
CANADA / JUDGMENT

R. v. Kandola

2014 BCCA 443

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 443 R. v. Kandola

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kandola,

2014 BCCA 443

Date: 20141117

Docket: CA040155

Between:

Regina

Respondent

And

Baljinder Singh Kandola

Appellant

Before:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Garson

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated July 13, 2012 (R. v. Kandola, 2012 BCSC 1042, New Westminster Docket X072997).

Counsel for the Appellant:

S. Conroy

Counsel for the Respondent:

R. Prior

Place and Date of Hearing:

Vancouver, British Columbia

October 7, 2014

Place and Date of Judgment:

Vancouver, British Columbia

November 17, 2014

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Harris

Summary:

The accused appealed from a sentencing decision imposing a 15-year sentence for conspiracy to import cocaine, importation of cocaine, bribery of a public official, and breach of trust. The accused argued, first, the sentencing judge erred in refusing to order a pre-sentence report. Second, he argued the sentence imposed was demonstrably unfit as being disproportionate to the degree of his moral culpability and offended the principle of parity in s. 718.2(b) of the Criminal Code, R.S.C. 1985, c. C-47, when compared to the 12-year sentence of one of his co-conspirators. Held: Appeal dismissed. It was unnecessary to order a pre-sentencing report, as the sentencing judge was well-aware of the circumstances of the accused. The sentencing judge correctly set out the law for imposing sentences for multiple offences. It was necessary to consider the breach of trust when determining a fit sentence for each count, and the sentencing judge did not err in imposing a consecutive sentence, as the offences targeted separate societal interests. The total sentence was not disproportionate to the accused's overall culpability.

Reasons for Judgment of the Honourable Madam Justice Garson:

I. Introduction

- [1] After a 41-day trial, the appellant Baljinder Singh Kandola, was convicted of conspiracy to import cocaine, importation of cocaine, breach of trust by facilitating importation of cocaine, and accepting a benefit while employed as a Border Services Officer with intent to facilitate the commission of the offence of importation of cocaine.
- [2] The judge sentenced Mr. Kandola to a global sentence of 15 years in jail, with credit for 2 weeks already served at the then-standard 2-for-1 regime. The reasons for sentence may be found at R. v. Kandola, 2012 BCSC 1042 [Reasons for Sentence].
- [3] Mr. Kandola now seeks leave to appeal and, if leave be granted, appeals the sentence imposed on him. He seeks a reduction in his 15-year sentence to one of 13 years.
- [4] First, Mr. Kandola argues the judge erred by refusing to permit him an adjournment for the purposes of obtaining a pre-sentence report. Second, he argues the sentence imposed was demonstrably unfit as being disproportionate to the degree of his moral culpability and offends the principle of parity in s. 718.2(b) of the Criminal Code, R.S.C. 1985, c. C-47, when compared to the 12-year sentence of one of his co-conspirators.
- [5] In my opinion, as I will explain, a pre-sentence report was not necessary in this case, and the 15-year sentence imposed by the sentencing judge is not demonstrably unfit or disproportionate to Mr. Kandola's overall culpability.

II. Circumstances of the Offence

- [6] In his Reasons for Sentence, the judge summarized the facts underlying the offences. He described how Mr. Kandola facilitated the drug importation conspiracy by communicating, via cellphone, his border inspection booth position to his co-conspirators, enabling them to arrive at his booth where he would waive them through without inspection (at paras. 8, 10-11):

In 2006 and 2007, the accused Johal befriended the accused Kandola, who was at that time employed as a Border Services Officer ("BSO") employed by the Canada Border Services Agency ("CBSA") at the Pacific Highway Border Crossing ("PHBC"). Johal at the time owned companies that regularly imported used car parts from the U.S. On July 24, 2006, Kandola, using his access code, made an unauthorized access of one of the CBSA's databases and discovered that Johal was suspected of importing cocaine in the cars and car parts that he, or his companies, regularly imported into Canada. On seeing this, Kandola immediately advised Johal of this suspicion by the authorities.

