

CANADA / JUDGMENT

R. v. Otchere

2025 BCCA 98

COURT

British Columbia Court of Appeal

DECIDED

31 March 2025

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2025 BCCA 98 R. v. Otchere

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Otchere,

2025 BCCA 98

Date: 20250331

Docket: CA50076

Between:

Rex

Respondent

And

Atta Otchere

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated

August 2, 2024 (sentence) (R. v. Cook, 2024 BCSC 1481,

Victoria Docket 183197-2).

Counsel for the Appellant:

B. Movassaghi

Counsel for the Respondent:

R. Leong

K.L. Torvik

Place and Date of Hearing:

Victoria, British Columbia

February 10, 2025

Place and Date of Judgment:

Vancouver, British Columbia

March 31, 2025

Written Reasons by:

The Honourable Justice Donegan

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals his sentence of six months' imprisonment, followed by 12 months probation, arising from his "dial-a-dope" drug trafficking conviction. The appellant submits that the sentencing judge improperly constrained his proportionality analysis, including the availability of a conditional sentence, by requiring exceptional circumstances to deviate from the guideline sentencing range.

Held: Appeal dismissed. The sentencing judge erred in principle by artificially constraining his ability to impose a proportionate sentence as discussed in *R. v. Graham*, 2022 BCCA 252, and this error had a material impact on the sentence. Sentencing the appellant afresh with deference to the judge's factual findings untainted by the error did not, however, result in a variation of the sentence. Six months' imprisonment, followed by a 12-month probation order is a fit sentence in the circumstances of this case.

Reasons for Judgment of the Honourable Justice Donegan:

Introduction

- [1] In August 2024, the appellant was sentenced to six months' imprisonment, followed by a 12-month period of probation, for possessing a Schedule I substance (cocaine) for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ("CDSA"). He appeals from that sentence.
- [2] The appellant alleges multiple errors in principle and that the sentence is demonstrably unfit. For the reasons that follow, although the court below did err in principle and it impacted the sentence, I would dismiss the appeal. After sentencing afresh, I have concluded that six months' imprisonment and a 12-month probation order is a fit sentence in the circumstances of this case.

Background

- [3] In January of 2021, police initiated an investigation into suspected drug trafficking activities in a residential area of Saanich. On May 14, 2021, police saw a pedestrian in this neighbourhood, who they had been observing in the course of this investigation, communicating on his cellular telephone. Shortly thereafter, a rented motor vehicle driven by the appellant approached this pedestrian and stopped. The pedestrian entered the rear passenger door of the vehicle and got inside. The appellant drove him a short distance before letting him out again. Believing a drug transaction had just occurred, police immediately stopped the vehicle and arrested its two occupants -- the appellant and his front seat passenger, Zoran Cooke.
- [4] During subsequent searches of the men and the vehicle, police found a total of 37.27 grams of crack cocaine, individually wrapped in 106 small plastic packages. These drugs, with an estimated street value of between \$2,800 and \$3,400, were found in three locations:
- a) within a repurposed Tylenol bottle in Mr. Cooke's pocket;
 - b) on the centre console of the vehicle, on top of the appellant's wallet; and
 - c) within a fanny pack (containing personal belongings of Mr. Cooke and two of the appellant's business cards) located on the floor of the front passenger's foot area.
- [5] Police also located in the vehicle \$140 in cash, four cell phones and, from within the passenger door side pocket, three empty bundles of the same plastic wrapping used to wrap the bundles of drugs found in the centre console and the fanny pack.
- [6] The appellant and Mr. Cooke were tried together, and convicted of possession for the purpose of trafficking. Mr. Cooke, who had a prior related conviction and was found to have played a primary role in this offence, was sentenced to 10 months' imprisonment, followed by a 12-month period of probation. The appellant, a first-time offender who was found to have played a secondary role to that of Mr. Cooke, was sentenced to six months' imprisonment, followed by a 12-month period of probation.

- [7] The appellant was 36 years old at the time of sentencing. He was born in Ghana and emigrated to Canada with his family in 1991. He grew up in a highly disadvantaged neighbourhood in Toronto and was primarily raised, along with his seven siblings, by his mother. The conditions of his youth were very challenging and include: his father's deportation in 1993; trauma related to his inability to return to Ghana to see his father before his death; neglect and abuse by caregivers; physical abuse by his mother; residing in a community in which illicit drugs, gang activity and gun violence were prevalent; and, like many racialized persons within his community, he experienced unfair treatment by school and law enforcement officials.
- [8] As a result of his family's circumstances, the appellant did not complete high school and entered the workforce at an early age. He worked as a mentor for at-risk youth at a community centre, and in the construction industry.
- [9] At the time of sentencing, the appellant had been a Victoria resident for about three years and had, for the preceding year, been living with his long-time friend, Mr. Cooke. His family connections and supports included his mother, siblings, a romantic partner (living in Calgary), and his two children (living in Toronto) with whom he maintained regular contact. The appellant derived income from his online clothing business, completing online surveys, investments, and periodic construction work during longer visits with his children in Toronto. The author of the pre-sentence report noted that the appellant's income, along with his ability to access a line of credit, allowed him to travel regularly throughout Canada and the United States, including trips to visit his children. The author also noted the appellant's desire to one day return to the Toronto community where he was raised, to aid in its revitalization.
- [10] The appellant did not suffer from any substance dependency at the time of the offence. He reported occasional mental health struggles but had not sought any assistance in that regard. If counselling were ordered, he thought he might derive benefit from receiving support in the areas of depression and trauma. While his position on the outcome of the trial prevented an exploration of the appellant's attitude and understanding of his offence, the appellant did express, through counsel, a general understanding about the "evil that trafficking is and the harm that it causes" in the community. During his allocution, the appellant apologized to the community, expressed a desire to be a positive role model for young people, and conveyed an intention to learn from his mistakes.
- [11] Prior to sentencing, the appellant was subject to a bail order that required him to report to a bail supervisor. His bail supervisor described his compliance with this condition as "inconsistent", but noted recent improvement. The appellant attributed his failures to report to his bail supervisor to "regular trips out of town". He has not been charged with breaching his bail order.

[12] At the sentencing hearing, the Crown sought a sentence of nine months' imprisonment, followed by a 12-month term of probation. The defence acknowledged that a term of imprisonment was required in this case, but advocated for a nine-month conditional sentence, followed by probation.

Reasons for sentence

[13] In reasons indexed as 2024 BCSC 1481 (the "Sentencing Reasons"), the judge began his analysis by reviewing the individual circumstances of the two offenders and outlining the principles of sentencing as codified in ss. 718-718.2 of the Criminal Code, R.S.C. 1985, c. C-46. He then discussed the range of sentence for a "first dial-a-dope trafficking conviction" in these terms:

[26] In *R. v. Voong*, 2015 BCCA 285, the Court held that in the absence of exceptional circumstances, the range for a first dial-a-dope trafficking conviction is between six months to eighteen months in prison. Where exceptional circumstances justify a non-custodial sentence, a suspended sentence can meet the principles of sentencing, but such a sentence will rarely be imposed.

