
CANADA / JUDGMENT

R. v. Voong

2015 BCCA 285

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 285 R. v. Voong

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Voong,

2015 BCCA 285

Date: 20150625

Docket: CA42051; CA42409;

CA42412; CA42325

Docket: CA42051

Between:

Regina

Appellant

And

Dau Man Voong

Respondent

- and -

Docket: CA42409

Between:

Regina

Appellant

And

Thomas Andrew Taylor

Respondent

- and -

Docket: CA42412

Between:

Regina

Appellant

And

Krystal Marie Charlton

Respondent

- and -

Docket: CA42325

Between:

Regina

Appellant

And

Jonathan John Galang

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 14 where changes were made on May 19, 2017.

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Garson

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Provincial Court of British Columbia, dated July 10, 2014 (R. v. Voong, 2014 BCPC 0211, Port Coquitlam Docket 90281-1); an order of the Provincial Court of British Columbia, dated November 21, 2014 (R. v. Taylor, Victoria Docket 160892-3C); an order of the Provincial Court of British Columbia, dated November 18, 2014 (R. v. Charlton, 2014 BCPC 0292, Campbell River Docket 36261 and 36242-4B); an order of the Provincial Court of British Columbia dated October 15, 2014 (R. v. Galang, 2014 BCPC 0240, Surrey Docket 202932)

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The Respondent, Jonathan John Galang:

In Person

Place and Date of Hearing:

Vancouver, British Columbia

March 30, 2015

Place and Date of Judgment:

Vancouver, British Columbia

June 25, 2015

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Garson

The Honourable Madam Justice Stromberg-Stein

Summary:

Crown appeal of sentences. Each of the four respondents pleaded guilty to dial-a-dope drug trafficking offences and was given a suspended sentence and probation order. The Crown argues the sentences are unfit. Held: Voong--leave to appeal granted, appeal dismissed; Galang--leave to appeal granted, appeal allowed to the extent of increasing the probation order to three years; Charlton--leave to appeal granted, appeal dismissed; Taylor--leave to appeal granted, appeal allowed, substituting a sentence of six months' incarceration followed by one-year probation. While probation is rehabilitative and not punitive, a suspended sentence can have a deterrent and denunciatory effect. Absent exceptional circumstances, the normal range of sentence for first offence dial-a-dope trafficking is between six to eighteen months in prison. Where exceptional circumstances justify a non-custodial sentence, a suspended sentence can meet the principles of sentencing and be a fit sentence in the dial-a-dope trafficking context. Such sentence will be rarely imposed.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Those who embark in drug trafficking engage in serious criminal conduct. Absent exceptional circumstances, in British Columbia, they should expect to be sent to prison.
- [2] Each of the four respondents pleaded guilty to trafficking drugs or possession of drugs for the purpose of trafficking in the context of a dial-a-dope operation.
- [3] The maximum penalty for trafficking and possession for the purpose of trafficking in a Schedule I or II substance is life imprisonment (Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5 [CDSA]). In 2012, the Criminal Code, R.S.C. 1985 c. C-46 was amended by the Safe Streets and Communities Act, S.C. 2012, c. 1, s. 34. As a result of this amendment, conditional sentence orders (CSOs) are no longer available where an offence has a maximum term of imprisonment of 14 years or life (Criminal Code, s. 742.1(c)) or where an offence involves the trafficking of drugs (Criminal Code, s. 742.1(e)(ii)). Therefore, a CSO is no longer available for the offences in the matter at bar.
- [4] In these four appeals, sentencing judges imposed suspended sentences accompanied by probation orders. The Crown has appealed the sentences on the basis that the sentences do not sufficiently address the principles of deterrence and denunciation. The Crown says that in each case, except Voong, the judge used the suspended sentence as an unlawful substitute for a conditional sentence order.
- [5] Three of the respondents, Charlton, Voong and Taylor, were selling drugs to support a drug habit and had criminal records. The fourth respondent, Galang, was a young, first offender who was selling drugs to help a friend avoid trouble as a result of a drug debt. I will address the details of each individual offender below, after I discuss the applicable legal principles.

Overview

- [6] Imposing a sentence for criminal conduct is in the purview of judges in the trial courts. It is an individualized process, in that a sentence must be fashioned to take into account the circumstances of the offence, the circumstances of the offender, the moral blameworthiness of the offender, the principles of sentencing, and proportionality to the offence and the offender.
- [7] Much has been written about the philosophical principles that underlie our present day sentencing ideology. For centuries, philosophers debated, and continue to debate, the role of punishment and the underlying ideology behind punishment. As a result, the law has developed a number of sentencing principles, some conflicting, some ameliorating others, such as retribution and rehabilitation, and all that must be considered by the judge who has to determine a "fit" sentence for the offender before him or her. It is not an easy task, and not a task that should come under microscopic scrutiny of the appellate courts.

Standard of Review

- [8] As a result, the standard of review by an appellate court of a sentence is one of "great deference" (R. v. L.M., 2008 SCC 31 at para. 14), and can only be interfered with if the sentence is "clearly unreasonable" (R. v. Shropshire, [1995] 4 S.C.R. 227 at para. 46). The sentencing judge knows his or her community, and is said to be on the "front line of the criminal justice system" (R. v. M. (C.A.), [1996] 1 S.C.R. 500 at para. 91). The sentencing judge has often heard the evidence that led to a conviction. He or she may have heard the offender address the court, and may have heard the victims speak about the effect of the offence on their lives. The sentencing judge is best positioned to determine the sentence.

