PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Masters*, 2017 NSPC 75

Date: 20171020
Docket: 8017629
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

David James Masters

DECISION

JUDGE: The Honourable Frank P. Hoskins

DECISION: October 20, 2017

CHARGE: That on or about the 21st day of August, 2016 at, or near Dartmouth, Nova Scotia did unlawfully have in their possession, for the purpose of trafficking, Methamphetamine, a substance included in Schedule 1 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and thereby commit an offence contrary to Section 5(2) of the said Act.

COUNSEL: Glen Scheuer, for the Crown
Patrick Atherton, for the Defence

By the Court (Orally)**:**

Introduction

[1] Mr. Masters pleaded guilty to the offence of having in his possession, for the purpose of trafficking, a substance included in Schedule 1 of the *Controlled Drugs and Substances Act,* (*CDSA*) and thereby committed an offence contrary to s. 5(2) of the said *Act*.

[2] In assessing the issue of what is the appropriate and just disposition for this offence and offender, I have carefully considered and reflected on the following: the circumstances surrounding the commission of the offence and the offender, Mr. Masters, the relevant statutory provisions, including s. 10 of the *CDSA* and s. 718 of the *Criminal Code*; the case law regarding sentences for trafficking in Schedule 1 offences; the submissions of counsel; the Pre-Sentence Report dated September 12, 2017, and the confirmation letter from Direction 180, and the letter from NSCC Akerley Campus confirming Mr. Masters enrollment at the school.

Background of Proceedings

[3] Mr. Masters pleaded guilty after numerous court appearances.

[4] Mr. Masters was released on an Appearance Notice dated August 21, 2016 without conditions other than the condition to attend court. There were no restrictive or onerous conditions imposed upon his liberty during this extended period of time.

[5] The sentence hearing was adjourned until today's date so that I could take the necessary time to consider the thorough and able submissions of both Crown and Defence counsel.

Circumstances of the Offence

[6] The circumstances surrounding the offence are not in dispute. The Crown has succinctly stated the facts as follows:

> The Police conducted a search of a motor vehicle in which Mr. Masters and another passenger were in and seized a white plastic bag containing pills, and a used crack pipe.
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> Both occupants were arrested. The police seized 198 tablets of methamphetamine (ice pills), two cell phones, which contained text messages relating to trafficking. The approximate value of each pill is between $3.00 to $5.00, for an approximate total value of $792, at $4.00 per pill.

The Aggravating Circumstances of the Offence

[7] There are no aggravating factors as contemplated under s. 10 of the *CDSA*, nor are there any overt aggravating factors such as the presence of firearms or weapons.

[8] The inherent nature of this offence, however, is aggravating because it requires a degree of planning and aforethought. Based on the undisputed facts, I am forced to the inescapable conclusion that Mr. Masters made a conscious and deliberate choice to engage in trafficking in a Schedule 1 substance.

[9] It is aggravating that Mr. Masters was in possession of methamphetamine, as it is a Schedule 1 offence, for the purposes of trafficking. The possession of a Schedule 1 offence is seen as a grave offence with a high degree of moral blameworthiness that requires emphasis on the overarching principles of denunciation and general deterrence, which will be specifically addressed later on in these reasons.

[10] The Crown and Defence have classified Mr. Masters as a *petty retailer* as defined in *R. v. Fifield*, [1978] N.S.J. No. 42 (C.A.). In that case, the Court of Appeal categorized drug traffickers based on the type and amount of drugs involved, and the level of involvement in the drug business, to assist in placing them within the appropriate sentence range. Thus, the amount of drugs involved helps determine the quality of the act or probable category of trafficker.

Mitigating Factors Surrounding the Offence and Mr. Masters

[11] As stated, the amount of illicit substance in Mr. Masters' possession places him in the lower categories of drug traffickers described in *Fifield*.

[12] Mr. Masters has pleaded guilty and has accepted responsibility for the offence, thereby saving substantial resources to the justice system.

[13] He has also expressed genuine remorse, and a sincere desire to seek treatment and/or counselling, which he understands and appreciates that he needs.

[14] The Pre-Sentence Report is relatively positive, as it suggests that Mr. Masters is motivated to make the necessary changes in his life to assist in his rehabilitation, including participating in meaningful treatment programs and/or counselling.

[15] Mr. Masters is a first offender. He has no criminal record.

[16] He is only 24 years of age. He is a youthful, first offender.

