
CANADA / JUDGMENT

HMTQ v. Lising and Pires

2001 BCSC 1891

COURT

Supreme Court of British Columbia

DECIDED

16 July 2001

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2001 BCSC 1891 HMTQ v. Lising and Pires

Citation:

HMTQ v. Lising and Pires

Date:

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Docket:

CC980886

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Reasons for Sentence

Mr. Justice K.J. Smith

July 16, 2001

HER MAJESTY THE QUEEN

AGAINST

RONALDO LISING and

FRANCISCO BATISTA PIRES

Counsel for the Crown

P. Hogg, E. Froess

Counsel for the Accused Lising

G. DelBigio

Counsel for the Accused Pires

K. Westlake

- [1] THE COURT: On January 23, 2001, following a lengthy trial, a jury found Mr. Lising and Mr. Pires guilty on one count of conspiracy to traffic in cocaine between November 1, 1995, and April 30, 1997, contrary to s. 465(1)(c) of the Criminal Code; one count of trafficking in cocaine between July 1, 1996 and April 30, 1997, contrary to s. 4 of the Narcotic Control Act, Revised Statutes of Canada 1985, Chapter N1; and one count of possessing the proceeds of trafficking in cocaine in a value in excess of \$1,000 between July 1, 1996 and April 30, 1997, contrary to s. 19.1 of the Narcotic Control Act.
- [2] The jury acquitted both on one count of trafficking in cocaine between November 1, 1995, and April 30, 1996, and one count of possessing the proceeds of trafficking between the same dates. As well, the jury acquitted Mr. Lising of one count of possession of cocaine for the purpose of trafficking and one count of possession of ecstasy for the purpose of trafficking, both on March 22, 1997. However, as to those counts, they found Mr. Lising guilty of the included offences of possession of cocaine, contrary to s. 3 of the Narcotic Control Act, and of ecstasy, contrary to s. 47 of the Food and Drugs Act, that is Revised Statutes 1985, Chapter F27.
- [3] The offenders were two of several targets of an investigation mounted by the Vancouver Police Department that involved the use of a police agent, undercover police work, numerous interceptions of private communications, and extensive surveillance. The Crown's theory was that the offenders were middlemen in an organization that distributed cocaine for retail sale and that they sold cocaine to employees of strip bars in the Vancouver area, primarily the No. 5 Orange and the Marble Arch. These employees, one of whom worked as a bartender and the others as doormen, sold the cocaine to their customers for personal use. The alleged salesmen, save for the Crown's key witness, Robert Molsberry, and another named Pandya, who did not testify, were named as unindicted co-conspirators on the conspiracy count.
- [4] The Crown, in its presentation of the case, divided the material events into three phases. The first phase, from November 1, 1995 to April 30, 1996, preceded Molsberry's involvement with the police and rested, so far as direct evidence is concerned, entirely on his testimony. He was at that time a doorman at the No. 5 Orange and he testified that he regularly sold cocaine to customers at the bar. In testimony that obviously did not persuade the jury to the criminal standard of proof, he said that he changed his source of supply to Lising and Pires in late 1995, after Lising told him that he and Pires were henceforth to be the suppliers of all cocaine sold at that establishment; that he became afraid and went into hiding for several weeks after he became indebted to various persons, including his new cocaine suppliers, to the extent of \$1,000; and that, when Lising found him and threatened him, he turned to the

police for help. The jury's verdict demonstrates that his testimony did not satisfy them beyond a reasonable doubt of the guilt of the two accused on Counts 2 and 3, the counts of trafficking and of possessing the proceeds of trafficking during that period of time.

- [5] The Crown's second and third phases comprise the period spanned by Counts 4 and 5 of the indictment - July 1, 1996, to April 30, 1997. The Crown's theory was that, during the second phase, Molsberry, working under the direction of his police handlers, repaid the alleged drug debt and purchased cocaine on six occasions from Lising and Pires. Molsberry's testimony in this regard was supported by the testimony of his police handlers, by surveillance observations of several officers, and by numerous intercepted communications of one or both of the two offenders.
- [6] Contacts between Molsberry and the two accused came to an end in late September 1996 and the police investigation continued thereafter without him in what the Crown characterized as the third phase, spanning the time from October 1, 1996, to April 30, 1997. The Crown's evidence in relation to this phase consisted of surveillance observations, intercepted communications, and evidence of undercover purchases from the named and unnamed co-conspirators. As well, the Crown relied on the events of March 22, 1997, when Lising was arrested and was found to be in possession of quantities of cocaine and of ecstasy. The events of this day, of course, founded the conviction of Lising on the two possession counts.
- [7] I begin with a description of the two offenders.
- [8] Ronaldo Lising is 38 years old. He was born in the Philippines and came to Canada with his mother and his two brothers in 1971 to join his father, who immigrated to Canada a year earlier. He is a graduate of Eric Hamber High School. His father worked as a store manager for a shoe company for 14 years and left that job in 1985 to operate a coin laundry business, which he had founded in 1980 with the assistance of his son Ronaldo. Through their efforts, the business has grown and they now own six coin laundries in the greater Vancouver area. As well, they have expanded into the vending machine business. Ronaldo joined the business on a full-time basis in 1994. In recent years, his father's health has deteriorated and Ronaldo's participation in the family business has consequently developed an increased importance, particularly with respect to the aspects that involve heavy lifting.
- [9] In addition to his involvement in the family business, Mr. Lising owns and has operated, since 1998, a mobile automobile and motorcycle detailing business in partnership with Mr. Pires. They apparently have one part-time employee.
- [10] Mr. Lising's mother is retired, his older brother, who is married and has four children, operates a delicatessen business with his wife and his younger brother is employed as a graphic designer.

- [11] Mr. Lising resided with his parents in the family home until 1998, and since then he has lived in an apartment. He is not married, but he has had a ten-year relationship with a woman who is supportive of him, as is her family.
- [12] Many of Mr. Lising's family members, neighbours, friends, and business associates wrote letters on his behalf attesting to his good character. They portrayed him as an industrious, warm, and generous person devoted to and loved by his family. He is described by several of his extended family as a role model for the younger family members.
- [13] He has no criminal record.
- [14] Francisco Batista Pires, known as Chico, is 38 years old. He was born in Portugal and came to Canada with his family in 1967. His parents are retired. His father worked for 40 years in the construction industry in Portugal and for six years for Canadian Pacific Railway. His mother was a hotel worker for 40 years. He has a 43-year-old sister, who is the head of the language department in a large secondary school. She speaks very well of him. He has three brothers, aged 42, 41 and 34. He graduated from Vancouver Technical High School in 1982 and earned an ironworker's certificate from the British Columbia Institute of Technology in 1986.
- [15] Thereafter, Mr. Pires worked in construction as an ironworker until 1997, save for a lengthy period on Workers' Compensation as a result of a serious arm injury. Since 1998, he and Mr. Lising have operated the detailing business to which I have already referred.
- [16] Mr. Pires has been a lifelong participant in sports and has competed successfully at an amateur level in boxing, kickboxing, lacrosse, and football. He was, for many years, a Big Brother for a young boy and their relationship has continued through the youth's teenage years. As well, he coached children in basketball and floor hockey for approximately six years at a community centre near his home.
- [17] Mr. Pires has been in a stable common-law marriage with a young woman for the past five years and they have a 14-month-old daughter. His wife remains very supportive of him, as do her parents and her brother. She has a diploma in financial management from BCIT and is employed as an accounts manager for a transport company.
- [18] The many letters written on behalf of Mr. Pires attest to the high regard in which he is held by his extended family, neighbours, friends, and associates. He is by all accounts a responsible, friendly, loyal, and helpful person to those who know him.
- [19] He, too, has no criminal record.
- [20] Two issues have been raised in submissions. The first is upon what facts should these offenders be sentenced, and the second is what is a fit and just sentence in all the circumstances?

