



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Blok-Andersen*, 2016 NLCA 9

Date: 20160304

Docket: 201401H0108 and 201401H0106

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

PETER BLOK-ANDERSEN

RESPONDENT

AND:

BEN STRONGITHARM

RESPONDENT

Coram: Welsh, Rowe and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201101G2974
2014 NLTD(G) 141

Appeal Heard: December 11, 2015

Judgment Rendered: March 4, 2016

Reasons for Judgment by Welsh J.A.

Concurred in by Harrington J.A.

Separate Concurring Reasons by Rowe J.A.

Counsel for the Appellant: David Schermbrucker

Counsel for the Respondent (Peter Blok-Andersen): John W. Lavers

Counsel for the Respondent (Ben Strongitharm): Bob Buckingham

Welsh J.A.:

[1] Peter Blok-Andersen and Ben Strongitharm were convicted of possession of cocaine for the purpose of trafficking and committing an offence “for the benefit of, at the direction of, or in association with a criminal organization” contrary to the *Controlled Drugs and Substances Act* and the *Criminal Code*. Mr. Blok-Andersen was sentenced to a total of seven years imprisonment, while Mr. Strongitharm was sentenced to a total of five and one-half years.

[2] The Crown appeals against both sentences on the basis that the trial judge erred by failing to make necessary findings of fact for purposes of imposing sentence after convictions by a jury. In addition, the appeal engages the circumstances when a judge may order a term of parole ineligibility.

BACKGROUND

[3] In September 2009, the police began a comprehensive drug trafficking investigation targeting Mr. Blok-Andersen, Mr. Strongitharm and five others. On January 12, 2010 there was a seizure of drugs and money and the men were charged. Four others pleaded guilty to charges all of which involved trafficking in cocaine and committing offences for the benefit of a criminal organization.

[4] Mr. Blok-Andersen and Mr. Strongitharm were charged on the same indictment. They were tried together and convicted by a jury. The charges in the indictment against both men on which they were found guilty read:

Count #1: Peter Blok-Andersen ... and Ben Strongitharm ... stand charged that they, on or between the 3rd day of September, A.D., 2009 and the 12th day of January, A.D., 2010, at or near St. John’s, in the Province of Newfoundland and Labrador, committed an unlawful offence (or offences) under the *Controlled Drugs and Substances Act* (the *CDSA*) ... for the benefit of, at the direction of, or in association with a criminal organization, contrary to section 467.12(1) of the *Criminal Code* ...

Count #2: Peter Blok-Andersen and Ben Strongitharm ... stand charged that they, on or about the 11th and the 12th days of January, A.D., 2010, at or near St. John’s, ... and other parts of Newfoundland

and Labrador, did unlawfully have in their possession for the purpose of trafficking, cocaine ... and did thereby commit an indictable offence contrary to section 5(2)-5(3)(a) of the *CDSA*.

[5] Mr. Strongitharm was convicted of two additional counts of trafficking in cocaine. Sentences concurrent to the sentence for count #2 have not been appealed. In addition, I note that, if the Court concludes that the trial judge erred, triggering a consideration of whether the sentences should be varied, Mr. Blok-Andersen and Mr. Strongitharm did not seek a reduction in their sentences.

[6] The Crown submits that the trial judge erred in determining appropriate sentences and seeks to have the sentences varied:

(1) for Mr. Blok-Andersen, an increase from five and one-half years to seven to nine years for trafficking in cocaine, and from one and one-half years to five years for acting for the benefit of a criminal organization, for a total of twelve to fourteen years imprisonment; and

(2) for Mr. Strongitharm, an increase from four years to six to eight years for trafficking in cocaine, and from one and one-half years to four years for acting for the benefit of a criminal organization, for a total of ten to twelve years imprisonment.

(Reference to the “Offenders”, below, means Mr. Blok-Andersen and Mr. Strongitharm together.)

ISSUES

[7] In addition to the question of leave to appeal, the issues engage consideration of

(1) The interplay among *Criminal Code* provisions regarding sentences imposed for the offence of acting for the benefit of a criminal organization and the predicate offence of drug trafficking;

(2) The discretion available to the judge in finding facts necessary and relevant to determining a sentence where there was a conviction by a jury; and

(3) The imposition of restrictions on eligibility for parole.

ANALYSIS

Leave to Appeal

[8] Leave to appeal is required because these are appeals by the Crown as to sentence only (section 676(1)(d) of the *Criminal Code*). The test to be applied is whether the appeal is “frivolous in the sense of having no arguable basis or sufficient merit” (*R. v. B.(A.)*, 2015 NLCA 19, 365 Nfld. & P.E.I.R. 160, at paragraph 15; *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78, at paragraph 2). At the hearing, given the issues discussed below, the Court concluded that this test was met and leave to appeal was granted.