- [9] The discretionary nature of the power to sentence is found in the Criminal Code:

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts the person who commits the offence.

[Emphasis added.]

- [10] These points were recognized in R. v. M. (C.A.), where the standard for interfering with a sentence was stated at paras. 90-92:

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

[Emphasis in original.]

The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

[Emphasis added.]

[11] In *R. v. L.M.*, the Court discussed the scope of appellate review, and standard to be applied:

[14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that . . . the sentence [is] clearly unreasonable"

[12] In *R. v. Nasogaluak*, 2010 SCC 6 the Supreme Court of Canada discussed the role of the sentencing judge, and said this, at para. 43:

The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.

[Emphasis added.]

[13] The wide discretion of the sentencing judge is not unlimited, and the appellate court has a role, as discussed in para. 44:

The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not

necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[Emphasis added.]

[14] In summary, sentencing an offender is within the purview of the sentencing judge, and the appellate court owes great deference to the exercise of his or her discretion. If there has been an "error in principle, a failure to consider a relevant factor or an overemphasis of the appropriate factors", the appellate court owes the sentencing judge's decision less deference, but must still ask whether the sentence is demonstrably unfit, or, in other words, clearly unreasonable (*R. v. Johnson* (1996), 112 C.C.C. (3d) 225 (BCCA) at para. 37). A sentence will be demonstrably unfit if it "is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*R. v. M. (C.A.)* at para. 92). Only then may an appellate court interfere with a sentence imposed in the trial court.

Statutory Framework

[15] The relevant Criminal Code provisions relating to the principles of sentencing, probation orders, and conditional sentences, along with the principles of sentencing found in the CDSA, all provide a framework for these appeals. These provisions are set out below for convenience:

Criminal Code

Purpose and Principles of Sentencing

718. 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.

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

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

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender
- (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.

Punishment Generally

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

Probation

731. (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
- (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
 - (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

732.1 (1) In this section and section 732.2,

"change", in relation to optional conditions, includes deletions and additions;

"optional conditions" means the conditions referred to in subsection (3) or (3.1).

- (3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:
 - (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

[Emphasis added.]

733.1 (1) An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding eighteen months, or to a fine not exceeding two thousand dollars, or both.

732.2 (5) Where an offender who is bound by a probation order is convicted of an offence, including an offence under section 733.1,

in addition to any punishment that may be imposed for that offence, the court that made the probation order may, on application by the prosecutor, require the offender to appear before it and, after hearing the prosecutor and the offender,

- (d) where the probation order was made under paragraph 731(1)(a), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended

Conditional Sentence of Imprisonment

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, 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 conditions imposed under section 742.3, if

- (a) the court is satisfied that the service of 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;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
 - (i) resulted in bodily harm,
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and

742.3 (1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:

- (2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:
 - (f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

[Emphasis added.]

742.6

- (9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may
 - (a) take no action;
 - (b) change the optional conditions;
 - (c) suspend the conditional sentence order and direct
 - (i) that the offender serve in custody a portion of the unexpired sentence, and
 - (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
 - (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

Controlled Drugs and Substances Act

Sentencing

10. (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
- (2) If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person
 - (b) was previously convicted of a designated substance offence;
- (3) If, under subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in paragraphs (2)(a) to (c), but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.

Dial-a-dope Offence

- [16] This Court recently discussed the serious nature of the "dial-a-dope" offence in *R. v. Oates*, 2015 BCCA 259 at paras. 19-20, citing Henderson J.'s decision in *R. v. Franklin*, 2001 BCSC 706. The customer calls a cell phone number, places an order and then the dealer travels to a location for the drug exchange to take place. In other words, the drugs can be obtained with the ease of "home delivery". This type of trafficking is particularly insidious, and permits the drug trade to infiltrate communities to a greater degree.
- [17] In *Franklin*, Henderson J. pointed out the easy access to drugs made available by the dial-a-dope model of selling drugs. He concluded that dial-a-dope required forethought and planning – a vehicle, a cell phone, a drug supplier and circulation of the knowledge that drugs are available at the phone number. In his view, general deterrence plays an important role in sentencing those who are involved in this type of offence.
- [18] This Court has repeatedly said that general deterrence and denunciation are the main principles to consider when sentencing drug traffickers. While no one principle "trumps" the other, there are offences and circumstances where one or more principles come to the forefront and generally will be given more weight than others.

Nature of the Suspended Sentence

- [19] Where no minimum sentence is required, the Criminal Code permits a court to suspend the passing of a sentence, rather than impose a sentence (s. 731(1)(a)), and to place a person on probation for a maximum of three years (s. 732.2(2)(b)). If an offender who is on probation is convicted of an offence, the suspension of the sentence may be revoked and the offender may be brought back before the court for sentencing. At that point, the judge may impose any sentence that could have been imposed at the time the sentence was suspended (s.

732.2(5)(d)).

