

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Johnston*, 2020 NSPC 12

Date: 20200110

Docket: 8287037,8287039, 8287041, 8287043,
8287045, 8291630, 8291632

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Jerrelle Orlando Johnston

Judge:	The Honourable Judge Theodore Tax,
Heard:	December 2, 2019, in Dartmouth, Nova Scotia
Decision	January 10, 2020
Charge:	Sections 86(1), 88(1), 91(1), 92(1) & 95(20 of the <i>Criminal Code</i> and 5(2) & 7.1(1) of the <i>Controlled Drugs and Substances Act</i> .
Counsel:	Glen Scheuer, for the Public Prosecution Service of Canada Gayle Karding, for the Nova Scotia Public Prosecution Service Trevor McGuigan, for the Defence Counsel

By the Court:

[1] Mr. Jerrelle Johnston is before the court for sentencing after having pled guilty to having possession for the purpose of trafficking, cocaine, a substance included in schedule I of the **Controlled Drugs and Substances Act (CDSA)** contrary to section 5(2) of the **CDSA**. He also pled guilty to possessing a prohibited or restricted firearm, to wit, “handgun” together with readily accessible ammunition capable of being discharged in that firearm, without being the holder of an authorization or license to possess that firearm or the registration certificate for the firearm, contrary to section 95(1) of the **Criminal Code**.

[2] The offences for which Mr. Johnston has entered pleas of guilty occurred on or about July 19, 2018 in Dartmouth, Nova Scotia. The Federal Crown proceeded by indictment on the **CDSA** charge and the Provincial Crown also proceeded by indictment on the **Criminal Code** firearms charge.

[3] The issue before the court is to determine a just and appropriate sentence in all the circumstances of the offences and of this offender.

The Positions of the Parties:

[4] The position of the Federal Crown Attorney is that Mr. Johnston was a mid-level trafficker, given the amount of cocaine found in his possession as well coupled with the significant quantity of cutting agents all point to the ongoing activity to his maximize cocaine sales. The Crown Attorney points to relatively few mitigating factors and the fact that the sales were driven by greed as there is no indication that Mr. Johnston became involved in trafficking to pay for his own addiction to cocaine.

[5] The Federal Crown Attorney recommends a sentence for the **CDSA** offence alone in the range of 4 to 5 years. He also seeks a DNA order as this is a secondary designated offence for that purpose, a lifetime firearms prohibition order and forfeiture of all items seized at the 2 locations. He acknowledges that the Court must also consider, in its sentencing decision, that there is a very serious **Criminal Code** firearms offence for which the Provincial Crown Attorney will recommend a separate sentence.

[6] The Provincial Crown Attorney agrees with the global assessment as recommended by the Federal Crown Attorney and points to the fact that the section 95 **Criminal Code** offence could have carried a minimum sentence of 5 years of imprisonment, if she had relied on a section 727 **Criminal Code** notice of increased penalty as a result of a previous conviction. The Provincial Crown Attorney points out that Mr. Johnston was previously subject to a section 109 **Criminal Code** lifetime firearms prohibition order from a prior conviction for attempted murder with a firearm. She points to the prior related record, the possession of a firearm, while on a firearms prohibition, even though he was not charged with that offence, in furtherance of his cocaine trafficking, as very significant aggravating factors.

[7] The Federal Crown Attorney and his Provincial counterpart acknowledge that the Court will have to consider the principles of proportionality and totality in emphasizing deterrence and denunciation of this unlawful conduct, and they recommend a global sentence of 6 years imprisonment. The Provincial Crown Attorney also seeks a lifetime firearms prohibition order, a section 491 **Criminal Code** order for the forfeiture to the Crown of the firearm and the ammunition as well as a DNA sample as the section 95(1) **Criminal Code** offence is a secondary designated offence.

[8] For his part, Defence Counsel acknowledges that the sentencing precedents provided by the Federal Crown Attorney clearly set out the purpose and principles of sentencing. He does not dispute the fact that the clear message from those cases is that a sentence of federal imprisonment is warranted. However, it is the position of the defence that the just and appropriate sentence when the Court considers the principles of proportionality and totality would be a global sentence of 3 years of imprisonment in a federal penitentiary.

[9] Defence Counsel submits that the appropriate sentence should consider the fact that the 2 offences for which Mr. Johnston is being sentenced occurred at the same time and location, and therefore, the Court ought to impose concurrent three-year sentences for those offences.

[10] In the alternative, if the Court was to conclude that these were separate and distinct offences, then the presence of the cocaine with the gun or the gun with the cocaine should not be considered as an aggravating factor to the other offence. In those circumstances, the Court would be required to consider the principle of proportionality and totality and then take a final look to see if the combined

sentence for this offender would be unduly long or harsh. Defence Counsel submits that there are many mitigating factors highlighted in the Pre-Sentence Report and that the court should exercise restraint in its final determination of the sentence.

[11] Defence Counsel confirmed that they do not oppose any of the ancillary orders sought by the Crown Attorneys, including the forfeiture orders.

