

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Murphy*, 2020 NSSC 265

Date: 20200929

Docket: CRH 474606 and 474607

Registry: Halifax

Between:

Her Majesty the Queen

v.

Lonnie Mercelle Murphy

SENTENCE DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: September 10, 2020, in Halifax, Nova Scotia

Counsel: Shauna MacDonald, for the Provincial Crown
Jill Hartlen, for the Federal Crown
Laura McCarthy, for the Defence

By the Court (orally):

[1] Lonnie Murphy is accustomed to overcoming obstacles. He is a person who it is easy to cheer for. There is every reason to want him to succeed. He has energy, drive, determination and ability. He speaks his mind and does it well. Those seem like strange things to say about a person whom I have found guilty of having committed several criminal offences and of being a cocaine dealer. I have said them because they are true. Lonnie Murphy should not be defined by a criminal record. There is much more about him than what happened in this case.

[2] He has been found guilty of 6 property related offences under the *Criminal Code* and guilty of possession for the purposing of trafficking cocaine and cannabis marijuana contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. This is now about the sad and unpleasant task of imposing a sentence. There is certainly no joy in it. There is no satisfaction either. A criminal sentence will be yet another obstacle for Lonnie Murphy to overcome. Criminal sentences are sometimes said to be about sending a “message” either to the person being sentenced or to the wider community. Given all that has happened in Lonnie Murphy’s life, his life should not now be used by the justice system to send a message to anyone else. And he does not need either a message or a lecture from me.

[3] The facts of the cases are set out in the reported decision *R. v. Murphy*, 2020 NSSC 35. Mr. Murphy was found guilty of possessing 52.1 grams of cocaine for the purpose of trafficking and possessing 3488.5 grams of marijuana for the purpose of trafficking. Those substances were found in his business, London Pawn Shop, on Isleville Street in Halifax. In that same location were found a large quantity of stolen items which gave rise to the 6 convictions under sections 355(a), 355(b) and 355.5(a) of the *Criminal Code*. Those are for the possession of stolen property and the possession of stolen property for the purpose of trafficking. He was using his business to sell goods that he knew were stolen.

[4] There are 3 reports that set out Mr. Murphy’s personal circumstances. There is a pre-sentence report. Mr. Murphy identifies as both African Nova Scotian and Mi’kmaq. So, a Cultural Impact Assessment was prepared by Sonja Paris, MSW, RSW and Lana MacLean MSW, RSW and a Gladue Report was prepared by Shelley Martin of Mi’kmaw Legal Support Network. Clearly a great deal of time and effort went into the preparation of those three reports which total more than 60 pages. They each provide valuable insight into the socio-cultural factors that

impact Mr. Murphy's experiences in the criminal justice system. They each provide vitally important context.

[5] Given the circumstances outlined in those reports it is not my intention to summarize them. That is out of respect for Mr. Murphy's privacy. Mr. Murphy has experienced what the writers of the Cultural Assessment have referred to as "immense trauma in his life that included witnessing violence, abuse, poverty, losing his family, abandonment and racial discrimination". They quote Mr. Murphy as reporting a "constant barrage on his personhood". He has been diagnosed with Post Traumatic Stress Disorder.

[6] If any proof were needed for the statement that life is not fair, Lonnie Murphy's life provides it. It is hard not to be angry, but that anger should not be directed toward him. He is personally responsible for his own actions or for how he played his hand. But life has dealt him a cruelly unfair hand. He grew up in extreme poverty. His involvement with the criminal justice system began when he was only 8 years old. He was too young to be charged then. He reported that he was put on probation when he was 9 years old and his life went downhill from there. He experienced trauma while in a system that was supposed to have protected him. He was eventually sent to youth detention in Shelburne. He started to increase his drug consumption when he was 16. He has 25 criminal convictions that date back to 1991. Most of those are property related crimes. There is a significant gap in his record from 1999 to 2017. He has spent many years crime free.