- [20] If probation is ordered, the judge must impose certain mandatory conditions found in s. 732.1(2) and may also impose optional conditions (s. 732.1(3)(a)-(g.2)). Under s. 732.1(3)(h), the Court may also impose any other "reasonable condition for protecting society and for facilitating the offender's successful reintegration into the community".
- [21] Suspended sentences were imposed in drug trafficking cases before CSOs became available in 1996 (introduced by the Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, S.C. 1995, c. 22). A suspended sentence is still a sentencing option in law in the cases at bar, as there is, at this time, no minimum sentence for the offences at issue.
- [22] Where a suspended sentence was imposed in drug trafficking offences prior to the availability of a CSO, there was always an indication of exceptional mitigating circumstances. For example, in *R. v. Harding*, [1977] B.C.J. No. 839 (C.A.), this Court dismissed a Crown appeal and upheld a suspended sentence with three years' probation with strict conditions, for a heroin addict who sold four caps of heroin. She had made significant steps towards overcoming her heroin addiction, and the majority concluded they should not interfere with the carefully reasoned sentence. The majority found that the trial judge had recognized that deterrence was of foremost importance but concluded that in the circumstances of the case before him, rehabilitation was worth the effort. The trial judge was alive to the fact that he could sentence her if his expectations of rehabilitation were not born out, and she breached the probation order.
- [23] In *R. v. Huang*, [1993] B.C.J. No 1118 (C.A.), this Court dismissed a Crown appeal upholding a suspended sentence and three years' probation for an offender who pleaded guilty to possession of one ounce of 90 percent pure heroin for the purpose of trafficking. The offender was 18 years old at the time, attending community college and had no prior record. Although this Court and the sentencing judge expressed reservations about a sentence other than incarceration, this Court concluded that the sentence was carefully considered and declined to interfere with it. Similarly, see *R. v. Yamanaka*, [1994] B.C.J. 521(B.C.C.A.).

Nature of the Conditional Sentence Order

- [24] In *R. v. Proulx*, 2000 SCC 5 Chief Justice Lamer discussed the differences between CSOs and probation orders. He noted that in most respects, they appear very similar (para. 23). He also observed that the penalty for breach of a probation order could be more severe than a breach of a CSO (para. 27). In the case of a breach of probation, the suspended sentence can be revoked and the offender may be sentenced for the original offence. By contrast, in the case of a breach of conditional sentence, the maximum punishment available is incarceration for the time remaining in the original sentence.

[25] Lamer, C.J.C. said, however, that there is one important distinction between the two: that the probation order is primarily rehabilitative in nature, while a CSO addresses both rehabilitative and punitive objectives of sentencing (para. 23). He came to this conclusion by comparing the "optional conditions" available for each order.

[26] The probation order and conditional sentence order provisions of the Criminal Code each prescribe mandatory conditions (three for probation orders and five for CSOs), conditions relating to treatment programs, and optional conditions (paras. 24-27).

[27] Prior to the Act to amend the Criminal Code (sentencing) and other Acts in consequences thereof coming into force on September 3, 1996, the optional condition provision for probation orders was as follows:

737.(2) the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,

(h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.

[28] This provision had been interpreted as meaning that terms of probation could not be imposed as "additional punishment". The conditions needed to be related to the offence and for the purposes set out in the section (see *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.) and *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.)). In *Lavender*, Lambert J.A., in concurring reasons held that a condition of probation could only be imposed for rehabilitative purposes. His reasons were approved in *R. v. D.E.S.M.* (1992), 80 C.C.C. (3d) 371 (B.C.C.A.) at p. 380 (a unanimous decision of a five-justice division). In that decision, the Court upholding a 45-day intermittent sentence and probation for historical sexual offences, affirmed that the maintenance of rehabilitation was a proper principle (the offender in that case having been completely rehabilitated long before the charge). The Court concluded that house arrest fell within the Criminal Code provisions, and that it was an appropriate sentence in the very special circumstances of that case where there were no factors that required punishment by conventional imprisonment.

[29] The 1996 amendments changed the nature of the optional conditions for probation orders. The language formerly found in s. 737 (the probation provision noted above) is now found in the CSO provision, s. 742.3(2)(f):

742.3 (2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:

(f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

[30] The optional condition provision for probation orders now reads:

732.1 (3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

- (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

[31] Lamer C.J.C. in Proulx interpreted this change as follows, at para. 34:

Despite the virtual identity in the wording of s. 742.3(2)(f) and the old residual clause applicable to probation orders, it would be a mistake to conclude that punitive conditions cannot now be imposed under s. 742.3(2)(f). Parliament amended the residual clause for probation, s. 732.1(3)(h), to read "for protecting society and for facilitating the offender's successful reintegration into the community". It did so to make clear the rehabilitative purpose of probation and to distinguish s. 742.3(2)(f) from s. 732.1(3)(h). The wording used in s. 742.3(2)(f) does not focus principally on the rehabilitation and reintegration of the offender. If s. 742.3(2)(f) were interpreted as precluding punitive conditions, it would frustrate Parliament's intention in distinguishing the two forms of sentence. Parliament would not have distinguished them if it intended both clauses to serve the same purpose.

[Emphasis in original.]

[32] He discussed the type of terms that should be included in a CSO, and concluded that house arrest or strict curfews should be the norm (para. 36). I note that this is the type of condition that was imposed in D.E.S.M. under the same statutory language as now exists for the CSO.

[33] In essence, the CSO is a sentence that has a more punitive aspect to it than a probation order, whereas the focus of the probation order is rehabilitation. This is supported when one examines the origins of a suspended sentence, and probation, between 1889 and 1955, which was initially available only for first offenders.

[34] The Court concluded that a CSO is, by statutory definition, a sentence of imprisonment (para. 40), and provides denunciatory and deterrent effect (para. 41). The CSO was introduced to relieve the high incarceration rates in this country, and to permit those who were sentenced to less than two years, and are no danger to the public, to serve the sentence in the community under "tight controls" (para. 36).