[14] After identifying the authorities relied upon by the parties, the judge next turned to the aggravating and mitigating factors. In terms of the aggravating factors, the judge found:

[30] I agree with Crown counsel that there are a number of aggravating factors present in this case, including the following:

- a) cocaine is a substance listed on Schedule 1 of the CDSA (I note that s. 10(2) of the CDSA requires the court to consider, as an aggravating factor, the fact that Mr. Cooke and Mr. Otchere were involved in trafficking such a substance);
- b) this was a dial-a-dope operation, although Crown counsel acknowledges that it was a relatively low-level and unsophisticated one; and
- c) Mr. Cooke and Mr. Otchere appear to have engaged in trafficking not to feed an addiction, but merely to make easy money.

[15] This is a convenient place to address a matter raised by the appellant at the hearing of this appeal in relation to the first aggravating factor identified by the judge.

[16] Cocaine is a substance included in Schedule I of the CDSA. Schedule I is reserved for the most addictive and dangerous substances. It is well-established in the jurisprudence that the involvement of such a substance is considered an aggravating factor on sentencing; see e.g., *R. v. Kang*, 2018 BCSC 2075 at para. 14; *R. v. Chamberlain*, 2016 BCSC 379 at para. 38. The appellant does not suggest otherwise, nor does he suggest the sentencing judge erred in finding this was an aggravating factor. Rather, the appellant argued in oral submissions that the judge erred in identifying statutory support -- s. 10(2) of the CDSA -- for this finding.

- [17] I agree with the appellant that the judge's reference to s. 10(2) was misplaced. Section 10(2) of the CDSA sets out specific circumstances which are deemed to be aggravating factors on sentence, such as when a person commits a trafficking offence in or near a school, school grounds or a public place frequented by persons under the age of 18: s. 10(2)(a)(iii). The Crown did not seek to prove that this circumstance, or any of the others set out in the provision, applied in this case. Nor did the judge make any finding that would correspond to any of the circumstances set out in the provision. The mistake the judge made was to identify s. 10(2) as support for a finding that the involvement of a Schedule I substance is an aggravating factor. This finding derives support not from s. 10(2), but from the common law. However, the error is inconsequential because, as the appellant acknowledges, the finding itself cannot be criticized. As such, the statutory reference had no impact on the sentence.
- [18] The judge identified the following mitigating factors in relation to the appellant:
- a) the absence of any weapons;
 - b) the appellant's background circumstances, including that:
 - i. he was raised in a neighbourhood where he was exposed to violence, crime and the drug subculture at an early age;
 - ii. his role models encouraged criminal behaviour;
 - iii. he experienced neglect and violence in his home as a child;
 - iv. he lost his father at an early age; and
 - v. he was unfairly targeted by authorities at times, causing him to lose a job and a home he was renting;
 - c) his positive contributions to society by supporting his children and others; and
 - d) his lack of any prior criminal record.
- [19] The judge next turned to discuss features of the appellant's role in the offence, his rehabilitative prospects, and his risk to re-offend. He found the appellant's level of involvement and motivation to be "unclear", and that he played a secondary role to that of Mr. Cooke in the offending that occurred (at para. 37). Regarding rehabilitative prospects, the judge found that while the appellant had expressed "at least some degree of remorse" for committing the offence and a willingness to undergo counselling, he had not taken any "concrete steps toward rehabilitation" of his own accord (at para. 38). He found the rehabilitative prospects of both offenders were "questionable" (at para. 39).
- [20] In rejecting a conditional sentence as an appropriate disposition, the judge held:
- [41] With respect to Mr. Otchere's submissions in favour of a conditional sentence order, I agree with Crown counsel that the authorities Mr. Otchere relies upon are distinguishable, insofar as they involve offenders struggling with their own substance abuse and, in several of them,

taking active steps to manage their problem. Overall, I am not persuaded that Mr. Otchere's circumstances are sufficiently unusual to justify departing from the ordinary range, although I do accept that the mitigating factors listed earlier justify a sentence at the low end of that range.

- [21] The judge concluded that a six-month period of imprisonment, followed by a 12-month probationary period was a proportionate sentence for the appellant. When addressing one of the probationary terms he would impose for both offenders -- community work service -- the judge found that "the harm to the community flowing from their conduct" required such a term (at para. 42). Regarding the only ancillary order in dispute -- the provision of DNA -- the judge found the appellant's risk of re-offending weighed in favour of such an order (at para. 42).

Standard of Review

- [22] An appellate court can only intervene to vary a sentence if the sentence is demonstrably unfit, or if the sentencing judge made an error in principle that had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Friesen*, 2020 SCC 9 at para. 26. A demonstrably unfit sentence is one that unreasonably departs from the principle of proportionality: *Lacasse* at para. 53.
- [23] Errors in principle can include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor: *Friesen* at para. 26. It can also be an error in principle if, as alleged in this case, a judge considers himself bound to a sentencing range due to a lack of "exceptional circumstances" (*R. v. Graham*, 2022 BCCA 252 at para. 19) or, put another way, artificially constrains the proportionality analysis by some "ill-defined exceptional circumstances threshold test": *R. v. Choi*, 2022 BCCA 90 at para. 24.
- [24] It is important to remember, however, that not every error in principle will be material, and appellate intervention is only possible where it is apparent from the judge's reasons that the error had an impact on the sentence: *Friesen* at para. 26, citing *Lacasse* at para. 44.
- [25] If the threshold for appellate interference has been met, an appellate court is to conduct its own sentencing analysis to determine a fit sentence: *Friesen* at para. 27. The appellate court will apply the principles of sentencing anew to the facts without deference to the original sentence. However, in doing so, deference is owed to the sentencing judge's findings of fact, to their identification of aggravating and mitigating factors, and to their determinations with respect to the relative weight to assign the various goals of sentencing that are found to be untainted by the error in principle: *R. v. Nystrom*, 2023 BCCA 232 at para. 16; *R. v. Agin*, 2018 BCCA 133 at para. 55.
- [26] While it will often occur that an appellate court sentencing anew will arrive at a sentence different from the one imposed by the sentencing judge, this will not always be the case. It may be that an appellate court determines that a fit sentence is the same as the one originally imposed, in which case it may affirm the sentence despite the error: *R. v. Knauff*,

2023 BCCA 174 at para. 26, citing Friesen at para. 29. As this Court held in Agin at para. 53, "[a] finding that an error had an impact on sentence at this stage of the analysis means only that appellate intervention is justified, and not the sentence should be necessarily varied". Knauff (at para. 48) and R. v. J.C.S., 2017 BCCA 87 (at para. 96) are examples of cases in which this Court found the sentencing judge made an impactful error in principle, but declined to vary the sentence.

