
CANADA / JUDGMENT

R. v. Von Holtum

2013 BCCA 384

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 384 R. v. Von Holtum

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Von Holtum,

2013 BCCA 384

Date: 20130830

Dockets: CA040064; CA040097

Dockets: CA040064

Between:

Regina

(Appellant)

And

Steven Robert Von Holtum

(Respondent)

- and -

Dockets: CA040097

Between:

Steven Robert Von Holtum

(Appellant)

And

Regina

(Respondent)

Corrected Judgment: The title page was corrected on March 26, 2014.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Low

The Honourable Madam Justice Neilson

On appeal from: An order of the Supreme Court of British Columbia, dated
June 22, 2012 (R. v. Von Holtum, Vancouver Docket Number 25502)

Counsel for the Crown:

P. Eccles

Counsel for the Offender:

I. Donaldson, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 26, 2013

Place and Date of Judgment:

Vancouver, British Columbia

August 30, 2013

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Mr. Justice Low

The Honourable Madam Justice Saunders

Summary:

The appellant was a baggage handler at the Vancouver International Airport. On December 22, 2007 he was not on duty but went to the airport in his Air Canada uniform to meet a flight from Mexico. He helped unload the luggage and then made an unauthorized entry to the customs hall, where he recovered four bags from the flight and attempted to move them out of the area. He was stopped by a baggage agent. Investigation revealed the bags contained 50 kg of high-grade

cocaine. The appellant was charged and convicted of unlawfully importing cocaine and possessing cocaine for the purpose of trafficking.

On sentencing, the trial judge characterized the appellant as a drug courier, and found the range of sentences for such offenders is generally eight to 12 years. She imposed sentences of nine years on each count, and then added a year to those sentences in recognition of the deemed aggravating feature of breach of trust, pursuant to s. 718.2(a)(iii) of the Criminal Code, resulting in a global sentence of ten years.

Both the appellant and the Crown sought leave to appeal the sentences.

The appellant's application for leave was denied as his appeal had no merit. The Crown's appeal was allowed and the sentences increased to 12 years. The trial judge erred in by failing to fully consider the unique context of these offences, and in sentencing the appellant as a courier. That characterization wrongly minimized his role in the importation scheme and the extent of his moral culpability. The appellant was not merely a courier, but a corrupt insider who used his special position and security clearance to facilitate the crimes. In doing so, he breached his employer's trust and the integrity of the civil aviation security requirements developed for the protection of the travelling public.

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] On June 22, 2012, following his conviction by a jury of unlawfully importing cocaine into Canada and unlawfully possessing cocaine for the purpose of trafficking, a Supreme Court judge sentenced Mr. Von Holtum to imprisonment for 10 years on each charge, to be served concurrently. The Crown as the appellant in appeal CA040064, and Mr. Von Holtum as the appellant in appeal CA040097, have both sought leave to appeal that sentence on the basis it was unfit.
- [2] The Crown contends the trial judge erred by underestimating both the seriousness of the offences and the degree of Mr. Von Holtum's moral culpability, and by identifying mitigating factors that had little import for crimes of this nature. It submits a fit sentence would be 16 years served concurrently on each count.
- [3] Mr. Von Holtum argues the trial judge erred by failing to give weight to the sentencing objective of rehabilitation, and seeks a substantial reduction in his sentence.

The Circumstances of the Offence

- [4] At the time of these offences, Mr. Von Holtum was a station attendant at the Vancouver International Airport, and had worked there as a baggage handler for 19 years. His duties gave him access to controlled areas at the airport by means of a Restricted Area Identification Card, or "RAIC" card.

