



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

Citation: *R. v. Nofall*, 2022 NLCA 23

Date: April 18, 2022

Docket Number: 201701H0104

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

CHARLES SHANNON NOFTALL

RESPONDENT

Coram: Hoegg, O'Brien and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G4105
(2017 NLTD(G) 185)

Appeal Heard: June 16, 2021

Judgment Rendered: April 18, 2022

Reasons for Judgment by: O'Brien J.A.

Concurred in by: Hoegg and Butler JJ.A.

Counsel for the Appellant: Elaine Reid

Counsel for the Respondent: Self-Represented

Authorities Cited:

CASES CITED: *R. v. Nofall*, 2017 NLTD(G) 128; *R. v. Nofall* 2017 NLTD(G) 185; *R. v. MacLean*, 2021 NLCA 24; *R. v. Noseworthy*, 2021 NLCA 2; *R. v. Tuglavina*, 2020 NLCA 30; *R. v. Roberts*, 2019 NLCA 43; *R. v. R.B.*, 2019 NLCA 22; *R. v. Martin*, 2018 NLCA 12; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Friesen*, 2020 SCC 9; *R. v. Parranto*, 2021 SCC 46; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Oates* (1992), 100 Nfld. & P.E.I.R. 289 (Nfld. C.A.); *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78; *R. v. Parsons*, 2017 NLCA 64; *R. v. Blok-Andersen*, 2016 NLCA 9, 376 Nfld. & P.E.I.R. 130; *R. v. Taylor*, 2013 NLCA 42, 337 Nfld. & P.E.I.R. 24; *R. v. Kleykens*, 2020 NSCA 49; *R. v. English*, 2012 NLCA 64, 328 Nfld. & P.E.I.R. 14; *R. v. Antle* (1993), 108 Nfld. & P.E.I.R. 321 (Nfld. C.A.); *R. v. Tuglavina*, 2011 NLCA 13, 305 Nfld. & P.E.I.R. 265; *R. v. J.J.*, 2004 NLCA 81, 244 Nfld. & P.E.I.R. 24; *R. v. J.E.D.*, 2018 MBCA 123; *R. v. Burnett*, 2017 MBCA 122.

STATUTES CONSIDERED:

Criminal Code, R.S.C. 1985, c. C-46, sections 676(1)(d), 718, 718.1, 718.2(b).

O'Brien J.A.:

Overview

[1] Charles Nofall was convicted in the Supreme Court of Newfoundland and Labrador of conspiracy to traffic in cocaine and in cannabis marihuana (*R. v. Nofall*, 2017 NLTD(G) 128, the conviction decision). He was sentenced to three years imprisonment for conspiracy to traffic in cocaine and two years imprisonment, to be served concurrently, for conspiracy to traffic in cannabis marihuana (*R. v. Nofall*, 2017 NLTD(G) 185, the sentence decision).

[2] The Crown is appealing the three-year sentence for conspiracy to traffic in cocaine and is seeking a greater period of imprisonment.

[3] The Crown argues that the sentencing judge made errors that impacted Mr. Nofall's sentence and that the sentence is demonstrably unfit. Mr. Nofall argues that the appeal should be dismissed. Alternatively, in the event that the appeal is allowed, and a greater period of imprisonment is imposed, he submits that he has served the original sentence and should not be re-incarcerated.

[4] For the reasons that follow, I would allow the appeal and impose a sentence of 4.5 years (54 months) imprisonment on the conviction for conspiracy to traffic in cocaine. I would stay the balance of this 54-month sentence, as Mr. Nofall's re-incarceration is not required in the public interest.

Background

[5] Mr. Nofall was convicted following a trial in the Supreme Court. Others involved in the conspiracy included Mr. Tan Tai Huynh and Mr. Alex Prefontaine, both from Quebec, Mr. Rodney Noseworthy, a friend who Mr. Nofall recruited into the conspiracy to distribute the drugs locally, and several other street-level dealers.

[6] Neither Mr. Nofall nor any other witness testified at the trial. By consent, documents were entered into evidence, including a 70-page agreed statement of facts, transcripts from police surveillance and other exhibits, as described in the conviction decision (para. 2):

The trial evidence comprised documentary exhibits only, all filed with consent of the Crown and the accused. There was no oral testimony. The Crown counsel made oral submissions on the law relating to conspiracy. Defence counsel made no substantive submissions. The accused maintained his plea of not-guilty. Both counsel asked that I review the documentary exhibits and make a determination. The exhibits included: agreed statement of facts, expert opinion of Sgt. Steve Conohan, and two volume binders with cell phone records and intercepted private communications.

[7] The evidence at trial described how the conspiracy worked. According to this evidence, cocaine and cannabis marihuana were hidden in the gas tanks of vehicles that were transported from Quebec to St. John's. Mr. Nofall owned a commercial automotive garage in St. John's, which he operated as his place of business. When the vehicles arrived from Quebec, with the drugs concealed within the gas tanks, they were brought to Mr. Nofall's garage where the drugs were removed and prepared for sale.

[8] Once the drugs were extracted from the gas tanks, Mr. Nofall and others would package them. Mr. Nofall would then provide the drugs for distribution locally, and the proceeds of the drug sales would be collected and remitted to Mr. Huynh or Mr. Prefontaine.