Discussion

Positions of the parties

- [27] The appellant submits the sentencing judge erred in principle by: (1) constraining his ability to impose a proportionate sentence by requiring a demonstration of "exceptional circumstances" as a precondition for departing from the otherwise applicable sentencing range; and (2) misapplying the law relating to conditional sentence orders. Related to the latter ground, the appellant also contends the judge failed to provide sufficient reasons for rejecting a conditional sentence order.
- [28] While he does not specifically identify a third ground of appeal, it is evident from the appellant's written materials that he contends the judge committed another impactful error in principle by sentencing him in accordance with principles developed to address those offenders "integrally involved" in dial-a-dope operations. While acknowledging that he was found in joint possession of the drugs in question he argues that, similar to the offender in R. v. Diedricksen, 2018 BCCA 336, there was insufficient evidence to support the conclusion he was integrally involved in this type of operation and says it was an error to treat him as such (at paras. 30-33).
- [29] Further, the appellant submits that these errors, individually or by virtue of their cumulative effect, led to a sentence that offends the principles of parity and proportionality and is one that is demonstrably unfit.
- [30] The respondent says there is no basis for appellate intervention here: that the judge made none of the alleged errors and the sentence he imposed was entirely fit. Read contextually in light of the submissions of the parties, the respondent submits that the judge's reference to "exceptional circumstances" reflects his way of identifying and describing the personal circumstances of offenders that would warrant a departure from the established sentencing range, rather than demonstrating he imposed a threshold the appellant was required to meet in order to obtain the sentence he sought. The respondent further submits that even if the judge did take an overly rigid approach to departing from a sentencing range, the error had no impact on the sentence.
- [31] As the respondent sees it, the judge appropriately found this was a dial-a-dope offence in which the appellant was actively involved, albeit in a secondary role to that of Mr. Cooke. The judge applied the correct legal principles, appropriately weighed the aggravating and mitigating factors and balanced the principles of sentencing in a manner that resulted in a

sentence that was proportionate to the gravity of the offence and the appellant's degree of responsibility. The resulting sentence recognized the need for deterrence and denunciation, and was tailored to the appellant's personal circumstances. Further, the respondent says the judge did not misapply the law concerning conditional sentences or fail to give sufficient reasons for rejecting such a sentence. Read contextually, it is clear the judge understood, and applied, the requirements for imposing a conditional sentence and properly rejected it as a proportionate sentence.

- [32] In short, the respondent contends that the judge made none of the errors alleged, the sentence was entirely fit, and the appeal should be dismissed.

Did the judge commit an error in principle that impacted the sentence?

- [33] I will separately address each of the errors alleged by the appellant, starting with the one that permeated many of his submissions.

Did the sentencing judge err by sentencing the appellant in accordance with sentencing principles developed to address those offenders "integrally involved" in dial-a-dope operations?

- [34] Dial-a-dope drug selling, essentially a phone delivery system for illicit substances, is a serious and particularly insidious type of trafficking offence. It requires forethought and planning. It facilitates easy dissemination of drugs and the infiltration of a criminal trade into communities: *R. v. Dickey*, 2016 BCCA 177 at para. 28. Instead of requiring would-be purchasers to go to particular areas known for the availability of drugs, which may act as a disincentive, dial-a-dope operations enable the delivery of drugs outside of trafficking hotspots, to the relative safety or familiarity of the buyer's own community: *Diedricksen* at para. 10, citing *R. v. Franklin*, 2001 BCSC 706 at paras. 18-21.
- [35] The appellant does not challenge the judge's finding that this offence involved the dial-a-dope business model of trafficking, albeit a relatively low-level, unsophisticated one (*Sentencing Reasons* at para. 30). Nor does he challenge that such a finding can serve to increase the gravity of the offence (*R. v. Voong*, 2015 BCCA 285 at para. 49, citing *R. v. Ahmed*, 2001 BCCA 504), elevating the role occupied by the sentencing objectives of denunciation and deterrence (*R. v. Gill*, 2013 BCCA 320 at para. 22). The appellant also accepts that the gravity of such an offence is reflected, for a first-time offender, by a general sentence range of six to 18 months' imprisonment (*Voong* at para. 59; *R. v. Finlay*, 2016 BCCA 299 at para. 34). His position, simply, is that the judge should not have applied these principles to him.
- [36] The appellant submits the error made by the judge in this case is comparable to the error made by the sentencing judge in *Diedricksen*. Taking the position that he is similarly situated to the offender in *Diedricksen*, the appellant says that while he was found to have committed an offence associated with a dial-a-dope trafficking scheme, the evidence does not support a conclusion that he was integrally involved with the scheme itself. He highlights findings made by the judge that his involvement in, and motivation for, this

offence was "unclear"; and that he played a "secondary role" in relation to the primary role played by Mr. Cooke in support of his position (Sentencing Reasons at para. 37).

- [37] Respectfully, I see no parallel with Diedricksen here and would not accede to this argument. The circumstances of Mr. Diedricksen's offence were very different. Mr. Diedricksen was a drug user. While at a nightclub one night, he was approached by an undercover police officer posing as someone who wanted to buy cocaine. Mr. Diedricksen offered to help and eventually put the officer in contact with a dial-a-dope trafficker: Diedricksen at para. 5.
- [38] During sentencing submissions, the Crown characterized Mr. Diedricksen's role as that of a party to a dial-a-dope operation for the sale of cocaine, and sought a six-month jail sentence: Diedricksen at para. 6. The offender disputed the characterization of the transaction as a dial-a-dope offence. He argued that he was not involved in the operation of drug trafficking through the dial-a-dope business model in that he did not produce the drugs for sale, did not receive the phone calls, was not the person delivering the drugs, and received no profit or benefit from the transaction: Diedricksen at para. 6. He was a drug user who was willing to help others access drugs when asked, but nothing more. He sought a suspended sentence.
- [39] The sentencing judge rejected Mr. Diedricksen's submissions and found, as an aggravating factor, that he was engaged as a "middleman in a dial-a-dope operation": Diedricksen at para. 16. In determining that six months' imprisonment was a proportionate sentence, the judge applied principles developed in relation to such operations.
- [40] On appeal, Justice Hunter found it was an error for the judge to have determined this factual dispute -- an aggravating factor going to the gravity of the offence -- without requiring the Crown to prove it beyond a reasonable doubt at a Gardiner hearing (Diedricksen at para. 32, citing *R v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368).
- [41] Justice Hunter drew a distinction between conduct where principles applicable to dial-a-dope operations would apply ("active engagement in the sale of drugs in a dial-a-dope operation") and conduct where they would not ("putting someone who wished to buy drugs in contact with a dial-a-dope dealer"): Diedricksen at para. 31. As the record could only support a characterization of the offender's conduct in the latter category, Hunter J.A. determined the judge had erred: Diedricksen at para. 33.
- [42] The circumstances of the appellant's offending are entirely different. While the appellant correctly identifies that the judge made findings at sentencing related to the secondary nature of his role in the offence, and the lack of clarity surrounding the appellant's precise motivations and involvement in the endeavour, his submission fails to account for the findings made by the judge at trial. In his reasons for conviction, indexed as 2024 BCSC 700 (the "Trial Reasons"), the judge made clear and unchallenged findings that the appellant was actively, directly and jointly involved in this dial-a-dope offence.