Circumstances of the Offences:

[12] In November 2017, police officers in the Integrated Guns and Gangs Section started an operation in relation to mid-level cocaine dealers in the Halifax Regional Municipality. As a result of source information and surveillance, police officers identified several suspects and the dwellings or stash houses used by them. On July 18, 2018, police officers obtained search warrants for several locations including an apartment located on Micmac Boulevard, in Dartmouth, Nova Scotia, which was leased to Gineen Thomas. Based upon surveillance and other information, police officers believed that the apartment was a “stash house” used by the accused, Jerrelle Johnston.

[13] On July 19, 2018, police officers conducted surveillance on Mr. Johnston and followed him until another person who they believed to be his partner in the cocaine trade, was arrested. Mr. Johnston had been followed to the apartment located on Micmac Boulevard, and police officers observed him enter that residence. Police officers waited for about 2 minutes after that, before they approached the apartment.

[14] Police officers had obtained a key to the apartment located on Micmac Boulevard and they used it to enter the apartment. Upon entering the apartment, Mr. Johnston was observed in the kitchen with his arms down by his sides, facing the door. Mr. Johnston had a rectangular object in his left hand which he dropped to the floor. That object was a working digital scale.

[15] During the search of that apartment, police officers located and seized the following items:

1. A black Triton T3 working digital scale with white residue;
2. 1 open bag containing 16.6 g of cocaine which was located on the kitchen counter beside a Pyrex measuring bowl, near where Mr. Johnston was standing when the police officers entered the residence;
3. \$201 in Canadian currency which was located on Mr. Johnston;

4. 3 different cell phones, which were located on Mr. Johnston;
5. 3 tied off baggies of cocaine, each weighing 0.5 g for a total weight of 1.5 g of cocaine, which were in a jewelry box on a dresser in the bedroom of the apartment;
6. several bags of white powder believed to be cutting agent;
7. one tied off baggie containing 43.6 g of cocaine which was located inside a safe that was found in the bedroom closet;
8. one larger bag with 2 tied off baggies of crack cocaine, each one weighing 24.6 g for a total weight of 49.2 g of cocaine, which was found in the safe in that apartment;
9. one set of house keys that had a key to apartment 103 as well as a key to the building located at 100A Mic Mac Boulevard
10. one set of keys to a residence located at 460 Portland Hills Dr in Dartmouth.; and
11. A loaded 25-calibre prohibited handgun was also located in that safe where some of the drugs were found;

[16] In addition to the search of the apartment located on Micmac Boulevard, a second search team executed a search warrant and entered a house located on Portland Hills Dr. in Dartmouth, Nova Scotia. There, police officers seized \$3000 from a safe located in the master bedroom's closet at that location. They seized 24 x \$100 bills and 12 x \$50 bills of Canadian currency.

[17] Police officers seized a total of 110.9 g of cocaine from the apartment located on Micmac Boulevard. In addition, police officers also seized over 10 kg of cutting agents, which was weighed as 10,257 g in total.

[18] In terms of the street value of the cocaine seized, the Federal Crown Attorney estimated, based upon the "usual value" of sales to users on the street, which goes for between \$80-\$100 per gram, that the street value of the 110.9 g of cocaine seized by the police, would range between \$8870 to \$11,090.

[19] With respect to the **Criminal Code** firearms offence, during the search of apartment located on Micmac Boulevard, police officers located and opened a safe which contained one white athletic sock. The sock appeared to have an object inside it and when the object was removed from the sock, police officers seized a small 25 calibre firearm, which was determined to be in working order. There was

a magazine within the firearm which contained 6 bullets. Photographs of the sock, the firearm, the magazine as well as the bullets were tendered as an Exhibit on this sentencing hearing.

[20] The small 25 calibre firearm is a prohibited weapon. The Provincial Crown Attorney noted that Mr. Johnston has been subject to a lifetime firearms prohibition since a conviction in July 2009. However, she also noted that Mr. Johnston was not charged with an offence contrary to section 117.01(1) of the **Criminal Code** for possession of a firearm while being prohibited from doing so.

Circumstances of the Offender:

[21] Mr. Johnston will soon be 38 years old. He has been in a common-law relationship for the last 19 years and is the father of 2 teenage children.

[22] Mr. Johnston has strong extended family and community ties as well as his parents and sister, whom he often looks to for advice and support. His sister noted that shortly after the death of his grandfather when Mr. Johnston was about 12 years old, he began to have conflicts with the law. However, she added that he is a dedicated father and partner to his common-law wife, as well as supporting other family members.

[23] Since 2016, Mr. Johnston has been the owner and operator of a business that provides landscaping and snow removal services to businesses and residential properties as well as non-profit organizations. Mr. Johnston has also enrolled and taken courses to further develop his business skills and his emotional wellness. Family members were shocked to learn that he was involved in the offences before the court.

[24] Mr. Johnston completed his grade 11 education in 1998 and ultimately left school to enter the workforce. In 2011, Mr. Johnston completed an 8 month long culinary course while incarcerated in New Brunswick. At that time, he started to complete his General Education Diploma, however, he was released prior to completing the course.