- [5] In the early morning of December 22, 2007, Mr. Von Holtum was not on duty but went to the airport wearing his Air Canada parka to meet a flight from Puerto Vallarta, Mexico. On arrival, he learned the flight was two hours late, but remained at the airport to meet it. When it landed, he drove an Air Canada tractor to the arrival gate and joined two on-duty Air Canada attendants who were unloading the luggage from the flight. After assisting with the bags, he used his RAIC card to enter the customs hall, an area in which baggage handlers were not permitted without specific direction from a supervisor.
- [6] In the customs hall, Mr. Von Holtum took four black suitcases from the flight off the baggage conveyor and loaded them onto a baggage cart. He tore the luggage tags off, threw them in the garbage, and was moving the bags through the customs hall when a baggage agent stopped him. Mr. Von Holtum told the agent the bags had been dispensed to the hall in error and he was removing them. The agent did not accept this and stopped him.
- [7] The agent then retrieved the baggage tags from the garbage. Further investigation demonstrated a breach of the passenger-baggage reconciliation requirement as the bags had been checked in Puerto Vallarta but the passenger named on the tags had not travelled on the flight. Canadian Border Service agents x-rayed the bags, and found they contained 50 kg of high-grade cocaine.
- [8] Mr. Von Holtum was charged and tried before a judge and jury. At the trial, the Crown called Staff Sgt. Murphy, a member of the R.C.M.P., who was qualified as an expert and gave the following evidence about the importation, sale, and consumption of cocaine in British Columbia. The cocaine found in the suitcases had a wholesale value of about \$1.2 million and, if sold on the street, represented about 500,000 individual doses that would generate \$4 million in revenue. Cocaine is typically traded through a hierarchy of distributors that stretches from the importers, who occupy the highest rung, to the street dealers who sell the drug to individual users. Importers often organize distribution in a manner such that each participant knows only what is required to perform his or her role. Since cocaine is not indigenous to Canada, its importation necessarily involves a breach of border integrity measures, and this is often accomplished by the use of insiders who work in border-related industries. These people are paid compensation commensurate with the risk, often receiving \$500 to \$2,000 for each kilogram of cocaine imported.
- [9] Mr. Von Holtum gave evidence in his own defence at the trial. He testified he had no knowledge of the drugs in the suitcases, and attempted to provide an innocent explanation for his presence and actions at the airport. It is evident from the jury's verdict that they did not accept his account.

Circumstances of the Offender

- [10] At the time of sentencing, Mr. Von Holtum was 47 years old. He is the youngest of six siblings. His father was abusive and left the family when Mr. Von Holtum was 9 years old. He is single and has always lived with and been the primary caregiver for his 80-year-old mother, who is unwell. He also cared for his brother, who was ill and died during the trial. His family and fiancé of six years are supportive.
- [11] Mr. Von Holtum has a high school education. He has worked at the airport since 1988, and has held various positions in his union, including shop steward. He describes soccer as his "passion" and has coached and organized soccer for children and adults for many years.
- [12] Mr. Von Holtum has no criminal record, and does not use alcohol or drugs. He is embarrassed and remorseful about these charges, particularly with respect to their impact on his family. At his sentencing, the defence filed 36 letters of support from his family, friends, and members of the community, which the trial judge summarized as follows:
- [21] Mr. Von Holtum has provided several character reference letters. Many of them express shock and surprise that Mr. Von Holtum has committed the offences. They describe his care of his mother and his brother, his selflessness and generosity. They describe his regret of being involved in this situation, which has caused hurt to others. They also describe Mr. Von Holtum's fear and anxiety about incarceration.

The Sentencing Proceedings

- [13] The Crown sought a sentence of 18 years' incarceration on each offence. The defence initially asked the trial judge to consider a conditional sentence due to Mr. Von Holtum's role as caregiver to his mother. Counsel ultimately acknowledged, however, that this was unrealistic and argued for a sentence of 6 or 7 years' incarceration.
- [14] The trial judge set out the circumstances of the offence and the offender and then, at para. 22 of her decision, addressed the impact of cocaine importation on the community, adopting these comments from *R. v. Sandhu*, 2003 BCSC 2033:
- [15] The trade in cocaine and other such substances is a highly lucrative, illegal enterprise. It is conducted outside the law and it is inextricably bound up in the activities of organized crime, with the violence and social destructiveness that that involves.
- [16] Because cocaine is not indigenous to Canada, every gram of the substance must be brought here from outside the country. That entails unlawful importation. Because of border surveillance, there is a high level of risk attached to the importation of the substance.
- [17] In order for those in the higher echelons of the trafficking organizations to conduct their business, they must find ways and means of bringing the cocaine into the country. No doubt there are a myriad of different strategies employed. One of them, obviously, is the use of the courier or the mule. Simply put, this involves paying rewards to ordinary persons to

transport the drugs through the border. Inevitably, some of those couriers will be detected and prosecuted. That risk is one that those in the higher positions in the organization would never take; they pay a premium to others to attempt the task.

