NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Oickle,* 2015 NSCA 87

Date: 20151001
Docket: CAC 432842
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Casey Elias Oickle

Respondent

Judges:	Farrar, Bryson and Scanlan, JJ.A.
Appeal Heard:	May 19, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Scanlan, J.A.; Farrar and Bryson, JJ.A. concurring.
Counsel:	David Schermbrucker, for the appellant Kenneth Greer, for the respondent

Reasons for judgment:

[1] On October 7, 2014, Provincial Court Judge Claudine MacDonald sentenced the respondent on a number of offences including possession of cocaine and possession of morphine, both for the purpose of trafficking. The respondent was in possession of 11 grams of cocaine and 23 morphine pills. When the respondent was arrested, the RCMP noted a large baton on the floor of the car under his feet, a dagger-style knife proximate to the space between the driver and passenger front seat. In addition they found a replica .45 calibre pistol between the front passenger seat and the centre console. The sentencing judge imposed two years' probation on the drug offences. The Crown appeals that sentence arguing that it is manifestly unfit considering the types of drugs involved and also considering the weapons found in the respondent's motor vehicle at the time of the arrest.

[2] I agree that the sentence imposed was demonstrably unfit and for the reasons set out below I would allow the appeal.

Background

[3] The respondent was arrested on June 13, 2013, in New Minas, Nova Scotia, as a result of the police investigating a report of a possible impaired driver. While speaking to the driver of the suspect car, the RCMP noted a large baton on the floor under his feet. In addition, in plain view they noted a pill bottle and a dagger-style knife situated on the floor, just behind the area between the driver and passenger seat.

[4] The respondent and passenger were arrested for possession of a weapon for a purpose dangerous to the public peace. After a search incidental to the arrests, the passenger was found in possession of a drug pipe and prescription bottle containing five grams of cocaine tucked in his left pant leg. The RCMP also found a replica .45 calibre pistol tucked between the front passenger seat and the centre console. The gun could not be fired but it was an exact replica.

[5] A further search of the vehicle also resulted in the RCMP finding a container with 23 morphine pills, 11 of which were 20 milligrams, 12 were 100 milligrams. The police also found six grams of cocaine packaged in individual baggies for resale. In addition, they located and seized from the vehicle one gram of cannabis marihuana, scales, a score sheet and $120 cash.

[6] In a cautioned statement the respondent claimed all the drugs in the vehicle including the cocaine found on the passenger. He indicated that he used cocaine and that the pills were for resale. In relation to the cocaine and morphine he was charged with two separate counts of possession for the purpose of trafficking under s. 5(2) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19 (**CDSA**). He was also charged with five **Criminal Code** offences in relation to the weapons found in the car. After the initial arrest he remained imprisoned for five days. On June 17, 2013, he was released on a recognizance with conditions, including a curfew. The respondent has been subjected to restrictions on his liberty and actions since that time.

[7] The matter proceeded in Provincial Court on April 8, 2014, when the respondent entered guilty pleas to the s. 88(2) **Criminal Code of Canada**, R.S.C. 1985, c. C-46 offence and to possession of a weapon for a dangerous purpose and two trafficking charges under s. 5(2) of the **CDSA**. The Crown offered no evidence on the four remaining **Criminal Code** offences.

[8] The sentencing hearing occurred September 23, 2014, and decision was reserved until October 7, 2014. At the sentencing hearing the Crown submitted the morphine pills in question had a street value of between $145 and $705. The record does not disclose a value for the cocaine.

[9] At the time of the offences the offender was 19 years old. He had no prior criminal record. He was 21 years old at the time of sentencing. The respondent asserted that he stopped using drugs in 2013 but when the pre-sentence report was prepared he said he was occasionally using marihuana. The record lacked detail in terms of Mr. Oickle's drug use between the date of the offence and the date of sentencing. However, Ms. Hobson, a clinical therapist with Addiction and Mental Health Services described the respondent in 2013 as, "… not committed to address addiction issues… " saying that he would "miss appointments and would later present in an emergency state…". By May of 2014 Ms. Hobson reported that he appeared more stable in terms of substance abuse.

[10] The respondent also stated he had been admitted to the Detox Unit in Lunenburg in October, 2013. He was subsequently discharged after detox and treated through the Methadone Clinic in Bridgewater. Although he had appointments with the Mental Health Psychiatry Unit, the record suggests that he did not attend. His mental health file was closed in January, 2014. However, he

did continue to speak to a counsellor, Ms. Morrell. Ms. Morrell provided a letter to the court respecting the respondent's rehabilitation efforts prior to sentencing.

[11] At the sentencing hearing, the federal Crown recommended a 2 year custodial sentence in relation to the **CDSA** offences. The provincial Crown recommended a period of incarceration concurrent to the **CDSA** sentence for the **Criminal Code** matters, to be followed by three years' probation.