[17] Mr. Masters was motivated by his need to feed his drug addiction. In *R. v. Andrews*, [2005] O.J. No. 5708 (S.C.), Hill, J., emphasized the significance of the distinction between a drug addict, who is trafficking for the purpose of supplying his or her habit, and the non-addict, who is trafficking purely out of motives of greed.

[18] At the age of 15 Mr. Masters was sexually assaulted, and has to endure the effects of that trauma.

[19] Mr. Masters has recently gained more insight into his addiction, and perhaps the underlying causes of that addiction can be addressed. He has sought treatment and has expressed a desire to continue counselling and/or treatment.

The Personal Circumstances of Mr. Masters

[20] Mr. Masters was 23 years of age when he committed the offence, in August, 2016. As previously stated, he is a youthful offender. This is his first offence as he has no previous convictions.

[21] The content of the Pre-Sentence Report reveals that Mr. Masters has had a positive upbringing, which included strong family and community support. He has endured the impact of being sexually abused at the age of 15.

[22] During his formative years, Mr. Masters resided with his mother and father. At 20, he lived with his girlfriend. After three years, that relationship ended and Mr. Masters returned home to his parents.

[23] In 2017, Mr. Masters moved to British Columbia to work. While there he lived with his friends, and returned to his parents' home in May 2017.

[24] Mr. Masters' mother was interviewed by the author of the Pre-Sentence Report. Ms. Masters was surprised to learn that her son was involved in the offence as she never expected him to be involved in such activity. She commented that there were no concerns with her son as a child.

[25] Ms. Masters acknowledged that her son has a drug addiction. She indicated that he is seeking treatment, and seems to be doing well. She added that she believes that her son may be suffering from depression.

[26] She also added that her son needs to disassociate with some of his peers who have a bad influence on him, as he is easily led by others. Ms. Masters added that she and her husband are very supportive of her son, and are prepared to provide the necessary support in his rehabilitation. Ms. Masters also commented that she believes that her son requires treatment and counselling to deal with past issues. She confirmed that her son was sexually abused when he was young, and added that her son wants to "shut it out", but she believes he needs to deal with it, if he is going to fully rehabilitate.

[27] It is noted in the Pre-Sentence Report that Mr. Masters has applied to the carpentry program at Nova Scotia Community College. The letter proffered in the sentencing hearing confirms his admission.

[28] Mr. Masters recognized in the Pre-Sentence Report that his consumption of illicit substances has caused issues for him. He noted that he started consuming marijuana then consumed Ketamine (an anesthetic), and then opiates and Dilaudid. He admitted that he has also taken drugs intravenously.

[29] In August 2016, Mr. Masters attended a 21-day treatment program, but did not complete the program as he left it a few days early. However, he reported that he has been seeking counselling since May 2017.

[30] Mr. Masters reported to the author of the Pre-Sentence Report that he is a participant in the Opioid Replacement Therapy Program offered through Directions 180 since May 2017. The letter from Direction 180 confirms that his admission date was May 25, 2017. Mr. Masters reported that he feels that he has made great improvements with this program, and plans to continue.

[31] Mr. Masters reported to the author of the Pre-Sentence Report that while he recognizes that he has made progress, he has a long way to go.

[32] The author of the Pre-Sentence Report further noted that Mr. Masters has attended appointments with a addictions counsellor. He attended his appointment in May 2017, and has had two meetings thereafter. He also noted that Mr. Masters failed to report in July 2017, and had made no further contact with his counsellor's office; that is, at the time of the writing the report.

[33] With respect to the offence, for which he has pled guilty and accepted responsibility, he reported to the author of the Pre-Sentence Report that he had been selling drugs to support his addictions. He also told the author of the report that the drugs he had in his possession were not what he wanted, as he was attempting to trade them for Dilaudid.

[34] Mr. Masters professed to the author of the report that he has been deterred from re-offending and stressed that by being in the Opioid Replacement Therapy Program, he will not re-offend.

[35] Mr. Atherton, counsel for Mr. Masters, emphatically stated that Mr. Masters has learned his lesson as demonstrated by his recent conduct in following up with counselling and treatment. In other words, he is back on the right track, after committing a serious transgression, has learned from it, and is desirous of continuing down the right path by working hard, and by becoming a productive member of society.

[36] The Defence contends that the prospects for Mr. Masters' successful rehabilitation are very real as demonstrated by his recent conduct, which shows that he has more insight; in that, he now understands and appreciates he needs treatment and/or counselling.

