PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Morrison*, 2019 NSPC 38

Date: 20190919
Docket: #3004329
Registry: Sydney

Between:

Her Majesty the Queen

v.

Derick Chad MORRISON

Judge:	The Honourable Judge A. Peter Ross
Heard:	September 4, 2019, in Sydney, Nova Scotia
Decision	September 12, 2019
Charge:	Section 5(2), Controlled Drugs and Substances Act
Counsel:	Joshua Bryson, for the Crown James Snow, for the Accused

Summary:

Sentencing of the accused for possession of roughly 60 grams of cocaine for the purpose of trafficking. Street value $6,000. Low-end retailer for about one year. Positive pre-sentence report, strong family support, commendable conduct in the community subsequent to offence while awaiting sentence. Eight month jail sentence imposed, followed by one year of probation.

By the Court:

[1] Derek Chad Morrison has pled guilty to possessing cocaine for the purpose of trafficking, at Glace Bay, on June 16, 2016. Both a Charter application and trial had been scheduled, but the former was withdrawn and a plea of guilty entered on October 4th, 2018. For various reasons oral submissions on sentence were not made until September 4th, 2019. I adjourned to September 12th for decision.

[2] Crown argued that Mr. Morrison should receive a federal sentence of two years imprisonment; Defence argued that he should receive a suspended sentence with probation.

[3] The plea of guilty is worthy of some favorable consideration, but it was not entered at an early stage in the proceeding. A change of solicitor in late 2017 appears to have slowed things down, and further delays of the sentencing were made at defence request. There were undoubtedly legal issues which needed to be examined and discussed. These things should not weigh against the accused, but neither does the fact that the offence is now somewhat dated weigh in his favor.

The Evidence

[4] The facts of the offence emerge from items seized upon execution of a search warrant, comments made to police by the accused shortly after his arrest, results of a forensic examination of a seized cell phone, and earlier observations of police which justified the issuance of the warrant. All of this is contained in the Crown's brief, provided to Defence counsel prior to sentence. The accused does not dispute these facts but argues against certain inferences put forward by the Crown.

[5] In the days prior to arrest police observed the accused meet with several individuals for short periods of time at different locations. They also possessed "source information" from someone who, one supposes, was able to give a first-hand account of the accused's activities. Police obtained a warrant to search his residence. On arrest, in his driveway, Mr. Morrison was found with one gram of cocaine on his person, a cellphone, and $640 in cash. In his residence police located 28 grams of cocaine broken down into one-gram lots, ready for sale, and another bag with an undivided 30 grams. Altogether it appears that he had possession of 59 grams of the substance, which would have a potential street value of nearly $6,000.

[6] Shortly after his arrest Mr. Morrison admitted to selling cocaine but claimed he limited sales to 10 or 12 friends, at $100 per gram, at a rate of approximately 50 grams every three to four weeks.

[7] A forensic examination of the cell phone revealed text messages; these were extracted and those from the week previous to arrest were tendered. They disclose dealings with four individuals. The accused is prepared to front drugs – one

customer says “Just seen my funds I’m low have 50 bones. I get paid tomorrow and would u mind ticking me 50 I can etransfer it to ya tomorrow even give ya 20 extra just for the bullshit . . . promise I’m good for it, wouldn’t ask if I wasn’t get my pay 6 a.m.” to which the accused replies “I will man. Just give me a minute.” Another says “I could use a few bumps but got no cash on me, lotsa booze here tho”. After a brief negotiation the accused texts “12 beer I’ll give ya g. Thursday” and later “that’s a good deal I’ll send Sean now?” and and then a couple of minutes later “he is on the way.” With one customer he seems to have lost track of who was owed what. The customer asks “u wanna meet up today before work like last week” to which the accused says “I recall 4 weeks ago at Big Bens you were short 30 . . . “ to which the customer pushes back “no the time at Big Bens I was 90 short. Thats what I gave u at kfc. C’mon, keep track” A few minutes later the customer says “I’ll take the one u got left I can meet in about 45 is that cool.” Mr. Morrison then indicates he wouldn’t have more drugs “till Monday.” Later exchanges in subsequent days appear to show persistent inquiries from that person, with the accused pushing back the date he will be supplied, with the customer finally saying “paid 800 for junk last night in the run of 5 hours, hurry up lol”

[8] Crown points out that there are also phone calls taking place, another means by which a person can traffick in drugs. We do not have the content of any such calls. Crown points to the quantity of drugs in his possession as the primary indicator that the accused was “entrenched” in the drug trade. It says the texts show that dealing drugs was a part of his daily routine.