Relevant Legislation

[9] Section 724(2) of the *Criminal Code* provides for a trial judge to make findings of fact necessary for sentencing purposes where there was a trial by jury:

Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

The Crown submits that the trial judge erred by failing to make necessary findings of fact under paragraph (b).

[10] Section 467.12 of the *Criminal Code* is one of three related provisions dealing with offences involving recruitment, membership in and acting for a criminal organization. “Criminal organization” is defined in section 467.1 to mean:

... a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

[11] Section 467.12, the relevant charge in this appeal, deals with acting for the benefit of a criminal organization:

(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

(Emphasis added.)

The maximum sentence is fourteen years imprisonment.

[12] It is important to distinguish that provision from sections 467.11 and 467.13. Section 467.11 relates to recruiting members for a criminal organization:

Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence ..., recruits, solicits, encourages, coerces or invites a person to join the criminal organization, is guilty of an indictable offence ...

(Emphasis added.)

The maximum sentence is five years imprisonment.

[13] Section 467.13 applies to a member of a criminal organization:

Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence... for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence ...

(Emphasis added.)

The maximum sentence is life imprisonment.

[14] Section 467.14 requires the imposition of a consecutive sentence where a person is convicted of offences involving a criminal organization:

A sentence imposed on a person for an offence under section ... 467.12 ... shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

[15] Section 718.2(a)(iv) specifies that acting for the benefit of a criminal organization constitutes an aggravating factor for purposes of sentencing:

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, and, without limiting the generality of the foregoing,

...

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, ...

Findings of Fact under Section 724 of the *Criminal Code*

[16] The principles to be applied when a judge imposes sentence following a conviction by a jury are discussed in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96. First, the judge must accept as proven those facts essential to the conviction (section 724(2)(a) of the *Criminal Code*). As to section 724(2)(b) of the *Code*, McLachlin C.J.C., for the Court, explained:

[18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

(Emphasis added.)

See also: *R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266.

[17] In this case, the trial judge made the following findings of fact under section 724(1) of the *Criminal Code*:

- (1) The existence of a criminal organization was proven;
- (2) A criminal organization operated in St. John's and area from September 3, 2009 to January 12, 2010;
- (3) The police gathered evidence from stash houses where significant quantities of cocaine and money were stored;
- (4) Mr. Strongitharm was seen entering and leaving stash houses throughout September and October 2009, while Mr. Blok-Andersen was seen entering a stash house on January 10, 2010;
- (5) Significant amounts of money were transferred from St. John's to British Columbia using banks and checked airline baggage, and "the combined totals of the sums being transferred amounted to almost \$500,000, \$195,000 of which was seized by police"; and
- (6) The motive for the venture was financial gain, with no indication of serious addiction issues by any of the parties.

(Decision of the trial judge, 2014 NLTD(G) 141, 358 Nfld. & P.E.I.R. 211, at paragraph 58.)

[18] The judge found that, for purposes of sentencing, it was not necessary to determine who were members of the organization. She explained:

[58] ...

The Crown did not charge these offenders under section 467.13 nor did it attempt to show membership in a charge under 467.11. In the result, I decline to make a finding that Peter Blok-Andersen and Ben Strongitharm were members of the criminal organization. This is not to say that their roles in the commission of the predicate offences cannot be considered in this sentencing.

[19] The Crown asked the judge to find that: (1) the criminal organization was a highly sophisticated organization; (2) Mr. Blok-Andersen was the directing mind between September 2009 and January 2010; and (3) the group or members were prepared to resort to violence, and that Mr. Blok-Andersen, in particular, resorted to threats of violence to keep other

members of the organization under control. In response, the trial judge found:

[60] In answer to the foregoing requests, I find:

(1) The criminal organization was a relatively sophisticated one dealing in multi-kilograms of cocaine.

(2) I decline to find Peter Blok-Andersen was the directing mind behind the drug operation carried out between September 2009 until the takedown on January 12th, 2010. Peter Blok-Andersen is charged with possession for the purpose of trafficking on January 11th and 12th, 2010 and is neither charged in respect of drug offences occurring between September and December 2009 nor membership in a criminal organization. His role in January, 2010, is relevant and is considered hereafter.