The Applicable Legislation

[37] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M.* (C.A.) (1996), 105 C.C.C. (3d) 327 and Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources, and the common law jurisprudence that courts must turn in determining the proper sentence to impose.

[38] It is trite to say that the imposition of a just and appropriate sentence can be difficult a task as any faced by a trial judge, as it was in this specific case. However, as difficult as the determination of a fit sentence can be, that process has a narrow focus. The Court aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings. Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[39] Although the sentencing process is highly contextual and necessarily an individualized process, the judge must also take into account the nature of the offence, the victims and community. As Lamer, C.J., (as he then was) noted in *M.* (C.A.), sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well.

[40] As previously mentioned, sentencing of drug offenders is governed by the specific sentencing principles enunciated in the *CDSA* in conjunction with the more general principles of sentencing provided for in s. 718 of the *Criminal Code*.

[41] The fundamental purpose to be pursued in sentencing drug offenders is to contribute to respect for the law and the maintenance of a just, peaceful and safe society, taking into account the rehabilitation and, where appropriate, the treatment of offenders, and acknowledging the harm done to victims and the community.

[42] In addition to complying with these principles of sentencing, dispositions or sentences must promote one or more of the six objectives identified in s. 718; (a) to (f), inclusive.

[43] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective, or combination of objectives deserves priority. Section 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing, which is the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[44] In addition to the specific sentencing principles articulated in s. 10(1) of the *CDSA*, s. 10(2) of the *CDSA* identifies a number of aggravating factors that must be considered by the Court when sentencing drug offenders.

[45] I am also mindful of the principle of restraint which underlies the provisions of s. 718 of the *Criminal Code*.

[46] Accordingly, in accordance with s. 726.2 of the *Criminal Code*, what follows are my reasons for imposing the sentence that I view as a "just and appropriate", "a fit and proper sentence" for this offender and for this offence.

Position of the Crown

[47] The Crown submits that the range of sentence for this offence and offender, is two years in a federal institution because of the mitigating factors, but contends that there are no *exceptional circumstances* in this case to warrant a departure from the normal range of a two to three year penitentiary sentence.

Position of the Defence

[48] Defence contends that there are *exceptional circumstances* in this case that warrants a departure from the normal range of sentence for this offence and for this offender. The Defence submits that Mr. Masters is a youthful, first offender, who has learned his lesson, is making positive changes in his life, and sincerely wants to rehabilitate. Therefore, the Defence contends that a custodial sentence is not warranted, rather a suspended sentence coupled with probation will strike a just proportion between the circumstances surrounding the commission of the offence and the personal circumstances of Mr. Masters. In the alternative, the Defence further submits that if it is necessary to impose a custodial sentence then a short, sharp period of custody coupled with probation, to assist in his rehabilitation, would be appropriate having regard to all of the circumstances.

Analysis

[49] This is a very serious offence as reflected by Parliament's imposition of a maximum sentence of *life* imprisonment. Indeed, the Nova Scotia Court of Appeal has repeatedly stated, for more than 25 years (at least since 1984), that persons involved in trafficking in Schedule 1 offences will be subject to sentences of incarceration. For example, in *R. v. Steeves*, 2007 NSCA 130, at para. 18, the Court stated:

> [18] This court has been steadfast in emphasizing that deterrence is a primary consideration in sentencing for drug offences. In *R. v. Robins*, [1993] N.S.J. No. 152 (C.A.), Chief Justice Clarke stated at p. 1:
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> > . . . The position of this court, repeated in many of our decisions since **Byers**, is that there are no exceptional circumstances where cocaine is involved. We are persuaded that general deterrence must be prominently addressed if the public is to be protected from the nefarious trade that has developed in this drug that is so crippling to our society.
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> See also, for example, *R. v. McCurdy* [2002] N.S.J. No. 459 at para. 15.

[50] In *R. v. Butt*, [2010] N.S.J. No. 346 at para. 13, the Nova Scotia Court of Appeal, in addressing the devastating effects of cocaine, stated:

> [13] . . . cocaine has consistently been recognized by this Court as a deadly and devastating drug that ravages lives. Involvement in the cocaine trade, at any level, attracts substantial penalties (see, for example, *R. v. Conway*, 2009 NSCA 95; *R. v. Knickle*, 2009 NSCA 59, *R. v. Steeves*, 2007 NSCA 130; *R. v. Dawe*, 2002 NSCA 147; *R. v. Robins*, [1993] N.S.J. No. 152 (Q.L.) (C.A.); *R. v. Huskins*, [1990] N.S.J. No. 46 (Q.L.) (C.A.); and *R. v. Smith*, [1990] N.S.J. No. 30 (Q.L.) (C.A.)). It is significant that the CDSA classifies cocaine as one of the drugs for which trafficking can attract a life sentence.

