PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Lambert*, 2020 NSPC 39

Date: 2020-09-24
Docket: 8254206, 8260204, 8260212, 8260216
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

MATTHEW ROSS LAMBERT

SENTENCING DECISION

Judge:	The Honourable Judge Elizabeth A. Buckle
Heard:	September 4, 11 & 22, 2020
Decision:	September 24, 2020 (oral) October 16, 2020 (written)
Charges:	Sections 5(1) & 5(2) *Controlled Drugs and Substances Act* Section 465(1)(c) *Criminal Code* x 2
Counsel:	Jeff Moors & Angela Nimmo, for the Crown Joel Pink, Q.C., for Matthew Lambert

Background

[1] I found Mr. Lambert guilty of Conspiracy to Import Cocaine, Conspiracy to Traffic Cocaine and of Attempts to Traffic and Possession Cocaine for the Purpose of Trafficking, contrary to s. 465(1)(c) of the *Criminal Code*, and ss. 5(1) and 5(2) of the *Controlled Drugs and Substances Act* (*CDSA*). Those convictions relate to Mr. Lambert's role in the importation, attempted retrieval and intended transport of 157 kg. of cocaine which was discovered hidden on a commercial container vessel in Halifax.

[2] Mr. Lambert also pleaded guilty to Conspiracy to Commit Robbery, contrary to s. 465(1)(c). That charge relates to planned, but not completed, robberies of people involved in the drug business.

[3] I now have to impose a fit and proper sentence.

Position of the Parties

[4] The Crown seeks a total custodial sentence of 21 years in custody. The Federal Crown suggests that the appropriate sentence for the drug-related offences is 19 years in custody. The Provincial Crown suggests the appropriate sentence for the Conspiracy to Commit Robbery, after consideration of totality, is 2 years consecutive to any sentence imposed on the drug matter. Both Crowns emphasise the need for denunciation and general deterrence and rely on the aggravating factors, including the quantity of cocaine, Mr. Lambert's role in the drug offence, the risk of violence in the planned robberies and the fact that the robberies were planned while Mr. Lambert was facing trial on the drug-related offences.

[5] The Defence argues that the appropriate sentence for all offences is a custodial sentence of 8 to 10 years. In doing so, he submits that Mr. Lambert's role in the drug offences puts him at the low end of what could constitute an importer, that the planned robberies were not carried out and would not have involved firearms or "home invasions". The Defence also emphasizes the principle of restraint given that this will be Mr. Lambert's first penitentiary sentence.

[6] The Defence also argues that the otherwise appropriate sentence should be reduced to reflect *Charter* breaches found at trial.

[7] The Crown and Defence agree that Mr. Lambert should be given credit for the time he has spent in pre-trial custody. They agree that as of the date of sentencing, he will have served 837 days in custody. The Crown is not opposed to Mr. Lambert receiving enhanced credit of one and a half days per day spent in custody in accordance with the exception in s. 719(3.1). The Defence seeks enhanced credit of two days per day spent in custody. The Defence has not filed a constitutional challenge to s. 719(3.1) and the Crown argues that absent such a challenge, that provision caps enhanced credit at one and a half days.

[8] Crown and Defence also agree on the imposition of various ancillary orders, including a DNA order, forfeiture of items seized and a lifetime firearms prohibition.

Circumstances of the Offences

[9] The facts relating to the drug offences are set out in detail in my trial decision (2020 NSPC 38). In summary, Mr. Lambert agreed to facilitate the importation of 157 kg. of cocaine into Canada. Prior to the cocaine entering Canada, Mr. Lambert agreed to retrieve it from the vessel where it was hidden. He then attempted to retrieve it in Montreal and again in Halifax. I concluded that the only reasonable inference from the evidence was that he was attempting to retrieve the drugs for the purpose of selling or transporting the drugs for sale by someone else.

