PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Herbert Joseph Sampson*, 2023 NSPC 67

Date: 20230404
Docket No.: 8496769
Registry: Port Hawkesbury

Between:

His Majesty the King

v.

Herbert Joseph Sampson

Judge:	The Honourable Judge Laurel Halfpenny MacQuarrie, JPC
Decision:	April 4, 2023
Charge:	5(2) x2 *Controlled Drugs and Substances Act*
Counsel:	Scott Millar, for the Public Prosecution Service Canada Robert Sutherland, for the Defence

By the Court:

[1] Herbert Joseph Sampson is before the Court for sentencing in relation to two offences contrary to Section 5(2) of the Controlled Drugs and Substances Act (hereinafter referred to as the "*CDSA"*).

> That he on or about November 7, 2020, at or near Louisdale, Nova Scotia, did possess a substance included in Schedule I, to wit: hydromorphone for the purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act.
>
> And furthermore, that he did on or about February 26, 2021, at or near Louisdale, Nova Scotia, possess a substance included in Schedule I, to wit: hydromorphone and cocaine for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

[2] These are Schedule I *CDSA* indictable offences, with a maximum punishment of life imprisonment.

[3] Mr. Sampson elected trial in the Provincial Court. He initially entered pleas of not guilty but there was a change in direction and on respective trial dates, changed his plea to guilty.

[4] The Court received a pre-sentence report as well as written submissions from counsel, followed today by oral arguments and evidence from Mr. Sampson himself. The Court received two exhibits, a JEIN report, and a letter written in support of Mr. Sampson from a Mr. Morris.

[5] Mr. Millar, for the Crown, is seeking a global sentence of two years incarceration with ancillary orders and Mr. Sutherland, a conditional sentence order of just less than 24 months with significant house arrest.

[6] The facts as agreed are set out in the Crown's brief with corrections noted today:

1. On November 7, 2020, members of the RCMP searched the Defendant's residence in Louisdale to search for drugs, pursuant to a CDSA search warrant.
2. In brief the Police found 55 hydromorphone capsules, $1,500 in cash, and "score sheets".
3. During this search, a cell phone was seized from the Defendant. An examination of the cell phone contents revealed extensive messages, for dates leading up to the search, consistent with the trafficking of Hydromorphone.
4. The Crown refers the Court to a copy of relevant excerpts from the seized cell phone. [Attachment A]
5. On February 26, 2021, members of the RCMP searched the Defendant's residence in Louisdale to search for drugs pursuant to a CDSA search warrant.
6. In brief, the Police found .7 grams of cocaine, several empty Hydromorphone capsules, one 3md Hydromorphone capsule, a pill bottle half full of empty 4.5-gram Hydromorphone capsules, a scale with cocaine residue, and a bag with white powder residue, 55 Hydromorphone capsules, $1500 in cash and "score sheets".
7. During this search, a cell phone was seized from the Defendant. An examination of the cell phone contents revealed messages, for dates leading up to the search, consistent with the trafficking of Hydromorphone and cocaine.

[7] The report, which is not disputed, is from Detective Constable Terrence Martell of the Cape Breton Regional Police.

[8] He based his opinion on the product found, the money found, the score sheets, the electronic digital scales, the cell phone, the text messages and cocaine packaging.

[9] His opinion is Mr. Sampson was involved in the sale of cocaine and dilaudid for profit and his opinion was that he is a multi-commodity drug trafficker.

Purposes and Principles of Sentencing

[10] The purposes and principles of sentencing for 5(2) *CDSA* offences are set out in Section 10 of the *CDSA* as well as Section 718, 718.1 and 718.2 of the *Criminal Code of Canada*:

> **718 Purpose** - The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> **718.1 Fundamental principle** - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[11] We often refer to this as the moral blame worthiness of the offender.

> **718.2 Other sentencing principles** - A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender
> (b) a sentence should be similar to the sentences imposed on similar offenders for similar offences committed in similar circumstances;
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

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

[12] Section 10(1) of the *CDSA*:

10 (1) Purpose of sentencing - Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
(2) Factors to take into consideration - If a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person…

(b) was previously convicted of a "designated substance offence", as defined in subsection 2(1) of this Act, or a "designated offence", as defined in subsection 2(1) of the Cannabis Act.

[13] Section 742.1 of the *Criminal Code*:

If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under 742.3, if

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in 718 to 718.2;

(b) the offence is not an offence punishable by minimum term of imprisonment…

Case Law and Authorities

[14] As a result of *Bill C-5*, there is no bar under 742.1 to a conditional sentence order as it relates to the offences before this Court.

[15] The Crown has provided significant caselaw in support of its position that a two-year sentence of imprisonment is the appropriate sentence and that a conditional sentence is not.

[16] Many of the Crown cases outline the continuous message from our Appeal Court that deterrence and denunciation, and the protection of the public must be the paramount considerations in sentencing for 5(1) and 5(2) *CDSA* offences.

[17] Counsel, I'm going to go through a number of these cases in detail and some I'm going to reference because it's important when the Court is considering a conditional sentence that particular circumstances that have been shown in other cases that has deviated from the, what I will call a benchmark, though I don't like to use that term, for these type of offences are outlined therein.