[51] More recently, in *R. v. Oickle*, 2015 NSCA 87, Scanlan, J.A., stressed that sentences 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. He wrote, at para. 31:

> [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 trafficking of Schedule 1 drugs.

[52] The Nova Scotia Court of Appeal has repeatedly emphasized that deterrence is a primary consideration in sentencing for drug offences, especially offences involving trafficking in Schedule 1 offences or for possessing it for the purpose of trafficking. Thus, in the present case there must be a strong emphasis on the principles of *denunciation* and *deterrence*. Sections 718(a) and (b) of the *Criminal Code* identify denunciation and deterrence as appropriate objectives of sentencing. Where the primary objective of sentencing is denunciation, the sentence must publicly condemn the offender's conduct. Denunciation typically plays a more central role in drug offences involving dangerous drugs such as Schedule 1 offences because they pose an especially high risk to users and the community.

Where the primary objective is also deterrence, the sentence must attempt to discourage individuals through specific deterrence as well as to deter other potential offenders from committing similar offences by way of general deterrence. Where, as in this case, the primary purpose of sentencing is to deter and denounce this type of behaviour, the Court must ensure its sentence is perceived by the public as strong condemnations of this type of behaviour.

[53] While the Nova Scotia Court of Appeal has repeatedly and consistently stated that offenders involved in trafficking Schedule 1 offences should receive a *federal* term of incarceration as the norm, the Court has clearly recognized that there is no minimum punishment of imprisonment mandated for these specific offences. In other words, the Court of Appeal had not precluded the possibility of the imposition of a conditional sentence for persons involved in trafficking in cocaine, or involved in the possession of it for the purposes of trafficking, when it was available.

[54] In other words, the Court of Appeal has not created a judicial minimum punishment of imprisonment for theses type of offences, as that would be clearly inconsistent with what the Supreme Court of Canada stated in *R. v. Proulx*, [2000] 1 S.C.R. 61. In *Proulx*, Lamer, C.J., in delivering the judgement for the Court, recognized that conditional sentence orders, in some instances, satisfy the objectives of denunciation and deterrence. Indeed, tailored properly, a conditional sentence order can be very restrictive and punitive in nature.

[55] In *Steeves*, at para. 20, the Court held:

> [20] While time served in a federal penitentiary is the norm, this is not to say that conditional sentences are precluded for trafficking in cocaine. Conditional sentences have been imposed where the judge has determined that exceptional circumstances exist. See, for example *R. v. Cameron*, [2002] N.S.J. No. 163 (S.C.); *R. v. Provo*, [2001] N.S.J. No. 526, 2001 NSSC 189; *R. v. Messervey*, [2004] N.S.J. No. 520 (P.C.); and *R. v. Coombs*, [2005] N.S.J. No. 158, 2005 NSSC 90. Circumstances that are sufficiently exceptional as to change a sentence of incarceration for such a serious offence to one that can be served in the community are rare.

[56] In *Rushton*, 2017 NSPC 2, Buckle, J., observations, at paras. 81 to 90, are apposite. She wrote:

> [81] The Court, however, has never established that a federal penitentiary term is mandatory and has recognized that in some circumstances the principles of

sentencing can be otherwise satisfied. In those cases, shorter periods of custody served in a provincial institution or in the community under a conditional sentence order, when those were available, have been accepted. (See for example: *R. v. Scott (supra);* and, *R. v. Howell*, 2013 NSCA 67.)

[82] In *R. v. Scott (supra),* Beveridge, J.A., writing for the majority, concluded that it was not necessary for a sentencing judge to find "exceptional" circumstances to justify a sentence lower than two years for trafficking cocaine (at para. 53). The task of a sentencing judge in imposing a sentence for cocaine trafficking is the same as any other offence – "considering all of the relevant objectives and principles of sentence as set out in the *Criminal Code*, balancing those and arriving at what that judge concludes is a proper sentence" (para. 26).

[83] I take from his reasons that while it may be rare for a cocaine trafficker to receive a sentence less than a federal penitentiary sentence, where the proper application of sentencing principles justifies that result, a sentencing judge is not required to make any specific conclusion that the circumstances are exceptional.