...

After being alerted by Kandola that he (Johal) was suspected of importing cocaine, it is not surprising that Johal decided to try to insulate himself from the prying eyes of the police during his efforts to import cocaine into Canada. Johal did this by using the services of Herman Riar ("Riar") to physically transport the cocaine into Canada. Johal devised a scheme whereby he and Riar would go to the U.S. in separate vehicles. Johal would place vehicle car parts into his vehicle while Riar picked up the cocaine from a locker in Bothell, Washington.

While in the U.S., both Riar and Johal would be in constant contact through dedicated phones that had been supplied by Johal. Johal and Riar would then wait to hear from Kandola as to when they could come through the border through his (Kandola's) Primary Inspection Line ("PIL") booth. Johal usually went through the border first in his vehicle and was then followed closely by Riar with the cocaine. After being waved through the PHBC by Kandola, Riar and Johal would then drive in tandem to a designated area where it is believed the cocaine would be unloaded.

[7] In his reasons for judgment on conviction (indexed as R. v. Kandola, 2012 BCSC 968 [Reasons for Judgment]) the judge described the specific circumstances leading to Mr. Kandola's arrest. He found that on October 25, 2007, while under RCMP surveillance, Mr. Johal and Mr. Riar entered into Canada at the Pacific Highway border crossing in separate vehicles. They passed through a customs checkpoint manned by Mr. Kandola. Mr. Kandola pretended to go through the customs screening process prior to granting them entry. Mr. Riar was arrested shortly after Mr. Kandola granted him entry. The RCMP search of his vehicle revealed 208 kilograms of cocaine, three handguns, and ammunition. Mr. Riar had a phone that was dedicated to communications about the importation scheme. Mr. Kandola was arrested shortly thereafter in the CBSA primary inspection booth. He too had a phone used solely to discuss the drug importation conspiracy.

A. Reasons for Sentence

[8] On July 13, 2012, the judge imposed custodial sentences on each count in the following terms:

- On Count 1, conspiracy to import -- 14 years.
- On Count 2, importation -- 14 years concurrent to the sentence imposed on Count 1.
- On Count 5, breach of trust -- one year consecutive to the sentence on Count 1.
- On Count 6, accepting a benefit -- one year concurrent to the sentence imposed on Count 5.

[9] The judge reviewed Mr. Kandola's background. He was then 40 years old, (now 42). He joined the CBSA in 2001. He is married and has a young child. The judge referred to evidence about the debilitating effects the charges, trial, conviction, and prospective lengthy jail term had on Mr. Kandola. At the sentencing, then-counsel for Mr. Kandola argued that the judge should take into account the lesser involvement of Mr. Kandola as compared to that of Mr. Riar and Mr. Johal. He submitted that Mr. Kandola acted as a facilitator, but did not play any other role. The judge noted that Mr. Kandola's counsel (not counsel on appeal) submitted

that the global sentence should be in the range of 15 years rather than the 20 years requested by the Crown: Reasons for Sentence at para. 27.

- [10] Turning to Counts 1 and 2, the judge described the scope and sophistication of the importing scheme, highlighting the particular involvement of Mr. Kandola and the method by which the three accused crossed the border with the direct assistance of Mr. Kandola:

The Crown highlights the level of sophistication involved in the scheme: the accused's use of dedicated phones and the Punjabi language to communicate for illicit purposes; the provisions of detailed logistical information of CBSA border procedures; the use of different parties in different roles in an attempt to shield Kandola and Johal from culpability; Kandola's actions at the border to wave Johal and Riar through and his pretending not to know either of them; and Kandola's communication to Johal of information in CBSA databases relative to Johal being a suspect of cocaine importation, are just some examples of the level of sophistication and the scale of the importation scheme that Kandola and Johal were involved with. The level of sophistication indicates that both Kandola and Johal knew the risk they were taking in pursuing the importation scheme. This is particularly so for Kandola who was employed in a role that was dedicated to preventing the very activity he was convicted of.

