NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Butler***, 2008 NSCA 102

Date: 20081029
Docket: CAC 294552
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

David Anthony Butler, also known as
David Anthony Heroux

Respondent

Judges:	Roscoe, Bateman and Fichaud, JJ.A.
Appeal Heard:	October 15, 2008, in Halifax, Nova Scotia
Held:	Leave to appeal sentence granted but the appeal is dismissed per reasons for judgment of Bateman, J.A.; Roscoe and Fichaud, JJ.A. concurring.
Counsel:	James A. Gumpert, Q.C., for the appellant Philip J. Star, Q.C., for the respondent

Reasons for judgment:

[1] The Crown seeks leave to appeal and, if granted, appeals the sentence (23 month conditional sentence followed by 2 years probation; a 10 year firearms prohibition and a DNA order) imposed upon Mr. Butler in relation to robbery (s.344(b) **Criminal Code**) and probation violation (733.1(1) **Criminal Code**) offences.

Circumstances of the Offence

[2] The victim of the robbery is Lois LeBlanc, a taxi driver in Yarmouth, Nova Scotia. In the early morning hours of December 15, 2007, she responded to a request for a cab at the New Life Church. Upon arriving at that destination Mr. Butler jumped into the front passenger seat, held a knife pointed in her direction and demanded all her money. As she reached for her purse she asked him how much he wanted. He responded fifty dollars, which amount she gave him. Grabbing the change holder, in addition to the $50, he left the vehicle and ran down the street.

[3] After an investigation by the police Mr. Butler was arrested and charged. The plan to rob the cab had been hatched by him and others. It was unclear who had played the lead role in devising it. Mr. Butler confessed to police that during the day prior to the robbery he had smoked 2 grams of crack cocaine and needed money to buy more drugs. He pled guilty to the offences at an early stage of the proceedings.

[4] Lois LeBlanc filed a victim impact statement for the sentencing. She has been traumatized by the robbery, which has dramatically affected her sense of personal security.

[5] At the sentencing hearing the Crown recommended an incarcerative sentence of three years while the Defence sought a conditional sentence to be served in the community, the centerpiece being a residential program of drug rehabilitation operated by the Salvation Army in Halifax.

[6] Lt. Bob Elliott, Criminal Justice Program Director of the Salvation Army, a defence witness on the sentencing hearing, testified that the Salvation Army was

willing to admit Mr. Butler into the six month addiction program at the Booth Centre in Halifax. Lt. Elliott described the program as "probably the toughest thing" Mr. Butler would ever go through. He further testified that should Mr. Butler not comply with the strict terms of the program or those of his conditional sentence he would immediately be reported to the authorities.

[7] The judge imposed a 23 month conditional sentence which, in addition to the usual conditions, required the following,:

- Mr. Butler must reside at Halifax Booth Centre on Gottingen Street and participate in the Anchorage Addiction Program;

- following the 6 month Booth Centre residency that he be on house arrest at a residence approved by his supervisor except for employment, education, health appointments, rehabilitation treatment assessment and counselling;

- he must have no contact with the victim;

- he must attend for substance abuse assessment, counselling and treatment;

- he must refrain from possession of alcohol and non-prescription drugs.

- he must make monetary restitution of $70 to the victim within the first six months of the sentencing order;

- he must not associate with persons with a known criminal, youth or drug record.

[8] The conditional sentence is followed by a two year period of probation containing the same conditions with the exception of the house arrest and attendance at the Booth Centre drug rehabilitation program.

ISSUES

[9] The Crown says the sentence inadequately reflects the objectives of denunciation and deterrence; is inadequate for the offences committed; and that the judge erred at law by failing to follow the proper procedure in imposing a conditional sentence.

STANDARD OF REVIEW

[10] Recently in **R. v. L.M.**, 2008 SCC 31, the Supreme Court of Canada reaffirmed the high level of deference due to sentencing decisions. LeBel, J., wrote for the majority:

> 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" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
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> > ... 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.
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> . . .
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> 15 Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required - for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. - to show deference to the sentence imposed by the trial judge.