[84] In the more recent decision of *Oickle (supra),* Scanlan, J.A. does not comment on whether "exceptional" circumstances are required but he specifically declines to set a hard and fast bottom or top boundary to the range (para. 40). He does, however, make it clear that the message to potential Schedule I traffickers should continue to be that incarceration will be the normal sentence (at para. 61).

[85] Based on the majority decision in *Scott (supra)* and its interpretation of the previous cases, I would say that the range in Nova Scotia for cocaine trafficking includes incarceration in a penitentiary and incarceration in a provincial institution or a lengthy conditional sentence order (when that was an available sentence). The lower end of the range has generally been used in cases involving one or more of the following: addictions; youth; limited or no prior record; relatively small amount of the drug; some hope of rehabilitation; and, absence of aggravating factors.

[86] As was noted in *Oickle (supra),* the range across Canada is broader and includes, in some provinces, intermittent sentences or suspended sentences with probation (see for example: *R. v. Peters*, 2015 MBCA 119; *R. v. McGill*, 2016 ONCJ 138; *R. v. Maynard,* 2016 YKTC 51; *R. v. Voong*, 2015 BCCA 285; *R. v. Carrillo*, 2015 BCCA 192; *R. v. Fergusson*, 2014 BCCA 347; *R. v. Arcand,* 2014 SKPC 12; and, *R. v. Yanke*, 2014 ABPC 88).

[87] Sentencing ranges are important. They are intended to encourage greater consistency between sentences and respect for the principle of parity. However, "they are guidelines rather than hard and fast rules" (*R. v. Nasogaluak*, 2010 SCC 6 at para. 44). This was recognized by Scanlan, J.A. in *Oickle (supra)* at para. 40 when he said "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". He went on to quote 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. ...
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> [88] Sentencing judges are permitted to go outside the established range for a given offence as long as the sentence imposed is a lawful sentence that adequately reflects the principles and purposes of sentencing (*Nasogaluak (supra),* at para. 44). This was recently affirmed by the Supreme Court of Canada in *Lacasse (supra),* where Wagner, J., writing for the majority, said as follows:
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> > [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. ...

[57] Finally, s. 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders. This is particularly so, in the case of a youthful offender or a first offender (See: *Priest*, [1996] O.J. No. 3369). While Mr. Rushton is not a first offender, these are his first adult offences and he has only a limited youth court record.

[58] I am required to consider alternatives to imprisonment and impose an alternative if it is reasonable in all the circumstances. The circumstances would include the circumstances of the offence and the offender as well as the statutory and common law principles of sentencing.

[59] In view of all of the foregoing, it seems that although the range for the offence of trafficking in Schedule 1 is two or more years, there are cases where the circumstances are sufficiently mitigating to warrant a sentence of less than two years of imprisonment. (See, for example: *Dawe*; and *Robbins*; *Rushton*; and *Christmas)*. Indeed, there are cases where conditional sentences have been

imposed where the judge has determined that *exceptional circumstances* exist. (See, for example: as noted in *Steeves*; *Cameron*; *Provo*; *Messervey; Coombs*; and more recently, *R. v. Scott,* [2012] N.S.J. No. 80).

[60] It is of significance that Mr. Masters is a youthful, first offender, as the *Stein* principle must be considered, which expresses the notion of restraint which underlies the purpose and principles of sentencing.

[61] The first offender principle requires the sentencing judge to exhaust all other dispositions before imposing a custodial disposition on a first-time offender. The authority for this proposition is found in the seminal case of *R. v. Stein* (1974), 15 C.C.C. (2d) 376 at para. 4 wherein Martin, J.A., on behalf of the Ontario Court of Appeal, stated:

> [4] … In our view before imposing a custodial sentence upon a first offender the sentencing Court should explore the other dispositions which are open to him and only impose a custodial sentence where the circumstances are such, or the offence is of such gravity that no other sentence is appropriate. …

[62] The primary objectives in sentencing a first offender are individual deterrence and rehabilitation *unless* the offence is of such gravity that no other disposition aside from a period of custody is appropriate. In other words, there are certain very serious offences including Schedule 1 offences, and offences involving violence, which require a custodial sentence notwithstanding that the offender has an unblemished past, is of good character, and accepted responsibility for the commission of the offence.

[63] The first offender principle has been codified in ss. 718 and 718.2 of the *Criminal Code*. Section 718(c) instructs that the separation of offenders from society is an objective of sentencing - *where necessary*. Section 718.2(d) directs that - *an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.* Further, s.718.2(e) is remedial in nature, not simply a re-affirmation of existing sentencing principles. It applies to all offenders and requires that - *all available sanctions other than imprisonment, that are reasonable in the circumstances should be considered for all offenders*. Section 10 of the *CDSA* incorporates these principles and specifically requires that a sentence encourage treatment of offenders in appropriate circumstances.

