IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Noseworthy*, 2021 NLCA 2
Date: January 5, 2021
Docket Number: 201901H0024

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

RODNEY DWAYNE NOSEWORTHY — RESPONDENT

Coram: Hoegg, O'Brien and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201401G1160 (2019 NLSC 23)

Appeal Heard: June 18, 2020
Judgment Rendered: January 5, 2021

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Hoegg and Butler JJ.A.

Counsel for the Appellant: Elaine Reid
Counsel for the Respondent: Self-Represented

O'Brien J.A.:

Overview

[1] Mr. Rodney Noseworthy was convicted of conspiracy to traffic in cocaine and in cannabis marihuana contrary to the provisions of section 465(1)(c) of the *Criminal Code*, with respect to offences under section 5(1) of the *Controlled Drugs and Substances Act*.

[2] He was sentenced in the Supreme Court of Newfoundland and Labrador, General Division (*R. v. Noseworthy*, 2019 NLSC 23).

[3] The Crown is appealing the sentence.

[4] For the conviction on conspiracy to traffic in cocaine, the sentencing judge indicated he would have imposed a sentence of 30 months imprisonment, but he reduced this by one-third (10 months) because Mr. Noseworthy had been subject to court-imposed conditions for an extended period while on judicial interim release. As a result, a "net sentence of 20 months in prison" was imposed (para. 70).

[5] For the conviction on conspiracy to traffic in marihuana, a sentence of 18 months imprisonment was imposed, to be served concurrently with the 20-month sentence described above (para. 71).

[6] The Crown argues that the 20-month sentence for conspiracy to traffic in cocaine is demonstrably unfit. It further argues that the judge made errors in principle in sentencing Mr. Noseworthy, and that these errors impacted the sentence. The Crown submits that a longer sentence of imprisonment is warranted in these circumstances.

[7] Mr. Noseworthy has served the 20-month sentence of imprisonment and has been released from prison. He argues that the appeal should be dismissed. In the event the appeal is allowed, and a longer period of imprisonment is imposed, he submits that he should not be re-incarcerated.

[8] For the reasons that follow, I would conclude that the judge made errors in principle in imposing a 20-month sentence of imprisonment for conspiracy to traffic in cocaine, that the errors impacted the sentence, and that the sentence is demonstrably unfit. As a result, I would allow the appeal and impose a sentence of 42 months imprisonment for the cocaine conspiracy conviction. In light of the particular circumstances, I would stay the balance of the 42-month sentence.

Issues

[9] The issues on this appeal are as follows:

1. As this is a sentence appeal, requiring leave to appeal, should leave be granted?

If leave to appeal is granted:

2. Is the 20-month sentence for conspiracy to traffic in cocaine demonstrably unfit?

3. Did the sentencing judge make errors in principle that had an impact on the sentence?

4. Did the sentencing judge err in reducing the sentence for conspiracy to traffic in cocaine by 10 months, to give credit for Mr. Noseworthy's pre-sentence release conditions?

5. If the sentence for conspiracy to traffic in cocaine should be varied, what is an appropriate sentence?

6. If a longer period of incarceration should have been imposed, should Mr. Noseworthy be re-incarcerated?

Issue 1: *Leave to Appeal*

[10] As this is a sentence appeal by the Crown, leave to appeal is required (section 676(1)(d) of the *Criminal Code*). The question to be considered is whether the appeal is frivolous in the sense that there is no arguable basis or sufficient merit to the appeal (see *R. v. Tuglavina*, 2020 NLCA 30, at paras. 12-13; *R. v. Roberts*, 2019 NLCA 43, at para. 32; *R. v. R. B.*, 2019 NLCA 22, at para. 9; *R. v. Martin*, 2018 NLCA 12, at para. 6; and *R. v. Blok-Andersen*, 2016 NLCA 9, 376 Nfld. & P.E.I.R. 130, at para. 8).

[11] The Crown submits that the judge made various errors in principle in sentencing Mr. Noseworthy, and that the 20-month sentence for conspiracy to traffic in cocaine is demonstrably unfit. In considering the issues the Crown wishes to argue on appeal, it cannot be said that there is no arguable basis or sufficient merit respecting these issues. The test for seeking leave to appeal is met, as the appeal is not frivolous. Leave to appeal the sentence is therefore granted.

Issues 2 and 3:

Is the 20-month sentence for conspiracy to traffic in cocaine demonstrably unfit?

Did the sentencing judge make errors in principle that had an impact on the sentence?

[12] The issues regarding whether the sentence is demonstrably unfit and whether the judge made errors in principle that had an impact on the sentence will be considered together, as there is overlap between them.

Standard of Review

[13] The Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, set out the standard of review for sentence appeals. This was further considered in *R. v. Friesen*, 2020 SCC 9 (see generally paras. 25-29).

[14] Writing for the majority in *Lacasse*, Wagner J., as he was then, noted "the importance of giving wide latitude to sentencing judges", stating that … "except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit" (para. 11). The same point was made in *Friesen* (paras. 25 and 26).

[15] The majority decision in *Lacasse* made clear that not all errors in sentencing attract consequences on appeal. Rather, appellate intervention is justified only when an error impacts the sentence:

> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

[16] Wagner J. discussed the threshold to be met to find that a sentence is demonstrably unfit:

> [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these

> expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

[17] Relevant to this appeal, and as will be discussed below, the majority in *Lacasse* noted that sentencing ranges are guidelines and that deviation from a sentencing range does not necessarily constitute an error (para. 60). This was reiterated in *Friesen* (paras. 36-39).

[18] Finally *Lacasse* and *Friesen* (see paras. 30-33) both stress the primacy of proportionality as the guiding principle in sentencing, and discuss the relationship between proportionality and parity. As Wagner J. stated in *Lacasse*:

> [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender …
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> …
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> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. … Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.
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> [54] … The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. …

[19] The principles set out in *Lacasse* and *Friesen* inform this Court's consideration of the present sentence appeal.

Background

[20] Following a trial in the Supreme Court in 2017, Mr. Noseworthy was acquitted of conspiracy to traffic in cannabis marihuana and cocaine (*R. v. Noseworthy*, 2017 NLTD(G) 125). The Crown appealed the acquittals and, in 2018, this Court allowed the appeal and entered convictions relating to the charges of conspiracy to traffic in cocaine and marihuana (*R. v. Noseworthy*, 2018 NLCA 69).

[21] A 70-page agreed statement of facts was entered into evidence at the 2017 trial. As well, Mr. Noseworthy testified at the trial. According to the evidence, significant quantities of cocaine and marihuana were hidden in the gas tanks of

vehicles transported from Quebec to St. John's. The drugs were then removed from the vehicles at a local garage in St. John's before being distributed for sale.

[22] Among those involved in the conspiracy were Mr. Tan Tai Huynh and Mr. Alex Prefontaine, both originally from Quebec, Mr. Charles Noftall, the owner of the garage in St. John's, and various street-level dealers.

[23] The evidence described how the conspiracy worked. Mr. Noseworthy would take possession of the drugs from Mr. Noftall, distribute them to local street-level dealers, and collect and remit the proceeds of the sales directly to either Mr. Huynh or Mr. Prefontaine.

[24] In the 2018 Court of Appeal decision, Hoegg J.A. described the factual circumstances relating to Mr. Noseworthy's participation in the conspiracy:

> [2] Mr. Noseworthy's charges arose from an investigation concerning the transport of illegal drugs from Quebec to the island of Newfoundland. At trial the evidence comprised a lengthy and detailed agreed statement of facts, a book of photographs, two volumes of transcripts of interceptions, and Mr. Noseworthy's *viva voce* testimony. In short, it established that two Quebec men, Tan Tai Huynh and Alex Prefontaine (also known as Dimitri), arranged for drugs to be transported to St. John's in the gas tanks of vehicles and offloaded at a garage owned and operated by Charles Noftall of St. John's. The drugs were then distributed for injection into the local market.
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> [3] Mr. Noseworthy trafficked the drugs locally. He acquired his supplies of cocaine and marihuana from Mr. Noftall, with whom he had a long-standing friendship, at the garage. He returned the proceeds from his trafficking to Mr. Prefontaine, which cash proceeds were then couriered or transported by Mr. Huynh to Quebec.
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> [4] Police began their conspiracy investigation in June of 2012. Mr. Noseworthy first came to their attention in December 2012, having been brought into the operation during the fall of 2012 by Mr. Noftall.
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> [5] The uncontroverted evidence, agreed to by Mr. Noseworthy, established that he communicated with all three of the men named above, by text, telephone and in person, on matters related to acquiring the drugs from Mr. Noftall at the garage and remitting the sales proceeds to Mr. Prefontaine for return to Quebec. As well, the evidence established that Mr. Noseworthy was a frequent visitor to Mr. Noftall's garage, that Mr. Noseworthy was aware of how the drugs had been brought into St. John's, and that it was those drugs that he agreed to sell and did sell, locally. The evidence also established that Mr. Noseworthy arranged for his friend Keith Walsh to become a trafficker of drugs obtained from Mr. Noftall at his garage, and that Mr.