[9] Defence contends that the texts suggest a petty, amateur retailer, unable to keep score, supplying a small number of people in order “to fund his own habit and lifestyle”.

[10] As with most crimes, s.5(2) encompasses a range of behavior. The level of trafficking is not defined as an aggravating circumstance *per se*, as are things mentioned in 718.2(a) (abuse of trust, criminal organization, etc.). Nor does this case engage factors set out in s.5(3) or s.10(2)of the CDSA (use of violence in commission, near a school, sale to minors, etc.).

[11] The writer of the pre-sentence report indicates that Mr. Morrison "insisted he did not understand the law around what constituted trafficking and stated 'I would bu(y) a lot of (it) and my friends would all do it with me'." His remark strikes me as somewhat disingenuous. Mr. Morrison was a mature adult (nearly 34 at the time of the offence) with a long work history. He surely knew what he was doing and the risks entailed. The foregoing texts belie any suggestion that he was simply sharing with friends.

[12] One acquaintance interviewed for the PSR said that when he "noticed that he (the accused) had new friends and was using hard drugs and alcohol . . . it got so bad I had to worry about my own reputation, I stopped associating with him". The same person says that Mr. Morrison began to use drugs in 2015 when his mother became sick. The accused confirms this. She died that same year. In the PSR Mr. Morrison says "I am here because I did not know how to cope with the passing of my mother." I take at face value that this was a difficult time for the accused, that he witnessed the progression of his mother's illness, that he may have suffered some depression and looked for a means to cope. He claims that friends gave him coke and urged him to try it, that doing so made him feel better, and it became a habit. But the death of a parent is a common life experience for adults and provides no excuse for entering into illegal activity. His path to addiction does not attract the level of sympathy accorded to some others.

[13] To his credit Mr. Morrison has a long and varied work history, predominantly in the service sector. He has managed fast food franchises. He has moved around in the province to work and also worked in Alberta and Toronto. He has lived with a brother and a sister at various times. He had a good upbringing, his parents and siblings have provided good role models, and he himself has shown industry and initiative. The relationship with his father was fractious at times but is positive now. His father is fully supportive, though puzzled and disturbed by his son's behavior. A brother also expresses support. He too notes the marked change in the accused's behavior after their mother passed away, saying "it triggered something in him that caused him to turn to drugs."

[14] Since being charged, Mr. Morrison has declared bankruptcy, been discharged, and has regained his footing in the workplace. He works at a local Sub shop, tends bar at special events, and is part owner of a small business producing a barbeque sauce which sells in retail outlets across Cape Breton. This past winter he also secured a job as labourer with an energy firm in western Canada. He has the opportunity to return to that job in two months time, in November. Family and work associates say that the accused has turned his life around. They say he has taken responsibility for what he has done by disavowing the drug scene, turning away from former associates, and spearheading volunteer efforts in the community, and maintaining gainful employment.

[15] Mr. Morrison's partner of one year is a nurse who has worked steadily for many years and raised two daughters on her own. She seems to be a responsible and level-headed person. She is also very supportive of Mr. Morrison. In a letter she relates that Mr. Morrison has been a great support to her and her children, who are now in university, and also to her parents. She and the accused have discussed

his current situation and she believes that he deeply regrets what he did and has made "great efforts to turn his life around and … great strides to try to restore his reputation as he had never been involved in criminal activity prior to this." She says he has a good heart, cares about his family and community, and has learned from his mistakes.

[16] The accused's business partner also wrote a support letter. He said the accused was "up front" about his legal troubles. He says that some in the community have shunned him, and he has fallen victim to gossip and abuse, but is deserving of a second chance. He credits him with staying in the community, facing all the negative publicity, and pulling himself up. A current employer notes his work ethic, punctuality, friendly demeanour and positive attitude.

[17] Crown argues that this accused "has failed to engage in any constructive rehabilitative measures", comparing his efforts to those of other accused who received relatively light sentences. I do not think that this should weigh against Mr. Morrison. By all accounts he has turned his back on drug use and the drug trade. If he was able to do this without professional counselling it should not be held against him. These needs have been served by family and friends. The PSR suggests "attending therapy to acquire self-management skills to avoid future recidivism." I do not detect any unwillingness on the part of the offender to undertake community-based programs as part of a probationary sentence.