[12] At the sentencing hearing the Crown noted that in the fall of 2012, minimum mandatory sentences came into effect, requiring a minimum mandatory sentence of one year on the **CDSA s.** 5(2) offences if firearms were involved. Mr. Oickle had not been provided notice of this minimum sentence and, as such, the provision had no application during the original sentencing hearing, nor does it on this appeal. The Crown, however, asked the court to consider the weapons as an aggravating factor in imposing a two years sentence in prison on the **CDSA** offences.

[13] Defence counsel urged a community based sentence but suggested that if the respondent were to receive a custodial sentence it should be in the range of eight months in total.

[14] The sentencing judge characterized the respondent as a petty retailer, selling to feed his drug addictions. She determined that in relation to s.10 of the **CDSA**:

> … Insofar as aggravating factors go, the Crown on the last day suggested that the presence of the weapon was an aggravating factor and that had Mr. Oickle been served with notice that, in fact, he would have been facing a minimum one year sentence for the weapons offence. I just want to make a couple of points about that. Well, first he's charged with that as a separate offence, possession of a weapon, but insofar as the aggravating factors go, there's nothing here to indicate that Mr. Oickle did, in the words of Section 10 of the **Controlled Drugs and Substances Act** "carried, used or threatened to use a weapon." I note that that section does not, for example, use the word "possess" because if that word were there then, yes, yes, it would be an aggravating factor in this case. But, as I see it, in other words, none of the aggravating factors as set out in the **CDSA** are present in this particular case. …(p. 90 AB)

[15] The sentencing judge noted the fact that the respondent pled guilty and accepted full responsibility for what he did. She determined that he was extremely remorseful.

[16] The sentencing judge characterized the pre-sentence report as a positive pre-sentence report quoting the letter from Ms. Morrell, his counsellor in the recovery

program. She noted that the Court of Appeal in this province has repeatedly indicated that there would be significant periods of custody for people who are involved in trafficking cocaine, suggesting that a person convicted of trafficking in cocaine can expect to go to prison for a period of two years even if the person has pled guilty and had no criminal record. In that regard she referenced the danger of cocaine, and the fact that it destroys not only the individuals using those drugs but communities. She noted that because of the far-reaching impact of cocaine courts of appeal have emphasized deterrence and denunciation in sentencing.

[17] The sentencing judge referred to the circumstances of the offender, his life history and the fact that his life had spiraled out of control after he became addicted to cocaine. He quickly became entrenched in the drug culture. He then started using morphine in an attempt to wean himself from cocaine. The sentencing judge referred to the respondent's personal circumstances arising shortly before he started using drugs. She noted his recent past, and efforts to reintegrate himself into the workforce and the community. The sentencing judge referenced her concerns that on the one hand she would be focusing on deterrence and denunciation when dealing with offences such as those now before the Court and then saying:

> On the other hand though, I am concerned here that to incarcerate Mr. Oickle would re-introduce him into a criminal subculture; that it is going to jeopardize the gains that he has made since these charges were laid because, as I thought about this, in the final analysis the public is served best and indeed is better protected if Mr. Oickle continues with the drug counselling, if he attends for the mental health counselling and if he succeeds in his rehabilitation. … (AB, p. 98)

[18] The sentencing judge imposed a conditional sentence of two years less one day in relation to the **Criminal Code** weapons offences. This, even though the provincial Crown recommended only "a short term of custody concurrent to any that's being given to Mr. Oickle on the more serious matters." The sentence was to be served in the community, and was to be followed by two years' probation. That was twice as long as the provincial Crown requested. On the **CDSA** offences she imposed a suspended sentence and probation, which was to run at the same time as the probation order on the weapons offences. She noted that, in total, the respondent would be under the supervision of Correctional Services for a period of four years. She said:

> The only reason why you are not going to a Federal Penitentiary today is, well, it is your age. It is the fact that you are an addict. You weren't doing this to make

> money. You weren't doing this out of greed. You weren't doing this for any reason like that. You were doing this to feed your addiction… (AB, p. 101)

[19] There were a number of conditions attached to the conditional sentence order including house arrest for the first 12 months followed by six months with a curfew and a mandatory prohibition order under s. 109 of the **Criminal Code** imposed in relation to the **CDSA** convictions.

[20] During the appeal hearing before this Court Crown counsel suggested there was no evidence that the respondent had in any way breached the conditions of his sentence once released into the community.

Standard of Review

[21] This Court will only interfere with a sentence where the trial judge has committed an error in principle, failed to consider a relevant factor or over-emphasized a relevant factor, or where the sentence is demonstrably unfit (**R. v. Scott**, 2013 NSCA 28, ¶7-10). As noted in **R. v. Steeves**, 2007 NSCA 130, ¶15 "...The standard of review is a deferential one, and the decision of a sentencing judge is not to be interfered with lightly…": **R. v. C.A.M.**, [1996] 1 S.C.R. 500, ¶91."

