

CANADA / JUDGMENT

R. v. Kodimyala

2020 BCCA 275

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 275 R. v. Smith

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kodimyala,

2020 BCCA 275

Date: 20201008

Docket: CA46496

Between:

Regina

Appellant

And

Rajesh Kodimyala

Respondent

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fisher

On appeal from: An order of the Provincial Court of British Columbia, dated
October 16, 2019 (R. v. Kodimyala, Surrey Docket 225774-1).

Counsel for the Appellant:

M. Richards

Counsel for the Respondent:

V. Larochelle

Place and Date of Hearing:

Vancouver, British Columbia

September 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2020

Written Reasons by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Mr. Justice Goepel

Summary:

The appellant was convicted on a charge of fraud over \$5,000, and the trial judge entered a suspended sentence with three years probation. The Crown appeals from this sentence on the basis that the judge erred in finding exceptional circumstances where none existed, resulting in an unfit sentence. Held: Appeal allowed, the suspended sentence is set aside and a substituted sentence of six months' imprisonment is entered. The trial judge made an error in principle when she considered the ordinary consequences of the offence as exceptional circumstances warranting a suspended sentence. The trial judge also erred by treating certain circumstances as mitigating when the circumstances did not relate to the gravity of the offence or the degree of responsibility of the offender.

Reasons for Judgment of the Honourable Mr. Justice Groberman and the Honourable Madam Justice Fisher:

- [1] Rajesh Kodimiyala was convicted after a five-day trial on a charge of fraud over \$5,000 contrary to s. 380(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. The trial judge, acting under s. 731(1)(a) of the Code, suspended the passing of sentence. The Crown applies for leave to appeal the suspended sentence, contending that such a disposition was unfit. If leave is granted, it seeks, instead, the imposition of a custodial sentence of six to 12 months.

Circumstances of the Offence

- [2] Mr. Kodimyala engaged in an unsophisticated "cheque kiting" scheme in November 2014. He deposited four cheques amounting to \$113,300 into his bank account at Vancouver City Savings Credit Union. The cheques were drawn on a closed account and were worthless. Within four days after the first cheque was deposited, and before the credit union became aware that it would not clear, Mr. Kodimyala made numerous cash withdrawals and online payments from the account. His subsequent withdrawals and payments from the rest of the deposits were unsuccessful, as they were returned for insufficient funds. In the end, the credit union suffered a loss of \$48,313.84.
- [3] Mr. Kodimyala pleaded not guilty to the offence, and gave evidence that exonerated himself and placed the blame for the bogus cheques on business associates. He also claimed that many of the withdrawals were initiated by persons other than himself. The judge rejected his evidence, and found that he was wholly responsible for both the deposits of the bogus cheques and for the withdrawal of funds.

Circumstances of the Offender

- [4] Mr. Kodimyala was 41 years old at the time of sentencing. He had resided in Canada for approximately 16 years, and had no criminal record.
- [5] The charge was not laid until some three years after the offence was committed. In the meantime, Mr. Kodimyala had obtained full-time employment with the IT department of a bank. He had re-married, and his wife had given birth to a daughter. The daughter was approaching two years old at the time of sentencing.
- [6] Mr. Kodimyala also had a 10-year-old daughter from a previous marriage who lived with the child's mother. Although Mr. Kodimyala had a substantial salary, he also had significant debts, and, in addition to child support he paid to his ex-wife, was also providing support to his parents and relatives in India.
- [7] From the pre-sentence period to the hearing itself, Mr. Kodimyala took no responsibility for his actions and expressed no remorse.

The Sentence Imposed

- [8] The maximum sentence for fraud over \$5,000 is fourteen years. Accordingly, under s. 742.1(c) of the Criminal Code, a conditional sentence order was unavailable.
- [9] The Crown took the position that the ordinary range of sentence for this type of offence, at least for a first offender, was nine to 18 months imprisonment. It sought a sentence of 12 months, to be followed by 12 months of probation.