[11] This deference is driven by the individualized and discretionary nature of the sentencing process. LeBel, J. continued:

> 17 Far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process (s. 718.3 *Cr. C.*; *R. v. Johnson*, [2003] 2 S.C.R. 357, 2003 SCC 46, at para. 22; *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82). To arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender, the judge must weigh the normative principles set out by Parliament in the *Criminal Code*:
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> > - the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders, and acknowledgement of and reparations for the harm they have done (s. 718 *Cr. C.*);
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> > - the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1 *Cr. C.*); and
> >
> > - the principles that a sentence should be increased or reduced to account for aggravating or mitigating circumstances, that a sentence should be similar to other sentences imposed in similar circumstances, that the least restrictive sanctions should be identified and that available sanctions other than imprisonment should be considered (s. 718.2 *Cr. C.*).

[12] Appellate deference to the sentence imposed applies only in the absence of either an error in principle or an over or under emphasis of relevant factors.

ANALYSIS

[13] The Booth Center is a Salvation Army facility on Gottingen Street in Halifax. It offers various services including a six month residential rehabilitation program for major drug addictions. It houses twenty men. The residents participate in a structured combination of community based and in-house programs.

[14] Lt. Elliot and the program's senior counsellor conducted an assessment of Mr. Butler to determine the extent of his addiction and his motivation to rid himself of it. Based upon that assessment they were willing to accept him into the

program if authorized by the Court. With the Court's approval, Mr. Butler would be escorted by Lt. Elliot from court directly to the Booth Center. The program requires strict adherence to its own house rules as well as compliance with the terms of the individual's community release.

[15] Mr. Butler was 21 years old at the time of this offence (d.o.b. 10 October, 1986). According to the Pre-Sentence Report, in his early years he lived in Yarmouth with his father and step-mother. He did not meet his biological mother, who resides in British Columbia, until he was 12 years old. He has Attention Deficit Hyperactivity Disorder as a result of which he was, by his own account, somewhat hard to manage at home. He left home to live on his own at age 16 having achieved only a grade 8 education. At age 16 and again at 18 he moved to live with his mother in British Columbia for short periods of time. His drug use began during his initial visit. Upon returning to Yarmouth at age 17 he first encountered trouble with the law which was related to his drug addiction. His abuse of drugs continued up to the time of this offence.

[16] After leaving school Mr. Butler earned about $16,000 annually in the lobster fishing industry, but his income went primarily to debt repayment and drug use. The police observed to the report writer that Mr. Butler appeared to have a drug addiction and to have involved himself with a negative peer group.

[17] He has a prior criminal record. On October 17, 2005 he was sentenced for a collection of offences committed in March, June and November of 2004. These included common assault, impaired and dangerous driving offences and theft. For the earlier offences he was sentenced under the **Youth Criminal Justice Act**, S.C. 2002, c. 1 (**YCJA)** Having reached the age of eighteen in October, 2004, he was considered an adult on sentencing for the November offences**.** He received concurrent periods of eighteen and twenty-four months probation and a driving suspension. In August of 2005 he was sentenced for a further **YCJA** offence committed in March, 2004 (possession of marijuana) as well as a second (unspecified) offence committed in June, 2006. In each case he was fined. Mr. Butler was still bound by the October, 2005 probation order when he committed this offence.

[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.

[21] Section 742.1 of the **Criminal Code** authorizes "conditional sentences", which is a sentence of imprisonment of less than two years, to be served in the community. The Crown says that the judge erred in principle in failing to follow the procedure outlined by the Supreme Court of Canada in **R. v. Proulx**, [2000] 1 S.C.R. 61; S.C.J. No.6 (Q.L.), required when a judge is considering a conditional sentence.

[22] A conditional sentence is not available unless the judge is satisfied that the appropriate sentence for the offence is a custodial one of less than two years (**Proulx**, paras. 58 and 59; s. 742.1(a)). The Crown says the judge failed to consider this threshold requirement.