[18] *R. v. Kleykens*, 2020 NSCA 49, written by Saunders J., was an appeal of a 90-day intermittent sentence with probation for offences of possession for the purpose of trafficking of cocaine, marijuana, and cannabis resin imposed by Judge Atwood of this Court. The Court of Appeal imposed two years incarceration, however, it was stayed for COVID-related issues. Keeping in mind that Mr. Kleykens was a major retailer, Mr. Sampson is a street level dealer, the reasons of

Justice Saunders in finding the sentence of Judge Atwood unfit, are important to courts that sentence for *CDSA* offences, as such as is before me today.

[19] At paragraph 28:

> 28 While it is true the judge did not have the benefit of this Court's decision in *White*, that does not excuse the flawed approach taken in this matter where, in sentencing Mr. Kleykens, the judge virtually ignored the many aggravating features of this case, as well as decades of binding authority in this province.
>
> 29 What this Court directed in *White:*
>
> > [76] In Nova Scotia there developed a long tradition of recognizing that the severity of a sentence should match the dangerousness of the drug involved, all other factors being equal. As our judicial understanding of the danger of "hard drugs" evolved, so did the approach taken in sentencing those convicted of participating in their distribution. Using very explicit language, this Court has repeatedly directed that the approach to be taken in sentencing those convicted for trafficking, and possession for the purpose of trafficking, in so called "hard drugs" requires as its principal objective the protection of society, such that our primary emphasis must be placed on the principles of deterrence and denunciation. The majority of these pronouncements have been made in relation to cocaine trafficking, and only a few need to be referred to here…

[20] Justice Saunders references *R. v. Byers*, *R. v. Huskins*, and *R. v. Scott*, all cases which the Crown has referred to, this being important instruction to sentencing Judges, at para. 34:

> 34 In satisfying their obligation to address the "fundamental principle" of proportionality, trial judges must ensure that the sentence be proportionate to the gravity of the crime and the offender's culpability in committing it. The gravity of the offence and its consequences will be informed by the range of sentence prescribed in the applicable legislation. In drug cases, the dangerousness of the particular drug, as well as the quantity of drugs seized, will also be important considerations when addressing both gravity and moral culpability (*White*, 32)

[21] At paragraph 56:

> There is nothing speculative about the devastating societal damage caused by trafficking drugs like cocaine, and the grave threat it represents to public safety.

> Over 30 years ago, this Court said explicitly that no one could be so naïve as to think otherwise. At this stage, there is no need to require the Crown to prove the deadly and devastating consequences of cocaine trafficking – a fact that has been recognized by courts across Canada for decades.

[22] He continues at paragraph 57:

> The Judge also sought to diminish the seriousness of the respondent's crimes by comparing cocaine and marihuana to opioids in terms of their respective societal harm. He said at 53 that he would rank cocaine and marihuana "a number of rungs down the ladder from medical opioids". Whether or not that is true, it hardly diminishes the severity of risk and ruin caused by drugs like cocaine. The harm the judge associates with opioids – physical and mental suffering; the loss of jobs, housing, families; the commission of crime to support dependencies - applies equally to cocaine as this Court has stated repeatedly for many years. Attempting to lessen the severe consequences of cocaine trafficking by comparing it to opioids misses the point. Both belong on the highest rungs of the ladder. [my emphasis added]

[23] At paragraph 64 he references *White*:

> [67] All Canadians, no matter where they reside in this country, are subject to the same criminal law as enshrined in the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Of course the sentencing process is highly contextual and meant to address the specific circumstances of the offence and the offender. Yet consistency in sentencing is also an important objective. Accordingly, after taking into account all of the features of a particular case, similar offences and similar offenders should be treated alike at sentencing, whether the conviction arose in Vancouver or Winnipeg, Halifax or Charlottetown. This is the principle of parity mandated in s. 718.2(b) of the *Criminal Code*: …

[24] At paragraph 67:

> The Crown provides a helpful and accurate summary of this Court's approach to sentencing in drug cases at 53-56 of its factum:
>
> > 53. To adequately address these primary sentencing objectives, the Court has emphasized that 'even minor traffickers' should expect significant periods of incarceration.
> >
> > 54. Beginning with *R. v. Byers*, 1989 CanLII 200 (NSCA) the Court has consistently warned of the 'severe penalties' that will be imposed for cocaine trafficking, even when relatively small amounts of the drug are involved. In *R. v. Huskins* … the Court stated, 'Rare indeed will be the case where less than federal time should be considered as a proper

> sanction for such offence.' In *R. v. Dawe* …Justice Hamilton noted that, 'Possession of cocaine for the purposes of trafficking typically resulted in sentences of two years or more…' In *R. v. Steeves*, 2007 NSCA 130 the Court stated that 'time served in a federal penitentiary is the norm…' In *R. v. Butt*, 2010 NSCA 56, the Court underlined that 'Involvement in the cocaine trade, *at any level*, attracts substantial penalties.'
>
> (emphasis added)
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> 55. In *R. v. Oickle,* 2015 NSCA 87, the Court reaffirming that trafficking cocaine will 'consistently attract sentences of imprisonment in the range of two years even for first time offenders.' More recently in *R. v. Chase*, 2019 NSCA 36, the Court reiterated that 'nothing has changed this Court's repeated and consistent warning that deterrence and denunciation will continue to be the primary objectives' and that cocaine trafficking 'will normally attract a federal prison term'.
>
> 56. Both *Chase* (6g cocaine) and *Oickle* (11g cocaine, 23 morphine pills) were 'petty retailers'. As outlined previously, the established sentencing range for offenders who traffick cocaine, marihuana or, as in the Respondent's case, both, at a higher level is broadly between 2 and 7 years imprisonment. The advent of the *Cannabis Act* has not changed the equation for offenders at the higher levels of marihuana trafficking.