[25] Prior to owning his own small business, which employs 2 people on a casual basis during peak times of the season, Mr. Johnston maintained employment as a labourer with various companies in the Dartmouth area. One of the clients of his small business advised the Probation Officer that Mr. Johnston is always respectful, professional and reliable in providing his service. The small business

provides income which covers all of his monthly expenses, with some assistance from his spouse and mother-in-law who lives in the same residence.

[26] Mr. Johnston is in good physical health, consumes alcohol on a social basis and does not have any substance abuse issues. In his spare time, he spends the majority with his family but also volunteers as a football coach and enjoys playing basketball. The Probation Officer contacted a volunteer coach who has known Mr. Johnston for about 10 years, and stated that he had encouraged Mr. Johnston to get involved in volunteering as a way of keeping Mr. Johnson on a positive path. He was disappointed to learn about the matters before the court.

[27] Mr. Johnston advised the Probation Officer that he accepted full responsibility for the offences before the court and that he let his children down. He stated that he committed the offences to “clean up” his debts, so that his family could have what they needed, and added that having the firearm was “stupid.”

[28] Mr. Johnston has 2 dated prior convictions for simple possession of **CDSA** substances on December 1, 2003 for which he was fined \$500 for each offence. He also has a prior conviction on July 9, 2009 for attempt to commit murder contrary to section 239 of the **Criminal Code** for which he was sentenced to 9 ½ years in prison less presentence custody credits, which resulted in a sentence of 6 years and 8 months in a federal penitentiary. There are also dated prior convictions for fraud contrary to section 380(1)(b) of the **Code** for which he was fined \$250 in May 2003 and for the careless storage of a weapon contrary to section 88(1) of the **Code** for which he was fined \$400, in March 2001.

Analysis:

[29] The determination of a just and appropriate sentence is a highly contextual and individualized process which depends upon the circumstances of the offence and the offender: see **R. v. Lacasse**, 2015 SCC 64 para.1. The trial Judge is required to carefully balance the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence, while at the same time, taking into account the victim or victims and the needs of and current conditions in the community: **R. v. M (CA)**, [1996] 1 SCR 500 at paras. 91-92.

[30] The fundamental purposes and principles of sentencing are set out in section 718 to 718.2 of the **Criminal Code** and with respect to **CDSA** offences, in section 10 of the **CDSA**. Those fundamental objectives of sentencing are to protect the public and to contribute to respect for the law and the maintenance of a safe

society, by having one or more of the following goals: denunciation, general and specific deterrence, separation from society where necessary, rehabilitation of the offender, promotion of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[31] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality in sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect or be proportionate to the seriousness of the criminal conduct.

[32] Pursuant to section 718.2 of the **Criminal Code**, the court that imposes a sentence is also required to consider several other sentencing principles in determining the just and appropriate sanction. Section 718.2(a) of the **Code** requires the court to consider the aggravating and mitigating circumstances which may either increase or reduce the appropriate sentence.

[33] The parity principle found in section 718.2(b) of the **Code** requires the court to consider that the sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[34] In addition, given the fact that the Court is required to impose a sentence for both the **CDSA** offence as well as the **Criminal Code** offence in this sentencing decision, the Court will also have to consider the totality principle set out in section 718.2(c) of the **Code**. The totality principle states that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[35] Furthermore, section 10(1) of the **CDSA** is applicable in this case as it sets out the fundamental purposes of sentencing which incorporate the purposes set out in section 718 of the **Criminal Code**. Section 10(2) of the **CDSA** outlines additional factors to consider where an offender is not subject to a minimum punishment, which should be considered as aggravating factors in considering the just and appropriate sentence. The Crown Attorney has not indicated that any of those aggravating factors in section 10(2) of the **CDSA** were present in this case.

[36] Our Court of Appeal has repeatedly stated that denunciation of the unlawful conduct and general deterrence must be the primary considerations when sentencing those who traffic in schedule I **CDSA** drugs [such as cocaine]. Some recent cases where the Court of Appeal has underlined that point include: **R. v.**

Steeves, 2007 NSCA 130; **R. v. Butt**, 2010 NS CA 56; **R. v. Scott**, 2013 NSCA 28; **R. v. Oickle**, 2015 NSCA 87 at paras 31 and 48.

[37] It is clear from those and other Court of Appeal cases that the sentencing judge should emphasize denunciation and general deterrence when imposing a sentence on an offender who has been involved in the trafficking of schedule 1 **CDSA** substances, like cocaine, to reflect society's condemnation for those offences and the tremendous harm that they cause in our communities.

[38] Despite that emphasis in the sentencing objectives, our Court of Appeal has not established that a federal penitentiary term is a "starting point" nor have they required the sentencing judge to find "exceptional" circumstances to justify a sentence lower than 2 years in a penitentiary for the trafficking of schedule I **CDSA** substances, like cocaine.