[35] Thus, despite the wording of the optional provisions being identical for probation orders pre-1996 and for the CSO, the Court found, that in the context of the entire amendment, the difference between the two provisions is that the CSO engaged the punishment principle of sentencing, and the suspended sentence with probation did not.

[36] The Crown says, as a result, it is an error in principle or law to equate the CSO with a suspended sentence and probation.

Deterrent Effect of Probation

- [37] A probation order has primarily a rehabilitative objective, however, as the statutory terms refer to the purposes of "protecting society" and "reintegration into the community", it is not limited to this objective.
- [38] What is required for the imposition of an optional condition in a probation order is a "nexus between the offender, the protection of the community and his reintegration into the community" (R. v. Shoker, 2006 SCC 44 at para. 13).
- [39] A suspended sentence has been found to have a deterrent effect in some cases. Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "Sword of Damocles" hanging over the offender's head. For example, in R. v. Saunders, [1993] B.C.J. No. 2887 (C.A.) at para. 11, Southin J.A. said:
- Deterrence is an important part of the public interest but there are other ways of deterring some sorts of crime than putting someone in prison who has no criminal record as this appellant did not. The learned trial judge did not turn her mind to whether the deterrence which is important might be effected by certain terms of a discharge or a suspended sentence such as a lengthy period of community service.
- [40] This Court, in Oates, recently confirmed that Saunders stands for the proposition that deterrence might be effected with a suspended sentence (Oates at para. 16).
- [41] In Shoker, at para. 15, the Court concluded that supervised probation is a restraint on the probationer's freedom.
- [42] Other Courts have confirmed the deterrent effect of a suspended sentence and a probation order in certain circumstances. See, for example, R. v. George (1992), 112 N.S.R. (2d) 183 (C.A.) at 187 (and a number of cases following, including R. v. Martin, 154 N.S.R. (2d) 268 (C.A.); R. v. R.T.M., 151 N.S.R. (2d) 235 (C.A.)) and R. c. Savenco (1988), 26 Q.A.C. 291 (C.A.).
- [43] The statutory phrase "protection of the public" now found in the Criminal Code gives a broad discretion to sentencing judges to impose conditions (see Shoker at para. 3). The public is protected when a former criminal is rehabilitated and deterred from committing more crimes (see R. v. Grady (1971), 5 N.S.R. (2d) 264 at 266). It is also protected when other offenders are deterred by the sentence imposed. Thus, imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation.

In D.E.S.M. (and affirmed in R. v. Sidhu (1998), 129 C.C.C. (3d) 26 (B.C.C.A.)), this Court concluded that "home confinement" was an appropriate term of a probation order for the purpose of the maintenance of rehabilitation. The court concluded, at p. 381:

It should not be thought that home confinement, if we may call it that, should readily be substituted for regular imprisonment. Such a disposition is suitable, in our judgment, only where very special circumstances are present such as where the accused demonstrates that he has rehabilitated himself prior to arrest, where he is not a danger to anyone, where others are dependent upon him, and where there are no factors that make it necessary in the public interest that punishment should be by conventional imprisonment.

[Emphasis added.]

Range of Sentence

- [44] What then is the range of sentence for dial-a-dope traffickers? We know the statutory range is from a suspended sentence to life imprisonment. We also know, from an abundance of cases decided by this Court, that the normal range of sentence for a first offence dial-a-dope drug trafficker is between six to nine months incarceration, and upwards to eighteen months in some cases, absent exceptional circumstances. A brief review of some of the cases will demonstrate this range.
- [45] The exceptional circumstances must engage principles of sentencing to a degree sufficient to overcome the application of the main principles of deterrence and denunciation by way of a prison sentence.
- [46] For example, in *R. v. Preston* (1990), 47 B.C.L.R. (2d) 273 a five-justice division of this Court examined the general principles of sentencing in the context of possession of heroin offences by a long-time heroin addict, with a lengthy criminal record. Ms. Preston had made substantial efforts at rehabilitation. Wood J.A., speaking for the Court, said, at 281:

The object of the entire criminal justice system, of course, is the protection of society, and I say at once that if incarceration is the only way of protecting society from a particular offender, then transitory and expensive though it may be, that form of protection must be invoked. But where, as in this case, the danger to society results from the potential of an addict to commit offences to support her habit, and it appears to the court that there is a reasonable chance that she may succeed in an attempt to control her addiction, then it becomes necessary to consider the ultimate benefit to society if that chance becomes a reality.

With respect, that benefit seems obvious. If the chance for rehabilitation becomes a reality, society will be permanently protected from the danger which the offender otherwise presents in the fashion described above. As well, the cost associated with her frequent incarceration will be avoided.

- [47] This concept applies to all offences, not just drug offences. For example, in *R. v. Smith*, 2013 BCCA 173, a case of impaired driving causing death, this Court concluded that despite the extensive rehabilitative steps taken by Ms. Smith, the circumstances of the offence for which she was convicted and her circumstances did not outweigh the fundamental importance of deterrence and denunciation.

- [48] A review of some of the many cases in the dial-a-dope context will demonstrate how this principle is applied.
- [49] In *R. v. Ahmed*, 2001 BCCA 504, the Crown appealed a CSO of 18 months. The offender was 29 years old, and was convicted on six counts of trafficking cocaine. The first five transactions involved selling drugs from a store where he worked as a clerk, while the last transaction was a dial-a-dope sale. The total drugs were 7.2 grams of cocaine for \$640. The Court affirmed that the "dial-a-dope" method of trafficking is an aggravating factor in sentencing. The other aggravating factors were that the offences were spread over several weeks, solely for profit and not to support an addiction, and were near a school in a neighbourhood where there had been a persistent drug problem. The sentencing judge also found that the accused had not taken responsibility for his actions. He was on judicial interim release for other offences, and therefore bound to "keep the peace and be of good behaviour" under that order. At para. 8, the Court concluded that there must be significant factors to justify a CSO:

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.