> Noseworthy arranged for relocation of Mr. Walsh's stash when Mr. Walsh became nervous about storing his stash at his own home.
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> [6] In addition to the agreed and uncontroverted evidence referenced above, Mr. Noseworthy gave *viva voce* evidence. He testified that when he initially agreed to traffic the drugs he only knew that Mr. Noftall could supply him with drugs to sell. Mr. Noseworthy's evidence was that he knew three days before meeting Mr. Prefontaine and Mr. Huynh that drugs were coming into Mr. Noftall's garage for sale. …
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> …
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> [17] The evidence, which was accepted by the Judge, shows that Mr. Noseworthy was fully aware of the plan to bring illegal drugs – cocaine and marihuana – into Newfoundland for the unlawful objective of selling them locally. He agreed to sell and did sell these drugs, which he obtained from Mr. Noftall with full knowledge of where they came from and how they got to Mr. Noftall's garage, and remitted the proceeds of their sales to Messrs. Prefontaine and Huynh for return to Quebec.
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> [18] Mr. Noseworthy's membership in the conspiracy is established by his knowledge of the conspiracy, and his agreement to join it by agreeing to further its unlawful objective of selling the drugs locally. His selling of the drugs locally, combined with his knowledge of the conspiracy and his agreement to traffic, is "powerful evidence" (*J.F.* at paragraph 52) that he actually was a member of the conspiracy. Moreover, his bringing a friend of his (Mr. Walsh) into the scheme is further evidence of his membership, as is his remittance of monies to Messrs. Prefontaine and Huynh for return to Quebec. …

[25] The sentencing judge in *R. v. Noseworthy*, 2019 NLSC 23, observed that this was a large-scale, commercial conspiracy to traffic drugs in this province:

> [23] … it was clear from the evidence that on each, the conspiracy was at the higher end of the spectrum. The drugs involved, marihuana, cocaine and phenacetin, present serious public safety issues, in particular the latter two. There were large quantities of drugs imported into the Province by the operation of this conspiracy, although the evidence did not disclose exact amounts. …
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> …
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> [25] … While the evidence on the amount of drugs involved was not specific, it did appear that large amounts of drugs and money were involved.

The established sentencing range

[26] The Crown submits that the 20-month custodial sentence for conspiracy to traffic in cocaine is demonstrably unfit because it is below the established sentencing range for this offence.

[27] In *R. v. Oates* (1992), 100 Nfld. & P.E.I.R. 289 (Nfld. C.A.) and *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78, this Court has considered the appropriate range of sentence for a mid-level trafficker of cocaine in a commercial operation.

[28] In *Oates*, it was held that 3.5 to 4 years was the normal sentencing range for this type of commercial trafficking in cocaine. There were three concurring judgments in *Oates*, and all agreed that the original sentence of two years less a day was too low. Goodridge C.J.N. stated that the 3.5 to 4 year range was required to promote general deterrence:

> [4] In my view, the sentence imposed by the trial judge was inadequate. A sentence in the range of 3½ to 4 years would have been more in keeping with the offence having a view to the factor of general deterrence which is a dominant consideration in most drug cases.
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> …
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> [7] It has to be noted however, that drug offenders are generally sophisticated criminals who take high risks for great profits, well aware of the strong possibility that they will be captured, prosecuted and convicted and that they will receive heavy sentences. Such sentences are imposed in drug offences so that they may act as a general deterrent. This has been generally the policy of Canadian courts. ...

[29] Goodridge C.J.N. discussed an earlier case from this Court, *R. v. Bearns* (1989), 77 Nfld. & P.E.I.R. 103 (Nfld. C.A.), which had set a sentencing range of 6 to 36 months for cocaine trafficking. He confirmed that this range was applicable only where the amounts of cocaine were small, and was inapplicable to commercial trafficking operations. Goodridge C.J.N. noted that, in *Bearns*, the offender was found with 21 grams of cocaine and the sentence was based on "only a single operation by one individual":

> [3] Counsel for the respondent relied to some extent on the decision of this Court in *R. v. Bearns* (1989), 77 Nfld. & P.E.I.R. 102; 240 A.P.R. 102 (Nfld. C.A.), where it was observed that the range of sentences for possession of cocaine for the purpose of trafficking runs between six months and 36 months. The cases referred to in that decision involved trafficking in relatively small amounts of cocaine. The respondent in

> this matter was dealing in a substantially greater quantity of cocaine, over 400 grams. The range for sentences suggested in *Bearns* is inappropriate where the offender was involved in trafficking to the extent that the respondent was in this particular case.

[30] Marshall J.A., concurring in *Oates*, also categorized the sentence imposed as "much too lenient" given the circumstances of the offence, noting the commercial nature of the operation and the harm caused:

> [24] The offence of the respondent is a serious crime. Trafficking in cocaine, in itself, is grave as it preys upon the addiction of others for profit leaving in its wake inestimable individual and social damage and desolation. While the conspiracy to which the respondent pleaded guilty was not a mega operation, he was obviously involved in a fairly substantial commercial venture. … The operation was also carried out with some degree of sophistication through a compact network of people. Therefore, the magnitude of the operation in which the respondent was involved aggravates the gravity of his offence.

[31] Marshall J.A. further noted the need to deter commercial drug trafficking:

> [26] …The nature and scope of the operation and the fact that it was calculated to profit from cocaine dependency mandated that considerably greater weight be accorded to deterrence in formulating an appropriate sentence.
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> …
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> [40] In this context it is relevant to refer again to the respondent's comment upon arrest indicating that before becoming involved in cocaine trafficking he weighed its potential gains against the risk of imprisonment. This would not be atypical of illegal drug dealers. It is a criminal business and, like legitimate ventures, it is not surprising that attendant risks are balanced against the chances of success. In such criminal ventures the major risk is, of course, the knowledge that a prison term will ensue if apprehended. It is also a major deterrent factor.

[32] Steele J.A., in a concurring opinion in *Oates*, also indicated the need for deterrence by a substantial period of imprisonment. As such, his view was that the proper sentence "would have been up to four years":

> [64] The courts in Canada have consistently held that deterrence and the protection of the public are the dominant considerations when sentencing an accused on conviction for trafficking or conspiring to traffic and barring highly unusual or exceptional circumstances incarceration is the consequence. As *MacFarlane* points out at p. 668, where the trafficking offence involves organized distribution for profit the courts usually impose very substantial periods of imprisonment:

> "Where the evidence establishes that the accused was engaged in a commercial trafficking operation, the courts generally have imposed very substantial periods of incarceration in a federal institution."
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> …
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> [68] … The point is that trafficking in drugs or conspiring to traffic in drugs and particular in "hard" drugs such as cocaine, is a very serious offence where, as I have already stated, deterrence is, or ought to be, the paramount consideration. …

[33] In *Kane*, decided in 2012 approximately two decades after *Oates*, this Court, in a unanimous decision, adopted the rationale in *Oates*, and confirmed that deterrence continued to be the primary factor to be considered in sentencing in this context:

> [13] A conspiracy of the type in which Mr. Kane participated is a serious offence. General deterrence and protection of the public are the paramount considerations in sentencing. The rationale for that is discussed in the *Oates* decision. …

[34] Welsh J.A., in *Kane*, referenced *R. v. Snow*, 2006 NLTD 3, 252 Nfld. & P.E.I.R. 351, wherein a 3.5 year sentence imposed for mid-level participation in cocaine trafficking was considered to be at the "lower end of the spectrum":

> [20] … Mr. Snow was convicted of conspiracy to traffic in cocaine. He arranged to have delivered to him from a source in Quebec more than a quarter of a kilogram of high grade cocaine for distribution in the Province. The package was intercepted and Mr. Snow was arrested while in the process of attempting to dispose of the packages that had been substituted by the police. …
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> …
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> [22] In the result in *Snow*, Dymond J. imposed a sentence of three and one-half years in prison, which he described as "in the lower end of the spectrum for these types of offence", that is, conspiracy to traffic in cocaine (paragraph 43).

[35] Upon consideration of the relevant authorities, it was concluded in *Kane* that, to promote deterrence and public protection, the expected custodial sentence for mid-level trafficking in cocaine in a commercial operation would be in the range of four years:

> [24] It is clear, for the reasons stated in *Oates*, *Snow* and others, that general deterrence and protection of the public are the paramount considerations where sentence is imposed for conspiracy to traffic in cocaine, with rehabilitation playing a

> secondary role. An appropriate sentence for an offender like Mr. Kane who, for the purpose of monetary gain, has played a trusted and necessary role in a sophisticated, commercial level conspiracy to traffic in significant amounts of cocaine, would be in the range of four years imprisonment. A person who engages in this type of conduct, absent other mitigating or aggravating circumstances, must expect that the risk associated with such criminal activity is a sentence of that length. …

Deviation from an established sentencing range

[36] As the Supreme Court has stated in various cases, including in *Lacasse*, deviation from an established sentencing range is not necessarily an error, and does not necessarily make a sentence unfit. Wagner J., in *Lacasse*, noted that the particular circumstances of an offence or an offender may necessitate a sentence outside the established range:

> [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. … This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. …

[37] In other words, "… sentencing ranges are primarily guidelines, and not hard and fast rules: *Nasogaluak*, [2010 SCC 6, [2010] 1 S.C.R. 206], at para. 44. As a result, a deviation from a sentencing range is not synonymous with an error of law or an error in principle" (*Lacasse*, at para. 60).

[38] Accordingly, this Court has accepted deviations from the established sentencing range with respect to sentences for conspiracy to traffic in cocaine, provided they are warranted in the particular circumstances.

