

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

ROBERT JOHN LIVINGSTONE

Transcript of the Oral Reasons for Sentence delivered
by the Honourable Justice L.A. Charbonneau, sitting
at Yellowknife, in the Northwest Territories, on June
29th, A.D. 2012.

APPEARANCES:

Ms. A. Paquin: Counsel for the Crown
Mr. P. Fuglsang: Counsel for the Accused
(Charges under s. 5(2) CDSA)

1 THE COURT: Earlier this week, Mr.
2 Livingstone pleaded guilty to two charges under
3 the Controlled Drugs and Substances Act: one
4 count of possession of cocaine for the purpose of
5 trafficking and one count of possession of
6 cannabis marijuana for the purpose of
7 trafficking. I must now sentence him for those
8 two offences.

9 The facts that led to these charges are
10 relatively simple. Mr. Livingstone was stopped
11 by the police about 40 kilometres outside the
12 City of Yellowknife in the early morning hours on
13 June 27th, 2010, just about two years ago today.
14 The police had started a drug related
15 investigation a few days before that as a result
16 of information that they had received from a
17 confidential human source. He was driving the
18 truck and he had one passenger with him.

19 The vehicle was taken back to the RCMP
20 detachment and was searched. The police found
21 268 grams of cocaine hidden inside the rear seat
22 of the vehicle. They also found 2,912 grams of
23 cannabis marijuana which was concealed inside
24 tires that were in the back of the truck.

25 Sold at \$20 per gram at the street level,
26 the value of that quantity of marijuana is close
27 to \$60,000. It would, of course, be worth less

1 than that if it was sold in larger quantities, by
2 the ounce or by the pound.

3 As for the cocaine, assuming a sales price
4 of \$120 per gram, the value of the quantity
5 seized that day is approximately \$32,000. Again,
6 the resale value would be less than that if the
7 drugs were sold in larger quantities, by the
8 ounce.

9 Mr. Livingstone provided a statement to the
10 police after his arrest. He admitted that he was
11 asked to take these drugs from British Columbia
12 to Yellowknife. He admitted that he was the one
13 who concealed the drugs in the manner described
14 before he left British Columbia. The Crown
15 advised that the passenger in the vehicle was
16 also charged in relation to this matter but was
17 found not guilty at trial.

18 Through the submissions of his counsel and,
19 to an extent, when he spoke directly to the
20 Court, Mr. Livingstone said that he was more or
21 less told to do this; that he had not intended on
22 committing these offences; that he is sorry that
23 he did; and that he has feared and still fears
24 retribution for having cooperated with the police
25 after he was arrested.

26 There is no evidence that he stood to make
27 any money out of this. According to his counsel,

1 what he was getting out of it was a means to
2 return to Yellowknife. His counsel advised that
3 Mr. Livingstone had recently moved to Yellowknife
4 from British Columbia. He had employment lined
5 up here. He wanted to go to British Columbia to
6 get his truck and drive it back. Once there, he
7 realized that the truck was not ready to be
8 driven back. He was short on funds. He was
9 anxious to get back to Yellowknife and it was
10 suggested to him that he could drive this
11 particular vehicle back, bringing the drugs with
12 him. All that information is not part of the
13 agreed facts, but it was conveyed by Mr.
14 Livingstone's counsel and the Crown has not
15 attempted to dispute it.

16 Mr. Livingstone's counsel described the
17 decision to agree to bring these drugs to
18 Yellowknife as a very bad choice. To say the
19 least, that is an understatement.

20 Mr. Livingstone has been in custody since
21 his arrest. His counsel advises that he spent
22 the entire time in administrative segregation at
23 the jail, because the authorities were concerned
24 for his safety. As a consequence, he has had no
25 access to any of the programs offered at the
26 jail. He has had very limited contact with
27 people during his time in custody, very limited

1 ability to use the facilities available to the
2 serving prisoners in the jail.

3 Counsel has also advised that he spoke to
4 Mr. Livingstone's case manager, who reported that
5 Mr. Livingstone was cooperative as an inmate and
6 that his behaviour was good while he was in
7 custody. It was further reported that there was
8 nothing about his behaviour that would have
9 prevented him from earning remission had he been
10 a serving prisoner instead of a remand prisoner.

11 Mr. Livingstone has a criminal record, but,
12 as was fairly acknowledged by the Crown, it is
13 unrelated. It is fairly dated, the last entry
14 being from 1999, more than 10 years ago. The
15 criminal record is part of Mr. Livingstone's
16 background, but I consider that it has minimal
17 weight for the purposes of this sentencing.

