judge Buckle sentenced a 60-year-old trusted courier to 10 years in jail, based on constructive possession of 250 kilograms of cocaine. After reviewing caselaw, she noted that "sentences in the range of 4 - 8 years are typical in cases involving trafficking or possession of cocaine for the purpose of trafficking at the kilogram or single digit multi-kilogram level" (at 37).

[46] In ***R. v. Mugford*, 2019 NSSC 127**, Justice Murray accepted a joint recommendation of 4 years for a 37-year-old first time offender who pleaded guilty

at an early opportunity. He helped with logistics, offered administrative support, and ran errands for high-level cocaine dealers at the kilogram level. The sentence was influenced by those imposed on his co-conspirators with more involvement in the operation.

[47] ***R. v. Knickle*, 2009 NSCA 59** was a sentence appeal for a 42-year-old first time offender who pleaded guilty to possession of 311.9 grams of cocaine for trafficking, along with improper storage of 4 firearms. The Court of Appeal increased the sentence to 3.5 years, noting that the starting sentence for a higher-level retailer is 2 years.

[48] ***R. v. Butt*, 2010 NSCA 56,** was a sentencing after police intercepted a package from British Columbia to Mr. Butts that contained two 1-kilogram bricks of cocaine and found another 196 grams in his home. Mr. Butt said that he was a middleman providing an address for shipment of the cocaine but not otherwise involved in the distribution. He was 35 years old with a prior drug conviction. The Court of Appeal substituted a 5-year sentence.

[49] In ***R. v. Banfield*, 2011 NSSC 56**, the accused, a man in his mid-20s, entered a guilty plea to trafficking cocaine. The amount involved was 125.8 grams. He had a related *CDSA* record. He was sentenced to 4 years, upheld on appeal.

[50] ***R. v. Holland*, 2017 NSSC 148,** was described as a true joint recommendation on sentence. It involved 167 grams of cocaine, a firearm, and an accused with a related *CDSA* record. The accepted joint recommendation was for 5 years total, of which 3.5 years was for the trafficking.

[51] There is no indication that Ms. Robinson was selling drugs herself. She was helping another person do so. Couriers and parties to trafficking are dealt with severely by the Courts. Otherwise, people would be more willing to take the risk for the kingpins, shielding them and isolating them, for their own personal gain with fewer consequences.

[52] There are many reported courier sentencing decisions, from the young women smuggling through airports, to truckers making long haul drug runs, and various other scenarios. In ***R. v. Hamilton*, [2004] O.J. No. 3252 (ONCA)**, issues of race and gender were at the forefront. The Ontario Court of Appeal confirmed that while these issues may be relevant to sentencing, judges cannot lose sight of the seriousness of the crime. Judges cannot lend validity to the choice of traffickers to use couriers in good standing in the community to both further their illegal business and shield them from detection and responsibility.

[54] ***R. v. Kirkpatrick*, 2019 NSPC 56**, was a recent decision in which Judge van der Hoek sentenced a 36 year old first time offender who allowed his drug dealing

friend to store 83g of cocaine, packaging materials, scales, cash, and a firearm in a safe in his home. He was sentenced to two years plus a day. Mr. Kirkpatrick had sought a suspended sentence and probation, or alternatively a shorter intermittent jail sentence. In passing the federal sentence, the Judge made the following remarks, which also bear on Ms. Robinson's situation:

> *67 In order for people to have drugs there must be people in the community to provide drugs. In order for people in the community to provide drugs they have to have a place to store drugs that keeps them off the radar of police investigations. It is not surprising that people like you Mr. Kirkpatrick become the people who have to hide the drugs for people in the community who, for whatever reason, cannot put drugs in a place where they can keep them safe. Mr. Corbin obviously felt the best place to keep his drugs was at your house, possibly because you are somebody who had good standing in the community and were without a criminal record. The problem that I have Mr. Kirkpatrick is when I take into account all the circumstances and conduct the balancing I am required to do, I note you did benefit from a good reputation and I measure that against the fact that you were an occasional user of the very drug that Mr. Corbin stored in your house. I also must consider the fact a weapon was involved in the storage. I also consider that you comingled your cash with the drug money and the drugs. I do accept that you are not a trafficker in the community however by providing Mr. Corbin a place to store his drugs you are responsible for allowing those drugs to have access to people in our community.* [emphasis mine]

[55] Justice Coady sentenced a cannabis courier in ***R. v. Withrow,* 2019 NSSC 270**. The accused was 54 years old, with no criminal record. He helped transport drugs and cash between Halifax and Vancouver, by picking up and delivering items to the Halifax airport. He knew what was in the packages. He entered guilty pleas to 5 counts in relation to this large-scale operation with co-conspirators. He received a 30-month sentence, of which 24 months concurrent was for trafficking marijuana. Justice Coady noted that while couriers can be insulated from detection

and prosecution, even if they are not the big money makers who download risk, couriers provide a critical role.