[22] In relation to the two offences under the **CDSA**, there is no minimum sentence applicable in this case, therefore, the provisions of s. 687(1) of the **Criminal Code** apply:

> **687.** (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

Analysis

Leave to appeal

[23] The standard to be applied on the issue of leave to appeal is whether there is an arguable issue. I am satisfied that the threshold of arguable issue has been met and that leave should be granted.

Error committed by sentencing judge in not considering the presence of weapons as an aggravating factor in sentencing on the CDSA offences

[24] I am satisfied the sentencing judge was wrong to interpret s. 10 of the **CDSA** as she did, finding that the presence of the weapons did not trigger s. 10(2) of the **Act** so that the weapons were an aggravating factor in the sentencing. The respondent had pleaded guilty to possession of a replica gun for a purpose dangerous to the public peace, contrary to s. 88(2) of the **Code.** There were other weapons in his immediate proximity. It appears the sentencing judge felt that he had to actually have weapons in hand to trigger the operation of s. 10(2) of the **CDSA.** The sentencing judge failed to acknowledge the presence of the replica handgun, baton and knife in close proximity to the driver in a vehicle driven by a person in possession of Schedule 1 drugs, for the purpose of trafficking. As noted in **R. v. Greencorn**, 2014 NSPC 10:

> [6] The combination of drugs with firearms, particularly prohibited firearms -- such as Mr. Greencorn's sawed-off 12 gauge -- is emblematic of the level of danger that this sort of trade poses to the public. It is not at all uncommon to find those who traffic in cocaine and other illegal substances armed with illegal firearms. The risks of this trade are obvious. Someone's going to try to rip you off or you try to rip someone else off or someone's not getting paid on time, …

[25] Section 10(2) of the **CDSA** makes it clear that if a weapon is carried, used or threatened to be used in relation to the commission of an offence under s. 5(2) of the **CDSA**, that it is an aggravating factor. The presence of weapons in the motor vehicle in immediate proximity and readily accessible by the person who possessed narcotics in cases such as this, I am satisfied, constitutes the carrying of a weapon envisaged by s. 10(2) of the **CDSA** whether those weapons are in hand or simply in his immediate proximity. I am satisfied that the presence of the weapons should have been considered an aggravating circumstance in this case. (See **Hanabury v. The Queen**, [1970] P.E.I.J. No. 9 (S.C.) ¶ 15 and 16; **R. v. Crawford**, [1980] O.J. No. 1047 (C.A.) ¶6).

[26] I cite with approval **R. v. Myroon**, 2011 ABPC 36:

> [52] Carrying and possessing are related terms. Indeed, the Dictionary of Canadian Law (3rd edition) defines the word carry as including "to store or to possess." Other dictionary definitions differentiate between the two terms. Possess is a transitive verb which is used in many contexts. Carry is also used in different contexts. For example, in the Canadian Oxford Dictionary (2nd Edition) sets out the three primary meanings of "carry" as follows:

"**carry** - verb (-**ries**, -**ried**)

1 - *transitive* support or hold up, esp. while moving.

2 - *transitive* convey with one from one place to another.

3 - *transitive* have on one's person (*should the police carry guns?; I never carry much money with me*)."

[53] The courts have also recognized that offence of carrying an offensive weapon can be committed when the item is hidden in a vehicle that is in the care or control of the accused.

[54] In *R. v. Hanabury* (1971), 1 C.C.C.(2d) 438 (P.E.I.S.C.) (*Hanabury*) the police found a bayonet under the front seat on the driver's side. The accused argued that he was not carrying a concealed weapon. Nicholson J. disagreed and wrote at p. 444:

> "The main argument advanced by the appellant on this appeal was that the appellant was not carrying the weapon in question. As is said in the ground of appeal, "the evidence showed that the accused did not carry a weapon, but showed that the accused had a weapon in his motor vehicle." I am unable to accept this contention, and I am of the opinion that a person could be convicted under s. 85 of the *Criminal Code* on a charge of "carrying a concealed weapon" if he is carrying a weapon in an automobile of which he has the care and control. In this modern day, with the use of automobiles so widespread, it cannot be seriously contended that the section of the *Code* relating to the carrying of weapons is restricted to carrying the weapon on or about the person of the accused."

[55] *Hanabury* was cited with approval by the Ontario Court of Appeal in *R. v. Crawford* (1980), 54 C.C.C. (2d) 412 (Ont. C.A.).

[56] Both these cases involved circumstances where the accused was the driver and the knife was under the driver's floor mat.

[57] The ordinary grammatical meaning of the word "carries" in the section must be considered in light of the other terminology in the section. Included in that consideration is the object of the section.