18 As far as Mr. Livingstone's personal
19 circumstances, I have heard that he is 48 years
20 old and he is originally from British Columbia.
21 He is a mechanic by trade, and his skills, I am
22 told, are largely self-taught. He grew up in
23 difficult circumstances, as his father was
24 violent and physically abusive towards him. I
25 heard of one instance where Mr. Livingstone, when
26 he was still very young, had to be hospitalized
27 as a result of an assault at the hands of his

1 father. His mother left the relationship and the
2 children were placed in care. Fortunately, the
3 siblings were kept together. Apparently, this
4 was at the insistence of Mr. Livingstone, even
5 though he would have still been quite young back
6 then. When he was 10, the children returned to
7 live with their mother and her new spouse.

8 Mr. Livingstone has a good work history. He
9 has worked at different jobs and has worked as a
10 mechanic. He has done some manual labour for CP
11 Rail and he has worked at repairing heavy
12 equipment. He has had some health issues,
13 including a nervous disorder when he was 21 from
14 which he has recovered. He also suffered a back
15 injury some time ago and has used marijuana from
16 that point on to control that pain, according to
17 his counsel.

18 The sentencing principles that provide the
19 framework for any sentencing decision are set out
20 in the Criminal Code. The fundamental sentencing
21 principle is proportionality. A sentence should
22 be proportionate to the seriousness of the
23 offence and the degree of responsibility of the
24 offender.

25 When considering the seriousness of a
26 criminal offence, one of the things to consider
27 is the sentence that can be imposed for it.

1 Possession of less than three kilograms of
2 cannabis marijuana for the purpose of trafficking
3 is punishable by a maximum sentence of five years
4 less one day in jail, but possession of cocaine
5 for the purpose of trafficking, irrespective of
6 quantity, is punishable by a maximum of life
7 imprisonment. That particular offence is among
8 the most serious provided for in the Controlled
9 Drugs and Substances Act and subject to the most
10 severe penalty available under our criminal law.

11 As for the degree of responsibility of Mr.
12 Livingstone, it is less than if he had been
13 motivated by greed and stood to make a profit
14 from his involvement with the illicit trade.
15 However, while he could be characterized as a
16 courier, he was also involved in the concealment
17 of the drugs in the vehicle.

18 I must say that what I heard earlier this
19 week leaves me with some uncertainty as to what
20 his actual motivation may have been. His counsel
21 referred to this as having been a way to
22 essentially get a ride back to Yellowknife. Mr.
23 Livingstone's comments, when he addressed me
24 directly on Monday, were to the effect that he
25 had been threatened. So I am not entirely clear
26 if the main reason he did this was because he
27 wanted to make his way back to Yellowknife so he

1 could report to his work, as was suggested in
2 counsel's submissions, or if it was because he
3 succumbed to some pressures from people, as he
4 alluded to in his comments. But whatever the
5 reason was, once he decided that he would do
6 this, he did take part in concealing the drugs
7 and there is no question that he knew exactly
8 where they were and the quantity he was bringing
9 into this community.

10 The courts in this jurisdiction and
11 elsewhere have long held that when dealing with
12 these types of offences, especially in relation
13 to hard drugs, the paramount sentencing
14 principles are deterrence, both general and
15 specific, and denunciation. This is so because
16 the drug trade is a very lucrative business. The
17 consequences for those who get caught have to be
18 harsh if they are to have any hope of making
19 people think twice before doing this kind of
20 thing. The consequences also have to be
21 significant to reflect the fact that this trade
22 causes a lot of harm and devastation in our
23 communities. As has been stated over and over
24 again by the courts in this jurisdiction and
25 elsewhere, these are not victimless crimes.

26 In recent years, this Court has had
27 occasion, unfortunately, to comment on the very

1 real impact that the trafficking in hard drugs
2 has had on our communities. In Yellowknife only,
3 we have had home invasions committed by people
4 who were desperate to get money to buy cocaine.
5 We have had a number of instances of respected
6 business people spiralling down after developing
7 an addiction to this drug and running their
8 business and themselves down to the ground. We
9 have had homicides committed in circumstances
10 related to the drug trade. We have had people
11 assaulted on the streets in broad daylight by
12 people who wanted to steal from them to get quick
13 money to buy the next hit of drugs. We have had
14 parents become addicts and neglect their own
15 children to the point of those children having to
16 be apprehended by Social Services. We have had
17 all sorts of violent crimes committed by those
18 trying to get money to buy these drugs, and we
19 have had all sorts of crimes of violence
20 committed by people under the influence of these
21 drugs.