[43] At trial, as a result of his admission that the weight and manner of packaging of the seized cocaine was consistent with an intention to traffic that drug, the only issue for the judge to determine was whether the Crown had proven the element of possession to the requisite standard.

[44] The judge summarized his material factual findings at para. 5 of the Trial Reasons:

- a) the defendants were arrested on May 14, 2021;
- b) at the time, Mr. Otchere was driving a silver Volkswagen Passat;
- c) Mr. Cooke was sitting in the front passenger seat;
- d) the Passat had just been observed by police engaging in a short duration stop with a pedestrian whom the police had been watching;
- e) on March 2 or 3, 2021, the police had observed the same pedestrian engage in a short duration stop with a beige Chrysler Sebring, bearing plates that were determined by police to be registered to Mr. Otchere, although the occupant or occupants of the Sebring on that occasion were not identified;
- f) the Passat was a rental vehicle but I received no evidence as to the details of the rental agreement;
- g) following the arrest, the defendants and the Passat were searched by police;
- h) in the course of those searches, cocaine was found in three separate locations, as follows:
 - i. first, three foil flaps containing a total of 0.61 grams were found in a repurposed Tylenol bottle that Mr. Cooke was carrying in his pocket;
 - ii. second, 20 "spitballs" containing a total of 4.65 grams were found in a bundle wrapped in black plastic located on top of Mr. Otchere's wallet in the centre console, both of which appear in the photographs taken at the scene to have been at least partially covered by a black garment;
 - iii. finally, the largest quantity was found in a fanny pack that was lying on the floor in the front passenger's foot area;
 - i) the fanny pack was zipped closed but when opened by police was found to contain the following, among other things:
 - i. Mr. Cooke's Ontario identity card;
 - ii. Mr. Cooke's inhaler;
 - iii. two of Mr. Otchere's business cards;
 - iv. \$100 in cash (one 50 dollar bill, two twenties and one ten);

- v. a zipped pouch which, when opened, was found to contain two bundles wrapped in black plastic like that found in the centre console, each of which was found to contain 35 rocks of cocaine totalling 8.63 grams and 8.23 grams, respectively; and
 - vi. a clear plastic ziplock bag containing the following:
 - (1) two baggies containing rocks of cocaine totalling 7.03 grams;
 - (2) three baggies containing rocks of cocaine totalling 5 grams; and
 - (3) eight baggies containing rocks of cocaine totalling 3.21 grams.
- [6] In addition, in the passenger side door pocket, the police found three bundles of the same black plastic wrapping that had been used to wrap the bundles of cocaine found in the centre console and the fanny pack, but these were found to be empty.
- [45] The judge recognized that while the Crown's case against Mr. Cooke rested on direct and circumstantial evidence, its case against the appellant was entirely circumstantial: Trial Reasons at para. 11. After considering all of the evidence, the judge concluded that the only reasonable inference to be drawn was that the appellant and Mr. Cooke were jointly in possession of the cocaine and were engaged in joint trafficking: Trial Reasons at paras. 19-22. In reaching this conclusion, he found the Crown had proven that cocaine trafficking was actively and visibly underway in the vehicle driven by the appellant during the short duration stop witnessed by police that day: Trial Reasons at para. 22. He also found, as the only reasonable inference from the whole of the evidence, that the appellant must have observed Mr. Cooke selling some of the cocaine located from within the partially depleted bundle on the centre console to the pedestrian, and that the appellant "participated in and contributed to that activity by driving the Passat to the pedestrian for that purpose": Trial Reasons at para. 19.
- [46] In short, unlike Mr. Diedricksen, the appellant was found to be actively and directly involved in a dial-a-dope trafficking offence.
- [47] The positions taken by the parties in Diedricksen were much different as well. In the case at bar, the Crown took the position that this was a dial-a-dope offence: an aggravating factor on sentence. The appellant did not dispute this characterization. Indeed, the appellant relied on authorities involving dial-a-dope offences in support of his position (for example, *R. v. Lawson*, 2022 BCSC 2035; *R. v. Gibb*, 2022 BCSC 1853; *R. v. Harrower*, 2021 BCSC 1796; and *R. v. Aeichele*, 2022 BCSC 195). While he did not dispute that he participated in the dial-a-dope offence witnessed by police that day, the appellant did urge the judge to find that his precise role was "unclear" and to conclude that he was "not the ringleader in this situation". The judge made these findings, and considered them in his analysis.
- [48] The judge found the appellant was the driver of a vehicle engaged in a dial-a-dope trafficking offence. He found the appellant and Mr. Cooke were jointly in possession of cocaine for the purpose of trafficking that day, and that the appellant actively participated in, and

contributed to, that activity. The judge's subsequent findings on sentence must be viewed in the context of these trial findings. That the appellant's precise involvement and motivations were unclear and his role was secondary to that of Mr. Cooke were factors taken into account by the judge on sentence. They do not conflict with, or undermine, his earlier findings that the appellant was an active participant in the dial-a-dope trafficking offence for which he was convicted.

[49] For these reasons, it is my view that the judge did not err in the manner suggested by the appellant and I would not accede to this argument.

Did the judge err in constraining his ability to impose a proportionate sentence by requiring a demonstration of "exceptional circumstances" as a precondition for departing from the otherwise applicable sentencing range?

[50] The goal of every sentencing judge is to impose a fair, fit and principled sanction: *R. v. Parranto*, 2021 SCC 46 at para. 10. Proportionality is the organizing principle in reaching this goal. All sentencing starts with the principle that the sanction must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Individualization is central to the proportionality assessment.

[51] Sentencing ranges reflect judicial consensus on one component of the proportionality analysis -- the gravity of an offence: *Parranto* at paras. 20, 44. Not binding in theory or in practice, sentencing ranges are considered "guidelines, not hard and fast rules": *Parranto* at para. 36, citing *Friesen* at para. 37.

[52] As sentencing is an individualized process, and parity is secondary to proportionality (*Parranto* at paras. 10, 12), departures from sentences above or below an established range are to be expected (*Parranto* at para. 38). Departing from a range is appropriate where required to achieve proportionality. For this reason, judges must not artificially constrain themselves in their ability to impose a proportionate sentence by requiring "exceptional circumstances" in order to depart from a range: *Parranto* at para. 40. As Justice Mackenzie aptly summarized in *R. v. Davies*, 2022 BCCA 391:

[31] Artificially constraining a sentencing judge's ability to impose a proportionate sentence by requiring them to adhere to a strict sentencing range is inappropriate (*Friesen*, at para. 112). However, sentencing ranges are still useful tools for judges because they provide "a frame of reference and a shorthand for judicial views on the gravity of the offence" (*Parranto*, at para. 41). Despite their usefulness, sentencing ranges must not be viewed as judicial straitjackets because sentencing is an individual process that considers the unique circumstances of the offence and the offender (*Choi*, at para. 3).