[7] Lonnie Murphy's life is not described in that brief comment about his tragically difficult life and his dated criminal record. He should not be defined by either of those things any more than he should be defined by the circumstances that led to this sentencing. He is a father, a son, an entrepreneur, a children's book author, and a tradesman. Through his life he has worked at being a mentor and a positive role model. He has worked with the organization "902 Man Up" where he helped members of the young African Nova Scotian community. Facing the obstacles that he did, it took an extraordinary amount of both effort and natural talent to put himself in a position where he could do those things. Then this mess comes along.

Controlled Drugs and Substances Act Offences

[8] Mr. Murphy was a petty retailer of cocaine and given the amount of marijuana involved was also a retailer though on a somewhat larger scale. He was

not a user or street dealer and was using his business location to keep the drugs intended for sale. The presence of benzocaine, which is a cutting agent, is evidence of his intent to dilute the cocaine for greater profit.

[9] In Nova Scotia sentencing for drug dealers involves a process that includes the categorization of the dealer within the hierarchy of drug traffickers. The quantity of the drugs is not determinative, but it is important in showing the probable category of the trafficker. While there have been some modifications through caselaw, those categories are generally set out as the isolated accommodator of a friend, a petty retailer, the large retailer/small wholesaler/ and the bigtime operator. As noted by my colleague Justice Rosinski in *R. v. LeBlanc*, 2019 NSSC 192, the range of sentences for cocaine trafficking for a petty retailer is from 18 to 30 months custody. Small scale retailers face sentences from 2 years to 6 years. Medium scale retailers can face custodial sentences from 5 to 8 years. Larger wholesalers and large-scale retailers will be sentenced to periods of incarceration ranging from 8 to 15 years. Importers are sentenced to 12 to 20 years.

[10] Lonnie Murphy was a petty retailer of cocaine. He was not a person who was providing the drug to a friend. He was packaging it for resale and cutting it with benzocaine. The amount of marijuana found in his possession also situates him as a retailer, though on a somewhat larger scale than with respect to the cocaine.

[11] The typical sentence in that situation is a federal term of imprisonment. Trafficking in cocaine consistently attracts sentences of imprisonment in the range of two years even for first time offenders. Denunciation and deterrence are the primary objectives in sentencing for drug trafficking. The Court of Appeal has authorized a deviation from the “typical sentence” of 2 years or more in *R. v. Livingstone, Lungal and Terris*, 2020 NSCA 5. That deviation can be justified if the sentence still honours the purposes and principles of sentencing. In that case a sentence of 18 months was found to recognize the mitigating factors present for each offender while still acting as a deterrent.

[12] Lonnie Murphy is unique. In an important sense everyone is. Yet it would be difficult to find a person whose life experiences could be considered to closely resemble his. Sentencing on drug related offences often refers to the deterrent effect of a period of incarceration. People are sentenced to send a message to others that the financial gains derived from the illegal activity will not be worth the significant jail time that will result when the person is caught and convicted. The

deterrent message is an important component of sentencing in these cases. In Lonnie Murphy's case, I have already expressed my concern about making him the vehicle of any message to anyone.

[13] His counsel has very ably argued for a creative sentence that would allow him to remain in his community. That would be a significant departure from the law that has developed in Nova Scotia regarding the sentencing of those who traffic in drugs, particularly cocaine. There are already a disproportionate number of African Nova Scotian men in jail. The only way to fight against the effects of racism is for those in positions of authority to act in ways that may be perceived as radical and as departing from some norms. Sending this man, Lonnie Murphy, to jail to send a message to others seems to be compounding a problem rather than dealing with it.