[23] This Court has repeatedly held that the starting point for robbery is a penitentiary term of three years. Occasionally, the sentence might go as low as two years (**R. v. Longaphy**, 2000 NSCA 136, [2000] N.S.J. No.376 (Q.L.) (C.A); **R. v. Bratzer**, 2001 NSCA 166, [2001] N.S.J. No.461 (Q.L.)(C.A.); **R. v. Johnson**, 2007 NSCA 102, [2007] N.S.J. No.430 (Q.L.)(C.A.); **R. v. Benoit**, 2007 NSCA 123, [2007] N.S.J. No.512 (Q.L.)(C.A.)). Of course, a starting point is not a rigid position from which a sentencing judge cannot depart. There will be special circumstances where a fit sentence falls below that range. Indeed, this Court has recently declined to interfere with a conditional sentence on a robbery conviction (see **R. v. Bratzer**, **supra**) upon being satisfied that the offender's circumstances were truly exceptional.

[24] Here, however, the judge does not appear to have turned his mind to the threshold requirement. In his sentencing reasons neither does he refer to the approximate three year starting point nor explain, in view of that starting point, how he concluded that a fit sentence would be a "custodial term" of twenty-three months. It is the Crown's submission that in the absence of express recognition of the threshold requirement, given a usual starting point of three years, the only reasonable inference is that the judge missed this essential step in the **Proulx** analysis.

[25] As the Crown rightly points out, those who work alone during the night-time hours such as taxi drivers, gas station attendants, convenience and fast food store operators, are particularly vulnerable to attacks by persons looking for easy cash. Such crimes cry out for a sentence emphasizing denunciation and deterrence (**R. v. Bratzer**, **supra**, para. 15). This was a premeditated armed robbery on one such vulnerable victim. In such a case it is incumbent on the judge to consider whether the circumstances of the crime are such that adequate denunciation and deterrence can only be accomplished through an incarcerative sentence (see **R. v. Proulx, supra**, at paras. 67, 106 and 107).

[26] The Crown's second point is that the judge improperly used the credit for remand time to reduce the sentence to less than two years. In **R. v. Fice**, [2005] 1 S.C.R. 742, the Supreme Court of Canada held that time spent in pre-trial custody cannot reduce the appropriate range of sentence to be considered at the first stage of the **Proulx** analysis. Time spent in pre-trial custody is relevant only to the

length of the conditional sentence, not its availability. Bastarache, J., writing for the Court, explained:

> [24] The conclusion that the appropriate range of sentence is dependent on the gravity of the offence and the degree of responsibility of the offender begs the question: what effect does pre-sentence custody have on these two concepts? In my view, spending time in custody pre-sentence in no way changes the gravity of the offence, the degree of responsibility of the offender, or, as it was put in *Proulx*, the "type of offender". Thus, it is clear that the time spent in pre-sentence custody is not a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence.
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> ...
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> [29] In my view, the time spent in pre-sentence custody ought to be considered at the second stage of the analysis with respect to the duration of the sentence rather than at the first stage with respect to sentence range. I have already explained above why the time spent in pre-sentence custody should not affect the range of the sentence. Let me now explain why this factor ought to be considered with respect to the duration of the sentence.
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> ...
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> [33] For all these reasons, I conclude that the time spent in pre-sentence custody should not affect a sentencing judge's determination of the range of sentence and therefore the availability of a conditional sentence. Rather, it is a factor that ought to be considered in the course of the judge's determination of the duration of the actual sentence imposed. To hold otherwise would run contrary to the nature of the conditional sentencing regime, as it was defined in *Proulx*.

[27] The credit for pre-trial custody is within the discretion of the sentencing judge. A judge is not obliged to give 2:1 or, indeed, any credit for remand time. As was explained in **R. v. R.K.A.**, 2006 ABCA 82, [2006] A.J. No. 307 (Q.L.) (C.A.), Paperny, J.A., writing for the Court:

> 5 That credit for pretrial custody is a matter of judicial discretion is well accepted: *R. v. Wust*, [2000] 1 S.C.R. 455. Judges are not required to mechanically apply any formula for pretrial custody but are instructed to consider time in custody in arriving at a fit sentence. While a practice has developed whereby courts frequently grant credit for pretrial custody on a two for one basis, such credit is not mandated nor necessarily warranted in all circumstances. Courts have upheld sentences where credit has been denied entirely and where it has

> been denied on the commonly accepted two to one ratio: *R. v. Millward* (2000), 271 A.R. 372, 2000 ABCA 308; *R. v. Austin* (1996), 78 B.C.A.C. 249. In departing from the practice, however, it is important that a trial judge articulate his or her reasons for doing so.
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> (Emphasis added)

(see also **R. v. Roulette**, [2008] M.J. No. 336 (C.A.))

