**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. MacKinnon*, 2022 NSPC 12

**Date:** 20220326
**Docket:** 8462453,8462454,8462455
**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Jarrett Anthony MacKinnon

| | |
|---|---|
| **Judge:** | The Honourable Judge Shane Russell, |
| **Heard:** | March 15th, 2022, in Sydney, Nova Scotia |
| **Decision** | March 23,2022 |
| **Charge:** | CDSA 5(2), CC 354(1)(A),CC 145(A) |
| **Counsel:** | David Iannetti and Darcy MacPherson, for the Crown<br>Oge Egereonu for Defence |

**Revised Decision:** The text of the original decision has been corrected according to the attached erratum, dated April 27, 2022

**By the Court:**

## Introduction

[1] This is the sentencing of Jarrett Anthony Mackinnon (DOB November 25, 1985). On the day of his trial, October 26, 2021, Mr. Mackinnon plead guilty to the following three offences;

On or about August 25th, 2020, at or near New Waterford Nova Scotia did unlawfully have in his possession for the purposes of trafficking, Cocaine, a substance included in Schedule 1 of the *Controlled Drugs and Substances Act*, SC 1996, c.19, and did thereby commit an offence contrary to Section 5(2) of the said *Act*.

On or about August 25th, 2020, at or near New Waterford Nova Scotia did have in his possession proceeds of property, Canadian currency, of a value not exceeding five thousand dollars knowing that all or part of the proceeds of the property was obtained directly by the commission in Canada of an offence punishable by indictment contrary to Section 354(1)(A) of the *Criminal Code of Canada*.

On or about August 25th ,2020 at or near New Waterford Nova Scotia did having been named in an undertaking on September 22, 2019, and being at large on that undertaking, did fail without lawful excuse, to comply with a condition of that undertaking, to wit: keep the peace and be of good behavior, contrary to Section 145(4) (a) of the Criminal Code of Canada.

## Circumstances Of Offence

[2] On August 25, 2020, the accused was 34 years of age and resided with his father at 397 King Street New Waterford, Nova Scotia. At the time of the offence, he had been living at that location for approximately two months after having been "kicked" out of his girlfriend's residence.

[3] On August 20, 2020, five days prior to his arrest members of the Cape Breton Regional Police drug section had received information from two confidential sources that the accused was in possession of cocaine for the purposes of trafficking.

[4] On August 25, 2020, police executed a search warrant at the address of 397 King Street New Waterford. As a result of the search officers seized 500 grams of cocaine, $1,055 in Canadian currency, cutting agent, an electronic scale, unused dime bags, and a cell phone.

[5] The accused was not present when police began the search. He arrived a short time later and under caution stated that his father had nothing to do with the drugs and that it was “all him”.

[6] Finally, the facts as read into the record by the Crown indicate that the potential profit to be gained by selling 500 grams of cocaine on the street in units of either one gram or half gram quantities is estimated to be in the range of $40,000 to $50,000.

[7] All facts as read into the record by the Crown were agreed to by the Accused.

**Circumstances of Offender**

[8] The accused is 36 years of age. He has no prior record. In submissions, the Crown did note that in the past he had received two absolute discharges. The first absolute discharge was in 2016 for Assault, s.266. The second absolute discharge was in 2019 and for the offences of possession of stolen property, s.354(1)(A) and failure to attend court, s. 145(5)(B). For the purposes of this sentencing, I do not attach any weight to the absolute discharges. The accused is being sentenced as a first-time offender.

[9] By all accounts the accused had a very positive upbringing and childhood. In his words “I came from a really good home”. His childhood home was free of, violence, poverty, and substance abuse. He grew up with loving supportive parents and had a great relationship with his older sister.

[10] The accused has an 8-year-old daughter who lives with his former spouse of 10 years. He sees his daughter on weekends. The accused has abilities. In 2004 he graduated from the Breton Education center. He completed an Oil Burner Mechanic Program and a Refrigeration/ Air Conditioning Program. He has a class 3 drivers’ licence and completed a Personal Fitness Training Program.

[11] His Employment Insurance benefits have recently ended and he has made application for Income Assistance through Community Services. He has recently

filed for bankruptcy. However, he does have casual employment opportunities with a disposal company. The accused's past employment includes roofing, security, and pipefitting. He describes himself as a very dependable worker who has never been fired from a job.

[12] In terms of health and lifestyle the accused states that although he was never formally diagnosed, he suffers from anxiety and depression. For several years he suffered from a sciatic nerve injury and last year had back surgery.

[13] There is some inconsistent information which suggests the accused may be minimizing his drug and alcohol dependence. He reports that he currently does not consume alcohol or any other substances such as cocaine. However, he has a long history of abusing cocaine, mushrooms, ecstasy, marijuana, and alcohol as far back as his early 20's. While in his 20's he advised that he became a "daily user". During his pre-sentence report interview he also stated that he has taken the prescription medications of others. These medications included Percocet and Tylenol with codeine. He claims to have never purchased them on the street and in his words "people just gave them to me". He claims that no one has ever suggested that he has a problem with drug use. As such, he has never attended any treatment program. In contrast to the accused's narrative his father expressed concerns in relation to his son's drug and alcohol abuse. He describes the accused's relationship with his former spouse as "toxic" and stated, "his choices and friends disturb me".

