**MEMORANDUM**

January 29, 2018

**TO:**  DISTRIBUTION LIST

**FROM:**  Shirley Mair

Senior Judicial EA

 Supreme Court Judges’ Chambers

**RE:** *R v Joe,* 2018 NWTCA 1

 File No.: A1-AP-2017-000 001

**ERRATUM**

On page 1, which says:

(2015 NWTSC 23, Docket: S-1-**CE**-2014-000078)

Should be read:

(2015 NWTSC 23, Docket: S-1-**CR**-2014-000078)

Please replace original first page with the attached.

 Shirley Mair

 Senior Judicial EA

In the Court of Appeal for the Northwest Territories

**Citation: *R v Joe*, 2018 NWTCA 1**

**Date:** 2018 01 29

**Docket:** A1-AP-2017-000 001

 **Registry:** Yellowknife, N.W.T

**Between:**

**HER MAJESTY THE QUEEN**

Appellant

- and -

**MELINDA JOE**

Respondent

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**The Court:**

**The Honourable Mr. Justice J.D. Bruce McDonald**

**The Honourable Madam Justice Myra Bielby**

**The Honourable Madam Justice Barbara Lea Veldhuis**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Memorandum of Judgment**

**Delivered from the Bench**

Appeal from the Sentence by

The Honourable Madam Justice K.M. Shaner

Dated the 1st day of December, 2016

(2015 NWTSC 23, Docket: S-1-CE-2014 – 000078)

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Memorandum of Judgment**

**Delivered from the Bench**

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**McDonald J.A. (for the Court):**

1. The Crown appeals this sentence of three years probation imposed by the sentencing judge upon the respondent for one count of possession of cocaine for the purpose of trafficking and one count of possession of marijuana for the purpose of trafficking, both contrary to section 5(2) of the *Controlled Drugs and Substances Act.*
2. The sentencing hearing was held on December 1, 2016. At that time, an agreed Statement of Facts was entered as an exhibit. It provides as follows:

1. The Inuvik RCMP engaged in an investigation into drug trafficking in Inuvik, Northwest Territories in late 2013. Based on the information that was gathered during those months a search warrant was sought on the residence of 27 Raven Street, Inuvik, Northwest Territories belonging to Melinda Joe.

2. The information to obtain a search warrant was sworn by Constable Ryan Gillis of the Inuvik RCMP and was issued on December 21st, 2013.

3. Inuvik RCMP members attended the residence at 27 Raven Street, Inuvik, Northwest Territories on December 21st, 2013 to conduct a search of the residence.

4. Upon entering the home the RCMP officers found Melinda Joe inside and she was given notice of the search warrant. She was arrested, read her Charter of Rights warnings and right to counsel as well as police cautions.

5. Melinda Joe was co-operative with the RCMP and she stated to the police officers where the weed and cash and other things were. She told the RCMP that there was a ½ pound of marihuana in the laundry room and cash and in the cupboard beside the fridge would be the other stuff.

6. A subsequent search of the residence resulted in the seizure of a ½ pound of cannabis marihuana that was in the laundry room. Canadian currency was seized from the laundry room as well. In the kitchen cupboard there were eight (8) individually wrapped grams of crack cocaine. The crack cocaine was pre-packaged in saran wrap. In addition, eighty (80) joints (28 grams) were seized as well.

7. The total amount of cannabis marihuana seized was 236.5 grams. The total amount of crack cocaine seized was 8 grams. The total amount of Canadian currency seized was $5280.50.

8. Melinda Joe admits that she did possess crack cocaine for the purpose of trafficking. Melinda Joe admits that she did possess cannabis marihuana for the purpose of trafficking. Melinda Joe admits that the $4200.00 found at the residence is offence-related property and can be forfeited.