[56] Simply put, drug dealers cannot sell drugs unless they have them. Ms. Robinson was an integral part of getting drugs to market.

[57] In ***R. v. Jones*, 2003 NSCA 48**, our Court of Appeal substituted a 3-year sentence for a man who was paid $1000 to deliver 4.6 kilograms of cannabis resin and $40,020 cash from Halifax to Moncton. While it was not proven that he knew the exact contents of the box, he knew it was related to the drug trade. The accused was 41 years old with a criminal record. Our Court of Appeal explained:

> *9 I would agree with the trial judge that the respondent's role was not equal to that of the "principal of a large scale commercial operation". The trial judge appeared to have found that since the respondent was simply or merely a courier, he was not a significant player in the drug trade, and therefore equivalent to a petty retailer. However, it is indisputable that a courier is an integral part of the distribution system in the drug business. Drugs and money have to be delivered from the importation or cultivation location to the dealers and the users. Couriers provide that critical link between the wholesalers and retailers, often shielding the major stakeholders from detection. In Nova Scotia, couriers have not traditionally been regarded as less culpable or treated more leniently than other middlemen in the organization.* [emphasis mine]

[58] In ***R. v. Miller*, 2000 ABPC 122**, the accused courier was sentenced to 4.5 years. He transported 1.114 kilograms of cocaine from British Columbia to Alberta via his airplane luggage. He knew the cocaine was to be sold to users. He was not an addict. The accused pleaded guilty. He had done it for money. After reviewing

Alberta trafficking decisions, along with cases in Canada involving other couriers (including inter-provincial), the Court concluded:

> *56 The observations made by various Courts of Appeal demonstrate that individuals who act as couriers to transport hard drugs, in this case cocaine, are not to be treated as if they were on the periphery of drug activity. On the contrary, couriers are recognized as a vital and necessary part of commercial drug activity. It is to be noted, that 'transport', and 'deliver', two activities that define what a courier does, are included in the definition of "traffic".*

[59] In ***R. v. Brake,* 2017 CarswellNfld 345**, a 37-year-old man with two prior convictions for simple possession was sentenced to two years in jail for his role as a courier. After a review of the decisions from across the country, the court noted:

> *24 Couriers are a necessary and integral part of a larger drug operation: without couriers, the drug trade would cease to function. In R. v. Nishikawa, 2011 ABCA 39, 505 A.R. 63 (Alta. C.A.), the Alberta Court of Appeal, at para 9, said as follows:*
>
> > *9 But most important, the theory that someone who serves as a courier of large quantities of drugs is "not vital to the scheme", and only serves a "peripheral" role must be rejected. The reality of the drug trade is that the supply chain depends on a wide variety of individuals, all of whom are indeed vital to the criminal enterprise as a whole. That certainly includes the couriers of the drugs, especially the couriers of large quantities of hard drugs. These couriers are not on the periphery of drug trafficking; they are integral to it, constituting, as they do, an indispensable part of the illegal distribution and sale of drugs. It must be remembered that trafficking in a prohibited drug includes transport and delivery of that drug. By including these activities in trafficking, Parliament signalled the high level of culpability that must attach to those carrying out these roles: R. v. Miller, 2000 ABPC 122, 269 A.R. 376at para. 56.*

[60] In ***R. v. Toorie,* 2012 MBQB 135**, an informant told Manitoba police officers that Mr. Toorie would be transporting a large amount of cocaine by car. Police officers pulled him over and found 30 individually wrapped one-ounce

packages of cocaine in the vehicle (less than what Ms. Robinson transported). Mr. Toorie was sentenced as a trusted mid-level courier (high end). He was 26 years old with an unrelated youth record. He received 3 years incarceration. This was in keeping with ***R. v. Rocha,*** **2009 MBCA 26**, in which the Manitoba Court of Appeal noted that mere couriers at the mid/ multi-ounce level can expect a range of sentence from 3 – 6 years.

[61] The defence acknowledges the large amount of cocaine involved. They argue that this does not take it outside the considerations that resulted in suspended sentences in other drug trafficking cases in recent years. On its own, it may not automatically preclude a suspended sentence, but Ms. Robinson does not share the characteristics that resulted in suspended sentences for others.