[14] Within the pre-sentence report the accused commented that he was holding the drugs and other seized items for an unidentified friend who has since abandoned him. He stated, "I regret getting involved. I thought it was going to be for a short time and I lost a lot from it. If I could go back, I would ". In his pre-sentence report, he states he feels taken advantage of by this unidentified friend. Despite being in possession of cash in the amount of $1,055 he denies receiving any financial benefit from his involvement.

[15] When discussing the current offences with the author of the pre-sentence report he is noted as accepting responsibility for his actions and said, "I regret getting involved". He has concerns about the outcome of sentence. He is worried about leaving his father and being away from his daughter. When asked if he wished to say anything before the passing of sentence his primary focus was on the fact that police seized a few hundred dollars of his own money.

[16] It was only after prompting by the Court that he chose to share with what appeared to be guarded reluctance. After a few short questions including being asked if he was aware of the harm cocaine does to others, he paused for some time then stated, “It looks bad”, “I made a bad decision”, “I don’t agree with it myself “, “Feel terrible”, and “I shouldn’t have done it”. He repeated that he doesn’t use cocaine himself and that he owed money to an unidentified person. I do find that the accused has expressed remorse for his actions. This will be treated as a mitigating factor.

[17] The Cape Breton Regional Police Service advised that the accused has not been a concern since the offences. As well, the accused was not well known to their service prior to these matters.

**Positions of the Parties**

**The Crown**

[18] Mr. Iannetti, the Federal Crown is seeking a global sentence of 5 years. Four- and one-half years for the CDSA 5(2) offence and 6 months consecutive for the s.354(1)(A) proceeds of crime offence. Considering the recommendation from the Federal Crown, Mr. MacPherson for the Provincial Crown seeks 1 day served as it relates to the 145(4)(A) offence of failing to keep the peace and be of good behavior. The Federal Crown argues that the accused is a “mid level” trafficker. The Crown’s recommendation is deeply rooted in placing emphasis on the sentencing principles of denunciation, general and specific deterrence. The Crown does not fully accept the accused’s claims that he was nothing more than a holder or a stash house for the cocaine. This is grounded in the reality that he was also in possession of several items related to drug trafficking including, cutting agent, unused dime bags, a digital scale, cell phone, and $1,055 in cash. The Crown states that he was a trusted confidant in a criminal operation which involved a substantial amount of a highly destructive and addictive substance. The Federal Crown bluntly stated, “It’s a lot of cocaine, record or no record”.

**The Defence**

[19] Mr. Egereonu argues that a fit and proper global sentence for all matters is 3 years. The defence position is rooted in the accused’s guilty plea, lack of criminal record, expression of remorse, and essentially that the accused lacks any past history of being connected to the drug trade. It is argued that unlike many

offenders who come before the court for this type of offence Mr. Mackinnon was not linked to weapons or violence. Mr. Egereonu points to the reality that sentencing is an individualized process and the prospects for his client's rehabilitation are high.

**Principles of Sentencing**

[20] My job is to craft a fit and proper sentence balancing and weighing the sentencing principles as set out by parliament in sections 718, 718.1, and 718.2 of the *Criminal Code*. I am to consider those principles as they relate to the particular accused, their circumstances, the circumstances of the offence, and harm done to victims and/or the community. Before passing sentence, I am also required to consider and balance any aggravating or mitigating factors.

[21] Obviously, there is no computerized algorithm in sentencing. While there are guiding principles set out in the code and case law, each sentence is and ought to be an individualized process having regard to the unique circumstance of the facts, the offence, offender, and impact on the victim. Simply put, there is no prepackaged readymade shake and bake sentencing recipe for each listed offence. Nor can there be a cookie cutter approach to sentencing.

[22] Section 718 of the *Criminal Code* outlines the purpose and principles of sentencing:

> **Purpose**
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions that have one or more of the following objectives:
>
> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;

> **(d)** to assist in rehabilitating offenders;
>
> **(e)** to provide reparations for harm done to victims or to the community; and
>
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[23] Furthermore, Section 718.1 directs that:

> **Fundamental principle**
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[24] Finally, Section 718.2 outlines additional principles of sentencing. In crafting a proper sentence, I have also considered and balanced the following principles:

> **Other sentencing principles**
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender……
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> **(e)** 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, with particular attention to the circumstances of Aboriginal offenders.

[25] The *Controlled Drugs and Substances Act* also contains a provision which speaks to the fundamental purpose of sentencing for drug-related offences. Section 10 reads:

> **Purpose of sentencing**
>
> 10 (1) Without restricting the generality of the ***Criminal Code***, the fundamental purpose of any sentence for an offence under this Part 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 the community.