Issues

[9] The issues on this appeal are as follows:

1. Should leave to appeal be granted?

If leave to appeal is granted:

2. Did the judge make errors that had an impact on the sentence, or is the sentence demonstrably unfit?
3. If the sentence should be varied, what is an appropriate sentence?
4. If a period of incarceration greater than three years is imposed, should Mr. Nofall be re-incarcerated?

Issue 1: Leave to appeal

[10] As this is a sentence appeal by the Crown, leave to appeal is required (section 676(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46). The Court must consider whether the appeal is frivolous, in the sense that there is no arguable basis to the appeal. See *R. v. MacLean*, 2021 NLCA 24, at para. 54; *R. v. Noseworthy*, 2021 NLCA 2, at para. 10; *R. v. Tuglavina*, 2020 NLCA 30, at paras. 12-13; *R. v. Roberts*, 2019 NLCA 43, at para. 32; *R. v. R.B.*, 2019 NLCA 22, at para. 9; and *R. v. Martin*, 2018 NLCA 12, at para. 6.

[11] The Crown argues that the judge erred in sentencing Mr. Nofall and that the sentence imposed is demonstrably unfit. In considering the issues raised by the Crown, and in light of the evidence and the record, I would conclude that there is an arguable basis and sufficient merit respecting the issues raised on appeal. As such, the test for leave is met and leave to appeal the sentence is granted.

Issue 2: Did errors impact the sentence or is the sentence demonstrably unfit?

[12] The principles set out by the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, *R. v. Friesen*, 2020 SCC 9, and *R. v. Parranto*, 2021 SCC 46, provide guidance on when appellate intervention is warranted in a sentence appeal.

[13] The Court in *Lacasse* stated that an appellate court may vary a sentence “where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence” or where the sentence is “demonstrably unfit” (para. 11). See also *Parranto*, at paras. 30, 117. As noted in *Lacasse*, when error is alleged, to justify appellate intervention the error must have impacted the sentence (para. 44).

[14] Further, the Supreme Court of Canada has stated in various cases that deviation from an established sentencing range is not necessarily an error, and does not necessarily make a sentence unfit, because the particular circumstances of an offence or an offender may necessitate a sentence outside the established range. See for example *Lacasse*, at paras. 58, 60; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 44; *Parranto*, at para. 29; and *Friesen*, at para. 37.

[15] Absent an error, intervention is warranted where a sentence is demonstrably unfit, which is a high threshold denoting a decision that is “clearly unreasonable”, “clearly or manifestly excessive”, “clearly excessive or inadequate”, or representing a “substantial and marked departure” (*Lacasse*, at para. 52; see also *Friesen*, at paras. 25-29). As stated in *Parranto*, at paragraph 118, a “sentence is ‘demonstrably unfit’ if it constitutes an ‘unreasonable departure’ from the fundamental principle of proportionality... (*Lacasse*, at paras. 52-53)”.

[16] In the present appeal, the Crown argues that the judge erred in three respects: by misapprehending Mr. Nofall’s key role in the conspiracy; by failing to impose a sentence consistent with comparable cases imposed by this Court; and by overemphasizing Mr. Nofall’s personal circumstances while underemphasizing denunciation and deterrence, the paramount sentencing principles in cocaine trafficking offences. The Crown submits that these errors impacted the sentence and resulted in a sentence that was demonstrably unfit.

[17] For the reasons that follow, I agree.

Mr. Nofall’s role in the conspiracy

[18] The sentencing judge, at paragraph 30, sentenced Mr. Nofall on the basis that his role was “not integral to the operation of the conspiracy”:

Mr. Nofall’s role, based on the evidence, was not integral to the operation of the conspiracy and he had no role sending monies back to the suppliers in Quebec. He

was one of a few local participants, at the mid-level, and had no direct dealing with the main suppliers or promoters in Quebec.

[19] However, the evidence at trial and the trial judge's findings in the conviction decision are to the contrary, and clearly demonstrate that Mr. Nofall's role was vital and integral to the trafficking operation.

The evidence at trial

[20] The evidence at trial shows that Mr. Nofall's role in the conspiracy was integral. As noted, the evidence included an agreed statement of facts and transcripts of police surveillance operations. This evidence was admitted by agreement and was not contested by Mr. Nofall.

[21] Extensive excerpts from the evidence, detailing Mr. Nofall's significant participation in the conspiracy, are set out in the conviction decision. These excerpts document Mr. Nofall's direct interactions with other members of the conspiracy. These included Mr. Huynh and Mr. Prefontaine from Quebec at the highest level of the operation, who would provide the drugs to Mr. Nofall in the gas tanks and ultimately receive the proceeds of sales, and Mr. Noseworthy at the local distribution level, to whom Mr. Nofall would supply the drugs for sale.

[22] The excerpts reveal Mr. Nofall's active participation in many of the day-to-day activities of the trafficking operation, including directing local distribution of the drugs, collecting and distributing proceeds of the sales, maintaining ongoing communications with the co-conspirators from Quebec regarding local operations, and keeping them apprised of sales, collections and any concerns.