- [15] The judge then summarized Staff Sgt. Murphy's expert evidence, noting that an importer will often hire someone in the border industry, such as a baggage handler or a port worker, to facilitate breaching the border. She also observed that such facilitators are well-remunerated and may have limited knowledge of the larger operation.
- [16] The trial judge next set out the principles of sentencing in ss. 718 and 718.2 of the Criminal Code, the positions of the Crown and defence, and the relevant case law, again taking guidance from Sandhu:
- [47] The Sandhu decision, to which I have referred, outlines the propositions arising from the authorities at paragraph 18. There are four:
1. the large-scale importation, particularly of hard drugs such as cocaine, is a very serious offence;
 2. the courts recognize importing a controlled substance as an offence of greater gravity than trafficking it;
 3. there is a range of sentence which is appropriate for offenders importing significant quantities of cocaine; and
 4. the authorities do not support the suggestion that couriers should receive substantially lesser sentences because they are not high in the drug hierarchy. Without couriers, the trade in cocaine would stagnate. As Mr. Justice Williams stated "If couriers are the link in the chain who are detected and prosecuted, the consequences must be severe."
- [17] She observed that the position of an accused in the drug hierarchy was important, stating:
- [49] In sentencing, the courts consider where the accused fits into the drug hierarchy; the higher the position, the higher the sentence. In the cases where the offender was considered to be at the senior level or was the overall boss or key figure, sentences between 18 and 24 years have been imposed. In cases involving truckers importing cocaine across international borders, the sentences have varied between 8 and 12 years.
- [18] The trial judge identified four aggravating factors: the large amount of high-grade cocaine imported; the highly sophisticated nature of the importing scheme; Mr. Von Holtum's breach of the trust his employer and the airport authority had reposed in him; and the fact his activity was motivated by greed. She did not accept the Crown's contention that Mr. Von Holtum's untruthful evidence at trial constituted a further aggravating factor. Nor did she find evidence to support its suggestion that Mr. Von Holtum had been aware of the breach of the passenger-baggage reconciliation system. As well, she found the Crown had not established beyond a reasonable doubt that he had committed similar crimes in the past, or that he was in the upper echelon of a criminal organization.

- [19] The judge accepted as mitigating factors the absence of any prior criminal record, and the letters of support, which she found demonstrated the charges were uncharacteristic of Mr. Von Holtum.
- [20] She concluded:
- [56] In cases such as these, the courts have emphasized that deterrence and denunciation are the most important applicable principles. The authorities are uniform in determining that cases involving the importation of cocaine justify a very severe sentence. The factors to be considered are the quantity and quality of the cocaine, the impact on the community of the importation of such a large quantity, the fact that a criminal act is done for profit, and that those who are key in a criminal organization deserve a much more severe sentence.
- [57] Most of these features describe Mr. Von Holtum, but not all. As I have stated, I cannot find that Mr. Von Holtum is a higher-up in a criminal organization. On that basis, I find that the Crown's submission of 18 years imprisonment is not justified.
- [58] Nevertheless, Mr. Von Holtum was a courier and, as Sandhu points out, a severe sentence is warranted for a person who assumes this role.
- [21] The trial judge imposed a sentence of 9 years on each count, and then went on to add a further year of imprisonment to address the deemed aggravating factor of breach of trust under s. 718.2(a)(iii) of the Criminal Code:
- [61] I have stated that I consider the breach of trust to be a factor here. This factor was taken into account in the length of sentence in the decision of *R. v. Moore*, 2009 BCSC 1926, aff'd 2011 BCCA 36 where a prison guard was sentenced to four years for bringing a paper bag of marihuana, ecstasy and steroids into prison, and also in the case of *R. v. Hodson*, 2011 BCPC 243 where a police officer was sentenced for four years for trafficking marihuana and unlawfully accessing the police database.
- [62] I accept that Mr. Von Holtum was entrusted with the RAIC card which gave him access to secure areas at YVR and his actions of importing and possessing cocaine are aggravated by this. However, he is not like a prison guard or a police officer, positions in which society places significant trust. His access to the secure areas of YVR is related to the duties he performed there. I find that an additional year of imprisonment is appropriate to address this aggravating factor.