**Principles Of Sentencing: Case Law**

[26] Judges are required to craft a sentence which is proportionate to the gravity of the offence and the degree of responsibility of the offender. What is a just sentence? A just sentence is one which never exceeds what is appropriate having regard to the moral blameworthiness of the offender and the gravity of the offence. In order for sentencing to be just it must be an individualized process. When it comes to crafting the appropriate sentence for Mr. Mackinnon, I remain guided by these principles. I will outline some of the cases I have read and used to guide the sentencing process in this case:

> **R v. Nasogaluak**, 2010 SCC 6 at paragraph 43:
>
> [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (R. v. Lyons, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; M. (C.A.); R. v. Hamilton (2004), 2004 CanLII 5549 (ON CA), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or

objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.

**R. v. Lacasse,** 2015 SCC 64 at paragraph 12:

[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. . .

**R v. Hamilton** [ 2004] O.J. No. 3252 at paragraphs 92 -95:

[92] In R. v. Priest (1996) 30 O.R. (3d) 538, 110 C.C.C. (3d) 289 (C.A.) at pp. 546-47 O.R., pp. 297-98 C.C.C., Rosenberg J.A. described the proportionality requirement in this way:

The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good.

[93] Fixing a sentence that is consistent with s. 718.1 is particularly difficult where the gravity of the offence points strongly in one sentencing direction and the culpability of the individual offender points strongly in a very different sentencing direction. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account. As indicated in Priest, supra, factors which may accentuate the gravity of the crime cannot blind the trial judge to factors mitigating personal responsibility. Equally, factors mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the crime committed.

[94] In some circumstances, one side of the proportionality inquiry will figure more prominently in the ultimate disposition than the other. For example, where a young first offender is being sentenced for a number of relatively serious property offences, the sentence imposed will tend to emphasize the features which mitigate the offender's personal culpability rather than those which highlight the gravity of the crimes: R. v. Priest, supra. If, however, that same young offender commits a crime involving serious personal injury to the victim, the "gravity of the offence" component of the proportionality inquiry will be given prominence in determining the ultimate disposition.

[95] Proportionality is the fundamental principle of sentencing, but it is not the only principle to be considered. Parity, totality, and restraint are also principles which must be engaged when determining the appropriate sentence: Criminal Code, s. 718.2(b)-(e). The restraint principle is of particular importance where incarceration is a potential disposition. That principle is reflected in s. 718.2(d) and (e):

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

**R. v. Fifield,** [1978] N.S.J. No. 42 at paragraph 11:

[11] We must constantly remind ourselves that sentencing to be an effective social instrument must be flexible and imaginative. We must guard against using …… the cookie-cutter approach.

**R v. C.A.M.** [1996] 1 S.C.R. 500 at paragraphs 91 & 92:

[91] …. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[92] …. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See Mellstrom, Morrissette and Baldhead. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

***R. v. Grady***, [1971] N.S.J No. 93, at paragraphs 5 and 7:

[5] It has been the practice of this court to give primary consideration to protection of the public, and then to consider

whether this primary objective could best be attained by (a) deterrence, or (b) reformation and rehabilitation of the offender, or (c) both deterrence and rehabilitation.

[7] It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing, the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons, it may appear at times that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case, on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.

**R. v. E.M.W.,** [2011] N.S.J. No. 513, the Nova Scotia Court of Appeal affirmed the words of Judge Campbell (as he then was) at paragraph 18:

**18** The judge discussed retribution, which he distinguished from vengeance:

Retribution is punishment. It is objective, measured and reasoned. Vengeance and anger have no place in sentencing. When reason and objectivity give way to expressions of righteous indignation or revenge, a sentence is no longer an expression of a system of values. It has then become an emotional act and not a rational one. It is then not measured or restrained. Justice can be and sometimes should be hard. It must, however, be thoughtfully so. It is important to treat the offender in a way that reflects his level of moral culpability. Simply put, the punishment, and punishment it is, should fit the crime and the person who committed it.

**Range of Sentence**

[27] There is a hierarchy of classification for drug trafficking and possession for the purposes of trafficking. In ***R. v. Fifield***, [1978] N.S.J. No.42, the Nova Scotia Court of Appeal outlined several general categories of drug traffickers: the young user sharing drugs with a companion; the petty retailer who is not shown to be involved full-time or in a large-scale commercial distribution; the large-scale retailers or small wholesaler or the big-time operator.