[39] For example, in *R. v. Parsons*, 2017 NLCA 64, despite the established range of 3.5 to 4 years, this Court allowed an appeal of a custodial sentence and imposed a conditional sentence of two years less a day for conspiracy to traffic in cocaine, due to the particular circumstances of the offender and his role in the offence. In doing so the Court maintained that deterrence was still the overriding factor, but acknowledged that there are instances where an offender's personal circumstances may militate against a custodial sentence:

> [53] As referenced by the trial judge, this Court has emphasized that general deterrence is a paramount consideration in cases involving conspiracy to traffic in

> cocaine, with rehabilitation being a secondary consideration. (See, for example, *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78.) However, that proposition does not foreclose a focus on rehabilitation where the circumstances warrant. This is such a case.

[40] Informing the decision in *Parsons* to deviate from the established sentencing range, this Court noted at paragraphs 48 to 51 that the trial judge had found that "there was no evidence of any degree of sophistication or high level organization in the activity; there was no evidence that [Mr. Parsons] was a significant player within a hierarchy of co-conspirators". The Court also observed: that Mr. Parsons had made great progress in his rehabilitation between his arrest and the appeal by completing a post-secondary educational program in Electronic Engineering Technology and obtaining gainful employment in his field of study in another province; that the sentencing judge had unduly considered the absence of a guilty plea in determining whether a conditional sentence should be imposed; and that Mr. Parsons had taken full responsibility for his actions.

[41] In light of all the circumstances, this Court held that a sentence well below the normal sentencing range was justified, and that this would not undermine the guiding principle that deterrence was to be a paramount consideration in sentencing for this offence:

> [54] As set out at paragraph 48, above, after his arrest, Mr. Parsons took steps to become a contributing member of society through further education and regular employment. During the five years between his arrest and sentencing, he continued on this path and was not involved in further criminal activity. As stated in the pre-sentence report, this offence was "an outlier incident in an otherwise non-criminal life".
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> …
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> [56] In the circumstances, I would vary the sentence imposed by the trial judge by substituting a sentence of two years less a day, to be served conditionally. This result is not inconsistent with this Court's determination that general deterrence is a paramount consideration in cases involving conspiracy to traffic in cocaine, with rehabilitation being a secondary consideration. The particular circumstances here are such that the sentencing principles of general deterrence and rehabilitation are best achieved by means of a lengthy conditional sentence with appropriate conditions.

[42] This Court has also confirmed sentences for cocaine trafficking that have been on the higher end of the range, where the particular circumstances have warranted higher sentences.

[43] For example, in *Blok-Andersen*, this Court confirmed a 5.5 year sentence of imprisonment for trafficking in cocaine. The Court referenced *Kane* and concluded that, while 5.5 years was high, it was not inappropriate in the circumstances:

> [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:
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> > [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. …
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> [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.
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> …
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> [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. …

[44] In summary, while a 3.5 to 4 year sentencing range has been established for mid-level cocaine trafficking in this province, the cases demonstrate that the particular circumstances of the offence and the offender must be considered to determine whether a deviation from the range is justified.

Application to this case

[45] In the present case, the Crown requested a four-year sentence for Mr. Noseworthy and the defence requested a suspended sentence. The judge stated that a suspended sentence would be inappropriate, and that a custodial sentence was warranted.

[46] The Crown cited authorities from this Court, including *Oates* and *Kane*, and from other courts indicating that an appropriate sentence for this offence would be in the four-year range:

> [30] The Crown acknowledged [Mr. Noseworthy's] positive antecedents but submitted that these offences were serious and should attract a significant period of incarceration. Based on a series of authorities in the Court of Appeal for this Province, it recommended that a sentence of four years' incarceration was appropriate.

[47] The sentencing judge considered the authorities, some of which dealt with trafficking in cocaine and others with conspiracy to traffic in cocaine, and noted that section 465(1)(c) of the *Criminal Code* indicates that the punishment for conspiracy to traffic in cocaine is the same as the punishment for trafficking in cocaine (para. 7).

[48] The judge accepted the Crown's position that the "normal range" of sentences for conspiracy to traffic in cocaine would be in the range of four years in prison:

> [49] The Crown's authorities support a sentence for trafficking in cocaine in the range of four to five years. That includes cases for which the offender had good antecedents and a reasonable prospect of rehabilitation. …
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> …
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> [55] The Crown's approach is based on authorities that establish a range of sentences of about four years for trafficking in cocaine. … The Crown also acknowledges that conspiracy to traffic in marihuana would attract a lesser penalty. In recommending a sentence of four years for the first offence involving cocaine, and two years concurrent for the second offence involving marihuana, the Crown is responding to existing authorities.
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> …
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> [57] I accept that the normal range for these offences would attract sentences in the range recommended by the Crown. …

[49] However the judge ultimately determined that, despite the sentencing range that he had identified and accepted as the normal or established range, a lesser sentence was appropriate:

> [65] … While I accept that the normal sentence for the offence involving cocaine should be in the range of four years, in the context of this offence, a sentence of 30 months is appropriate. Against that I would give credit of 10 months for the time on remand, for a net period of incarceration of 20 months.

[50] The judge's decision to sentence below the established range was based on three main factors: first he characterized Mr. Noseworthy's role in the

conspiracy as minor; second he placed great emphasis on Mr. Noseworthy's continued employment, his acceptance of responsibility for his actions, and his positive prospects for rehabilitation; and third he determined that it would be inappropriate for Mr. Noseworthy's sentence to exceed the sentence imposed on a co-conspirator (Mr. Noftall) who, the judge indicated, played a greater role in the conspiracy.

[51] These factors will be considered next. For the reasons that follow, I would conclude that the judge made errors in principle in relying on these factors to depart from the accepted sentencing range of 3.5 to 4 years.

Mr. Noseworthy's role in the conspiracy

[52] The judge described Mr. Noseworthy's participation in the conspiracy as minor, and indicated that this minor role should be a mitigating factor in sentencing:

> [26] … I believe the evidence disclosed that he was, at most, a minor player. As such, sentencing must take his lesser role into consideration.
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> [28] The main mitigating factors are his minor role in the conspiracy and the positive antecedents as set out in the PSR. While he appears to have been aware of, and participated in, some aspects of the operation, he was not one of the guiding minds of the enterprise.

[53] With respect, the evidence does not support a conclusion that Mr. Noseworthy's role in this conspiracy was minor. While the judge is correct that Mr. Noseworthy may not have been a guiding mind of the enterprise, and that others may have played greater roles, this does not mean his part was minor. Mr. Noseworthy's participation must be considered in terms of what he actually did to further the conspiracy.

[54] The evidence reveals that Mr. Noseworthy was fully knowledgeable and was a key player in a commercial, inter-provincial conspiracy to bring cocaine into this province and sell it in the local market. His positon could be best described as somewhere in the middle of the operation, as he had direct dealings with those above and below him.

[55] On the upper end of the spectrum, the evidence indicates Mr. Noseworthy would deal directly with Mr. Noftall to acquire the drugs, with full knowledge of how they were brought into the province, and provide the proceeds of sales

directly to Mr. Prefontaine and Mr. Huynh. On the other end of this hierarchy, Mr. Noseworthy dealt directly with the street-level dealers to supply the local market. This included providing the drugs to the dealers, collecting the proceeds, and in at least one instance bringing a street-level dealer into the conspiracy.

[56] In *R. v. Noseworthy*, 2017 NLTD (G) 125, the trial judge extensively referenced the evidence, which took "the form of consent exhibits and an agreed statement of facts" … and which included "the 70-page statement, and the three binders of exhibits covering the record of intercepted communications and photographs" (para. 6). This evidence included transcripts of intercepted "telephone conversations on cell phones, text messages on cell phones, and by the use of listening devices" (para. 9).

[57] The evidence details Mr. Noseworthy's numerous discussions and meetings with Mr. Prefontaine, Mr. Huynh and Mr. Noftall, and with the street-level dealers. Mr. Noseworthy was a main link between these two levels of the conspiracy.

[58] The transcripts and intercepted communications illustrated Mr. Noseworthy's role in collecting outstanding monies from multiple street-level dealers, attempting to meet deadlines to remit monies to Mr. Prefontaine and Mr. Huynh, introducing at least one of the street-level dealers into the conspiracy, ensuring drugs were hidden and arranging for drugs to be moved from a so-called "stash house" when a street-level trafficker living at the house expressed concern to Mr. Noseworthy about the risk of detection.

[59] Much of the intercepted communications referenced by the trial judge involved discussions about drugs being provided to Mr. Noseworthy by Mr. Noftall or money owed to Mr. Noseworthy by local dealers, which Mr. Noseworthy would need to collect and remit to Mr. Prefontaine or Mr. Huynh.

[60] The trial judge referenced a conversation between Mr. Noseworthy and Mr. Noftall which provides some indication of the quantum of drugs and money being handled, discusses payment in respect of a "stash house", and references the collection of payments from street-level dealers. The trial judge stated:

> [39] On February 2, 2013, Police intercepted a conversation between Mr. Noftall and Mr. Noseworthy through a listening device placed in Mr. Noftall's garage. They could be overheard counting money. The conversation seemed to focus on how much money could result from some of the outstanding amounts due from others. …

[61] The agreed statement of facts details the conversation referenced above by the trial judge:

> During their conversation, Noftall and Noseworthy could be heard counting. Noftall said, "And we're pretty well done of that… maybe a quarter wasn't paid in the bag."
>
> Noftall asked "… sure how many did you sell? It was only half a key, it was only 17 or 16 ounces off."…
>
> At a later point in the conversation, Noftall asked: How much are we givin' our little spot? … The little spot where we got it stashed." Noseworthy said, "We gotta give 'em somethin'."…
>
> At one point [Mr. Noseworthy] said "Here's your ten grand," and he later mentioned "… I'm going across town again, grabbing money, eventually I'm coming back – if not I'll get more money to you later."
>
> Noftall told Noseworthy he could take his "six grand" that was to be paid by Mark until he had been paid by his "two Bobs" who owed "fifteen grand".
>
> (Appeal Book, Tab 6, at para. 91).