- [50] The Court substituted a sentence of 18 months in prison.
- [51] In *R. v. Chang*, 2002 BCCA 644 a case of possession for the purpose of trafficking heroin and cocaine, this Court overturned a prison sentence of 9 months, and substituted a CSO of 9 months for a 22-year-old student, who was a first offender. Of interest are the observations of Esson J.A. commenting on the principles of deterrence, denunciation and rehabilitation, in response to the sentencing judge's view that a CSO would not serve the factors of general and specific deterrence:
- [13] As to general deterrence, that may be so, but each individual must be judged upon his own circumstances. Here we have a young man whose personal circumstances appear generally to be favourable. There was no real proof that he was engaged in a sophisticated operation. Having regard to those matters, I consider that the elements of specific deterrence and denunciation can adequately be met by a conditional sentence.
- [14] I consider that, in this particular case, such a sentence is more likely to serve the important end of rehabilitation. It may be that this young man will learn his lesson from having been arrested, charged and convicted.
- [Emphasis added.]
- [52] In *R. v. Tran*, 2007 BCCA 613, the offender, a 28-year-old first offender was convicted of possession of heroin and cocaine for the purpose of trafficking in a dial-a-dope operation. He received a sentence of nine months incarceration, which was upheld on appeal. This Court said at para. 14:

Mr. Tran was not a drug user. He involved himself in the drug trade for financial gain. His behaviour was part of a "dial-a-dope" drug trafficking scheme - a mode of trafficking which this Court has observed in the past plays on the addiction and weakness of habitual drug users, and the degradation of the community. The drugs in question are hard drugs and are known to be highly addictive. In the circumstances, I see no error which would permit this Court to interfere with the sentence imposed.

[53] On the other hand, in *R. v. Charlie*, 2008 BCCA 44, the Crown appealed an 18 month CSO imposed on an Aboriginal offender, after a guilty plea, for possession for the purpose of trafficking cocaine. At the time of the offence, Mr. Charlie was bound by a CSO for a similar offence. However, the Crown appeal was not heard until two years after the offence occurred. In that time, Mr. Charlie had taken exceptional steps towards his rehabilitation, which were supported in a pre-sentence report. In dismissing the Crown appeal, Frankel J.A. said, at para. 35:

The concern expressed in [*R. v. Morphy* (1974), 21 C.C.C. (2d) 62 (B.C.C.A.)] and [*R. v. Nelson*, [1992] Y.J. No. 171 (C.A.)] applies here. It would be unjust, and counterproductive not only to Mr. Charlie's interests, but those of society at large, to interfere with his successful efforts at rehabilitation by sentencing him a period of incarceration at this time. It is on this basis alone that I would dismiss this appeal.

[54] Similarly, in *R. v. Amhaz*, 2013 BCCA 348, the offender appealed a six-month incarceration sentence imposed after a guilty plea for one count of trafficking in cocaine, involving a continuing dial-a-dope operation. He was 25 years old and had no criminal record. He was selling drugs to pay off debts. Mr. Amhaz was not arrested until five months after the offences occurred. Shortly after the offences, Mr. Amhaz's family performed an "intervention", and as a result, by the time he was charged and sentenced, he had made profound changes in his life.

[55] Saunders J.A. discussed the need for some "out of the ordinary" circumstances that would permit a non-custodial sentence to be imposed. In allowing the appeal, and substituting a CSO, Saunders J.A. said this, at para. 19:

While Mr. Ahmaz's involvement in the illegal business is to be deplored, and must be reflected in the sentence imposed, the fact he left this criminal lifestyle before engagement with the criminal justice system, reinforced by his assumption of an appropriate employment role and his move towards stable family life, is a feature that should have been reflected in the sentence imposed, in my respectful view. This feature demonstrates self-directed rehabilitation before contact with the criminal justice system, and distinguishes the case from those to which I have referred. In my view it comes within the descriptions 'particularly positive' and 'out of the ordinary'.

- [56] Of significance is the recent decision of this Court in *R. v. Cisneros*, 2014 BCCA 154. This case was decided after the CSO became unavailable for drug trafficking. The sentencing judge imposed a \$2,000 fine and one-year probation for an offence of possession for the purpose of trafficking cocaine in a dial-a-dope operation.
- [57] The offender was working a "shift" in a dial-a-dope operation between midnight and 6:30 a.m. He had 25 rocks of cocaine and 29 baggies of heroin. Each rock and bag contained less than 0.5 grams of the drug. He was 27 years old, had no criminal record and was selling the drugs for about ten years, for profit.
- [58] In allowing the Crown appeal, and substituting a sentence of six months, Groberman J.A. said, at paras. 13-14:

The case before us is a straightforward case in which the offender was involved in a busy dial-a-dope operation. While he had no criminal record, this was not an isolated event, as he conceded in his sentencing submissions. There were no extraordinary circumstances that would take this case out of the ordinary sentencing range.