- [10] Mr. Kodimyala argued that a suspended sentence was appropriate, and sought such a sentence with a two-year period of probation. The Crown contended that there were no exceptional circumstances that would justify a sentence lower than the range suggested above.
- [11] The judge accepted that the ordinary range of sentence for the offence was nine to 18 months. She considered as aggravating factors that there was some planning and premeditation to the offensive conduct, albeit an unsophisticated crime that occurred for a short duration, the conduct was not isolated, the amount obtained was "not insignificant", and there was an impact on the credit union. She did not consider that any of the statutory aggravating factors in s. 380.1(1) were present. In particular, she found that Mr. Kodimyala's reputation as a customer and businessman did not contribute to the offence.
- [12] The judge considered as mitigating factors Mr. Kodimyala's lack of a criminal record, his pro-social life and efforts to rehabilitate himself, the stability provided by his second marriage and the birth of his daughter, the support from his family and friends, his success in maintaining lawful employment since 2015 with no offensive conduct, his stated intention and ability to pay restitution, his embarrassment, shame and loss of reputation, and the fact that he was not in a position of trust. She also considered as mitigating the period of pre-charge delay, concluding that the delay took this matter "into one of the rare cases that exceptional circumstances do exist" and "most significantly in the context of Mr. Kodimyala's efforts to rehabilitate himself".
- [13] The judge concluded that a custodial sentence was not necessary, summarizing her reasons as follows (at para. 123):

In conclusion, in the circumstances of this case, including the lack of criminal record, the significant pro-social changes in Mr. Kodimyala's life which I outlined above including a stable family life and secure full-time employment, the support that he gives to the community including his extended family, and as I said, most importantly the significant time delay from the date of the offence to the date the charges were sworn, I am satisfied that the circumstances here are above and beyond the norm to justify a non-custodial sentence and I conclude that Mr. Kodimyala has truly turned his life around and the protection of the public is better served by a non-custodial sentence.

- [14] Her view was that a suspended sentence was appropriate "so long as the conditions imposed satisfy all the principles of sentencing including the paramount principle of deterrence and the secondary principle of denunciation". She therefore suspended sentencing, and placed Mr. Kodimyala on three years of probation. Among the terms of the probation were the imposition of a curfew during the first nine months and a requirement to perform 80 hours of community service. The judge also imposed a restitution order, requiring Mr. Kodimyala to make payments to reimburse the credit union for the losses it suffered.

The Crown Appeal

- [15] On appeal, the Crown contends that the judge erred in finding exceptional circumstances where such circumstances did not exist, relying on pre-charge delay, and erroneously considering mitigating factors, all of which resulted in an unfit sentence.
- [16] Mr. Kodimiyala contends that there is no requirement for exceptional circumstances to justify a departure from a range of sentence. However, if there is, he says the judge's findings are entitled to deference from this court and the sentence was not demonstrably unfit, especially given the judge's conclusion that the public would be better served by a non-custodial sentence.

Analysis

1. Exceptional and mitigating circumstances
- [17] The Crown submits that it is an error in principle to categorize the ordinary as exceptional, citing *R. v. Zenari*, 2012 ABCA 279; *R. v. Burnett*, 2017 MBCA 122 and *R. v. Murdoch*, 2015 NBCA 38. The Crown referred to *R. v. Voong*, 2015 BCCA 285 in respect of what may constitute exceptional circumstances but acknowledged that such circumstances do not oust the proportionality principle, citing *R. v. L.S.N.*, 2020 BCCA 109. The Crown also takes issue with the judge's description of certain circumstances as being mitigating.
- [18] Mr. Kodimiyala's submission concerns, in part, the application of *Voong*, and whether it continues to be good law in light of the subsequent decisions of the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64 and *R. v. Friesen*, 2020 SCC 9, both of which emphasize the limited basis for appellate intervention in sentencing.
- [19] The judge considered that the issue before her was whether or not there were exceptional circumstances as contemplated in *Voong* to justify a departure from the range of sentence. She did not make an explicit finding of "exceptional circumstances", other than in relation to the pre-charge delay, but it is implicit in her reasons that she considered the mitigating circumstances she identified to be sufficiently "exceptional" so as to justify a sentence below the range she accepted as between nine and 18-months imprisonment.