[39] However, it is relatively rare for a petty trafficker of cocaine (utilizing the categories of drug traffickers described by our Court of Appeal in **R. v. Fifield**, [1978] NSJ no. 42) to receive less than 2 years imprisonment for the trafficking of that schedule I **CDSA** substance. Where sentences of less than 2 years in a federal penitentiary have been ordered, the sentencing judge has applied the sentencing principles which tend to decrease the sentence imposed due to the presence of one or more of the following mitigating factors: addictions; a youthful offender with good prospects for rehabilitation; no prior record or a limited and unrelated prior record; a relatively small amount of the drug and an absence of aggravating factors.

[40] In this case, given the significant amounts of cocaine and cutting agent as well as the possession of a prohibited firearm and the use of a stash house, I find that Mr. Johnston is not a "petty retailer" or "street level" trafficker as described by Chief Justice MacKeigen in **R. v. Fifield**. He did not possess small quantities for sale and the other aspects of the possession of the cocaine for the purpose of trafficking clearly differentiate him from that low-level "petty retailer." In those circumstances, I find that Mr. Johnston was a mid to high level retailer of cocaine as described by the Nova Scotia Court of Appeal in **R. v. Conway**, 2009 NSCA 95 at paras. 9-10.

Aggravating and Mitigating Circumstances:

[41] Section 718.2(a) of the **Criminal Code** requires the Court to consider the aggravating and mitigating circumstances which may increase or reduce the sentence imposed by the Court.

[42] I find that the Aggravating Circumstances are as follows:

- Mr. Johnston possessed the loaded firearm, despite having been placed on a lifetime firearms prohibition on July 9, 2009, following his conviction for attempted murder, which was a very serious crime of violence;
- The firearm possessed by Mr. Johnston was a prohibited firearm which was loaded with 6 bullets in the magazine;
- The offender has a very dated and minor record for possession of **CDSA** substances;
- The loaded and prohibited firearm was located in the residence and in the close proximity to the location where Mr. Johnston was in possession of a significant amount of cocaine [100.9 g] with estimated street value of between \$8870-\$11,090 as well as over 10 kg of cutting agent for the purpose of trafficking.

[43] I find that the Mitigating Circumstances are as follows:

- Mr. Johnston pled guilty to the charges before the court, relieving the Crown of the burden to prove the charges beyond a reasonable doubt;
- He has accepted full responsibility for the offences before the court;
- Mr. Johnston has strong family ties and support in the community;
- He is the owner and operator of the small business that has employed seasonal workers for landscaping and snow removal services;
- Mr. Johnston has volunteered in the community as a coach;
- The Pre-Sentence Report was generally positive and there are relatively good prospects for his rehabilitation.

The Principle of Proportionality and the Parity Principle:

[44] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality in sentencing. In this case, I find that gravity or seriousness of the

possession of cocaine, a substance listed in schedule I of the **CDSA**, for the purpose of trafficking, is very high. There can be no doubt relating to the seriousness or gravity of that offence as Parliament has determined that it is an indictable offence for which an offender is liable to imprisonment for life. The Court is well aware of the impact on the community of trafficking this so-called “hard” drug which often include users being addicted to the substance and crime occasioned to obtain articles that can be swapped for cocaine or sold for cash to purchase cocaine.

[45] Similarly, the seriousness or gravity of the section 95(1) **Criminal Code** offence for possession of a prohibited or restricted firearm with ammunition must also be regarded as being very high. As an indictable offence, an offender is liable to a term of imprisonment not exceeding 10 years and to a minimum punishment of imprisonment for term of 3 years, in the case of a first offence. The **Code** also states that there is a 5-year minimum punishment of imprisonment for a second or subsequent offence.

[46] However, it should be noted that the Supreme Court of Canada struck down the minimum sentence provisions of section 95 of the **Criminal Code** for contravening the section 12 of the **Charter** and held that it was not saved by section 1 of the **Charter** in **R. v. Nur**, 2015 SCC 15. Therefore, while the Supreme Court of Canada has held that there is no minimum punishment for this offence, there can be no doubt that it remains a very serious offence, which relates in a very direct manner to the safety and security of the members of the community.

[47] In addition, the Provincial Crown Attorney has confirmed that they did not serve notice under section 727 of the **Code** that a greater punishment would be sought by reason of a previous conviction. Therefore, for both reasons, the Court is not bound by those minimum sentences stipulated in section 95(1) of the **Code**. As a result, the sentence imposed on Mr. Johnston should be determined after having considered all of the relevant purposes and principles of sentencing in this case.

[48] As mentioned previously, I find that the gravity or seriousness of this offence is very high considering the potential for violence, serious injury or death which may result from the possession of a firearm. In addition, the gravity or seriousness of the offence is also very high since the firearm possessed was a prohibited firearm, and Mr. Johnston had been previously prohibited from possessing any firearm.

[49] In considering the seriousness or gravity of the *CDSA* offence, although there is no specific victim impact statement or community statement before me, it is well understood by the courts that cocaine has insidious addictive qualities that has ruined the lives of many people and often leads to theft and other crimes of violence to support an addiction.