The Crown also points to the fact that, unlike some of the cases referred to below, the importation scheme in this case involved the bribery of a public official, who, as mentioned, was charged with preventing the very activity he took part in. This aspect, says the Crown, strikes at the heart of Canada's democratic system in which public officials--and especially those charged with the protection of the border--are entrusted with the public's confidence to enforce the law in an objective manner and without consideration of personal gain.

Finally, the Crown points to the scale of the offence, involving 208 kilograms of a Schedule I substance. Though quantity of the drug should not be given overriding weight, it is a relevant factor to consider in sentencing. Additionally, conspiracy is a continuing offence and there is good reason to believe that October 25, 2007 was not the first time Kandola, Johal and Riar imported cocaine into Canada.

Overall, the Crown submits this is a case in which the sentencing principles in s. 718 of the Criminal Code of denunciation and general deterrence should play a major role. To a lesser extent, consideration should be given to specific deterrence, the protection of the community and acknowledging the harm done to victims and the community. The Crown highlights the public injury suffered by the CBSA as a result of Kandola's involvement. Finally, the Crown points out that, pursuant to s. 718.2(a)(iii) of the Code, the fact that Kandola committed a breach of trust is considered an aggravating factor.

[Reasons for Sentence at paras. 35-38].

- [11] The judge instructed himself on the principle of totality. In particular he quoted from *R. v. Hutchings*, 2012 NLCA 2 (as cited in *R. v. M.E.*, 2012 ONSC 1078), noting the importance of ensuring the combined sentence is proportionate "to the gravity of the offence[s] and the degree of responsibility of the offender": *Hutchings* at para. 84.
- [12] Next he turned to a consideration of parity with the co-conspirator Riar. Riar was sentenced in Provincial Court to 12 years of imprisonment following his guilty plea. The sentencing judge examined the role played in the conspiracy by Riar and concluded that Riar had played a lesser role than that of Kandola and Johal. He noted that the Provincial Court sentencing judge treated Riar's role in the conspiracy as that of a courier. Like Kandola, Riar was a first-time offender whose personal circumstances boded well for his rehabilitation. As well, the sentencing judge noted that the Provincial Court judge considered Riar's guilty plea a mitigating factor: *Reasons for Sentence* at para. 47.
- [13] After considering a number of similar cases--including *R. v. Isaza* (1993), 35 B.C.A.C. 217; *R. v. Lore* (1996), 116 C.C.C. (3d) 255 (Que. C.A.); *R. v. Hamilton* (2004), 72 O.R. (3d) 1; *R. v. Bacon*, 2013 BCCA 396; *R. v. Pederson and Hernandez* (July 27, 2011), Victoria 149340-2 (B.C.S.C.); *R. v. Vukelich*, [1994] B.C.J. No. 3338 (S.C.); *R. v. Powers and Powers* (April 7, 2011), Kamloops 19747 (B.C. Prov. Ct.); *R. v. Cook*, 2010 ONSC 5016; *R. v. Chand* (1994), 52 B.C.A.C. 301 (B.C.C.A.); *R. v. Joubert* (1993), 35 B.C.A.C. 214 (B.C.C.A.); *R. v. Epp*, 2006 BCCA 570; *R. v. Frost*, 2011 ONSC 6448; *R. v. Malanca*, 2007 ONCA 859; *R. v. Sandhu*, 2003 BCSC 2033; and *R. v. Trigueros Sibrian*, 2011 BCSC 1516--the judge quoted from the sentencing decision in *R. v. Oliynyk, Lepage and Ferris*, 2006 BCSC 572, *aff'd* *R. v. LePage*, 2010 BCCA 249, in which MacKenzie J. (as she then was) held that drug importation should lead to severe sentences. What she said at paras. 94-96, is apt to Mr. Kandola:

All the accused are intelligent adults. They are not young, vulnerable or naïve. They were always aware of the huge risks they were taking, yet knowingly and willingly exposed themselves to them.