I agree with the Crown's assessment that the ordinary sentencing range for a first offender in a crime of the nature involved in this case is approximately 6-9 months' imprisonment. Even before the option of giving a conditional sentence of imprisonment for such offences was removed by amendment to the Criminal Code, such sentences were very much the exception.

- [59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.
- [60] A CSO was considered a sentence of imprisonment because of the strict and punitive conditions that could be imposed. As we have seen above, a suspended sentence can attract similar strict conditions, but only if they are aimed at protection of the public and reintegration of the offender into society. Rehabilitation clearly plays a significant role in both of those conditions.

- [61] A suspended sentence can achieve a deterrent effect, as noted above, as well as a denunciatory effect. And, as Esson J.A. stated in *Chang*, the fact of being arrested, tried and convicted, can also address these principles. In other words, the stigma of being a convicted drug trafficker and the consequences of that conviction--for example, restricted ability to travel outside of Canada and exclusion from many forms of employment--may also play a deterrent effect.
- [62] Thus, while it is an error to simply substitute a suspended sentence for a CSO, as they are not governed by the same principles, that does not end the inquiry into whether these non-custodial sentences are fit.
- [63] The issue then for each of these appeals becomes whether there were sufficient exceptional circumstances to justify going outside the normal range of sentence and imposing a non-custodial sentence. In each case, the sentencing judge concluded that there were exceptional circumstances.

Application to Cases at Bar

Dau Man Voong

- [64] Mr. Voong was caught selling drugs on January 24, 2013. He pleaded guilty to one offence, possession for the purpose of trafficking cocaine (contrary to s. 5(2) of the CDSA), on June 30, 2014. He was sentenced on July 10, 2014 to a suspended sentence and 30 months' probation with strict conditions.
- [65] The police had Mr. Voong under observation, and he was suspected of committing over 16 transactions before he was arrested. Upon his arrest, he was found in possession of score sheets, 6.6 grams of cocaine and a small amount of heroin, and \$680 in cash. The offence took place in the context of a dial-a-dope operation.
- [66] Mr. Voong had a criminal record: in 1994, he was convicted of two counts of possession for the purpose of trafficking a narcotic and received a \$500 fine for the first count and a suspended sentence with probation for one year for the second count. In 1996, he was convicted of breaking and entering and theft, and in 2002, he was convicted of breaking and entering. He has had no convictions since 2002.
- [67] He was 40 years old at the time of sentencing. He has a long history of drug use and attempts at treatment. He was selling the drugs to support his drug habit. He is single, and lives with his mother. He has anxiety and panic disorders.
- [68] After he was charged with this offence, he attended a drug treatment program at the Pender Community Health Centre. As a result, he has been free of illicit drugs since May 2013. He is tested regularly at the treatment program he is continuing.
- [69] The sentencing judge referred to the proper principles and legal parameters. The Crown is not alleging that he made the error of simply substituting a suspended sentence for a CSO.

[70] The sentencing judge said the following at paras. 37-41:

In the Court of Appeal decision authored by Chief Justice Finch [R. v. Tucker, [2011] B.C.J. No. 2212], it was noted that Tucker was on a methadone maintenance program and he had not committed any breaches of the terms of his probation order or committed any other offence. The Court of Appeal noted the sentence [a suspended sentence] was an unusual disposition, but the Court was not persuaded that it should intervene. Appellate courts, the Chief Justice said, are reluctant to substitute a custodial sentence for a non-custodial sentence when doing so would be detrimental to the offender's success and continued rehabilitation.

No one can suggest that a suspended sentence is the usual sentence for people involved in dial-a-dope trafficking cases. The question is whether it is appropriate in the circumstances, whether it can meet the principles of sentencing, and whether jail is necessary in order to achieve those goals. I really cannot conclude that jail is necessary in order to meet those goals with respect to Mr. Voong.

Mr. Voong has by the people who are dealing with him at the Pender Community Health Centre so consolidated a path of rehabilitation that in my mind it would not serve society or the public at all to take him off that path and to send him to jail for a period of time, notwithstanding that these are very serious offences, and they deserve a serious response by the courts.

Every case is different; every case involves the personal circumstances of an accused and here we have Mr. Voong who was obviously suffering from multiple concurrent disorders. He has an anxiety panic disorder combined with a drug addiction that he was dealing with at the time. He was dealing in drugs in order to receive a discount on drugs and that was his involvement.

Mr. Voong has left that business. He is on a path that is different from that; he is on a path that society would want to support and help him to consolidate further instead of imposing a sentence that would take him off that path.

[71] He suspended sentence, and placed Mr. Voong on probation for 30 months, with strict terms including house arrest for the first six months of his sentence, and 80 hours of community service.

[72] The high end of the custodial range, twelve months or more, would normally be appropriate for an offender with Mr. Voong's history. The question in this case is whether a prison sentence is necessary in order to satisfy the principles of denunciation and deterrence. The relevant circumstances include the fact that he was not selling drugs for profit (but rather to support a long-standing drug habit), and importantly, that he has apparently turned a corner in his drug addiction, which is supported by objective evidence from the Pender Community Health Centre. He has served almost one year of his sentence.

[73] In my view, given all of the circumstances, and taking into account all of the principles noted above, this offender does present an exceptional circumstance by his commitment to rehabilitation and his apparent success to date. I would not interfere with this sentence.