[58] In *Felawka* the Court explained the object of the s. *90(1)* as follows:

> "Perhaps a solution can be arrived at by considering the aim or object of the section itself. There is something extremely menacing and intimidating about the presence of a naked weapon. There is something even more sinister in the presence of a concealed weapon. No doubt the legislators enacting s. 89 believed that weapons are usually concealed by persons on the way to commit crimes or after leaving the scene. Clearly then one of the goals of the section is to discourage the prospective bank robber who might be apprehended on the way to the bank with a sawed-off shotgun concealed in his pant leg. Yet, I think the section has a wider aim. All Canadians have the right to feel protected from the sinister menace of a concealed weapon. If it was ever thought that it was lawful to carry concealed weapons more and more Canadians might come to believe it would be prudent for them to carry concealed weapons in order to defend themselves and their families. This might lead to a vigilante attitude that could all too readily result in an increase in violence in Canadian society. Canadians are well satisfied with the security provided by the close regulation of the ownership and use of firearms. They have every right to expect the concealment of weapons would also be prohibited or properly regulated. To fulfil the aim and object of s. 89, it would then appear that the requisite intent or mental element should be that the accused intended to hide from others an object he knew to be a weapon."
>
> [59] Applying the object of the section, the jurisprudence and the ordinary grammatical meaning of "carry" it is clear that it is meant to apply to situations where movement of an object is taking place or might take place. It can also apply to situations where a concealed weapon is readily handy.
>
> [60] In this case, the accused had the knife on his person and was conveying the weapon in a motor vehicle. There could be little doubt that he was "carrying" that weapon.

[27] The meaning of the word “carry” in s. 10 of the **CDSA** should be given the same meaning as set out in **Myroon** above in relation to s. 85 of the **Criminal Code**.

[28] The sentencing judge should have considered the presence of the weapons including the replica handgun, and the close proximity of those items to the driver as an aggravating factor.

Conditional Sentence was not an option for the s. 5(2) offences

[29] In November of 2012 there were significant changes to sentencing provisions in both the **Criminal Code** and the **CDSA** with the implementation of the **Safe Streets and Communities Act**, S.C. 2012, c. 1. Specifically, s. 742.1 eliminated conditional sentences as an option in relation to s. 5(2) of the **CDSA** offences. That amendment applies in the circumstances of this appeal and a conditional sentence is not an option for the **CDSA** offences here.

Failure by the sentencing judge to properly address the principles of denunciation and deterrence as expressed in the common law of sentencing for similar offences

[30] The Court has emphasized denunciation and deterrence as being a relevant factor in relation to sentencing on s. 5(2) offences. In this regard I quote from the appellant's brief on appeal:

> 1. For over 25 years, the consistent direction of this Court has been that cocaine traffickers must receive a sentence that emphasizes deterrence and denunciation because of the harmful nature of this drug and the drug trade. This Court has never endorsed a non-custodial sentence for cocaine trafficking – yet that was the sentence imposed in this case.

[31] This Court has consistently commented on the dangers to the communities posed by individuals who choose to traffic Schedule 1 drugs such as cocaine. Deterrence and denunciation remain at the forefront in terms of sentencing in relation to the trafficking of Schedule 1 drugs.

[32] I refer to cases set out below in saying I am satisfied that the period of probation imposed for the **CDSA** offences is demonstrably unfit. I also reference those cases in deciding what an appropriate sentence is in the present case:

> **R. v. Dawe**, 2002 NSCA 147, The offender was sentenced to a period of imprisonment of 15 months in a case where he had 200 grams of hash, 235 grams of marijuana and four grams of cocaine. Hamilton, J.A. noted that "Possession of cocaine for the purposes of trafficking typically results in sentences of two years or more…", ¶6;
>
> **R. v. Steeves**, **supra**: The appellant was not a first time offender and was a mature offender. There were additional aggravating circumstances but there were no weapons involved. Conditional sentence of two years less a day varied to two years and six months in prison. The court noted:

> [20] While time served in a federal penitentiary is the norm, this is not to say that conditional sentences are precluded in trafficking in cocaine. ...

Since that time conditional sentences are no longer available due to the statutory enactments I have referred to;

R. v. Knickle, 2009 NSCA 59, ¶18: The court noted that "[t]his Court has never approved or endorsed a conditional sentence on charges of possession of cocaine for the purpose of trafficking";

R. v. Butt, 2010 NSCA 56, ¶13 The court referred to cocaine as a deadly and devastating drug that ravages lives, saying: " Involvement in the cocaine trade, at any level, attracts substantial penalties";

R. v. Jamieson, 2011 NSCA 122, ¶38 "Persons who seek to profit by trafficking in cocaine, or possessing it for the purpose of trafficking, will upon conviction, be virtually guaranteed a prison term in a federal penitentiary";

[33] In **R. v. Scott**, **supra**, Justice Beveridge, writing for the majority, refused to set aside a sentence of two years less a day to be served as a conditional sentence noting that there was no requirement to serve a sentence in a federal institution on a s. 5(2) **CDSA** conviction. As noted above, conditional sentences are no longer an option for these offences.

[34] I refer as well to what was occurring in some other Canadian jurisdictions recently.