[62] This is a large amount of cocaine. A categorization that starts with the amount of drug involved puts Ms. Robinson's actions at the top of the ***Fifield*** ladder. She is not a young user sharing with friends, nor a petty retailer, but rather was involved in a large-scale retail/ commercial wholesale enterprise. This would be 4 – 8 years of jail based on precedent. I reduce that range in recognition that she is not the owner trafficker of the drugs and see the range as 4 – 6 years. Saying that, I must then consider any mitigating factors that might place her sentence outside that usual range.

[63] As I stated earlier, I do not have a lot of information about Ms. Robinson's offence. Her lawyer put it this way in written submissions:

> *Given the realities of the illicit trade in narcotics, Ms. Robinson simply cannot talk about the specifics of her involvement in an extra-provincial cocaine trafficking scheme without putting her life at risk. The most she is safely able to say appears in the African-Canadian Cultural Impact Assessment (at p. 25):*
>
> > *Ms. Robinson reports that her current charges were the result of making a poor choice for a friend. She denied knowing what she was returning with from Ontario and also fears retaliation this, has accepted her criminal charge.*
>
> *The defence submits that some reading between the lines is necessary when evaluating this passage. There is no evidence on which this Honourable Court might base a finding that the "criminal organization" provisions set out in CC s. 467.1 are made out in this matter. That said, Ms. Robinson's personal circumstances, as cited in the abovementioned reports, would have made her especially vulnerable to being persuaded to make such a "poor choice for a friend". At the time of the offence, she was grappling with socioeconomic marginalization, a significant trauma history, and recurring exposure to racist attitudes both in her own family and in the wider community. As Ms. Paris persuasively explains, all of these factors left Ms. Robinson was a poor sense of self-worth.*

[64] The authors of the Cultural Impact Assessment authors concluded the following regarding her involvement in this offence:

> *. . . Ms. Robinson was a victim of violence both as a child and as an adult which greatly affected her self-esteem.. . In addition, poverty and Ms. Robinson's core values and worldview (i.e., striving to be a responsible 'good enough' parent) was a motivating factor impacting on her to make poor judgment and not question the motives of her male friend which resulted in her current charges. As with many women who are survivors of abuse and trauma the impacts of patriarchy (power and control) and the cycle of abuse (physical and emotional) have led Ms. Robinson before the court.*

[65] I am sentencing Ms. Robinson based on a one-time ill-informed favour for a friend in the drug business. I am not willing to make the same jumps as the assessors. I know nothing of her relationship with any others involved in the

operation, nor their role in her decision-making. I do not know if Ms. Robinson was paid. I do not know the nature of her relationship history with the male friend involved.

[66] It has been nearly two years since Ms. Robinson's charges. Unlike other offenders referenced by the defence, I do not have information about notable changes in Ms. Robinson's life during that time. I am told she continues with be involved with the Elizabeth Fry Society. I am told she is involved with the Peoples Counselling Clinic. At the time of the Cultural Impact Assessment in August 2019, she had recently sought counselling and remained on a waitlist. This was 1.5 years after her charge. She is not amid big personal changes or intensive supports. She has potential for this, should she seek it in the future. She is trying to address her health issues with the assistance of a new family doctor, as she was without one for a time and this led to difficulties with her medication and treatment. I have no doubt that she takes these charges seriously and is genuinely remorseful for the choices that got her here. Specific deterrence and denunciation must be considered and others who would make the same choice as Ms. Robinson (and those who rely on them to do so) need to know it will have serious consequences. Cocaine forces havoc on our communities. Ms. Robinson was a part of this harm.

[67] Ms. Robinson was alone in the car, traveling between multiple provinces over days. This took time and planning and was very deliberate. She played an important role in a trafficking operation at the higher end of the scale. Was she a leader? No. I have no indication it was anything other than this one time. I have no reason to disbelieve that she was unaware of the exact contents of the backpack. She did a favour for a drug dealer. She either knew it was drugs or was willfully blind, hence the guilty plea. She took a chance. She says she cannot say why. There is no other reasonable alternative available to me, other than a jail sentence, that would be in keeping with the purpose and principles of sentencing.

[68] The seriousness of this offence is not reduced by my empathy for Ms. Robinson, nor by those factors that mitigate her moral blameworthiness considering her constrained choices. The seriousness of Ms. Robinson's crime weighs heavily against mitigating factors. Ms. Robinson made a choice and went to great, deliberate lengths to see it through.

DECISION ON SENTENCE

[69] The Crown's request is appropriate. I sentence Ms. Robinson to **3 years incarceration**.

[70] I grant the following **Ancillary Orders**: Forfeiture Order for the seized items, pursuant to s. 16 of the *CDSA*; DNA Order (secondary designated offence),

pursuant to s. 487.051(3) of the *Criminal Code,* and a mandatory 10-year Firearms prohibition, pursuant to s. 109 *Criminal Code.*

Amy Sakalauskas, JPC