[23] The trial judge reviewed the evidence extensively and, at paragraph 14 of the conviction decision, referenced excerpts of the evidence that chronicled Mr. Nofall's role:

[14] The evidence upon which I rely in drawing inferences about what Mr. Nofall did and what he knew include:

- Mr. Huynh's frequent visits to Mr. Nofall's garage during the relevant time frame...
- On October 25, following a garage visit, Mr. Huynh shipped a courier package of cash from Newfoundland to Quebec...

- On October 25 (same day) following a garage visit, Mr. Huynh travelled from Newfoundland to Quebec, with a large quantity of cash (\$8,500).
- On January 14, following a garage visit, Mr. Huynh travelled from Newfoundland to Quebec, with a large quantity of cash (vacuum-sealed package containing an unknown amount of cash and a tinfoil wrapped package containing \$8,700).
- On November 15, following a garage visit, Mr. Huynh went to UPS and shipped a fuel pump still smelling of gasoline. This is circumstantial evidence, corroborated by direct observation at time of Mr. Huynh's arrest, that drugs were imported inside automobile fuel tanks and gas was pumped out of fuel tanks to facilitate recovery of cached drugs.
- ...
- On December 24, during an intercepted conversation, Rod Noseworthy advised Mr. Noftall that "Tai [Mr. Huynh] was pissed" because "he was expecting something". I infer from this that moneys from drug transactions were owing to Mr. Huynh and [he] had not been fully paid.
- ...
- On December 30, during an intercepted conversation among Mr. Huynh, Mr. Noftall and an unknown male, the unknown male says: "That stuff is not going as fast as I thought it would". Mr. Noftall replies: "Shut the fuck up now, ya meathead". From this exchange I infer that the sale of illegal drugs is not going as quickly as hoped, and that Mr. Noftall is concerned about the possible monitoring of conversations by police.
- ...
- On January 3, during an intercepted conversation among Mr. Noftall and Mr. Noseworthy, drug trafficking activity and sharing of profits is discussed using cryptic language.
- On January 8, Alex Prefontaine attends at Mr. Noftall's garage immediately following a meeting he had with Mr. Huynh.
- ...
- On January 27, during an intercepted conversation with an unknown male, Mr. Noftall is cautioned that a Montana that had pulled out of his

garage was being followed. From this I infer that there was concern about police detection of criminal activity and a concern about police watching for illegal activity at Mr. Nofall's garage.

- On January 28, during an intercepted conversation with an unknown male, Mr. Nofall is advised by the caller that he would be able to pay \$3,000 by the following Wednesday. Mr. Nofall replied that he needed more. From this I infer that Mr. Nofall's agreed role in the drug trafficking business included collection of money from drug sales.
- On January 30, during a search of Mr. Nofall's garage, the police discovered: a garbage bag full of empty vacuum sealed bags that smelled of gasoline (more circumstantial evidence of the storage of drugs inside the fuel tanks); ... The Nissan Titan vehicle that had been in the driveway of the residence belonging to Mr. Huynh on January 26 was inside the garage. From this I infer that Mr. Nofall had previously agreed with Mr. Huynh that the garage could be used in connection with the drug trafficking business.
- On February 1, during an intercepted conversation, Mr. Nofall discussed a possible cocaine sale with an unknown male. They referred to the cocaine as "gear" and engaged in negotiations on price. The prospective purchaser said that he was not prepared to pay \$2,800. Mr. Nofall proposed selling "four of them for twenty six each", and suggested that the purchaser could "cut it at least in half". Mr. Nofall added that: "[For payment] I'll give you the weekend man, it's only, fucking, ounce ... Jesus Christ b'y ... what kind of dealer are you? Fucking mickey mouse". This intercepted call, combined with the other circumstantial evidence, supports my finding that Mr. Nofall had a prior agreement with Mr. Huynh to participate in cocaine trafficking activity.
- On February 2, during an intercepted conversation at Mr. Nofall's garage, police could hear Mr. Nofall and Mr. Noseworthy counting money and at one point saying: "It was only half a key". In the context I find that this was a reference to half a kilogram of cocaine. Mr. Nofall comments: "That's your fucking 58 and there's a little bit left". I accept Sgt. Conohan's opinion that 58 refers to \$58,000 would be equivalent to the cost of a kilogram of cocaine. From this circumstantial evidence I conclude that Mr. Nofall had agreed to allow his garage to be used in connection with the drug trafficking business.
- On February 2, during an intercepted conversation at Mr. Nofall's garage, police could hear Mr. Nofall asking Mr. Noseworthy: "how many did you sell? It was only half a key". I find that this was a discussion about the sale of some part of a half kilogram of cocaine. In

the same conversation Mr. Noseworthy is heard passing over to Mr. Nofall \$10,000: "Here's your ten grand". This is circumstantial evidence that Mr. Nofall had previously agreed to allow his garage to be used in connection with the drug trafficking business.

...

- On February 7, intercepted noises inside the garage, and intercepted communications among Mr. Nofall and Mr. Prefontaine inside the garage, are consistent with the counting of large sums of money. Mr. Nofall was counting out loud, and at one point said: "I've got to pick up another 8-grand ... my other buddy, he owes me for a well he paid 1,800 last night and that's what we ended up getting for that one". The activity inside the garage involves counting money and discussing large amounts of money. This is circumstantial evidence supporting my finding that Mr. Nofall had agreed to allow his garage to be used in connection with the drug trafficking business.
- On February 7 (same day as counting of money inside Mr. Nofall's garage), Mr. Prefontaine shipped a courier package of cash to Quebec using a fictitious sender's name and an untraceable return address. The package contents included three bundles of cash wrapped in tin foil and vacuum sealed.