R. v. Voong

- [20] Given Mr. Kodimiyala's submission and the judge's approach in this case, it is important to begin the discussion with a consideration of what *Voong* decided.
- [21] In *Voong*, this court considered both whether suspended sentences were available for drug trafficking offences, and what circumstances could justify such a sentence. *Voong* is a detailed and carefully reasoned judgment. It discusses principles of sentencing, and analyses the seriousness of drug trafficking as a crime. It discusses the historical range of sentences. Following the analysis, the judgment concludes that a custodial sentence will normally, though not always, be required for those found to have participated as traffickers

in dial-a-dope operations:

- [59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.
- [22] Lacasse specifically rejected the idea that a sentence could be overturned on appeal simply because the trial judge imposed a sentence outside of the normal "range" for the offence. Wagner J. (as he then was), speaking for the majority, stated:
- [11] This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, inter alia, the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the Criminal Code in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
- [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts.
- [23] The court further clarified the limited role of appeal courts on sentencing appeals in Friesen:

- [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.
- [24] The court also clarified (at para. 112) that there is no requirement for there to be "rare or special circumstances" in order to impose a substantial sentence where it is proportionate, which we interpret as equally applicable to the imposition of a lenient sentence where one is proportionate. The Manitoba Court of Appeal echoed the same principle in *Burnett*, noting that the law does not require a sentencing judge to find exceptional circumstances to justify a sentence below a judicially created range: see paras. 25-26.
- [25] In our view, *Voong* is not based on the idea that a departure from normal sentencing ranges requires justification. Rather, it is a case that discusses the reasons why the principle of proportionality will usually require a custodial sentence for drug traffickers in dial-a-dope cases, subject to there being circumstances that demonstrate that a lesser sentence will satisfy the principle. Understood in that light, it does not run afoul of the principles set out in *Lacasse* and *Friesen*.
- [26] In the years following the judgment in *Voong*, submissions were made to this court in several cases that attempted to characterize the question of whether there were "exceptional circumstances" as a question of law. Such an approach has been rejected. In *R. v. Ruiz*, 2019 BCCA 323, the court said:
- [18] It is important to recognize that "exceptional circumstances" is not a term of art, but rather a generalized description intended to encompass circumstances of the offender and of the offence that call out for a sentence that is well below the generally accepted range. [The Court then quotes from para. 59 of *Voong*].
- [19] There is, in short, no litmus test for "exceptional circumstances". Further, as Bennett J.A. recognized in *Voong*, at para. 102, there are degrees of "exceptional circumstances". A sentencing judge, recognizing that suspended sentences may be imposed even for trafficking of drugs, must evaluate the circumstances of the offence and of the offender and decide whether the situation is such as to call for a sentence that is lighter than those usually imposed for trafficking offences.

- [27] In *L.S.N., Fitch J.A.*, on behalf of the court, specifically discussed the relationship between "exceptional circumstances" and the proportionality principle:
- [50] Proportionality is the cardinal principle of sentencing: *Lacasse* at para. 12. All sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. Proulx*, 2000 SCC 5 at para. 54; *Friesen* at para. 30.
- [51] Sentencing judges exercise a broad, case-specific discretion in determining the weight to be accorded to the sentencing principles set out in s. 718 and 718.2 of the Code. Sentencing judges also exercise a broad discretion in determining how those principles are best achieved in a particular case. But the resulting sentence must respect the fundamental principle of proportionality: *R. v. Nasogaluak*, 2010 SCC 6 at para. 40; *R. v. Ipeelee*, 2012 SCC 13 at para. 37.
- [52] Sentencing is, of course, an individualized process. Exceptional circumstances--often rooted in an offender's disadvantaged background--may inform the assessment of an offender's moral culpability. The moral culpability of a significantly disadvantaged offender may be attenuated in the face of circumstances a sentencing judge considers to be exceptional.
- [54] Exceptional circumstances do not, however, oust the proportionality principle. They simply permit the taking into account of case-specific considerations that could conceivably justify departure from a conventional sentencing range in order to craft a proportionate sentence. As this Court noted in *R. v. Padda*, 2019 BCCA 351 at para. 36, characterizing an offender's circumstances as exceptional "is simply a shorthand means of identifying the kind of personal circumstances which justify going outside a conventional range in order to craft an appropriate individualised proportionate sentence."
- [28] The judge in this case identified the issue as "whether or not there were exceptional circumstances as contemplated in *R. v. Voong* to justify a departure from the range of sentence", went on to assess the aggravating and mitigating factors, and concluded that the circumstances justified a non-custodial sentence. This court must show deference to her findings and conclusions absent any demonstrated error of principle.