[62] The trial judge referred to excerpts from the transcript of intercepted communications between Mr. Noseworthy and Mr. Prefontaine, where the apparent topic of discussion was the quantity of cocaine distributed by Mr. Noseworthy. The trial judge stated:

> [43] A little while later in the conversation, the following exchange takes place:
>
> Noseworthy: ... I goes to see another guy tomorrow. Maybe I'll get rid of that one for seventy-five, you know?
>
> Prefontaine: Mmm.
>
> Noseworthy: And then we'll be cool, then when me and Charlie goes into the . . .
>
> Prefontaine: I know but we are ... and your profit and buying and, and everything.
>
> Noseworthy: Yeah, but ...
>
> Prefontaine: We can't do it, you know it ... like ah we'll have some shit. You know?

> Noseworthy: But, think about it this way, four keys, at and add the sixty-six sixty-seven fifty, four keys, I made fucking five hundred in one.
>
> [44] This exchange appears to be about cocaine. Staff-Sergeant Conohan testified that a "key" is common parlance for a kilogram of cocaine.

[63] The trial judge also referenced a passage where Mr. Noseworthy complained to Mr. Prefontaine about the quality of the cocaine provided, and discussed mixing the cocaine:

> [45] Another part of the conversation is summarized in the agreed Statement of Facts at paragraph 108 as follows:
>
> > Noseworthy told Prefontaine, "We got a guy that's takin' it just like it is, he's gonna take it like it is, and do, its separate all together, you know what I mean?" A little later Noseworthy said, "I said to Charlie already, no more fuckin' mixin' the shit, man, they either take it raw, or . . . if you don't want it go somewhere else, we're not mixing, no more mixing, fuck that, I'm not doin' that no more, fuck that shit. Yeah, for the extra fuckin' thousand bucks, you know, tryin' to mix it up, to make an extra thousand bucks, next thing you know you're fuckin' two thousand in the hole. I am not mixin' no more of this shit, fuck that, it's either raw or nothing."

[64] The evidence revealed that the drugs flowed to the street-level dealers through Mr. Noseworthy and the money flowed back through him. In this respect, he was strategically positioned as a trusted intermediary between the higher and lower-level participants in the conspiracy. He was brought into the conspiracy through Mr. Noftall, who introduced him to Mr. Prefontaine and Mr. Huynh, and he was trusted enough to deliver the money back directly to Mr. Prefontaine and Mr. Huynh, rather than going through Mr. Noftall.

[65] Mr. Noseworthy fully understood the scope of the operation, those involved, and what their respective roles were. He knew the details of how the drugs were coming into the province, concealed in vehicle gas tanks, and where the proceeds were going. His role cannot reasonably be characterized as minor or low-level, but rather is that of a mid-level trafficker.

[66] In this regard, Mr. Noseworthy's role is remarkably similar to the offender in *Kane*. Mr. Kane's participation in that conspiracy to traffic in cocaine was not at the highest or lowest level. However, like Mr. Noseworthy's participation in the present case, it was held to be "integral to the operation of the conspiracy":

> [1] Mr. Kane pleaded guilty to conspiracy to traffic in cocaine and marihuana. The conspiracy, involving large amounts of drugs, was controlled by an individual in Quebec. Mr. Kane was involved primarily in setting up 'stash houses' and directing the dispersal of the drugs to traffickers. …
>
> …
>
> [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, helping to set up a second 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.
>
> [12] Mr. Kane's role was integral to the operation of the conspiracy and must be distinguished from, for example, the role of traffickers who, while taking advantage of the availability of the drugs provided by the conspirators, were not part of the organized importation and distribution scheme. The conspiracy involved commercial quantities of drugs and, as submitted by the Crown, required planning, deliberation, cooperation and trust among the co-conspirators, including Mr. Kane, over an extended period of time which ended only when the players were arrested. Mr. Kane was an active and key participant in the conspiracy. His legal responsibility must be assessed from that perspective (*R. v. Oates* (1992), 100 Nfld. & P.E.I.R. 289 (NLCA), at paragraph 58).

[67] The Court in *Kane* concluded that an appropriate sentence for Mr. Kane's level of participation in the conspiracy, where an offender "for the purpose of monetary gain, has played a trusted and necessary role in a sophisticated, commercial level conspiracy to traffic in significant amounts of cocaine", would be in the range of 4 years imprisonment (*Kane*, at para. 24).

[68] In light of all the circumstances, and the uncontroverted evidence, the sentencing judge's characterization of Mr. Noseworthy's role in the conspiracy as minor was a palpable and overriding error that had an impact on the sentence. This mischaracterization of Mr. Noseworthy's role does not provide a basis upon which to deviate from the normal sentencing range.

Mr. Noseworthy's employment, acceptance of responsibility and prospects for rehabilitation

[69] The sentencing judge considered Mr. Noseworthy's employment, his acceptance of responsibility and his positive prospects for rehabilitation as mitigating factors warranting a sentence below the normal range.

[70] Respecting Mr. Noseworthy's employment, the judge stated:

> [17] … He is currently employed with a courier company as an independent contractor. That employment may be in jeopardy arising from these current charges.
>
> …
>
> [19] … It appears his employment history is positive and provides an encouraging outlook for his future prospects. His latest employer has been supportive; however, the impact of the current offences on his employment is quite uncertain. …

[71] The record confirms that Mr. Noseworthy had been employed as a courier with a local company for many years before his arrest. He described his work routine as follows: "My route is a structured route, it's a fixed-route courier and I do pretty much the same route for the last 18 years".

[72] Mr. Noseworthy continued to work in this capacity while on judicial interim release. He resumed his employment following his release from prison. While his employment is certainly a positive factor to be considered, it is one that existed before the offences occurred. As such, unlike the situation discussed above in *Parsons*, for example, this does not provide compelling evidence of rehabilitation.

Acceptance of responsibility

[73] With respect to Mr. Noseworthy's acceptance of responsibility for his part in the conspiracy, the sentencing judge noted that, while the pre-sentence report "is ambiguous in whether he accepts responsibility for these offences" (para. 20), "he appeared to have accepted responsibility for the offences and expressed remorse for his actions" (para. 21). Later the sentencing judge concluded that Mr. Noseworthy "has accepted responsibility for his actions" (para. 64).

[74] However, the pre-sentence report does not confirm that Mr. Noseworthy accepted responsibility with respect to all the offences. On appeal, he acknowledged responsibility for trafficking in marihuana, but not cocaine. Mr. Noseworthy maintained this position despite the evidence, including the agreed statement of facts and his own testimony at trial, where he admitted to trafficking in cocaine (but denied participating in a conspiracy to do so).

[75] In *R. v. Noseworthy*, 2017 NLTD(G) 125, the trial judge concluded from the evidence that "the Defence has admitted that Mr. Noseworthy trafficked in

marihuana and cocaine" (para. 18) and that Mr. Noseworthy "freely admits trafficking in both marihuana and cocaine…" (para. 20).

[76] The judge found:

> [30] The Crown has put forth evidence in the form of the consent exhibits which contain intercepted conversations and text messages, and an agreed statement. … Mr. Noseworthy testified on his own behalf, and that testimony, together with the Crown's evidence, leads me unequivocally to the conclusion that he was involved in trafficking in marihuana and cocaine. …

[77] Further, the trial judge assessed the evidence relating to text messages retrieved from Mr. Noseworthy's telephones relating to cocaine trafficking:

> [96] The second set of exchanges of messages on this cell phone was alleged by the Crown to relate to cocaine. The messages appear clear references to a "key", and whether it would be "raw untouched off the block" for a specific price. These terms appear to refer to cocaine, as Staff Sergeant Conohan indicated in his testimony. There were even further messages about using the "raw" and that it could be "stepped" to increase the quantity. Staff-Sergeant Conohan testified that this is a common way to get more value out of nearly pure cocaine, by mixing it, or "cutting it" with other substances to increase its value on the street. I am also satisfied that these are fairly clear references to trafficking in cocaine.
>
> …
>
> [98] The first series of exchanges, alleged to relate to cocaine, begin on November 14, 2012 and continue until March 1, 2013. There are thirteen exchanges, and the subject matter concerns a request for "raw", whether it is "mixed", amounts requested, and pricing. Each of the exchanges appears to be communications to facilitate a transaction. Without relating each of them, the terminology is consistent with that described by Staff-Sergeant Conohan as references to cocaine, the concentration or quality of the product, and the pricing. There were also references to arranging locations where the actual exchange could take place. I am satisfied that, taken together, they represent arrangements for several transactions of trafficking in cocaine.

[78] The trial judge further referenced Mr. Noseworthy's testimony at trial, wherein he admitted to selling cocaine:

> [101] The final piece of the evidentiary puzzle in this case was the testimony of the Accused, Rodney Noseworthy. … He admitted quite freely that he had been trafficking in marihuana for some time, and had also sold some cocaine… Mr. Noftall was one of his suppliers for hashish and cocaine, and he contacted him first in November 2012 about having a supply.