[50] In addition, gun violence has increased in our community and firearms are now frequently being used by drug traffickers for their self defence as well as to protect their stash of drugs or to intimidate and threaten people, especially other people involved in the drug trade. Unfortunately, some of those incidents involve shots being fired which have resulted in serious injuries or death. In addition, when those incidents occur in populated areas, innocent bystanders are placed at risk or may become the unintended victims of this gun violence.

[51] Furthermore, in my opinion, the possession of a restricted or prohibited firearm and the large quantity of cocaine possessed for the purpose of trafficking with its devastating impacts on our community, reflects a significant degree of planning and forethought on the part of Mr. Johnston. In those circumstances, I find his degree of responsibility for this combination of offences is very high as it is self-evident that he was fully immersed in this serious criminal activity for his own profit, regardless of the impacts on the community.

Sentencing Precedents to Establish a Range of Sentence:

[52] As I indicated previously, the parity principle which is found in section 718.2(b) of the **Code** requires the court to consider that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A review of the sentencing precedents provided by counsel or reviewed by the Court may be considered to establish a range of sentence, as a guideline for the trial judge. It does not, however, create any hard and fast rules, nor does the consideration of an appropriate range preclude a greater sentence where the emphasis is upon denunciation, deterrence and the gravity of the offence or a lesser sentence based upon special or significant mitigating circumstances.

[53] In support of the Federal Crown Attorney's sentencing position, he provided the following cases:

- (a) **R. v. Byers**, 1989 CanLii 200 (NSCA) – The offender had pled guilty to 2 separate sales of 1 g of cocaine and, on the second occasion, 4

grams of cocaine to an undercover officer. The trial judge had ordered one-year consecutive for each of the offences for a total of two years imprisonment. The Court of Appeal noted, at page 3, that cocaine is a “highly addictive substance” and that it was necessary “to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved.” The sentence was varied to be 18 months on each of the two counts consecutive for a total of three years in prison.

- (b) **R. v. Dann**, 2002 NSSC 237 – The offender was found guilty following a trial of possessing 300 g of powdered cocaine for the purpose of trafficking. The offender was 27 years old, engaged to be married and did not have an extensive prior criminal record, although there was a prior conviction for possession of narcotics. The Court accepted a joint recommendation for a 4 ½ year sentence of imprisonment and noted that the Nova Scotia Court of Appeal had “consistently emphasized the need for general deterrence” as the primary consideration in the sentencing of a drug trafficker.
- (c) **R. v. Knickle**, 2009 NSCA 59 - The offender had pled guilty to charges of having possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA** and careless storage of a firearm contrary to section 86(1) of the **Criminal Code**. A search of his residence located almost 312 g (about 11 ounces) of cocaine, three scales, baggies and 19 firearms, four of which were being stored improperly. The street value of the drugs was between \$23,000 and \$31,000. The trial judge had ordered a two-year less one day conditional sentence of imprisonment in the community.

The Court of Appeal allowed the appeal and substituted a sentence of 42 months in prison but gave credit for the 9 months that he served on the conditional sentence. The offender was 43 years old, a divorced single parent with two teenaged children, with grade 9 education who had been involved in the fishing industry until he suffered a serious injury. He had no prior criminal record.

The Court of Appeal stated at para. 18 that persons involved in the trafficking of cocaine will be subject to sentences of incarceration. The Court added at para. 29 that deterrence must be emphasized and to give effect to the principle of proportionality and the seriousness of

the offence. Given the large amount of cocaine involved as well as the other aggravating circumstances such as the presence of improperly stored weapons in a residence where teenaged children were living, the Court of Appeal held that the appropriate sentence would be a penitentiary term of 3 ½ years.

- (d) **R. v. Butt**, 2010 NSCA 56 - The offender had pled guilty to one count of possession for the purpose of trafficking cocaine. Police intercepted a package which was destined for Mr. Butt's home address which contained two one-kg bricks of cocaine of significant purity. A search of his house located an additional 196 g of powdered cocaine. He claimed to be acting only as a middleman for others operating at higher levels in the drug trade to distribute cocaine to local traffickers.

Mr. Butt was 35 years old and had a prior drug conviction with a lengthy criminal record who claimed to have been involved in the drug trade only to feed his addiction to cocaine. He had told the trial judge that he had turned his life around, planned to upgrade his education, was regularly employed, now drug-free and was receiving chemotherapy for non-Hodgkin's lymphoma. A post-sentence report indicated that most of what he had told the trial judge was not true and that he had continued to offend up to the month before the sentencing hearing.

The Court of Appeal stated at para. 13 that "cocaine has consistently been recognized as a deadly and devastating drug that ravages lives. Involvement in the cocaine trade, at any level, attracts substantial penalties." The Court of Appeal set aside the trial judge's decision of 3 ½ years in prison based upon the fact that the judge was not aware of the other offences prior to sentencing, the judge was mistaken as to Mr. Butt's health situation and had misunderstood the Crown's position on sentence. The Court of Appeal substituted a sentence of five years incarceration.