- [21] It is the Crown's position that I must sentence on the basis of all relevant facts that have been proven beyond a reasonable doubt. The Crown submitted that it has proven to that standard a sophisticated criminal enterprise and numerous incidents of trafficking and of possession of the proceeds thereof within the times specified in Counts 4 and 5 of the indictment.
- [22] The Crown seeks a global term of imprisonment of six years for each offender, as well as a fine of Mr. Pires in the amount of \$4,400 pursuant to s. 462.37(3) of the Criminal Code in lieu of forfeiture of certain proceeds of trafficking specified by Crown counsel. The Crown seeks no fine of Mr. Lising because he has already had monies in that approximate amount seized and forfeited.
- [23] As aggravating facts, Crown counsel emphasized the scope and sophistication of the trafficking involved and the planning and deliberation that went into it. As well, the Crown stressed that the offenders themselves are not addicts and were motivated simply by the profit to be gained. The Crown submitted that they were middlemen operating their own business in the distribution scheme and that they had connections to suppliers higher up in the cocaine trade.
- [24] Crown counsel acknowledged that the letters filed on behalf of the offenders are heartfelt expressions of the views of their authors, and that they show a side of each of these offenders that contrasts markedly with the aspects of their character illuminated by the evidence during the trial. Counsel submitted, however, that in disregard of the values and qualities of character to which these men were exposed, and despite their strong family ties, they chose deliberately to traffic for profit in a drug that has had a deleterious effect upon society as a whole.
- [25] In Crown counsel's submission, general deterrence - the deterrence of others from trafficking in cocaine - is the most important sentencing factor in this case.
- [26] Mr. DelBigio, on behalf of Mr. Lising, submitted first that, because the Crown chose to draw the indictment in general terms, I ought not to consider any evidence beyond the facts necessarily found by the jury, that is, an agreement to traffic in cocaine, one incident of trafficking, and one incident of the possession of proceeds thereof. He submitted that, because the Crown chose not to particularize any transactions in the indictment, to find aggravating facts would work an unfairness in that the defence might have proceeded differently if faced with allegations of specific transactions. Alternatively, he submitted that the jury's verdict demonstrates that they rejected the testimony of Molsberry entirely and urged that I should do so, too. Accordingly, he contended, I cannot find aggravating facts beyond a reasonable doubt and I ought to sentence only upon the minimal facts necessary to support the jury's verdict.
- [27] Mr. DelBigio relied upon the positive aspects of Mr. Lising's character identified by the writers of the many supportive letters filed and emphasized the fact that he is a first offender. He stressed as well that both offenders have been law-abiding citizens since these

offences and that they have complied with the conditions of their release on bail and have shown up for every court proceeding since they were arrested in July 1998. He referred to judicial comments to the effect that incarceration is not an effective deterrent or rehabilitative tool and urged that rehabilitation is the most important sentencing factor for first offenders.

- [28] Mr. DelBigio submitted that Mr. Lising poses no danger to the community and that the network of social support provided by his family and friends would facilitate effective monitoring of him should he be permitted to serve his sentence in the community. He referred to *R. v. Gladue*, a 1999 decision of the Supreme Court of Canada reported at 133 C.C.C. (3d) 385, for the principle that sentencing judges should use restraint and that imprisonment should be the sanction of last resort. As well, he invoked *R. v. Proulx*, a 1998 decision of the Supreme Court of Canada reported at 127 C.C.C. (3d) 190, for the principle that conditional sentences can serve the sentencing goals of deterrence and denunciation. He went on to refer to a number of cases in which conditional sentences and short reformatory sentences have been imposed on, as I understood him, similar offenders in similar circumstances for similar offences.
- [29] In conclusion, Mr. DelBigio said that general deterrence is no longer the central factor in trafficking cases, given the recent emphasis on restraint in the use of imprisonment as a sanction. He urged that a six-year sentence would be too harsh in these circumstances and that an appropriate sentence would be well under the two-year mark. Accordingly, he asked for a conditional sentence of imprisonment. Alternatively, he suggested that if a custodial term should be imposed, it should be a short one to be followed by a probationary period of up to three years.
- [30] Mr. Westlake echoed Mr. DelBigio's submission that I should base the sentence upon the minimal facts necessary to support the jury's verdict. He, too, urged a complete rejection of Molsberry's testimony and, as well, pointed to aspects of the evidence from which it is arguable that some of the unindicted co-conspirators were obtaining cocaine during the material times from suppliers other than the two offenders.
- [31] Mr. Westlake's submission tracked Mr. DelBigio's submission as well on the need for the use of restraint and the requirement to impose imprisonment only as a last resort. Mr. Westlake also pointed out that several of the sentencing cases referred to by Crown counsel involved heroin, and he referred to *R. v. Bengert*, a 1979 decision of this court at 52 C.C.C. (2d) 100, and to *R. v. Libby*, a 1980 decision of the Quebec Court of Sessions of the Peace, 63 C.C.C. (2d) 69, in support of his submission that heroin is viewed more seriously than cocaine in the eyes of the law.
- [32] Mr. Westlake stressed the positive characteristics of Mr. Pires as disclosed by the many letters of support and noted that, like Mr. Lising, Pires has led a law-abiding life since these offences and has faithfully complied with his bail conditions. In his submission, this offence was out of character for his client.