[10] The cocaine was hidden in a sea chest (an underwater chamber) in the hull of the Arica, a container vessel. The plan to retrieve the cocaine from that location was logistically challenging. It required specific knowledge of its location and the Arica's itinerary, diving skill and special equipment. Mr. Lambert researched and purchased the necessary diving equipment and tools to access it, paid for flights, hotel rooms and boat rentals. He and his co-accused traveled to Montreal where they first tried to remove the cocaine from the Arica. When that failed due to bad weather, they came to Halifax, the Arica's next port of call. They again tried to recover it, but the authorities intervened, and Mr. Lambert was arrested.

[11] The total quantity of cocaine was approximately 157 kg and it was of relatively high purity (79% - 91%). It had a purchase price of approximately one million dollars if purchased in Columbia and a resale value of between $6.9 and $7.5 million, if sold at the kg. level in Montreal.

[12] After his arrest and while in custody, Mr. Lambert attempted to arrange for the placement of fake algae traps in the Halifax Harbour. His aim was to have police find them to corroborate his cover story.

[13] An agreed statement of facts was filed in relation to the charge of conspiracy to commit robbery. Following his arrest on the drug charges, Mr. Lambert was released from custody on a Recognizance. Authorities obtained an authorization to intercept his communications. Starting in July of 2018, about four days after his release, he began discussing planned robberies. Between July 23, 2018 and August 15, 2018, he was recorded planning with another person to commit several robberies of people involved in the drug trade.

[14] The first discussion of a planned robbery involved using two teams, one to rob a truck transporting drugs and the other to kick in the door of the house where the drugs would be delivered. Mr. Lambert emphasized that this would not be a "home invasion" because they would just "boot in the door, run in the garage, grab it" and leave.

[15] The second discussion of a planned robbery involved a truck that would be leaving a warehouse carrying drugs. He suggested he could have a tracker put on one of the trucks.

[16] In another discussion, Mr. Lambert said he was going to set up a "jack" in Toronto. Later, Mr. Lambert told the person he was speaking to that he had an easy job involving a guy who lives in Toronto by himself. He said there would be "$150,000 there and the person would not need a 'strap'" (believed to be a firearm).

[17] During the conversation about the Toronto plan, Mr. Lambert suggested he might have an easier job in Vancouver.

[18] In another discussion it was not clear which job Mr. Lambert was referring to, but he said, "you grab the guy and you hold him and you make him tell you where everything is".

[19] When authorities reviewed Mr. Lambert's cell phone, they discovered 50 files related to a planned robbery of a transport truck.

Application of *Kienapple*

[20] The Federal Crown argues that, given the distinctions between the elements of the two conspiracies and between the substantive offences and the conspiracies, the principle enunciated in *R. v. Kienapple,* [1975] 1 S.C.R. 729, does not preclude conviction for both drug conspiracies and one of the substantive attempts. The Crown concedes a legal nexus between the two attempt offences (attempt to traffic and attempt to possess for the purpose of trafficking), such that only one of the attempt offences should stand for sentencing.

[21] The Defence argues that convictions can only stand for the charges of conspiracy to import cocaine and one of the two attempts.

[22] I agree with the Crown. The two conspiracy offences have different legal elements and, while there is factual overlap, the factual basis for the two convictions are not identical. The charge of attempt to possess cocaine for the purpose of trafficking will be stayed and Mr. Lambert will be sentenced for the remaining three drug offences. The Federal Crown is not, however, seeking consecutive sentences for those offences.

Mr. Lambert's Circumstances

[23] I do not have the benefit of a pre-sentence report for Mr. Lambert. Information about his background and current circumstances have been provided by counsel and during his own testimony.

[24] Mr. Lambert is 36 years old. He is married with a three-year old daughter. For the past two years he has been incarcerated. Prior to that, he resided in British Columbia with his wife and daughter. He was working in the development and construction business with his brother and father. I know nothing about his upbringing. I have no information about any addictions or mental health challenges. I understand from his testimony that he has had issues with re-occurring bronchitis, but there is no evidence of any other physical health challenges.

[25] He has a criminal record. His only previous drug conviction is for possession of marijuana for which he received a fine. The most serious of his previous convictions are for break and enter, one in 2007 and one in 2013. He has previously received short custodial sentences or conditional sentence orders but has never been sentenced to a penitentiary sentence.