[28] Here, the Crown attorney expressly referred to the remand time and proposed that Mr. Butler receive credit at the usual 2:1 resulting in an eleven month equivalent. The judge made no mention of remand credit in his reasons for judgment. Given the usual starting point for robbery, the Crown says the only reasonable inference is that the judge impermissibly used the credit to reduce the sentence into the conditional range (see **R. v. Fice**, **supra** and **R. v. Benoit**, **supra**).

[29] In **R. v. Sheppard**, [2002] 1 S.C.R. 869 the Court highlighted the importance of reasons in explaining the path taken by the judge through confused or conflicting issues in arriving at a decision to convict or acquit (at para. 46). This requirement applies equally to sentencing determinations (**R. v. Lamouche**, 2004 ABQB 638,[2004] A.J. No. 1184 (Q.L.); **R. v. Craig** [2003] O.J. No. 3263; **R. v. MacLean**, 2004 ABCA 353, [2004] A.J. No. 1276 (Q.L.)(C.A.)). Indeed, Section 726.2 of the **Criminal Code** requires the judge to give reasons for sentence. With respect, these reasons are insufficient to allow us to meaningfully consider these two important issues raised by the Crown: whether the judge considered the threshold availability of a conditional disposition and his treatment of the remand credit (**R. v. Abourached**, 2007 NSCA 109; [2007] N.S.J. No. 470 (C.A.) (Q.L.) at paras. 51 and 55 to 60). If the judge credited remand time before arriving at 23 months, then he would have defined a threshold sentence exceeding the maximum permitted for a conditional sentence by s 742.1 of the **Code**. If, on the other hand, the judge did not credit remand time, then his 23 month threshold would depart significantly from the sentencing principles established by the authorities for this crime, and this Court would have to consider fitness. The first alternative involves a different analytical path and standard of review for the Court of Appeal than does the second. So the ambiguity in the reasons seriously affects the ability of this Court to determine the appeal. This lack of clarity in the reasons is an error of law justifying appellate review of the sentence.

[30] Having found that this Court is justified in interfering with the sentence we must determine a fit disposition. In so doing I would respect the factual findings of the judge, referenced at para. 20 above, as they are clearly supported by the record. I would agree that this offence was driven by Mr. Butler's addiction for which he had not received treatment in the past. Mitigating factors included his relative youth; his apparently sincere expression of remorse and acceptance of responsibility; his early guilty plea; and the fact that he completed an addiction course while on remand.

[31] However, this was a serious, premeditated crime of threatened violence which carries a possible life sentence and a usual starting point in the three year range. Aggravating factors include the fact that his victim was a particularly vulnerable member of society; that Mr. Butler was on probation at the time of the offence; that he has a prior record of multiple convictions including two breaches of undertakings. The fact that the victim suffers lasting emotional effects is to be considered in the context of the gravity of the offence.

[32] Mitigating the length of sentence is the fact that this would be a first incarceration for Mr. Butler. In **R. v. Riley**, [1996] N.S.J. No 183 (Q.L.)(C.A.) at para 26, the Court approved the following statement from *Ruby on Sentencing*, 4th ed at page 204):

> The proper sentencing of first offenders requires that the sentencing judge exhaust all other possibilities before concluding that imprisonment is required. . . thus, in examining the possibility of a custodial term, the court should ask whether it is 'the only appropriate sentence to be imposed'. <u>One may be treated as if one were a first offender, in appropriate circumstances, if a custodial sentence has never been imposed, or even if one has served only a very minor term of imprisonment</u>. The notion that a first offender should be treated leniently in the hope that lesser punishment would be effective has been characterized as 'doubly so' in the case of youthful first offenders. There is a presumption of fact that one who has not offended previously is capable of reform and not to be dealt with accordingly.
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> (Emphasis added)

[33] Sentences for youthful offenders should, where appropriate to the circumstances, lean toward rehabilitation rather than general deterrence (see **R. v. Bratzer**, **supra**, at paras. 40 to 42).