[28] Specifically, in terms of cocaine trafficking, the Nova Scotia Court of Appeal in **R v. Knickle**, [2009] N.S.J. No. 245 stated at paragraphs 16-18 and 27:

> *[16]* The first step of the analysis is a consideration of the appropriate range of sentence for the offence. Here the judge briefly commented that the sentencing range in Nova Scotia for cocaine trafficking is a penitentiary term in the range of two to five years. Then without further analysis, indicated that there was nothing to warrant a sentence in a three-and-a-half-year range, and finally concluded that the defence had satisfied her that a sentence of two years less a day would be appropriate because of exceptional circumstances.
>
> [17] The judge failed to recognize how this court has consistently categorized drug traffickers, based on the type and amount of drug involved and the level of involvement in the drug business, to assist in placing them within the range. In **R. v. Fifield**, [1978] N.S.J. No.42, the court described the following general 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; the large-scale retailers and commercial wholesalers. Chief Justice MacKeigan noted that the amount of drugs involved helps determine the quality of the act or the probable category of trafficker.
> The **Fifield** categories have also been applied by this court to cocaine and crack cocaine trafficking cases. See, for example:
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> **R. v. Carvery**, [1991] N.S.J. No. 501 -- high level retailer -- 6 1/2 ounces cocaine -- five years' incarceration.

> **R. v. Steeves**, 2007 NSCA 130 -- not a lower-level trafficker -- 77 grams of cocaine, and 100 pills of ecstasy -- 2 years, six months' incarceration.
>
> **R. v. Sparks**, [1993] N.S.J. No.448 -- four counts of selling small amounts of crack cocaine and one count of possession for the purpose -- totalling just over 1.5 grams -- not a petty retailer -- 32 months' incarceration.
>
> [18] Numerous other sentencing decisions from this court repeatedly and consistently emphasize that persons involved in trafficking in cocaine will be subject to sentences of incarceration. This has been absolutely clear since the very first case heard by this court involving trafficking in cocaine: **R. v. Merlin**, [1984] N.S.J. No. 346,63 N.S.R. (2d) 78. See also, for example: **R. v. Dawe**, 2002 NSCA 147; **R. v. Jones**, 2008 NSCA 99; **R. v. Stokes**, [1993] N.S.J. No. 412, 126 N.S.R. (2d) 66; and **R. v. J.B.M.**, 2003 NSCA 142. This court has never approved or endorsed a conditional sentence on charges of possession for the purpose of trafficking or trafficking in cocaine. As well, we have regularly allowed appeals from conditional sentence orders for trafficking in large amounts marijuana and substituted penitentiary terms. See for example: **R. v. Hill**, 1999 NSCA 118; **R. v. McCurdy**, 2002 NSCA 132; **R. v. Jones**, 2003 NSCA 48. The sentencing judge in this case did not refer to any decisions of this court.
>
> *[27]* As noted above, this court has never wavered in expressing these principles in cocaine trafficking cases. Another example is found in ***McCurdy***, *supra*…. Although it is not necessary that the length of sentence be precisely proportionate to the quantity of drugs involved, commercial distributors and growers require "materially larger" sentences than the petty retailer, as stated in **R. v. Fifield** (1978), 25 N.S.R. (2d) 407 at para. 8.

[29] In the decision of **R v. LeBlanc**, [2019] N.S.J. No. 339 two co-accused were sentenced for trafficking in 210 grams of cocaine. The offence was characterized

as a mid-level trafficking operation. The court noted that sentences for drug trafficking are related to the type and quantity of the drugs involved as per **R v. Fifield,** *supra*. The 25-year-old youthful co-accused who was the "driving force "behind the operation was sentenced to 5 years imprisonment. After a very comprehensive review of the caselaw the Court provided further clarity as to the normal ranges of sentences for the various categories of drug traffickers. I adopt Justice Rosinski's comments at paragraph 22:

> [22] To recap, in my opinion, the normal range of sentences for possession of cocaine for the purpose of trafficking or trafficking in cocaine appear to be:
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> * as I concluded in Murphy, for a petty retailer the range is from approximately 18 to 30 months in custody;
>
> * for small scale retailers (with cocaine up to 1/3 kilogram available for further distribution), such as Messrs. LeBlanc and Benoit, the range of sentence is from 2 to 6 years in custody;
>
> * for medium scale retailers/small wholesalers (distributing more than 1/3 kilogram and up to lower single digit kilograms) the range of sentence is from 5 years to 8 years;
>
> * for larger wholesalers and large scale retailers (distributing higher single digit, double digit or more multi-kilogram quantities), the range of sentence is from 8 to 15 years in custody;
>
> * for importers (double digit or more multi-kilogram quantities) the range of sentences is from 12 to 20 years in custody.

[30] While Mr. Mackinnon clearly would not fall into the highest category of a "large scale retailer", he was far from a "petty retailer". He is also above the "small scale retailer" level. I come to this conclusion based on the type and amount of drugs in his possession combined with his level of involvement. Mr. Mackinnon possessed a significantly high quantity of cocaine. It was far in excess of a "petty retailer" and also above what Justice Rosinski set out as the established range for "small scale retailers". It was 500 grams which is impossible to ignore. Mr.

