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Docket: 12/10
Citation: *R. v. McNeil*, 2013 NLCA 52

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

STEPHEN JAMES MCNEIL

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Barry and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Grand Bank

Appeal Heard: May 23, 2013

Judgment Rendered: August 6, 2013

Reasons for Judgment by Welsh J.A.

Concurred in by Barry and White JJ.A.

Counsel for the Appellant: Averill Baker

Counsel for the Respondent: Suhanya Edwards

Welsh J.A.:

[1] Stephen McNeil was convicted of possession of cannabis marihuana for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*. He was sentenced to nine months imprisonment less fifteen days served on remand while awaiting sentence. He appeals both his conviction and sentence.

BACKGROUND

[2] On August 27, 2010, based on information supplied by an informant, the police stopped Mr. McNeil's vehicle. An "overwhelming" smell of marihuana emanated from the driver's open window. Mr. McNeil was arrested and a search of the vehicle resulted in the seizure of 3.15 pounds of marihuana and \$2200 in cash. He was charged with possession of cannabis marihuana for the purpose of trafficking. Upon being convicted of the offence, he was remanded in custody pending sentencing. Mr. McNeil's appeal has four bases.

[3] First, he submits, the trial judge erred in denying his request to elect to be tried in the Supreme Court, Trial Division. Second, he appeals the dismissal of his application alleging that his rights under sections 8 and 9 of the *Canadian Charter of Rights and Freedoms* were infringed. Third, he submits that the trial judge erred in revoking his judicial interim release pending sentencing. Finally, he appeals against the sentence of nine months less fifteen days served on remand after his conviction.

ISSUES

[4] There are five issues. Did the trial judge err in: (1) refusing to allow Mr. McNeil to elect to be tried in the Supreme Court; (2) concluding that Mr. McNeil's rights under sections 8 and 9 of the *Charter* were not infringed; (3) dismissing Mr. McNeil's submissions regarding deficient disclosure; (4) revoking Mr. McNeil's judicial interim release pending sentencing; and (5) sentencing Mr. McNeil to nine months, less fifteen days, imprisonment, refusing to order that the sentence be served conditionally, and ordering, as a term of his probation, that he remain within the Province for one year?

ANALYSIS

Absolute Jurisdiction of the Provincial Court over the Offence

[5] By information sworn on August 31, 2010, Mr. McNeil was charged with possession of marihuana for the purpose of trafficking. There was no reference to the amount of drugs at issue. On November 10, 2010, Mr. McNeil sought to elect to be tried in the Supreme Court, Trial Division rather than in Provincial Court. At that time, counsel for the Crown advised the Provincial Court judge that such an election was not available to the accused because the amount of marihuana at issue, 3.15 pounds, being less than 3 kilograms, mandated absolute jurisdiction over the offence by the Provincial Court (section 553(c)(xi) of the *Criminal Code* together with section 5(4) and Schedule VII(2) of the *Controlled Drugs and Substances Act*). The trial judge, accepting the Crown's advice regarding the amount of marihuana at issue, proceeded under the objection of counsel for Mr. McNeil. A plea of not guilty was entered and a date was set for a pre-trial *Charter* application.

[6] On February 2, 2011, the Crown filed a new information, sworn on January 2, 2011. The initial information reads:

On or about the 27th day of August, 2010, on Route 210, north of the Town of Marystown, in the Province of Newfoundland and Labrador did possess a substance included in schedule II to wit: cannabis marihuana for the purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act.

[7] The new information, which the Crown advised was intended to replace the earlier information, reads:

On or about the 27th day of August, A.D., 2010, on Route 210 north of the Town of Marystown in the province of Newfoundland and Labrador, did unlawfully have in his possession for the purpose of trafficking, not in excess of 3 kg (three kilograms) cannabis marijuana, a substance included in Schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit *an* offence contrary to Section 5(2) of the said Act. [The italicized "an" above originally read "and", but is marked on the information as amended.]

[8] In accepting the new information, the trial judge stated that he would "use the endorsements on the first information then to apply to the second." The endorsements on the first information included the not-guilty plea entered on November 10, 2010.

[9] Mr. McNeil's complaint is simply that he did not want to be tried in Provincial Court. However, as noted above, given the amount of drugs involved, the option of electing to be tried in the Supreme Court was precluded by operation of the *Criminal Code*. Mr. McNeil does not suggest that he has been prejudiced in his ability to answer to the charge. He was aware before his plea was taken that the Crown was proceeding on the basis that the amount of marihuana involved was less than three kilograms.