...

- On February 9, during an intercepted conversation, an unknown male (using cryptic language) acknowledges to Mr. Nofall that he owes \$1,100 but says he can only pay \$600. This is circumstantial evidence of Mr. Nofall's prior agreement to participate in the drug trafficking business.

...

- On February 14, Mr. Prefontaine shipped by FedEx several bundles of cash and then went to Mr. Nofall's garage.
- On February 18, Messrs. Nofall, Huynh and Prefontaine meet at the garage. During an intercepted conversation Mr. Nofall asked Mr. Huynh if he was "happy with the bill?" Mr. Huynh replied: "I'm getting prouder of you". Mr. Nofall replied: "Yeah I'm pulling my weight for sure". From this conversation I infer that Mr. Huynh and Mr. Nofall had a prior agreement to work together in the drug trafficking business, and that Mr. Huynh was the superior player and that Mr. Nofall was delivering better than promised. In the same conversation, in the presence of Mr. Huynh, Messrs. Prefontaine

and Noftall are heard discussing potential transactions for various quantities of drugs. Mr. Noftall disclosed to Mr. Huynh a cocaine transaction that he had completed and disclosed an amount that he is owed for a prior transaction. Again the garage is used for meeting and discussing drug trafficking business activity.

...

- On February 24, during an intercepted conversation, Messrs. Noftall and Prefontaine are discussing how they are being paid and when they are receiving money.
- On February 26, during an intercepted conversation, Mr. Noftall advised Mr. Prefontaine that he wants to continue working. I infer from this that there was a prior arrangement, i.e. the pre-existing agreement, and the inquiry is whether the working agreement should continue. Mr. Noftall also mentioned concerns about police and about money still owed.
- On February 27, during an intercepted conversation, Mr. Prefontaine and Mr. Noftall discussed buying new cell phones using fake names. The phones were purchased later that day with fake names and an untraceable address ...
- On February 28, during an intercepted conversation, Mr. Noftall discussed supplying cocaine to Mr. Rodrigues. ... As the two settle on a price Mr. Rodrigues agreed to “half a sheet pure cocaine”. There is nothing cryptic about that reply and the discussion is obviously about the sale of cocaine. As the discussion continues Mr. Noftall mentions “coke”. I find that “coke” in this context refers to cocaine, and that the entire discussion was about the sale of cocaine. On the same call Mr. Noftall said the product he has is three times as good [and] blows the head right off of them. This is circumstantial evidence of Mr. Noftall’s prior agreement to participate in this drug trafficking business.
- On March 1, during an intercepted conversation at the garage among Mr. Noftall and Mr. Prefontaine and Mr. Noseworthy, mutual concerns about police surveillance are discussed. Mr. Prefontaine suggests that: “We take a break for a few months”, and Mr. Noftall replies: “No. Fuck that. I’m not worried”. Again we have the use of the garage as the meeting place to discuss and plan drug trafficking activity. In the same conversation Mr. Noftall inquired of Mr. Noseworthy and Mr. Prefontaine if “we are all still in good standing”. The context is that police may be watching them and the risks are higher. This intercepted conversation is circumstantial evidence of Mr. Noftall’s prior

agreement to participate, and prior agreement to allow the use of his garage.

- A cell phone seized at Mr. Huynh's residence on March 4 recorded a call to Mr. Noftall on the same day that Mr. Huynh arrived in Newfoundland with 50 half kilogram bags of phenacetin (cocaine cutting agent).
- On March 4, when Mr. Noftall was arrested, the police discovered drugs and drug paraphernalia, including small amounts of marihuana and cocaine, score sheets, and a vacuum sealer, at his residence.

The judge's findings in the conviction decision

[24] The conviction decision, at paragraph 12, stated that the "common design from the outset was to profit from the illegal trafficking of drugs" ...and that "all of the evidence... shows active participation by Mr. Huynh and Mr. Noftall, both working together, in various aspects of the drug trafficking business" (emphasis added).

[25] The conviction decision also indicated that that there is "no doubt that Mr. Noftall was heavily and actively involved during the relevant time frame in a drug trafficking business that included cannabis marihuana and cocaine" (para. 8) (emphasis added).

[26] At paragraph 8, the conviction decision provides details of Mr. Noftall's "multiple levels" of involvement in carrying out various tasks in the conspiracy. These included "distribution to dealers, counting proceeds from drug sales, tracking transactions with score sheets, collecting the debts, tracking debts, and facilitating (through use of his garage) the drugs trade, and the handling and packaging of imported drugs".

[27] The conviction decision also noted that Mr. Noftall's involvement included the use of his commercial business, an automotive garage, in the conspiracy. Mr. Noftall's use of his garage was described as a "key component of the drug trafficking scheme" (conviction decision, at para. 17), and the garage was made available due to Mr. Noftall's direct, active role in the operation and his agreement to facilitate the conspiracy through the use of this garage:

[16] The agreed facts and other documentary evidence establish beyond a reasonable doubt that Mr. Noftall agreed that his garage could be used in relation to a drug trafficking scheme involving cannabis marihuana and cocaine. The indicators of this include use of the garage by vehicles and people involved in this drug trafficking

business, and the drug paraphernalia and drug residue discovered inside the garage on January 30, 2013, and the drugs and drug paraphernalia discovered at Mr. Nofall's home on March 4, 2013.