[25] At paragraph 68:

> As we explained in *White*, these longstanding pronouncements are consistent with and echoed by the Supreme Court of Canada. For example, in *R. v. Lacasse*, 2015 SCC 64, Justice Wagner (as he then was) stated:
>
> > [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

[26] And further, at paragraph 70:

> While the above commentary from *Lacasse* deals with impaired driving rather than drug offences, the Supreme Court has also identified drug trafficking as a serious offence meriting denunciation and deterrence. In *R. v. King-Brown*, 2008 SCC 18, Justice LeBel stated at 184:
>
> > [184] The objective being pursued by the police was an important one, because trafficking in illegal drugs is a serious criminal offence. As has already been mentioned, the offence in issue in this

> case carries a maximum punishment of life imprisonment. Drug trafficking leads to other crimes. Illegal hard drugs such as cocaine are widely recognized to be a serious problem in our society. Their use not only fuels organized crime, but can also destroy lives…

[27] And finally, at paragraph 75:

> As noted by Wagner, J. at 58 of Lacasse, *supra:*
>
> [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…

[28] In *Kleykens*, the Court found that there were no unique circumstances.

[29] The Crown brief references many of the decisions outlined in *Kleykens* and I do not need to, as I say, repeat them all here but I am going to refer to a few.

[30] *R. v. Oickle*, 2015 NSCA 87 the accused was found with 11 grams of cocaine and 23 morphine pills, and he received 2 years in custody, replacing a suspended sentence. Justice Scanlan at paragraph 61:

> … it would be the rare case that would not justify a period of incarceration even for first offenders, who traffic in, or possess Schedule I narcotics for the purposes of trafficking, especially with the presence of weapons as in this case….

[31] *R. v. Reid*, 2015 NSSC 276, was a case involving fentanyl and hydromorphone for which the accused received 30 months.

[32] *R. v. Swaine*, 2015 NSSC 265, a decision of Justice Chipman, involved a petty retailer, on a possession for the purpose of trafficking of hydromorphone charge, for which he received 2 years. At paragraph 26 he stated:

> …While Mr. Swaine may classify as an unsophisticated petty retailer, his actions have resulted in severe consequences to not only himself and Ms. Chapman but others within the community. Cst. Burridge spoke of the toll the prescription drug trade has brought to Southwestern Nova Scotia. To pick up on the words of our Chief Justice, it is an awful business which leads to destroyed lives. The message has to be sent that the drug trade must not be permitted an that petty retailers will pay a price for engaging in this despicable business.

[33] In *R. v. Janice April Green*, 2021 NSSC 134, a decision of Justice Muise, Ms. Green entered a guilty plea to 5(2) possession for the purpose of trafficking cocaine. A search warrant had been executed, cocaine, a scale, cash and paraphernalia such as baggies were found. It was an indictable offence. She was a first-time offender. She had no criminal record. She was a primary caregiver for her 12-year-old daughter. She had substance abuse issues with no treatment, and she had some health issues including a neck injury from a prior motor vehicle accident. It was agreed that she was a petty retailer. The Crown sought two years incarceration and Defence sought probation, keeping in mind again, that a conditional sentence order was not available at that time.

[34] However, many of the comments of Justice Muise I find appropriate and helpful for this matter, starting at paragraph 30:

The key objectives of the sentence in this case include:

- Denouncing unlawful conduct.
- Deterring the offender and other persons from committing offences.
- Drug trafficking, especially Cocaine trafficking, is a very serious offence. Cocaine is an insidious drug which creates great risks for users and the community at large.
- Denunciation and deterrence are very important objectives. Sentences must be sufficiently stringent to ensure that they will not be viewed as the 'cost of doing business' and will deter who may be attracted to trafficking as an easy way of making money: R.v. Smith, [1992] N.S.J. No.265(C.A.); and, R. v. Butler (1987), 79 N.S.R.(2d) 6(C.A.).
- Where necessary, separating the offender from society.
- R. v. Knickle, 2009 NSCA 59, noted the NSCA has never endorsed or approved a conditional sentence order or suspended sentence for cocaine trafficking. Courts have regularly imposed penitentiary sentences.
- However, 'attenuating circumstances relating to the offence or the offender may warrant a sentence that falls below' this regular range: R. v. Suter, 2018 SCC 34, para. 27.
- Promoting a sense of responsibility in the offender, and acknowledging the harm done to the community.
- Cocaine trafficking is not a victimless crime. It wreaks havoc on society. The sentence imposed should bring that message home to people who traffic in cocaine. With the introduction of the practice of cutting fentanyl into other street drugs, such as cocaine, trafficking of such drugs has become what has been described as a public health crisis in Canada, because of the increase in opioid-related deaths, and of course, the purchaser cannot know, whether or not there is fentanyl in the product: R. v. Smith, 2017 BCCA 112.