[10] To ensure that the trial was conducted on the basis of an appropriate information, the preferable procedure may have been for the Crown to request an amendment to the information to include reference to an amount of marihuana less than three kilograms at the November 10, 2010 hearing, prior to Mr. McNeil entering a plea. However, in the circumstances, the fact that the Crown waited until the next court appearance, choosing to file a new information rather than to amend the original information, does not vitiate the proceedings or affect the Provincial Court judge's jurisdiction over the matter.

[11] The decision in *R. v. Sewell*, 2003 SKCA 52, 175 C.C.C. (3d) 242, provides a helpful review of the effect of amending an information and of failing to do so. Pursuant to the original information, Sewell was charged in count one with trafficking in marihuana in an amount exceeding three kilograms. At the initial court appearance, the Crown advised that it was proceeding on the basis that the amount of marihuana was less than three kilograms. The Crown's application to amend the information was allowed giving absolute jurisdiction over the offence to the provincial court.

[12] The second count in the indictment charged Sewell with possessing marihuana for the purpose of trafficking, but did not specify an amount. The parties proceeded under the mistaken assumption that count two did not engage the right to an election. That count was not amended. On appeal, the Court concluded that the provincial court lost jurisdiction over that charge because Sewell was not put to his election and the information had not been amended to specify an amount of marihuana not exceeding three kilograms. In the result, the conviction under count two was quashed. However, Sewell was convicted under the amended count one.

[13] A similar approach was taken in *R. v. Tucker* (2006), 213 C.C.C. (3d) 89 (ONCA), where the Court concluded:

[9] We do not agree with the submission that the proceedings were a nullity on the ground that the information failed to specify either the quantity of drugs at issue or the section of the *Controlled Drugs and Substances Act* under which the charges were brought. That deficiency may constitute a valid ground for appeal after trial on such an information or indictment as in *R. v. Sewell, supra* at para. 55, as the deficiency could have deprived the accused of an election. However, we do not agree that the defect in the information in the present case rendered the proceedings a complete nullity and void *ab initio*. The information could have been amended to repair the deficiency: see s. 601(2)(b). In *R. v. Sewell, supra*, at para. 52, the case relied upon as authority for the proposition that a defect of this nature results in a loss of jurisdiction, one count was amended and the conviction on that count survived on appeal. We see no procedural denial comparable to what occurred in *R. v. Sewell, supra*.

[14] In the instant case, all the necessary procedural requirements were met. The filing of a new information had the same effect as amending the original. The application of the endorsements from the original to the new information, including the not-guilty plea, facilitated this result. Mr. McNeil was not prejudiced in his ability to answer the charge against him. Accordingly, the appeal on this basis must be dismissed.

Sections 8 and 9 of the Charter

[15] Sections 8 and 9 of the *Charter* guarantee rights regarding unreasonable search and seizure and arbitrary detention:

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

[16] The trial judge reviewed the factual background to Mr. McNeil's arrest and charge beginning with the informant who initiated the events ((2011), 311 Nfld & P.E.I.R. 26):

[19] ... On August 27, 2010, [Constable Lush] received information from [an informant] about Stephen McNeil. The [informant] has been a source of information for the police since 2006. Cst. Lush has known this [informant] since October, 2007, and has been the primary "handler" of this [informant] since March, 2010. Cst. Lush considered the [informant] to be reliable, because in the past, information received from the [informant] has been corroborated by positive search and seizure and arrests. Some of these seizures included cocaine and marijuana. The [informant] has provided information to the police on more than forty occasions. The [informant] has no criminal record, and has been paid in the past for information. The [informant] had earlier given Cst. Lush information about McNeil, on two separate occasions.

[17] On August 9, 2010, based on information from the informant that Mr. McNeil “was moving marijuana in a pickup truck” (paragraph 20), Constable Lush located Mr. McNeil in a Dodge Ram pickup truck. Mr. McNeil and his passenger identified themselves, but the police took no further action that day. The trial judge continued:

[22] On August 23, 2010, the [informant] contacted Cst. Lush again. This time, he said that McNeil had brought out another “load of weed” last week. The police started surveillance of the place where McNeil was believed to spend his time while in Marystown At the same time, Cst. Lush learned through [a] CPIC search that McNeil had been charged with a simple possession offence under the **Controlled Drugs and Substances Act** by the Royal Newfoundland Constabulary.