- [33] Mr. Westlake observed that the matters described by the Crown as aggravating factors are in reality present in virtually every trafficking offence and cannot be considered as aggravating. He stressed that Mr. Pires is a first offender and submitted that his being charged and being required to sit through this lengthy trial, coupled with the realization of the effects of his conduct upon himself and his family, are sufficient to meet the objective of specific deterrence. He submitted that the imposition of a six-year sentence upon Mr. Pires would be harsh and shocking and is not required to meet the sentencing objectives.
- [34] Mr. Westlake argued that an appropriate sentence would be somewhat less than two years less a day and that the sentence should be served in the community on conditions. He referred to a number of cases that, in his submission, would support such a disposition for his client.
- [35] It is appropriate at this stage, I think, before turning to my analysis and my conclusions, to add my observation that many persons who appeared to me to be family members of the two offenders were in attendance throughout this trial. In particular, I mention that Mr. Lising's parents and Mr. Pires' mother, wife and child, and sister were here virtually every day.
- [36] I turn now to my analysis of the submissions and my conclusions, and I begin with the circumstances of the offences.
- [37] Section 724(2) of the Criminal Code provides that in determining sentence:
- Where the court is comprised of a judge and jury, the court
- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven.
- Subsection (3)(e) requires the prosecutor to establish the existence of any aggravating fact by proof beyond a reasonable doubt.
- [38] Section 724 was first enacted in the 1995 amendments to Part XXIII of the Criminal Code dealing with sentencing. It codified the existing common-law approach to sentencing after a jury verdict, which is set out in the Supreme Court of Canada decision in 1991 in *R. v. Brown*, 66 C.C.C. (3d) 1, at p. 4, as follows:

...Subject to the jury's express and implied factual findings the judge must make the necessary sentencing findings. He or she must, of course, make those findings in keeping with the law relating to the finding of facts on sentencing set out in *R. v. Gardiner*, which establishes that while all credible and trustworthy evidence may be accepted, disputed facts relied upon the Crown in aggravation must be established beyond a reasonable doubt.

- [39] The court went on in that case at p. 5 to say that the trial judge must make his or her own independent determination of the facts where the jury's verdict is ambiguous. I see no ambiguity in the verdict in this case. The verdict on Counts 6 and 7 was curious, since the amounts of cocaine and ecstasy found in Lising's possession were relatively large if they were for personal use, since there was no evidence that Lising was a user of either drug, and since the wiretap and surveillance evidence of the circumstances immediately preceding the arrest was capable of supporting an inference of the prohibited purpose. There were, however, significant inconsistencies in the police evidence concerning the search and seizure of Lising's automobile and, as well, troubling lapses in usual police procedures in the handling of items seized during that search and during the earlier search of Lising's person that were capable of leading to inferences of police misconduct during the searches and of a lack of candour in the police testimony concerning the circumstances surrounding the arrest. One might therefore speculate that the jury's conclusions on Counts 6 and 7 were the result of a compromise. In any event, however, the failure of the Crown to prove beyond a reasonable doubt that Lising's purpose in possessing the cocaine found in his automobile at the time of his arrest was to traffic in that cocaine does not preclude conclusions that he trafficked in cocaine on other occasions before and after that time.
- [40] The jury necessarily found that the two offenders were parties to a conspiracy to traffic in cocaine during the material times and found further at least one incident of trafficking and of possession of the proceeds thereof. In these minimally essential things, the jurors were unanimous. Beyond that it cannot be said that they were necessarily unanimous, since jurors are entitled to arrive at a unanimous verdict for different reasons and on separate evidential bases, and I refer in that regard to *R. v. Gauthier* (No. 2), a British Columbia Court of Appeal decision in 1996, 108 C.C.C. (3d) 231, at para. 14.
- [41] As I understand the law, it is my responsibility to make all factual determinations relevant to sentencing that are supported by the evidence and that are not inconsistent with the verdict of the jury. Here the Crown asks me to find that there were numerous acts of trafficking and of possession of the proceeds of trafficking. For purpose of sentencing, these are facts in aggravation and I must examine the evidence given at the trial to determine whether they have been proven beyond a reasonable doubt.
- [42] I cannot agree with the defence submission that it would be unfair to the offenders to make findings in respect of aggravating facts. Defence counsel concede that the indictment was legally sufficient. If they apprehended that particularization of the charges was necessary to enable them to effectively defend, they could have applied for particulars pursuant to s. 587 of the Code, or for a division of counts pursuant to s. 590(3), but they did neither. Moreover, any suggestion of actual prejudice is belied by the extensive pre-trial disclosure made by the Crown and by the detailed cross-examination at trial of the Crown witnesses in relation to the discrete events relied upon. There is therefore no basis for saying that fairness requires the Crown to be confined on sentencing to the minimal facts necessarily found by the jury in reaching the verdict.

- [43] Moreover, while the jury obviously did not find Molsberry's unsupported testimony sufficient to discharge the Crown's burden on Counts 2 and 3, that is, on phase one of the Crown's theory, I find Molsberry's evidence to be reliable where it is supported by the evidence, independent of him, of his police handlers, by police surveillance evidence, by intercepted communications, and by the probabilities inherent in the surrounding circumstances.
- [44] Applying the principles that I have just described, I find that the relevant factual circumstances of the offences are as follows.
- [45] In the period between July 1, 1996, and April 30, 1997, Lising and Pires were the joint operators of a wholesale cocaine-selling business and were parties to a conspiracy with the named co-conspirators, Munoz, Knezevic, McFayden and MacGruder, and with the unnamed co-conspirator, Pandya, to traffic in cocaine. The agreement was that Lising and Pires would supply cocaine to the others, who would sell at a retail level to customers in the bars in which they were employed. In pursuance of the agreement, Lising and Pires purchased cocaine from their supplier and sold it in one-ounce amounts for \$1,300 each on a regular basis to their co-conspirators. They "fronted" the cocaine to their salesmen, that is, they delivered the cocaine against a promise to pay for it after it had been sold at the retail level. The co-conspirators in turn divided the cocaine into half-gram flaps and sold them for \$40 each to customers in the bars in which they worked. The co-conspirators sometimes sold to each other for personal use, and at times used some of the cocaine themselves. However, Lising and Pires were not users of cocaine.
- [46] In addition to those transactions, Lising and Pires also sold cocaine to Molsberry in six separate one-ounce transactions on August 9, August 15, August 23, September 5, September 12 and September 25, 1996, respectively. Molsberry was acting as a police agent in these transactions and on each occasion he paid the offenders \$1,300 in cash that had been provided to him by his police handlers for that purpose.
- [47] Molsberry's first meeting with Lising and Pires in his capacity as a police agent took place at Fresgo's Restaurant on July 17, 1996. At that time, Molsberry gave them \$1,000 in cash that had been provided to him by his police handlers, ostensibly to clear a debt owing for a past cocaine delivery. However, as the jury's verdict on Counts 2 and 3 demonstrated that they were not satisfied beyond a reasonable doubt that the offenders trafficked in cocaine in the period before July 1, 1996, they could not have accepted Molsberry's testimony that he delivered the money for the purpose of paying an antecedent cocaine debt. I am satisfied to the requisite standard, however, that the meeting took place and that Molsberry delivered \$1,000 in cash to Lising and Pires.
- [48] I find that the following transactions also took place:
1. On December 19, 1996, Lising delivered cocaine to MacGruder behind a liquor store near 18th Avenue and Cambie Street;