[14] There is another troubling side to this, as there often is. It is not about the "message" that would be sent to anyone in the community by sending Lonnie Murphy to jail. It is about what not sending him to jail says to that community. Cocaine is a scourge. It ruins lives. Those who sell it prey upon others for their own benefit. They do not sell this stuff as a service to the community. They sell it, knowing what it does to the lives of people in the communities in which they live. No good comes of it. It is the destroyer of communities. Failing to respond to this crime seriously, in effect says that this crime is not serious. Lonnie Murphy was selling cocaine out of a pawn shop in the North End of Halifax. He was plying the trade in his own community. The people of that community deserve protection from drug dealers just as much as any others do. That is why a federal penitentiary term has become a standard in sentencing.

[15] Reconciling those competing interests is not just a matter of finding a way to split the difference. There are real problems with incarcerating Lonnie Murphy. He should not be used to send a message to anyone. Yet there are real problems with not incarcerating Lonnie Murphy who has acted in a predatory way within the community that clearly means so much to him. The Federal Crown has recommended a sentence of between 20 and 22 months. Mr. Murphy was dealing in both cocaine and marijuana and selling it out of his own retail shop. The amount of marijuana involved was large. It is shorter than the sentence that would normally be imposed. The Federal Crown has recommended that Mr. Murphy's case be treated as a "deviation" from the "typical" sentence.

[16] A somewhat more significant deviation from the typical sentence is required to reflect Mr. Murphy's situation. The sentence must be just long enough, not to send a message, but to not send a message. It must not suggest that a shorter sentence has become the norm so that people can feel emboldened to continue in the business of ruining the lives of people whose lives are already too difficult. It should not suggest some kind of downward sentence creep toward a lower standard. In Mr. Murphy's extraordinary circumstances, a sentence of 18 months can be justified. Anything lower than that does send a message about the value placed on communities where the struggles against drug abuse, poverty, racism, and inequality intersect. A period of incarceration of 18 months reflects the level of Mr. Murphy's involvement in the illegal drug trade while still recognizing that Lonnie Murphy is a person who is much more than a drug dealer. He is a man who has made a terrible mistake. It was a mistake that had consequences for him and for his community.

Criminal Code Offences

[17] The circumstances of the property offences in this case are remarkable for the sheer volume of goods involved. Subsection 355.5(a) is possession of stolen property for the purpose of trafficking. That is the most serious of the property charges. It should be addressed first.

[18] Mr. Murphy had stolen property in a shop for the purpose of offering that property for sale to the public. It was a "for profit" undertaking though there is no evidence of how much, if any profit, Mr. Murphy realized. In operating a shop in which stolen goods, some of them of significant value, could be sold and converted into cash, Mr. Murphy created a place for laundering stolen goods. There is no evidence that Mr. Murphy sought out stolen goods or requested that people steal property for him. He received property however that was stolen and that he knew was stolen. His purpose was to sell it to the public. His attitude was that despite how suspicious the circumstances might have been, all that he needed to do was to ask whether the item was stolen. He was wrong.

[19] The Crown has put forward 2 cases dealing with sentencing on subsection 355.5(a) which came into effect on November 18, 2010. In *R. v. Poisson*, [2019] B.C.J. No. 1779, the offender was dealing in stolen motor vehicles and related equipment valued at almost \$1 million. The court imposed a sentence of 18 months incarceration.

[20] In *R. v. Grandinetti*, [2020] A.J. No. 772, the offender was involved in what appears to have been a complex arrangement using cloned vehicle identification numbers and forged bills of sale for stolen vehicles. The court ordered concurrent sentences of 6 months incarceration and 3 years probation on the trafficking and possession charges and a conditional sentence of 18 months on the charge relating to using forged documents.

[21] In Mr. Murphy's case the system used was hardly devious or complex. He had handwritten pawn slips which appear to have been stored in no order. He brought them to court in plastic bags. In some cases he did not even bother to take the original store price tag off the item. An expensive specialty guitar that had been stolen from Long and McQuade was in his store with the price tag still on it.