1. The respondent had initially entered pleas of not guilty to each of the counts in question. On September 23, 2016, the respondent changed her election from trial by judge and jury to trial to judge alone.
2. She also at that time withdrew her not guilty pleas and entered a guilty plea to each of the two counts in question. The proceedings were adjourned over to December 1, 2016 so that a Pre-Sentence Report could be prepared.
3. The Pre-Sentence Report was prepared and entered as an exhibit at the sentencing hearing on December 1, 2016. There are three comments regarding the Pre-Sentence Report that are in order. First, the author appears to have been under the misapprehension that the respondent had pled guilty to two counts of possession of marihuana for the purpose of trafficking whereas of course she had pled guilty to one count of possession of marihuana for the purpose of trafficking and one count of possession of cocaine for the purpose of trafficking.
4. Second, the author noted that the respondent had been a user of cocaine herself in the past. Third, although the Pre-Sentence Report was somewhat positive, it did stop short of recommending a community based sentence.
5. At the sentencing hearing the Crown’s position was that a fit and proper sentence would be a term of incarceration in the range of 12 to 18 months with a term of probation of 18 to 24 months thereafter. The position of respondent’s counsel at the sentencing hearing was that a term of incarceration of one year followed by three years probation would be a fit and proper sentence.
6. In support of his position that a term of incarceration in the range of between 12 to 18 months would be a fit and proper sentence, Crown counsel cited to the sentencing judge the following decisions of the Northwest Territories Supreme Court:
	* *R v Mohammed*, 2015 NWTSC 38. In that case, the youthful offender was sentenced to a term of two years eight months incarceration for trafficking in crack cocaine. There were no *Gladue* factors in this case.
	* *R v Turner*, 2006 NWTSC 64, wherein a 22 year old Metis was sentenced to a term of 11 months incarceration for a conviction for a dial-a-dope operation where he was selling cocaine.
	* *R v Hodges*, 2015 NWTSC 59 was another dial-a-dope operation. There were at least four occasions where Mr. Hodges, who was 20 years of age, sold cocaine to an undercover police officer. He received a sentence of two and one-half years incarceration. There were no *Gladue* factors involved nor, however, was there a prior criminal record.
	* *R v Randall*, 2015 NWTSC 27 wherein a 19 year old with no criminal record was sentenced to a term of 20 months incarceration for trafficking cocaine to an undercover police officer on four occasions.
7. For his part, counsel for the respondent went through the Pre-Sentence Report at some length in support of his submission that a fit and proper sentence would be a term on incarceration of one year followed by three years probation.
8. After hearing the submissions of counsel, the sentencing judge adjourned the proceedings until later that afternoon to allow her to reach her decision.
9. The sentencing judge commenced her reasons by acknowledging that the respondent had no previous criminal record and went on to state:

There are a number of sentencing principles and objectives that are at play in this case.

The case law is clear in drug trafficking cases that the objectives of denunciation and deterrence play a significant role in crafting an appropriate sentence. The Court takes a very dim view of trafficking in our communities and that is for good reason.

The destruction that drug addiction leaves in its wake has been articulated over and over. It hurts people. It makes our communities unsafe. It costs the justice system a lot of money; the health care system a lot of money; and the child protection system a lot of money. Kids go without food or proper clothing; the rent goes unpaid; the list goes on.

At the same time, rehabilitation is also an important objective. If we, as Judges, do not craft sentences that promote rehabilitation in offenders we achieve, at best, a temporary band-aid fix.

A sentence has to be meaningful. It must show an offender that what they did was wrong and in doing so, deter further incidents. At the same time, however, the sentence must impart to the offender the tools that he or she needs to avoid repeating the behavior again. It must provide a map to a healthy law-abiding path. In our complex society, that cannot be achieved by punitive action alone.

The overarching principle in any sentencing is proportionality. That means that the punishment must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. This requires the Court to consider not only the seriousness of the crime but also the circumstances of the individual offender. What is his or her background? How did he or she get here? And how do these things affect moral blameworthiness?

1. After reviewing the respondent’s personal circumstances and the Pre-Sentence Report, the sentencing judge said that a community based sentence was appropriate. At that point Crown counsel stood up and advised the court that a Conditional Sentence Order was not available for the count of possession of cocaine for the purpose of trafficking.
2. The sentencing judge’s response was that she was not imposing a Conditional Sentence Order, but rather probation pursuant to section 732.1 of the *Criminal Code*. The sentencing judge described it as a probationary sentence, not a suspended sentence and proceeded to sentence the respondent to a period of three years probation. In addition she imposed a section 109 Prohibition Firearms Order to be in effect for 10 years, a Victim Crime Surcharge in the amount of $200 for each count for a total of $400 with one year to pay and finally a Forfeiture and Disposition Order.
3. On appeal, Crown counsel argued that the sentencing judge erred in principle by merely imposing a term of probation. He argued that the respondent should be resentenced to a term of one year incarceration together with a term of probation thereafter.
4. Respondent’s counsel agreed that the appeal should be allowed and that the respondent should be resentenced to a period of one year incarceration and probation thereafter but that this court should use its discretion to stay the execution of the custodial portion of the sentence.
5. In support of his position, respondent’s counsel argued that, given how the respondent has turned her life around, to impose a fit sentence now would work an undue hardship on the respondent.
6. On a criminal sentence appeal, this court can only intervene if there has been an error in principle, a failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor, and only where it appears from the judge’s decision that such an error had an impact on the sentence. The choice of a sentencing range or the category within a range falls within the trial judge’s discretion and cannot in itself constitute an error. An appellate court may intervene if the sentence imposed is demonstrably unfit: *R v Sargent*, 2016 ABCA 104 at para 9 citing in turn *R v Lacasse*, 2015 SCC 64 at paras 39 – 41 and 51.
7. In our view the sentence of three years probation is illegal and unfit since a Conditional Sentence Order was not available for the count of possession of cocaine for the purpose of trafficking: *R v Geiger*, 2016 ABCA 337.
8. Unlike the majority of the offenders in the cases cited by the Crown both before the sentencing judge and in its factum, the respondent was not a youthful offender. Rather she was 37 years of age at the time of sentencing having been born in 1978.
9. Furthermore, it appears that the respondent only changed her election to trial by judge alone and entered guilty pleas after her section 8 *Charter* challenge to the validity of the search warrant was rejected in May 2015. Under the circumstances, the respondent’s guilty pleas could in no fashion be considered early guilty pleas notwithstanding the sentencing judge’s characterization to that effect.
10. As noted in several cases, drug trafficking is a very serious problem in the Northwest Territories. In that regard I quote from the decision of Madam Justice Charbonneau (as she then was) in *R v Mohammed* as follows:

