



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

**Citation:** *R. v. Mitchell*, 2017 NLCA 26

**Date:** April 18, 2017

**Docket:** 201701H0005

**BETWEEN:**

DARLA CATHERINE MITCHELL

APPELLANT

**AND:**

HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA

RESPONDENT

**Coram:** Welsh, Harrington and Hoegg JJ.A.

**Court Appealed From:** Grand Bank Provincial Court

**Appeal Heard:** March 16, 2017

**Judgment Rendered:** April 18, 2017

Reasons for Judgment by Welsh J.A.

Concurred in by Harrington and Hoegg JJ.A.

**Counsel for the Appellant:** Donald MacBeath Q.C.

**Counsel for the Respondent:** Elaine Reid

**Welsh J.A.:**

[1] On October 18, 2016, Darla Mitchell was convicted of one count of trafficking in oxycodone contrary to section 5 of the *Controlled Drugs and Substances Act*. She appeals the sentence of fifteen months imprisonment that was imposed on January 12, 2017. Leave to appeal was granted on February 21, 2017 (2017 NLCA 15).

**BACKGROUND**

[2] On August 5, 2015, Ms. Mitchell was stopped for a traffic violation. Acting on a tip, the police searched her vehicle. No drugs were found and she was released without charge. However, her cell phone was seized and a warrant was obtained permitting the police to extract data from the phone. An application under the *Canadian Charter of Rights and Freedoms* to exclude the evidence from the cell phone was dismissed and has not been appealed.

[3] When the *Charter* application was unsuccessful, Ms. Mitchell admitted the facts and opinions in the report on data obtained from the cell phone and the report of Constable Emberley. A conviction was entered on that basis. The trial judge described the offence as “a dial-a-dope” operation involving prescription drugs, occurring over several months, in which arrangements for the sale of the drugs were made by phone.

[4] In the sentencing decision, the trial judge summarized (2017 NLPC 0815A00261):

[4] The Appendix to the report prepared by Cst. Emberley sets out a persistent pattern of drug trafficking. Counsel for the Crown pointed out that there were 17 drug trafficking related text messages over 13 days in April, 4 such texts in each of May and July, and 5 in each of June and August. ...

[5] ... At page 6 of the [pre-sentence report], [Ms. Mitchell] is described as having “sold drugs to support her habit”. The PSR also says, at page 7, that [Ms. Mitchell] is “attending the Opioid Treatment Centre and has been compliant with the requirements of the program”.

[6] The PSR also advises that [Ms. Mitchell] is a 21 year old first offender who is working and who is in a common law relationship. The author of the PSR considers [Ms. Mitchell] to be a suitable candidate for community supervision.

[5] In imposing sentence, the judge noted that the maximum sentence for trafficking in oxycodone, a Schedule I drug, is life imprisonment, and that

section 742.1(e) of the *Criminal Code* precludes the option of a conditional sentence. Regarding the range of sentence, he concluded:

[8] All of these decisions are from this jurisdiction, and generally support a sentence of incarceration for trafficking in Schedule I drugs. While *Bearns* [(1989), 77 Nfld. & P.E.I.R. 103 (Nfld. C.A.)] set out a range of 6 to 36 months, the range of sentence which is found in the more recent jurisprudence for first offenders is between 15 months and 2 years less a day.

[6] The judge emphasized the need for denunciation and deterrence as applied to the trafficking of Schedule I drugs, and referred to such offences as “a prevalent and persistent part of the docket of this court” (paragraph 19).

[7] Ms. Mitchell submits that, in her case, rehabilitation was particularly relevant and that an appropriate sentence would be a non-custodial disposition by suspending the passing of sentence and imposing a lengthy period of probation. The judge concluded:

[23] For more than two decades, our Court of Appeal has consistently endorsed periods of incarceration for Schedule I drug dealers, including first offenders who plead guilty. The Court of Appeal has also consistently endorsed the principle of parity of sentence. There is no reason to sentence [Ms. Mitchell] to any different sentence than the other drug dealers who have been sentenced for similar offences in this jurisdiction.

[24] For these reasons, a term of imprisonment of 450 days (fifteen 30 day months) is ordered. It is at the low end of the range of sentence set out in the local jurisprudence. The sentence is set at the low end recognizing the efforts of [Ms. Mitchell] at rehabilitation, as well as the s. 655 admission of fact. Crown counsel is correct when he says that there is a distinction between an admission of fact and a guilty plea. However, the admission of fact did abbreviate the trial.

## ANALYSIS

[8] Ms. Mitchell submits that the trial judge erred regarding the use of the range of sentence in two ways: first, that the appropriate range is not fifteen to twenty-four months less a day; and, second, that a range must be construed as a guideline to be applied in accordance with the principles of sentencing.