> …
>
> [103] He also said he had no involvement in sending money out of the Province. He assumed that was done by Mr. Prefontaine and Mr. Huynh. His only involvement, according to his testimony, was in using Mr. Noftall as a supplier and selling the drugs himself to users. He said he never got drugs from Mr. Prefontaine or Mr. Huynh. However, he did admit to satisfying his debt to Mr. Noftall for the supply of drugs by delivering money directly to Mr. Prefontaine.
>
> …
>
> [116] The Crown on cross-examination uncovered some inconsistencies in his testimony. For example, he said he knew nothing about the cocaine trade, and how it is prepared and diluted for street sale. The testimony clearly indicated he was aware of the cocaine trade by late in 2012, and understood the sources of supply, the issues of purity, cutting and stepping up. …

[79] It is difficult to reconcile the evidence, and the trial judge's findings, with Mr. Noseworthy's position on appeal that he was not involved in cocaine trafficking and that he has fully accepted responsibility for his actions.

Prospects for rehabilitation and consideration of mitigating and aggravating circumstances

[80] The sentencing judge referred to the pre-sentence report which he viewed as positive. It disclosed that Mr. Noseworthy had a supportive spouse, was supporting a family, and that the "only criminal conviction, apart from the current offences, arose in 2015 and is related to trafficking in a controlled substance" (para. 16). The sentencing judge noted that the "Crown has acknowledged that it arose within the currency of the current charges" (para. 16), and should not be considered a prior offence. Regarding Mr. Noseworthy's family, the judge stated:

> [64] … He also has a family that will be profoundly affected by a lengthy jail term. While a jail term is warranted, in particular for the offence involving cocaine, if it is excessively long it may have a crushing impact on his long-term prospects.

[81] While it is wholly appropriate for the judge to have considered the mitigating factors, including positive elements in the pre-sentence report, in determining whether a sentence below the established range was justified, aggravating factors also need to be assessed.

[82] The judge stated in this regard that the scale of the conspiracy was an aggravating factor:

> [10] The *Code* also directs the court to consider, in imposing sentence, any aggravating or mitigating factors. In the facts of this case, the scale of the operation with which the offender was involved is certainly an aggravating factor. …
>
> …
>
> [22] … The aggravating factors, which are obvious in the facts, relate to the scope of the conspiracy to traffic in illegal drugs of which he was a member. …

[83] At paragraph 27, the judge states: "There are no aggravating factors, other than his low-level participation in the conspiracy." At paragraph 28, Mr. Noseworthy's minor role is characterized as one of the main *mitigating* factors. The judge states: "The main mitigating factors are his minor role in the conspiracy and the positive antecedents as set out in the [pre-sentence report]."

[84] In this respect, the aggravating factor of Mr. Noseworthy's involvement in this commercial-scale cocaine trafficking conspiracy was discounted because of a mischaracterization of his role as minor. As discussed above, Mr. Noseworthy's role was not low-level or minor, and this could not possibly warrant discounting or minimizing his involvement in the conspiracy. Nor could the asserted minor role be considered a mitigating factor on sentencing.

[85] Further, the presence of mitigating factors and the offender's prospects for rehabilitation have generally been considered to be secondary considerations in sentencing for cocaine trafficking. As discussed above, this Court, in *Oates*, *Kane*, and *Parsons* has confirmed that, in sentencing for conspiracy to traffic in cocaine, general deterrence and protection of the public are the principal considerations, and failure to properly consider these factors is an error.

[86] In *Kane*, at para. 24, the Court stated that "general deterrence and protection of the public are the paramount considerations where sentence is imposed for conspiracy to traffic in cocaine, with rehabilitation playing a secondary role" (see also *Parsons*, at para. 53).

[87] The circumstances of rehabilitation would need to be compelling to override the primary considerations of deterrence, public protection, and denunciation, and displace the normal sentencing range. In *Oates*, the Court stated the principle this way:

> [68] … The respondent's good prospects for rehabilitation did not constitute the necessary exceptional or unusual circumstances necessary to allow the sentencing judge to pass a lenient sentence thereby departing from the principles of sentencing reflected in the decisions of Canadian courts for offences of this kind.

[88] The sentencing judge gave little consideration to deterrence and denunciation, considerations which this Court has said must be paramount in sentencing for this offence. The failure to properly consider the principles of denunciation and deterrence, when imposing a sentence for conspiracy to traffic in cocaine, was an error in principle that impacted the sentence imposed.

Consideration of the sentences of others convicted in the conspiracy

[89] The sentencing judge considered the sentences that had been imposed on others involved in the conspiracy. He observed that Mr. Prefontaine's charges had been transferred to Quebec and that the proceedings had not been resolved at the time Mr. Noseworthy was sentenced. He noted that, for Mr. Huynh, the more serious charges of conspiracy to traffic in cocaine and marihuana had been dropped. Mr. Huynh had pleaded guilty to a lesser offence of conspiracy to traffic in phenacetin and was sentenced to 306 days imprisonment, which was the time he had spent on remand (*R. v. Huynh*, 2017 NLTD(G) 44). The sentencing judge held that Mr. Huynh's situation was therefore not comparable, as he was not convicted of the more serious offences, and noted that he could not "look behind the Crown's decision to accept a guilty plea to a lesser offence in the case of Huynh" (para. 61).

[90] The judge indicated that Mr. Noftall had been convicted on three counts of conspiracy to traffic in marihuana, cocaine and phenacetin and had been sentenced to a term of incarceration of 36 months (*R. v. Noftall*, 2017 NLTD(G) 185). Both Mr. Huynh and Mr. Noftall were sentenced by other judges in separate proceedings. The Crown has appealed Mr. Noftall's sentence, and the appeal has not yet been concluded.

[91] The sentencing judge stated that it would be "unacceptable" to impose a sentence on Mr. Noseworthy that was higher than Mr. Noftall's 36-month sentence of imprisonment:

> [61] … I am satisfied that it would be unacceptable to impose a sentence on Mr. Noseworthy that was higher than that of Mr. Noftall …
>
> …
>
> [65] Accordingly, I will impose a sentence that is less than that received by Mr. Noftall …

[92] The judge was obviously concerned with the principle of parity. Failure to consider parity in sentencing can constitute an error (see for example, *Freisen*, at para. 31; *Kane*, at para. 32).

[93] However, while parity is an important consideration, it is but one factor to consider in this context, and it must always be assessed in light of the principle of proportionality and the duty to impose a sentence that is proportional to the circumstances of the offence and the offender.

[94] In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), the Supreme Court considered parity and an appellate court's role when reviewing sentences that are alleged to be disparate:

> [92] ... It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. … Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be fruitless exercise of academic abstraction. …

[95] The Supreme Court also noted in *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, that parity does not displace proportionality:

> [36] Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity where warranted by the circumstances, because of the principle of proportionality. …

[96] In *Friesen*, the Supreme Court observed that parity between sentences is not an inevitable result, as sentencing remains an individualized process:

> [32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 78-79).

[97] The sentencing judge's stated view, that Mr. Noseworthy's sentence could not exceed Mr. Noftall's 36-month sentence, left little room for consideration of other appropriate factors in sentencing.

[98] The sentencing judge's emphasis on parity eclipsed or displaced the requirement to properly consider other relevant factors. These include: Mr. Noseworthy's role in the conspiracy; the requirement for a meaningful consideration of the fitness of sentence and whether a deviation from the

established range was justified; the requirement for the sentencing process to be focused on the particular circumstances of the offence and the individual offender; and the requirement to consider other factors particular to sentencing for cocaine trafficking offences, such as denunciation and general deterrence.

[99] Parity must be considered in the overall context of "individualized sentencing", as observed by the Alberta Court of Appeal in *R. v. Trung*, 2007 ABCA 103:

> [6] In terms of comparative fairness, it must be emphasized that parity is not the strongest or most compelling of principles to the extent that it must be balanced by the importance of individualized sentencing. …

[100] The Saskatchewan Court of Appeal makes a similar point in *R. v. McKay*, 2019 SKCA 129:

> [29] Clearly, proportionality is *the* fundamental principle of sentencing (s. 718.1 of the *Criminal Code*), whereas parity among offenders who have committed similar offences is a secondary sentencing principle (s. 718.2(b) of the *Criminal Code*). …

[101] While those with more significant involvement in a conspiracy would have greater culpability and, all other things being equal, may receive higher sentences, this is not the sole consideration in sentencing. Parity in sentences between conspirators should always be a consideration, but there is no strict or absolute rule that mandates sentencing based primarily on a conspirator's comparative rank in the hierarchy. Courts must always have regard to the principle of proportionality in recognizing that sentencing is an inherently individualized process.

[102] Parity, and assessing the relative blameworthiness, culpability and roles of respective offenders in a conspiracy is an important factor to consider. Depending on the circumstances, it may be a critical factor in sentencing, but it is not always the determinative factor. It should not fetter a sentencing judge's discretion in assessing individual considerations and in crafting a sentence that is appropriate and proportional.