- (e) **R. v. Murphy**, 2019 NSSC 105 - The offender had been found guilty following a trial of possession of 17 chunks of crack cocaine weighing 6.2 g with an approximate street value of \$510-\$620. The Court found that he was a street-level trafficker and that this was not a one-time situation. He had an unrelated, but extensive youth and adult criminal

record, with several serious property offences and failing to attend court, but only one prior section 4(1) **CDSA** possession charge

The offender was 35 years old with a 10-year-old son who lived with his parents. The Court noted that trafficking of crack cocaine was especially damaging to members of our communities because of its low cost to users, making it available to many vulnerable people as well as its strong addictive grip on users. The Court emphasized deterrence and denunciation and indicated that the offender's rehabilitation was a secondary purpose in ordering a two-year go forward prison sentence to be followed by two years on probation.

[54] In addition to those cases provided by the Crown Attorney, I have also reviewed some other recent cases which involved the combination the possession of cocaine for the purpose of trafficking and a firearm:

1. **R. v. Holland**, 2017 NSSC 148 - The offender had pled guilty to one count of possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA** as well as one count of possession of a prohibited or restricted firearm with ammunition contrary to section 95(1) of the **Code**. A search of the offender's apartment located 167 g of cocaine, various drug trafficking paraphernalia and a sizable quantity of cash. They also found a 9 mm handgun with ammunition.

Mr. Holland was 36 years old, single but had one child for whom he was paying child support. His parents had separated at an early age and he was raised by his mother, grandmother, his aunt as well as one year in foster care. He had two years of university education and was gainfully employed as a co-owner of two businesses.

The Pre-Sentence Report was generally positive, and an important mitigating factor was his guilty plea and acceptance of responsibility. However, as an aggravating factor, he had a criminal record of two prior section 5(2) **CDSA** trafficking convictions and two prior firearm possession convictions under section 91(1) and section 95(1) **Code**. For those prior offences, which had occurred about 10 years earlier, he had served about three years in jail.

The Court accepted the joint recommendation and ordered a sentence of five years on the section 95(1) **Code** firearms offence and 3½ years concurrent on the section 5(2) **CDSA** offence.

2. **R. v. Fraser**, 2019 NSSC 368 - The offender had pled guilty to the possession of a loaded restricted or prohibited firearm, being a 9 mm semi-automatic handgun contrary to section 95(1) of the **Criminal Code** as well as possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA**, in November, 2017. Mr. Fraser was subject to two different firearm prohibition orders at the time.

Based upon source information, police officers arrested Mr. Fraser and during a search incidental to his arrest, they located \$1870 in Canadian currency, \$500 in American currency and two cell phones. In a duffel bag, which was next to where Mr. Fraser had been seated in the rear seat of a taxi cab, police officers located a loaded 9 mm handgun, three Ziploc bags containing 62.7 g of crack cocaine and a functioning digital scale below his girlfriend's feet on the other side of the cab.

Once transferred to the police station, a further search of Mr. Fraser was conducted. Mr. Fraser reached into his underwear and removed a Ziploc bag which contained an additional 23.6 g of crack cocaine. The police officers estimated that the street value of the total amount of 96.3 g of crack cocaine was approximately \$4900-\$6300 as packaged.

At the time of the sentencing hearing in November 2019, Mr. Fraser was 27 years old. Since he has both aboriginal and African Nova Scotia ancestries, the Court had received a **Gladue** report. He is the father of four children, the oldest being eight years of age. The report indicates that his parents separated at an early age and he was raised by his mother.

As a young person, Mr. Fraser began experimenting with various substances and began selling drugs to support himself and provide the necessities for his mother, which led to his first incarceration as a youth.

Mr. Fraser had several convictions as a youth for robbery, assault, failure to comply with court orders, possession of a firearm contrary to section 94(1) of the **Code** and possession of drugs for the purpose of trafficking. As a youth and as an adult, he also has eight prior convictions for offences contrary to the **CDSA**, of which three were for trafficking and two were for possession for the purpose of trafficking.

Mr. Fraser acknowledged his responsibility for the offences and his awareness of the negative effects and addictive qualities of the drugs that he had been selling. In the **Gladue** report, he also acknowledged the violence and distrust which exists in the drug trafficking trade and that drug trafficking usually results in death or jail.

In his decision with respect to the parity principle, Justice Duncan looked at cases like **R. v. Holland**, *supra*, in concluding, at para. 58, that “when one considers the combined effects of a firearm charge with a drug charge, the courts have generally said that ‘exemplary sentences of incarceration’ are required.”

After considering the principle of totality, the fact that Mr. Fraser had not previously served any time in a federal institution and weighing the potential for rehabilitation and the deterrent effect of a first-time federal imprisonment, Duncan J concluded that the just and appropriate sentence was to impose a sentence of four years plus nine months, less 250 days served on remand credit for the section 95(1) **Code** offence. In relation to the section 5(2) **CDSA** offence of possession of cocaine for the purpose of trafficking, Duncan J. imposed a sentence of three years concurrent to the sentence imposed for the section 95(1) **Code** offence.