[9] The fundamental principles that apply on a sentence appeal are discussed in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089. Wagner J., for the majority, explained:

[44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

...

[51] Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.

[52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" ... . All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

[53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.

[54] ... The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. ...

[10] Regarding the use of ranges, Wagner J. explained:

[60] In other words, sentencing ranges are primarily guidelines, and not hard and fast rules: *Nasogaluak* [2010 SCC 6, [2010] 1 S.C.R. 206], at para. 44. As a result, a deviation from a sentencing range is not synonymous with an error of law or an error in principle. ...

...

[69] ... The sentencing ranges must in all cases remain only one tool among others that are intended to aid trial judges in their work.

[11] For a range to be helpful in determining an appropriate sentence, it must be sufficiently broad to account for proportionality as discussed in *Lacasse*. The trial judge referred to the decision in *R. v. Bearns* (1989), 77 Nfld. & P.E.I.R. 103 (Nfld. C.A.), citing a range of six to thirty-six months imprisonment for possession of cocaine for the purpose of trafficking. However, he declined to apply that range in favour of “more recent jurisprudence” which he concluded established a range of fifteen months to two years less a day.

[12] A nine-month range is too narrow to be helpful, and sets the low end of the range at too high a level to accommodate the principle of proportionality which, along with other sentencing principles, underlies the range of six to thirty-six months set out in *R. v. Bearns*. That range was reiterated in *R. v. Byrne*, 2009 NLCA 3, 281 Nfld. & P.E.I.R. 353, at paragraph 17, with reference to *R. v. Brown* (1997), 155 Nfld. & P.E.I.R. 188 (Nfld. C.A.).

[13] Further, in setting a range of fifteen to twenty-four months less a day, the trial judge characterized charges of trafficking in prescription drugs, such as oxycodone, as being “a prevalent and persistent part of the docket of this court”, and referred to the submission of Crown counsel that “the drug problem is rampant on the Burin Peninsula” (paragraph 19).

[14] While, in appropriate circumstances, conditions in a particular locale may be relevant to the imposition of sentence, some evidentiary basis must be established for altering the range of sentence by distinguishing that locale from others in the Province. Making an adjustment to the range should be distinguished from taking account of conditions in the community in determining an appropriate sentence for a particular offender. The relevance of this factor is discussed by Lamer C.J.C., for the Court, in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500:

[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. ...

(Emphasis added.)

[15] Conditions in the community is just one factor to be taken into account, and must be balanced with other principles of sentencing including parity and proportionality. As discussed in the subsequent decision in *Lacasse*, at paragraph 53 (paragraph 9, above), proportionality involves an individualized assessment taking account of sentences imposed in similar circumstances.

[16] Finally, it is clear from his decision that the judge used fifteen months as a “starting point”, though he referred to it as the “low end of the range of sentence set out in the local jurisprudence” for a first-time offender trafficking in Schedule I drugs. The judge’s analysis indicates that he was assuming that the sentence would comprise a minimum of fifteen months imprisonment regardless of the circumstances of the offender and the offence. This approach was in error. In *R. v. Byrne, supra*, Rowe J.A., for the Court, stated (footnote 1):

This Court does not use the “starting point” approach. Rather, we use the “acceptable range” approach. See *R. v. Shropshire*, [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37, where at para. 50, Iacobucci, J., for the Court, wrote:

“Unreasonableness in the sentencing process involves the sentencing order falling outside the ‘acceptable range’ of orders ...”.

[17] The approach taken by the trial judge failed to recognize that sentencing ranges are intended to be guidelines, “not hard and fast rules” setting a minimum sentence for a particular charge (*Lacasse*, at paragraph 60 (paragraph 10, above)).

[18] In summary, the trial judge erred in principle and in law by (1) establishing a new range of sentence without a proper basis, (2) applying the lower end of that range as a starting point, (3) adopting a range that is too narrow to accommodate the determination of proportionate sentences, and (4) failing to use the range of sentence as a guideline to determine an appropriate, proportionate sentence in the circumstances of the particular offender.

[19] These errors had an impact on the sentence because the judge did not consider imposing a sentence other than a minimum of fifteen months imprisonment regardless of the relevant circumstances. His consideration of mitigating factors was improperly restricted by his failure to apply an appropriate range of sentence and to use the range as a guideline. Further, he did not take account of all the relevant mitigating factors, relying only on Ms. Mitchell's efforts at rehabilitation and her admission of facts. In the result, the sentence must be varied in accordance with section 687(1)(a) of the *Criminal Code*.