[35] Looking at "aggravating circumstances", at paras 32-34:

> 32 Both drugs involved in these offences were Schedule I drugs.
>
> 33 They are highly addictive and insidious drugs, which time and time again have been noted as: wreaking havoc on society; destroying lives; resulting in uncontrollable addictions leading to repeated criminal activity; and, engendering a drug culture plagued by violence and lawlessness.
>
> 34 The packaging, unused baggies, scale and substantial amount of cash present show a level of preparation and organization. It was not an impulsive, one-off, situation, such as where an offender is asked for drugs and goes to get a single hit from a dealer to satisfy that request.

[36] For "mitigating circumstances" he stated at paras 35-43:

> 35 She entered guilty pleas. However, that was on the day of trial. Therefore, the mitigating effect is greatly diminished…

41 She advanced addiction as a mitigating feature and presented the case of *R. v. Forward*, 2017 NSSC 190, in support. In that case it was noted that trafficking to support a habit can have a mitigating effect on sentence. However, in the case at hand, in addition to a significant amount of drugs, $7,450 in cash was also seized. Therefore, the situation cannot properly be described as trafficking to support a habit. It is more accurately described as her consuming some of the profit, and that is the only reasonable inference to be drawn from the circumstances…

43 Similarly, she indicated that she was having issues with her liver, gallbladder and kidneys for which she is seeking treatment. She did not relate any diagnosis, nor what impact, if any, these issues would have upon her if serving a period of custody. In addition, though she takes pain medication for injuries suffered to her neck in a car accident, there is no elaboration on the impact that would have in such a situation.

[37] At paragraphs 49-51:

49 Sentences of 2 years' imprisonment or more have been regularly imposed on offenders similar to Ms. Green for having committed a similar offence in similar circumstances.

50 However, the Court cannot take a cookie-cutter approach to sentencing and impose sentences based only on the type of offence committed. Despite the need to consider the principle of parity, the Supreme Court of Canada has 'repeatedly emphasized the value of individualization on sentencing': *R. v. Pham*, 2013 SCC 15. I am not imposing a sentence on drug traffickers and persons possessing Schedule I substances generally. I am imposing a sentence on this particular offender, for having committed such offences.

51 The individualization on sentencing was also highlighted in paragraph 87 and 88 of *R. v. Rushton*, 2017 NSPC 2, where, in a cocaine trafficking case, the Court suspended the passing of sentence and place the accused on three years' probation.

[38] And finally, at paragraphs 105-106:

105 It is a fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1.

106 These offences are extremely grave and Ms. Green was fully responsible for them. Though she was an addict, she did not engage in trafficking merely to support her habit. She would not have been found to be in possession of $7,450 if she had been. There was clearly a significant profit-making element. Her addiction only skimmed some of that profit. Otherwise, no circumstances have

> been advanced as diminishing her level of responsibility, nor moral culpability in any meaningful way.

[39] He imposed two years with the attendant orders.

[40] Justice Muise did a very thorough review of cases in Nova Scotia, most of them from this Court and upheld by the Nova Scotia Court of Appeal where suspended sentences and periods of probation were imposed. He referred to *R. v. A.J.L.*, 2018 NSPC 6, *R. v. Casey*, 2017 NSPC 55, *R. v. Christmas*, 2017 NSPC 48, *R. v. Masters*, 2017 NSPC 75, *R. v. Saldanha*, 2018 NSSC 169 and *R. v. Rushton*, 2017 NSPC 2. He distinguished each of those cases from that of Ms. Green:

- that the offenders were generally youthful between 18 and 24, one of them may have been in their 30's
- with no records
- significant rehabilitation having taken place
- significant community and family support
- no breaches of release conditions
- and an active treatment plan and compliance

[41] The Court did not receive any case law authorities from Mr. Sutherland but written submissions that lead the Court, and the Crown, to assume Mr. Sampson was seeking a conditional sentence order. In oral submissions today, he has outlined that to be the case and that rehabilitation should be considered as Mr. Sampson has "turned his life around".

[42] The Crown, anticipating such, addressed some of the cases referred to already in my comments and I'm going to look at a few of them where this Court has given sentences less than the two years, as such are instructive and helpful.

[43] *R. v. Rushton*, 2017 NSPC 2, Judge Buckle at paragraph 85 stated:

> …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.

[44] In *R. v. Chase*, 2019 NSCA 36, Judge Murphy was upheld by the Nova Scotia Court of Appeal, in what they called a "close call". She imposed a 90 day intermittent sentence for possession of 6 grams of cocaine for the purpose of trafficking.

[45] Mr. Chase was 28 years old. He had some prior convictions, the most recent being some six years or so before the case before the court. He had a dysfunctional upbringing, having been in foster care for most of his formative years. He had significant letters of support as to his progress at rehabilitation and a very real crime free life going forward as his rehabilitation was thought to be honest and genuine. He had significant remorse, I guess is the best way to say it, with respect to being involved in the matters before the court to the point that, in his text messaging that the police received as part of their search warrant, he made such comments.