[35] In **R. v. Carrillo**, 2015 BCCA 192 the British Columbia Court of Appeal upheld the judge's sentence of a suspended sentence and two years' probation for cocaine trafficking. The offender was described as a mid-level trafficker found in possession of three ounces of cocaine.

[36] In **R. v. Datt**, 2014 BCCA 484, the British Columbia Court of Appeal affirmed that the normal range of sentence for first time offenders trafficking in Schedule 1 is six to nine months (see ¶94).

[37] I note that there have been a number of cases in the British Columbia Supreme Court where suspended sentences and probations have been given for first time offenders. In **R. v. Oates**, 2015 BCSC 584, ¶18, Justice Weatherill

referred to eight prior cases where a suspended sentence and probation had been given for first time offenders. There is also an additional case from British Columbia, **R. v. Fergusson**, 2014 BCCA 347, where a trial judge had imposed a six month conditional sentence for cocaine trafficking and the British Columbia Court of Appeal held that this was an inappropriate sentence and varied it to a suspended sentence and 18 months' probation.

[38] In **R. v. Cisneros**, 2014 BCCA 154 the Court said:

> [14] 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. …

[39] The Alberta Court of Appeal appears to be at the opposite end of the spectrum in terms of sentencing for Schedule 1 offences. That court has instituted what has been referred to as a starting point for sentencing of three years even for small amounts. I note that the concept of "starting points" has been the subject of critical comment. This criticism of "the range of sentences" is warned against in **R. v. Cromwell**, 2005 NSCA 137 ¶67.

[40] I concede that it is not appropriate to set a bottom range or a top range for a particular offence without regard for the offender or other sentencing principles. As noted by Justice Farrar in **R. v. Phinn**, 2015 NSCA 27 where he refers to **R. v. A.N.**, 2011 NSCA 21:

> [34] Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: [Authorities omitted]. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability. …

[41] In **R. v. Ramos**, 2007 MBCA 87, the Manitoba Court of Appeal gave a conditional sentence of two years less a day for a man in possession of 10 ounces of crack cocaine. He was 36 years old and had no prior record. That, of course, was prior to the legislative change prohibiting conditional sentences for these offences.

[42] The above-noted cases are not a complete summary of sentencing in Canadian jurisdictions, but they appear to capture the range of approaches.

[43] When the **CDSA** was amended with the implementation of the **Safe Streets and Communities Act** in November, 2012, it removed conditional sentences as an available option in relation to the s. 5(2) **CDSA** offences. In doing so Parliament clearly intended that prison sentences for these offences should not be served within the community. Nothing in that legislation suggests that a reasonable alternative envisaged by Parliament was to have the common law of sentencing altered by imposing even more lenient sentences through the use of a suspended sentence and probation. The legislation did not alter the common law in terms of duration of sentences. It simply eliminated the option of the sentence being served in the community.

[44] Counsel for the appellant argues that what the sentencing judge did simply sidestepped the express intent of Parliament. Whether the judge intended or not to side step the express intent of Parliament, what she did had the effect of circumventing the express intent of Parliament.

What is an appropriate sentence in the circumstances of this offender and for these offences?

[45] The fact the Crown did not give notice of intent to seek a mandatory minimum sentence does not mean that the possession of weapons by the respondent were not an aggravating factor. I have noted above the numerous factors considered by the sentencing judge. I adopt those as appropriate considerations, supplemented by the fact the respondent carried weapons at the time of the offence. I take into account the need to express both denunciation and deterrence as set out in cases that have gone before. I believe the circumstances of this offender, as a first time offender with his background and his rehabilitative accomplishments are more than offset by the presence of the weapons he carried. The offences under the **CDSA** should have been dealt with in accordance with established precedent which suggest that possession of cocaine for the purpose of trafficking consistently attract sentences of imprisonment in the range of two years even for first time offenders.

[46] The sentence imposed on the **Criminal Code** weapons offences appears to have been the instrument the sentencing judge used to justify or achieve an otherwise unfit sentence for the **CDSA** offences. The sentence imposed on the **Criminal Code** offences is a relevant consideration as it relates to the **CDSA** sentencing when considering the principle of totality, but it cannot be used as a means to craft an otherwise demonstrably unfit sentence for the **CDSA** offences. In

this case there has been no appeal of the sentence imposed for the weapons offences.

[47] I am now in the position of attempting to make a disposition that is appropriate, yet takes into account the situation as it now exists rather than the situation as it existed at the time of the original sentencing. It has been over two years since the respondent was first arrested. He has been under strict curfew since then, including an extended period of time serving a conditional sentence. The sentence on the **Criminal Code** offences is not under appeal and it will not expire until October 16, 2016. Throughout that entire period of time the respondent will be subjected to strict controls. If the sentence of two years imprisonment were imposed in the first instance the respondent would likely have been eligible for parole by this date.