Mackinnon also had in his possession $1,055 in Canadian currency, cutting agent, an electronic scale, and unused dime bags. All of these items are consistent with what was full awareness of a fairly significant ongoing drug trafficking operation. He was a trusted confidant whose willingness to at least act as a stash house allowed this high quantity and hard drug enterprise to exist. At a minimum he also knew the person or persons involved in the trafficking of higher levels of cocaine while at the same time being the one trusted to have sole responsibility for the drugs which had an estimated street value profit of between $40,000 and $50,000. It can be readily inferred that Mr. Mackinnon was a key component of a "medium scale" cocaine trafficking operation as outlined in **R v. Leblanc**, *supra*.

[31] Again, even if he wasn't the principle of such an operation, he was an essential and integral part of what was criminal activity involving a significant quantity of an exceptionally addictive and destructive drug. His claims that he was not profiting from this activity simply can not be reconciled with the reality that he was found in possession of a large sum of cash in the amount of $1,055. Given the quantity, the scale, the bags, cell phone, and cutting agent, this was intended to be a larger scale operation well above the "petty retail" and "small scale" level. Mr. Mackinnon knew that and facilitated it. I find that Mr. Mackinnon's circumstances are such that they are characteristic of someone involved in a mid-level cocaine trafficking operation. He would fall in the medium scale retailers/small wholesalers' category (distributing more than 1/3 kilogram and up to lower single digit kilograms) as outlined in R **v. LeBlanc,** *supra*. Therefore, before I consider the mitigating and aggravating factors, I find that the appropriate range of sentence for Mr. Mackinnon is somewhere between 5 to 8 years.

**Case Law Essential Principles: CDSA 5 (2)**

[32] The Courts within Nova Scotia have long recognized the devastating impact cocaine has had on all communities across Nova Scotia. I adopt the following comments from Judge Buckle in **R v. Chevrefils**, [2019] N.S.J. No. 276 at paragraphs 24 and 25:

> [24] Possession of cocaine, a Schedule I substance, for the purpose of trafficking is a very serious offence. This is reflected in the fact that Parliament has set the maximum sentence at life imprisonment and removed the offence from consideration for a conditional sentence order.

> [25] The tremendous harm that comes from trafficking cocaine has been repeatedly commented on by our Court of Appeal and can be seen in this and other courts every day. Going back to the Court of Appeal decision in R. v. Huskins, 95 N.S.R. (2d) 109, and perhaps before, the Court of Appeal has recognized the "creeping evil" and danger of cocaine. In Butt (at para. 13), the court referred to cocaine as a deadly and devastating drug that ravages lives. People who traffic in cocaine take advantage of the vulnerabilities of others.

[33] The Nova Scotia Court of Appeal in **R v. Butt** 2010 NSCA 56 at paragraph 13 stated:

> [13] I would agree with the Crown that cocaine has consistently been recognized by this Court as a deadly and devastating drug that ravages lives. Involvement in the cocaine trade, at any level, attracts substantial penalties (see, for example, R. v. Conway, 2009 NSCA 95; R. v. Knickle, 2009 NSCA 59; R. v. Steeves, 2007 NSCA 130; R. v. Dawe, 2002 NSCA 147; R. v. Robins, [1993] N.S.J. No. 152 (Q.L.) (C.A.); R. v. Huskins, [1990] N.S.J. No. 46 (Q.L.) (C.A.); and R. v. Smith, [1990] N.S.J. No. 30 (Q.L.) (C.A.)). It is significant that the CDSA classifies cocaine as one of the drugs for which trafficking can attract a life sentence.

**Proportionality: The Gravity of The Offence And The Accused's Culpability:**

[34] Recently , the Nova Scotia Court of Appeal in **R v. Kleykens**,[2020] NSJ No 221 took the opportunity to remind trial judges of what was clearly expressed in **R v White**, [2020] NSJ No 131 . The principles as expressed by the Court of Appeal in that decision are highly relevant in any case involving trafficking and possession for the purposes of trafficking so-called "hard drugs". Specifically, our Court of Appeal stated at paragraph 29:

> [29] What this Court directed in White:
>
> [76] In Nova Scotia there developed a long tradition of recognizing that the severity of a sentence should match the dangerousness of the drug involved, all other factors being equal. As our judicial understanding of the

> danger of "hard drugs" evolved, so too did the approach taken in sentencing those convicted of participating in their distribution. Using very explicit language, this Court has repeatedly directed that the approach to be taken in sentencing those convicted for trafficking, and possession for the purpose of trafficking, in so-called "hard drugs" requires as its principle objective the protection of society, such that our primary emphasis must be placed on the principles of deterrence and denunciation. The majority of these pronouncements have been made in relation to cocaine trafficking, and only a few need to be referred to here.