[46] At paragraph 5, Judge Murphy stated:

> The record which the judge described as comprising ‘a great deal of material’ also included a lengthy Pre-Sentence Report (PSR), a detailed Gladue Report, and several letters of support written by people prepared to vouch for the appellant’s recent good character and the remarkable changes he made in his life.

[47] The Court of Appeal referenced her comments at para 36:

> As stated by Judge Hoskins in the *Masters* case, the case law does not clearly define, or delineate factors to consider in determining when a case is exceptional towards the sentence, outside of the usual range. In *Masters*, Judge Hoskins considered the nature and quantity of the illicit substance, the offender’s involvement, and motivation to commit the offence, the age of the offender, more particularly how it relates to real potential for successful rehabilitation, and a significant, remarkable change in circumstances since the commission of the offence.
>
> In this instance, I am satisfied that for the mitigating factors that are present, and very specifically, Mr. Chase’s still rather youthful age, his significant potential for rehabilitation, a significant and remarkable change in circumstances since the commission of the offence, that a sentence of 90 days is warranted, followed by three years probation.

[48] At paragraph 39:

> To say that Mr. Chase’s sentence falls outside what would normally be the appropriate range of sentence, does not mean that the sentence Judge Murphy imposed against Mr. Chase was necessarily unfit. In *Lacasse*, *supra*, Justice Wagner observed at 58:
>
> > [58] There will always be situations that call for a sentence outside of 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 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. LeBel J. commented as follows on this subject:

> A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[49] The Crown submitted *R. v. Livingstone, Lungal and R. v Terris,* 2020 NSCA 5, to the Court after its written brief. I recently gave a decision in this jurisdiction, Mr. Jeremy Sponagle, and am very familiar with these cases based on my decision in that case, it having been referenced by counsel for Mr. Sponagle. He was sentenced on the 5(2) of the *CDSA* and received 8 months incarceration, taking into account his very youthful age and his significant progress at rehabilitation.

[50] The Court of Appeal overturned the suspended sentence of *Livingstone and Terris* but upheld the *Lungal* suspended sentencing with three years probation.

[51] Justice Farrar stated at paragraph 25:

> As noted earlier, the range of sentences in Nova Scotia for Schedule I trafficking offences is typically a custodial sentence of two years or more. However, deviation from a sentencing range is not an error in principle unless it departs significantly and for no reason from the contemplated range (*R. v. Lacasse*, 2015 SCC 64 (S.C.C.), 67).

[52] At paragraphs 28-32, in *Lungal,* Judge Atwood, in considering factors before him, identified mitigating factors as:

- Low level addict retailer;
- Petty retailing in small quantities;

- Participating in a dial-a-dope operation due to financial difficulties and pressure from intimate partner;
- Lesser involvement then co-accused partner;
- Troubled upbringing including drug use at a young age;
- Addict relatively young (37 years of age);
- First time offender;
- Timely guilty plea;
- Expression of remorse and understanding of responsibilities;
- Excellent rehabilitative prospects;
- No charges since arrest; and
- Compliance with strict release conditions including house arrest.

29 It was reasonable for the sentencing Judge to determine that the mitigating factors outweighed the aggravating factors.

30 It was unnecessary to incarcerate her for specific deterrence, and the potential augmentation of general deterrence did not warrant imprisonment.

31 Finally, he found that imposing a sentence that would allow Ms. Lungal to remain in the community would have a number of positive effects on her rehabilitative progress.

32 Rehabilitative progress is a key consideration as described by Clayton C. Ruby, Gerald J. Chan, and Nader R. Hassan in *Sentencing*, 8th ed. (Markham, Ont: LexisNexis, 2012) at 1139:

> …Where the offender's participation in moderate-to-low-level cocaine trafficking is seen to result partly from drug dependency, brief incarceration or not-custodial sentence may be imposed when the offender shows potential to overcome the habit. For low-level cocaine trafficking, weight will be given to evidence demonstrating that the offender wishes to reform his life, whether or not he is an addict…

[53] At paragraph 33:

In addition, Ms. Lungal has continued to make remarkable strides following her arrest in overcoming addiction issues that she has been dealing with her entire life. This Court received a post-sentence report and letters of support from her employer, for whom she has worked in a fulltime position since May 13, 2019. She continues with rehabilitation to overcome her drug addiction.

[54] At paragraph 46, Judge Atwood referencing Mr. Livingstone:

46 The sentencing judge identified two mitigating factors that are not supported by the evidence. First, that Mr. Livingstone was supporting his individual use of controlled substances through low level dealing and secondly, that he had a substance abuse habit. Neither of these factors are borne out by the evidence. As well, the absence of an aggravating factor is not a mitigating factor (*R. v. Barrett*, 2013 QCCA 1351 (C.A. Que.)

48 Mr. Livingston made a considered and deliberate choice to traffic cocaine. There was no suggestion he was recruited or pressured to do so in any way. He was not an addict selling to support an addiction. His only apparent motive was profit. He had cocaine on his person and in his residence. He was in the business and had all the necessary tools of the trade.

