
CANADA / JUDGMENT

R. v. Sandher

2008 BCSC 263

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 263 R. v. Sandher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sandher,

2008 BCSC 263

Date: 20080130

Docket: 23961

Registry: Vancouver

Regina

v.

Gurjit Singh Sandher

Before: The Honourable Madam Justice Bennett

Oral Reasons for Sentence

January 30, 2008

Counsel for the Crown

T.C. Gerhart

Counsel for the Accused

J.I.S. Sutherland

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: Mr. Sandher has pleaded guilty to four counts of trafficking cocaine in what is commonly referred to as a "dial-a-dope operation". The four sales occurred on February 13, April 1, May 20, and June 11, 2004. The main issue on sentencing is whether Mr. Sandher should be sentenced to a conditional sentence of imprisonment.

The Facts

- [2] Counsel have agreed to facts, which were read into the record; however have made submissions regarding the inferences to be drawn from the facts. Further, facts from the counts that Mr. Sandher was charged with, but did not plead guilty to, were also read into the record as part of the circumstances, by consent. There was no reference to either Count 9 or 11 on the indictment and those counts have not been considered by me.
- (a) Circumstances of the Offence
- [3] Mr. Sandher sold five ounces of cocaine during seven different exchanges with undercover police officers. The RCMP in North Vancouver had two projects underway with undercover operators buying drugs from dial-a-dope operations. Mr. Sandher sold drugs to both undercover operators. All of the transactions occurred either in the City or District of North Vancouver, B.C.
- [4] The first sale occurred on February 13, 2004. On this day, a female undercover operator purchased one gram of cocaine from Mr. Sandher for \$70. He was quite busy and it took him several hours before he could complete the sale.
- [5] The next sale was on March 18, 2004. The same female undercover operator called a number she had previously used to reach the drug dealers. Mr. Sandher answered the telephone this time. She again bought one gram of cocaine for \$70. This transaction occurred at the Esso gasoline station.
- [6] On April 1, 2004, the same undercover operator met Mr. Sandher at the Esso station at the Westview Mall. This time Mr. Sandher sold her 3.5 grams of cocaine for \$180.
- [7] On April 16, 2004, the same undercover operator met Mr. Sandher at the Shell gas station on Capilano Road and he sold her 3.5 grams of cocaine for \$180.
- [8] The balance of the transactions were part of the second project, which utilized a male undercover operator. The undercover operator called a number and reached Michael Hopper, a co-accused. Mr. Hopper has not yet been sentenced. Mr. Hopper would then contact Mr. Sandher and drugs were delivered. Mr. Hopper utilized his girlfriend, Cabrina Moxey, for a number of these sales. The undercover operator called Mr. Hopper and Mr. Hopper would send Ms. Moxey out to meet the undercover operator and then they would meet Mr. Sandher, who had the drugs.

- [9] On May 12, 2004, the undercover operator drove around with Ms. Moxey and eventually met up with Mr. Sandher who sold him a quarter ounce of cocaine and an eighth of an ounce of rock cocaine for \$490. This sale occurred at the Rogers Video Store parking lot on Marine Drive.
- [10] On May 20, 2004, the undercover operator contacted Mr. Hopper and arranged to meet. The undercover operator was in Mr. Hopper's apartment and overheard him discussing a cell phone number as a contact for the organization. Further, he had a discussion with someone named "Pat" who did not want Mr. Sandher keeping the undercover operator waiting. Pat appears to be Patrick Cully about whom more will be said shortly. On this day, Mr. Sandher met the undercover operator in the Rogers Video parking lot again and sold him an ounce of cocaine for \$1,025.
- [11] On June 10, 2004, there were two events. Up to this point, there had been a great deal of surveillance with Mr. Sandher. He was seen on one occasion with his child in the car, but was not seen making a sale at that time. On June 10, 2004, he was observed making a sale and the purchaser was arrested. The purchaser had half a gram of cocaine in his possession. Mr. Sandher was also arrested. He had \$350 cash, three cell phones, and diapers, (assumed to be for his child), in his possession.
- [12] Mr. Sandher was arrested at this time but released with no process issuing. He was fingerprinted, photographed, and consulted counsel while at the police station. He returned to the police station on June 11, 2004, and picked up his possessions, which had been left there.
- [13] In spite of his arrest, on June 11, 2004, he was involved in the sale of four ounces of cocaine to the undercover operator for \$4,000. This transaction occurred near the Maplewood Pub in North Vancouver.
- [14] The undercover operator had called the same number at different times over the months during the project and bought drugs from other accused. It is accepted that the people who were selling drugs were working in "shifts". Indeed, Mr. Sandher once told the female undercover operator to phone back because he was off-shift in 10 minutes.
- [15] During the course of the transactions, Mr. Sandher was seen using five vehicles: a Dodge Ram, which is registered to his father; a GMC Yukon, which is registered to him; a Volkswagen Cabriolet; a black convertible Mustang and a blue Chevrolet Cavalier.
- [16] The female operator also did drug deals with Patrick Cully. Mr. Sandher was regularly answering this phone and gave the undercover operator a number where she could reach Mr. Cully.
- [17] On October 24, 2004, a search warrant was executed in Mr. Sandher's home. A number of things were seized as a result of this search. The only items that I consider of relevance were corporate documents and cell phone records. A number of cell phone bills were in names similar to Mr. Sandher's company's name as well as similar to some of his relatives or