(3) There is no evidence that Peter Blok-Andersen resorted to violence in the commission of possession for the purpose of trafficking on January 11th, 12th, 2010. He did, however, threaten violence towards others involved in the criminal venture Insofar as Ben Strongitharm is concerned the evidence at trial indicated an individual, who appeared to be Ben Strongitharm gestured to another individual during an encounter The Crown says the gesture which amounted to some finger pointing suggested violence. I conclude the evidence is insufficient for me to make such a determination. Accordingly, in respect to the drug charges for which Peter Blok-Andersen and Ben Strongitharm have been found guilty, violence cannot be considered as an aggravating factor in the sentencing of Ben Strongitharm. Threatening violence will form part of my considerations in the sentencing of Peter Blok-Andersen.

[20] For convenience, I will first address the appeal regarding Mr. Blok-Andersen's sentence. Much of the analysis will also apply to the Strongitharm appeal.

Mr. Blok-Andersen

[21] The Crown submits that the judge erred by refusing to find that Mr. Blok-Andersen was the "directing mind" of a criminal organization for the period of September 2009 to January 2010. The judge's underlying rationale was that Mr. Blok-Andersen was charged with acting for the benefit of, in contrast to membership in, a criminal organization, and that the predicate offence related only to the January events.

[22] Being the directing mind of a criminal organization presupposes membership in that organization, or in the language of section 467.13, being

“one of the persons who constitute a criminal organization”. (See: *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211, at paragraph 25.) Since Mr. Blok-Andersen was not charged under section 467.13, it is necessary to determine whether facts that would support a charge under that section are relevant to sentencing under section 467.12. There are two components to the analysis: first, the operation and effect of section 725 of the *Criminal Code*; and second, the characterization of Mr. Blok-Andersen’s role in the context of the factual circumstances.

[23] Section 725(1) of the *Criminal Code* addresses the use of related offences in imposing a sentence:

In determining a sentence, a court

...

(c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

Section 725(2) addresses the effect of applying section 725(1)(c):

The court shall, on the information or indictment, note

...

(b) any facts considered in determining the sentence under paragraph (1)(c),

and no further proceedings may be taken with respect to any offence ... disclosed by those facts unless the conviction for the offence of which the offender has been found guilty is set aside or quashed on appeal.

[24] These provisions are discussed in *R. v. Larche*, 2006 SCC 56, [2006] 2 S.C.R. 762. Fish J., for the Court, drew the following conclusions:

(1) In general, persons may be punished only for offences for which they have been convicted. Section 725(1)(c) provides a limited exception to this rule;

(2) Considering facts that could constitute the basis for a separate but uncharged offence under section 725(1)(c) falls within the discretion of the judge;

(3) The decision by a judge to apply section 725(1)(c) does not require the agreement of either the Crown or the defence. Fish J. emphasized that the application of section 725 “remains at all times subject to the sentencing judge’s discretion” (paragraph 38).

[25] Section 725(1)(c) was not considered in the court below, nor did counsel raise it in this Court. However, at the instance of this Court, counsel were given the opportunity to make submissions on the provision and related case authority.

[26] The *Larche* decision discusses principles of statutory interpretation relevant to two issues engaged by this appeal: first, the effect of section 725(1)(c) where the charge is under section 467.12 and the Crown seeks to rely on facts relevant to section 467.13; and second, the interplay among sections 725(1)(c), 718.2(a)(iv) and 467.14.

[27] Of general application in this appeal, Fish J. emphasized fundamental principles when interpreting and giving effect to section 725(1)(c):

[22] ... Section 725(1)(c) and s. 725(2) are best understood not by looking to past cases but by considering their plain terms, their evident purpose, and their relationship not only to the rest of s. 725 but also to other provisions of Part XXIII of the *Criminal Code* and to the scheme of the *Criminal Code* as a whole.

[28] On the question of double punishment, Fish J. wrote:

[26] Second, s. 725(2) then protects the accused from being punished twice for the same offence; incrementally, as an aggravating circumstance in relation to the offence charged, and then for a second time should a separate charge subsequently be laid in respect of the same facts. ...

Sections 725(1)(c), 467.12 and 467.13

[29] In *Larche*, Fish J. pointed to the discretionary nature of section 725(1)(c) which, when applied, engages the mandatory application of section 725(2):

[32] As appears from the plain wording of both provisions, s. 725(1)(c) and s. 725(2), read together, are at once discretionary and mandatory. Discretionary, because courts *may* – not *must* – consider the facts that could support other charges; mandatory, because if they do, they *must* – not *may* – note on the record that they have done so. [Italics in the original.]