[103] Another offender in a conspiracy may receive a sentence well above or below an established sentencing range because of aggravating or mitigating factors particular to that offender. A judge sentencing an offender in a conspiracy, after co-conspirators have been sentenced, must be mindful of the sentence(s) imposed on any fellow conspirator, but must not necessarily be hamstrung by a perceived sentencing floor or ceiling resulting from the other

sentence(s). Otherwise, the result may be an improper or inadequate sentence, as noted by this Court in *R. v. Mahoney*, 2018 NLCA 16:

> [27] Giving effect to the parity principle does not require a judge to impose an inadequate sentence on an offender in order to achieve parity with an inadequate or improper comparison sentence (*Roche*, at paragraph 12). See also *R. v. Hunter*, [1970] O.J. No. 927, 16 C.R.N.S. 12 (Ont. C.A.).
>
> …
>
> [33] In *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 (S.C.C.), the Court emphasized the importance of individuality to the sentencing process, and restated that each offender must be sentenced in accordance with his or her degree of responsibility and personal circumstances.

[104] All other relevant factors must be considered carefully before concluding, as the sentencing judge did, that "it would be unacceptable to impose a sentence on Mr. Noseworthy that was higher than that of Mr. Noftall…" (para. 61). The sentencing process in this context cannot become solely a comparative exercise based on one's position in the conspiratorial hierarchy, without considering other relevant factors.

[105] In the result, the sentencing judge's analysis was unduly influenced by the sentence imposed on another individual involved in the conspiracy, and this was an error that impacted the sentence.

Conclusion on Issues 2 and 3

[106] For the reasons provided, I would conclude that the sentencing judge made errors in principle in sentencing Mr. Noseworthy. Specifically the judge: mischaracterized Mr. Noseworthy's role in the conspiracy as minor; overemphasized and in some respects misapprehended mitigating factors such as Mr. Noseworthy's employment, acceptance of responsibility, and positive rehabilitation prospects; did not properly consider aggravating factors such as the nature of the offence of cocaine trafficking and this Court's view that deterrence, denunciation and public protection are to be paramount considerations in sentencing for this offence; and allowed the sentence imposed on a co-conspirator to unduly influence the sentence he imposed on Mr. Noseworthy. These errors had an impact on the sentence.

[107] Further, the 20-month custodial sentence for conspiracy to traffic in cocaine was demonstrably unfit in the circumstances. The factors relied upon by the sentencing judge to impose a 20-month sentence of imprisonment did not

warrant a deviation from the established sentencing range of 3.5 to 4 years, as set out by this Court in *Oates*, *Kane* and other cases.

[108] As a result, I would allow the appeal on the sentence imposed for conspiracy to traffic in cocaine.

Issue 4: ***Reduction of the sentence by 10 months to give credit for pre-sentence release conditions***

[109] The Crown also submits that the sentencing judge erred in giving Mr. Noseworthy 10 months credit for having been subject to conditions while on judicial interim release. While the judge indicated in paragraph 65 that he was giving credit for "the time on remand", this appears to have been an inadvertent reference. Mr. Noseworthy was not incarcerated on remand but was released on conditions during the time period for which credit was given. This is correctly referenced by the sentencing judge elsewhere in the decision.

[110] In the present case, the sentencing judge referenced *R. v. Sol*, 2016 ONSC 605, in which the court gave six months credit for an offender "having abided by strict bail conditions". As the period of release on conditions was longer for Mr. Noseworthy, the judge determined a greater period of credit, namely 10 months, was warranted:

> [54] Applying the same approach in this case would involve providing a higher level of credit than in *Sol*, given the much longer time this offender has been under court-imposed bail condition.

[111] The judge's approach to providing credit on sentencing for time spent on release conditions suggests there is a customary or automatic entitlement to credit, depending on the length of the period one is subject to conditions. However, an entitlement to credit, if any, in such circumstances is far from automatic, and is much more nuanced and case-specific, requiring consideration of the nature of the release conditions imposed.

[112] In *Lacasse*, the Supreme Court noted a reluctance to give credit for pre-sentence release conditions, noting that release on conditions is not the same as pre-sentence custody; that is, "bail is not jail":

> [112] The courts have seemed quite reluctant to grant a credit where the release of the accused was subject to restrictions, given that such restrictive release conditions are not equivalent to actually being in custody ("bail is not jail"): *R. v. Downes* (2006), 79 O.R. (3d) 321(Ont. C.A.); *R. v. Ijam*, 2007 ONCA 597, 87 O.R. (3d) 81 (Ont. C.A.), at para. 36; *R. v. Panday*, 2007 ONCA 598, 87 O.R. (3d) 1 (Ont. C.A.).

[113] In *Kane*, this Court also considered the distinction between serving time in jail, in pre-sentence custody, as opposed to being released in the community on conditions. The Court assessed the limited circumstances in which credit for release on conditions might be given:

> [36] … I begin by noting that the circumstances in which time on judicial interim release will be given effect as a mitigating factor in sentencing are limited. … MacPherson J.A., for the majority in *Ijam*, [2007 ONCA 597] … emphasized the difference between release pending trial, which permits the accused a large measure of liberty, and remittal of the accused on remand which, being imprisonment, amounts to "a profound loss of liberty" (paragraph 36). …

[114] In *R. v. Lever*, 2014 SKCA 58, the Saskatchewan Court of Appeal reviewed the "significant body of appellate level decisions dealing with the effect, if any, that pre-sentence release should have on the determination of an appropriate sentence" (para. 9), and identified the overriding principles to be considered. It held that, unlike pre-sentence custody, there is no automatic reduction in sentence or sentencing "credits" for pre-sentence release conditions. Further, the harsher the conditions, and the more impact on day-to-day activities like employment, the more likely they might be considered on sentencing. Such conditions must impose "meaningful hardship or important limitations" on liberty. The Court of Appeal in *Lever* (referencing this Court's decision in *Kane*, and other authorities) stated:

> [10] First, pre-sentence release should not be seen as the necessary equivalent of pre-sentence custody and it obviously does not automatically reduce what would otherwise be a fit sentence. See, for example: *R. v. Walsh*, 2011 ONCA 325 (Ont. C.A.) at para. 10; *R. v. Voeller*, 2008 NBCA 37, 335 N.B.R. (2d) 143 (N.B. C.A.) at para. 21.
>
> [11] Second, pre-sentence release does not generate sentencing "credits" in the same way as pre-sentence custody. Rather, it is one of many potentially mitigating factors to consider when formulating an appropriate sentence. See: *R. v. Irvine*, 2008 MBCA 34, [2008] 6 W.W.R. 438 (Man. C.A.) at para. 27; *R. v. Knockwood*, 2009 NSCA 98, 283 N.S.R. (2d) 156 (N.S. C.A.) at para. 33; *R. v. Nghiem*, *supra* at para. 16.
>
> [12] Third, the harsher and more burdensome the pre-sentence release conditions, the more likely they are to have a valid mitigating effect. The factors to be taken into account in this regard include (but are not limited to) the length of time spent on release, the stringency of the release conditions, and the impact of those conditions on the offender's ability to carry on normal personal relationships, employment and the like. See, for example: *R. v. Irvine*, *supra* at para. 29.

> [13] Fourth, and speaking generally, time spent on pre-sentence release can reduce an otherwise appropriate sentence only if it involves meaningful hardship or important limitations on the offender's liberty. …See also: *R. v. Knockwood*, *supra* at para. 34; *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78 (N.L. C.A.) at para. 36; *R. v. Ijam*, 2007 ONCA 597, 226 C.C.C. (3d) 376 (Ont. C.A.) at para. 29.

[115] There is no examination in the sentencing decision of the nature of Mr. Noseworthy's release conditions, whether they might be described as harsh or burdensome, or how they might have impacted Mr. Noseworthy's daily life. Rather the judge simply references "the stress of having these charges interrupt and disrupt his life" (para. 62). The record confirms that Mr. Noseworthy's ability to work and maintain his relationship with his family continued while he was subject to the release conditions.

[116] While the judge referenced a six-year period in which pre-sentence release conditions applied, the Crown noted (and the record confirmed) that the period in question in this case was substantially less. During some of the time period referenced by the judge, Mr. Noseworthy was actually serving an unrelated conditional sentence for drug trafficking, and would have been subject to the conditions of that sentence. For some additional part of the time period in question, the record showed that Mr. Noseworthy was not subject to any release conditions.

[117] Moreover, the release conditions in this case were not onerous or unusual. The conditions were contained in a recognizance dated March 26, 2013, entered into after Mr. Noseworthy was arrested and charged with the offences in question. Most of the conditions of Mr. Noseworthy's release might be regarded as standard conditions of judicial interim release.

[118] For example, the conditions required that Mr. Noseworthy: keep the peace and be of good behavior; appear in court as required; report to police as required; notify police of any change of residence; not possess weapons; not possess or traffic in illegal drugs or substances; refrain from contacting specific individuals, including others charged in the conspiracy; and remain in the province. With respect to this last condition that he remain in the province, a specific exception included in the recognizance authorized Mr. Noseworthy's travel to Montego Bay, Jamaica, for a vacation that he had planned before he was arrested.

[119] Two additional conditions were included. One required Mr. Noseworthy to be in his residence between 11:00 pm and 7:00 am daily. The evidence was that this condition did not interfere with Mr. Noseworthy's ability to continue to

work at his job as a courier throughout the court process. The second condition prohibited him from possessing a “cellular telephone, blackberry, smart phone or any other wireless communication device”. Such devices commonly feature in drug trafficking offences, and the record indicates they were a central communication tool in this conspiracy.