[55] Based upon the precedents which I have reviewed, I find that the range of sentences for an offender who has possessed a significant amount of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA** and, at the same time, possessed a restricted or prohibited firearm with readily accessible ammunition that is capable of being discharged in that firearm contrary to section 95(1) of the **Criminal Code**, could reasonably result in a global sentence of 6 years as recommended by the Crown Attorneys. The Crown Attorneys also submit that a global sentence of 6 years in prison would not be unduly long or harsh in all of the circumstances of this case.

[56] Defence Counsel submits that the appropriate sentence for each of the two offences is three years in prison, but his position is that the sentences should be served concurrently. In the alternative, Defence Counsel submits that if the court concludes that the sentences ought to be imposed on a consecutive basis, then, the Court is required to take a final look at the aggregate sentence based upon the principle of totality to ensure that the aggregate sentence is not unduly long or

harsh. In either alternative, Defence Counsel submits that a three-year sentence for Mr. Johnston is a just and appropriate sentence in all the circumstances of this case.

[57] However, it must be remembered that the circumstances of each offence and of each offender are different and that the Court must also consider the aggravating and mitigating circumstances in determining the just and appropriate sentence. It must also be remembered that the range, which is established by previous sentencing decisions is simply a guide to encourage greater consistency between sentencing decisions, in accordance with the parity principle.

The Totality Principle:

[58] As I indicated previously, the disparity in the sentencing recommendations made by the Crown Attorneys and Defence Counsel relates primarily to the difference in which they recommend that the Court consider the application of the totality principle, which is found in section 718.2(c) of the **Code**.

[59] In **R. v. M (CA)**, 1996 CanLII 230 (SCC) at para. 42, the Supreme Court of Canada described the totality principle in the following manner:

“The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender.”

[60] In **R. v. Skinner**, 2016 NSCA 54, at para. 41, Justice Saunders succinctly summarized the sequential steps to follow when sentencing an offender for multiple offences. The Court of Appeal directed that, when sentencing for multiple offences, sentencing judges should proceed in the following order:

- Fix a sentence for each offence;
- Determine which should be consecutive and which, if any, concurrent;
- Take a final look at the aggregate sentence; and
- Only if the total exceeds what would be a just and appropriate sentence, is the overall sentence reduced.

[61] Furthermore, in **Skinner**, *supra*, at para. 42, Saunders JA added that in considering the sequence outlined above, the sentencing judge should keep in mind

that the Nova Scotia Court of Appeal has “always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences.” He then referred to the remarks of Chief Justice MacKeigan in **R. v. Hatch**, [1979] N.S.J. no. 520 (NSCA):

[6] We have frequently noted that the **Code** seems to require consecutive sentences unless there is a reasonably close nexus between the offences in time and place as part of one continuing criminal operation or transaction: (citations omitted). This does not mean, however, that we should slavishly impose consecutive sentences merely because offences are, for example, committed on different days. It seems to me that we must use common sense...

[7] The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences.

The Just and Appropriate Sentence:

[62] During their sentencing submissions, the Crown Attorneys and Defence Counsel have acknowledged that the circumstances in this case require an overall sentence which would result in incarceration in a federal institution. As I mentioned previously, there is no recommendation which has been jointly made by counsel and therefore, the Court must determine the length of the just and appropriate sentence, in all the circumstances of this case.

[63] Furthermore, there is no dispute between the parties that this is a case where specific and general deterrence as well as denunciation of the unlawful conduct must be emphasized. However, Defence Counsel also points out that although Mr. Johnston is not a youthful, first-time offender, the Pre-Sentence Report was generally positive and there are reasonable prospects for his rehabilitation, which should also be considered by the court in determining the global sentence.

[64] After having considered the parity principle and the range of sentence established by similar offenders who have committed similar offences in similar circumstances, I find that Mr. Johnston’s personal circumstances and the offences are similar to the recent cases of **R. v. Holland** and **R. v. Fraser** where those offenders possessed a significant amount of cocaine for the purpose of trafficking and, at the same time, they possessed a prohibited or restricted firearm similar to the one possessed by Mr. Johnston.

[65] In the **Holland** case, the trial judge accepted a joint recommendation of five years on the section 95(1) **Criminal Code** offence and three and half years concurrent on the section 5(2) **CDSA** offence. A significant difference in that case to the circumstances of Mr. Johnston, was that Mr. Holland had two prior section 5(2) **CDSA** convictions for possession for the purpose of trafficking and two prior firearm possession convictions.