Exceptional vs. ordinary

- [29] As noted above, the Crown submits that the judge erred in principle by considering the ordinary exceptional. It says that many of the factors considered by the judge to justify the non-custodial sentence were nothing more than the normal consequences of the fraud offence and notes that such offenders frequently come before the court with no record and strong family support. This was addressed in *Zenari*, a case involving employee fraud:
- [8] While the sentencing judge correctly stated the principle [absent exceptional circumstances the goals of deterrence and denunciation demand a sentence of imprisonment for such crimes], she misapplied it. Many of the factors she found to be exceptional are merely the normal consequences of this type of crime. The consequences of a fraud conviction for a

person of previous apparently good character are often the same: loss of reputation; loss of job; shame; financial ruin; loss of house; negative repercussions for the family; letters of surprise but continuing support from friends and family; concerns about who will support the family while the accused is in jail, etc. These are common features of many of the other reported decisions, and cannot be considered to be exceptional. If these are exceptional, then virtually every case like this is exceptional. It was an error of principle for the sentencing judge to categorize the ordinary as exceptional.

[30] See also Murdoch at para. 47 and Burnett at para. 31.

[31] We agree with the Crown that the factors the judge considered to be exceptional enough to justify a suspended sentence were not exceptional. As a first offender, Mr. Kodimyla had the support of his family and friends and suffered shame, embarrassment and loss of his reputation due to the nature of his crime. While he had left his risky business after the offence and secured full time employment, the pro-social changes referred to by the judge were not reflective of an accused who had turned his life around in a significant way. His life both before and after the offence was not markedly different. He was pro-social and married before and he re-married since, and he continued to support his immediate and extended family. Moreover, some of the circumstances the judge considered to be mitigating were not in fact mitigating, which brings us to the Crown's next submission.

Mitigating circumstances

[32] The Crown submits that the judge erred in treating certain circumstances as mitigating: the fact that Mr. Kodimyla did not occupy a position of trust, the pre-charge delay, and his stated intention to pay restitution.

[33] Again, we agree with the Crown that these factors cannot properly be considered to be mitigating in the circumstances of this case.

[34] First, the fact that Mr. Kodimyla was not in a position of trust is simply the absence of an aggravating factor, which is neutral to the determination of sentence: see *R. v. Scofield*, 2019 BCCA 3 at para. 36.

[35] Second, mitigating factors are those related to the gravity of the offence or to the degree of responsibility of the offender: *R. v. Pham*, 2013 SCC 15 at para. 11. Pre-charge delay in and of itself, relates to neither, and it may only be a mitigating factor when it rises to the level of a Charter breach or causes prejudice to the offender, neither of which was raised or argued here: see *R. v. K.V.E.*, 2013 BCCA 521 at para. 30 and *R. v. Nasogaluak*, 2010 SCC 6 at paras. 53-55. The judge first determined that the delay "took this matter into one of the rare cases that exceptional circumstances do exist" on the basis of her own analysis of the conduct of the police investigation. She then related the delay to the context of Mr. Kodimyla's efforts to rehabilitate himself, but there was no evidence that the delay prejudiced Mr. Kodimyla; to the contrary, during this time period he was able to secure new employment, re-marry and have another child.