[35] In **R v. Kleykens,** supra., at paragraphs 34 and 35 the Nova Scotia Court of Appeal also took the time to outlined how trial judges are to consider proportionality in drug cases:

> [34] In satisfying their obligation to address the "fundamental principle" of proportionality, trial judges must ensure that the sentence be proportionate to the gravity of the crime and the offender's culpability in committing it. The gravity of the offence and its consequences will be informed by the range of sentence prescribed in the applicable legislation. In drug cases, the dangerousness of the particular drug, as well as the quantity of drugs seized, will also be important considerations when addressing both gravity and moral culpability (White, para32).
>
> [35] It is obvious that in order to be "proportionate", a sentence must be based upon an accurate assessment of the seriousness of the offence and the offender's degree of culpability.

[36] The sentencing objectives and principles are very well-established in cases involving “hard drugs” such as cocaine. Unfortunately, judges of the Provincial Court are uniquely positioned to understand exactly what they reflect. A long line of judges well before me have seen the daily devastating effects drugs such as cocaine have on our communities. This poison inevitably finds it way into the hands of our most vulnerable citizens including teenagers and those from marginalized communities. It destroys families, friendships, and the lives of children. It also turns otherwise pro-social friends and family members into a fraction of who they once were. It is worth repeating that these drugs are often at

the very core of human trafficking, intimate partner violence, robbery, and homicide. These are just a few examples. It tears at the fabric of our society in countless ways. Cocaine quicky rips though communities leaving behind devastation, decay, and death. That is the sad reality.

[37] Those responsible for facilitating the devasting destruction of the community and ravaging lives, ought to be separated from society. Especially those who like Mr. Mackinnon who are found in possession of staggering amounts of cocaine in the range of 500 grams. Mr. MacKinnon recklessly turned a blind eye to the wellbeing of others. At his sentence he professes "I don't agree with it myself". This may now be his current belief; however, it wasn't when he maintained control over a half of kilogram of cocaine, the proceeds of crime, and the other items ready made for immediate distribution. Mr. Mackinnon's level of moral blameworthiness is undeniably high. I will now examine the respective aggravating and mitigating factors to determine if they "*will then push the sentence up or down the scale of appropriate sentences for similar offences"* **R v. Nasogaluak**, *supra.*

**Aggravating Factors**

[38] This is a Schedule 1 substance. The substance involved was cocaine. In addition to being highly addictive it is well known to destroy lives and rip communities apart. This highly potent poison has consistently been linked to violence, physical abuse, property offences, and homicide. Those who traffic in this drug take financial advantage of those who are addicted and vulnerable. They operate on the sad reality that individuals will keep coming back for more in what is inevitably a never-ending downward spiral.

[39] The quantity of cocaine. As stated, the accused was in possession of a half kilogram of cocaine. Clearly, that quantity allows for higher levels of criminal profit. More importantly, however, is that higher quantities increase the odds of a higher number of transactions. Logically, with each passing transaction you increase the chances of further devastation, destruction, and tragedy. Simply put, large quantities of cocaine at some point inevitably make their way into the community. That's the very intent and purpose. The more that enters, the greater the corresponding risk to public safety.

[40] The accused was on an undertaking at the time of the offence. Despite being bound by the terms and conditions of a police undertaking the accused still brazenly forged on. This speaks to the accused's willingness to engage in criminal

activity even in the face of being expressly aware that there could be additional consequences. The existing release conditions simply didn't seem to matter to Mr. Mackinnon who made a conscious decision to ignore them and chose to engage in the serious criminal activity.

**Mitigating Factors**

[41] The accused has entered a guilty plea and has accepted responsibility. This is highly mitigating. Mr. Mackinnon's guilty plea benefits the administration of justice in that he has spared the Crown considerable time and expense of what would have otherwise been a protracted trial. More importantly, his guilty plea is an ownership of his wrongdoing and a public acknowledgement of how he failed his community. It also demonstrates a willingness to commit to rehabilitation. This shows a commitment and an early start to the days ahead where he can hopefully better himself.

[42] The lack of a prior record. Unlike many others who come before the court charged with possession for the purposes of trafficking Mr. Mackinnon does not have a criminal history. Up until these offences, he was by all accounts an unknown to the Cape Breton Regional Police Service. There is no suggestion that he had been in the drug trade for long. As well, I think it's fair to say that having appeared before the court on numerous occasions in relation to these offences and now faced with not knowing what sentence he will receive resonates heavily with Mr. MacKinnon. He is a relativity young man and from a prosocial family. He knows nothing of the experience which is life inside a correctional institution.

[43] Prospects for rehabilitation. As stated earlier, for a variety of reasons, I am somewhat reluctant to accept Mr. Mackinnon's entrenched position that he does not have recent substance abuse issues. This certainly isn't aggravating; however, it tempers to some degree his prospects of rehabilitation when it comes to his own wellness. Mr. MacKinnon has abilities, diverse skills, and a history of employment. He has a small support network in the form of his father. He has shown an ability to comply with conditions after being charged with these serious offences. He has avoided further criminal activity in the almost 19 months since he was charged. This gives some insight into how things may look going forward. In summary, at 36 years of age, I'm confident that there is a good prospect for rehabilitation. This of course assumes Mr. MacKinnon fully comes to terms with his degree of responsibility in these matters and avoids a network of questionable

associates. He also ought to commit to accepting his long history of substance abuse and seek professional assistance in that regard.