[23] On August 27, 2010, the same [informant] called Cst. Lush again. This was around quarter after two in the afternoon. The [informant] said that McNeil was on his way, heading South on Route 210, to Marystown with a load of marijuana. The [informant] also told the police officer that McNeil “never moves less than two pounds”.

[18] At about 6:00 p.m., the police located Mr. McNeil in a Dodge Ram crew cab pickup truck. The trial judge continued:

[25] . . . Constables Martel and Lush both approached the driver’s side door. As soon as the window was opened, the smell of marijuana was overwhelming. Cst. Lush said that there was an instant and overwhelming smell of cannabis marijuana coming out of the truck window.

[26] Based on this, Cst. Lush immediately placed McNeil under arrest, and advised him of his rights to counsel and to silence, and also read him verbatim the police caution. In addition to being advised of his constitutional rights, McNeil was also searched. In addition to a quantity of money, McNeil was carrying a red cell phone and a silver coloured marijuana grinder.

[19] Upon his arrest, Mr. McNeil was placed in the police car while the truck was searched. In the back seat of the crew cab the officers found a tool box in which there were four mason jars containing marihuana and a small bag of marihuana. As well, there was a hockey bag containing four large plastic bags of marihuana. Under the rear seat and in the glove compartment, the officers found a total of \$2200 in cash.

[20] In conducting his analysis under the *Charter*, the trial judge relied largely on what the officer described as “an overwhelming smell of fresh, unburned, marijuana coming from McNeil’s pickup truck” (paragraph 40)

and on the informant's tip "which the police had reason to consider reliable" (paragraph 43). In determining that Mr. McNeil was not arbitrarily detained, the trial judge referred to additional factors: the police knew Mr. McNeil and his vehicle from the August 9th stop, they knew he had recently been charged with drug possession, they had received information from a reliable source on three occasions that Mr. McNeil was "moving marijuana on the Burin Peninsula", and that he was "moving more than two pounds of the stuff at a time" (paragraph 47).

[21] Mr. McNeil's challenge to the trial judge's dismissal of the *Charter* application is based on three factors: (1) the trial judge's reference to the plain view doctrine; (2) reliance on the smell of marijuana emanating from the vehicle; and (3) failure of the Crown to disclose that the informant had indicated that Mr. McNeil was moving more than two (or a couple) of pounds of marijuana at a time.

[22] First, regarding the plain view doctrine, Mr. McNeil submits that the trial judge erred when he stated:

[41] ... Instead, the smell of marijuana, once recognized by the police for what it is, is in my view comparable to the plain view doctrine, and provides the grounds necessary for the police to believe that the occupant(s) of the vehicle from which the smell of marijuana emanates are or have been in possession of marijuana.

[23] Reading this statement in context, the reference to the plain view doctrine serves only as an analogy employed by the trial judge in recognizing that a police officer may use his senses, including smell, as one element in determining the presence of grounds to proceed with an investigation. However, while reference to the doctrine does not amount to error in the instant case, I would caution against use of the analogy. Something that is in plain sight may have stronger persuasive value in assessing police conduct than something that is smelled since smells travel in the air and may not be as clearly located as something that is seen. In the instant case, the smell was just one of many factors on which the police proceeded and was appropriately considered as such by the trial judge.

[24] Mr. McNeil submits, in any event, that he was arbitrarily stopped and detained by the police and that, therefore, the search of his vehicle violated his rights under the *Charter*. I begin with the initial detention of Mr. McNeil

by the police. In *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, Iacobucci J., for the majority, discussed investigative detention:

[45] To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. ... I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.

(See also: *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408.)

[25] In the instant case, Mr. McNeil's vehicle was stopped based on information from an informant whom the trial judge accepted as reliable. The police had been told that Mr. McNeil was "on his way" heading to Marystown with a load of marihuana (paragraph 17, above). Stopping the vehicle cannot be said to have been arbitrary. Further, the investigative detention was short in duration. The police officers reported an overwhelming smell of marihuana emanating from inside the vehicle. Mr. McNeil, who was the lone occupant, was immediately placed under arrest and advised of his constitutional rights. The search did not take place until after Mr. McNeil was arrested. In these circumstances, the investigative detention could not be said to be arbitrary.