Discussion

- [22] Sentencing is a highly individualized and broadly discretionary process lying within the expertise of trial judges. As a result, an appellate court must review the fitness of a sentence with considerable deference. It is not entitled to interfere with a disposition simply because it might have imposed a different sentence. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of appropriate factors, a court of appeal may only vary a sentence if it is demonstrably unfit in that it represents a marked departure from

sentences generally imposed for similar offenders and similar crimes: R. v. C.(A.M.), [1996] 1 S.C.R. 500 at paras. 91-92; R. v. L.M., [2008] 2 S.C.R. 163 at paras. 14-15, 17.

Mr. Von Holtum's Appeal CA040097

- [23] Mr. Von Holtum filed a factum that reiterated many of the same arguments he made before the trial judge. At the appeal hearing, however, his counsel was frank in acknowledging that, given the authorities, it is difficult to argue his sentence was unfit. He advised the appeal was essentially motivated by his mother's distress and Mr. Von Holtum's hope that this might be viewed as a mitigating feature that could return him to the community to care for her.
- [24] While I am sympathetic to his mother's plight, there is no merit to this argument. A conditional sentence, or a shorter custodial sentence, would fall well short of addressing the objectives of deterrence and denunciation that must be paramount when sentencing an offender who played a critical role in the importation and trafficking of a large quantity of cocaine.
- [25] I would dismiss Mr. Von Holtum's application for leave to appeal his sentence.

The Crown Appeal CA040064

- [26] The Crown contends the sentencing judge erred by failing to recognize both the seriousness of the offences and the significance of Mr. Von Holtum's role in them. It says the circumstances leave no doubt that he was involved in a large-scale importation of this significantly destructive drug, accomplished through a sophisticated scheme that was operated by distributors who were motivated solely by greed. The Crown argues the courts have recognized that offences of this nature are linked to organized crime and, while it concedes there is no evidence that Mr. Von Holtum was involved in a criminal organization, it maintains this context cannot be ignored in considering the seriousness of the offence.
- [27] As to Mr. Von Holtum's role, the Crown maintains the trial judge erred by mischaracterizing him as a courier, a label that inadequately describes the degree of his moral culpability. The Crown contends Mr. Von Holtum cannot be compared to truck drivers or "mules" who simply bring drugs across the border. His inside position and privileged access as an airport employee made him a key figure in defeating the border security and perpetrating the crime. In breach of the trust reposed in him by his employer, he used his RAIC card and special status to pick up the cocaine, move it through a controlled area, and divert it from customs screening to avoid detection, all in aid of delivering it to the next link in the chain for ultimate distribution in Canada. As well, when confronted, he misrepresented his actions. The Crown says the marginal increase in his sentence of one year to recognize his breach of trust failed to adequately recognize that this lay at the heart of his utility to the importation scheme and was central to his moral culpability.

- [28] In short, the Crown maintains that by mischaracterizing the seriousness of the offence and underestimating Mr. Von Holtum's moral culpability the trial judge imposed an unfit sentence. It contends that a fit sentence would be 16 years.
- [29] The Crown also argues the trial judge erred by giving too much weight to the two mitigating factors she identified. Relying on Sandhu, at paras. 20 and 27, it says the absence of a criminal record in offences of this nature should not be treated as a mitigating factor since an unblemished record is often the reason the offender is in a position to commit the crime. As well, the Crown contends the trial judge should not have concluded the letters of support demonstrated the offences were out of character for Mr. Von Holtum since it was evident he had lied to the jury at his trial.
- [30] In reply, Mr. Von Holtum points to the highly discretionary nature of sentencing, and the deferential standard of review operative on sentence appeals. He says the trial judge thoroughly addressed the circumstances of the offences and his background, and her reasons demonstrate she knew and correctly applied the governing principles as well as the relevant authorities in imposing a sentence of ten years, which properly falls at the mid-point of the range for drug couriers. Further, Mr. Von Holtum maintains the trial judge correctly identified and weighed the mitigating circumstances. He says the evidence that these offences were out of character for him was overwhelming, and the judge did not err in holding that the jury's rejection of his evidence was not an aggravating factor. In short, he says his sentence was eminently fit and the trial judge's decision reveals no basis on which this Court could properly interfere with it.
- [31] I discern no error in the trial judge's treatment of the mitigating factors she identified. Even if Mr. Von Holtum's unblemished record did play a role in positioning him to commit the offence, I cannot agree this entirely eliminates consideration of the fact that he is a first-time offender with potential for rehabilitation. As to the import of his trial testimony, while the jury evidently did not accept his evidence the trial judge, who heard all of the evidence, made no finding that he lied under oath. In any event, as discussed by Mr. Justice Esson in *R. v. Vickers* (1998), 105 B.C.A.C. 42, at paras. 13-15, to increase Mr. Von Holtum's sentence for this reason would be tantamount to punishing him for an offence for which he has not been convicted. While false testimony may negate the mitigating factor of remorse, the trial judge did not consider remorse as mitigation in this case. I would not give effect to this ground of appeal.
- [32] There is some overlap between the Crown's arguments that the sentence imposed by the trial judge failed to adequately reflect the severity of the offence, and that it underestimated the extent of Mr. Von Holtum's moral culpability. I intend to address these points separately, however, to the extent possible.