- [53] The parties agree the sentencing range identified by the judge in this case -- six to 18 months' imprisonment -- is an appropriate guideline. The issue is whether the judge required a demonstration of "exceptional" or "unusual" circumstances as a precondition for departing from this range, and thereby constrained his ability to impose a proportionate sentence. Respectfully, I agree with the appellant that the judge here imposed that restriction on himself, and in doing so fell into error.
- [54] The error made in this case is similar to the error identified by this Court in *Graham*. In *Graham*, the offender was sentenced to six months' imprisonment for the offence of possessing a Schedule I substance (methamphetamine) for the purpose of trafficking: at paras. 1-4. At the sentencing hearing, the Crown sought a nine-month jail sentence, along with a period of probation, while Ms. Graham urged the judge to suspend the passing of sentence and place her on probation: *Graham* at para. 6.
- [55] Ms. Graham was a first-time offender and dependent methamphetamine user. She had lived a very difficult and vulnerable life. Her personal circumstances led to her drug dependency and marginalization. She was in receipt of disability benefits, worked in the sex trade, and suffered post-traumatic stress from a lifetime of trauma and barriers as a transgender woman: *Graham* at para. 5. Having worked her way out of a tenuous and marginalized life in the downtown east side, by the time of sentencing she had obtained subsidized housing and made progress in restoring her mental well-being and building a healthy life. Incarceration understandably created fear of facing further trauma and would have jeopardized her housing and the progress she had made: *Graham* at para. 24.
- [56] The sentencing judge was very sympathetic to Ms. Graham's personal circumstances, but his reasoning revealed that he felt he had no alternative but to impose a custodial sentence within the identified range unless there were exceptional circumstances within the meaning of Voong, as he understood it: *Graham* at paras. 8, 10, 19. Having found no such circumstances, he imposed a jail sentence at the bottom of the range.
- [57] In concluding the judge had erred in principle by approaching his analysis this way, this Court in *Graham* referenced paras. 3, 17, and 22-24 of *Choi* and noted:
- [12] The important point that emerges from this discussion is that the term "exceptional circumstances" is simply a generalized description of the type of circumstances that justify imposing a sentence that is outside a conventional range. Judges should not be artificially constrained in imposing a proportionate sentence by an overly rigid insistence on a demonstration of exceptional circumstances. Respectfully, I think the judge here imposed that constraint on himself and so fell into error.
- [58] In my respectful view, the judge here made the same error. He imposed the same constraint upon himself and erred in principle by treating the sentencing range as a judicial straitjacket, thereby limiting his discretion to craft a proportionate and individualized sentence.

[59] Beginning at paragraph 22 of the Sentencing Reasons, the judge identified the sentencing principles that inform a fit sentence. He properly reminded himself of the objectives of sentencing (Criminal Code, s. 718), the fundamental principle of proportionality (Criminal Code, s. 718.1), and the non-exhaustive list of secondary principles (Criminal Code, s. 718.2) to be considered. He also recognized the harm and destruction that dial-a-dope drug trafficking causes to drug users and the community, and noted that denunciation and deterrence are the primary sentencing objectives in such cases.

[60] Next, and indicative of the error, the judge outlined what he understood to be the legal principles related to the range of sentence in this case:

[26] In *R. v. Voong*, 2015 BCCA 285, the Court held that in the absence of exceptional circumstances, the range for a first dial-a-dope trafficking conviction is between six months to eighteen months in prison. Where exceptional circumstances justify a non-custodial sentence, a suspended sentence can meet the principles of sentencing, but such a sentence will rarely be imposed.

[Emphasis added.]

[61] Following this, the judge turned to consider the aggravating and mitigating factors, and prospects for rehabilitation and ultimately concluded that a period of incarceration, not in the form of a conditional sentence, at the low end of the range was appropriate. He reasoned:

[41] With respect to Mr. Otchere's submissions in favour of a conditional sentence order, I agree with Crown counsel that the authorities Mr. Otchere relies upon are distinguishable, insofar as they involve offenders struggling with their own substance abuse and, in several of them, taking active steps to manage their problem. Overall, I am not persuaded that Mr. Otchere's circumstances are sufficiently unusual to justify departing from the ordinary range, although I do accept that the mitigating factors listed earlier justify a sentence at the low end of that range.

[Emphasis added.]

[62] As Madam Justice Newbury held in *R. v. Bridgen*, 2023 BCCA 229, the use of a particular word, such as "exceptional" or "unusual" alone does not denote legal error: at para. 24. The words used must be viewed in the context of the reasons as a whole and the submissions of the parties in order to answer the question of whether the judge artificially limited his discretion to craft a proportionate and individualized sentence. When I do so, it is clear to me that the judge considered that "exceptional" or "unusual" circumstances were required as a necessary precondition to depart from the usual sentencing range. The language he used supports this conclusion, as does the manner in which he approached his conditional sentence analysis.

- [63] The appellant advocated only for one sanction at the hearing -- a conditional sentence. As a result, the parties focused much of their submissions on the statutory criteria and legal principles engaged by the conditional sentence regime and the appropriateness of such a sanction.
- [64] Indicative of the error foreshadowed earlier in his reasons, the sentencing judge did not decide this central issue by reference to the statutory criteria or any of the applicable legal principles. Rather, he rejected such a sanction because he found the appellant's circumstances were not sufficiently "unusual to justify departing from the ordinary range": at para. 41. The use of this language in this context is a clear indication that the judge considered he had no alternative but to reject a sentence outside the usual range (in this case, a conditional sentence) unless exceptional or unusual circumstances existed. Respectfully, this is an error in principle.
- [65] While the judge might have reached the same conclusion had the error in principle not been made, I am not prepared to say that the error identified by the appellant was immaterial or "nothing more than incidental": Knauff at para. 35, citing *R. v. Gavin*, 2009 QCCA 1 at para. 35, cited with approval in *Lacasse* at para. 45. The error impacted the judge's analysis of the central issue -- whether a conditional sentence was a proportionate sentence -- and thus had an impact on the sentence imposed.

What is a fit sentence for the appellant?