[30] The Crown submits that this provision is not relevant because the question of leadership of and membership in the organization is simply a part of the factual context for the charge under section 467.12. This is an over simplification.

[31] The specification of three separate offences, with differing levels of seriousness, indicates Parliament's intention that membership in a criminal organization and the related question of leadership is to be considered separately from acting for the benefit of, or recruiting members for, a criminal organization. Where the Crown chooses to charge one offence, in this case, acting for the benefit of an organization, the incorporation of facts proving another of the three offences engages the operation of section 725(1)(c). That is, the trial judge has discretion to consider facts related to another of the section 467 provisions, but must make a note to that effect on the record if that discretion is exercised.

[32] In this case, the trial judge exercised her discretion not to consider facts that would fall outside the scope of section 467.12. Indeed, she indicated that, if the Crown alleged that the Offenders were members of a criminal organization, that charge should have been laid. In *Larche*, Fish J. recognized:

[39] It is true that prosecutorial discretion in the laying of charges will not lightly be interfered with by the courts. But proceedings cannot be delayed abusively to increase punishment Nor can offences be artificially fractioned in the pursuit of a like objective.

[33] While the judge did not refer to section 725 of the *Criminal Code*, her reasons, discussed above, demonstrate that she was exercising discretion as authorized under that section when she refused to find as a fact, for purposes of sentencing, that Mr. Blok-Andersen was a directing mind of a criminal organization from September to December 2009. There is no basis on which to interfere with the exercise of that discretion based on section 725.

Section 724

[34] That said, the focus of counsels' submissions for purposes of sentencing was section 724. Applying that provision, the judge was required to accept findings of fact essential to the jury's verdict. The charge under section 467.12 in the indictment fails to separate the two Offenders. Both were charged that "on or between" September 3, 2009 and January 12, 2010, they committed an unlawful offence "for the benefit of, at the direction of, or

in association with a criminal organization”. Mr. Strongitharm was charged with drug trafficking offences in September and October as well as in January. Mr. Blok-Andersen was charged with drug trafficking only “on or about the 11th and 12th days of January, A.D., 2016”.

[35] Regarding Mr. Blok-Andersen’s conviction for the section 467.12 charge, the essential facts were that he trafficked in cocaine on or about January 11 or 12, 2010 for the benefit of a criminal organization. There was no underlying charge that would have required the jury to find that he was trafficking for the benefit of a criminal organization for the other dates specified in the 467.12 charge. By contrast, those dates clearly applied to Mr. Strongitharm who was charged with additional drug trafficking offences in September and October. In short, it was not essential for the jury to find that Mr. Blok-Andersen was acting for the benefit of a criminal organization other than on the January dates.

[36] Nonetheless, the judge exercised her discretion to make additional factual findings. In this context, she turned, among other things, to the joint submission on sentencing proffered by the others who were involved in the same enterprise:

[71] As set out at paragraph 33 of this decision five other individuals involved in Operation Razorback were sentenced all by joint submission, although Green had gone to trial and was convicted. I have received from counsel the agreed statement of facts used in the joint submission tendered for Evan Brennan-Smith. I have read the court’s decision in *R. v. Green* (2010), 302 Nfld. & P.E.I.R. 237 (N.L. Prov. Ct.) and *R. v. R.Z. (Zanolli)*, 2012 YKSC 2. I have throughout this trial had the benefit of hearing much of the evidence forming the foundation upon which the joint submissions are based. Accordingly, I am in a position to assess the parallels between the offenders sentenced by joint submission and the two offenders in this case.

[37] Mr. Brennan-Smith was convicted of multiple charges involving cocaine and cannabis, two criminal organization offences and a money laundering charge. The judge was satisfied:

[72] ... The evidence both in the agreed statement of facts as well as evidence called before me clearly shows [Mr. Brennan-Smith] was the organizational man on the ground in Newfoundland and Labrador. ... He was a consistent and instrumental person in the unlawful ventures.

[73] ... In January of 2010 Peter Blok-Andersen, as can be seen from the communications log, directed Evan Brennan-Smith as to the manner in which he

was carrying out his criminal activities and expressed dissatisfaction with how certain matters had transpired. In the hierarchy of authority he ranked above Evan Brennan-Smith for this period of time, being the only period relevant to the predicate offence.

[38] The judge concluded:

[76] ... Mr. Blok-Andersen acted in a supervisory and/or directive role over Evan Brennan-Smith, Ben Strongitharm, Zach Hill and Andrew Green throughout January, 2010 leading up to the takedown on January 12th, 2010. He was the directing mind in ensuring the transport of the cocaine from British Columbia, its distribution and receipt of monies on sale.