**Parity: Cases Involving Similar Circumstances**

[44] I must be mindful of the principle of parity which requires the Court to impose similar sentences for similar offences, circumstances, and offenders. Parity does not mean that a trial judge must engage in the futile exercise of trying to find only perfectly matching cases. However, a trial judge must not loose sight of the reality than parity is different that proportionality and one does not replace the other. They are separate and distinct considerations but there is an interplay between the two. Proportionality in many ways is about the individual accused while parity is about where the accused stands in relation to others. I'll first look at the two cases provided by Mr. Egereonu in support of his client's position. Both cases are distinguishable in several respects. Nevertheless, I have considered them and am mindful that the quantities of cocaine in both cases were at least twice the amount found in Mr. MacKinnon's possession.

[45] In the well reasoned decision of **R v. Robinson** [2020] N.S.J. No. 7 Judge Sakalauskas imposed a 3-year period of incarceration for the offence of possession for the purposes of trafficking. The accused was 40 years old, entered a guilty plea and had no prior record. During a targeted traffic stop the accused was found in possession of a 1-kilogram brick of cocaine and 200 grams of cocaine packaged separately inside a backpack in the trunk. She was transporting the substance from Toronto to Halifax and claimed she "was doing a favour for a friend". Judge Sakalauskas was able to conclude that her actions were, "a one-time ill-informed favour for a friend in the drug business". She also held, "I have no reason to disbelieve that she was unaware of the exact contents of the backpack". In contrast, Mr. Mackinnon knew full well what was in his possession which was 500 grams of cocaine, the cutting agent, a digital scale, cell phone, and unused "dime" bags. As well, the accused in **R v. Robinson**, identified as a Black Nova Scotian and was also of Indigenous ancestry. Properly, Judge Sakalauskas devoted considerable time and weight to this reality at sentencing. Judge Sakalauskas received very compelling evidence by way of a Cultural Impact Assessment and a Gladue Report. It will not be my intention to cite the many differences in Ms. Robinson's circumstances compared to Mr. MacKinnon's. There are many differences and they are not hard to find. In short, Ms. Robinson's 3-year sentence was reflective of the reality that her moral culpability was reduced due to a number of factors not present in Mr. MacKinnon's circumstances. One primary

consideration involved the impact of race and cultural considerations which I need not consider in this case.

[46] The second decision provided to the Court by Mr. Egereonu is **R v. Green**, [2020] N.S.J. No. 283. The accused enter guilty pleas to possession for the purpose of trafficking in cocaine and two counts of possessing a prohibited weapon (firearm). After a search of his person the accused was in possession of 17 grams of cocaine. Subsequent searches were conducted on two residences. A search of the first residence associated to the accused resulted in the seizure of 1,085.9 grams of cocaine along with cutting agent. A search of a second residence resulted in the seizure of two handguns. Justice Arnold of the Supreme Court accepted a jointly recommended global sentence of 4 years incarceration.

[47] This case in the context of what I am to consider when passing sentence for Mr. Mackinnon is difficult to reconcile in several ways. First, the decision is devoid of any real discussion about the accused's circumstances. We do not know such things as his age or if he has a prior record. Nevertheless, you can see that the case has several additional aggravating features not present in Mr. MacKinnon's case. The accused in **R v. Green,** *supra.* is found in possession of at least twice the quantity of cocaine. He is also in possession of two handguns. These factors are clearly more aggravating. However, when comparing cases, the "absence of an aggravating factor does not mitigate the seriousness of an offence", **R v. Kleykens**, *supra*. Mr. Egereonu's argument that his client was not in possession of weaponry is not persuasive. The absence of what is otherwise aggravating can not serve to mitigate the seriousness of something which actually exists. The reality remains that Mr. Mackinnon was a key cog in the wheel which was a drug trafficking operation in high quantities of a lethal drug. He was also found in possession of the tools of the trade. Finally, on his own admission he wasn't in possession of this cocaine because he was an addict himself. He specifically refutes the very suggestion that he has issues with drug dependency. As stated earlier, an assessment of Mr. Mackinnon's circumstances places him within the third tier of the four *Fifield* categories. He was involved in a "mid-to-high" level drug trafficking operation.

[48] More significantly, in **R v. Green**, *supra,* Justice Arnold makes clear that this recommendation was "what was described by both parties as a true negotiated plea agreement". There were several pre-trial motions which led to the negotiated resolution. In the end Justice Arnold made extensive reference to why judges should give heavy weight to the acceptance of joint recommendations as outlined

by the Supreme Court of Canada in **R v. Anthony-Cook**, [2016] 2 S.C.R. 204. While in the end Justice Arnold concluded that the joint recommendation would not be contrary to the public interest nor would it bring the administration of justice into disrepute, the reality remains that this sentence was a result of classic quid pro quo between the Crown and Defence. While I'm certainly not dismissing the precedential value of this case, I ought to keep certain aspects of it in perspective.