- [66] In reaching the above conclusion, I am satisfied that appellate intervention is justified and the Court is entitled to conduct its own sentencing analysis to determine a fit disposition for the appellant. In so doing, I am to apply the principles of sentencing afresh to the factual findings untainted by the error in principle. Accordingly, it is unnecessary to address the appellant's second ground of appeal -- that the judge improperly considered the principles of conditional sentence orders.
- [67] The offence committed by the appellant carries with it a maximum punishment of life imprisonment: CDSA, s. 5(3)(a). As there is no mandatory minimum punishment, all sanctions are available for consideration.
- [68] Setting out all of the objectives and principles that properly inform the sentencing analysis in this case is unnecessary. Suffice it to say that sentencing is an individualized process and our task is to fashion a fit disposition -- one that is proportionate to the gravity of the offence and the degree of responsibility of this offender: Criminal Code, s. 718.1. The task involves a careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a particular offender. This balancing process is to occur within a legislative framework (s. 10(1) of the CDSA and ss. 718, 718.1 and 718.2 of the Criminal Code), as informed by common law principles.

- [69] Conditional sentences are a form of imprisonment provided for under 742.1 of the Criminal Code. Such sentences permit offenders who meet statutory criteria to serve their sentences under strict monitoring in their communities, rather than in jail: *R. v. Sharma*, 2022 SCC 39 at para. 7. Parliament's principal objectives in enacting the conditional sentencing regime in 1996 was to reduce sentences of imprisonment and to expand the use of restorative justice principles in sentencing: *Sharma* at para. 9, citing *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 at para. 48, *R. v. Proulx*, 2000 SCC 5 at para. 15.
- [70] Conditional sentences are capable of achieving denunciation and deterrence: *Proulx* at para. 22. There are, however, certain circumstances where the need for denunciation is so pressing that incarceration is the only suitable way in which to express society's condemnation of the offender's conduct: *Proulx* at para. 106.
- [71] I agree with the sentencing judge that the paramount objectives in a case such as this are denunciation and deterrence: *Voong* at para. 18. This does not mean, however, that other objectives may not assist in achieving a fit and proportionate sentence. Given the nature of the offence, the objectives of reparations to the community, promoting a sense of responsibility and acknowledging harm, while of lesser importance to the primary objectives, should play a role as well. Although it also plays a lesser role to that of deterrence and denunciation, rehabilitation remains important in light of the appellant's age, background circumstances, lack of criminal history, expressed general understanding of the harms associated with this type of offence, and expressed desire to live a pro-social life.

Gravity of this offence

- [72] The gravity of the offence includes two components: (1) the harm or likely harm to the victim; and (2) the harm or likely harm to society and its values. The gravity of the offence is usually assessed by referring to the essential elements of the offence including the mens rea requirement, the degree of harm that can flow from the prohibited conduct, and the legislated penalty provisions: *R. v. Ellis*, 2022 BCCA 278 at paras. 129-130, citing *R. v. Okimaw*, 2016 ABCA 246.
- [73] The gravity of an offence is one component of the proportionality analysis. It does not focus on the circumstances of the offender, including their personal characteristics or aspects of the offender's social context or background that may provide an explanatory context for the choice to commit the offence. Those factors are relevant to an assessment of the offender's personal responsibility or blameworthiness, which represents the other aspect of the proportionality analysis: *Ellis* at para. 131, citing *R. v. Morris*, 2021 ONCA 680 at para. 75.
- [74] The appellant committed a trafficking offence involving crack cocaine in a residential community. The judge found the context within which the offence was committed was that of a dial-a-dope operation, albeit an unsophisticated one. He further found that although the appellant played a secondary role to that of Mr. Cooke in the offence, he was nevertheless an active and direct participant.

- [75] There is no question that the gravity of hard drug trafficking-related offences such as this is high. The appellant's offence carries a maximum sentence of life imprisonment, which reflects Parliament's view about the seriousness of this offence and its high degree of objective gravity.
- [76] The individual and societal harms caused by trafficking in hard drugs, including crack cocaine, have been the subject of much judicial writing. Some of these harms were summarized in *Ellis* (at para. 148), with reference to Justice Moldaver's comments in *Parranto*, and include: facilitating substance use disorders, adverse health effects and death by overdose; increased crime by those who seek to finance their own use of substances, as well as organized crime groups; devastation to families and intergenerational trauma; and significant costs in health care and law enforcement expenses (see also *R. v. Lynch*, 2022 ONCA 109 at para. 17).
- [77] Counsel agree that as the appellant is a first-time offender, the sentencing range of six to 18 months imprisonment identified in *Voong* applies. As I discussed earlier, this range reflects the objective seriousness of the appellant's offence. It speaks to "judicial consensus on the gravity of the offence" and is intended to ensure that the significant harms associated with this offence are "consistently accounted for in sentencing": *Ellis* at para. 164, citing *Parranto* at para. 20. This is done through an emphasis on the sentencing objectives of denunciation and deterrence: *Ellis* at para 164.
- [78] This sentencing range merely guides consideration of one side of the proportionality analysis -- the need to "ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused": *Ellis* at para. 165, citing *R. v. Nasogaluak*, 2010 SCC 6 at para. 42. As this Court observed in *Ellis*, any findings (aggravating and mitigating) specific to the manner in which the offender carried out their offence are also relevant to the analysis.
- [79] The gravity of this offence is high. The appellant was personally and objectively involved in facilitating the harmful distribution of crack cocaine into a residential community through the dial-a-dope model. The circumstances of the offence he committed that day are serious. They give rise to a pressing need to protect the public from the societal and individual harms caused by trafficking in these substances by imposing a sentence that emphasizes general deterrence and denunciation: *Gill* at paras. 22-24.

Personal responsibility of this offender

- [80] Gravity of the offence is only one component of the proportionality analysis. The second component, moral culpability or degree of responsibility, must also be considered. It is through this part of the analysis that we ensure the appellant is punished "no more than is necessary": *Ellis* at para. 166, citing *Nasogaluak* at para. 42.

- [81] Assessing moral blameworthiness requires consideration of the offender's state of mind and acts at the time of the offence. In *R. v. C.K.*, 2023 BCCA 468, this Court outlined factors that may be relevant to this assessment:
- [71] Relevant factors include: the level of planning and/or intentionality brought to the crime; the degree, nature and extent of the offender's personal participation in the offence; the means or method by which the crime was committed; the motive or reasons for the offender's participation; the offender's awareness of the legal and moral wrongfulness of their conduct; their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and their persistence in perpetrating the offence despite that awareness.
- [Internal references omitted.]
- [82] There may also be aspects of an offender's background that attenuate their moral responsibility. The Court in *R. v. Hills*, 2023 SCC 2 explained:
- [58] . The offender's moral culpability or degree of responsibility should be measured by gauging the essential substantive elements of the offence including the offence's mens rea, the offender's conduct in the commission of the offence, the offender's motive for committing the offence, and aspects of the offender's background that increase or decrease the offender's individual responsibility for the crime, including the offender's personal circumstances and mental capacity (*Hamilton*, at para. 91; *Boudreault*, at para. 68; *Ipeelee*, at para. 73).
- [83] The judge made findings that support a conclusion that the appellant's moral culpability in committing this offence is high.
- [84] First, the judge found this offence involved the dial-a-dope model of drug trafficking. The appellant's actions were intentional and involved some degree of planning.
- [85] Second, the judge found that the appellant's motive for committing the offence, while lacking some clarity, was generally for financial gain (to "make easy money"): Sentencing Reasons at para. 30. This finding has not been challenged. Unlike some of the authorities his counsel relied upon at the sentencing hearing, the appellant's offending was not motivated by substance dependence, a circumstance which has served to reduce the moral blameworthiness of other offenders (in some cases substantially) who have committed this type of crime: see e.g., *Ellis* at paras. 168-170. As identified in *Ellis*, this Court has long recognized that people with substance use disorders who traffic to support their own drug dependence are less morally culpable than those who traffic for profit: *Ellis*, at para. 153.
- [86] Third, the appellant acknowledged at his sentencing hearing that he possessed a clear awareness and understanding, generally, of the actual harms flowing from this type of conduct. Despite having this insight, he nevertheless made the choice to commit this offence.