### Appropriate Sentence

[20] In determining an appropriate sentence, the circumstances to be considered include: Ms. Mitchell is a first-time offender; she was nineteen years of age at the time of the offence; she was addicted to oxycodone and trafficked in pills in order to support her habit; she squandered on her addiction \$60,000 left to her by her deceased father; she was trafficking oxycodone in relatively small amounts at irregular intervals over several months; when arrested, she realized the extent of her problem and immediately sought help to overcome her addiction; at the time, her partner was also addicted to drugs but is currently on a methadone program; upon being charged, Ms. Mitchell moved back home with her mother, separating for a time from her partner; approximately one year later she relocated to St. John's, is employed and is participating successfully in a methadone program; she would be characterized as a minor street level trafficker of a Schedule 1 drug.

[21] Ms. Mitchell has expressed shame and accepted responsibility for her actions. The post-sentence report includes a positive review of her behaviour during her incarceration in which she has exhibited responsibility in undertaking assigned tasks, and has been "a very positive influence" and "exhibits an excellent work ethic" in a program that requires "long hours" and the trust of staff. In addition to continuing with the methadone treatment program, she is attending programs such as adult basic education and has completed two addictions group programs, having participated actively.

[22] The fact that Ms. Mitchell was trafficking in a "hard" drug must be considered in determining an appropriate sentence that will address the principles of denunciation and deterrence as well as rehabilitation. The relevance of the distinction between "hard" and "soft" drugs is discussed in

*R. v. Provost*, 2006 NLCA 30, 256 Nfld. & P.E.I.R. 205, at paragraphs 21 to 25. The two types of drugs are dealt with in separate schedules to the *Act*, with differing maximum sentences. In general, sentences for trafficking in “hard” drugs will be more severe than in the case of “soft” drugs.

[23] In considering an appropriate range of sentence, in addition to *Bearns*, the following are of assistance. In *Byrne, supra*, the offender pleaded guilty to possession of cocaine for the purpose of trafficking. Rowe J.A., for the Court, wrote:

[3] Mr. Byrne was found with 10 ounces of cocaine (divided into one ounce lots) and \$10,410 cash, digital scales, “score sheets” and drug paraphernalia. A police drug expert valued the cocaine at \$18,000.

[24] Mr. Byrne, who was twenty-eight years old at the time of the offence and a first-time offender, was employed, and said he sold drugs to earn money for a new car. He was sentenced to two years less a day to be served conditionally in the community. (Following an amendment to the *Criminal Code*, a conditional sentence is no longer available.) In *Byrne*, Rowe J.A. discussed a similar case:

[40] I would note, as well, a recent decision of this Court that also informs the decision in this case, albeit it relates to trafficking in a variety of drugs. In *R. v. Barrett (T.)* (2008), 275 Nfld. & P.E.I.R. 308, 842 A.P.R. 308, 2008 NLCA 23, the offender pleaded guilty to trafficking in various drugs, principally ecstasy, but including a small quantity of cocaine. The value of the drugs was \$29,000. The offender was motivated by profit, rather than to support an addiction. He had a prior conviction for possession of marijuana. The sentencing judge, emphasizing rehabilitation, imposed two years less a day conditional. On appeal, the Crown sought to increase the sentence to three years. This Court upheld the conditional sentence (though with more stringent conditions). See also *R. v. Chow (D.)* (2008), 273 Nfld. & P.E.I.R. 126; 833 A.P.R. 126; 2008 NLCA 10.

[25] In *R. v. Brown, supra*, this Court affirmed a sentence of six months consecutive for two convictions for trafficking in small amounts of cocaine that were sold to an undercover police officer for \$60 on two separate occasions. The result was a total of twelve months imprisonment to be served conditionally in the community.

[26] In *R. v. Strickland*, 2010 NLTD 2, 294 Nfld. & P.E.I.R. 190, Handrigan J. imposed a sentence of sixteen months imprisonment for trafficking in Schedule I drugs. The police had seized from Mr. Strickland’s residence 9.6 grams of cocaine, 66 ecstasy pills, and 2 oxycontin pills along

with drug paraphernalia. The judge distinguished *Brown* on the basis that, in that case, the amounts were small, Mr. Brown had no criminal record for drug trafficking, and he had acknowledged his addiction problem and entered a rehabilitation program on his own initiative before he knew he was being investigated by the police.

[27] By contrast, in *Strickland*, the judge refused to order a conditional sentence, finding that the offender posed a risk of further harm to the community. Handrigan J. explained:

[46] ... The author of the pre-sentence report rated the risk [to reoffend] as “medium”. I addressed that risk in the preceding paragraphs by discussing the various factors that Mr. Strickland says lead him to traffic in drugs. Many of those factors – lack of money; lack of work; isolation in the community; and lack of structure in his life – are still present. While he identified a gambling addiction as a significant contributor, he has not shown how he will deal with his gambling problem. The risk, then, is that Mr. Strickland may slip back into trafficking in hard drugs as he struggles to cope with the negative influences which still bear on him.