[39] In comparing Mr. Blok-Andersen with Mr. Brennan-Smith, the judge recognized that Mr. Brennan-Smith was charged with multiple counts for events occurring between September 2009 and January 2010, including two criminal organization offences and money laundering. This was in contrast to Mr. Blok-Andersen's situation in which there was one criminal organization offence, restricted to the events of January 2010. The judge gave reasons for declining to find that Mr. Blok-Andersen had been a directing mind of the organization for the period of September to December 2009. As discussed above, there is no basis for concluding that she erred in exercising her discretion to limit her findings of fact with respect to Mr. Blok-Andersen to the January events.

[40] In further comparing Mr. Blok-Andersen to Mr. Brennan-Smith, the judge found that the latter's guilty pleas had minimal mitigating effect because he knew the evidence against him was strong and an acquittal was unlikely. In addition, Mr. Brennan-Smith "played a significant and key role" in managing the venture in this Province over the whole of the four-month timeframe while Mr. Blok-Andersen's charges were limited to the January events (paragraph 80).

[41] In sentencing Mr. Blok-Andersen, the judge found, as aggravating factors, the large quantity and type of drugs seized on January 12, 2010, estimated to be approximately fifteen kilograms of cocaine; threats of violence made by Mr. Blok-Andersen against others involved in the enterprise; and the fact the offence was committed for the benefit of a criminal organization (section 718.2(a)(iv) of the *Criminal Code*, discussed below).

[42] As to mitigating factors, the judge considered several positive character references as well as Mr. Blok-Andersen's apology in court and expression of remorse for the harm done to society. For more than four years he had adhered to conditions imposed when he was granted judicial interim release. While Mr. Blok-Andersen had a criminal record, the judge noted:

[37] ... The last offence occurred in 2005. The only related offence is one of simple drug possession in 2002. ...

[43] The judge also considered the range of sentence:

[83] The range of sentencing applicable to Peter Blok-Andersen is found in the Newfoundland cases cited by the Crown, *R. v. Kane*, *R. v. Payne*, and the joint submission sentences of the co-actors in their criminal enterprise. For the drug offence, Count 2, the comparable range of sentence is between 2 and 7 years. For the criminal organization offence it is between 1 and 3 years. I note that where 3 years was imposed in respect of the co-actors they had been charged with more than one criminal organization offence.

[44] Based on the above, the judge imposed a total sentence of seven years imprisonment comprised of five and one-half years for possession for the purpose of trafficking on January 11 and 12, 2010, and one and one-half years for the criminal organization offence, with credit for time on remand to be deducted. In addition, she ordered that Mr. Blok-Andersen must serve one-half of the sentence imposed for the criminal organization offence.

[45] In assessing whether the judge erred, since she also considered the application of section 718.2(a)(iv) in determining an appropriate sentence for the drug trafficking offence, it is necessary to analyze the interplay between that section and section 467.14.

Sections 718.2(a)(iv) and 467.14

[46] The question of possible double punishment arises where the application of section 467.14 is engaged along with section 718.2(a)(iv). That is, the combination engages the interplay between requiring a consecutive sentence for a criminal organization offence and use of the same facts and reason as an aggravating factor in sentencing on the predicate offence.

[47] In *Larche*, in the context of section 725 of the *Criminal Code*, Fish J. refers to the discretion available under section 718.2:

[33] In my view, the discretion afforded judges by s. 725(1)(c) is not trumped by s. 718.2, which enumerates principles of sentence that courts “shall ... take into consideration”. One of these principles, set out in s. 718.2(a), is that “a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances”. Though framed in mandatory terms – “shall” and “should” – s. 718.2 must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50.

[48] Further, with respect to the language in section 718.2 that “a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances”, Fish J. cautioned:

[35] Taking this principle into consideration does not require the court to apply it without regard to the other principles of sentencing set out in the *Code* or in binding decisions of the courts. Nor does it override s. 725.