[64] In *Priest* at para. 20, Rosenberg, J.A.'s, comments are apposite:

> [20] The duty to explore other dispositions for a first offender before imposing a custodial sentence is not an empty formalism which can be avoided merely by invoking the objective of general deterrence. It should be clear from the record of the proceedings, preferably in the trial judge's reasons, why the circumstances of this particular case require that this first offender must receive a sentence of imprisonment. …

[65] Similarly, in *Laschalt*, [1993] M.J. No. 193, at p. 1, Sinclair, J., of the Manitoba Court of Appeal, stated:

> The imprisonment of non-violent first offenders is counterproductive. It strains a system already strained by more violent and repeat offenders than it can rehabilitate. It often results in a first offender emerging bitter and more ready to commit further crimes. Better that a non-violent, first offender be punished in another way.

[66] The so-called first offender principle is a good illustration of the application of the principle of restraint in the sentencing process. However, its application is restricted where the offence is of such gravity that no other sentence is fit. For instance, in certain drug cases, crimes of violence such as armed robbery, violent home invasions and brutal assaults, requires the sentencing judge to place emphasis upon the principles of denunciation and deterrence.

[67] Moreover, as stressed by Judge Buckle in *Rushton*, rehabilitation continues to be a relevant objective even in cases requiring that denunciation and deterrence be emphasized. I would add, especially in cases involving young, first offenders who have potential to rehabilitate such as Mr. Masters. As Buckle, J., wrote:

> [65] Rehabilitation continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized. This was recently confirmed by the Supreme Court of Canada in *Lacasse* (*supra)* where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said:
>
> > One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate. (at para. 4)
>
> [66] The rehabilitative objective of sentencing is even more important when dealing with youthful offenders. This principle has been recognized and applied by our Court of Appeal even in cases where the nature of the offence requires that denunciation and deterrence be paramount. For example, in *R. v. Bratzer* (2001

NSCA 166), the court upheld a conditional sentence for a youthful offender convicted of three counts of robbery. In writing the judgement of the Court, Bateman, J.A., said the following:

> 40 There is ample authority for the proposition that sentences for youthful offenders should be directed at rehabilitation and reformation, not general deterrence. (R. v. Leask [1996] M.J. No. 587 (Quicklaw) (C.A.); R. v. Demeter and Whitmore (1976), 32 C.C.C. (2d) 379 (Ont. C.A.); R. v. Casey, [1977] O.J. No. 214 (Quicklaw) (Ont. C.A.)). This is common sense. A youthful offender, particularly one such as Mr. Bratzer, who has an interest in a vocation and can be equipped with the tools to earn an honest living, is more likely to be diverted from a life of crime than would a career criminal.

[67] Bateman, J.A., went on to quote with approval from the Ontario Court of Appeal decision in *R. v. Quesnel,* (1984), 14 C.C.C. (3d) 254:

> In sentencing the respondents as he did, the trial judge acknowledged that the sentences "will undoubtedly be considered lenient in the circumstances". After indicating that he was not satisfied that the respondents were incorrigible, the trial judge explained that he was proceeding on the basis that "a chance for rehabilitation remains" and in "the hope that something good" could come of the sentences thus imposed. Clearly he regarded the sentences as a last chance being offered to the respondents to turn their lives around.
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> There can, of course, be no quarrel with the proposition that from time to time a judge sentencing a convicted person, particularly a youthful one as in this case, should indeed "take a chance" on such person by exercising leniency in circumstances where leniency might not otherwise appear to be called for. In our opinion, however, there must be some factor present in the case before the sentencing judge that is sufficient to warrant a reasonable belief on his part, going beyond a mere hope, that the leniency proposed to be extended holds some prospect of succeeding where other dispositions available to him may fail.
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> Whether the factor present is an indication of remorse, a glimpsed change in attitude on the part of the convicted person, or some other sign or signal that the convicted person may have learned something beneficial from his or her past and present encounters with the criminal justice system, there must be something positive weighing in his or her favour which can be looked to to support the judge's chosen course of action.

[68] In view of these observations, the law does indeed confirm that there is a place for leniency when sentencing youthful offenders, even for serious offences such as the offence in the present case.