[28] In *R. v. Woodford* (2013), 335 Nfld. & P.E.I.R. 336 (N.L. Pv.Ct.), the offender was sentenced to fifteen months imprisonment for trafficking in methylphenidate, diazepam, cocaine and methadone. The drugs were sold from Mr. Woodford’s truck as he drove to parking lots to meet people and conduct the transactions. Walsh P.C.J. accepted that Mr. Woodford and his partner were both addicted to prescription drugs and that:

[20] Their collective drug habit was costing them hundreds of dollars per day. To feed their habit, he began selling large amounts of the same drugs. As their addiction got worse, he expanded the type of drugs he was selling in order to address the increased cost of their addiction.

[21] Subsequent to his arrest on this set of charges, Mr. Woodford entered the Opioid Treatment Centre in Pleasantville. His partner had entered the program the previous February. He indicates that [aside from the methadone treatment program] he has been drug-free since July 2012 and his partner has been drug-free since February 2012.

[29] Regarding aggravating factors, the judge determined:

[54] Conversely, I find the following to be aggravating factors:

(1) The drugs involved were highly addictive.

(2) Mr. Woodford possessed a prohibited weapon during his transactions; namely, the knuckles.

(3) Mr. Woodford's placement of the hammer between the driver's seat and condole indicates that it was part of his drug dealer's tools.

(4) There evolved a commercial aspect to his drug trafficking given the multiple types of drugs involved and that his partner had first applied for and then commenced treatment for her opioid addiction prior to his arrest.

(5) He was being fronted larger amounts of drugs which indicates a regular and sustained drug marketing program.

(6) Mr. Woodford was operating a "mobile drug store" similar to a "dial-a-dope" operation.

(7) Mr. Woodford had previous convictions for s. 4(1) of the *Controlled Drugs and Substances Act*.

[30] Mr. Woodford was employed, twenty-five years old, and had a supportive family. He accepted responsibility and expressed remorse for his actions. In the pre-sentence report he was assessed as a medium risk to reoffend. In imposing the fifteen-month sentence for the drug offences, the judge reiterated the need especially for general deterrence and denunciation, balanced against Mr. Woodford's efforts towards rehabilitation.

[31] Turning to the case on appeal, in determining an appropriate sentence, deterrence, particularly general deterrence and denunciation are important factors. The courts are well aware of the broadly-based social costs related to trafficking in prescription drugs such as oxycodone. Taking these factors into account, in achieving a proportionate sentence, the particulars of this offender and this offence must be assessed.

[32] Ms. Mitchell is young, a first-time offender who was trafficking in drugs on an irregular basis to obtain funds to finance her addiction. Immediately upon being charged, she took positive steps to address her addiction. She has family support and has taken advantage of her time in prison to continue with the methadone treatment program and to access other programs designed to address her addiction problems in the long term.

[33] In the circumstances, I would impose a term of imprisonment of seven months. This serves as notice to those who might consider undertaking similar drug trafficking activities, particularly involving Schedule I drugs,

that a term of imprisonment is to be expected. On the other hand, account must be taken of serious steps towards rehabilitation.

Additional Comment

[34] Ms. Mitchell requested that this Court consider adopting the approach of the British Columbia Court of Appeal in *R. v. Voong*, 2015 BCCA 285, in which the Court imposed a suspended sentence with lengthy probation for trafficking in Schedule I drugs. As discussed above, on the facts of the case before this Court, such a sentence would not be appropriate or proportionate. It is necessary, then, to leave this question for another day.

**SUMMARY AND DISPOSITION**

[35] In summary, I conclude that the trial judge erred in principle and in law by (1) establishing a new range of sentence without a proper basis, (2) applying the lower end of that range as a starting point, (3) adopting a range that is too narrow to accommodate the determination of proportionate sentences, and (4) failing to use the range of sentence as a guideline to determine an appropriate, proportionate sentence in the circumstances of the particular offender. These errors had an impact on the sentence with the result that the sentence should be varied in accordance with section 687(1)(a) of the *Criminal Code*.

[36] In the circumstances, I would impose a sentence of seven months imprisonment. The remaining provisions of the trial judge's order were not appealed and would remain in force.

---

B. G. Welsh J.A.

I Concur: \_\_\_\_\_

M. F. Harrington J.A.

I Concur: \_\_\_\_\_

L. R. Hoegg J.A.