49 One of the cellphones seized revealed a text conversation relating to his trafficking activity, which indicated he was experiencing slower sales and that he owed a substantial amount of money. Mr. Livingstone was entrenched in trafficking in a controlled substance.

50 Further, unlike Ms. Lungal, there was no evidence of substantial rehabilitative progress.

51 Finally, as I have identified above, the sentencing judge was influenced by his finding that Mr. Livingstone was supporting a drug habit through the sale of cocaine, which is not supported by evidence.

52 … An appropriate sentence for Mr. Livingstone's circumstances would be 18 months incarceration. This is somewhat less than the typical two year custodial sentence, taking into account the appropriate mitigating factors identified by the sentencing judge, but sending the clear message that trafficking in controlled substances is a serious offence, at any level, and will usually result in imprisonment.

[55] And at paragraph 78, referencing Mr. Terris:

78 Although Mr. Terris' situation is similar to Mr. Livingstone's, it is very dissimilar to that of Ms. Lungal. In passing sentence, Judge Atwood made reference to the following factors:

- First-time offender;
- Petty retail possession of small quantity of Schedule I contraband;
- Solid employment history and good family support;
- No aggravating factors under the statute;
- No evidence of weapons or violence;
- Cooperation with police;
- Early guilty plea;

- Bail compliance; and
- Good prospects for rehabilitation.

> 79 As with Mr. Livingstone, the absence of aggravating factors is not a mitigating factor.
>
> 80 Unlike Lungal, there was nothing to suggest the respondent was pressured into dealing drugs or that drug abuse problems had anything to do with his motivation for committing the offences. The sentencing Judge himself recognized that the absence of such a consideration indicated a greater need for deterrence. Further, there was no evidence the custodial sentence would negatively impact Mr. Terris' rehabilitation progress.

[56] And in that case he also imposed 18 months.

[57] Mr. Millar referenced *R. v. Russell*, 2019 NSSC 353, a decision of Justice Lynch. Mr. Russell was 68 years old and found guilty of possession for the purpose of trafficking of hydromorphone. Eighteen hydromorphone pills were found in the search. He was a retired truck driver with a thoracic aorta aneurism. He had had three heart attacks since the age of 50, three stents and had daily medications. He had diabetes and was seeing a therapist consistently for depression and anxiety. He had an unrelated record.

[58] Justice Lynch referred to the devastation in communities because of opioid abuse. At paragraph 37, she said:

> 37 Opioid use is called an epidemic and a crisis in our society. As I stated above, it is not a recreational drug but rather an addiction which becomes necessary for life. Opioids have led to increased crime, devastating families and communities. In many areas of this country there is an overdose crisis.

[59] She imposed two years incarceration.

Circumstances of Mr. Sampson

[60] Turning to the circumstances of Mr. Sampson, the Court considers aggravating and mitigating factors: parity, denunciation, deterrence, protection of society, rehabilitation, gravity of the offence and the degree of responsibility of Mr. Sampson, that is his moral blameworthiness.

[61] The Court has a somewhat dated pre-sentence report from June 2022 outlining Mr. Sampson's early childhood, his adult life, his relationships with which he has one daughter, his employment history and his medical history.

[62] His childhood, appears from the report, to have been positive for the most part, with some alcohol issues on the part of his father. They did not have a lot to come and go on. I think he described his upbringing as being poor. He was in a significant motor vehicle accident in the early 1990's, it might have even been 1990 which left him with chronic pain, which it seems or appears to have led him to becoming opioid dependent.

[63] The report indicates that he is a paid caregiver for his bother-in-law. He lives with his brother-in-law and sister. He has a number of other health issues, in particular he had a heart attack a few years ago, he is diabetic, has osteoarthritis and hypertension.

[64] Regarding his opioid dependency on both prescription medication and street opioids, Dr. MacNeil who has been his family doctor for a significant number of years and continues to be even though he is in the Halifax Regional Municipality (HRM), was interviewed and his comments are important to the Court:

> Mr. Sampson came under my care in 2008 with a history of chronic pain with excessive prescribed and street opioids … At the time he was interested in discontinuing his opioids… He agreed that narcotic over use was causing mood changes and increased pain. He agreed to the narcotic contract and had actually started a narcotic withdrawal program 4-5 months previously. Since then it has been an ongoing battle with several years of tapering opioid dosage, following by a methadone replacement program and now Suboxone as an opioid replacement. His compliance has always been "spotty" for lack of a better term, but usually with underuse rather than abuse. He would usually blame that on compliance difficulties due to house arrest, inability to obtain transportation or cost of transportation. He had a myocardial infarction treated with stents x 2, November 2019. This was felt to be complicated by previous narcotic use and ongoing tobacco smoking. He failed to attend cardiology follow up and bloodwork which he stated was due to financial barriers. He has diabetes mellitus but has failed to follow up properly for the condition that he also blames on financial challenges. He is currently prescribed ten medications, which he admits to having stopped episodically including Suboxone, once again due to financial challenges so if Mr. Sampson has once again broken his narcotic contract, our Arichat clinic can no longer provide medical services to him after giving him multiple changes to comply with treatment….

[65] Today we heard evidence from Mr. Sampson, sort of, as an update to that, and outlining his current living situation and employment situation.