Discussion / Case Law

[18] Schedule I drugs present health risks to users who purchase the product on the street. This can bring further harm to a user's family and create negative impacts in the workplace. Even if is true that Mr. Morrison had only a dozen

customers, this provides no assurance that they all kept the substance to themselves strictly for personal use. Further dissemination would spread the risks inherent in drug abuse to a wider circle and compound the foregoing effects. It is not possible for traffickers to circumscribe the resulting harm, however convinced they are by the rationalizations they use to justify their behavior.

[19] There is a plethora of case law about the appropriate sentence for traffickers of hard drugs and how best to approach this difficult task. I will not attempt an extensive canvass of the law. The Supreme Court's judgement in R. v. LeCasse, 2015 SCC 64 is instructive. Crown and Defence have both made excellent arguments and have highlighted decisions which support their respective positions.

[20] In R. v. Rushton [2017] N.S.J. No.23 at par.85 Judge Buckle identified a set of features generally found in cases where courts have imposed a sentence at the lower end of the range - addictions, youth, limited or no prior record, relatively small amount of the drug, hope of rehabilitation and absence of aggravating factors.

[21] In R. v. Voong [2015] B.C.J. No.1335 (BCCA) at par.59 the court, seeking to identify "exceptional circumstances" justifying a non-custodial sentence for trafficking in cocaine, put it this way:

> Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught.

[22] The need to identify "exceptional circumstances" has been de-emphasized in this province, beginning with R. v. Scott 2013 NSCA 28, but the tendency to do so

has not entirely disappeared. Courts will inevitably attempt to distill those features which connect individual cases, to draw them into a broader framework which renders the law comprehensible and clarifies future application.

[23] However one conceptualizes the approach, it is clear that the features distilled in *Rushton* and *Voong* should not be regarded as strict criteria. Nor does it follow that in any case displaying these features a lenient sentence automatically follows. Such an approach would be just as rigid as one which mandates a lengthy jail term for trafficking in cocaine regardless of individual circumstances.

[24] Defence counsel submits, "The doctrine of 'exceptional circumstances' allows a sentencing judge to depart from a judicially-established range of sentences. However, a suspended sentence is well within the range of appropriate sentences . . . This may be why judges in Nova Scotia have held that a finding of exceptional circumstances is not a necessary precondition to the imposition of suspended sentences in like cases."

[25] I think it is fair to say that many courts which have imposed or upheld sentences at the low end of the spectrum have attempted to explain them as 'exceptions that prove the rule'. In R. v. Chase, 2019 NSCA 36 the Crown expressed concern that the exceptions were becoming the rule. It voiced concern over the number of reported cases in which traffickers in hard drugs received either non-custodial sentences or relatively brief periods of incarceration, often intermittent 90-day jail sentences. It argued that if such sentences became "unexceptional" it would seriously erode the message of deterrence and denunciation which is required to protect society from the devastating impact of these offences (see par.44). In subsequent paragraphs the Court of Appeal

addressed those concerns. It endorsed the unique perspective of the sentencing judges in three important decisions and noted (as Defence counsel in *Chase* had argued) that there are many unreported cases in which federal sentences have been imposed. One cannot escape the thought that unusual outcomes are more likely to be supported by written decisions. This may affect perceptions of how the criminal justice system as a whole deals with drug trafficking cases.

[26] I agree that it is better to dispense with an inquiry into "exceptional circumstances" and instead focus on where, on the legal spectrum, within the range of permissible sentences, a particular case falls. Almost by definition, the frequency of very lenient sentences and very harsh sentences will both be small. What is 'lenient' and what is' harsh' may change as the overall distribution curve moves - as cases accumulate, as legislation is enacted, as social conditions change, as norms evolve. In an ever-evolving legal landscape, courts attempt to put individual cases in their proper place.

[27] To my knowledge judges do not keep a running tally. They do not adhere to percentages. But trial courts have at least a rough idea of the range and frequency of sentence in the cases which come before them, and should must bear in mind the general precept that sentences which are well below (or above) the general range for a given crime should be few in number and meted out sparingly.

[28] LeBel J., writing for a unanimous Court in *R. v. Nasogaluak*, 2010 SCC 6 said:

> [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] 2 S.C.R. 309; M. (C.A.); *R. v. Hamilton* (2004), 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.
>
> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[29] Cases which support the Crown position include R. v. Oickle 2015 NSCA 87, R. Forward 2017 NSSC 190, R. v. Swaine 2015 NSSC 265. R. v. Reid 2015 NSSC 276 is not as instructive given that the accused was a pharmacy technician, there was a breach of trust, and fentanyl is arguably an even more addictive and dangerous substance than cocaine. A recent decision in R. v. Roberts 2019 NSPC 27, where a three year sentence was imposed, is also distinguishable by the variety of drugs and the presence of weapons and ammunition.