John Galang

- [74] On December 11, 2013, Mr. Galang sold 1.04 grams of cocaine to an undercover police officer for \$100, as part of a dial-a-dope operation. He was arrested shortly afterwards, and found to have \$190 on his person, including the \$100 from the sale. He had no other drugs in his possession.
- [75] He pleaded guilty to the offence at an early opportunity. Mr. Galang had no prior criminal record. He had a steady work history, and at the time of sentencing, was running a legitimate business with two others. He was 22 years old at the time of sentencing.
- [76] He said he became involved in the drug operation to help a friend who had found himself owing money to his superiors in the drug trafficking operation. The sentencing judge accepted this explanation, and concluded that Mr. Galang was "at a very low end of the drug trafficking business" (para. 35).
- [77] During his careful analysis, the sentencing judge reviewed some historical features of sentencing. He referred to this under the heading "Re-emergence of Suspended Sentences in Drug Trafficking Cases" (paras. 27-30). He expressed the view that after the CSO became a sentencing option in 1996, judges tended to opt for this type of order instead of a suspended sentence. He opined that this may be because the two types of sentences were, in practice, very similar. This view, I note, is confirmed by Lamer C.J.C. in Proulx. On the other hand, he observed that a breach of a CSO can be enforced "swiftly and significant consequences can be imposed promptly" (para. 30) while the process for revoking a suspended sentence was procedurally more complicated.
- [78] The Crown says that the error here was equating the suspended sentence with a conditional sentence order. It submits that in Proulx, the Court clearly distinguished between the two, and that the sentencing judge erred in considering them to be similar.
- [79] In my view, the sentencing judge in this case did not equate the two and misunderstand that the CSO was a "jail term" (Proulx). He looked back in time, before a CSO was available, to see if a suspended sentence was an appropriate sentence for drug trafficking. He referred to one decision, Harding, which I have referred to above, to demonstrate that a suspended sentence could, in exceptional circumstances, be imposed for a serious offence. The judge said the same – he looked for "exceptional circumstances" and he was alive to the fact that a suspended sentence would be a very unusual sentence to impose.
- [80] In sentencing Mr. Galang, the sentencing judge said, at paras. 37-38:

The accused's prospects for rehabilitation are good. Mr. Galang is young, has a good employment record, and is now engaged in the difficult task of running a business. He has no criminal record. He has taken responsibility for his offence by pleading guilty' at a relatively early stage in the process. There is no evidence that he lives an antisocial lifestyle. That is, this offence represents an isolated act in an otherwise law-abiding life. On the evidence that I have heard, I conclude that it is unlikely that he will reoffend.

Conclusion

A suspended sentence is one of the sentencing options available in this case. Is it a fit sentence in the circumstances? In my view it is. The accused's moral culpability is at the lower end of the spectrum of those who engage in drug trafficking. Even so, there is no question that a deterrent sentence must be imposed in such cases. However, the courts have found that in some circumstances a suspended sentence will accomplish that goal. In my view, the goals of rehabilitation and reintegration into the community outweigh the goals of deterrence and denunciation in these particular circumstances.

- [81] He suspended the passing of sentence, and imposed a probation order for one-year. Mr. Galang is a young person with no criminal record, and who is of otherwise good character, running his own business. He was found to be at the low end of the drug trafficking chain. I would not interfere with the sentencing judge's weighing of the circumstances and the principles of sentencing, except to the following degree. In my view, one year probation does not satisfy the deterrence or denunciatory aspect of sentencing. The proverbial "Sword of Damocles" plays a significant role in satisfying both of these principles, and one year is not sufficient. I would increase the probation order to three years' probation. I would also impose a curfew. I would add the term that Mr. Galang be in his home between the hours of 10 p.m. and 6 a.m. seven days a week, except when he is at work or travelling to and from work, or for a medical emergency. He will present himself at his door upon request of either his probation officer or a peace officer.
- [82] This condition will remain in place for 18 months from the commencement of the probation order, dated October 15, 2014.

Krystal Charlton

- [83] Ms. Charlton pleaded guilty to one count of possession for the purpose of trafficking cocaine, one count for the purpose of trafficking heroin and one count of breach of a probation order, which required her not to possess illegal drugs.
- [84] She was a courier for a dial-a-dope operation, and when arrested she possessed 5.7 grams of cocaine, 1.51 grams of powdered cocaine, 1.75 grams of heroin and \$156. She has a lengthy criminal record, including four convictions for possessing illicit drugs. She was on probation for drug offences when she committed the additional offences. She is a drug addict.