[66] He testified that he goes to NA and AA, so Narcotics Anonymous and Alcoholic Anonymous when he can. He goes with Mr. Morris, his brother-in-law, who is a recovering alcoholic. Over the period of the last eighteen months, he has gone six times. He has been in the HRM for about two years.

[67] The Court received through counsel, a letter from a Mr. Morris:

> I am writing this letter in hopes that it may shed some light on Herby's behalf. I have Herby Sampson with me as my caretaker. I am 79 years old. I had a stroke almost 3 years ago now and I am unable to do things for myself as I used to. Herby is being paid by the government to be my caretaker. His duties are to drive me to where I need to go, such as the doctor's, to get groceries and to all other important appointments. I am unable to lift almost anything heavy. And he has been a big help when we moved to our new home. He looks after all my meals and helps in any way I need him to. Since he's been living with us, he has been living with us. He has been a tremendous asset to me for the past 2 years.
>
> signed by Mr. Morris.

[68] Mr. Sampson is a caregiver for Mr. Morris, paid by Veterans Affairs Canada. Mr. Sampson testified about not having money for a certain period of time when he left Louisdale and went to Halifax, his monies were cut off, he did not have any co-pay, but he has finally got that sorted and is able to purchase his Suboxone at this point. He advised the Court he has not had a prescription refill in about 4 months. He gets it at Shopper's Drug Mart in Dartmouth or Halifax, but such is now all straightened out is the best I could make from his evidence. He will be contacting Dr. MacNeil to get a new prescription for his Suboxone.

[69] When queried about how long this money issue has been resolved, it's been "about two months" but he has not yet made the appointment with Dr. MacNeil but he will do it soon.

[70] He says his move to Halifax has created a completely different environment for him from when he lived in the Louisdale area with respect to pills and "that life" he now stays home pretty much 24 hours a day and does not go out.

[71] Mr. Sutherland went through his release conditions that were basically house arrest, with some exceptions for a period of about 22 months between 2017 and 2019. He had no breach of the conditions. He has not had other criminal charges since the latest charge before the Court.

[72] Mr. Sampson confirmed Veterans Affairs Canada, who pays him to be the caregiver for Mr. Morris is available for Mr. Morris' care and not tied to him specifically.

[73] In sentencing Mr. Sampson and I have repeated it a number of times, I have to consider the principles and purposes of sentencing as set out in s. 10 of the *CDSA* and s. 718, 718.1 and 718.2 of the *Criminal Code*. The purposes of sentencing in s. 718 is to protect society and to contribute to the respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have enumerated objectives in 718.1 and .2.

[74] The Nova Scotia Court of Appeal has said repeatedly that the primary objective for an offence involving trafficking or possession for trafficking this type

of offence, is denunciation and deterrence and that rehabilitation always has to be a consideration by any court.

[75] A conditional sentence is available to Mr. Sampson, should the sentence be one of under two years and if it meets the purposes and principles of sentencing. There is nothing exceptional needed to be shown to be considered for such, rather the court must sentence him based on the purposes and principles as I have outlined in 718, the provisions that follow and of s. 10 of the *CDSA*.

Gravity and Degree of Responsibility

[76] The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[77] This is an indictable Schedule I offence for which imprisonment for life can be imposed, which in and of itself demonstrates the significant gravity of the offences before the Court. The degree of responsibility of Mr. Sampson, that is, his moral culpability or moral blameworthiness is high.

[78] He, as can be seen, from the text and Facebook messages, which were part of the Crown sentencing submissions, was very active in what I will call, “dealing drugs” that formed the basis of these two charges. From those text messages he

solicited sales, he arranged for pickup, he set prices, he talked about prices, he clearly was talking to other people as to how to get these drugs into Nova Scotia.

Parity

[79] The sentence must be similar to sentences given for similar offences in similar circumstances to similar offenders.

[80] I have gone through a significant number of cases where the norm for these type of offences is two years but that is not a minimum, I am not bound to sentence Mr. Sampson to such. It is based on the circumstances of the offence and the circumstances of Mr. Sampson, much of which is as reviewed in his presentence report and his testimony today.

[81] There are cases that I have referred to where less than two years have been imposed, where there has been eighteen months, where there has been suspended sentences and terms of probation.

[82] To make a determination I look at Mr. Sampson's degree of his responsibility which I have already referenced, the type of drugs involved, these being Schedule I offences, and I look at aggravating and mitigating circumstances.

[83] Mr. Sutherland argues that a conditional sentence can meet the purposes and principles of sentencing when properly structured. He is correct that rehabilitation always must be considered, it cannot be excluded.

[84] A conditional sentence does not require any exceptional circumstances be demonstrated to the Court; he is correct.

[85] Mr. Sutherland argues the nature of the offences, being Schedule I, such does not call for a knee jerk requirement of imprisonment by the Court.

[86] As I say, I have referenced cases where people have been convicted or plead guilty to offence such as is before this Court where there has not been two years imprisonment. No two cases are ever the same; no two offenders are ever the same.

Aggravating Factors

[87] These are Schedule I life imprisonment offences and such is to be considered.