[33] Canadian courts have for many years recognized that the importation and trafficking of drugs such as cocaine are serious offences due to the significant deleterious impact these drugs have on the community. For example, in *R. v. Smith*, [1987] 1 S.C.R. 1045, at 1053, Lamer J. began his judgment with these remarks:

Those who import and market hard drugs for lucre are responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drug addicts. The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons, with few exceptions (as an example, the guilt of addicts who import not only to meet but also to finance their needs is not necessarily the same in degree as that of cold-blooded non-users), should, upon conviction, in my respectful view, be sentenced to and actually serve long periods of penal servitude.

[34] It is generally accepted that importing drugs is a more serious offence than trafficking in them. This is particularly the case with drugs like cocaine that are not indigenous to Canada, since deterring their importation would effectively eliminate their use and abuse in this country: *R. v. Saulnier* (1987), 21 B.C.L.R. (2d) 232 (C.A.) at 235; *R. v. Hamilton* (2004), 72 O.R. (3d) 1, 186 C.C.C. (3d) 129 (C.A.), at paras. 104-105.

[35] The courts of this province have routinely recognized the multiple evils that are attributable to the importation and sale of cocaine by imposing lengthy custodial sentences for offences and offenders associated with the drug. The comments of Williams J. in *Sandhu*, referred to by the trial judge at paras. 22 and 47 of her reasons, have been frequently adopted and reiterated by judges of this Court and the trial court, see for example *R.v. Epp*, 2006 BCCA 570, at para. 12; and *R. v. Kang*, 2009 BCSC 1827, at para. 4.

[36] I am not persuaded the trial judge failed to recognize the seriousness of Mr. Von Holtum's offences. Her reasons for judgment, particularly her reliance on *Sandhu* and her acceptance of Staff Sgt. Murphy's expert evidence about the cocaine trade, demonstrate she was well aware of the significant detrimental impact this drug has on the community. She recognized that these offences typically attract long custodial sentences that vary with the offender's place in the hierarchy of the importation scheme. She correctly identified the aggravating circumstances of Mr. Von Holtum's crimes, notably that this was a large-scale, sophisticated scheme, motivated solely by greed, that relied on his inside position and abuse of trust to breach the border. As well, she clearly understood that in these circumstances deterrence and denunciation were the paramount sentencing objectives, and that precedent justified "a very severe sentence". I would not accede to this ground of appeal.