[69] Having carefully considered and weighed all of the mitigating factors earlier identified in this case against the seriousness of the offence and the normal range of sentence for this specific offence and offender, I am of the view that a custodial sentence is warranted followed by a significant period of probation, which recognizes the mitigating factors surrounding the offence and offender, Mr. Masters. A custodial sentence is warranted, notwithstanding that Mr. Masters is a youthful, first offender. The cumulative weight of all of the mitigating factors justify leniency or reduction in the imposition of a custodial disposition, but does not warrant, in my view, a non-custodial disposition, as was the case in *Rushton.*

[70] Put differently, I do not find that the cumulative weight of the mitigating factors sufficient to justify the imposition of a non-custodial disposition. Rather, I am the view that the cumulative weight of all of the mitigating factors present in this case justifies an imposition of a custodial sentence coupled with a significant period of probation.

[71] Considering the need for denunciation and general deterrence as emphasized in the case law when sentencing persons involved in trafficking Schedule 1 offences or in possession of it for the purpose of trafficking and having considered the totality of the circumstances of the offence and Mr. Masters, I am not satisfied an appropriate sentence in this case is a suspended sentence with a significant period of probation as suggested by Defence Counsel.

[72] Mr. Atherton, Defence Counsel, also argues that the present case is an *appropriate case*, which justifies a departure from the range of sentence suggested by the Crown, and contends, in his usual candour, that a short, sharp custodial sentence with probation may be appropriate because it would be similar to other cases in Nova Scotia where such dispositions have been imposed in similar circumstances. In essence, Mr. Atherton argues the principle under s. 718.2 (b) of the *Criminal Code* must be considered, which states that, "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".

[73] In my view, that while the cumulative weight of the mitigating factors justifies some leniency or reduction of the sentence such as was the circumstance in cases such as: *Cameron*, *Messervey*, *Coombs*, *Talbot*, *Provo*, *Scott*, and *Jamieson*, a suspended sentence with probation would not strike a just proportion between the offence and offender, Mr. Masters.

[74] I should note that I am mindful that while each case appears to turn, very much, on its own unique set of circumstances and thus no case can be an exact guide for another, it is important to carefully review the cases in an effort to apply the principle under s. 718.2 (b) of the *Criminal Code*.

[75] In *Scott*, the offender was in possession of 30 grams of cocaine. He was a youthful, first offender who possessed the cocaine primarily to feed and fund his own addiction. Judge Tufts held that Mr. Scott was a petty retailer and had turned his life around by enrolling in substance abuse counselling on his own initiative. Judge Tufts stressed that Mr. Scott was not a greedy non-user selling for profit, which is similar to Mr. Masters' circumstances.

[76] Again, what can be seen by comparing the aforementioned cases, is that no two cases are exactly alike, and it is often difficult to compare cases because of the multitude of varying factors or considerations that are considered and weighed cumulatively.

[77] Having considered all of the circumstances of this case, which includes the circumstances of the offence and Mr. Masters, it is my view that this is an appropriate case to justify or warrant a deviation from the normal range of sentence for this offence.

[78] Unfortunately, the case law does not clearly define or delineate factors to consider in determining when a case is *exceptional* to warrant a sentence outside of the usual range. The reason for that may be because sentencing is a highly contextual and necessarily an individualize process, therefore a wide and flexible approach is required.

[79] I am sure that there is an indefinite number of factors or considerations that could be considered, as each case very much turns on its own unique set of circumstances. Moreover, while there is no definite test of what constitutes an exceptional case, the Court is required to consider a multitude of considerations or factors, and balance them accordingly. Obviously, in some cases, more weight will be attributed to some considerations or factors than the others.

[80] In considering the issue of whether the present case is an exceptional case, I have considered a number of factors, including the nature and quantity of the illicit substance. In my view, while the nature and quantity of the drugs is not determinative of the issue, it is a significant factor which must be considered. It would appear from review of the case law that courts embrace the notion that the

nature and quantity of the drugs is relative to the risk of danger to the general public.

[81] The degree of the offender's involvement in the commission of the offence is also a relevant factor, which includes consideration of the offender's motivation to engage in the offence. Often, in drug trafficking cases, offenders are motivated by the greed to make easy money as this type of offence is an enterprise crime. However, there are cases, such as in this case, where the offender was involved in trafficking in drugs to feed his or her drug addiction. Generally, courts seem to be more lenient in sentencing of drug addicts then in sentencing offenders motivated by greed. For example, *Scott*. Perhaps this is a reflection of an emphasis on rehabilitation as well as on the principles of general and specific deterrence and restraint. Similarly, the courts seem to be more lenient in sentencing offenders who acted under a degree of duress, or compulsion to help a friend rather than for profit. For example, see: *Cameron*; *Messervey*; and *Coombs*.