[88] Aggravating is that on November 7, 2020, and I asked the Crown this morning if Mr. Sampson was home when the search warrant was executed and he was, he knew what was seized and he knew on February 7, 2021, that he had been

charged with the offence because on that day he was served with a summons by Cst. Legere. Yet on February 26, just 19 days later, another *CDSA* search warrant was executed on his premises.

[89] The text messages and Facebook messages that were offered by the Crown show that there was no cease and desist by Mr. Sampson between the November and February dates. It was business as usual.

[90] Mr. Sampson, who had his drug trafficking paraphernalia seized on November 7 along with his cellphone was again on February 26, in possession of the same tools.

[91] Mr. Sampson comes before this Court with three prior drug offences, one from 1993 which was a 4(1) under the previous *Narcotic Control Act* for which he received a fine. In 2000 he was sentenced for a 5(2) *CDSA* offence for which he received 4 months incarceration and in 2019, a s. 4(1) *CDSA* for which, I believe, he received a fine.

[92] Such demonstrates a long-standing relationship by Mr. Sampson with illicit drugs.

Mitigating Factors

[93] There are mitigating factors in this sentencing and Mr. Sutherland has referred to some of them.

[94] He has entered a guilty plea to both offences, albeit, on dates when these matters were set for trial and as noted by, I think it was Justice Muise, such is not given the same weight as if it had had been an early resolution of the matter.

[95] He is currently employed full time as a caregiver, and he has the support of that gentleman. Mr. Morris says that Mr. Sampson is a very important person in his life.

[96] Mr. Sutherland talks about the principle of restraint and of course that is always important in any sentencing.

[97] Mr. Sutherland refers to Mr. Sampson as having been on release conditions for a 22-month period between 2017 and 2019 with conditions but that does not carry much weight. Those conditions were in place “prior” to these two offences before the Court.

[98] These are two very significant offences before the Court, offences that destroy communities, wreak havoc in families, lead to criminal activity and often

people involved in such have a total lack of understanding as to such repercussions.

[99] Mr. Sutherland points to Mr. Sampson's health issues, which he talked a bit about today, they have been long standing and this would make life in jail difficult.

[100] I have no medical evidence of that; such is pure conjecture. Obviously, if you have health issues, the Provincial Institutions and Federal Penitentiaries are equipped to deal with such. I have no evidence that he would not receive proper health care.

[101] Mr. Sutherland says that there has been a significant change in his life after moving to Halifax; that he has attended NA's and AA's over the last eighteen months. I think it became clear during his testimony he has never been to NA's that it is A.A.'s and they deal with addiction and that is something that you are to be commended for, Mr. Sampson. However, you have been there six times in eighteen months, and you have only went, from your evidence, "because Mr. Morris urged you to go; that he thought it was a good idea" and you agreed.

[102] Attending AA's once every three months is not a commitment to rehabilitation. That coupled with the evidence of Dr. MacNeil in the pre-sentence report regarding his lack of effort at treatment, does not permit this Court to

conclude as suggested, that Mr. Sampson has things under control and significantly turned his life around. There have been no genuine attempts of rehabilitation by Mr. Sampson.

[103] Mr. Sampson testified he needs to see Dr. MacNeil. He has his financial situation rectified but has not reached out to Dr. MacNeil for that appointment; that he is “going to see how things go today”.

[104] There is no evidence of him seeking substantive substance abuse counselling through the Nova Scotia Health Authority, Addictions and Mental Health Department, such is free. It is not lost on me the comments of Mr. Millar, that according to everything in his pre-sentence report, and there is no evidence to the contrary today, that he did not have the financial means to get to those places he needed to go. This is with respect to not only his drug addiction but with respect to his health, in particular, Dr. MacNeil talks about him not following through on his diabetes follow up.

[105] Cases where there has been less than two years imposed show significant, genuine, and active participation in rehabilitation with a plan to go forward for the same. There is nothing in the evidence today or in any of the reports received to

suggest that Mr. Sampson is in such a situation. Mr. Sampson lacks follow through.

[106] I do not find from his testimony that he understands the significance of what he is facing here today. He was not focused on the questions that were being asked of him with respect to important information that this Court would need in determining his prospects of successful rehabilitation.

[107] Mr. Morris will perhaps be without the benefit of Mr. Sampson taking care of him but as the Crown pointed out, the funding for Mr. Sampson's caretaking duties is a government funded position; it is not a position that is attached specifically to Mr. Sampson.

Parity

[108] A sentence must be similar to other offenders sentenced in similar circumstances.

[109] With specific reference to Mr. Sampson, the circumstances of his life, he is a 60-year-old repeat offender; the circumstances of these offences being just months apart with evidence from the first arrest to the second arrest that he was not halted at all in his illegal activity.

[110] This court will not deviate from the cases in Nova Scotia that call for a term of imprisonment of two years.

[111] I am sure there will be cases where a conditional sentence is a proper and fit sentence and can meet all the purposes and principles of sentencing as I have referenced but the circumstance of this case is not one of them. Aggravating factors before this Court do not permit such, and taking totality into account, Mr. Sampson, you are sentenced to two years incarceration on the November 7th offence, followed by two years concurrent on the February 26th offence. There will be the attendant DNA, forfeiture and s. 109 Orders.

[112] So that is the Court's sentence, Mr. Sampson.

MacQuarrie, JPC