[36] Finally, in the context of Mr. Kodimyala's continued denial of responsibility for the offence, it is difficult to conceive how his stated intention to pay restitution in and of itself could have been considered a mitigating factor. A restitution order acceded to by an offender may be taken into account in mitigation as indicative of remorse: see *R. v. Chamczuk*, 2010 ABCA 380 at para. 14. However in this case, there was no expression of remorse, and as the Crown pointed out, Mr. Kodimyala's denial carried through the pre-sentence process to the hearing itself despite the judge's finding at trial that his evidence was not believable. While a lack of remorse is clearly not an aggravating circumstance, there was no indication from Mr. Kodimyala that he had come to realize the gravity of his conduct or to otherwise provide an explanation for it.

Errors in principle

[37] For the forgoing reasons, we have concluded that the judge erred in principle by considering the normal consequences of the offence as exceptional and by treating some factors as mitigating when they were not. In essence, her conclusion that a non-custodial sentence was appropriate was based on Mr. Kodimyala's rehabilitation subsequent to the offence. While these positive steps are clearly important and may justify a more lenient sentence, the judge failed to properly assess whether a suspended sentence was proportionate to the gravity of the offence and the degree of responsibility of Mr. Kodimyala. These errors in our view impacted the sentence, and therefore this court may intervene to vary it.

2. What is a fit sentence?

[38] The Crown's position at sentencing, accepted by the judge, was that the range of sentence for fraud offences of this type is nine to 18 months, with the lower range at 12 months being appropriate in this case. It takes the same position on appeal, but at the hearing suggested a lesser sentence of six months to take into account the nine-month period of curfew Mr. Kodimyala served under his probation order.

[39] Mr. Kodimyala submits that the range of sentence for this kind of fraud is from a suspended sentence to 12 months. He says that the nine to 18-month range is appropriate only for fraud that involves a breach of trust. He seeks, as he did at sentencing, a suspended sentence with probation, or alternatively a 90-day sentence to be served intermittently. He also seeks an order staying the execution of any custodial sentence given the length of time since the offence.

[40] We see no error in the judge's acceptance of a range of sentence of nine to 18 months, with a sentence in the lower end of the range being appropriate here. She relied on cases that included similar cheque-kiting frauds, the most analogous being *R. v. Asgari*, [1997] B.C.J. No. 3149, and *R. v. Dolder*, [1985] B.C.J. No. 2638. Asgari involved three forged cheques totalling \$132,000, with \$82,000 being advanced to the offender. The scheme, while unsophisticated, was found to require a concentrated commitment of time and effort over a short period of time to make the withdrawals, and the offender was not remorseful. A 12-

month sentence was imposed, along with a restitution order. In Dolder, a sentence of two years less a day was upheld where the loss was much less (\$2,791), with the court commenting that a fit sentence for the cheque-kiting offences would have been 12 to 15 months. While these cases are dated, the ranges suggested continue to be appropriate today.