[48] Sentences as imposed by trial court judges must continue to send a message that possessing Schedule 1 drugs for the purpose of trafficking, or trafficking in cocaine and morphine, will be treated most seriously by courts. The sentence imposed by the sentencing judge in this case is a manifestly unfit sentence. It does not adequately send a message of denunciation and deterrence as justified by the nature of the drugs involved.

[49] I am at a loss to figure out how individuals and communities are impacted in a different way depending on whether the trafficker is motivated by the desire to feed one's own drug habit as compared to selling for profit based purely on greed. In both situations families are torn asunder, lives are destroyed and lost. The trade in Schedule 1 drugs or any drugs depends on those who traffic and those who consume. The potential for profit attracts individuals who might not otherwise be prepared to engage in criminal acts. How is the risk and harm decreased if the trafficker is selling to feed an addiction versus selling for profit?

[50] In this case, it is an aggravating factor that the respondent had possession of weapons. This offender should have been sentenced to a substantial period of incarceration, and, in keeping with the clear directive by Parliament, the sentence should be served in a prison, not in the community.

[51] I am satisfied that a fit sentence at this time is to sentence the respondent to a period of imprisonment of two years. Considering the circumstances as noted above, it is appropriate that this Court however stay the sentence. This is what occurred in **R. v. MacDonald**, 2014 NSCA 102 after that case was remitted back

to this Court by the Supreme Court of Canada (See **R. v. MacDonald**, 2014 SCC 3).

[52] Mr. Oickle has now served one full year of a conditional sentence which included extended house arrest. While Parliament has indicated conditional sentences are not adequate, the fact of the matter is that that conditional aspect of the sentence cannot be undone in this case. Mr. Oickle has served a substantial period of incarceration, albeit, in the community. As I have noted above, the sentence for the weapons offence has not been appealed and, as such, Mr. Oickle will be subject to the conditional sentence for an additional year. The result is that in total, Mr. Oickle will have been under the control of the courts for a total of four years plus an additional period of probation to follow. There is nothing before the Court to suggest that Mr. Oickle has breached any of the terms of his judicial release or conditional sentence to date. I refer to **R. v. MacDonald**, 2014 NSCA 102, and the words of Chief Justice MacDonald where he said:

> [57] That said, I am troubled by the fact that, in addition to serving his brief periods of incarceration and a term of probation, Mr. MacDonald has now been in jeopardy for almost five years. There is nothing to suggest that he has been in any kind of trouble since that fateful evening. In my view, it is therefore no longer in the interests of justice to enforce this 18 month sentence. In other words, it is one of those exceptional cases where justice commands that this sentence be stayed.

[58] This Court in **R. v. Best**, 2012 NSCA 34 considered the rare circumstances that would warrant such an order:

> [35] I realize that this represents an exceptional form of relief. However it is not unique. For example, in **R. v. Butler**, 2008 NSCA 102, the Crown appealed a community sentence for armed robbery (robbing a taxi driver at knife point by an offender suffering from addictions). This court found this disposition to be demonstrably unfit in the circumstances and declared a 30-month sentence to be appropriate:
>
> > 18 Mr. Butler spent the five and one half months between his arrest and sentencing on remand. In that period he made what efforts he could at rehabilitation, successfully completing the short term drug rehabilitation course available to him in the institution. It was while on remand that he learned of the Salvation Army program, which he brought to his counsel's attention. Mr. Butler maintained that he was determined to overcome his addiction to drugs. He accepted responsibility for the offence and expressed remorse.
> >
> > 19 The judge made several factual findings which are supported by the record:

- Mr. Butler has a significant and chronic addiction to both powder and crack cocaine;
- he has an attachment to the work force;
- in the past he has not had any significant intervention with respect to his substance abuse;
- were it not for his chronic addiction he would not be involved in the criminal justice system.

20 It is clear that in crafting this sentence the judge had determined that the public could best be protected if Mr. Butler's drug addiction were successfully addressed. This, he determined, should be accomplished through a sentence which facilitated Mr. Butler attending the Salvation Army program.

. . .

38 The appropriate sentence, before credit for remand time, would have been 30 months. But it is important here to consider Mr. Butler's considerable progress since sentence was imposed.

[36] However, despite this conclusion, the court resolved not to incarcerate Mr. Butler:

39 Although I have concluded that the sentence imposed by the trial judge, notwithstanding the need for rehabilitation, inadequately reflects denunciation and general deterrence, in view of the sentence served and the post-sentence update, I am not persuaded that it is in the interests of justice to now substitute incarceration for the conditional sentence. (See, for example**, R. v. C.S.P.** 2005 NSCA 159, [2005] N.S.J. No. 498 (Q.L.) (C.A.); and **R. v. Hamilton**, [2004] O.J. No. 3252 (Q.L.) (C.A.) and **R. v. Edmondson**, 2005 SKCA 51, [2005] S.J. No. 256 (Q.L.) (C.A.); leave to appeal refused [2005] S.C.C.A. No. 273).