Sentencing Principles

General

[26] In sentencing Mr. Lambert, I have to apply the objectives and principles set out in 718 to 718.2 of the *Criminal Code* and s. 10 of the *CDSA*. The best means of addressing these principles and attaining the ultimate objective of sentencing will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is a delicate and inherently individualized process (*R. v. LaCasse*, 2015 SCC 64 at para. 1 and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at paras. 91-92).

Objectives of Sentencing

[27] The purpose of sentencing is to protect the public and contribute to respect for the law and the maintenance of a safe society. Section 718 instructs that this purpose is to be accomplished by imposing just sanctions that have one or more of the following objectives: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

Denunciation and Deterrence

[28] Denunciation is the means by which a sentence communicates society's condemnation of conduct. As Justice Lamer said in *R. v. M. (C.A.)*,."a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law." (at para. 81).

[29] The goal of general deterrence is to discourage others from committing similar offences.

[30] Our Court of Appeal has repeatedly stated that denunciation and general deterrence must be the primary considerations when sentencing traffickers in Schedule I drugs (for examples, see: *R. v. Steeves*, 2007 NSCA 130*; R. v. Butt*, 2010 NSCA 56***;*** *R. v. Scott*, 2013 NSCA 28; *R. v Oickle*, 2015 NSCA 87; *R. v. Chase*, 2019 NSCA 36; *R. v. White*, 2020 NSCA 33*;* and, *R. v. Kleykens*, 2020 NSCA 49).

[31] The Court of Appeal has also said that these principles are important when sentencing for the offence of robbery (*R. v. Benoit*, 2007 NSCA 123).

[32] Emphasizing these objectives reflects society's condemnation for the conduct underlying these offences and acknowledges the tremendous harm it does to

communities. General deterrence is most effective in cases such as this one, where offenders tend to make calculated decisions and balance the potential financial reward against the risk and consequences of getting caught.

[33] The goal of specific deterrence is to discourage Mr. Lambert from committing further offences. His criminal record and the fact that he conspired to commit robberies while awaiting trial on the drug offences suggest that there is a need to specifically deter him. When testifying at his sentencing hearing, Mr. Lambert said the two years he has spent in pre-trial custody, the longest he has ever served, has caused him to understand the consequences of involvement in criminal offences and he will not re-offend.

Rehabilitation

[34] Rehabilitation continues to be a relevant objective even in cases requiring that denunciation and deterrence be emphasized (*LaCasse,* at para. 4).

[35] I have no information about any specific rehabilitative needs for Mr. Lambert. However, he has things in his life that should motivate him to rehabilitate. He reports that prior to his arrest he was employed, so presumably has employable skills. I have no information about his education, but he is articulate, appears intelligent and presents well. At 36 years old, he is still a relatively young man. He has a wife and child whom he has expressed a desire to care for. I have no doubt that if he chose to use his intelligence and effort toward legitimate enterprise, he could be successful.

Proportionality

[36] Section 718.1 says that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It requires that a sentence not be more severe than what is just and appropriate given the seriousness of the offence and the moral blameworthiness of Mr. Lambert. It also requires that the sentence be severe enough to condemn his actions and hold him responsible for what he has done (*Lacasse,* at para. 12; and, *R. v. Nasogaluak*, 2010 SCC 6, at para. 42).

[37] Assessing the gravity of the offence requires me to consider both the gravity of these offences in general and the gravity of Mr. Lambert's specific offending behaviour.

[38] All the offences here are serious. However, the Conspiracy to Commit Robbery and Conspiracy to Import Cocaine, a Schedule I substance, are particularly

so. This is reflected in the fact that Parliament has set the maximum sentence for each of those offences at life imprisonment.

[39] By definition, robbery is a violent offence. The combination of theft with violence or threat of violence, creates a significant risk of harm. That risk is even greater in the context of a "drug rip" where there is a reasonable possibility that the victim will have armed themselves, will resist and will be motivated to use force or weapons to protect their product.