2. On December 20, 1996, Munoz picked up cocaine for Knezevic from Lising at or near the corner of Kootenay and Adanac;
3. On December 24, 1996, Lising delivered cocaine to Pandya in Lising's Acura automobile at a location on Joffre Street in Burnaby just south of Imperial Avenue;
4. Earlier that afternoon, MacGruder picked up cocaine from Lising or Pires at or near a place described by the participants as the clubhouse in East Vancouver;
5. On December 27, 1996, Lising delivered cocaine to McFayden in Lising's Acura automobile in the parking lot of an Esso station at 41st Avenue and Knight Street in Vancouver;
6. On December 30, 1996, Lising delivered cocaine to MacGruder in a black sports utility vehicle in an alley behind a store on 49th Avenue near Knight Street known to the co-conspirators as "Flowers;"
7. On January 6, 1997, Lising delivered cocaine to Knezevic at a place known to them as "the old can" at or near 12th Avenue and Commercial Drive, and then delivered cocaine to MacGruder at the Marble Arch Motel;
8. On January 10, 1997, Pires met Knezevic and MacGruder at or near the old can and delivered cocaine to them;
9. On January 11, 1997, Lising picked up a supply of cocaine from his supplier, who he identified as Frank, and delivered at least some of it to Pires;
10. On January 14, 1997, Pires delivered cocaine to MacGruder at the can;
11. On January 16, 1997, Pires delivered cocaine to Knezevic at the can;
12. On January 17, 1997, Pires delivered cocaine to MacGruder at the can;
13. On January 25, 1997, Lising delivered cocaine to Knezevic at the Marble Arch bar;
14. On January 31, 1997, Lising delivered an ounce of cocaine to Knezevic for \$1,300 in Lising's Acura automobile in the parking lot of Nuffy's Donuts at 33rd Avenue and Main Street;
15. On February 1, 1997, Lising delivered cocaine to Knezevic in the lane at the back of Lising's residence;
16. On February 9, 1997, Officer Hudson, operating undercover, purchased two flaps of cocaine from McFayden for \$40 each at Fresgo's Restaurant; McFayden told Hudson that Hudson could see him for more cocaine any time at the No. 5, and that he would introduce Hudson to Munoz in case he was not there;
17. On February 10, 1997, Officer Hudson purchased one flap of cocaine from Munoz at the No. 5 Orange Bar for \$40;

18. On February 14, 1997, Pires delivered cocaine to MacGruder at a location that is not clear from the evidence;
19. On February 15, 1997, in the early evening, Knezevic picked up a delivery of cocaine from Pires at the clubhouse;
20. On February 15, 1997, later in the evening, Officer Hudson purchased a flap of cocaine from Knezevic at the Marble Arch Bar for \$40;
21. Shortly after midnight the next morning, February 16, 1997, Officer Hudson purchased a flap of cocaine for \$40 from Pandya in Casey's Pub in the Mr. Sport Hotel in Burnaby, where Pandya was working as a bartender; Pandya told Hudson that he could return in future to purchase cocaine from him and explained how Hudson should approach him;
22. On February 16, 1997, after leaving Pandya, Officer Hudson purchased a flap of cocaine from Munoz for \$40 at the No. 5 Orange; After Hudson told Munoz that he wanted a flap and before Munoz delivered the flap, Munoz met and spoke with McFayden in the bar;
23. On February 18, 1997, Lising and Pires met MacGruder at the Fitness Quest Gym on 8th Avenue near Cambie Street and delivered cocaine to him; MacGruder paid them \$1,240 on account in Lising's Acura automobile at that time;
24. On February 21, 1997, Lising and Pires met Munoz, Knezevic, and MacGruder at the Fitness Quest Gym and delivered cocaine to them; Lising made the deliveries to Munoz and Knezevic in a white van that was parked outside the gym as he made entries in a notebook; Also, Munoz handed him some cash at that time;
25. On March 2, 1997, Lising picked up a supply of cocaine from his supplier in the parking lot of a Chevron Station at the intersection of Nanaimo Street and Grandview Highway; Lising was driving a red Ford Contour automobile at the time;
26. A few minutes later, on March 2, 1997, Lising picked up MacGruder in the red Ford Contour near 41st Avenue and Knight Street and delivered cocaine to him;
27. Later that evening, March 2, 1997, Lising delivered cocaine to Pandya;
28. On March 5, 1997, Officer Hudson purchased a flap of cocaine for \$40 from Munoz at the No. 5 Orange;
29. Later on March 5, 1997, Officer Hudson purchased a flap of cocaine for \$40 from Knezevic at the Marble Arch bar;
30. On March 8, 1997, MacGruder met Lising in Lising's Acura automobile and paid him \$1,400; Lising told MacGruder that he owed \$1,800 and \$500 for something else, and that he wanted the money next time;

31. About an hour later, on March 8, 1997, Lising met Munoz in Lising's Acura automobile on the Lougheed Highway outside Milestone's Restaurant in Burnaby; Munoz told Lising that he still had some cocaine left, delivered \$1,100 to Lising, and said that McFayden owed him for half an ounce and would pay him that night; Lising said he wanted to clear it up at their next meeting;
32. On March 11, 1997, Lising delivered cocaine to Pires in Lising's Acura automobile;
33. Later that morning, March 11, 1997, Lising met Knezevic and delivered cocaine to him;
34. Early that afternoon, March 11, 1997, MacGruder met with Lising and Pires in Lising's Acura automobile in the Sports Mart parking lot at 8th Avenue and Cambie, where they delivered cocaine to MacGruder and discussed the fact that MacGruder owed them \$2,000 and had to pay up before they would give him any more cocaine;
35. On March 12, 1997, Knezevic picked up an ounce of cocaine for Munoz from Lising at Lising's residence; Lising and Munoz had agreed earlier on a price of \$1,300;
36. On March 16, 1997, MacGruder met Lising at the Fitness Quest Gym to pay him some of the money that he owed;
37. On March 17, 1997, MacGruder met Lising at or near an Esso station on East Hastings Street at Skeena and paid what he owed and took delivery of more cocaine;
38. On March 20, 1997, Lising delivered cocaine to MacGruder in Lising's Acura automobile on Skeena Street near the Esso station at Hastings and Skeena;
39. At about two o'clock in the afternoon of March 22, 1997, Lising picked Knezevic up in front of Knezevic's residence in his Acura automobile; Knezevic went to the trunk of Lising's car, took out a black bag and returned to the passenger seat; Lising drove around the block and then let Knezevic out where he had picked him up; On the journey around the block, Lising delivered cocaine to Knezevic;
40. A few minutes later, Lising was arrested on Main Street when he parked and got out of his car; The black bag was in the passenger compartment of Lising's car and it contained, among other things, 29.52 grams, or approximately one ounce, of cocaine and 70 tablets, weighing about 47.5 grams, of ecstasy;
41. On March 24, 1997, Lising left a telephone message for Pandya not to call Ronnie's pager or cell, but to call Chico, which, as I have said, was Pires' nickname; Later that afternoon, Lising spoke to Pandya on the telephone and told him, "The cops got my pager. Don't call my pager anymore. Call Chico";
42. On March 27, 1997, Pires and Lising delivered cocaine to Pandya at his residence;
43. On April 10, 1997, Officer Hudson purchased a flap of cocaine for \$40 from Munoz at the No. 5 Orange;