40 Mr. Butler has successfully completed the six month addiction program at Booth Centre. He is pursuing an upgrading program with a view to entering Community College for which he has funding in place. It would not be in the interests of justice to now commit him to a prison environment which may adversely affect his rehabilitation (**R. v. Bratzer, supra**, at para. 47 and **R. v. Parker** [1997] N.S.J. No. 194 (Q.L.) (C.A.)). I have considered, as well, the fact that Mr. Butler, having spent five and one half months on remand, prior to trial, is now aware of the realities of prison life. Indeed, that experience may well have motivated him to get his life in order and will hopefully keep him moving forward on that path. (**R. v. C.S.P.**, **supra**; **R. v. Hamilton**, **supra**; **R. v. Edmondson**, **supra**; **R. v. Symes**, [1989] O.J. No. 528 (Q.L.) (C.A.); **R. v. Shaw**, [1977] O.J. No. 147 (Q.L.) (C.A.***); R. v. Boucher***, [2004] O.J. No. 2689 (Q.L.) (C.A.); **R.**

> **v. Hirnschall**, [2003] O.J. No. 2296 (Q.L.) (C.A.); **R. v. Fox**, [2002] O.J. No. 2496 (Q.L.) (C.A.); and **R. v. G.C.F.**, [2004] O.J. No. 3177 (Q.L.) (C.A.)).

[37] A similar approach has been taken by other Canadian appellate courts. For example, in **R. v. Shaw**, [1977] O.J. No. 147, two respondents were convicted of "serious drug trafficking offences" for which the trial judge gave them no jail−time, but rather, strict probation for two years. The sentences were imposed ten months after the offence, and at the time of the appeals the two respondents had carried out four months of their two−year probation order. Post−sentence reports meanwhile indicated that their work records were exemplary, and that their community involvement was providing needed services in the community. The Ontario Court of Appeal observed: "[i]t is apparent that the rehabilitation program directed by the trial judge is working" and "[t]o impose a custodial term now would be a sentence far more crushing than it would have been if it had been imposed at the time of trial". The court moreover stated:

> 15 Although as I have observed this was a case in which an appropriate sentence should have included the imposition of a custodial term, in the circumstances which now confront this Court general principles of sentencing are not paramount.

[38] Then in **R. v. Boucher**, [2004] O.J. No. 2689, the respondent was sentenced to two years (less one day) plus two years of probation for attempting to murder his estranged wife. The Ontario Court of Appeal held that this sentence was unfit and that a term of six years less time on remand was more appropriate. However, the sentence at trial was varied only to increase the probation period to three years. The court stated:

> 33 …[A]t the time this appeal was heard, [the respondent] had been out of custody for several months. On the record before us, there is no indication that the [respondent] has made any attempt to contact the complainant, or otherwise repeat his previous misconduct, since being released. This court has commented on other occasions about the potentially deleterious impact of re−incarceration, particularly in relation to its effect on rehabilitation. ... In all of the circumstances, I do not consider that it would be in the interests of justice to re−incarcerate the appellant at this time.

[59] This was the same approach taken by the Ontario Court of Appeal in **R. v. Smickle,** 2014 ONCA 49; a situation very similar to ours:

> 10 This court has, on occasion, declined to re-incarcerate a respondent even though the sentence imposed at trial was manifestly inadequate. Sometimes after identifying the sentence that should have been imposed and explaining why the respondent should not be re-incarcerated, this court has simply dismissed the

appeal: e.g. see *R. v. Hamilton* (2004), 72 O.R. (3d) 1, at para. 165 (C.A.); and *R. v. Banci*, [1982] O.J. No. 58 (C.A.). The court also has the power to impose the appropriate sentence but stay the execution of the remaining custodial part of that sentence: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 132. As explained in *R. v. F. (G.C.)* (2004), 71 O.R. (3d) 771, at para. 35, the imposition of the appropriate sentence followed by a stay of the execution of the remainder of the custodial sentence is probably a more appropriate disposition than is an outright dismissal in that it identifies the sentence that should have been imposed.

11 When, as in this case, the sentencing of an accused has been delayed by a lengthy appellate process, and the accused has served the sentence imposed at trial, the imposition of a "just sanction" demands that those factors be taken into account. The respondent completed the sentence imposed on him long ago. He has spent the last two years in legal limbo uncertain as to whether he would be required to return to jail and, if so, for how long. Those hardships must be taken into account. As observed in *Hamilton*, at para. 165:

> This court has recognized both the need to give offenders credit for conditional sentences being served pending appeal and the added hardship occasioned by imposing sentences of imprisonment on appeal. The hardship is readily apparent in these cases. Had the respondents received the appropriate sentences at trial, they would have been released from custody on parole many months ago, and this sad episode in their lives would have been a bad memory by now.