Motivated by profit, the accused had no moral reservations about their activities and the destruction they would cause. Importing and trafficking in drugs causes misery to addicts and their families and it spawns further and other crimes of all sorts. Much serious crime is drug-related. It touches all our society. And these three men imported a very large quantity of cocaine, and planned on importing more.

They know the law. They knew they faced severe, lengthy jail sentences if they were caught. They have been caught. They must be sentenced severely.

[Quoted with approval and emphasis added by the Court of Appeal in

R. v. LePage, 2010 BCCA 249 at para. 23]

[14] At para. 70, the sentencing judge in this case then cited *R. v. Greenhalgh*, 2011 BCSC 511 at para. 53, aff'd 2012 BCCA 236, in which Verhoeven J. relied on the principles articulated by Hill J. in *R. v. Cook*, 2010 ONSC 5016. In *Cook*, Hill J. described the significance of a police officer "crossing to the other side of the road and [becoming] a criminal" as follows:

1. Police officers, as officials discharging public duties, occupy a special position of trust in the community.
2. As in any line of work, the moral compass of an individual police officer may become untrue as he or she elects "to cross to the other side of the road and become a criminal". Police officers have opportunities, practically on a daily basis, to cross the line and engage in prohibited conduct. The public trusts them to resist the temptation and relies upon the courts to deal firmly with those who stray.
3. When sentencing a police officer for a crime involving breach of the public trust the court may properly take into account that the accused would necessarily be well aware of the consequences of its perpetration.
4. Not surprising is the reality that individuals who find themselves before a criminal court convicted of a breach of trust crime are able to adduce abundant good character evidence - "[i]t is, of course, this very type of character profile which allows an individual to attain a position of trust".
5. In any case involving conviction and sentence, the accused is stigmatized, more or less, by the process. While shame and disgrace may be amplified in the instance of a public official, these consequences are not to be over-emphasized in determining a fit punishment.
6. Quite apart from the police corruption offence in s. 122 of the Criminal Code, breach of a position of trust is a deemed aggravating factor in sentencing: s. 718.2(a)(iii) of the Code.
7. General deterrence and denunciation drive the sentencing process in abuse of trust prosecutions. In the absence of an exceptional mitigating factor (e.g., addiction), severe sentences are justified for police officer offenders to honour these sentencing principles.
8. While a police officer who breaches the public trust brings upon himself or herself the consequence of dismissal, that penalty falls to be considered within the totality of the circumstances worthy of review by a sentencing court. The jeopardy of loss of employment on the part of a police officer cannot trump the pressing need for denunciation and deterrence.
9. Police officer offenders will almost inevitably serve much or all of the sentence in protective custody. This reality, involving as it does more limited social contact and institutional amenities, ordinarily warrants consideration in mitigation of punishment.

[Reasons for Sentence at para. 70, citations omitted]

- [15] The sentencing judge found that there were very few mitigating factors to be considered with respect to Mr. Kandola. He found that Mr. Kandola breached his position of trust, accepted bribes, and played a pivotal role in the conspiracy, all motivated by greed. He rejected the submission that Mr. Kandola had played a lesser role than the one played by his co-conspirator Riar: Reasons for Sentence at paras. 57-58.

III. Discussion

- [16] The standard of review to be applied when this Court is asked to review the "fitness of the sentence appealed against" under s. 687(1) of the Criminal Code is a deferential one. It was described in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90 and 92, by Lamer C.J.C. in the following manner:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code

. . . . a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

- [17] If the sentencing judge made an error in principle, deference plays a less important role, and the question becomes "whether that error led the sentencing judge to impose a sentence that was unfit": *R. v. Johnson* (1996), 112 C.C.C. (3d) at para. 37 (B.C.C.A.).
- [18] The maximum penalty for importing cocaine is life imprisonment (Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 6(3)(a)); conspiracy to import cocaine has the same maximum penalty (Criminal Code, s. 465(1)(c)). With respect to breach of trust, the maximum penalty is five years (Criminal Code, s. 122); with respect to the bribery offence, the maximum penalty is 14 years (Criminal Code, s. 120(a)).