friends. The phone records include a number Mr. Sandher gave to the undercover operator to find Patrick Cully. This bill had 1,000 minutes of short one-minute calls. Another bill had 1,950 minutes in short one-minute calls in one month. A phone bill for August was 68 pages in length with 2,150 minutes of largely one-minute calls. It is not disputed that these phone records are consistent with a large dial-a-dope operation.

- [18] Mr. Sandher submitted that the phone records went to a mailbox in Surrey and he just picked them up for Patrick Cully. He said he gave them to Mr. Cully and Mr. Cully would pay them. The address for the mailbox is the same address as the registered records office for Mr. Sandher's company. As noted, the phone bills are in names similar to Mr. Sandher's company, his brother and his brother's girlfriend, as well as an alias that Mr. Sandher has used. There were five or six different cell phone accounts. Mr. Sandher seeks to portray himself only as a "delivery boy" for the drug dealers. The Crown says he is much more.
- [19] It is trite to say the Crown must prove disputed, aggravated facts in a sentencing proceeding beyond a reasonable doubt. See *Gardiner v. The Queen* (1982), 68 C.C.C. (2d) 477 (S.C.C.). The defence, however, is not without an obligation. If the defence wishes to put forward a disputed mitigating factor it must do so on a balance of probabilities. See *R. v. Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.), leave to appeal refused (1984), 4 C.C.C. (3d) 32n and Criminal Code s. 724.
- [20] Mr. Sandher has admitted to having possession of cell phone records, which I find are overwhelmingly consistent with a dial-a-dope operation. The records are in the names of things or people associated with Mr. Sandher and the billing address is his company's corporate address. Mr. Sandher has not called or presented any evidence to the contrary other than submissions of counsel.
- [21] The only reasonable inference is that Mr. Sandher is more than a delivery boy. He was involved at a higher level of the organization. There is no suggestion that he was a controlling mind or that he obtained the large supply of cocaine himself for sale. However, his role was greater than simply delivery.
- (b) Circumstances of the Offender
- [22] Mr. Sandher is 28 years old. He was born in England and he moved here when he was 16 years old. His mother is 46 years old and his father is 50 years old. Both parents were in court during the sentencing proceedings. His parents operated a garment business in England, which involved them being away from home for long periods of time. As a result, Mr. Sandher was raised by his grandparents until the age of five years. He lived with his parents after this time, but had to move a number of times, which resulted in a frequent change of schools. He did not develop long-term friends and he was bullied. He went to a private boarding school at age nine and excelled in both sports and academics. When the economy took a downturn, his parents could no longer afford private school and he returned to the public system. His grades suffered, but he continued to excel in sports.