[17] The circumstantial evidence combined, including the frequency of visits to Mr. Nofall's garage, the direct trips from the garage to courier companies with bundles of cash destined for Quebec, establish that Mr. Nofall's garage was a key component of the drug trafficking scheme. Access to this garage could only be facilitated with Mr. Nofall's prior agreement.

[28] Mr. Nofall's garage became a significant hub of the operation where he would host co-conspirators in order to carry out the many key activities related to the cocaine trafficking, including the initial extraction of the drugs from the gas tanks, packaging the drugs for sale, and counting money collected from dealers. This was confirmed in the conviction decision:

10. ... This garage, at 280 Brookfield Road, was an important part of this drug trafficking business. It was used by Mr. Huynh and others, on a frequent basis for unloading the cached drugs hidden in vehicles, for repackaging, and for counting proceeds from drug sales...

11. The evidence regarding use of the garage for counting money and drug packaging material inside the garage, and other circumstantial evidence, supports the completion of the agreement.

Both the evidence at trial and the trial judge's findings in the conviction decision demonstrate that Mr. Nofall's role in the conspiracy was integral

[29] Mr. Nofall's role must be considered in terms of what he actually did to further the conspiracy. This is set out in the evidence, and the trial judge's findings, discussed above.

[30] The evidence demonstrates, and the trial judge found, that Mr. Nofall was involved in many aspects of the operation, and that his involvement included using his garage to receive the drugs and facilitate their distribution. He was a key player and an active participant in this commercial, inter-provincial conspiracy to bring cocaine into this province and sell it locally. The evidence indicates that he was the primary local connection with the co-conspirators from Quebec, Mr. Huynh and Mr. Prefontaine, and that he later recruited Mr. Noseworthy into the operation to assist with distribution.

[31] The evidence also indicates that Mr. Nofall had ongoing contact with and was answerable to the suppliers from Quebec, and that he, in turn, supplied and

directed the street dealers. This included providing the drugs to his friend, Mr. Noseworthy, and collecting and accounting for the proceeds. The evidence reveals that Mr. Nofall was the highest positioned local player in the conspiracy. His role and level of responsibility surpassed the other local participants. He had a trusted role with the conspirators at the highest level who delivered the cocaine from Quebec directly to him.

[32] In light of the above, the conclusion follows that the sentencing judge erred in finding that “Mr. Nofall’s role, based on the evidence, was not integral to the operation of the conspiracy” and that Mr. Nofall was “one of a few local participants, at the mid-level, and had no direct dealing with the main suppliers or promoters in Quebec” (sentence decision, at para. 30). This finding cannot be maintained in light of the evidence at trial and the judge’s findings in the conviction decision.

Distinguishing higher sentences imposed in similar cases

[33] As noted, the sentencing judge erroneously found that Mr. Nofall’s role was not integral or significant. On the basis of this finding, the judge distinguished similar cases from this Court where higher sentences had been imposed.

[34] An appropriate sentence for a mid-level trafficker of cocaine in a commercial operation has been considered by this Court in various cases, including *R. v. Oates* (1992), 100 Nfld. & P.E.I.R. 289 (Nfld. C.A.), and *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78. In 1992, this Court in *Oates* held that 3.5 to 4 years imprisonment was the normal sentencing range, stressing that deterrence and public protection were paramount factors to be considered.

[35] Two decades after *Oates*, in 2012, this Court in *Kane* adopted the rationale in *Oates*, and confirmed that deterrence continued to be the primary factor in sentencing in this context. The Court in *Kane* concluded that an appropriate sentence for participation in a conspiracy, where an offender “for the purpose of monetary gain, has played a trusted and necessary role in a sophisticated, commercial level conspiracy to traffic in significant amounts of cocaine”, would be in the range of four years imprisonment (*Kane*, at para. 24).

[36] The sentencing judge referenced *Kane* but distinguished it on the basis that the “role of the offender in *Kane* was greater in comparison to the role of Mr. Nofall in the current conspiracy” (sentence decision, at para. 30). Further, the sentencing judge concluded that “while many of the personal circumstances,

and most of the factors relevant to sentencing, are similar in comparing *Kane* with our facts, the ‘role’ or ‘level’ of Mr. Nofall within the hierarchy is less, and a lesser sentence is appropriate”(sentence decision, at para. 32).

[37] In *Kane*, the Court described the offender’s role in that case as “integral to the operation of the conspiracy” (para. 12). Similar to Mr. Nofall, Mr. Kane was the local principal involved in receiving drugs originating from individuals in Quebec, distributing the drugs to local traffickers and handling significant amounts of money:

[1] Mr. Kane pleaded guilty to conspiracy to traffic in cocaine and marihuana. The conspiracy, involving large amounts of drugs, was controlled by an individual in Quebec.

...

[11] As a member of the conspiracy, Mr. Kane did more than carry drugs as in the case of a courier and more than act as a conduit for the drugs and money. He was responsible for setting up and maintaining a stash house, helping to set up a second stash house, and for seeing to the distribution of large amounts of drugs. He delivered drugs to traffickers, instructing them on how the drugs were to be mixed with cutting agents to obtain a specified number of portions to be sold to other traffickers or to purchasers. He had responsibility for and was trusted with significant sums of money.