[82] The age of the offender is often considered in cases involving youthful offenders, particularly in cases where the personal antecedents of the youthful person demonstrates a real potential for successful rehabilitation.

[83] In my view, an important or critical consideration to justify a departure from the norm is whether there has been a significant and remarkable change in the personal circumstances of the offender since the commission of the offence. In circumstances where the offender has clearly shown a substantial or remarkable improvement in his or her life such as successful enrollment in a rehabilitation treatment program, where success is imminent and thus rehabilitation is certain, a departure from a federal period of incarceration could be justified, all things being equal. However, there will be cases where the nature and quantity of the drugs is just too great to be seriously considered as an exceptional case for these purposes. For example, *Knickle*.

[84] Another factor, although perhaps not as significant as a remarkable change in the offender's life, is the criminal record of the offender. The absence of a criminal record is a mitigating factor, which is obviously considered favourably toward an offender. Unfortunately, in the Provincial Court it is not uncommon to deal with cases involving persons charged with serious drug offences who do not have a criminal record, or have never been charged with a criminal offence. Usually, these first offenders are persons of previous good character, but are lured by greed to make easy money in the very lucrative business of drug trafficking.

Thus, it is not a rarity to have first time offenders charged with drug offences appear in the Provincial Court nor is it rare to read about them in the case law. For example: *R. v. Smith*, [1990] N.S.J. No. 30 (C.A.); *Talbot*; *R. v. VanAmburg*, 2007 NSSC 220; *Conway;* and *Messervey*.

[85] Lastly, it may be helpful to review cases, other than drug cases, where the courts have considered exceptional circumstances in the context of the offender's personal circumstances to warrant or justify a departure from a federal sentence. An excellent example of this is found in the decision of *R. v. Bratzer*, 2001 NSCA 166. In that case, the Crown sought leave to appeal a conditional sentence given to Mr. Bratzer following his conviction for three robberies. Mr. Bratzer robbed three gas stations, brandishing a weapon each time to take money in the early hours of the morning from the sole employee on duty. He was 18 years old, and pleaded guilty upon appearing for trial. He had a record of minor previous offences, but the trial judge found that he had made significant progress while awaiting trial, having completed his grade 12 equivalency, having performed volunteer work, and having undergone counselling. He had significant family support and was a good candidate for a career in the Armed Forces. Considering these improvements and Mr. Bratzer's youth, the trial judge sentenced him to a conditional sentence of two years less a day on each offence, all to be served concurrently.

[86] To conclude, I want to re-emphasize the important principles that have guided me in reaching my decision here today to impose a 90-day term of imprisonment coupled with a three period of probation; that is, the principles of denunciation and deterrence. These principles have been repeatedly and consistently emphasized by the Court of Appeal, as noted earlier in these reasons. I should add that while there was an emphasis on the principles of denunciation and deterrence in this case, it was not at the exclusion of other important principles of sentencing such as rehabilitation.

[87] I am mindful that a proper sentence must take into account the aggravating factors of this offence; namely, the nature of the offence, the type of drugs involved, the prevalence of the offence in the community, and balance them against all of the mitigating factors identified earlier in these reasons including Mr. Masters' lack of criminal record, his plea of guilty, his expression of remorse, his relatively positive Pre-Sentence Report and his continued support of his family.

[88] For all of the foregoing reasons, having carefully considered all of the circumstances surrounding the offence and Mr. Masters, I conclude that the

appropriate sentence to be imposed upon Mr. Masters is a term of imprisonment of 90 days coupled with a three-year period of probation.

[89] Mr. Masters, would you please stand. I sentence you to a term of imprisonment of 90 days coupled with a three-year period of probation for having committed the offence of possession for the purpose of trafficking a controlled substance included in Schedule 1 of the *Controlled Drugs and Substances Act*, contrary to s. 5(2) of the said *Act*.

[90] The Crown also seeks, as part of this sentencing, three ancillary orders; namely, a weapons prohibition order under s. 109 of the *Criminal Code* for 10 years, a DNA sampling order, and an order of forfeiture of items seized from Mr. Masters. Those ancillary orders are not contested by the Defence and will be granted by the Court in the usual form.

Frank P. Hoskins, J.P.C.