44. On April 14, 1997, Munoz and Lising spoke on the telephone and Munoz confirmed that he had "got everything together" and they agreed to meet at a restaurant on or near Broadway; Munoz travelled to the meeting by taxi and either picked up cocaine from Lising or paid him for past purchases; He then travelled by taxi to the Fitness Quest Gym, where he was arrested and had in his possession \$2,680 in cash and 16 flaps of cocaine weighing 14.73 grams or approximately one-half ounce.
- [49] This dry recitation of relevant events does not do justice to the scope and complexity of the trafficking. Between December 19, 1996 and April 14, 1997, a period of 85 days, 286 communications were intercepted and entered into evidence that related to this business and involved one or other or both offenders. These conversations reflected trafficking-related activity on 51 separate days, in the morning, in the afternoon, and at night. I am satisfied that the Crown has proven 36 deliveries of cocaine to the retail salesmen, including the six to Molsberry. Simple arithmetic indicates that the wholesale value of the cocaine involved, at \$1,300 per ounce, was in the order of \$47,000. At \$40 per half-gram flap, the retail value of the cocaine was about \$82,000 assuming that it was not cut or diluted by the retail sellers, which is unlikely. In short, the offenders were not involved in this business on a casual basis. This was a busy, wholesale commercial business.
- [50] Moreover, the business was a sophisticated one. The offenders used cell phones and pagers as well as landline telephones on occasions. They and their co-conspirators used number codes to identify themselves on pagers and, during their communications, used code words to describe the subject matter of their conversations. For example, cocaine to be delivered was often referred to as "lunch" or as "dinner" or as "beer." The actual exchanges of cocaine and money took place quickly and furtively in prearranged locations, which were sometimes described in terms recognizable only by the conspirators, such as "Flowers" to denote a particular small suburban market and "the can" to identify a location near 12th Avenue and Commercial Drive. On March 2, 1997, when Lising took delivery of cocaine from his supplier and delivered some of it to MacGruder, he did so in an automobile other than the one that he normally drove, which I infer was an attempt on his part to minimize the chances of detection.
- [51] Lising was the managing partner in this business. He took delivery of the cocaine from the suppliers and delivered Pires' share to him for distribution. As well, Lising made most, though not all, of the deliveries to the retail sales force. He also took responsibility in large part for marketing efforts and for collecting the accounts receivable from the retail salesmen. The intercepted communications show that he frequently urged them to increase their sales and to catch up their accounts payable for the cocaine. MacGruder, in particular, was the object of considerable pressure from Lising to make up his late payments.
- [52] While Lising was, on the evidence, the more active of the two offenders, they were partners in the business and Pires was a frequent participant in all aspects of it. Their moral culpability is equal, in my view.

[53] I turn now to what would be a fit and proper sentence in the circumstances.

[54] The fundamental purpose and the principles of sentencing are set out in the new Part XXIII of the Criminal Code. So far as they are relevant, they read as follows. Section 718:

The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in the offenders, and acknowledgment of the harm done to victims and to the community.

Section 718.1:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Section 718.2:

A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

[55] Bill C-41, which enacted the new Part XXIII of the Criminal Code as of September 3, 1996, represents a shift in emphasis in sentencing away from imprisonment as the primary sanction for criminal behaviour. Thus s. 742 creates conditional sentences of imprisonment; s. 718.2(d) and (e) instruct us that offenders should not be deprived of liberty if other less restrictive sanctions may be appropriate and that all available sanctions other than

imprisonment that are reasonable in the circumstances should be considered for all offenders; and s. 718(c) directs that the objective of separating offenders from society should be given effect only where necessary. This new approach was recognized by Chief Justice Lamer, speaking for the Supreme Court of Canada in *R. v. Proulx*, where he said at para. 1:

Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison. In an attempt to remedy the problem of over-incarceration, Parliament has introduced a new form of sentence, the conditional sentence of imprisonment.

- [56] As Chief Justice Lamer noted in *Proulx*, at para. 46, there are four criteria that must be met before a conditional sentence may be imposed. They are: first, the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; second, the court must impose a term of imprisonment of less than two years; third, the safety of the community would not be endangered by the offender serving his sentence in the community; and, fourth, a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2, which I have just read.
- [57] None of the offences of which the jury found these offenders to be guilty carries a minimum term of imprisonment, so the first condition is satisfied.
- [58] Further, Crown counsel made no attempt to persuade me that the safety of the community would be endangered if these offenders should be given conditional sentences of imprisonment. Nevertheless, the possibility that they might reoffend is a troubling one, especially because no explanation has been offered as to why or how these two otherwise apparently typical citizens became involved in this nefarious business. There is no suggestion that they were desperate for cash to feed drug habits, or to repay crushing debts, or anything of that nature. I infer that they did it simply out of greed for the large amounts of easy money that the drug trade offered them. On the other hand, there is no evidence that they have been involved in criminal activities in the four years that have passed since the events in issue, and they have faithfully complied with their conditions of bail and have attended at court when necessary. As well, neither has a criminal record. Moreover, it would be possible to impose restrictive conditions on any community-based sentence that would eliminate for practical purposes their ability to reoffend. In the result, while it is a close call, I cannot say that they pose a danger to society should they be allowed to serve a sentence in the community. Thus the third criteria is satisfied.
- [59] The second condition precedent to a conditional sentence requires a two-step approach, and that is set out in *Proulx* at paras. 55 through 61. First, I must make a preliminary determination of the appropriate range of available sentences. If this review demonstrates that either probationary measures or a penitentiary term are appropriate, a conditional sentence cannot be imposed. If probation and incarceration in a federal institution are excluded as possibilities, then I must consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. If a conditional sentence would be consistent, a conditional sentence should be

imposed. If not, a sentence in a provincial institution should be the result.