22 These consequences were referred to in
23 recent cases such as R. v. Turner [2006] NWTJ No.
24 76, R. v. Desjarlais [2007] NWTJ No. 23,
25 R. v. Gosselin [2009] NWTJ No. 25, R. v. Baker
26 [2009] NWTJ No. 81, R. v. Howie [2009] NWTJ No.
27 46, to name only a few. Unfortunately, the

1 court's response to these crimes, imposing jail
2 terms of some significance, has not had the
3 effect of stopping this activity. But the courts
4 must continue to send the same consistent
5 message. The court's response to crimes
6 involving drugs, especially hard drugs, must
7 leave no doubt in the public's mind about the
8 consequences for those who choose to engage in
9 this kind of activity.

10 This is especially important when dealing
11 with people who take on a role that they may
12 consider to be peripheral: couriers or people who
13 agree to store the drugs for someone else, even
14 though they themselves are not making any money
15 out of it. These people are an essential part of
16 the chain. It is not a complicated proposition.
17 Those higher up in the chain of the drug trade
18 organizations, those who stand to make the most
19 money out of this, are not the ones who take the
20 risk of getting caught transporting these drugs.
21 The ability of those people to continue to
22 traffic is entirely dependent on having others
23 willing to take those risks, to act as couriers
24 and move the drugs, to store the drugs and also,
25 obviously, to sell them at a street level.

26 So there has to be a strong deterrent
27 message sent to anyone who, for whatever reason,

1 is inclined to agree to become a courier. One
2 would think that people would realize that the
3 very reason they are being asked to do this is
4 that, in fact, there is a risk of getting caught.

5 The drug world is not a world of tea parties
6 and crumpets. It is an underworld where people
7 set other people up, rat each other out, get back
8 at each other in a variety of distasteful and
9 criminal ways. And the police are out looking.
10 They have ways of finding things out. So those
11 who decide to take the risk and contribute to
12 this very destructive substance hitting our
13 streets must face the consequences. Even if they
14 themselves did not stand to make a profit from
15 it, the harm that these drugs cause is just too
16 great, and anyone who plays a part in that chain
17 bears responsibility for the devastating
18 consequences that I have already referred to.

19 I recognize that there are mitigating
20 factors in this case. It is mitigating that Mr.
21 Livingstone has pleaded guilty, although this is
22 not an early guilty plea. Crown counsel
23 acknowledged that the Preliminary Hearing in this
24 case was focused on very specific points that the
25 defence wished to explore, including possible
26 Charter issues. That Preliminary Hearing took
27 place over a year ago, in April, 2011, and there

1 has not been any reference as to why it has taken
2 so long since then to bring this matter to a
3 conclusion. But still, the guilty plea has
4 avoided the time and cost of a trial and for this
5 Mr. Livingstone deserves credit.

6 He also deserves credit for having
7 cooperated with the police after his arrest, and
8 I recognize that by doing so he has possibly
9 placed himself at some risk of retribution. The
10 correctional authorities certainly seemed to
11 think so, since they kept him in administrative
12 segregation while he was on remand.

13 As far as credit for the time that he has
14 spent on remand, counsel agree that the
15 circumstances of this case are such that I do
16 have the discretion to grant credit on a ratio
17 higher than one-for-one; namely, that I am
18 entitled to give him more than one day's credit
19 for every day he has spent on remand under the
20 provisions of the Criminal Code.

21 His counsel has provided information about
22 his detention conditions and his behaviour while
23 he was in custody. That information was obtained
24 by counsel speaking with Mr. Livingstone's case
25 manager.

26 As this Court recently recognized in
27 R. v. Mannilaq [2012] NWTSC 48, the issue of

1 credit to be given for remand time should be
2 approached on a case-by-case basis, not in a
3 mechanical way. The type of information that was
4 provided in this case through counsel can form
5 the basis for affording credit on an enhanced
6 basis.

7 In this case, I am satisfied that the
8 detention conditions that Mr. Livingstone was
9 under, even though they were for his own
10 protection, have made his remand time more
11 difficult than it would have been if he had not
12 been in segregation. The fact that his behaviour
13 was such that he would have been earning
14 remission, had he been a serving prisoner, is
15 something that I have also taken into account in
16 giving him credit for the time he has spent on
17 remand. Because of those reasons, I am satisfied
18 that he should get enhanced credit for the time
19 he has spent on remand.