- [23] His parents moved to Canada when he was 15 years old and he joined them when he was 16. The family lived in North Vancouver and he attended Argyle High School. Shortly after his arrival, his parents bought a restaurant in Langley and moved to Langley. Mr. Sandher remained in North Vancouver and lived with his uncle while he finished high school. Some of the people who were arrested in this drug operation were friends he made while attending high school in North Vancouver.
- [24] Between 1997 to 2001, he apparently took courses at Capilano College in acting, but I was not advised if he finished that program. He worked as a grip in the movie industry, but that was short-lived. He also worked driving trucks. In 2001, he started an Internet-based business called Priority Placement Worldwide. His company was quite successful and he was invited to take courses at the Harvard Business School and MIT. However, the letter from the Harvard Business School, while addressed to Mr. Sandher, appears to be a rather general invitation. For example, the letter reads quote, "I also ask that you share this material with other high potential managers," which does not exactly reflect a discriminating nature with respect to invitations to the potential participants of the course.
- [25] In 2002, Mr. Sandher married and now has two children. There were difficulties in the marriage in part because of financial problems and his wife left him. His wife, apparently, is a drug and alcohol user and Mr. Sandher has had custody of the children since May of 2005. Around 2003 and 2004, the Internet business went into a recession and he lost everything and declared bankruptcy. His mother, in a letter to the Court, said: "He was not the same person." He began to see his friends from North Vancouver again and became involved in drug selling as a way to get himself out of debt. He is not a drug user himself.
- [26] Mr. Sandher works driving a truck for the movie industry. However, that work is now sporadic due to the writers' strike. The children are now aged six and five years. The daughter is a special needs child. She has both physical and cognitive difficulties. Mr. Sandher and the children live with his parents. His parents still own the restaurant plus work at other jobs. Mr. Sandher, as I noted, worked for a while driving a truck for the movie industry and he works with his father. He recently enrolled in a course at the Vancouver Film School, which commenced in January 2008. He volunteered to raise money for an event held November 23rd, 2007, to raise money for Surrey Memorial Hospital Foundation.
- [27] Mr. and Mrs. Sandher Sr. claim they cannot look after the children if Mr. Sandher goes to prison. I found this to be an in terrorem position. I asked rhetorically what would happen if Mr. Sandher died. I am not faulting counsel for this submission. He can only work with what he is given. However, the position taken by the grandparents, who are both young, that they cannot look after their grandchildren who live with them if their son is sent to prison is not believable. While this, of course, will not weigh against Mr. Sandher, I do not accept this position put forward by his parents.

[28] Mr. Sandher has a new girlfriend who has written a letter of support. He has had no incidents while on bail. However, his bail was not onerous. He was required to report as directed, stay away from the North Shore, and have no contact with his co-accused. Mr. Sandher has no criminal record.

(c) Impact on the Community

[29] The impact on the community is significant. There has been much judicial comment about dial-a-dope operations. In *R. v. Franklin*, 2001 BCSC 706, Mr. Justice Henderson said this at paragraphs 17 to 21 and 45 to 46.

17 Some explanation of Dial-A-Dope operations is relevant.

18 Traditionally, drugs were disseminated at the street level by purchasers going to certain areas of town and taking the initiative to seek out those who sold the drugs on street corners and in back alleys. This, to some extent, constrained the dissemination of the product. A Dial-A-Dope operation is different. Anyone, anywhere in the Lower Mainland, can place a telephone call to a vendor of narcotics and, after establishing his or her credibility by satisfying the vendor that he or she is not an undercover officer, make an arrangement to have the drugs delivered to wherever the purchaser happens to be. Typically, the drugs are delivered within fifteen or twenty minutes and handed over in exchange for cash.

19 This has several significant results.

20 First, it makes these drugs, and I refer primarily to cocaine and heroin, more readily accessible throughout the Lower Mainland than they have been in the past. It makes them accessible with less effort on the part of the purchasers. Purchasers, and here I think of adolescents, who might feel intimidated at the thought of seeking out a drug dealer in the recesses of the Main and Hastings area may nevertheless, in the relative comfort and safety of suburban locations, easily purchase cocaine and heroin as long as Dial-A-Dope operators are willing to oblige them.

21 I infer also that Dial-A-Dope operations are profitable. There is no evidence before me as to how much a typical Dial-A-Dope dealer makes in the course of a day or a week but, having sat as the trial judge on a number of these cases, I am aware that it is a profitable way to make easy money.

45 On the other hand, it must be said that the Lower Mainland of British Columbia is overrun with cocaine and heroin. Those who are willing to disseminate drugs through the community by Dial-A-Dope operations are responsible for the ready availability of these drugs. People such as Mr. Franklin, who engage in Dial-A-Dope operations, are lured into them by the high profits available with little effort. It is easy money.