- [85] She was 28 years old at the time of sentencing, and was sharing custody of her five-year-old daughter with her mother under the auspices of the Ministry of Children and Families. Ms. Charlton has been on judicial interim release since March 8, 2014. She has had mental health issues in the past, and since her release is obtaining counselling from the local health authority. She has been prescribed a new medication that her counsellor says has caused major positive changes for her.
- [86] Her counsellor provided a very positive report on her progress. Of significance, she obtained certification to be a nutritional coach, and has been hired by a local fitness club. Her employer, who was aware of her circumstances, provided a very positive reference and attended court and spoke at her sentencing hearing. Her employer said that if Ms. Charlton is sentenced to prison, her job would be waiting for her upon her release.
- [87] In discussing the applicable principles, the sentencing judge acknowledged that generally, a suspended sentence would "fail to provide the measure of general deterrence appropriate in a dial-a-dope case, particularly for an offender with a record which includes previous drug offences" (para. 10). The Crown submits that the trial judge acknowledged that the sentence would not satisfy the principles of sentencing and thereby erred by imposing a suspended sentence. It is necessary to read the statement in context:
- [10] It must be conceded that a suspended sentence will fail to provide the measure of general deterrence appropriate in a dial-a-dope case, particularly for an offender with a record which includes previous drug offences. The question is whether, in this case, that factor is outweighed by the sentencing objective of rehabilitation and the statutory instruction that I am to consider all reasonable alternatives to incarceration; Criminal Code, section 718.2(e). In my view, it is. It is clear that, since her arrest, Ms. Charlton has taken meaningful, practical and successful steps to leave her life of crime and to become a useful and contributing member of society.
- [88] The sentencing judge suspended the passing of sentence and imposed three years' probation with terms, as she had established, in his view, exceptional circumstances.
- [89] Ms. Charlton was a drug addict, who had been six years' clean before she "fell off the wagon" in 2013. Her arrest was clearly a wake-up call for her. She has taken significant steps towards her rehabilitation. She has employment and a very supportive employer, which is not usual for drug addicts. At the time of sentencing she had accessed Mental Health and Addictions Services, and has new medication that seems to be helping her cope much better than she was before. The road to sobriety for drug addicts is long and difficult. She appears to be doing whatever is necessary to maintain her sobriety, and eventually obtain custody of her child.
- [90] As noted in Preston, the public is best protected if Ms. Charlton is not committing offences.

- [91] The sentencing judge recognized that he was obliged to sentence Ms. Charlton to imprisonment unless the circumstances were "so compelling as to justify a sentence outside the normal range" (para. 3).
- [92] Without these significant steps towards rehabilitation, Ms. Charlton would be looking at the higher end of the range, 12 months or more. However, I agree with the conclusion of the sentencing judge that this is a case of exceptional circumstances that justifies a non-custodial sentence. I would not interfere with this sentence.

Thomas Taylor

- [93] Mr. Taylor pleaded guilty to one count of possession for the purpose of trafficking in cocaine, one count of breach of a recognizance for possessing a cell phone, and one count of breach of a recognizance for failing to present himself for a curfew check. He was sentenced on November 21, 2014.
- [94] On August 6, 2013, the police arranged to buy 3.5 grams of cocaine from Mr. Taylor in a dial-a-dope operation. When he was arrested he had 9 grams of cocaine packaged in two dozen small packets. He also had a \$110 dollars. He has a minor criminal record for mischief and two breaches of an undertaking.
- [95] He was 25 years old at the time of sentencing and worked for his father as a landscaper, and also found employment as a barber. Mr. Taylor was selling drugs for a period of time to fund his own addiction.
- [96] The pre-sentence report indicates that he is making some efforts at rehabilitation and tackling his drug addiction. He is apparently doing well in his employment, however, this observation had no independent verification.
- [97] He is on a methadone program, and medical records indicated that he last tested positive for cocaine in May 2014. The date of the pre-sentence report was July 21, 2014. Thus, post-offence, he was still using illicit drugs. He advised the probation officer that he found the selling of drugs stressful and did not want to return to that lifestyle.
- [98] The sentencing judge was aware of the principles of sentencing, and said this at para. 30:

In this case, where I am dealing with a young man who sold drugs to finance his own addiction, I am satisfied that all of the principles of sentencing can be met by suspending the passing of sentence and placing him on probation for a period of two years. I have not come to this decision easily. I am well aware of the comments of the Court of Appeal with respect to the appropriate range of sentencing, but given the conditions I am going to impose, this is still a significant sentence and can meet the principles of deterrence and denunciation while at the same time supporting Mr. Taylor's efforts at rehabilitation which, in my view, must be given the appropriate effect.

- [99] She then suspended sentence and imposed a period of probation for two years.

- [100] An examination of the reasons for sentence demonstrates that the sentencing judge did not give sufficient consideration to deterrence and denunciation. The steps taken by Mr. Taylor, while commendable, do not reach the level of "exceptional circumstances" that is described in the multitude of cases that address the issue.
- [101] Much of the evidence supporting his progress came from his mother, who no doubt wishes to see the best for her son. There is, however, little independent evidence of progress, and he was clearly using drugs approximately ten months after the offence date in this case, which was August 2013.
- [102] Mr. Taylor has not demonstrated the degree of "exceptional circumstances" in terms of rehabilitation that would justify a non-custodial sentence. In my view, the sentencing judge erred in overemphasizing rehabilitation over denunciation and deterrence, and that error led her to impose a sentence that was unfit.
- [103] I would interfere with this sentence. Mr. Taylor has been on strict terms of probation since November, including house arrest. Therefore, I would impose a sentence at the lower end of the range, and substitute a sentence of six months imprisonment to be followed by one-year probation. The terms of the probation are the statutory terms, to report as directed by his probation officer and to attend and participate in any addiction counselling program as directed by the probation officer.

Summary

- [104] I would grant leave to appeal with respect to Mr. Voong, but dismiss the appeal.
- [105] I would grant leave to appeal with respect to Mr. Galang, and allow the appeal to the extent of increasing the probation order to three years, with a house arrest term. Mr. Galang has three days to present himself at the Court of Appeal Registry and enter into the new probation order.
- [106] I would grant leave to appeal with respect to Ms. Charlton, but dismiss the appeal.
- [107] I would grant leave to appeal with respect to Mr. Taylor, allow the appeal, set aside the suspended sentence and probation and substitute a sentence of six months' incarceration to be followed by one-year probation with the terms as set out above. Mr. Taylor will surrender to the Court of Appeal Registry in Victoria, B.C. within 72 hours of the issuance of these reasons or a warrant of committal will issue.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

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