[38] Neither Mr. Nofall’s nor Mr. Kane’s role was low-level or fleeting. Both Messrs. Nofall and Kane were actively involved in an organized, commercial importation and distribution conspiracy, requiring ongoing “planning, deliberation, cooperation and trust among the co-conspirators” (*Kane*, at para. 12):

[12] Mr. Kane’s role was integral to the operation of the conspiracy and must be distinguished from, for example, the role of traffickers who, while taking advantage of the availability of the drugs provided by the conspirators, were not part of the organized importation and distribution scheme. The conspiracy involved commercial quantities of drugs and, as submitted by the Crown, required planning, deliberation, cooperation and trust among the co-conspirators, including Mr. Kane, over an extended period of time which ended only when the players were arrested. Mr. Kane was an active and key participant in the conspiracy. His legal responsibility must be assessed from that perspective (*R. v. Oates* (1992), 100 Nfld. & P.E.I.R. 289 (NLCA), at paragraph 58).

[39] With respect, and as discussed above, characterizing Mr. Nofall’s role in the present conspiracy as anything less than integral or significant is not

supported by the evidence or the trial judge's findings in the conviction decision.

[40] Given the uncontroverted evidence, and the findings at trial, the judge erred in distinguishing *Kane* on this basis. Indeed, and as discussed below in considering an appropriate sentence, the evidence reveals that Mr. Nofall's role was actually greater and more consequential than the offender in *Kane*, and warrants a higher sentence. The mischaracterization of Mr. Nofall's role does not provide a basis upon which to distinguish *Kane* or deviate from the normal sentencing range.

Paramount and secondary factors in sentencing for this offence

[41] At paragraph 18 of the sentence decision, the sentencing judge referred to Mr. Nofall's pre-sentence report as a mitigating factor:

It is a positive report and has a mitigating impact on sentence. Mr. Nofall's educational background, his good work history, and his positive family support, suggest good prospects for rehabilitation.

[42] The sentencing judge concluded: "the positive pre-sentence report and the positive post-arrest lifestyle push this sentence slightly below the range suggested in *Oates*" (sentence decision, at para. 32). As noted earlier, the range in *Oates* was 3.5 to 4 years imprisonment.

[43] It was appropriate for the sentencing judge to have considered mitigating factors, including positive elements in the pre-sentence report, in determining whether a sentence below the established range was justified.

[44] However, positive mitigating factors and prospects for rehabilitation are viewed as secondary considerations when sentencing for cocaine trafficking in this province. This Court has confirmed that, in sentencing for conspiracy to traffic in cocaine, general deterrence and protection of the public are the principal considerations (see *Oates*, paras. 4, 7, 64, 68; *Kane*, para. 13; and *R. v. Parsons*, 2017 NLCA 64, at para. 56). Failure to properly consider these factors is an error.

[45] In *Kane*, at para. 24, this Court stated: "general deterrence and protection of the public are the paramount considerations where sentence is imposed for conspiracy to traffic in cocaine, with rehabilitation playing a secondary role" (see also *Parsons*, at para. 53).

[46] The circumstances of rehabilitation would need to be compelling to override the primary considerations of deterrence, public protection, and denunciation, and displace the normal sentencing range, as this Court noted in *Oates*:

[68] It would be wrong therefore, to view the respondent's admirable efforts towards rehabilitation as vindication for the lenient sentence imposed. On the facts of this case rehabilitation was, or should have been, a secondary concern. ... The point is that trafficking in drugs or conspiring to traffic in drugs and particular in "hard" drugs such as cocaine, is a very serious offence where, as I have already stated, deterrence is, or ought to be, the paramount consideration. The respondent's good prospects for rehabilitation did not constitute the necessary exceptional or unusual circumstances necessary to allow the sentencing judge to pass a lenient sentence thereby departing from the principles of sentencing reflected in the decisions of Canadian courts for offences of this kind.

[47] In this case, the personal factors that the judge considered in assessing future rehabilitation (for example, good work history and a supportive family life) were all present before the offence occurred. While these are positive factors to consider, they would not constitute the "necessary exceptional or unusual circumstances" required to displace the paramountcy of denunciation and deterrence (*Oates*, at para. 68).

[48] This Court has confirmed that deterrence and denunciation are paramount in sentencing for this offence. The sentence decision does not assess the personal circumstances of the offender as secondary to these paramount considerations. This was an error impacting the sentence.

Conclusion on Issue 2

[49] For the reasons provided, I would conclude that the sentencing judge made errors that impacted the sentence by mischaracterizing Mr. Noftall's role in the conspiracy, distinguishing similar sentence decisions on that basis, and focusing primarily on mitigating, personal circumstances rather than on the paramount considerations of deterrence, denunciation and public protection. The three-year custodial sentence for conspiracy to traffic in cocaine was demonstrably unfit in the circumstances. The factors relied upon by the sentencing judge to impose a three-year sentence of imprisonment did not warrant a deviation from the established sentencing range as set out by this Court in *Oates*, *Kane* and other cases.