A. The Lack of a Pre-Sentence Report

- [19] The first argument advanced by Mr. Kandola on appeal is that the judge erred in refusing to order a pre-sentence report, considering the very long 20-year custodial sentence sought by the Crown. Mr. Kandola does not point to any factor that such a report might have revealed that was not already before the judge. I must therefore conclude that counsel for the accused put before the sentencing judge all that could be said about Mr. Kandola in mitigation of his sentence. The judge offered to provide a short adjournment to permit counsel to obtain further materials for sentencing, but this offer was declined by Mr. Kandola.

[20] By the time of the sentencing hearing, the judge had heard 41 days of evidence and submissions at trial, including testimony in which Mr. Kandola described his own background and involvement in the conspiracy in some detail. The judge was well aware of any factors in Mr. Kandola's background that might have mitigated his sentence. The judge accepted that Mr. Kandola was a relatively young first-time offender who succumbed to temptation. That he was a good candidate for rehabilitation was not in doubt. Nor was his previously unblemished lifestyle. What influenced the judge to impose a very long sentence was the fact that this was an offence involving both corruption in public office and importation of cocaine. A pre-sentence report would not have affected the outcome in this case. I would not accede to this first ground of appeal.

B. Fitness of the Sentence

[21] The second ground of appeal concerns whether the sentence offends the principles of parity as set out in s. 718.2(b) of the Criminal Code, or was unduly long and harsh and thereby offends the principles of totality as set out in s. 718.2(c) of the Code.

1. Parity with the Sentence of Mr. Riar

[22] Mr. Kandola argues the sentence is disproportionate to his degree of moral culpability and he should have received a sentence of similar length to the one imposed on Riar.

[23] Mr. Kandola summarizes the relative contributions of the three conspirators as follows:

- (a) Mr. Riar was found by the trial judge to have been involved in the conspiracy as a transporter. It was Mr. Riar who picked up the cocaine in the United States and imported it across the border into Canada, and he was the one found in possession of 208 kilograms of cocaine after a search of his vehicle.
- (b) Mr. Kandola was found by the trial judge to have been involved in the conspiracy as a facilitator. The judge found that Mr. Kandola had been "wilfully blind" as to the nature of what Mr. Riar and Mr. Johal were importing into Canada and deliberately chose not to make further inquiries. There was no evidence that he knew the nature of the drug being imported or the quantity.
- (c) Mr. Johal was found by the trial judge to have been the overseer of the operation. It was Mr. Johal who made all of the arrangements, who bribed Mr. Kandola for his cooperation, and who received the cocaine after it had been imported into Canada by Mr. Riar.

[24] Mr. Kandola argues that Mr. Riar had greater moral culpability, his role being to actually import and handle the cocaine. Citing *R. v. Arcand*, 2010 ABCA 363, he argues in his written submission:

In the context of co-accuseds being sentenced for the same offence, the level of mens rea is a relevant circumstance bearing on their comparative levels of moral blameworthiness under the parity principle. Thus, an offender who is willfully blind has a lower level of moral

blameworthiness than a co-accused who has actual knowledge. While Mr. Kandola's moral culpability may have been greater due to his breach of trust, this was already accounted for in the consecutive one year sentence imposed on him for the separate breach of trust offence. Further, as noted above, the sentencing judge failed to acknowledge or account for many of the mitigating factors present in Mr. Kandola's case.

[25] Arcand is not of assistance to Mr. Kandola. The comments made regarding the effect of wilful blindness on an accused's moral culpability by the Alberta Court of Appeal in that case were obiter dicta; the case did not involve wilful blindness. This is not a case in which he was "duped" by his or her co-conspirators: *R. v. Sidhu*, 2009 ONCA 81 at para. 15. The facts of this case do not lead to a conclusion that Mr. Kandola's moral culpability was reduced by his wilful blindness. The judge's finding that Mr. Kandola was wilfully blind in the perpetration of the importation scheme related to whether he had knowledge that Mr. Riar was carrying cocaine when he crossed the border. The trial judge in this case found that Mr. Kandola "had full knowledge or at the least was wilfully blind and deliberately did not seek out information to confirm his belief that Riar and Johal were bringing cocaine . . . into Canada": Reasons for Judgment at para. 416. After all, this "turning a blind eye" was the whole purpose of Mr. Kandola's involvement; that is, his role was to waive Riar through the border without enquiry. He cannot rely on this conduct as reducing his level of moral culpability.