[26] As to the validity of the arrest, in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, Sopinka J., for the majority, summarized factors relevant to the use of information provided by informants, at pages 1456 to 1457:

... Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* [[1989] 2 S.C.R. 1140] and *Greffe* [[1990] 1 S.C.R. 755].

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

- (a) the degree of detail of the “tip”;
- (b) the informer’s source of knowledge;
- (c) indicia of the informer’s reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[27] The factors discussed by the trial judge at paragraph 16, above, clearly satisfy the requirements for the use of information provided by an informant. In the context of assessing the validity of the arrest and consequent search, the informant’s information was corroborated by other factors. In particular, Mr. McNeil was alone in the vehicle, the police reported the overwhelming smell of marihuana, they knew Mr. McNeil and his vehicle from the August 9th stop, and they knew he had earlier been charged with drug possession. It follows that there is no basis on which to conclude that the trial judge erred in determining that Mr. McNeil’s arrest and the consequent search did not infringe sections 8 and 9 of the *Charter*.

Duty to Disclose

[28] Mr. McNeil submits that there was a deficiency in disclosure by the Crown because Constable Lush’s reference to the informant saying that Mr. McNeil “never moves less than two pounds” was not disclosed to the defence before the officer testified. The officer explained that he had not disclosed that particular information earlier because he believed it may have served to identify the informant. However, at the time of trial, he had reversed his opinion and felt that release of the information should not be problematic.

[29] The Crown’s duty to disclose is discussed in *R. v. Dixon*, [1998] 1 S.C.R. 244. Cory J., for the Court, explained:

[20] In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. Relevance was described in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467, in this way:

One measure of the relevance of information in the Crown’s hands is its usefulness to the defence: if it is of some use, it is relevant and should be

disclosed – *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

[21] ... The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. See *R. v. Chaplin*, [1995] 1 S.C.R. 727, at p. 742.

[30] In the circumstances of the instant case, the information at issue, that Mr. McNeil always had a minimum of two pounds, or a couple of pounds, when he was transporting marihuana to Marystown, could not be said to be relevant in the sense described in *Dixon*. It is not apparent, and counsel did not explain, how that information could reasonably have been used by Mr. McNeil to assist in his applications under sections 8 and 9 of the *Charter*, or for purposes of the trial.

[31] In summary, there is no basis on which to conclude that the trial judge erred in dismissing Mr. McNeil's application under sections 8 and 9 of the *Charter*.

Revocation of Judicial Interim Release

[32] Mr. McNeil appeals the trial judge's order by which, upon conviction, his judicial interim release was revoked. He was remanded for fifteen days pending sentencing, and that time was factored into the calculation of his sentence.

[33] At this stage of the proceeding, this issue is moot. The time was served and was taken into account as if the sentence began on the day of conviction.

[34] In appropriate circumstances this Court will address an issue that has become moot. However, this is not such an instance. The relevant law was not canvassed by Mr. McNeil to enable a full consideration of the issues by the Court. Accordingly, I would leave the question to another day.

Appeal Against Sentence

[35] The trial judge imposed a sentence of nine months, less the fifteen days served pending sentence. The applicable standard of review of a sentencing decision is set out in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500:

[90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. ...

[36] Lamer C.J.C., for the Court, went on to explain that deference to the decision of the trial judge is appropriate because, not only does that judge have the advantage of hearing the evidence but, as well:

[91] ... A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[37] In the instant case, the trial judge made some comments which, Mr. McNeil submits, indicate a failure to properly assess the circumstances and impose an appropriate sentence. The "normal maximum" or upper range of a sentence for possession of marihuana for the purpose of trafficking where the quantity is not large "would be around 24 months" (*R. v. Provost*, 2006 NLCA 30, 256 Nfld. & P.E.I.R. 205, at paragraph 57). The trial judge took this into account, though I caution that it is important to approach the analysis from the perspective of a 'range', rather than a 'ceiling' as referenced by the judge.