- [60] As to the preliminary determination of the appropriate range of sentences, I note first that Parliament has provided by virtue of s. 465(1)(c) of the Criminal Code and by s. 4(3) and s. 19.1(2)(a) of the Narcotic Control Act that the maximum penalty on Counts 1 and 4 is life imprisonment, and that the maximum penalty on Count 5 is ten years imprisonment. As Count 4, trafficking in cocaine, is the most serious of the offences involved, the question whether a conditional sentence is appropriate must be answered in relation to it, and the analysis must therefore begin with the identification of the appropriate range of sentence for that offence.
- [61] A review of the relevant cases satisfies me that the appropriate range of sentence in this case is between three years and six years imprisonment and that general deterrence and denunciation remain the primary sentencing factors in offences of this sort despite the 1996 amendments to the sentencing provisions of the Criminal Code.
- [62] First, *R. v. Vien Ngoc Bui* [1996] B.C.J. No. 269 (C.A.), that is the QuickLaw citation, establishes the rough upper end of the range at six years. I find support for that view in cases dealing with offences involving heroin, which are treated slightly more seriously in the authorities than are cases involving cocaine. In particular, *R. v. Chu*, a Court of Appeal decision [1996] B.C.J. No. 713 on QuickLaw, and *R. v. Ying Chuk Lore*, a decision of this court on June 13, 1997, Vancouver Registry, CC960204, bear some significant similarities to the case at bar, save that they involved heroin rather than cocaine. In the former, a sentence of five and a half years, which, considering pre-trial custody, was effectively seven years, was upheld and, in the latter, a sentence of seven years was imposed.
- [63] The lower end of the range is established at about three years, in my view, by *R. v. Lobon-Valencia* 1999 BCCA 315, and by *R. v. Jose Fernando Castro*, a decision of this court on December 1, 1999, Vancouver Registry, No. CC970801. These cases are also similar in significant ways to the case under consideration. I find confirmation of that range in *R. v. Ditson*, a Court of Appeal decision [1994] B.C.J. No. 2346, QuickLaw, where the Court of Appeal observed that the range for minor players in the wholesale distribution of cocaine and heroin is two to three years.
- [64] Defence counsel referred to three cases in which conditional sentences of imprisonment were given for offences involving cocaine, namely *R. v. Trung Viet Bui* [1997] B.C.J. No. 2761 (C.A.), *R. v. Ellrodt* 1999 BCCA 57, and *R. v. Kozma* 2000 BCCA 440. The circumstances of these cases bear some resemblance to the circumstances before me but were sufficiently different that I have concluded that they are not useful comparators. In my view, they did not involve similar offences committed in similar circumstances by similar offenders.
- [65] First, *Trung Viet Bui* involved sales of two ounces and 25 ounces to an undercover police officer about one month apart. That contrasts with the numerous and frequent transactions in this case conducted over a period of ten months. Like the offenders in this case, Mr. Bui was a first offender. Unlike Mr. Lising and Mr. Pires, however, he pleaded guilty. Further,

unlike the offenders here, Mr. Bui was not a "main figure" in the trafficking. The Court of Appeal acknowledged that a conditional sentence would only rarely be given for trafficking offences, but it upheld a conditional sentence of two years less a day for Mr. Bui. As I read the decision, they did so out of deference to a very experienced trial judge, who had carefully weighed the circumstances, and because Mr. Bui had already completed one year of his conditional sentence in an exemplary fashion.

- [66] Next, Ellrodt involved a 32-year-old man who was convicted of possession of four ounces of cocaine for the purpose of trafficking. The relatively small amount involved and the fact that no actual sale took place are distinguishing features of that case. As well, unlike the offenders before me, Mr. Ellrodt was an addict himself, and addicts who sell to support their habit are normally treated more leniently than non-addicted offenders who are motivated to traffic only by the profit to be gained. Moreover, in substituting a conditional sentence of two years less a day for an initial custodial sentence of the same length, the majority of the Court of Appeal was swayed by the facts that Mr. Ellrodt had become a father while he was incarcerated and that his wife was experiencing difficulties without him because of the remoteness and isolation of their home. One of the judges in the majority described the case as "unique" and observed that a custodial sentence was, in effect, a sentence imposed on the wife and child. Nothing similar to those circumstances is present in this case.
- [67] Finally, Kozma concerned a conviction of a 36-year-old man on four counts of trafficking in cocaine to an undercover police officer over a period of several months in amounts that escalating from one-half gram to 12 ounces. The smaller amounts of cocaine, the fewer number of transactions and the absence of a sophisticated organization are significant distinguishing features of that case. Unlike the offenders in this case, Mr. Kozma had a difficult upbringing, which is often considered to be a mitigating circumstance, particularly with first offenders. As well, he was an addict at the material time but, following his arrest, he abstained from drugs, revived his failing marriage and family life with two young children, and obtained stable employment. In reducing his sentence of two years by one day and converting it to a conditional sentence, the Court of Appeal observed that "rehabilitation was at least as important as deterrence in this case." The precedential value of Kozma for present purposes is questionable in view of the remarkable rehabilitative progress made by the offender there and in view of the effect of that rehabilitation on the consideration of the case in subsequent cases, and I refer, for example there, to *R. v. Manhas* 2001 BCSC 876. Further, rehabilitation has a different complexion in this case, where the offenders are not addicts, have always been gainfully employed, and have strong networks of support among family and friends.
- [68] Defence counsel cited several other authorities that I did not find to be helpful because the circumstances were so dissimilar to the circumstances in this case. In particular, they did not involve sophisticated wholesale commercial trafficking of cocaine on the scale involved here, and I will mention them. They were *R. v. Migalski* [1999] O.J. No. 1235 (Q.L.) (Ont.C.A.); *R. v. Carlos Vaquerano* 2000 BCCA 343; *R. v. Poulin* (1995), 54 B.C.A.C. 312; *R. v. Mong* [1998]

B.C.J. No. 2388 (Q.L.) (B.C.C.A.); *R. v. Surjit Singh Bains*, a decision of this court, February 24, 1998, New Westminster Registry, No. X046601; *R. v. Fehr and Pugliese* [2001] BSCS 9; *R. v. Kam Singh Raymond Sun and William Yee*, a decision of this court, November 27, 1998, Vancouver Registry, No. CC961087; *R. v. Stevens* (1997), 115 C.C.C. (3d) 372 (Manitoba C.A.); *R. v. Munro and McLennan* 2001 BCCA 299; *R. v. Le*, [2000] B.C.J. No. 2709 (Q.L.), a decision of this court; *R. v. Douglas Peterson*, a decision of the County Court of Vancouver, November 7, 1984, Vancouver Registry, No. CC831473; *R. v. Jones*, [1986] B.C.J. No. 230 (Q.L.) (C.A.); *R. v. Bonner*, [1991] B.C.J. No. 754 (Q.L.) (C.A.); and *R. v. Alvarez*, [1986] B.C.J. No. 300 (Q.L.) (B.C.C.A.).