12 We adopt the observation of Green C.J.N.L. in *R. v. Taylor*, 2013 NLCA 42, at para. 133, who, in the course of explaining the function of the appellate court when deciding whether to re-incarcerate an accused who had received an inappropriately low sentence at trial, said:

> ... there is nothing inconsistent with saying that the sentencing judge, with the record in front of him, should have sentenced the offender to greater incarceration than he did and at the same time saying that, with what the court now knows, the application of the sentencing principles does not now require the offender actually to serve the remainder of the sentence. *Unlike the sentencing judge, the court of appeal will be deciding whether the offender should actually serve the rest of his sentence with the benefit of hindsight, a perspective that the sentencing judge did not have. The corrective appellate function of giving guidance as to what the sentencing judge ought to have done can therefore be achieved while at the same time the court can make an appropriate practical disposition, based on current circumstances.*
>
> [Emphasis added.]

13 Counsel for the respondent relies primarily on two arguments in urging the court to not re-incarcerate the respondent. First, counsel submits that, through no fault of the respondent, the determination of an appropriate sentence comes

almost five years after the commission of the offence, almost three years after the conviction, almost two years after sentence was imposed at trial, and a year and a half after the respondent successfully completed the sentence imposed at trial. Counsel argues that this timeline speaks loudly to the significant added hardship that the respondent would suffer should he be incarcerated at a point so distant from the events that led to his conviction.

14 Second, counsel stresses that incarceration at this time poses a significant risk to the stability of the respondent's present life and, therefore, to his ultimate rehabilitation. That ultimate rehabilitation provides, by far, the best long-term hope for "a just, peaceful and safe society".

15 The respondent, who apart from this offence has no other convictions, has continued in the years since his conviction to live a positive law-abiding lifestyle. He works two jobs, is developing his own business, has a stable loving relationship with his fiancée, and a close relationship with his two children from earlier relationships. He supports both children financially.

16 Counsel submits that incarceration of the respondent in the name of the abstract notions of deterrence and denunciation puts at very real risk the positive and tangible steps the respondent has taken to establish himself as a responsible father, spouse, employee, and contributing member of society. Counsel, relying on the respondent's latest affidavit, submits that the respondent has even come to appreciate the seriousness of the conduct that led to his conviction. He has taken steps to avoid any further such conduct by disassociating himself from his cousin, the owner of the firearm that the respondent had in his possession at the time of the offence.

17 Counsel urges the court to give priority to the very real benefits to society flowing from the respondent's ongoing positive lifestyle over the much more nebulous and uncertain societal benefits that may flow from further incarceration in the name of denunciation and deterrence. Finally, counsel submits that the denunciation/deterrence message can be forcefully sent by a clear statement as to the appropriate sentence for this offence, and an equally clear explanation of the extraordinary circumstances that justify the staying of what would otherwise be the appropriate sentence in this case: see *Taylor*, at paras. 67 and 154.

18 We agree with Crown counsel's submission that the offence committed by the respondent was serious and that the principles of deterrence and denunciation must be paramount in fixing an appropriate sentence. If those principles cannot be adequately served without further incarceration, then incarceration is necessary, despite the significant hardship to the respondent and the risk it may pose to his rehabilitation and full reintegration into the community.

19 We are satisfied that the principles of deterrence and denunciation can be fully served without re-incarcerating the respondent at this time. This court has clearly indicated that convictions under s. 95 of the *Criminal Code* demand denunciatory sentences: see *Smickle*, at para. 30; and *R. v. Nur*, 2013 ONCA 677,

> at para. 206. Most s. 95 offences will attract a penitentiary term even for first offenders. Offences like that committed by the respondent, while somewhat less serious than the typical s. 95 offence, will demand the imposition of sentences at or very near the maximum reformatory sentence, even for first offenders. Staying the execution of the appropriate sentence in this case should not dilute in any way the pronouncements in *Nur* and *Smickle* as to the appropriate sentences for s. 95 offences.
>
> 20 Given that the principles of denunciation and deterrence can be adequately served without re-incarceration, we agree with counsel for the respondent that re-incarceration would not serve the other principles of sentencing and would undermine the fundamental purpose of sentencing set out in s. 718. The community is best protected if the respondent continues along the rehabilitative path that he has followed in the five years that he has been before the court.

DISPOSITION

[60] In this case I impose a sentence of 2 years on each of the **CDSA** offences, to be served concurrently. Based on the principles as set out in **MacDonald**, I am satisfied this is an appropriate case to stay the sentence.

[61] It would be improper for a sentencing judge to attempt to circumvent the elimination of conditional sentence orders for Schedule 1 offences using the approach that was adopted in this case. A more appropriate position would be to consider the circumstances of the offender and the offence, taking into account all applicable provisions in the **CDSA**, and the common law. I repeat, it would be the rare case that would not justify a period of incarceration, even for first offenders, who traffic in, or possess Schedule 1 narcotics for the purpose of trafficking, especially with the presence of weapons as in this case. That is the message that should be sent to those who choose to traffic in such dangerous drugs.

Scanlan, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.