[30] Cases which support the Defence submission include R. v. Rushton 2017 NSPC 2, R, v, Masters 2017 NSPC 75, R. v. Chase 2019 NSCA 36 and R. v. Provo [2001] N.S.J. No.526. Support is also found in R. v. McGill [2016] O.J. No.1346, R. v. Casey 2017 NSPC 55, and R. v. Saldanha 2018 NSSC 169.

[31] I also note this trio of cases – R. v. A.L. 2018 NSPC 61, R. v. Livingstone 2018 NSPC 62 and R. v. Terris 2019 NSPC 11 - grouped together by the sentencing judge himself at par.26 of Terris as being similar in these respects:

- First time offender
- Petty-retail, small quantity of Schedule 1 drugs
- Solid employment history, good family support
- No statutory aggravating factors
- No weapons or violence
- Cooperation with police
- Early guilty plea
- Bail compliance
- Good prospects for rehabilitation.

[32] One finds most of these features in the case before me. However Mr. Morrison's plea was not early (although there appear to have been arguable issues which would require some attention, consume counsel's time, involve discussions between the parties and thus account for much of the delay). More importantly, Mr. Morrison was found with a greater quantity of drugs than the accused in the cases above. For instance (restricting the comparison to the amount of 'hard' drug and discounting the presence of cannabis) the quantity of cocaine in *Rushton* was 6 grams, in *Casey* 0.23 grams of crack cocaine, in *Saldanha* approximately 8 grams and in *Provo* 0.67 grams.

[33] R. v. Kleykens 2019 NSPC 28 involved an accused found in possession of 144 grams of cocaine – much more than Mr. Morrison – as well as 8.25 kg of cannabis marihuana and 56 grams of cannabis resin. The accused was cooperative,

had no prior record, expressed regret, had a strong work ethic, was gainfully employed and appeared to have turned his life around. He was given a 90 day intermittent sentence and three years probation. Crown cannot distinguish this case on its facts but urges me not to see it as an example, and I am persuaded that I should not.

DISPOSITION

[34] I accept that Mr. Morrison now understands the extent of his wrongdoing and is truly remorseful for his actions. Mr. Morrison has no prior criminal record. Aside from this one aspect of his life – trafficking in small amounts of cocaine to a relatively small number of people for a number of months – Mr. Morrison has made a positive contribution to society. Calls for leniency are completely understandable in such a case but must be tempered by an awareness of the destructive effects of hard drugs. Many of the people wracked by drug abuse are just as worthy and capable as Mr. Morrison. They too have (or had) jobs and families. Drug abuse has to potential to ruin lives, destroy families, and damage the community. It can turn healthy people into sick and needy people. It can turn an honest person into a habitual liar. A user's life goals shrink to one short-sighted objective – to get that next 'bump'. The hard and important problems of life are cast aside in favour of the easy quick fix.

[35] It is my conclusion that a significant term of imprisonment is called for in this case. There are strong mitigating factors which decrease the length of sentence which would otherwise be appropriate – two years. However, this is a case where the tendency towards mercy must be tempered by recognition of the harmful effects of the accused's behavior. The significant amount of cocaine

seized, the daily involvement of the accused in purchasing and further distributing a dangerous Schedule I drug in the community - these call out for something more than a suspended sentence, and something more than 90 days. At par. 25 of *Swaine* (above) Justice Chipman quotes these words with approval: "The trafficker is a retailer of poison. Cocaine destroys lives and breeds crime."

[36] Denunciation of this conduct and deterrence to others similarly inclined require me to impose nothing less than a jail sentence of 8 months. Given the principle of restraint, it will be nothing more. Mr. Morrison is sentenced to an 8-month period of incarceration at the Cape Breton Correctional Centre. This will be followed by 12 months of probation on terms which include abstention from alcohol and illicit drugs, counselling for drug use, mental health counselling if deemed necessary by the probation service, and a requirement not to associate with anyone who is known to have a record under the CDSA except incidental to employment or counselling or any immediate family members.

[37] Ancilliary Orders:

S.109 ban on firearms for life, prohibited and restricted firearms and weapons for life

487.051 DNA order – secondary designated offence

Forfeiture of drugs, cellphone

Dated at Sydney, N.S. this 12 day of September, 2019

Judge A. Peter Ross, PCJ