[50] As a result, I would allow the appeal on the sentence imposed for conspiracy to traffic in cocaine.

Issue 3: What is an appropriate sentence?

[51] Having determined that errors impacted Mr. Nofall's sentence, and that the three-year sentence imposed was demonstrably unfit, this Court must determine a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" (see *Friesen*, at para. 30, and *Lacasse*, at para. 53). The Supreme Court noted in *Friesen* that proportionality is the fundamental principle in sentencing:

[30] The principle of proportionality has long been central to Canadian sentencing (see, e.g., *R. v. Wilmott*, [1966] 2 O.R. 654 (C.A.)) and is now codified as the "fundamental principle" of sentencing in s. 718.1 of the *Criminal Code*.

[52] This is echoed in *Lacasse*, at paragraph 12: "proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender". See also *Parranto*, at para. 10.

[53] A sentence imposed must also recognize the principle of parity, codified in section 718.2(b) of the *Criminal Code* whereby "similar offenders who commit similar offences in similar circumstances should receive similar sentences" (see *Friesen*, at para. 31). As *Lacasse* points out "[t]he principle of parity of sentences...is secondary to the fundamental principle of proportionality" (*Lacasse*, at para. 54). See also *Parranto*, at para. 38.

[54] In the present circumstances, I would consider a sentence of 4.5 years (i.e., 54 months) imprisonment to be a fit sentence on the conviction for conspiracy to traffic in cocaine.

[55] In my view, this is consistent with the purposes and principles of sentencing set out in section 718 of the *Criminal Code*, including the primary principle of proportionality, in section 718.1. It is proportionate to the gravity of the offence of conspiracy to traffic in cocaine in this instance, and takes into account the degree of Mr. Nofall's responsibility and his particular circumstances.

[56] In terms of the gravity of the offence, this Court has made the point on many occasions that the proliferation of cocaine is a serious matter, resulting in significant societal consequences, and that this should be reflected in the sentences of offenders (see, for example, *Oates*, at para. 24). The sentencing

judge also noted the gravity, stating at paragraph 10 that “cocaine is considered a ‘hard’ drug, in the sense that its sale and consumption results in greater harm to society...”. See also *Parranto*, at paras. 87-91, regarding the harm related to the gravity of trafficking in hard drugs such as cocaine.

[57] With respect to Mr. Nofall’s role and degree of responsibility, the conclusion follows from the evidence and the conviction decision that Mr. Nofall was a lead player carrying out a fundamentally important role in this conspiracy.

[58] This conclusion is supported by the uncontroverted evidence documenting Mr. Nofall’s use of his garage (a vital operational requirement that enabled cocaine concealed in gas tanks to be extracted in a setting that was not meant to attract suspicion); his hands-on and lead role in all local aspects of the operation; his direction of Mr. Noseworthy and other local distributors; his primary position in the hierarchy of the operation among participants within this province; and his ongoing coordination with and reporting to the principals from Quebec.

[59] Regarding Mr. Nofall’s personal circumstances and characteristics, the sentence is meant to take into account the positive, mitigating factors such as his employment prospects and family situation, described earlier, without having these eclipse what this Court has determined to be the paramount considerations in sentencing for this offence, namely denunciation, deterrence, and public protection. It also reflects the fact that Mr. Nofall has a criminal record, including a prior conviction for trafficking in a controlled substance.

[60] A sentence of 54 months is meant to accord with the principle of parity, acknowledging the established sentencing range for this offence, as indicated in *Oates*, *Kane*, and other authorities. While *Kane* speaks to a four-year sentence in that case, this Court has accepted that the particular circumstances of each offence and offender may warrant a sentence for conspiracy to traffic in cocaine that is less than or exceeds this amount (see *Parsons*; and *R. v. Blok-Andersen*, 2016 NLCA 9, 376 Nfld. & P.E.I.R. 130).

[61] As stated by the Supreme Court of Canada in *Lacasse*, at paragraph 58, “the gravity of the offence, the offender’s degree of responsibility and the specific circumstances of each case” may require deviation from an established sentencing range. Similarly, in *Parranto* the Supreme Court noted: “Departing from a range or starting point is appropriate where required to achieve proportionality” (para. 40). Based on the totality of the evidence and the trial

judge's findings in the present case described above, I would conclude that, when considering Mr. Nofall's degree of responsibility, his personal circumstances, and the circumstances of the offence, a sentence above the four years imposed in *Kane* is warranted in this case.

[62] Further considerations of parity may arise in the particular context of sentencing participants with differing roles in a conspiracy. However, as noted by this Court in *Noseworthy*, at paragraphs 101-103, this does not displace the principle of proportionality and the requirement to sentence based on individual considerations.

[63] In the result, mindful of the sentencing principles of proportionality and parity, and considering the overall circumstances of the offence and the offender, including the gravity of the offence, Mr. Nofall's role and personal circumstances, mitigating and aggravating factors, and considerations of denunciation and deterrence, the sentence imposed for conspiracy to traffic in cocaine is 54 months.

Issue 4: Do the interests of justice require Mr. Nofall's re-incarceration?

[64] As Mr. Nofall's sentence has been increased from 36 to 54 months, this Court must consider whether he should be re-incarcerated to serve the remainder of the 54-month custodial sentence. Mr. Nofall was self-represented on the appeal and addressed this issue of re-incarceration. He provided oral and written submissions at the appeal hearing, arguing that he should not be re-incarcerated in the event that his sentence is increased.