[22] As I said earlier, Mr. Murphy should not be sentenced as an example to anyone else. He has suffered too much already for that to be in any way fair, as if it ever can be fair. The crimes cannot go unpunished, but that punishment must still acknowledge the real potential that Mr. Murphy will put this behind him and direct his drive and his talents once again toward more pro-social ends. For Count 10, s. 355.5(a), a sentence of 6 months is appropriate having regard to the offence and Mr. Murphy's own circumstances.

[23] Count 10, the charge under s. 355.5(a) dealt with the possession of stolen goods for the purpose of trafficking. In order to be found guilty of that offence, a finding had to be made that Mr. Murphy possessed property that was stolen, either knowing that it was stolen or being "wilfully blind" as to whether it was stolen or not, and that he possessed that property for the purpose of trafficking it. The property is identified as being valued at over \$5,000 and being the property of "persons, including persons unknown". That count includes every piece of property that was seized and found to have been stolen.

[24] The remaining counts are each more specific. Count 9 is a charge under s. 355(a) and involves the simple possession of stolen property, the property of persons unknown, where the value is more than \$5,000. It is distinguishable from Count 10 only by the lack of the phrase "the property of persons" and the charging section. In order to be found guilty under that charge Mr. Murphy had to have been found to have possessed the stolen property, either knowing that it was stolen or being wilfully blind as to whether it was stolen. It is the same charge without the trafficking aspect. There is a legal and factual nexus that means Mr. Murphy would be sentenced twice for doing the same thing. That charge should be stayed.

[25] The same is true of the other remaining charges. Count 1 charges the possession of property of Long and McQuade where the value is over \$5,000. Count 2 charges the possession of the property of Duron Atlantic, valued under \$5,000. Count 6 charges the possession of the property of Stephen Bradley, valued under \$5,000. Count 7 charges the possession of the property of Economy Glass valued at under \$5,000. The facts that sustain each of those charges are the same facts that sustain the charge under Count 10. Those charges should be stayed.

[26] If I am wrong in ordering a stay, the result would be the same. Each count would require a sentence of 30 days. Because of the very close connection with Count 10, those sentences would be served concurrent with the sentence on Count 10. The total sentence on all *Criminal Code* charges would be 6 months.

[27] The *Criminal Code* sentence should be served consecutive to the *Controlled Drugs and Substances Act* sentence.

Totality

[28] The principle of totality must apply. Mr. Murphy's moral blameworthiness is matched by the cumulative sentences on the two indictments.

[29] Lonnie Murphy's life of traumatic events and his willingness to use his talents to try to make a better life for himself come together as a mitigating factor. Offences are not sentenced. People are sentenced. Lonnie Murphy has made some bad mistakes. He must pay for them. But that must be calculated having regard to what he has experienced, who he is and who he has the potential to be.

[30] The total period of incarceration for both *Criminal Code* and *Controlled Drugs and Substances Act* offences is 2 years served in a federal institution.

Summary

[31] On indictment CRH No. 474606 under the *Criminal Code*:

- Count 10 (possession of stolen property for the purpose of trafficking): 6 months incarceration.
- Count 1 (possession): stay.
- Count 2 (possession): stay.
- Count 6 (possession): stay.

- Count 7 (possession): stay.
- Count 9 (possession of property of persons unknown): stay.
- Counts 3, 4, 5, 8, 11, 12, 13, and 14: not guilty.

[32] On indictment CRH No. 474607 under the *Controlled Drugs and Substances Act*:

- Count 1 (possession of cocaine for purpose of trafficking): 18 months incarceration, consecutive to the *Criminal Code* sentence.
- Count 2 (possession of marijuana for purpose of trafficking): 18 months incarceration, concurrent to Count 1 of the *CDSA*.

[33] Forfeiture orders, in the form provided by the Provincial and Federal Crown.

[34] Firearm prohibition order for 10 years, in the form provided by the Federal Crown.

[35] DNA order, in the form provided by the Federal Crown.

Campbell, J.