[38] In imposing a sentence of nine months, Mr. McNeil submits that the trial judge erred by relying on the decision in *R. v. Williams*, 2010 ONSC 3904, to assist in identifying an appropriate sentence. The difficulties with relying on the *Williams* decision relate to factual distinctions between the two cases. For example, *Williams* is not a decision from a court in this Province though the trial judge indicated his concern with the prevalence of marihuana related offences in the Burin area; Williams was convicted of trafficking in crack cocaine, a hard drug, an offence tending to result in a harsher sentence than in the case of soft drugs such as marihuana; while on judicial interim release, Williams was arrested and convicted on two occasions for breach of his recognizance and possession of marihuana, while

in Mr. McNeil's case, the other offence, possession of marihuana, was committed before his arrest for the within charge; Williams attempted to evade arrest which Mr. McNeil did not.

[39] There are decisions from this Province which would have provided the trial judge with a better basis for comparison in determining a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" and that is "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (sections 718.1 and 718.2(b) of the *Criminal Code*). However, consideration of cases more consistent with the facts of this case lead to the conclusion that a sentence of nine months would fall within an appropriate range in the circumstances. For summaries of case law regarding the range of sentence, see *R. v. Provost, supra*; and *R. v. Martin*, 2011 NLTD(G) 142, 316 Nfld. & P.E.I.R. 1.

[40] The trial judge also referred to Mr. McNeil's lack of remorse and failure to take responsibility for his conduct. A willingness to accept responsibility may be considered by a trial judge when assessing the offender's rehabilitative prospects. It is, in this sense, a mitigating factor. Where an expression of remorse or acceptance of responsibility is absent, it may be indicative of a convicted person's steadfast position that he has been wrongly convicted and expects to be exonerated on appeal. For this reason, failure to express remorse or to accept responsibility for criminal conduct may not be taken into account as an aggravating factor to increase a sentence.

[41] In the instant case, reading the decision as a whole leads to the conclusion that, in determining an appropriate sentence, the trial judge was attempting to balance the rehabilitative prospects of Mr. McNeil as a first-time offender as against the need for general deterrence arising from the societal concern with the extent of marihuana related offences in the area. There is no indication that the trial judge used Mr. McNeil's failure to express remorse or accept responsibility for his conduct as an aggravating factor resulting in a higher sentence.

[42] Finally, the trial judge indicated a particular concern with what he referred to as the prevalence of marihuana related offences in the area. He referred to a "companion case" in which an expert witness testified that "Newfoundland is flooded with marijuana". As noted in *M. (C.A.)*, "the needs and current conditions of and in the community" and the "protection

of that community” are valid factors to be considered (paragraph 36, above). The issue is also commented upon in *Provost*:

[13] In para. 15 of his sentencing decision, the Provincial Court Judge wrote:

“... considering the number of trafficking offences that are coming before the courts, it is obvious that conditional periods of imprisonment have failed to have a deterrent effect. [...]”

[14] It is good when judges are mindful of developments in their communities and of patterns of offences that come before the courts. That being said, such considerations need to be dealt with in ways that maintain procedural fairness; as well, they must not be used so as to detract from proper application of recognized principles of sentencing.

...

[16] An appropriate means to [maintain procedural fairness] was set out by Goodridge, C.J.N., in **R. v. Abbott** (1992), 97 Nfld. & P.E.I.R. 213; 308 A.P.R. 213 (NLCA) at para. 22 and 23:

“While a Court may take judicial cognizance of its own records, it is probably not proper in this context to draw conclusions from them without giving counsel an opportunity to be heard to resist the drawing of those conclusions.

“It would have been a better practice for the judge to make this observation and to allow counsel to make representations in respect of them before imposing sentence. He might have asked Crown counsel to adduce evidence in that respect.”

[43] In the instant case, in his submissions at the sentencing hearing, Crown counsel referred to this portion of the *Provost* decision, raising the issue as a factor to be considered in determining an appropriate sentence. There is no indication that counsel for Mr. McNeil made representations in response.

[44] The prevalence of criminal activity is a factor which relates to general deterrence as a sentencing principle to be considered in conjunction with other sentencing principles. (See, for example, *R. v. Nguyen*, 2013 ONCA 51, at paragraph 4.) In *R. v. Cody*, 2007 PESCAD 7, 265 Nfld. & P.E.I.R. 190, McQuaid J.A. commented:

[43] Trial judges, particularly Provincial Court judges in this province, are in the front lines of the protection of society from the perpetrators of the heinous crime of trafficking in cocaine, and they are acutely aware of the prevalence of this type of offence in our community. They have a sense from their vast experience of dealing with like offences and like offenders as to the type of sentence which best achieves all the purposes and objectives of the individualized sentencing process. If they are of the view it is necessary to give primacy to objectives of deterrence and denunciation to alleviate society of this drug and this crime, this Court should not interfere absent a valid argument this constitutes an error in principle. ...