[66] In Mr. Fraser's case, like Mr. Johnston, there was no joint recommendation and the offender was subject to a firearms prohibition order when he possessed a loaded, restricted or prohibited firearm contrary to section 95(1) of the **Code**. However, unlike Mr. Johnston, Mr. Fraser had also been convicted of five prior trafficking or possession for the purpose of trafficking **CDSA** offences as a youth and as an adult. In **Fraser**, after considering the parity principle and the principle of totality, Duncan J imposed a sentence of 57 months less approximately eight months served as remand credit, for the section 95(1) **Code** offence and three years concurrent for the section 5(2) **CDSA** offence.

[67] With respect to the section 5(2) **CDSA** offence, for the reasons outlined above, I find that Mr. Johnston was a mid to high level retailer of cocaine and not a petty retailer of small amounts of cocaine at the street level. Furthermore, I find that the combination of possessing guns and cocaine intended for sale is consistent with the person who is fully immersed in this serious criminal activity for his own profit, regardless of the consequences or harm done in the community. When I consider the aggravating circumstances and several mitigating circumstances, I find that the just and appropriate sentence for the **CDSA** offence is three years in prison.

[68] With respect to the section 95(1) **Criminal Code** offence of possessing a prohibited or restricted firearm together with readily accessible ammunition capable of being discharged in that firearm, and that Mr. Johnston was previously prohibited from possessing a firearm as a result of a previous conviction for a very serious crime of violence, I find that the just and appropriate sentence for that offence should also be three years in prison.

[69] I find that Mr. Johnston's degree of planning and forethought to have also possessed a very significant amount of cocaine, cutting agent as well as the use of a stash house and three different cell phones, all lead me to the conclusion that he was involved in possessing cocaine for the purpose of trafficking at a much higher level than that of a petty, street-level trafficker of small amounts of cocaine.

[70] Furthermore, his possession of a restricted or prohibited firearm, involved a delict of a completely different nature, and its presence near the stash of cocaine, despite the fact that Mr. Johnston was prohibited from possessing that firearm, also points to a significant, but separate, degree of planning and forethought to commit that offence.

[71] In those circumstances, and for the reasons mentioned by our Court of Appeal in the **Hatch** case, although there may be a close nexus in time and place between those two offences, I find that the imposition of a concurrent sentence as opposed to a consecutive sentence would certainly obscure the cumulative seriousness of the two separate offences. For those reasons, I find that the sentences for the **CDSA** and the **Criminal Code** offences, should be served on a consecutive basis. In the final analysis, the imposition of the two sentences on a consecutive basis would result in a sentence of six years in a federal institution.

[72] Having come to those conclusions, the principle of totality requires me to take a final look at the aggregate or global sentence imposed by the Court to see whether the total sentence exceeds what would be a just and appropriate sentence. When I consider the aggregate or global sentence of six years, together with the strong family support, community involvement of a positive nature and relatively good prospects for Mr. Johnston's rehabilitation, I find that a six-year sentence may slightly exceed what I consider to be his overall culpability.

[73] Taking all of those additional factors into account when I consider this "final look" at the global or aggregate sentence, I am prepared to reduce the overall or global sentence by one year. As a result, I hereby impose a sentence of 2 ½ years on the section 95(1) **Criminal Code** firearms offence and a consecutive sentence of 2 ½ years for the possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA**. Since the sentences imposed on Mr. Johnston are to be served on a consecutive basis, they will result in a global sentence of 5 years imprisonment in a federal penitentiary.

[74] In addition, there will be the following ancillary orders:

- Lifetime firearms prohibition orders, made pursuant to section 109(3) of the **Criminal Code**;
- An order to forfeit the firearm and ammunition which was seized by the police, pursuant to section 491 of the **Code**;

- An order pursuant to section 487.051 of the **Code** to provide a DNA sample as the section 95(1) **Code** offence and the section 5(2) **CDSA** offence are secondary designated offences for that purpose. The order was not opposed by Defence Counsel;
- An order to forfeit all items listed in the Order of Forfeiture, which were particularized in schedule “A” as submitted by the Federal Crown Attorney pursuant to section 16 of the **CDSA**.

[75] Finally, with respect to the victim fine surcharge, I find that it would be an undue hardship to order any payment of that surcharge, given the imposition of a five-year penitentiary sentence today and the fact that Mr. Johnston will have very limited means for the foreseeable future to make the payment of that amount. In those circumstances, I hereby waive the imposition of the surcharge for victims.

[76] At the conclusion of the Court’s decision with respect to the global sentence of 5 years of imprisonment in a federal penitentiary, Defence Counsel advised the Court that Mr. Johnston had earned some pre-sentence custody credits prior to his release on a Recognizance. The Court was advised that Mr. Johnston had been arrested on July 19, 2018 and was released on a Recognizance on July 26, 2018. In those circumstances, Mr. Johnston is entitled to 1½ days of pre-sentence custody credits for each of the 7 days of pre-sentence custody, which rounds up to 11 days of pre-sentence custody credits.

[77] Therefore, taking into account those 11 days of pre-sentence custody credits, the global sentence imposed upon Mr. Johnston, on a go forward basis, shall be 4 years and 354 days of imprisonment to be served in a federal penitentiary.

Theodore Tax , JPC