- [41] That said, there are certainly cases where the sentences imposed for fraud offences were below this range, as cited by Mr. Kodimyla. Most of those cases involved guilty pleas where the offenders accepted responsibility and expressed genuine remorse for their conduct: see, for example, *R. v. Abdulahi-Sabet*, 2019 BCSC 1538 (8 months); *R. v. Steen*, 2018 BCPC 353 (4 months and two years probation); *R. v. Johal*, 2018 BCPC 360 (90 days intermittent and three years probation). In some cases, conditional sentence orders were imposed for terms between nine months and two years: *R. v. Truong*, 2017 BCPC 68 (nine months CSO, guilty plea); *R. v. Gonzalez-Urena*, 2011 BCSC 406 (15 months CSO); *R. v. Burkart*, 2006 BCCA 446 (18 months CSO, guilty plea) and *R. v. Offman*, 2017 BCPC 70 (two years less a day CSO, guilty plea). These latter cases have limited applicability, as a conditional sentence is no longer available for the offence of fraud over \$5,000, but the length of the conditional sentences imposed is consistent with the range discussed above.
- [42] As the judge recognized, the principles of denunciation and deterrence are paramount in fraud and dishonesty-related offences. Deterrence may be particularly important because these kinds of offences are often committed by otherwise law-abiding citizens like Mr. Kodimyla: see *R. v. Proulx*, 2000 SCC 5 at para. 129. However, it is our view that the judge gave these principles insufficient weight in concluding that they could be satisfied by imposing conditions under a probation order, in light of the circumstances of the offence and Mr. Kodimyla's failure to take responsibility and to express any remorse. While a suspended sentence may have a deterrent effect, a probation order has primarily (but not exclusively) a rehabilitative objective, and optional conditions are usually directed to protecting the community and reintegrating the offender: see *Voong* at paras. 37-43. We do not see this as a case where a period of incarceration would unduly interfere with Mr. Kodimyla's rehabilitation and reintegration, nor do we see a suspended sentence having a sufficiently deterrent effect. In our view, a suspended sentence is not proportionate, and the paramountcy of the principles of denunciation and deterrence make it necessary in the public interest to impose a custodial sentence.
- [43] We accept the judge's assessment of the aggravating factors: principally that the scheme, while unsophisticated, required some planning and premeditation given the numerous steps taken to make the deposits and withdrawals, and the loss was reasonably substantial and had some impact on the credit union.
- [44] The mitigating factors are Mr. Kodimyla's lack of a record, his pro-social and stable family life, the support of his family and friends, and his successful efforts to rehabilitate himself over a substantial period of time.

- [45] In these circumstances, we agree with the Crown that a sentence of 12 months would be appropriate, but should be reduced to six months to take into account the nine-month period of curfew and the community services hours that were completed under the terms of the probation order. The period of probation should also be reduced to two years, from the time of the original sentence.
- [46] We would not accede to Mr. Kodimyla's request to stay the execution of the sentence. Stays have been granted in cases where the principles of denunciation and deterrence could be adequately served without further incarceration: see, for example, *R. v. Smickle*, 2014 ONCA 49, and *R. v. MacDonald*, 2014 NSCA 102. In both of those cases, the constitutionality of the three-year minimum sentence for firearms offences had been adjudicated prior to the appellate court considering the fitness of the sentences, resulting in considerable time delays where the offenders had long completed their sentences and had successfully rehabilitated and reintegrated in the community. We agree with the summary of the jurisprudence, primarily from Ontario, set out by the majority in *R. v. Dufour*, 2015 ONCA 426, as well as their cautious approach:
- [29] To summarize, this jurisprudence indicates that on a successful Crown appeal against sentence, where the seriousness of the offence does not require that an offender serve the sentence that should have been imposed, the appellate court can consider the length of the sentence to be served and the offender's post-sentence rehabilitative efforts in determining whether to stay the sentence. However, over-emphasis of post-sentencing rehabilitation has the potential to distort the sentencing process. Staying appropriate sentences may also introduce unwarranted disparities between similarly situated offenders where one is released from custody pending appeal and another is not.

[Emphasis added.]

- [47] While the offence in Mr. Kodimyla's case was committed almost six years ago, there has not been inordinate delay since his conviction (in July 2019) and sentencing (in October 2019). The circumstances today have not shown to be appreciably different from those that prevailed at the time of sentencing, so what was a fit sentence for the trial judge to impose remains a fit sentence today, subject to adjustment for the completion of probation conditions. Mr. Kodimyla has not served any time in prison, and we have already taken into account the fact that he completed the curfew and community service conditions in his probation order to reduce the sentence. We certainly appreciate his successful rehabilitative efforts, but that alone does not justify a stay of execution. In our view, the seriousness of the offence and Mr. Kodimyla's degree of moral culpability require that he serve his sentence.

Disposition

[48] We would grant the Crown's application for leave to appeal sentence and we would allow the appeal. We would set aside the suspended sentence and substitute a sentence of six months' imprisonment. We would also reduce the period of probation to two years, effective from the date of the original sentence.

"The Honourable Mr. Justice Groberman"

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Goepel"

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