[49] I will now list some but not all the cases I have considered when considering parity:

> **R. v. Carvery,** [1991] N.S.J. No. 501 (NSCA)
>
> 184 grams of cocaine-high level retailer- no prior record – 5 years imprisonment.
>
> **R v. Smith**, [1992] N.S.J No. 365 (NSCA)
>
> 372 grams of cocaine- "upper end" of the scale as a retailer-minor unrelated record, 5 years imprisonment.
>
> **R v. Dann,** [2002] N.S.J. No. 456 (NSSC)
>
> 300 grams of cocaine – courier travelling between provinces-27 years old no lengthy criminal record-joint recommendation, 4 and ½ years imprisonment. The Court noted at paragraph 13: "it is clear to me, after a review of these cases and other cases in our jurisdiction that a fit and proper sentence for this type of offence would be in the range of 4 to 5 years.".
>
> **R v. Knickle** [2009] N.S.J. No. 245 (NSCA)
>
> 312 grams of cocaine – 19 firearms seized- 43 no prior record-guilty plea- positive rehabilitative prospects, 3 and ½ years imprisonment.

[50] Again, the case law is vast and for obvious reasons. Some of the cases for similar offenders under similar circumstances have resulted in higher penitentiary sentences while some have resulted in lower penitentiary sentences. That is true not only within Nova Scotia but also across Canada. I'm confident, after a very

extensive and lengthy search, that there isn't a single case which matches Mr. Mackinnon's circumstances in every way. As stated earlier, parity isn't perfection in finding an exact match between cases. I'm satisfied that Mr. MacKinnon falls within the specified range as set out earlier. I've considered and balanced the mitigating and aggravating factors which move him along the scale.

**Totality and Restraint**

[51] Before I conclude, I am reminded of essential principles of restraint and totality. Mr. Mackinnon's sentence must be just in that it should never exceed what is appropriate having regard to all the circumstances. With that in mind I have considered the Crown's position with respect to whether the sentence for the proceeds of crime offence should be consecutive to the offence of possession for the purpose of trafficking. I am not satisfied that a fit and proper sentence would necessitate making the sentences consecutive. While they are separate offences and under some circumstances may warrant consecutive sentences, I do not feel adding an additional six months custody would further advance the sentence in any meaningful way. Essentially the proceeds of crime offence is part and parcel of the whole of the circumstances of the offence, and I've treated it as such.

**Conclusion**

[52] Mr. MacKinnon will be sentenced as follows

- August 25, 2020, Count #1 CDSA 5(2) – Four (4) and One Half (1/2) years in Custody.
- August 25, 2020, Count #2 354(1) (A) – Six (6) months concurrent.
- August 25, 2020, one (1) day served by his presence in court.

[53] The following ancillary orders are granted

- Firearms prohibition order in accordance with s. 109 of the *Criminal Code*; that Mr. Mackinnon is prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substances for a period of 10 years

from his release from prison and any prohibited firearm, restricted firearm, prohibited device and prohibited weapon for life.

- DNA Order in accordance with s. 487.051(3) (Secondary Designated Offence) of the *Criminal Code*

[54] I herby order that the following items seized from Mr. Jarrett Anthony Mackinnon shall be forfeited to Her Majesty the Queen in right of Canada:

- The Cocaine seized from 397 King Street New Waterford, Nova Scotia.
- The Cutting agent seized from 397 King Street New Waterford, Nova Scotia.
- $,1,055 Canadian currency.
- Scale;
- and drug packaging.

Shane Russell, JPC

**PROVINCIALCOURT OF NOVA SCOTIA**
**Citation:** *R. v. MacKinnon*, 2022 NSPC 12

**Date:** 20220326
**Docket:** 8462453,8462454,8462455
**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Jarrett Anthony MacKinnon

## ERRATUM

| | |
|---|---|
| **Judge:** | The Honourable Judge Shane Russell, |
| **Heard:** | March 15th, 2022, in Sydney, Nova Scotia |
| **Decision:** | March 24, 2022 |
| **Charge:** | CDSA 5(2), CC 354(1)(A), CC 145 (A) |
| **Counsel:** | David Iannetti and Darcy MacPherson, for the Crown<br>Oge Egereonu for Defence |
| **Erratum Date:** | April 27, 2022 |

Paragraph 18: replaced principals with principles
Paragraph 20: replaced principals with principles
Paragraph 21: replaced principals with principles
Paragraph 22: replaced principals with principles
Paragraph 24: replaced principals with principles
Paragraph 26: replaced principals with principles

Paragraph 28: replaced principals with principles
Paragraph 34: replaced principals with principles
Paragraph 36: replaced principals with principles
Paragraph 44: replaced the word that with than
Paragraph 51: replaced principals with principles