The North is a very tempting market for drug traffickers, and judging by the number of drug cases that have been heard by the Territorial Court and this court over the last few decades, it is apparent that there continues to be a need to impose sentences that denounce this conduct and send a clear message that when people do get caught, they will face stern sentences no matter how young they are or no matter how good their background might otherwise be. Sadly, there are quite a few young people in the Northwest Territories who have learned that lesson the hard way.

The reason why courts have to be firm in their sentencing practices is very simple and was referred to this morning. Cocaine causes ravages and devastation in our communities. Yellowknife has seen its fair share of the collateral damage that crack cocaine has caused. The people who become addicted to this drug harm themselves of course. They sometimes lose everything to it, their families, their work, and their health, but they also often harm others. Houses get broken into, people commit robberies, sometimes on the street in broad daylight or in small convenience stores or gas stations to get money to buy more drugs, or they break into homes and steal property. And they steal, in addition to property, the occupants’ sense of safety in their own home, sometimes for a very long time. Some addicts get to the point of being so dysfunctional that they neglect their own children.

We do not just hear about cocaine in the Criminal Code. We hear about cocaine in family court frequently, and the Territorial Court hears about it in child welfare court frequently.

We agree with and adopt these remarks.

1. Since the sentence of three years probation is illegal and unfit we allow the appeal and impose a sentence of one year incarceration for the charge of possession of cocaine for the purpose of trafficking and a sentence of six months incarceration for the charge of possession of marihuana for the purpose of trafficking. These sentences are to be served concurrently. In addition to the period of incarceration we find that a 12 month Probation Order to follow (with the same conditions as contained in the sentence imposed by the sentencing judge) would be appropriate, however credit will be given for any probation already completed.
2. The question now becomes should there be a stay of the one year sentence of incarceration? On appeal, counsel for the respondent introduced, with Crown counsel’s consent, a Progress Report regarding the respondent.
3. We note that this is far from being a positive report. For example, the respondent has used both marihuana and alcohol although under conditions not to do so. Furthermore, the respondent failed to attend 12 counselling sessions that had been scheduled and in contrast attended only three.
4. We make the following comments. First as indicated previously, the respondent was in her mid-thirties at the time of the offences. She was not a youthful offender. Second, the respondent had been, in the past, a user of cocaine herself and must be taken to know of its devastating effects both upon the user and the community as a whole. Third, the respondent was a trained hair stylist and therefore had a skill with which to earn a legitimate livelihood.
5. The importance of the sentencing objectives of deterrence and denunciation should not be undermined. As the Ontario Court of Appeal noted in *R v Smickle*, 2014 ONCA 49 at para 18:

We agree with Crown counsel’s submission that the offence committed by the respondent was serious and that the principles of deterrence and denunciation must be paramount in fixing an appropriate sentence. If those principles cannot be adequately served without further incarceration, then incarceration is necessary, despite the significant hardship to the respondent and the risk it may pose to his rehabilitation and full reintegration into the community.

1. In relation to *Gladue* and *Ipeelee* considerations, we accept that the respondent’s upbringing in a home marked by violence and alcohol abuse, leading to her being raised in foster care for a period of time impacts her moral culpability for these offences as an Aboriginal offender. However, these considerations support the imposition of a minimal sentence of 12 months. They do not justify the imposition of a stay of what is otherwise a fit and proper sentence.
2. Given the primacy of the sentencing objectives of deterrence and denunciation for these offences, we decline to stay the one year term of incarceration.
3. The respondent is to be credited for any time she has already served in relation to the custodial portion of her sentence and with the time she already has spent on probation in relation to the probationary portion of her sentence including credit for any of the conditions imposed by the sentencing judge that she has completed such as community service.
4. All other ancillary orders granted by the sentencing judge remain in place.
5. The respondent is to turn herself in to the RCMP detachment in Inuvik within 72 hours or a warrant of committal will issue.

Appeal heard on January 16, 2018

Memorandum filed at Yellowknife, Northwest Territories

this  day of January, 2018

McDonald, J.A.

**Appearances:**

B. Macpherson

 for the Appellant

T. Bock

 for the Respondent

 A1-AP-2017-000 001

IN THE COURT OF APPEAL

OF THE NORTHWEST TERRITORIES

**Between:**

 **HER MAJESTY THE QUEEN**

Appellant

 **- and -**

 **MELINDA JOE**

Respondent

MEMORANDUM OF JUDGMENT