- [87] These factors support a finding of high moral culpability. Other findings serve to diminish this somewhat, but not significantly, namely: the appellant's secondary role to that of Mr. Cooke, and the mitigating factors in his background identified by the sentencing judge.
- [88] While not raised in his written materials on appeal, the appellant's counsel suggested in oral submissions that the judge may not have properly considered the possible impacts of anti-Black racism apparent in the appellant's background in assessing his moral culpability, and/or the appropriateness of a conditional sentence.
- [89] I do not share this concern.
- [90] Courts have recognized the role of systemic racism in the over-representation of Black and other racialized individuals in the justice system, and the importance of social context evidence in the sentencing process: see e.g., *R. v. Anderson*, 2021 NSCA 62; *R. v. Morris*, 2021 ONCA 680.
- [91] The Court in *Morris* discussed how principles developed in the jurisprudence surrounding the treatment of Indigenous offenders in sentencing should inform the sentencing of Black and other racialized offenders:
- [123] Although we would not equate Black offenders with Indigenous offenders, for the purposes of s. 718.2(e), the *Gladue/Ipeelee* jurisprudence can inform the sentencing of Black offenders in several respects: see *Borde*, at para. 30. Just as with the discrimination suffered by Indigenous offenders, courts should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender's community, and the impact of that racism on the offender's background and circumstances. Similarly, in considering the restraint principle, courts should bear in mind well-established over-incarceration of Black offenders, particularly young male offenders. Finally, as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender's moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances.
- [92] In *Ellis*, this Court has looked to social context evidence as grounding a basis upon which judges can conclude that the fundamental purpose of sentencing is "better served by a sentence which, while recognizing the seriousness of the offence, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism": *Ellis* at para. 76, citing *Morris* at para. 79. This Court further held:
- [78] In my view, the use of social context evidence for the purposes identified in *Morris* is consistent with long-standing sentencing practices and principles, and logically fits within the existing statutory and common law sentencing framework.

- [79] It has long been the case that an offender's background may properly affect a sentencing court's assessment of moral blameworthiness.
- [80] In *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 at paras. 66-69 and *R. v. Ipeelee*, 2012 SCC 13 at paras. 73-77, the Supreme Court of Canada affirmed the critical importance of this principle in the context of s. 718.2(e) of the Criminal Code specific to the sentencing of Indigenous offenders.
- [81] Non-Indigenous offenders are also entitled to present background information as a basis for a finding of diminished moral culpability. Lived experiences involving "social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options" can be highly relevant to assessing blameworthiness: *Anderson* at para. 146. As explained in *Morris*, "an offender's life experiences can influence the choices made by the offender, and can explain, to some degree at least, why an offender made a choice to commit a particular crime in the specified circumstances" (at para. 75).
- [93] Similarly, in *R. v. Desmond*, 2023 BCCA 442, Justice Griffin endorsed the view that social context evidence is relevant to assessing an offender's moral blameworthiness: at para. 33. In *Desmond*, social context evidence was admitted in the form of an Impact of Race and Culture Assessment ("IRCA Report"): at para. 29.
- [94] There is no need to establish a causal link between the offending behavior and social context evidence before that evidence can properly be used, but there must be "some connection" between the systemic racism identified in the community and the circumstances of the event that are said to explain the offending behaviour: *Ellis* at para. 83, citing *Morris* at para. 97. The requirement to establish "some connection" is not aimed at proving a causal link between the social context and the crime. Rather, it is aimed at ensuring the sentencing process is focused on the offender's personal circumstances and background such that the social context evidence "can reasonably inform the individualization of the sentence": *Ellis* at para. 88, citing *R. v. Ipeelee*, 2012 SCC 13 at para. 83.
- [95] While no IRCA Report was prepared in this case, the sentencing judge was presented with a good deal of evidence about the appellant's background, including social context, through the pre-sentence report and the submissions of counsel. At the sentencing hearing, counsel both urged the judge to consider this evidence as mitigating. The Crown identified this factor as having an impact on the judge's assessment of moral culpability, but the defence did not advocate for it to be used in any particular way in the analysis. Notably, no submissions were made suggesting the presence of some connection between the appellant's personal and contextual background circumstances and his choice to engage in this offence.
- [96] The appellant is a 37-year-old Black individual who immigrated to Canada with his family at a very young age. He was raised primarily by a physically abusive mother in a disadvantaged neighbourhood in Toronto, in which drugs, gangs and gun violence were prevalent.

Individuals interviewed by the author of the pre-sentence report described the neighbourhood as a "school to prison pipeline", in which youths are often unfairly targeted by law enforcement and subjected to discrimination. The appellant experienced this at times in his youth.

- [97] The judge was not only alive to the appellant's background and social context evidence (see e.g., Sentencing Reasons at paras. 14-16), his reasons reveal that he understood this was relevant to his analysis, and that he expressly took those circumstances and context into account in determining a proportionate sentence (Sentencing Reasons at para. 34). The judge approached this factor in the manner suggested by the parties and treated it as somewhat diminishing the appellant's moral culpability. This conclusion was open to him and I am independently satisfied of this as well.

Appropriateness of a conditional sentence

- [98] In all of these circumstances, as a preliminary determination, I am satisfied that a sentence at the low end of the general range -- six months' imprisonment -- is appropriate. Having rejected a penitentiary term and a probationary sentence, I will turn now to consider whether it is appropriate for the offender to serve his sentence in the community.
- [99] In order to do so, I must be satisfied that the safety of the community would not be endangered by the appellant serving the sentence in the community and that such a sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code: s. 742.1 of the Criminal Code.
- [100] In determining whether an offender would endanger the safety of the community, I am to consider the risk of re-offence, and the gravity of the damage should re-offending occur: Proulx at para. 69.
- [101] The risk that a particular offender poses to the community must be assessed in each case, on its own facts. That assessment may include such factors as: the nature of the offence; the relevant circumstances of the offence; the degree of the offender's participation; the relationship of the offender to the victim; the profile of the offender (such as occupation, lifestyle, criminal record, family situation, mental state); and conduct following the commission of the offence: Proulx at paras. 70-71, citing *R. v. Maheu*, 1997 CanLII 10356 (QC CA), [1997] R.J.Q. 410 at p. 374.
- [102] The risk of re-offence should also be assessed in light of the conditions that would be attached to the conditional sentence. The risk of re-offending can be mitigated by "the imposition of appropriate conditions" that support rehabilitation and institute a level of supervision to ensure compliance: Proulx at para. 72.
- [103] If the risk of recidivism is minimal, the second factor to consider is the gravity of the potential damage in case of re-offence. A small risk of very harmful future crime may warrant a conclusion that the prerequisite is not met: Proulx at para. 74.