46 The destructive potential of these drugs is so well known as not to require comment.

[30] Most of the places where the sales were made in North Vancouver were public places, almost flaunting the sales as opposed to making exchanges in a covert manner away from the public view. The comments of Judge Baird Ellan, a Provincial Court judge who sits in North Vancouver and knows the community well, when she sentenced a co-accused in *R. v. Kerr*, 2006 BCPC 144, in my view, are apposite. She said the following at paragraph 76:

I would add to that the fact that these kinds of organized, drug-related criminal operations conducted in public locations may endanger the public by giving rise to ancillary crimes, the use of weapons, confrontations and violence in the community, which is itself becoming more frequent. None of that was alleged here, but it is one of the hazards of this kind of occupation on the part of young people. It is alarming criminal activity conducted as Justice Henderson noted in that case, *Franklin*, in suburban neighbourhoods, making the substances more readily accessible to adolescents and young adults, who might thereby become addicted and placing the community at risk of further crime.

Positions of the Crown and Defence

[31] I turn now to the position of the Crown and the defence. The defence position is that a conditional sentence be imposed for two years less a day. The Crown opposes a conditional sentence and submits that a sentence of 20 months is a fit sentence, taking into account Mr. Sandher's circumstances.

The Case Law

[32] The leading case on when to impose a conditional sentence order is *R. v. Proulx* 2000 SCC 5, 140 C.C.C. (3d) 449 (S.C.C.). In writing that decision, the court said the following:

Principles Militating For and Against a Conditional Sentence

90 First, a consideration of ss. 718.2(d) and 718.2(e) leads me to the conclusion that serious consideration should be given to the imposition of a conditional sentence in all cases where the first three statutory prerequisites are satisfied. Sections 718.2(d) and 718.2(e) codify the important principle of restraint in sentencing and were specifically enacted, along with s. 742.1, to help reduce the rate of incarceration in Canada. Accordingly, it would be an error in principle not to consider the possibility of a conditional sentence seriously when the statutory prerequisites are met. Failure to advert to the possibility of a conditional sentence in reasons for sentence where there are reasonable grounds for finding that the first three statutory prerequisites have been met may well constitute reversible error.

[33] At paragraph 102, the court, reviewing the principle of denunciation, said:

Denunciation is the communication of society's condemnation of the offender's conduct. In *M. (C.A.)*, supra, at para. 81, I wrote: "In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. "

Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances.

[34] At paragraph 106, the court said:

The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed, and the community in which the sentence is to be served. As a general matter, the more serious the offence and the greater the need for denunciation, the longer and more onerous the conditional sentence should be. However, there may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct.

[35] In dealing with deterrence, the court said at para. 107 that:

Incarceration, which is ordinarily a harsher sanction, may provide more deterrence than a conditional sentence. Judges should be wary, however, of placing too much weight on deterrence when choosing between a conditional sentence and incarceration. The empirical evidence suggests that the deterrent effect of incarceration is uncertain. Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences. There is also the possibility of deterrence through the use of community service orders, including those in which the offender may be obliged to speak to members of the community about the evils of the particular criminal conduct in which he or she engaged, assuming the offender were amenable to such a condition. Nevertheless, there may be circumstances in which the need for deterrence will warrant incarceration. This will depend in part on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect, as well as on the circumstances of the community in which the offences were committed.

[36] *R. v. Proulx* indicates that any offence, unless a minimum sentence is required, may attract a conditional sentence order. I will address in more detail during the final reasons the analysis of whether of Mr. Sandher's circumstances meet the conditional sentencing order.

[37] I accept that a conditional sentence may be imposed for a dial-a-dope operation. Indeed, I imposed such a sentence in *R. v. Osborne*, 2007 BCSC 1840.

[38] In *R. v. Ahmed*, 2001 BCCA 504, 159 BCAC 136, the Court of Appeal overturned a conditional sentence order of 18 months granted to a person convicted of six counts of trafficking in a dial-a-dope operation. In doing so, the court said at paragraphs 8 and 9:

8 In *R. v. Vu*, [1998] B.C.J. No. 249, January 19, 1998, Vancouver Registry CA023175, Chief Justice McEachern, in upholding a custodial sentence in a case similar to the present one, said this:

I think that when someone is engaged in trafficking over a period of time and is convicted of offences in trafficking over a period of time and is convicted of offences which justify a consecutive sentence that in most cases a conditional sentence may well not be appropriate.