2. Parity with Sentences in Similar Cases

[26] Last, Mr. Kandola relies on *R. v. Von Holtum*, 2013 BCCA 384; *R. v. Epp*; *R. v. Lawson*, 2005 CanLII 12513 (Ont. C.A.); and *R. v. LePage*, 2010 BCCA 249, for the proposition that the overall sentence is outside the range for similar offences and similar offenders.

[27] In *Von Holtum*, both *Von Holtum* and the Crown appealed a 10-year sentence on conviction for importing and trafficking cocaine. Importantly, *Von Holtum* was an airport baggage handler who abused his position and ability to access secure parts of the airport to facilitate the importation. This Court allowed the Crown appeal and increased his sentence to 12 years. In doing so, Neilson J.A. held that the trial judge had erred in characterizing *Von Holtum* as merely a courier. That characterization wrongly minimized his role and the extent of his moral culpability. The Court described him as a "corrupt insider" who used his special position and security clearance to facilitate the crime, and in doing so "breached his employer's trust and the integrity of the civil aviation security requirements": *Von Holtum* at paras. 41, 46. Similar to Mr. Kandola, *Von Holtum* was a 47-year-old, first-time offender, who cared for his elderly mother and had contributed much to his community. Neilson J.A. compared *Von Holtum* to Mr. Kandola, who had by then been sentenced to 15 years. She justified a lesser sentence for *Von Holtum* on the basis that Kandola's sentence reflected his role as a peace officer, which was an "important distinguishing feature from Mr. *Von Holtum*'s circumstances": *Von Holtum* at para. 48. Mr. Kandola argues that he is in a position similar to *Von Holtum*, both as to his circumstances and as to his role in the crime. He argues that a similar sentence should be imposed upon him.

- [28] I do not agree with Mr. Kandola that Von Holtum is comparable. I agree with Neilson J.A.s characterization of the two roles of border guard and baggage handler as being distinguishable in the degree of seriousness of the breach of trust.
- [29] Next, is the case of R. v. Epp. Epp was a 35-year-old, first-time offender who acted as a courier in driving a tanker containing 100 kilograms of cocaine across the border. He appealed his 14-year sentence. On appeal to this Court, his sentence was reduced to 10 years. He pled guilty and co-operated with the police. The Crown accepted that this was his first involvement in the movement of drugs. Mr. Kandola argues that increasing the sentence imposed on Epp by three years, to account for the aggravating factor of Mr. Kandola being a border guard, would result in a 13-year sentence: the sentence he seeks.
- [30] The third case relied on by Mr. Kandola is Lawson. The Crown appealed Lawson's 8-year sentence for conspiracy to import 100 kilograms of cocaine and making a false statement to procure a passport. The Ontario Court of Appeal dismissed the Crown's sentence appeal, holding that the sentence was not unfit. In my view, that sentence, on the whole, appears to be inconsistent with comparable jurisprudence in this jurisdiction.
- [31] In LePage, the accused was convicted of conspiracy to import cocaine. His involvement in the conspiracy was described as "second in command" of a sophisticated ongoing cocaine importation conspiracy: LePage at para. 3. He was sentenced to 12 years of incarceration. He appealed, arguing that a fit sentence would be six to eight years. The appeal was dismissed. Mr. Kandola argues that, considering the role of LePage in that case, the resulting sentence should be used as a close comparator, which supports his submission that 13 years is an appropriate sentence for him.
- [32] In contrast to Mr. Kandola, the Crown argues that the combination of the importing offences together with the bribery and breach of trust offences demand the stiffest of sanctions. The Crown relies on a number of case authorities to support the sentence. The following are the most relevant.
- [33] First, the Crown also relies on LePage, but draws this Court's attention to the sentence of one of the co-accused of LePage: Mr. Oliynyk. Mr. Oliynyk was the main figure in the cocaine importation conspiracy and had a previous criminal record for distribution of drugs in the United States. The sentencing judge sentenced Oliynyk to 18 years. The sentence was upheld on appeal. Oliynyk had a significant related prior record and his role was higher in the organizational hierarchy of the criminal conspiracy than Mr. Kandola's.
- [34] In R. v. Bacon, the offender was convicted for his role in a conspiracy to traffic 100 kilograms of cocaine to be imported from Mexico, and which was to be part of a stable, ongoing supply of cocaine. The offender's role was to negotiate with the police agent to acquire drugs (through a co-accused), to arrange financing, and to distribute the drugs on an ongoing basis until they were disposed of. The offender had a criminal record consisting of eight previous convictions, but none for drug trafficking. The judge held out little hope for rehabilitation. The judge sentenced the offender to a 12-year imprisonment (seven years and two months