- [69] Accordingly, the appropriate range of sentence for these offenders in these circumstances requires custodial time in a penitentiary and a conditional sentence of imprisonment is therefore not an available option.
- [70] Moreover, the objectives and principles of sentencing set out in Part XXIII are subsidiary to and supportive of the fundamental purpose of sentencing, which is said in s. 718 to be "to contribute ... to respect for the law and the maintenance of a just, peaceful and safe society." A sentence in the range suggested by defence counsel would, in this case, undermine the fundamental purpose of contributing to respect for the law. The sophistication of this criminal enterprise, its scope and duration, and the amounts of cocaine and money involved call out for a significant deterrent and denunciatory term of imprisonment.
- [71] The defence submission that general deterrence has been overtaken in importance by rehabilitation since the sentencing amendments rested primarily on *Gladue*, a case of manslaughter involving an aboriginal offender, and *Proulx*, a case of dangerous driving causing death. The Court of Appeal of this province observed on March 26, 1990, in *R. v. Masse*, [1990] B.C.J. No. 746 (Q.L.), that cocaine trafficking has become an increasingly serious societal problem and emphasized the importance of general deterrence in sentencing for that offence. The continuing vitality of that approach was confirmed in *Lobon-Valencia*, a case decided after *Gladue*, where the Court of Appeal again emphasized the importance of a deterrent sentence in a case involving cocaine trafficking. This court adopted the same approach in *Castro*, where the sentence for trafficking in cocaine was imposed in December 1999. In this connection, Mr. Justice Twaddle, speaking for the Manitoba Court of Appeal in *R. v. Garoufalis* (1998), 131 C.C.C. (3d) p. 242, made some comments that bear repeating:

The operation of a cocaine-selling business is also a crime which must be denounced. The crime does not have a solitary victim, but many. The victims are not confined to those who become addicted to the drug, but extend to those who are victims of consequential crimes committed by addicts to feed their habit. Society has a vital interest in both denouncing and deterring those who are principals in such businesses.

- [72] Vien Ngoc Bui, which establishes the upper end of the range at six years, involved conspiracy to traffic in heroin as well as conspiracy to traffic in cocaine. As I have mentioned already, the authorities treat heroin-related offences slightly more severely than cocaine-related offences, and that fact distinguishes Vien Ngoc Bui from this case. Moreover, the published reasons of the Court of Appeal in that case do not set out the circumstances of the offence or of the offender and it is of somewhat limited value for that reason.
- [73] On the other hand, this case is more serious than those established in the lower end of the range. In Lobon-Valencia, a case of possession of six kilograms of cocaine for the purpose of trafficking, the offender was merely a courier and there was no actual sale of cocaine, although the amount involved was large in comparison to this case. Castro involved delivery of one kilogram, or approximately 35 ounces, of cocaine by Mr. Castro to one of his co-conspirators for re-sale. In passing sentence in that case, Mr. Justice Curtis remarked that he would have imposed a sentence of four to five years but for the fact that the offender had led a crime-free life in the five years between the offence and the sentencing. The latter fact is somewhat analogous to this case, but the circumstances in Castro were otherwise far less egregious than the circumstances in this case.
- [74] In *R. v. Gisby*, [1991] B.C.J. No. 3119 (Q.L.) (B.C.C.A.), a sentence of 48 months was imposed on a Crown appeal for possession of cocaine for the purpose of trafficking. In effect, the sentence took into account possession of four kilograms, or approximately 140 ounces - three kilograms on one occasion and one kilogram on another while awaiting sentence for the first offence. The offender, who was about 27 years old, had a criminal record, although not for narcotics offences. His purpose in possessing the cocaine was to profit from its sale and the commission of the second offence while awaiting sentence on the first was a significant aggravating factor. He had a favourable pre-sentence report and was seen as a superior candidate for rehabilitation. In allowing the appeal, the court referred to the serious societal problem created by the trafficking of cocaine and to the need to impose sentences that will deter specifically and generally.
- [75] In *R. v. Gilbertson*, our Court of Appeal, [1993] B.C.J. No. 354 (Q.L.), a sentence of four years for a single transaction of trafficking in cocaine in the amount of one kilogram, or about 35 ounces, was upheld for a 25-year-old man with a record of drug offences. The Court referred to the increasingly serious problem in society as a result of cocaine use and of the need to try to curb trafficking in cocaine "because of the disastrous social consequences to those who indulge in its use."
- [76] In *R. v. Sandhu*, [1994] B.C.J. No. 520 (Q.L.), our Court of Appeal, a sentence of four and one-half years for possession of two kilograms, or approximately 70 ounces, of cocaine for the purpose of trafficking was upheld in relation to a 30-year-old single, well-educated man with an exemplary family background, good reputation, and no criminal record. He was not an addict, but was in it for the money. The Court repeated the comments of the sentencing judge to the effect that rehabilitation was a less significant factor because of the offender's successful past and the likelihood that, with the benefit of his supportive family, he would be

able to integrate successfully into the community after serving his sentence. The offender in that case was part of what the court characterized as a "very elaborate scheme to import large quantities of cocaine into British Columbia." The force of this case in the present circumstances is attenuated somewhat by the latter fact. Here, the offenders have been proven to be part of an elaborate scheme of distribution of cocaine in the Vancouver area but there was nothing in the evidence to link them directly to importing the cocaine or to a widespread distribution throughout the province.

- [77] In *R. v. Masse*, which I have already mentioned, the offender pleaded guilty to three counts of trafficking in cocaine and one count of possession of cocaine for the purpose of trafficking. The offences spanned about ten months. The trafficking convictions involved a total of about 16 ounces and the possession conviction involved 14 ounces. The offender was 46 years old and had no criminal record for the preceding 13 years. His last conviction for a narcotics offence was 13 years before and he was a reformed cocaine addict. The third offence was committed while he was on bail for an earlier offence. On the positive side, he had worked hard to establish a successful business and was well-regarded by his associates. The Court of Appeal emphasized the need to deter cocaine trafficking and the fact that the offender was in the business of trafficking for profit and increased a one-year sentence to a total of four years.
- [78] The authorities to which I have referred make it clear that the predominant sentencing factors here are deterrence, both general and specific, and denunciation. I have not overlooked rehabilitation, but, as in *Sandhu and Masse*, these offenders have demonstrated an ability to lead law abiding and productive lives. As well, they have the support of their families and many friends and business associates, and should have no difficulty in successfully integrating themselves into society following the completion of their sentences.
- [79] Thus, a custodial penitentiary term will meet the objectives of s. 718(a) and (b) without unduly minimizing the rehabilitative goals set out in s. 718(d). The separation of the offenders from society, as mentioned in s. 718(c), is a relatively minor sentencing objective in this case.
- [80] The restorative objectives set out in s. 718 (e) and (f), that is, to provide reparations for the harm done to the community and to promote a sense of responsibility in the offenders for that harm, can be met here by a fine imposed pursuant to s. 462.37(3) of the Criminal Code. The Crown submits that the following sums of money are proceeds of trafficking in cocaine: \$1,000 paid by Molsberry to Lising and Pires on July 17, 1996; \$1,300 paid by Molsberry to Lising and Pires for an ounce of cocaine on August 9, 1996; \$1,300 paid by Molsberry to Lising and Pires for an ounce of cocaine on August 15, 1996; \$1,300 paid by Molsberry to Lising and Pires for an ounce of cocaine on August 23, 1996; \$1,300 paid by Molsberry to Lising and Pires for an ounce of cocaine on September 5, 1996; \$1,300 paid by Molsberry to Lising and Pires for an ounce of cocaine on September 12, 1996; \$1,300 paid by Molsberry to Lising and Pires for an ounce of cocaine on September 25, 1996; \$900 seized from the leather bag in Lising's Acura automobile on March 22, 1997; \$1,000 seized from Lising's vest pocket

on March 22, 1997; \$185 seized from Lising's jeans pocket on March 22, 1997.