There are many other decisions that support that view and the view has equal application, in my opinion, to a case involving a number of transactions that attract a global sentence as opposed to consecutive sentences. In a case involving trafficking in hard drugs, there must be some significant factor or factors relating to the background of the offender, his underlying reasons for trafficking or his pre-sentence efforts at rehabilitation that would support the imposition of a conditional sentence.

9 Another decision of this court illustrates what I have just said. In *R. v. Farnsworth*, [2000] B.C.J. No. 2534, December 7, 2000, Vancouver Registry CA027649, a panel of this court reduced to ten months a custodial sentence of 14 months that followed two months in custody. The reduction was made because of an apparent misunderstanding by the trial judge of the Crown's position on sentence. The 30-year old appellant had become addicted to crack cocaine that derailed a productive life. A conditional sentence was not appropriate because incarceration was needed to deter him. Mr. Justice Hall observed that this need distinguished the case from *Kozma* where the offender was well on his way to rehabilitation.

[39] It is submitted by the defence that Mr. Sandher has done these things, has made efforts at rehabilitation and his background would lend towards a conditional sentence order. Mr. Sandher points to two decisions where a conditional sentence order was imposed because of family considerations in that the family would suffer if the accused went to prison. See *R. v. Ellrodt*, 1999 BCCA 57, 119 B.C.A.C. 18 (B.C.C.A.) and *R. v. Nikkanen* (1999), 140 C.C.C. (3d) 423 (Ont.C.A.).

[40] Of importance is how the co-accused were treated as parity in sentencing is an important factor. I have not gone into the detailed circumstances of the co-accused. However, suffice to say, that Mr. Couture, who was one of the drug suppliers, pleaded guilty to several sales of ounce-quantities of cocaine during the investigation. Large amounts of money and drugs were located when Mr. Couture's premises were searched. There is no question that Mr. Couture was much more involved in this operation than Mr. Sandher. Mr. Couture was also 28 years old and a new father and had no criminal record. The sentencing judge accepted that a four-year sentence was fit and imposed a sentence of three-and-a-half years, taking into account time in custody. See: 2005 BCPC 373.

- [41] Ms. Moxey, the girlfriend of Mr. Hopper, had no criminal record, was 24 years old at the time of sentencing, and was a drug user. The reasons for sentencing in her case do not set out the circumstances clearly or Ms. Moxey's role in the drug business. I know that she accompanied the buyers when the sales were in progress. She received a conditional sentence order of 18 months. However, I frankly do not consider this decision useful. The reasons are sparse and, from what I do know, a sentence of this nature was lenient indeed and perhaps unfit. See (31 August 2005), North Vancouver Registry 43437-C7 (B.C.P.C.)
- [42] Mr. Ho, who was not known to Mr. Sandher, but who was one of the other sellers, was sentenced by Justice Chamberlist. Mr. Ho was 22 years old, 20 when he committed the offences. His sales were much smaller than those of Mr. Sandher and it appears that he was just a delivery boy. The grand total of his sales was \$600 for three sales and marihuana clones. He made an unsolicited call to the undercover operator hoping to make another sale. There was some discussion of further sales in greater amounts, but this did not come to fruition. Mr. Ho had made efforts to turn his life around and had employment. He also sought a conditional sentencing order. The Court rejected this submission and he was sentenced to 10 months imprisonment. See (16 February 2006) Vancouver Registry 23650 (B.C.S.C.).
- [43] Christopher Kerr, who had been a high school friend of Mr. Sandher, was sentenced, as noted above, by Judge Baird Ellan. Mr. Kerr pleaded guilty to nine counts of trafficking. He sold grams with one exception when he sold an ounce of cocaine. His total sales were just under two ounces. Mr. Kerr also attempted to turn his life around and, like Mr. Sandher, had a favourable pre-sentence report. Mr. Kerr had a criminal record for breaching probation, breaking and entering, and theft. Judge Baird Ellan rejected the submission for a conditional sentence order and imposed a sentence of 15 months. Mr. Sandher submits that if he is not granted a conditional sentence order, then his sentence should be 15 months, not 20 months, as there is little to distinguish him, he submits, from Mr. Kerr. However, from Judge Baird Ellan's reasons, I should infer that Mr. Kerr was a delivery boy and did not have higher involvement in the operation. See: 2006 BCPC 144.
- [44] Mr. Cully was sentenced by Associate Chief Justice Dohm. His role was far more significant than Mr. Sandher and he received a sentence of 29 months. He was found with large quantities of drugs and cash and was clearly in the same league as Mr. Couture. See: (11 September 2006) Vancouver Registry 23925 (B.C.S.C.). As noted, Mr. Hopper has not yet been sentenced.
- [45] I have been given many other cases in terms of setting a range. There are cases where conditional sentence orders have been imposed and there are cases where terms of imprisonment have been imposed. I do not propose to review all of them. I add that the 20 months proposed by the Crown is in the range given these decisions.