[120] Similar restrictions involving a curfew and cell phone prohibition were considered by this Court in *Kane*. The Court concluded that these conditions did not rise to the level required to merit a reduction in sentence, even where the curfew interfered with employment. In the present case, there is no impact on Mr. Noseworthy’s employment as a result of the conditions. The Court in *Kane* stated:

> [38] … As noted above, the only conditions that may be argued to be somewhat unusual are the curfew and the restriction regarding a cell phone or pager.
>
> [39] A curfew is not house arrest (*R. v. R.J.H.*, 2012 NLCA 52). Indeed, a curfew from 10:30 p.m. to 7:00 a.m. as imposed in this case is generally consistent with the hours when most working people are at home in any event. Given the nature of the offence and the manner in which Mr. Kane got involved in the conspiracy through his work at a bar during the night, the curfew was intended to strike a balance between protection of the public by putting preventive measures in place and Mr. Kane's right to the presumption of innocence until proven guilty.

[121] The Manitoba Court of Appeal in *R. v. Irvine*, 2008 MBCA 34, also noted that curfew conditions requiring a person to be at home during hours when most people would normally be at home do not possess the “significant custodial and penal attributes” required for a mitigating factor in sentencing:

> [30] … For bail conditions to be considered as a mitigating factor they must impose significant custodial and penal attributes. As this court said in *R. v. Higgins*, 2001 MBCA 177, 160 Man. R. (2d) 105 (Man. C.A.), when the terms "merely mimic the conditions of ordinary life for the accused ... [they] do not contain any punitive sanction" (at para. 17), nor do they if the "house arrest required duplicates the hours when most working people are at home in any case" (at para. 20).

[122] The case law illustrates that there may be rare cases when strict or harsh release conditions might be considered as a mitigating factor on sentencing. However, this is not one of those cases. Applying the principles outlined in the authorities, the conditions of release imposed upon Mr. Noseworthy would not warrant a reduction of sentence. As such, I would conclude that the judge’s reliance on the pre-sentence release conditions to reduce the sentence by 10 months was an error in principle that had an impact on the sentence.

Issue 5: ***If the sentence for conspiracy to traffic in cocaine should be varied, what is an appropriate sentence?***

[123] For the reasons provided above, I would conclude that the sentencing judge made errors in principle that impacted on Mr. Noseworthy's sentence, and that the 20-month sentence of imprisonment for conspiracy to traffic in cocaine was demonstrably unfit.

[124] As such, this Court must determine a fit sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Friesen*, para. 30). In this respect, the Supreme Court noted in *Friesen* that proportionality is the fundamental principle of sentencing:

> [30] The principle of proportionality has long been central to Canadian sentencing (see, e.g., *R. v. Wilmott*, [1966] 2 O.R. 654 (C.A.)) and is now codified as the "fundamental principle" of sentencing in s. 718.1 of the *Criminal Code*.

[125] The sentence imposed must also recognize the principle of parity, codified in s. 718.2(b) of the *Criminal Code* whereby "similar offenders who commit similar offences in similar circumstances should receive similar sentences" (see *Friesen*, para. 31).

[126] In the present circumstances, I would consider a sentence of 3.5 years (i.e. 42 months) imprisonment to be a fit sentence for Mr. Noseworthy on the conviction for conspiracy to traffic in cocaine.

[127] This sentence takes into consideration Mr. Noseworthy's role in the conspiracy and his particular circumstances, including the mitigating and aggravating factors. It is consistent with the purposes and principles of sentencing set out in s. 718 of the *Code*, including the primary principle of proportionality, in s. 718.1. It is proportionate to the gravity of the offence of conspiracy to traffic in cocaine in this instance, the degree of Mr. Noseworthy's responsibility, and his particular circumstances.

[128] A sentence of 42 months is also informed by the principle of parity, as it accords with the established sentencing range for this offence, as indicated in *Oates*, *Kane*, and other authorities discussed above, and reflects the fact that there are no particular circumstances warranting a deviation from the established range in this instance.

Issue 6: ***Do the interests of justice require Mr. Noseworthy's re-incarceration?***

[129] Mr. Noseworthy made submissions, in writing and orally at the appeal hearing, that he should not be re-incarcerated in the event that his sentence was increased on appeal. Mr. Noseworthy was self-represented on appeal, and no formal application or affidavit was provided outlining his post-conviction circumstances, as is generally required in order for this Court to properly consider the issue of re-incarceration. However, Mr. Noseworthy did raise the issue of re-incarceration in his written submissions and, at the appeal hearing he provided further information about having completed the sentence of imprisonment, his post-sentence employment, family responsibilities and the absence of any further criminal activity since his arrest in 2013.

[130] While the appropriate procedure to raise the issue of re-incarceration was not observed in this instance, in all the circumstances, including Mr. Noseworthy's self-represented status, sufficient information was provided to engage the issue of re-incarceration, to enable the Crown to respond, and to allow the Court to consider the issue.

[131] Given that Mr. Noseworthy has served the 20-month custodial sentence originally imposed, and has been released from prison and returned to his life in the community, it remains to be considered whether Mr. Noseworthy should be re-incarcerated to serve the remainder of the 42-month custodial sentence.

[132] The overriding principle to be considered in terms of whether to incarcerate or re-incarcerate an offender who has served a sentence originally imposed, and whose sentence has increased on appeal, is whether "it is in the interests of justice" to do so. In this context, a court must also consider whether the principles of denunciation and deterrence can be realized without re-incarcerating the offender.

[133] In *Kane* this Court decided that, while a conditional sentence imposed for conspiracy to traffic in cocaine was below the 4 year range of imprisonment that offenders in these circumstances "might expect", it was not in the interests of justice to incarcerate Mr. Kane:

> [45] … This Court has repeatedly emphasized that general deterrence and protection of the public are the paramount considerations in cases involving a commercial level conspiracy to traffic in cocaine, with rehabilitation of the offender being secondary. The sentence imposed on Mr. Kane was clearly unfit. Ordinarily, in such circumstances, this Court would allow the appeal and proceed to vary the sentence imposed by the trial judge by determining a fit sentence. Nonetheless, there

> are limited circumstances when "it is in the interests of justice to leave the sentence (flawed as it is) in place to run its course" (*R. v. J.J.*, 2004 NLCA 81, 244 Nfld. & P.E.I.R. 24 (N.L. C.A.), at paragraph 76; see also, *R. v. Oates*, *supra*).

[134] In *R. v. R.B.*, 2019 NLCA 22, this Court applied *Kane* and, noting among other factors that the original sentence had been served, determined that it would not be in the interests of justice to require the offender to be re-incarcerated:

> [41] … While the six months sentence imposed in respect of the arson offence should, by law, have been served in prison, I am satisfied that it would not be in the interests of justice to require R.B. to serve additional time in prison for that offence. …
>
> [46] … In the circumstances, I would apply the approach taken in *Kane* to the length of the sentence of imprisonment imposed for the offence of sexual assault. That is, on the facts of this case, I am satisfied that the interests of justice are best served by allowing the one year sentence imposed by the trial judge to run its course, and not to vary the length of sentence to two years less a day.

[135] The Nova Scotia Court of Appeal in *R. v. Kleykens*, 2020 NSCA 49, outlined factors to consider in determining whether or not to incarcerate or re-incarcerate an offender in these circumstances:

> [87] The test to be applied is broadly stated; that being whether it is "in the interests of justice to incarcerate or re-incarcerate the offender". While not an exhaustive list, factors typically taken into account in applying that test are such things as:
>
> - the passage of time since the arrest and whether the offender has served his or her original sentence, either entirely or in part;
> - the extent to which incarceration will adversely affect the stability of the offender's current circumstances and ultimate rehabilitation;
> - whether the offender has been compliant with the conditions of his or her release and the extent to which the offender has lived a law-abiding lifestyle since his or her conviction;
> - whether the principles of denunciation and deterrence can be adequately served without re-incarcerating the offender.

[136] Similarly, in *R. v. Taylor*, 2013 NLCA 42, 337 Nfld. & P.E.I.R. 24, White J.A., for the majority, canvassed numerous authorities and provided a list of non-exhaustive factors to be considered in determining whether re-incarceration

would be required, and appropriate. Some of these overlap with the factors in *Kleykens*, and some are considerations not considered therein.

[137] In paragraph 65 of *Taylor*, White J.A. identified and considered the following factors in concluding that the offender need not be re-incarcerated:

> 1. *The seriousness of the offence*. As a general rule, the more serious the offence, the more likely the offender will be re-incarcerated. Generally denunciation and deterrence of serious offences are more likely to be achieved by incarceration. But not necessarily so. As noted above, denunciation and deterrence can be achieved without incarceration even for serious offences in some cases.
>
> Here, this Court has made it clear that trafficking in drugs is a very serious offence (*Downey*, paragraph 32). … The question to be faced in this case is whether the sentencing objectives of denunciation and deterrence can only be achieved through incarceration for the balance of the sentence or whether they can be achieved by other means or in the circumstances are outweighed by other considerations.
>
> 2. *Rehabilitative efforts and the impact on those efforts if re-incarceration were to be imposed.* Where efforts at rehabilitation may be jeopardized by re-incarceration, it is less appropriate for the Court to re-incarcerate. … From previous cases in this jurisdiction, the following circumstances would be relevant: whether the offender is now employed (*Porter*; *Warr*); whether the offender has or is taking care of young children (*Porter*; *J.J.*); whether the offender is pursuing further education (*Oates*); and whether the offender is addressing his addiction issues (*J.J.*). …
>
> 3. *Length of Time Released.* The greater the time the offender has been released, the greater the likelihood that he will have reintegrated into society. As well, the longer he or she has been released, the greater will be the adjustment that the offender will have to make if he or she were to be re-incarcerated. …
>
> 4. *Difference in the sentence imposed and that imposed following appeal.* The greater the difference between the original unfit sentence and the one determined by the appellate court to be appropriate is a factor favouring possible re-incarceration. This is because a greater disparity between the two sentences makes it harder to justify achieving the objectives of denunciation and deterrence by other means. … In the current case, the sentence is more than doubled. This is significant.
>
> 5. *Whether any measures other than re-incarceration could be imposed that would serve to denounce and deter while still promoting rehabilitation.* While not an absolute requirement to justify not re-incarcerating, the fact that the objectives of denunciation and deterrence can be achieved by other means is obviously a factor favouring not re-incarcerating the offender. …

[138] Guided by the considerations in *Taylor* and *Kleykens*, and while mindful of the similarities between the present case and *Taylor*, in terms of the seriousness of the offence (both involved serious drug offences) and also the significant difference between the sentence imposed by the sentencing judge and on appeal, I would conclude that Mr. Noseworthy's re-incarceration is not required in the interests of justice.