[49] A principle that may be drawn from Fish J.’s analysis is that section 718.2 does not restrain the trial judge’s exercise of discretion not to consider an aggravating circumstance where the situation warrants. For example, in *R. v. Smith*, 2006 SKQB 137, [2006] 9 W.W.R. 317, affirmed 2008 SKCA 20, Zarzeczny J. explained:

[65] With respect to the criminal organization charges set out in Counts 6 and 7 of the Indictment, the Court firstly observes that any sentence imposed in respect of these offences must be consecutive as mandated by Parliament in s. 467.14 of the *Criminal Code*. The Court has already observed that committing a crime for the benefit of a criminal organization is considered to be an aggravating factor, both with respect to the sentencing principles contained in s. 718 of the *Criminal Code* and s. 10 of the *CDSA*. The Court has not, however, approached its sentencing with respect to Counts 2 and 4 of the Indictment [drug trafficking] taking this aggravating factor into account since that factor is directly addressed by virtue of the charges proffered against the defendant in Counts 6 and 7 of the Indictment.

(Emphasis added.)

[50] This interpretation of section 718.2(a)(iv) is consistent with the principle that an offender should not be punished twice for the same reason. Further, this interpretation does not render section 718.2(a)(iv) ineffective since there will be circumstances in which acting for the benefit of a criminal organization may be taken into account as an aggravating factor. For example, the Crown may not have charged an offender with a section

467 offence, though the facts establish beyond a reasonable doubt that the offence was committed for the benefit of, at the direction of, or in association with a criminal organization.

[51] A contrary view was adopted by the Ontario Court of Appeal in *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280, in which the Court opined:

[323] Where, as here, there is evidence before a sentencing judge that an offence was committed for the benefit of a criminal organization, Parliament has decreed such evidence shall be considered as an aggravating circumstance on sentencing: *Criminal Code*, s. 718.2(a)(iv). By reason of s. 467.14 of the *Criminal Code*, Parliament has also directed that a s. 467.12 sentence must be served consecutively to any other punishment imposed on the offender for an offence arising out of the same event or series of events and to any other sentence to which the offender is subject at the time when the s. 467 sentence is imposed.

[324] Brunet essentially invites this court to read s. 718.2(a)(iv) as applying only where no s. 467 conviction has occurred. In other words, on Brunet's interpretation of the interplay between ss. 718.2(a)(iv) and 467.14, evidence of conduct supporting a s. 467.12(1) offence is an aggravating circumstance on sentencing only in the absence of a s. 467 conviction.

[325] This interpretation must be rejected. There is nothing in the language of s. 718.2(a)(iv) to support this narrow construction. Brunet was unable to point to any authority or principled rationale for confining the application of s. 718.2(a)(iv) to cases involving only non-criminal organization offences. And s. 467.14 is clearly not restricted to situations where only a s. 467 conviction is at issue: s. 467.14 specifically applies when convictions in addition to a single s. 467 conviction are in play.

[326] In our view, a plain reading of s. 718.2(a)(iv) confirms that evidence an offence was committed in association with or for the benefit of a criminal organization is an aggravating factor on sentencing for non-criminal organization offences, even when the offender is also convicted of a s. 467 offence. Like any other statutory aggravating circumstance, it is but one of many factors to consider when fashioning an appropriate sentence.

[52] This analysis fails to take into account the principles discussed in *Larche*, and in particular, the discretion inherent in section 718.2(a)(iv). Accordingly, I would not adopt the analytical approach set out in *Beauchamp*.

[53] That said, there are different approaches that may be taken in sentencing an offender for a conviction under section 467.12 and for the

predicate offence while avoiding double punishment. (A helpful discussion of alternative approaches is found in *R. v. Evans*, 2013 ONSC 7003, at paragraphs 146 to 152.) In *Smith*, the Court accepted that punishment for the section 467.12 offence was dealt with under section 467.14 with a consecutive sentence, and that it would be unfair to also apply section 718.2(a)(iv).

[54] Alternatively, a court may attempt to apply both sections 467.14 and 718.2(a)(iv) by reducing the sentence for both the section 467 offence and the predicate offence to which section 718.2(a)(iv) would apply. I would reject this option because it may lead to skewing the development of the case law unless the judge specified a sentence for each offence as well as the reduction that was applied to each in order to avoid double punishment.

[55] Because section 467.14 requires the imposition of a consecutive sentence and since discretion is available under section 718.2(a)(iv), the preferred approach is that taken in *Smith*. This approach maintains the integrity of the sentencing scheme under the *Criminal Code*. That is, the sentence for the section 467.12 offence addresses punishment for acting for the benefit of a criminal organization. Imposing a consecutive sentence under section 467.14 leaves no room for additional punishment for the same reason under section 718.2(a)(iv).

[56] In this case, the judge did not address this issue. However, in sentencing for the predicate offence, trafficking in cocaine, along with the other factors referenced above, she indicated that section 718.2(a)(iv) was taken into account, but accorded “minimal weight because the offenders are being sentenced under Count 1 [section 467] consecutive to the predicate offences” (paragraph 69).