Mitigating and Aggravating Factors

- [46] I will first address mitigating factors. Mr. Sandher pleaded guilty. However, he did not do so at the first opportunity. He pleaded guilty after a preliminary inquiry and on the eve of trial. Therefore, the effect of mitigation of his guilty plea is somewhat lessened. He apparently has not committed further crimes since he was charged in October. However, he did commit his largest sale after his arrest in June. He is going to school, has family support, and works when he can find employment. He is supporting two children, one who is special needs. However, his school did not commence at a time when he was charged. He waited until weeks before he was to be sentenced to enrol in a school program. His volunteer work, commendable as it is, occurred at the end of November just two months before he was to be sentenced. I would be more impressed with Mr. Sandher's efforts to turn his life around if he had commenced some of these activities at an earlier date and not on the eve of sentencing. Mr. Sandher has no criminal record.
- [47] In terms of aggravating factors, the case law cited above sets out the seriousness of dial-a-dope operations. It highlights the problems in communities as a result of drugs. The gravity of the offence is serious. Mr. Sandher's motivation was to make quick money and that increases his moral culpability. He knew this was wrong yet he went ahead for profit.

Principles of Sentencing

- [48] I turn now to outline the principles of sentencing. Section 718 of the Criminal Code R.S.C. 1989, c. C-46 sets out the purpose of sentencing:

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

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

- [49] Section 718.1 says:

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

- [50] I will read the relevant parts of s. 718.2:

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

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

[51] The conditional sentence order is found at 742.1:

Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

Reasons

[52] Mr. Sandher is a young man with no criminal record who has committed serious offences. He was a successful businessman who, when he suffered financial losses, turned to the drug trade to earn a living. He has suffered other setbacks including his wife leaving him and he has custody of his children. He suffered some depression after his business collapsed. He works when he can. His employment as a truck driver in the movie industry has apparently stalled because of the writers' strike. He is attending film school and wishes to become an actor.

[53] First, as noted, a conditional sentence may be imposed where the sentence of imprisonment will be less than two years. The sentence in this case will be less than two years. The Crown does not seek more. Second, that the judge is satisfied that serving the sentence in the community would not endanger the safety of the community; I am content that Mr. Sandher would not commit further offences and, in particular, will not turn to selling drugs again. Three, would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2; I am not satisfied that this condition is fulfilled by Mr. Sandher's

background given all of the circumstances.

- [54] A conditional sentence order is not appropriate in this case. It would not achieve the important principles of denunciation and general deterrence. The community is entitled to denounce unlawful conduct and that is reflected in sentencing. I have already read extensively from *R. v. Proulx* where the Chief Justice discussed the role of denunciation in sentencing.
- [55] Further, a great deal of money is available in the drug trade even for people operating at Mr. Sandher's level. If lenient sentences are the standard, then there is no incentive to stop involvement in the trade for many people. Thus, general deterrence is also important. Indeed, in the *Franklin* decision, Mr. Justice Henderson said the following at paragraph 47:

It is my view that this is the sort of offence where general deterrence has an impact. One does not enter into a Dial-A-Dope operation impulsively or spontaneously. It is necessary to obtain a supplier, to outfit oneself with a pager and a cell phone and a vehicle, and to make sure the word gets around. It is a calculated decision to engage in a particular type of business. It is reasonable to think that those who are considering that decision will take into account the likely penalty they would receive upon conviction. In other words, general deterrence is a genuine consideration in cases of this sort.

It is also my view that general deterrence is entitled to very considerable weight when imposing sentence for trafficking in hard drugs. When I weigh the need for general and specific deterrence, the need to protect the public, the need to rehabilitate this offender, and the need to denounce his conduct; and when I take into account the injunction in the Criminal Code that incarceration should not be imposed unless and until all other alternate forms of sentencing have been considered, I find myself of the view that a term of true imprisonment is necessary in [the] case.