- [81] The standard of proof on this issue is not proof beyond a reasonable doubt. I am satisfied on a balance of probabilities, which, by virtue of s. 462.37(1) of the Code, is the standard of proof to be met by the Crown in this regard, that those sums, which total \$8,800, are the proceeds of trafficking in cocaine. As I understand the Crown's position, it is that Lising and Pires were partners in this business and that they should each be liable to forfeit one-half of that amount. Further, because the money cannot be traced, a fine in lieu of forfeiture should be imposed pursuant to s. 462.37(3). I agree. I also accept the Crown's submission, relying on *R. v. Hoyles*, a Newfoundland Court of Appeal decision [1997] N.J. No. 265 (Q.L.), that Lising should be given credit for approximately \$4,400 seized from his home during a police search and subsequently forfeited to the Crown. Ability to pay is not a factor in relation to a fine pursuant to s. 462.37(3); the authority for that is *R. v. Garoufalis*, the Manitoba Court of Appeal decision that I have cited a moment ago, at para. 19. Nevertheless, given the sophisticated and extensive nature of the trafficking here, I am satisfied that this should not be a concern for Mr. Pires, in any event. I should also add that I have considered the forfeiture of monies, in the case of Mr. Lising, and the fine, in the case of Mr. Pires, as restoration, not as punishment, and that I have not taken these things into account in fixing the custodial sentence.
- [82] Mr. Lising and Mr. Pires, it has been said that there are three general classes of people that pass through our criminal justice system. Most are otherwise ordinary citizens who through haste, inattention, indiscretion, or overindulgence have made some understandable error that has transgressed the criminal law. Others are socially unskilled, weak, and ineffective and do not have the strength of character or the willpower to avoid their criminal behaviour. Such persons often were, in their upbringing, deprived through no fault of their own of the training and guidance that instils the values and social skills that are necessary to good citizenship. Others are criminals in the true sense. These include persons like you, Mr. Lising and Mr. Pires, who enter upon their criminal conduct deliberately and for selfish reasons. In choosing this criminal path, you have let down your families and your friends. In particular, you have let down your parents, who have worked so hard to establish themselves in this country and to provide you with a good upbringing and with the opportunities to succeed in life, and you have let down the young friends and relatives who look upon you as role models. It is apparent from the outpouring of respect and affection displayed by your families, friends, and associates in the letters that they have written in your support, that you each have it in you to be law-abiding, responsible, and productive citizens. I sincerely hope that you have learned your lesson and that on completion of your sentences you will choose to follow that path.

- [83] Having considered the fundamental purpose and principles of sentencing and the submissions of counsel in the light of the cases of similar offences committed in similar circumstances by similar offenders, I sentence each of you to imprisonment in a penitentiary for a term of four and one-half years on Count 1, four and one-half years on Count 4, and two years on Count 5, all to be served concurrently.
- [84] In addition, I fine you, Mr. Pires, the sum of \$4,400. You will have one year to pay, and in default of payment you will serve a sentence of imprisonment of three months consecutive to the sentences that I have just imposed.
- [85] In addition, Mr. Lising, I must impose a sentence upon you in relation to Counts 6 and 7. In that regard, I refer to R. v. Gonzalex, a Court of Appeal decision of this province [1990] B.C.J. No. 854 (Q.L.), where imprisonment for three months and a fine of \$1,500 were imposed for simple possession of one-quarter pound of cocaine, and I adopt the following apt comments of the Court of Appeal in that case:

I am of the view that the possession and transportation of such a large quantity of this prohibited drug must be regarded in an entirely different light than possession of a quantity which can be used to maintain a personal habit for a day or two. Such a large quantity, for whatever purpose it is possessed, constitutes a serious danger to the community, as well as major participation as a purchaser in the drug business.

- [86] You had approximately one ounce of cocaine in your possession, which by my calculation had a street value of something in the order of \$2,000. Accordingly, I sentence you to two months imprisonment on Count 6. As well, you had approximately one and three-quarter ounces of ecstasy in your possession. The societal damage occasioned by designer drugs such as ecstasy is well-described in R. v. Russell 2000 BCSC 27, and I need not repeat it here. I sentence you to two months imprisonment on Count 7. The sentences on Counts 6 and 7 will be served concurrently with each other and concurrently with the sentences that I have imposed upon you on Counts 1, 4 and 5. We will adjourn.

[87] MADAM REGISTRAR: Order in court --

[88] COUNSEL: My Lord, can I address the court, please --

[89] THE COURT: Mr. Westlake.

[90] COUNSEL: -- with respect to a clarification on your judgment. You gave Mr. Pires a year to pay the \$4,400. Would that be a year following his release?

[91] THE COURT: Mr. Hogg?

[92] COUNSEL: I think it's a year from the date of sentence, My Lord.

[93] COUNSEL: Well, if he's going to prison, how's he going to pay \$4,400? With respect --

[194] THE COURT: Well, I have imposed the sentence, Mr. Westlake. I have given him one year to pay. He has, I am sure, means. He has people outside the prison that he can deal with in that regard.

[195] COUNSEL: Well --

[196] THE COURT: I am not going to hear further submissions on it.

[197] COUNSEL: Well, could I ask for an extension of a year to two years, My Lord, bearing in mind the lengthiness of the trial and of the stress on the family financially as well.

[198] THE COURT: Mr. Hogg, do you have any comment --

[199] COUNSEL: I have no position to take on that, My Lord.

[100] THE COURT: Do you have in mind there, Mr. Westlake, that the trial has been a financial hardship, is that what you are suggesting?

[101] COUNSEL: It's been an enormous burden on the family.

[102] THE COURT: All right. I will amend the sentence to that extent. It will be two years to pay the fine.

[103] MADAM REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

[104] THE COURT: My apologies for coming back, but after I left the courtroom I was thinking about Mr. Westlake's submission on time to pay and it occurs to me that this is not an ordinary fine. This is a fine in lieu of forfeiture. I am not sure I should impose any time to pay. If Mr. Pires pays the fine by the time he has served his sentence, well, that is the end of it. If he has not, then the custodial time in default would be effective. And I do not know -- I want to hear what counsel say, but my reaction after thinking about what Mr. Westlake said is that I should not impose any time to pay but should simply impose the fine. Mr. Westlake, do you have anything to say about that?

(SUBMISSIONS BY COUNSEL RE: PAYMENT DEADLINE)

[105] THE COURT: It is not a fine in the ordinary sense, and I think - and I am grateful that you raised it, Mr. Westlake - I think on reflection that time to pay should not be a part of the order, and accordingly I will simply impose the fine and I will delete the provision that there be time to pay. So there will be the fine, and in default of payment the three months that I imposed. All right, thank you.

"K.J. Smith, J."

The Honourable Mr. Justice K.J. Smith

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