[57] In considering an appropriate range of sentence for the drug trafficking offence, the judge referred to the decision in *R. v. Kane, supra*, in which this Court determined:

[48] ... An offender like Mr. Kane who, for the purpose of monetary gain, has played an active, trusted and necessary role in a sophisticated, commercial level conspiracy to traffic in significant amounts of cocaine, should expect a sentence in the range of four years imprisonment. The risk associated with such criminal activity is a sentence of that length. ...

[58] This principle was applied by the judge in this case. To the extent that the sentence of five and one-half years reflects Mr. Blok-Andersen’s

supervisory role in respect of the January events, the threat of violence and the application of section 718.2(a)(iv), taken together with the mitigating factors outlined above, this sentence falls within, but at the high end of the range.

[59] In addition to the sentence for the drug trafficking offence, Mr. Blok-Andersen was sentenced to one and one-half years imprisonment for the section 467.12 offence, to be served consecutively. This sentence is less than the two to three year sentences imposed on the offenders who pleaded guilty. However, the trial judge distinguished those cases particularly on the basis that those offenders had each been charged with more than one criminal organization offence and multiple predicate offences. As outlined above, there were several mitigating factors in Mr. Blok-Andersen's case and he was found to have had a supervisory role limited to the enterprise carried out in January 2010.

[60] Given these factors, taken in the context of the judge's decision as a whole, the sentence imposed for the section 467.12 offence was at the high end of the range. However, Mr. Blok-Andersen did not request a reduction in either of the sentences or in the total sentence of seven years imprisonment. While the judge did not apply the preferred approach to sections 467.14 and 718.2(a)(iv) outlined above, there is no basis on which to conclude that she erred by failing to consider relevant facts or principles of law.

[61] In the result, while the individual and total sentences imposed on Mr. Blok-Andersen are at the high end of the range of appropriate sentences, the judge did not err in the exercise of her discretion. I would dismiss the Crown's appeal.

Mr. Strongitharm

[62] In determining an appropriate sentence for Mr. Strongitharm, the judge relied on the findings of fact discussed above. She concluded that his role in the enterprise was similar to that played by Mr. Kane in *R. v. Kane*, *supra*:

[86] ... For ease of reference paragraph 11 [of *Kane*] states:

"11 As a member of the conspiracy, Mr. Kane did more than carry drugs as in the case of a courier and more than act as a conduit for the drugs and money. He was responsible for setting up and maintaining a

stash house, and for seeing to the distribution of large amounts of drugs. He delivered drugs to traffickers, instructing them on how the drugs were to be mixed with cutting agents to obtain a specified number of portions to be sold to other traffickers or to purchasers. He had responsibility for and was trusted with significant sums of money.”

[87] The aggravating factor in Ben Strongitharm’s case, like Peter Blok-Andersen, is the type and quantity of the drugs in his possession and/or trafficked by him. Considering September and October, 2009 as well as January, 2010 the quantity of cocaine attached to his involvement would be somewhat greater than 15 kilos. The drug offences were committed for the benefit of, at the direction of, or in association with a criminal organization, an aggravating factor to be given some minimal consideration in light of Count 1 [section 467.12].

[63] The judge considered that Mr. Strongitharm was a first-time offender, was aged twenty-four at the time of commission of the offences, and appears to have matured while on judicial interim release. Several letters attesting to his good character were proffered and he had apologized for his misdeeds.

[64] The judge rejected the Crown’s submission that Mr. Strongitharm’s role and criminal activity were comparable to those of Mr. Brennan-Smith. She explained:

[73] The Crown suggests that the actions of Ben Strongitharm are comparable to those of Evan Brennan-Smith. I do not agree with this characterization. Ben Strongitharm through the months of September and October was regularly in the company of Evan Brennan-Smith and was seen both entering and exiting stash houses with him and meeting with individuals known to be involved in the drug trade. He did not rent stash houses, drive any of the motor vehicles and only accessed one stash house on one occasion by himself. I conclude he had a less prominent role than Evan Brennan-Smith in September and October, 2009. Insofar as the January events are concerned the evidence satisfies me Ben Strongitharm acted as courier in transporting drugs from British Columbia to Newfoundland and Labrador in the Toyota Cruiser ultimately found at 224 Anchorage Road.

[65] Having considered the evidence and relevant principles of sentencing, the judge imposed a sentence of four years imprisonment for each drug trafficking offence, to be served concurrently. This sentence is consistent with the discussion of the range of sentence in *Kane*. The judge indicated that, while she did consider acting for the benefit of a criminal organization under section 718.2(a)(iv), she gave it minimal weight given the conviction under section 467 and the requirement for a consecutive sentence under section 467.14.