- [56] I have come to a similar conclusion. This is not to say, as I have already said, that a conditional sentence order cannot be imposed in a dial-a-dope operation or a drug-trafficking case. In my view, however, the circumstance of this offence does not lend itself towards a conditional sentence order. I have not overlooked the principle of rehabilitation. It is unlikely that Mr. Sandher will commit further crimes. He will not be able to continue with his schooling. However, he knew that was a possibility when he enrolled in the course in January. There is no suggestion that he will lose his employment as a result of an imposition of a jail term other than for the period of the term.
- [57] His children will suffer and that I regret. If his parents truly cannot look after them and no other family member can, then they will have to surrender them to the government on a voluntary care agreement until Mr. Sandher is released from custody. The greatest loss with respect to Mr. Sandher's offences is the effect of these offences on his children. However, that in and of itself is not a sufficient basis upon which to grant a conditional sentence order.

[58] In terms of sentencing, I apply the principle of parity and look at the sentences imposed on others, including Mr. Sandher's co-accused. Mr. Ho received 10 months. Mr. Kerr received 15 months. However, Mr. Sandher's role and moral culpability in the offences was more serious than both of these offenders. On the other hand, Mr. Kerr had a criminal record and Mr. Sandher does not. The Crown submits that a 20-month sentence takes into account the mitigating factors as noted above. There is no remand time to consider. I have taken into account all of the circumstances noted above as well as the submissions of counsel and the case law submitted, and I conclude that a sentence of 18 months is a fit sentence on each count concurrent.

Ancillary Orders

[59] There will be an order of forfeiture of the drugs and drug paraphernalia pursuant to s. 16 of the Controlled Drugs and Substances Act, S.C. 1996 c. 19. There will also be an order pursuant to s. 109 of the Criminal Code with respect to the ban on possession of weapons. There will be a prohibition order with respect to Mr. Sandher from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substances for a period of 10 years. He will have 72 hours from the time of his release to surrender any items he has in his possession to the RCMP.

[60] THE COURT: Mr. Sandher, would you stand up, please.

[61] I am sentencing you to a sentence of 18 months imprisonment on each count concurrent. Thank you. You may sit down.

[62] I see no reason to add a probation order as Mr. Sandher does not require probation for his rehabilitation.

[63] With respect to the victim fine surcharge, given Mr. Sandher is going to be serving a sentence of imprisonment and also has two children to support, I do not see any point in imposing the victim fine surcharge. That will be waived.

[64] The Criminal Code provides for the taking of a DNA sample for a databank. There are some offences where the order is mandatory. There are secondary offences where it is discretionary. The offences to which Mr. Sandher has pleaded guilty are secondary offences. Section 487.051(3) of the Criminal Code says that:

In deciding whether to make an order under paragraph (1)(b), the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

- [65] The Court of Appeal has dealt with this issue in two cases: *R. v. Durham*, 2007 BCCA 190, 221 C.C.C. (3d) 304 and *R. v. D.P.*, 2006 BCCA 409, 212 C.C.C. (3d) 237. In *R. v. Durham*, Mr. Justice Low indicated that in most cases the order sought under a secondary designated offence will be granted, pointing out that the invasion of privacy with respect to an adult is minimal. He also focused on the important aspects of the purpose of the DNA order as stated in *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.). These are to:
- (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).
- [66] However, in *R. v. D.P.*, the Court of Appeal overturned a DNA order which was made for a secondary offence. That case dealt with a young person who had no criminal record. The Court of Appeal found that insufficient emphasis was placed on the fact of the age of the offender, the supportive family and stable family situation, the remorse the offender expressed, steps he had taken to rehabilitate himself, and a positive pre-sentence report. The court said those factors offset the administration of justice interest regarding having the order be made.
- [67] In this case, Mr. Sandher has pleaded guilty to four counts of drug trafficking involving a dial-a-dope operation. He has not committed offences since these offences occurred a number of years ago. He has a stable and supportive family situation. He has employment. He was attending school and he has sole custody of two children, ages five and six. He has no criminal record and no other criminal history. In all of those circumstances, in my view, the interests of the administration of justice would not be served by ordering Mr. Sandher to take a DNA test for the DNA databank, and therefore I refuse that application.

"E. Bennett J."

The Honourable Madam Justice Bennett

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