20 The Crowns has asked for a number of
21 ancillary orders, and I will deal with those
22 first.

23 First of all, I have signed the forfeiture
24 order that was prepared by Crown counsel and
25 signed by defence counsel. The order will issue
26 as presented and the items listed in the order
27 will be forfeited.

1 Next, there will be a firearms prohibition
2 order pursuant to section 109 of the Criminal
3 Code. It will commence today and expire 10 years
4 from Mr. Livingstone's release from imprisonment.

5 Third, the Crown has asked that I issue a
6 DNA order. These are secondary designated
7 offences. That means that the order is
8 discretionary. The test that I must apply in
9 order to decide whether to make this order is set
10 out in the Criminal Code. It is in section
11 487.051(3), and I will just read an excerpt from
12 that. It says that:

13 The court may, on application by the
14 prosecutor and if it is satisfied
15 that it is in the best interests of
16 the administration of justice, make
17 a DNA order.

18 (...)

19 In deciding whether to make the
20 order, the court shall consider the
21 person's criminal record, whether
22 they were previously found not
23 criminally responsible on account of
24 mental disorder for a designated
25 offence, the nature of the offence,
26 the circumstances surrounding its
27 commission and the impact such an

1 order would have on the person's
2 privacy and security of the person.

3 In R. v. Gosselin, a similar application was
4 made in the context of a matter involving
5 possession of cocaine for the purpose of
6 trafficking. The quantity seized in that case
7 was 146.5 grams of cocaine. In that case, I
8 ultimately denied the Crown's application for a
9 DNA order. Mr. Gosselin was a young man. He had
10 no prior record. He had allowed his address to
11 be used for the delivery of a package that
12 contained the cocaine. The Crown's basis for
13 seeking the order was simply the inherent
14 seriousness of the offence. R. v. Gosselin,
15 paragraphs 60-64.

16 There are some differences between the
17 Gosselin case and this one. Mr. Livingstone was
18 found with two different types of drugs. The
19 quantity of cocaine found in his possession was
20 almost twice what it was in Mr. Gosselin's case.
21 Unlike Mr. Gosselin, he handled the drugs, in the
22 sense that he was the one who concealed them. He
23 also transported them some distance; whereas Mr.
24 Gosselin simply allowed his address to be used
25 and was going to give the package to a friend
26 when he was intercepted by police.

27 On balance, I am satisfied that there are

1 sufficient distinctions between the two
2 situations to justify a different outcome, given
3 the test provided in the Criminal Code which I
4 have just referred to.

5 The process for taking samples for DNA
6 testing is not particularly intrusive, and I am
7 satisfied, given the nature of the offence, the
8 circumstances of its commission and Mr.
9 Livingstone's criminal record, that it is in the
10 best interests of the administration of justice
11 to have a DNA order issue in this case.

12 That leaves the question of the jail term to
13 be imposed. The Crown's position is that a
14 sentence of two and a half years is an
15 appropriate sentence for this crime and that from
16 this I should give Mr. Livingstone credit for the
17 time he spent on remand.

18 I have given that position careful thought.
19 There is never just one and only one appropriate
20 sentence for a given crime committed by a given
21 offender. There is always a range that is
22 appropriate. The sentence proposed by the Crown
23 is within that range, but I consider it is at the
24 very low end of that range, considering the
25 quantities of drugs seized. The cases that were
26 filed by the Crown are useful to get a sense of
27 what the range is for these types of offences.

1 In Gosselin, the amount of drugs, as I have
2 said, was about half as much cocaine as in this
3 case and no other type of drug was seized. The
4 matter did go to trial, but, as the reasons for
5 sentence show, there were numerous admissions.
6 The admissibility of Mr. Gosselin's statement,
7 which was essentially a confession, was not
8 challenged. The trial was basically focused on
9 the question of Mr. Gosselin's knowledge and
10 wilful blindness as to what was in that package.
11 He was young and had no criminal record. He was
12 sentenced to two years less a day, but the Court
13 made it clear in that decision that this was
14 primarily because of his very young age and that
15 the sentence could have been much higher.

16 In R. v. Howie, the quantity of drugs seized
17 was larger - it was over 1,000 grams, if I recall
18 - and the involvement of the offender was more
19 significant, as he was actually selling some of
20 the drugs, but he also had extenuating personal
21 circumstances. The sentence imposed was two and
22 a half years on a guilty plea, and in that
23 decision the Court described that sentence as the
24 "absolute minimum", even considering the guilty
25 plea.