after credit was given for pre-trial custody). The Crown appealed the sentence. This Court allowed the appeal (MacKenzie J.A. dissenting) and increased the sentence to 14 years.

[35] In *R. v. Pocasangre*, 2013 BCSC 193, the offender was convicted of importing nine kilograms of cocaine into Canada and possession of that cocaine for the purposes of trafficking. He was sentenced to eight years of imprisonment. There was nothing to suggest that this was more than a one-time event. Importantly, the judge found it to be an aggravating factor that the offender used his special U.S. security clearance to facilitate the offence.

[36] In my opinion, the cases cited by both Mr. Kandola and the Crown support the sentence imposed by the judge as being within the range of sentences imposed for similar crimes, although undoubtedly at the high end of the range. It is not, though, a substantial or marked departure from the range (*R. v. M. (C. A.)*). I would not accede to this argument on appeal.

3. The "Double-Counting" of the Breach of Trust

[37] Mr. Kandola also argues that the sentence is inconsistent with the principle of totality because, in having the breach of trust considered as both an aggravating factor and the basis for a consecutive sentence, he is, essentially, punished twice for the same conduct. Mr. Kandola argues that, in respect to the conspiracy and importation charges, his moral culpability may have been greater because of his breach of trust, but he says this aggravating factor was already accounted for in the consecutive one-year sentence imposed on him for the separate breach of trust offence. Therefore, he says that his 15-year sentence is demonstrably unfit, not only in comparison to Mr. Riar as discussed above, but it is disproportionate to the gravity of the offences in total.

[38] The judge found Mr. Kandola's abuse of public trust was a crime demanding the stiffest of sanctions. On my reading of the judge's reasons, although the importation was no doubt serious, Mr. Kandola's involvement in the conspiracy was not, on its own, something that would merit a sentence on the high end of the spectrum. The judge increased the sentence for Counts 1 and 2 (importing and conspiracy) to 14 years in order to reflect the aggravating factor of his abusing a position of trust as a peace officer. The judge then also imposed a consecutive one year sentence for both the breach of trust and bribery offences, pursuant to ss. 120(a) and 122 of the Criminal Code, resulting in a 15-year total sentence.

[39] As stated in *R. v. Hutchings* and *R. v. M.E.*, and as acknowledged by the judge in this case, a sentencing judge must first determine an appropriate sentence for each count individually. Second, the judge must determine whether the offences are sufficiently related such that a concurrent sentence would be appropriate. Finally, the judge must turn to an analysis of the proportionality of the sentence in total. (See also *R. v. Li*, 2009 BCCA 85).

[40] There is an inevitable overlap when imposing consecutive sentences for crimes arising from related acts, which is why courts hesitate to impose consecutive sentences when the related acts constitute a single endeavour: *R. v. Barrick*, 2012 BCCA 83 at para. 18. However, overlapping offences that, nonetheless, constitute crimes directed at "different societal

interests" can appropriately give rise to consecutive sentences: *R. v. McCrea*, 2008 BCCA 227 at paras. 7-8. The judge's discretionary decision to impose a consecutive sentence when different societal interests are at play is subject to the same deference by this Court as the length of the sentence imposed: *R. v. McDonnell*, [1997] 1 S.C.R. 948 at para. 46.