[139] In the present case, Mr. Noseworthy has served his original sentence of imprisonment, he has recommenced his employment since being released from prison, he continues to support a family, and he has re-established his life, post-imprisonment, which are factors considered in *Taylor* and *Kleykens*. Before serving the sentence of imprisonment he abided by conditions of judicial interim release, and there is no evidence of any further criminal activity or breach of these conditions since he was charged with the present offences in 2013, which is also a relevant consideration.

[140] White J.A. further noted in *Taylor* that what must ultimately be considered is whether re-incarceration is required to meet the overall objectives and principles of sentencing. It was determined that re-incarceration was not required:

> [67] Taking all these factors into account, and considering them in light of the purpose, objectives and principles of sentencing, I have concluded that it is not necessary to re-incarcerate Mr. Taylor even though a fit sentence in this case is, as I have said, 36 months. I am satisfied that Mr. Taylor has, in the time available to him, made not insignificant steps toward his rehabilitation and reintegration into society. If he were re-incarcerated at this point, this progress would be severely interrupted … In the circumstances, even considering the significant increase in the sentence that should have been imposed and the seriousness of the offences, with aggravating circumstances, I am not satisfied that the objective of promoting rehabilitation should be sacrificed at this juncture in the interests of making an even stronger statement relative to deterrence and denunciation. … As to specific deterrence, given the fact that Mr. Taylor appears well on the way towards rehabilitation, this objective does not need additional emphasis.

[141] In *Oates*, a drug-trafficking case, it was determined that "it would be now counter-productive to re-incarcerate" the accused (para. 5). Similarly, in *Kane*, dealing with trafficking in cocaine, incarceration was held not to be in the interests of justice.

[142] Depending on the particular circumstances involved, this Court has, in various cases, either re-incarcerated an offender (see for example *R. v. English*, 2012 NLCA 64, 328 Nfld. & P.E.I.R. 14; and *R. v. Antle* (1993), 108 Nfld. &

P.E.I.R. 321 (Nfld. C.A.)), or declined to re-incarcerate (see, for example, *Oates; Kane; Taylor; R.B.; R. v. Tuglavina*, 2011 NLCA 13, 305 Nfld. & P.E.I.R. 265; *R. v. J.J.*, 2004 NLCA 81, 244 Nfld. & P.E.I.R. 24). In some of these cases, the offence has involved drug trafficking (for example, *Oates*, *Kane*, *Taylor*), and in some circumstances where an offender has not been re-incarcerated, an additional period of probation has been imposed.

[143] Both *Taylor* and *Kleykens* indicate that a relevant factor to consider when assessing possible re-incarceration is whether the sentencing objectives of denunciation and deterrence can be achieved without re-incarcerating the offender.

[144] In appropriate circumstances, where a demonstrably unfit sentence has been imposed, these objectives might be realized without re-incarceration by allowing a sentence appeal and imposing a fit sentence. In this regard, there is a distinction between dismissing a sentence appeal and leaving "the sentence (flawed as it is) in place to run its course" (*Kane*, at para. 45; see also *R.B.*, at para. 46), and allowing a sentence appeal, imposing a fit sentence and, where appropriate, staying the enforcement of that sentence.

[145] This distinction was considered by the Ontario Court of Appeal in *R. v. Smickle*, 2014 ONCA 49, with the court deciding that allowing the appeal and staying the operation of the new sentence was appropriate:

> [10] This court has, on occasion, declined to re-incarcerate a respondent even though the sentence imposed at trial was manifestly inadequate. Sometimes after identifying the sentence that should have been imposed and explaining why the respondent should not be re-incarcerated, this court has simply dismissed the appeal: *e.g.* see *R. v. Hamilton*, [2004] 72 O.R. (3d) 1, at para. 165 (C.A.); and *R. v. Banci*, [1982] O.J. No. 58 (C.A.). The court also has the power to impose the appropriate sentence but stay the execution of the remaining custodial part of that sentence: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 132. As explained in *R. v. F. (G.C.)* (2004), 71 O.R. (3d) 771, at para. 35, the imposition of the appropriate sentence followed by a stay of the execution of the remainder of the custodial sentence is probably a more appropriate disposition than is an outright dismissal in that it identifies the sentence that should have been imposed.

[146] Citing *Smickle*, the Manitoba Court of Appeal noted in *R. v J.E.D.*, 2018 MBCA 123, that "an appellate court allowing a Crown appeal against sentence has the authority to grant a stay of execution against the remaining portion of a custodial sentence (see *R. v Proulx*, 2000 SCC 5 at para. 132; and *R. v Smickle*, 2014 ONCA 49 at para. 10)" (para. 114). (See also, for example, *R. v. Livingstone; R. v. Lungal; R. v. Terris*, 2020 NSCA 5).

[147] In *J.E.D.*, at para. 116, the court determined that, in appropriate cases, "considering the totality of the circumstances, the sentencing objectives of denunciation and deterrence can be properly respected without re-incarceration (see *Burnett* at para 41)".

[148] Whether the objectives of denunciation and deterrence can be met by allowing a sentence appeal, substituting a fit sentence and staying the sentence is a determination to be made on a case by case basis. In assessing whether it is in the interests of justice to re-incarcerate an offender, guidance can be taken from the factors described above, but each circumstance has its own particular variables which must be considered. This involves more than the mechanical or perfunctory application of the factors.

[149] Allowing the appeal in this case confirms that the 20-month sentence imposed was demonstrably unfit and not in keeping with the principles of denunciation and deterrence for this offence, established in *Oates*, *Kane* and other authorities. This is so even if the balance of the 42-month sentence is stayed for this particular offender, noting the amount of the sentence already served.

[150] Allowing the appeal and stating that the sentence imposed is demonstrably unfit, even without re-incarcerating the offender, also confirms that the established sentencing range of 3.5 to 4 years should apply unless there are particular circumstances which would clearly justify a deviation from the range. This might clarify sentencing expectations for these offences in future, consistent with the sentencing objectives of deterrence and denunciation.

[151] In the present case, I would allow the Crown's appeal of the 20-month sentence for conspiracy to traffic in cocaine and impose a sentence of 42 months imprisonment. As re-incarceration is not required in the interests of justice, I would stay the balance of the 42-month sentence of imprisonment.

<u>The 18-month concurrent sentence of imprisonment for conspiracy to traffic in cannabis marihuana</u>

[152] Finally, the present appeal focused almost exclusively on the 20-month custodial sentence for conspiracy to traffic in cocaine. While the notice of appeal also included an appeal of the 18-month sentence of imprisonment for conspiracy to traffic in cannabis marihuana (which ran concurrently with the 20-month sentence), there was very little mention of this sentence either in the written submissions or the oral argument on appeal.

[153] The Crown's emphasis on appeal was on the sentence relating to the conspiracy to traffic in cocaine. Some of the issues raised by the Crown would have related to both convictions. But primarily, the authorities and sentencing range presented related to the sentence for conspiracy to traffic in cocaine. The sentencing judge in *R. v. Noseworthy*, 2019 NLSC 23, noted that the Crown had acknowledged that the conspiracy to traffic in marihuana would attract a lesser penalty, and that the Crown had suggested a sentence of two years in prison for this offence, to run concurrently with the cocaine sentence (para. 55).

[154] As the sentence for conspiracy to traffic in marihuana was not the focus of the appeal, no substantial argument was advanced on appeal that the judge had erred in imposing this sentence. That is, there was no basis provided on which to conclude that the sentencing judge erred in principle, or that the sentence was demonstrably unfit. As noted above, the Crown's position at the sentencing hearing was that a concurrent sentence be imposed for the marihuana conspiracy conviction. As such, no argument was made on appeal that the sentencing judge had erred in respect of totality. In the circumstances, I would conclude that the 18-month concurrent sentence of imprisonment imposed for conspiracy to traffic in marihuana should not be disturbed.

Conclusion

[155] In the result, I would allow the Crown's appeal of the 20-month custodial sentence for conspiracy to traffic in cocaine, impose a 42-month sentence of imprisonment, and stay the balance of the 42-month sentence.

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F.P. O'Brien J.A.

I Concur:_____

L.R. Hoegg J.A.

I Concur:_____

G.D. Butler J.A.