[45] In the instant case, the issue was raised by the Crown. The preferred approach would have been for the Court to ask counsel for Mr. McNeil if she intended to respond, particularly in light of the evidence the Crown led in the *Lewis* case. (Here, the situation is unusual because the trial judge wrote one decision regarding the section 8 and 9 *Charter* applications covering three separate cases, including this case and *R. v. Lewis*, [2011] N.J. No. 253 (P.C.) . In *Lewis*, the Crown led evidence regarding the prevalence of marihuana related offences in the area.) However, the fact that the trial judge did not take this step is not determinative. The issue was raised in the Crown's submissions. It was open to counsel for Mr. McNeil to respond. There may have been strategic reasons to explain why she did not take that action.

[46] Finally, in refusing to order that the sentence be served conditionally, the trial judge began with reference to section 742.1 of the *Criminal Code* which requires that the judge:

... is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2
...

[47] As noted above, the trial judge was concerned with general deterrence, particularly given what he determined to be the prevalence of marihuana related offences in the area and the failure of conditional sentences to have the necessary deterrent effect. In addition, he was not satisfied that Mr. McNeil had demonstrated that he had insight into the wrongfulness of his conduct, which led him to conclude that it was "unrealistic, therefore, to expect him to correct his behaviour" (paragraph 29). In the result, the trial judge concluded that the requirements of section 742.1 had not been satisfied.

[48] In assessing this conclusion, I am mindful of the caution expressed in *M. (C.A.)*:

[91] This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire* [[1995] 4 S.C.R. 227], at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. ... A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. ...

[49] In the instant case, the trial judge had before him a pre-sentence report in addition to the evidence heard at trial and the submissions of counsel. On balance, the judge determined that societal concerns deserved particular consideration and weight, especially given his assessment that, based on the evidence he heard and Mr. McNeil's position regarding his culpability, an order that the sentence be served conditionally would not satisfy the fundamental purpose and principles of sentencing. There is no basis on which to interfere with this discretionary decision of the trial judge.

[50] To summarize, a nine month sentence for this level of trafficking is well within the range. Further, there no basis on which to interfere with the trial judge's discretionary decision to deny Mr. McNeil's application to serve the sentence conditionally.

Probation Condition Not to Leave the Province

[51] Mr. McNeil submits that the trial judge erred in imposing, as a condition of probation, the requirement that he "remain within the Province of Newfoundland and Labrador". This is not an invalid condition. The *Criminal Code* authorizes a judge to impose optional conditions in a probation order. If the condition becomes inappropriate, for example, by a change in circumstances, the court that made the order may make changes or adjustments to the condition. Section 732.2(3) of the *Code* provides:

A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,

(a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,

(b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition,

...

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.

[52] Accordingly, should it be appropriate to alter the requirement that Mr. McNeil remain in the Province during his period of probation, he may make an application under section 732.2 of the *Code*. There is no basis on which to conclude that the trial judge erred in imposing the optional condition at the time of sentencing.

SUMMARY AND DISPOSITION

[53] In summary, absolute jurisdiction over the offence resided in the provincial court. The necessary procedural requirements were met. Mr. McNeil was not prejudiced in his ability to answer the charge against him.

[54] Mr. McNeil's rights to be secure against unreasonable search or seizure and not to be arbitrarily detained under sections 8 and 9 of the *Charter* were not infringed.

[55] There was no problematic deficiency in disclosure by the Crown. The information at issue does not meet the relevancy threshold underlying disclosure.

[56] Revocation of Mr. McNeil's judicial interim release upon conviction and incarceration for fifteen days pending sentencing is moot. This is not an appropriate case in which to address general principles that may apply.

[57] A sentence of nine months imprisonment is well within the appropriate range. There is no basis on which to interfere with the trial judge's exercise of discretion to emphasize general deterrence rather than possible rehabilitation of Mr. McNeil and to refuse an order that the sentence be served conditionally. Should it be appropriate, an application may be made to alter the requirement that Mr. McNeil remain in the Province during the period of probation.

[58] Accordingly, I would dismiss the appeal.

B. G. Welsh J.A.

I Concur: _____

L. D. Barry J.A.

I Concur: _____

C. W. White J.A.