[66] As to section 467.12, Mr. Strongitharm received the same sentence as Mr. Blok-Andersen. This was at the high end of the range taking into account that, unlike Mr. Strongitharm, Mr. Blok-Andersen had exercised a level of supervision in the January enterprise. However, the judge balanced this against Mr. Strongitharm's longer involvement, including trafficking offences in September and October 2009.

[67] In summary, the judge gave reasons for exercising her discretion in determining factors relevant to the sentences imposed on Mr. Strongitharm. She did not err in principle or in law in making the findings of fact, and applying the limitations, which she did. The sentences imposed were not outside the appropriate range. Accordingly, I would dismiss the Crown's appeal.

Serving One-half of the Sentence for the Section 467.12 Offence

[68] Restrictions on eligibility for parole are set out in section 743.6(1.2):

Notwithstanding section 120 of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more ... on conviction for ... an offence under section ... 467.12 ... the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence

[69] In these appeals, section 743.6(1.2) is not engaged because the sentences do not satisfy the minimum two year requirement. Accordingly, the judge erred when she applied this provision. As a consequence, the order must be amended to remove "Service of one-half of the sentence imposed for Count 1 before release on full parole".

SUMMARY AND DISPOSITION

[70] In summary, leave to appeal having been granted at the hearing, the sentences imposed by the trial judge on both Mr. Blok-Andersen and Mr. Strongitharm fall within an appropriate range. The judge did not err in the exercise of her discretion regarding findings of fact following convictions by a jury.

[71] However, the judge erred by imposing parole ineligibility under section 743.6(1.2) of the *Criminal Code*. Accordingly, that portion of the orders must be set aside.

[72] In the result, I would dismiss the appeals against the sentences imposed on Mr. Blok-Andersen and Mr. Strongitharm, except that the words, “Service of one-half of the sentence imposed for Count 1 before release on full parole” shall be deleted from the sentences.

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.

Rowe J.A. (Separate Concurring Reasons):

[73] I have read the reasons of my sister Welsh. I agree with her concerning leave to appeal. I would adopt her statement of the facts. I would also adopt her reasons regarding parole ineligibility.

[74] The Crown in its Factum set out the principal issues as follows:

Whether the trial judge erred in law by declining [or] failing to make appropriate findings of fact consequent upon the jury’s verdict, and specifically erred:

- (a) by declining to consider whether the respondents were members of the criminal organization referenced in Count 1 of the indictment, for sentencing purposes; and
- (b) by declining to find whether respondent Blok-Andersen was a leader of the criminal organization referenced in Count 1 of the indictment, for sentencing purposes.

(a) Members of a Criminal Organization

[75] The Crown takes the position that the evidence at trial proved beyond a reasonable doubt that Messrs. Blok-Andersen and Strongitharm were members of a criminal organization (as per s. 467.13) and that there was an obligation on the trial judge to so find and then treat this as an aggravating

factor for the purposes of sentencing for the convictions under s. 467.12. I do not agree.

[76] If the Crown wished to obtain convictions against Messrs. Blok-Andersen and Strongitharm for being members of a criminal organization, they should have charged them under s. 467.13. But, the Crown did not. Rather, the Crown exercised its discretion to charge them with committing an indictable offence (drug trafficking) “for the benefit of, at the direction of, or in association with a criminal organization” as per s. 467.12.

[77] While it is clear that pursuant to s. 725(1)(c) it is open to a judge to “consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge” (here s. 467.13), the sentencing judge is under no obligation to do so. In this regard, I would adopt Justice Welsh’s analysis at paragraphs 23 to 33 (relating to *R. v. Larche, supra*).

[78] The foregoing is adequate to dispose of issue (a) set out above.

(b) Blok-Andersen as Leader of a Criminal Organization

[79] To be leader of a criminal organization necessarily entails that one be a member of it. Thus, the Crown’s argument that the sentencing judge erred in law by failing to find that Mr. Blok-Andersen was the leader of a criminal organization can succeed only if the Crown succeeds on issue (a) above.

[80] As I have already decided that the Crown’s arguments fail regarding issue (a), then logically the Crown must fail as well regarding issue (b).

[81] The Crown has shown no legal basis to vary the sentences imposed on Messrs. Blok-Andersen and Strongitharm.

[82] I agree with Justice Welsh in the result.

M. H. Rowe J.A.