- [41] In this case, the whole *actus reus* of the importing scheme involved the abuse of public office. That element of the offence would need to be considered when determining an appropriate sentence for each count. In deciding that a consecutive sentence was appropriate for the breach of trust and bribery counts, the judge made specific reference to the "special position of trust" Border Services Officers hold in the community. When such officers abuse their power "all of Canadian society is put at risk": *Reasons for Sentence* at para. 73. The judge's reasons show that the separate societal interest threatened by the bribery and breach of trust necessitated a separate, consecutive sentence. As well, I note that the bribery offence includes elements and actions that are not accounted for under the other counts, even if there was some overlap. I would not accede to the argument that imposing a consecutive sentence was an error in this case.
- [42] Finally, once the judge in this case determined an appropriate sentence for each count and whether the sentences should be served concurrently or consecutively, he was obliged to take a step back and consider the proportionality of the sentence in total, including the effect of counting the breach of trust as both an aggravating factor and the basis for a separate sentence: *R. v. Li* at para. 28.
- [43] Although the judge instructed himself on the totality principle, he did not expressly consider whether the use of the breach of trust as both an aggravating factor and the basis for a consecutive sentence resulted in a sentence disproportionate to Mr. Kandola's overall culpability. However, this was not, in my view, an error in principle. The judge carefully set out the law on totality and it may easily be inferred from his reasons that such consideration occurred.
- [44] I should add that the one year sentence imposed for Count 5, breach of trust, and Count 6, accepting a benefit, does not, itself, appear to reflect the gravity of those offences. Standing alone, a sentence of one year for a breach of trust in these circumstances would be inadequate, but the gravity of the breach of trust has been taken into account in the sentence for Counts 1 and 2. It would not be appropriate to take the gravity of the breach of trust into account a second time in sentencing for the breach of trust. The comparatively short consecutive sentence reflects both the totality principle and the fact that the gravity of the offences aggravated the sentence for Counts 1 and 2.
- [45] Even if the judge erred in the final totality analysis, the appellant would still carry the onus of establishing that the error led to an unfit sentence: *R. v. Johnson*. That is, Mr. Kandola would need to show that it led to a global sentence disproportionate to the overall culpability of the appellant: *R. v. M. (C.A.)* at para. 42. In my view, this has not been shown.

[46] Mr. Kandola points to his previous unblemished record as a mitigating factor. There is no doubt that the result of his embarking on this criminal venture is a personal tragedy for him and his family. But principles of general deterrence factored heavily in the sentencing judge's mind, and correctly so. In my view, corruption by a public official, while thankfully rare, is indeed a crime deserving of a very severe sanction. As a border guard, Mr. Kandola occupied a special position of trust in his community and in his workplace. The type of corruption evidenced by this case has a corrosive effect not just on his former colleagues, but also on public trust in law enforcement. Public confidence in the administration of justice requires severe sanctions in the rare instances when a law enforcement officer does succumb to such temptation. In Mr. Kandola's case, the combination of importing cocaine, which leads to untold misery for those addicted, combined with the abuse of trust while facilitating illegal importation of cocaine, the very task with which he was entrusted to deter, must lead to a lengthy sentence. It cannot be said, on review of the cases already mentioned, that the total sentence is outside the range of sentences imposed in similar cases while adjusting for the specific circumstances of the appellant or is disproportionate to his overall culpability.

IV. Conclusion

[47] The 15-year sentence is not, in my opinion, demonstrably unfit for any of the reasons advanced by the appellant. It is not disproportionate to Mr. Kandola's overall culpability. Nor did the judge require a pre-sentencing report, as he was well-aware of Mr. Kandola's background and the relevant facts.

[48] I would grant leave to appeal, but I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Harris"

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