[37] Of greater concern is the question whether the trial judge gave adequate weight to Mr. Von Holtum's role in the importation scheme, and properly assessed the extent of his moral culpability. As set out above, a sentence for importation and trafficking will generally reflect the offender's position in the hierarchical chain of actors required to accomplish the crimes. Justice Low described this in *Epp* in these terms:

- [15] There is a wide general range of sentences for cocaine trafficking. Street-level couriers are usually sentenced less severely than street-level traffickers. As one moves up the drug distribution hierarchy the sentences become more severe. The most severe sentences are reserved for owners of large quantities of cocaine who import their product into this country with the intention of distributing it at huge profit.
- [16] There is no category of cocaine offender known as couriers. Some people act as runners at the street level. They assist traffickers by delivering small quantities of the drug to users. Higher up the distribution chain, others transport cocaine domestically in larger quantities, not as owners but for payment per transaction or on some other basis. Still others are used as "mules" to bring cocaine into the country on passenger airplanes in larger, uncut quantities, perhaps one or two kilograms at a time. However, there are very few sentencing cases involving international transport of cocaine in large quantities by a person such as Mr. Epp who was hired for one transaction.
- [38] The trial judge was handicapped in identifying Mr. Von Holtum's precise position in the drug hierarchy because, apart from the fact the cocaine had come from Mexico, nothing was known about the people who provided the links on either side of him in the chain of actors. She was thus obliged to conclude that he was not "in the upper echelon of a criminal organization", a finding with which I would not interfere.
- [39] The trial judge decided that Mr. Von Holtum was a courier and sentenced him accordingly. She recognized that a severe sentence was warranted for offenders who perform this role, and correctly noted that truckers who courier drugs across the border typically receive custodial sentences of between eight to 12 years. She accordingly imposed a sentence of nine years, and then increased it by one year to acknowledge his breach of trust under s. 718.2(a)(iii) of the Criminal Code.
- [40] The bifurcation of the sentence in this manner, while not an error, is unusual. It was perhaps generated by the trial judge's review of cases involving trafficking by prison guards and police officers who, as state employees, may be separately charged and sentenced for breach of trust by a public officer, pursuant to s. 122 of the Criminal Code, in addition to their principal offences. In this case, since Mr. Von Holtum's breach of trust arises solely as a deemed aggravating factor in the principal offences pursuant to s. 718.2(a)(iii), I consider it preferable to review the sentence imposed as a global sentence of ten years.
- [41] I am persuaded that the trial judge erred by using couriers such as truckers as her primary reference point in sentencing Mr. Von Holtum, and by failing to fully consider the unique context in which he committed his offences. As Low J.A. noted in Epp, the term "courier" may encompass a wide range of actors and responsibilities. I agree with the Crown that Mr. Von Holtum was not simply moving the cocaine from point A to point B like the truckers in cases such as Sandhu, Epp, and Kang. Instead, he was a corrupt insider whose utility lay in using his position and security clearance to transport the cocaine through the airport, and reduce the risks inherent in this activity by diverting the cocaine from screening by the

Canada Border Services Agency ("CBSA").

- [42] Further, I am satisfied that the context in which Mr. Von Holtum operated introduced concerns of public safety and security that set his circumstances apart from what I will call "ordinary couriers", and that the trial judge ignored. It is apparent to any Canadian air traveller that the Air India tragedy in 1985, as well as subsequent terrorist activities, notably the events of September 11, 2001, have brought massive changes to civil aviation security requirements to protect the travelling public. Secure baggage management is an integral part of this. In using his position as an airport baggage handler to breach security protocol and facilitate the importation of cocaine, Mr. Von Holtum not only betrayed his employer's trust, but denigrated the public interest in maintaining airport and baggage security.
- [43] I appreciate that the trial judge acknowledged these circumstances to a degree by adding a year to Mr. Von Holtum's sentence. The global sentence she imposed nevertheless fell at the mid-point of sentences generally given to ordinary couriers. I must conclude that in choosing a sentence in that range, the trial judge erred by failing to consider the unique context and circumstances that distinguished Mr. Von Holtum from such offenders and enhanced his moral culpability. In the result, the sentence of ten years was unfit.
- [44] This is a case of first instance. Counsel provided no authorities dealing with importation and trafficking by an airport employee, and I have found none. The absence of similar offenders renders the objective of parity for Mr. Von Holtum difficult.
- [45] The trial judge found that Mr. Von Holtum's culpability was not on the same level as that of police officers or prison guards convicted of trafficking in drugs as he was not a peace officer invested with, and abusing, state authority. I agree that is an important distinction that should be maintained. Nevertheless, I discern some analogies with those cases, in that they similarly involve insiders who have used their employment status to facilitate crimes. For example, Mr. Von Holtum used his position in the same manner as the police officer described in *R. v. Shaw* (1969), 66 W.W.R. 626, at 628:

A police officer is in a position of trust and in a position where he can commit offences without arousing suspicion. For example, the work of a constable on night patrol, as Shaw was most of the time, includes going onto private premises and checking doors and windows. The uniform he wears and the police car in which he drives about give him unquestioned access to places where the presence of any other person would arouse suspicion, and they make certain otherwise suspicious activities appear proper. ...