[65] In *Noseworthy*, this Court noted some of the factors and principles to be considered when deciding whether to re-incarcerate an offender whose sentence was increased on appeal (see generally paras. 129-151). Mr. Noseworthy had received a 20-month sentence of imprisonment, which was increased to 42 months by this Court on appeal. The Court observed in *Noseworthy* that the "overriding principle" was whether it was in the interests of justice to re-incarcerate:

[132] The overriding principle to be considered in terms of whether to incarcerate or re-incarcerate an offender who has served a sentence originally imposed, and whose sentence has increased on appeal, is whether "it is in the interests of justice" to do so. In this context, a court must also consider whether the principles of denunciation and deterrence can be realized without re-incarcerating the offender.

[66] In *R. v. Taylor*, 2013 NLCA 42, 337 Nfld. & P.E.I.R. 24, and in *R. v. Kleykens*, 2020 NSCA 49, the respective courts both provided non-exhaustive lists of factors to be considered when determining when re-incarceration was required, and appropriate. These factors include the seriousness of the offence, the rehabilitative efforts of the offender, the difference between the sentence imposed at trial and appeal, the passage of time, whether the offender has served his or her original sentence, and whether the principles of denunciation and deterrence can be adequately served without re-incarceration (*Taylor*, at para. 65; and *Kleykens*, at para. 87).

[67] As noted in *Noseworthy*, while the above factors provide helpful guidance, a rote or cursory application of these factors is not indicated. In each case, the specific circumstances must be considered to determine whether re-incarceration is required in the interests of justice, and whether the principles of denunciation and deterrence can be achieved in the absence of re-incarceration:

[143] Both *Taylor* and *Kleykens* indicate that a relevant factor to consider when assessing possible re-incarceration is whether the sentencing objectives of denunciation and deterrence can be achieved without re-incarcerating the offender.

...

[148] Whether the objectives of denunciation and deterrence can be met by allowing a sentence appeal, substituting a fit sentence and staying the sentence is a determination to be made on a case by case basis. In assessing whether it is in the interests of justice to re-incarcerate an offender, guidance can be taken from the factors described above, but each circumstance has its own particular variables which must be considered. This involves more than the mechanical or perfunctory application of the factors.

[68] As such, the analysis is context and offender specific, and may or may not result in re-incarceration. Examples where re-incarceration has been required by this Court include *R. v. English*, 2012 NLCA 64, 328 Nfld. & P.E.I.R. 14; *R. v. Antle* (1993), 108 Nfld. & P.E.I.R. 321 (Nfld. C.A.); and *MacLean*. Examples of cases where this Court has declined to re-incarcerate include *Oates*; *Kane*; *Taylor*; *R. v. R.B.*, 2019 NLCA 22.; *R. v. Tuglavina*, 2011 NLCA 13, 305 Nfld. & P.E.I.R. 265; *R. v. J.J.*, 2004 NLCA 81, 244 Nfld. & P.E.I.R. 24; and *Noseworthy*.

[69] With respect to the particular circumstances in *Oates*, it was held that it would be “counter-productive” to re-incarcerate the offender (para. 5). In *Taylor* “in light of the purpose, objectives and principles of sentencing”, re-

incarceration was found to be unnecessary (para. 67), and in both *Kane* (paras. 45-47) and *Noseworthy* (para. 138) re-incarceration was not required in the interests of justice.

[70] In the present case, having considered the factors in *Taylor* and *Kleykens* in light of the circumstances, I would conclude that Mr. Nofall's re-incarceration is not required in the interests of justice. Mr. Nofall has served the three-year custodial sentence originally imposed, he has been released from prison and has returned to his life in the community. He provided information about his post-sentence employment, his family situation and the completion of prison programming to assist in his rehabilitation.

[71] While the offence here is serious, and the difference in sentences imposed at trial and appeal, from 36 to 54 months, is significant (which are factors to be considered), the Court also notes Mr. Nofall's efforts to re-establish his life post-imprisonment, including through his employment and his family life, which are also factors noted in *Taylor* and *Kleykens*. On balance, and considering the totality of the circumstances, the sentencing objectives of denunciation and deterrence can be realized in this instance without requiring re-incarceration for the balance of the sentence (see *R. v. J.E.D.*, 2018 MBCA 123, at para. 116; *R. v. Burnett*, 2017 MBCA 122, at para. 41).

[72] As indicated in *J.E.D.*, at paragraph 114, an "appellate court allowing a Crown appeal against sentence has the authority to grant a stay of execution against the remaining portion of a custodial sentence (see *R. v. Proulx*, 2000 SCC 5 at para. 132 and *R. v. Smickle*, 2014 ONCA 49 at para. 10)". See also *Noseworthy* at para. 146. As such, in the present case I would stay the balance of the sentence of imprisonment.

Conclusion

[73] In the result, I would allow the Crown's appeal of the sentence for conspiracy to traffic in cocaine and impose a 54-month sentence of imprisonment. As re-incarceration is not required in the interests of justice, I would stay the balance of this 54-month sentence.

I Concur: _____
L.R. Hoegg J.A.

I Concur: _____
G.D. Butler J.A.