[34] Given his youth; the fact that this would be a first incarcerative sentence for Mr. Butler; the real prospect that he is genuinely motivated to conquer his drug addiction; and, significantly, the fact that it is that addiction that drives his criminal actions, I would find a fit sentence would have been a thirty month penitentiary term, before credit for remand time, followed by two years probation.

[35] With the agreement of counsel we have received a post-sentence report about Mr. Butler. Obviously it provides information which was unavailable to the sentencing judge. In **R. v. Simon**, 2007 MBCA 97, [2007] M.J. No. 318 (Q.L.)(C.A.), the Manitoba Court of Appeal reviewed, in detail, the authority for taking into account post-sentence conduct in determining fitness of sentence (at paras. 27 to 30).

[36] The detailed September 8, 2008 post-sentence report is unequivocally positive. I will highlight some of Supervisor, Greg Sullivan's comments:

> ... Mr. Butler is honest and forthcoming with respect to his addiction to cocaine, and appears sincere and committed in his efforts to overcome this problem. He has been participating fully in the Anchorage Addictions program, and [this] writer has consistently received nothing but positive reports from Addictions Counsellors at the Anchorage program.
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> . . .and
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> [Program Assistant Rick Macdonald] feels Mr. Butler has a desire to live a life of sobriety, and is working hard to achieve this new lifestyle. Mr. Macdonald added Mr. Butler has never been absent from a group session except for professional appointments, and noted he has shown great determination to move forward in his recovery. Mr. Macdonald stated Mr. Butler has also been working to improve his future by setting realistic and attainable goals, and taking advantage of other programs offered at the center . . .and is expected to receive a certificate of completion of the program in mid-September.
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> ...
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> In anticipation of completion of the Anchorage program, Mr. Butler has enrolled in the Level II Adult Learning Program at the Cunard Learning Centre, located at St. Patrick's Alexandra School in Halifax. . . his intentions are to achieve high school equivalency through the program in order to attend a community college in the future. Mr. Butler has been able to secure funding for this program through

> Employment Insurance, as well as a grant from Service Canada through the Skill Development Employment Benefit program which will fund up to $11,000 towards his educational upgrading.
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> ...
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> This writer has been supervising Mr. Butler since the commencement of his Conditional Sentence Order. Mr. Butler has shown full compliance to this Order to date. His reporting habits are excellent, and he appears to provide information in an honest and forthright manner. He appears to be sincerely motivated to attain productive goals such as sobriety, education, and employment. He has set realistic goals for himself and has shown an initiative in improving his lifestyle. Despite his relatively young age, Mr. Butler has a great deal of insight into his addiction issues, and appears quite aware of the challenges he will continue to face in dealing with his addictions. In this sense, he has shown a maturity level beyond what one might expect from a person of his age. The Conditional Sentence Order also directs Mr. Butler to be subject to electronic supervision as directed by the supervisor. This tool of supervision has not been utilized to date on Mr. Butler, as he has been residing in a supervised setting. However, it is the intention of the undersigned to monitor Mr. Butler via electronic monitoring ankle bracelet when he moves out of the Anchorage program and to his new address. . .
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> . . .
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> In summary, Mr. Butler has been addressing his addiction issues, and has not relapsed during the course of this Order. He has set realistic and attainable education/employment goals for himself for the future, and appears to appreciate the gravity of the order he is serving. He has presented no compliance issues to date, and has been cooperative and pleasant to deal with. Mr. Butler has incurred no new criminal charges during the course of this Order and has no pending matters before the court.

[37] Filed, as well, is a letter from the Cunard Learning Centre confirming that Mr. Butler is a student in good standing and that he has maintained excellent attendance and takes an active part in each class.

[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.

[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.)).

[41] While I would grant leave to appeal sentence, in the circumstances, I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.