- [104] The sentencing judge concluded that the appellant poses some risk to re-offend (Sentencing Reasons at para. 42). Addressing Mr. Cooke and the appellant together, he found that their prospects of rehabilitation are "questionable" and their intentions not to re-offend are "qualified and guarded" (Sentencing Reasons at paras. 38-39).
- [105] Although not addressed in his written materials, counsel for the appellant focused his oral submissions at the hearing of this appeal on what he says is the appellant's negligible risk of re-offending. He argued that the judge's conclusion on his risk to re-offend has no evidentiary support, and places particular emphasis on the extended time the appellant has spent on bail without any further criminal charges arising. I will pause here to note that to the extent counsel for the appellant advanced other criticisms of the judge that were not grounded in the record, I have not considered them, nor have I attributed them to the appellant. This includes counsel's submission that the appellant's status as a Black offender was the sole basis on which he was found to present a risk of re-offending. The record and the judge's explicit analysis of risk demonstrate the opposite. In my view, this serious allegation was made without any foundation and was wholly inappropriate.
- [106] Sentencing judges, as in the present case, are often required to assess risk of recidivism without the benefit of a formal risk assessment. The judge in this case was uniquely positioned to do so, having made detailed findings relating to the appellant's participation in this offence after a trial that spanned several days. He was also provided with evidence pertaining to the appellant's background, current circumstances, performance on bail, and lack of criminal history. The judge was entitled to take the whole of this information into account in assessing risk. He concluded the appellant posed some risk to re-offend. This conclusion was open to him, but I am independently satisfied of this as well.
- [107] The appellant has some social support through family and friends (although the record is unclear whether any of these supports are local), a history of employment, no prior criminal record, an expressed desire to lead a pro-social life, and a willingness to attend counselling if ordered by the court. These factors weigh in favour of a finding of reduced risk. There are, however, factors that weigh against this.
- [108] The appellant's performance on bail during proceedings in the court below reflects a rather cavalier attitude toward compliance with court orders. While the record shows improvement over time, the appellant did not always meet his reporting obligations. His earlier "inconsistent" reporting occurred as a result of choices the appellant made -- choices that privileged his desire to travel over his responsibility to the court.
- [109] As well, the appellant was involved in this offence through his long-time friend and roommate, a person he characterized as the "ringleader". Both offenders were motivated by the prospect of "easy money". While he did not contest the imposition of a probationary term prohibiting contact with Mr. Cooke, he did so as a result of the practical effect of Mr. Cooke's incarceration and not from any voluntary recognition that he should distance himself from Mr. Cooke and his criminality. The appellant also expresses a very limited

(fairly described by the sentencing judge as "guarded") intention not to re-offend and, related to this, has taken no steps to address whatever factor(s) may have influenced his decision to engage in this conduct.

- [110] Weighing all of these circumstances, I conclude, as the sentencing judge did, that the appellant poses some risk to re-offend. I would not characterize this risk as high, but it is not minimal either.
- [111] Although the appellant's risk to re-offend is not high, he nevertheless poses some risk of committing a future crime that would be very harmful to the community. The gravity of the potential damage, should this risk materialize, is very high and warrants a conclusion that this prerequisite for the imposition of a conditional sentence is not met. I cannot be satisfied that the safety of the community would not be endangered by the appellant serving the sentence in the community.
- [112] I also conclude a CSO would not be consistent with the fundamental purpose and principles of sentencing.
- [113] When denunciation and deterrence are particularly pressing objectives, as in this case, incarceration will generally be the preferable sanction. This may be so even if restorative goals might be achieved through a conditional sentence. However, a conditional sentence may also provide sufficient denunciation and deterrence -- even in cases in which restorative objectives are of diminished importance -- depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served: Proulx at para. 106.
- [114] In such cases, a finding of significantly diminished moral blameworthiness arising from the offender's social context, background and their personal circumstances is likely to play a pivotal role. There will likely also be evidence that a community-based sentence offers the greatest potential for the offender's rehabilitation, or evidence of specific harms the offender may suffer if incarcerated: Ellis at para. 170.
- [115] This is not one of those cases. As I have noted, in this case, denunciation and deterrence are paramount. Notwithstanding the mitigating factors identified in the Sentencing Reasons, the sentencing judge made no finding of significantly (as opposed to somewhat) diminished moral blameworthiness. While there is some rationale for rehabilitative and restorative aims in this case -- the appellant has demonstrated a commitment to supporting his children and others, and has some legitimate employment -- he has taken no steps to address whatever factor(s) may have influenced his decision to commit this crime or to disavow future association with Mr. Cooke and his criminal behaviour. He poses some risk to re-offend and has also failed to consistently meet the obligations of his bail order, which undermines the Court's confidence in his ability to comply with a community-based sanction. In all of these circumstances, I conclude a CSO would not be consistent with the fundamental purpose and principles of sentencing in this case.

- [116] As the sentencing judge observed, the authorities relied on by the appellant in support of the appropriateness of a conditional sentence are distinguishable -- generally on the basis of the significantly reduced moral culpability of the offenders, and their promising prospects for rehabilitation in most of those cases. In Lawson, for example, the offender was addicted to cocaine at the time of the offence, had subsequently stopped his cocaine use, and was employed on a full-time basis: at para. 13. Similarly, in Gibb, the offender had struggled with addiction throughout his life, but had obtained stable employment at the time of sentencing: at paras. 56-57.
- [117] Like the sentencing judge, I consider that a sentence of six months imprisonment, followed by a 12-month probationary period, is a proportionate sentence for the offence committed by this offender. In my view, this sentence is commensurate with the gravity of this offence and the appellant's degree of responsibility in committing it. It is an individualized sentence that considers all of the aggravating and mitigating circumstances, and is crafted to achieve the primary objectives of denunciation and deterrence, while not losing sight of the appellant's rehabilitation and the need for restraint. Although an individualized sentence, it also satisfies the principle of parity. I see it as a just sanction that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

Disposition

- [118] For the foregoing reasons, although the sentencing judge erred in principle, thereby allowing this Court to sentence afresh, the sentence ultimately imposed by him was a fit sentence and I would have arrived at the same conclusion.

- [119] Accordingly, I would dismiss the appeal.

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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