26 In R. v. Baker, the facts upon which the
27 offender was sentenced were that he had agreed to

1 let Mr. Howie store the drugs in the ceiling
2 above his restaurant in exchange for \$5,000. So,
3 again, the quantity of drugs was larger, but on
4 the facts alleged by the Crown the involvement
5 was less significant. In that case, counsel
6 presented a joint submission for two and a half
7 years in jail for that case. I applied the law
8 that joint submissions must be followed unless
9 they are clearly unreasonable, and I accepted the
10 joint submission. But in that case, as well, I
11 said that the sentence could easily have been
12 much more significant and that it was at the low
13 end of the available range.

14 Having reviewed those cases, reviewing the
15 comments that were made in them about the
16 seriousness of the drug trade problem in our
17 jurisdiction and the harm it continues to cause,
18 I conclude that this Court ought not to impose a
19 sentence that is at the low end of the available
20 range when dealing with this offence of
21 possession for the purpose in trafficking in a
22 hard drug such as cocaine. Perhaps the Court's
23 response needs to be more stern than it has been
24 to make the point that needs to be made in this
25 area.

26 In saying this, I am not being critical of
27 the Crown, as I do not think that the range

1 proposed by the Crown is inadequate. It does
2 fall within the range that emerges from some of
3 the cases decided in this jurisdiction. But
4 considering that there were two types of drugs
5 and the quantities involved, considering that it
6 appears the drug trade continues to be alive and
7 well in this community and considering the
8 terrible ravages that it causes, on balance I
9 have decided that the sentence must be higher
10 than what the Crown seeks. But I am going to
11 exercise some restraint still, as this, too, is
12 an important sentencing principle.

13 I am taking the principle of totality into
14 account and also the fact that these offences
15 were essentially committed simultaneously, and,
16 of course, I have taken into consideration the
17 guilty plea. What I want to make clearest of all
18 is I consider that the sentence that I have
19 determined is fit for this crime is certainly not
20 at the high end of the range, even on a guilty
21 plea, and that that is the reality that people
22 involved in these types of crimes need to be
23 aware of for future cases that might come before
24 this Court.

25 Please stand, Mr. Livingstone. For these
26 two offences, Mr. Livingstone, I have concluded,
27 for the reasons I have just mentioned, that a fit

1 sentence would be three years' imprisonment.
2 Because I have decided to give you the maximum
3 credit that the law entitles me to give you for
4 the two years you spent in jail, the net result
5 is that I am not going to impose a further jail
6 term today. But, as I have said, this is not the
7 high end of the range. This is maybe not even
8 the middle.

9 THE ACCUSED: I understand.

10 THE COURT: The sentence imposed for
11 today's purposes will be time served,
12 essentially. You can sit down now.

13 THE ACCUSED: Okay. Thank you.

14 THE COURT: For the purposes of the
15 warrant of committal, Madam Clerk - because we
16 are required to be very specific on these things
17 - the sentence on count 1 is three years. The
18 sentence on count 2 is two years concurrent. The
19 credit for the remand time is three years. So
20 the sentence imposed is time served.

21 Mr. Livingstone has the ability to work, and
22 although it may take him some time to get himself
23 organized and start working again, I have decided
24 there should be an order for payment of a victim
25 of crime surcharge in this case. The Criminal
26 Code sets out the amount of that surcharge. It
27 is not a large sum of money, but these surcharges

1 go to a fund that is used to assist victims of
2 crime.

3 As I said already, there are many, many
4 victims to drug crimes, and no one should ever
5 lose sight of that, and that is the reason why I
6 am imposing the surcharge. Section 737 of the
7 Criminal Code says that the surcharge is \$100,
8 and I am going to give Mr. Livingstone until
9 October 31st, 2012 to pay it. If you are not
10 able to do so, you can apply for extensions. But
11 in relative terms it is not a large sum of money,
12 and I think it is important that the surcharge
13 orders be made when possible.

14 Is there anything that I have overlooked,
15 Ms. Paquin?

16 MS. PAQUIN: No. Thank you, Your Honour.

17 THE COURT: Anything I have overlooked
18 from your perspective?

19 MR. FUGLSANG: No, ma'am.

20 THE COURT: All right. I want to thank
21 counsel for their work in resolving this case and
22 for your submissions earlier this week.

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Jill MacDonald, RMR-RPR
Court Reporter