- [46] I also find some guidance in the decision of Mr. Justice Romilly in *R. v. Kandola*, 2012 BCSC 1042, released after the proceedings before the trial judge. Mr. Kandola was a Border Services Officer employed by the CBSA at the Pacific Highway Border Crossing. He used his position to facilitate the importation of 208 kgs of cocaine by a friend, Mr. Johal. Mr. Kandola accessed the CBSA database without authority to warn Mr. Johal he was under suspicion, and then arranged to be on duty when Mr. Johal and the courier who actually carried the cocaine, Mr. Riar, passed through the border in their vehicles so he could wave

them through. Romilly J. found Mr. Kandola was motivated solely by greed, played a pivotal role in the importation scheme, and breached his position of trust by accepting bribes and acting as a facilitator. He recognized this was an aggravating feature under s. 718.2(a)(iii) in sentencing him to 14 years for conspiracy to import cocaine and importing cocaine. As a Border Services Officer, Mr. Kandola was a peace officer, and so was also charged with breach of trust by a public officer pursuant to s. 122 of the Criminal Code. In sentencing him to one year consecutive to the importation charges on this count, Mr. Justice Romilly stated:

- [73] This offence is a serious breach of trust by a BSO. Similar to Hill J.'s findings in *Cook*, as discussed by Verhoeven J. in *Greenhalgh* above, BSOs, like police officers, occupy a special position of trust in the community. They are charged with a foundational role in preventing dangerous substances from entering the country. When they abuse their position and seek to profit by criminal activities, all of Canadian society is put at risk. I am in agreement with Verhoeven J.'s analysis that the sentence should be a deterrent in this case.
- [47] Mr. Justice Romilly imposed a sentence of 16 years on Mr. Johal as the overseer of the operation. Mr. Riar had earlier pleaded guilty in the Provincial Court and been sentenced to 12 years' imprisonment as a courier.
- [48] I appreciate Mr. Kandola's global sentence of 15 years reflects the heightened severity of his breach of trust as a peace officer, and represents an important distinguishing feature from Mr. Von Holtum's circumstances. Nevertheless, there are a number of similarities in their crimes. Both were corrupt insiders who used their positions to facilitate the importation of large amounts of cocaine. In doing so, they breached both the trust reposed in them by their employers and the integrity of the border, and harmed the public interest in border and airport security. They were, to use Mr. Justice Romilly's term, facilitators, whose moral culpability clearly exceeded that of a truck driver transporting drugs across the border.
- [49] I do not agree with the Crown that 16 years would be a fit sentence for Mr. Von Holtum. That would place him near the top rung of the drug hierarchy and in the company of the "operating minds" of the scheme, exemplified by Mr. Johal, or *R. v. Vukelich*, [1994] B.C.J. No. 3338 (B.C.S.C.); *R. v. Joubert* (1994), 35 B.C.A.C. 214; and *R. v. LePage*, 2010 BCCA 249. The trial judge properly found the evidence did not support such a conclusion.
- [50] She also found the Crown had failed to establish that Mr. Von Holtum had provided the same assistance on earlier occasions. He is thus being sentenced for one transaction only. The fact that these are his first criminal convictions, and the support he enjoys from his family and friends, augur well for his potential for rehabilitation, but it is clear that deterrence and denunciation must remain the paramount considerations in crimes of this nature.

- [51] Having considered the unique features of this case in the context of the sentencing objectives, as well as the circumstances of Mr. Von Holtum and his crimes, it is my view that a fit sentence would be 12 years. This places him at the most serious end of the range for drug couriers, thereby properly acknowledging the heightened degree of moral culpability that arises from the unique setting in which his crimes occurred.
- [52] I would grant the Crown's application for leave to appeal, allow the appeal, and increase the sentence of ten years to 12 years on each offence.

"The Honourable Madam Justice Neilson"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Low"

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