[40] The tremendous harm that comes from cocaine has been repeatedly commented on by our Court of Appeal and can be seen in this and other courts every day. Going back to the Court of Appeal decision in *R. v. Huskins,* 95 N.S.R. (2d) 109, and perhaps before, the Court has recognized the "creeping evil" and danger of cocaine. In *Butt* (at para. 13), the Court referred to cocaine as a deadly and devastating drug that ravages lives. These comments were made in the context of trafficking cocaine, sometimes relatively small amounts.

[41] More than 30 years ago, in *R. v. Smith,* [1987] 1 S.C.R. 1045, at 1053, the Supreme Court of Canada commented on the direct and indirect devastation caused by the importation and trafficking of hard drugs, like cocaine. The language used is somewhat dated, but the concepts apply with equal force today. Justice Lamer, writing for himself and Chief Justice Dickson said:

> Those who import and market hard drugs for lucre are responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drug addicts. The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons, with few exceptions (as an example, the guilt of addicts who import not only to meet but also to finance their needs is not necessarily the same in degree as that of cold-blooded non-users), should, upon conviction, in my respectful view, be sentenced to and actually serve long periods of penal servitude.

[42] More recently, in *R. v. Von Holtum,* 2013 BCCA 384, the British Columbia Court of Appeal recognized that importing cocaine is viewed as more serious than trafficking cocaine:

> It is generally accepted that importing drugs is a more serious offence than trafficking in them. This is particularly the case with drugs like cocaine that are not indigenous to Canada, since deterring their importation would effectively eliminate

> their use and abuse in this country: *R. v. Saulnier* (1987), 21 B.C.L.R. (2d) 232 (C.A.) at 235; *R. v. Hamilton* (2004), 72 O.R. (3d) 1, 186 C.C.C. (3d) 129 (C.A.), at paras. 104-105, (see para. 34).

[43] In *R. v. Hamilton*, (2004), 72 O.R. (3d) 1 (C.A.), Justice Doherty said that while the act of importation itself is not a violent one in the strict sense, cocaine importation cannot be disassociated form its inevitable consequences. He characterized cocaine importation as both a violent and serious offence.

[44] I turn now to my assessment of the gravity of Mr. Lambert's offending behaviour.

[45] The drug offences capture a broad range of culpability ranging from the courier or "mule" to the "owner-importer" or "owner-trafficker". Where the offender fits in that hierarchy is relevant to sentencing; generally, the higher the position, the higher the sentence.

[46] My assessment of the gravity of the drug offences and Mr. Lambert's degree of responsibility is impacted by the quantity of drugs and Mr. Lambert's level of involvement in the enterprise.

[47] The operation in the case before me was clearly a wholesale commercial one involving bringing cocaine from a source country to Canada. It was not proven that the Arica came from a source country, but I have no doubt that the cocaine did. According to the expert, its purity, quantity, packaging and method of transport were all consistent with that.

[48] I was not persuaded that Mr. Lambert was directly involved in obtaining the cocaine from the source country. I was not persuaded that he negotiated the contract or terms of delivery with the seller or made arrangements in the source country for the importation. It was also not proven that Mr. Lambert was an "owner-importer" or "owner trafficker". On the evidence presented at trial, the Crown did not prove more than that Mr. Lambert agreed to facilitate their importation into Canada by recovering the drugs and transporting them. However, in doing so, he became part of the sophisticated international commercial enterprise. His role, even as part of a recovery team, involved a relatively high level of expertise, planning and equipment. I am persuaded that he had some connection and contact with the person or persons who put the drugs in the sea chest, he was trusted with that specific and essential information, he was responsible for many of the financial and logistical arrangements for the recovery, he took the lead when reserving and renting the boats,

appeared to have decision making authority for the team and was not hesitant to chastise his co-accused for failing to be careful enough about secrecy.

[49] I have no information about the logistics of what was to be done with the cocaine after it was removed from the Arica. I inferred from the evidence that he was at least going to transport the drugs for eventual sale. But the Crown has not proven that Mr. Lambert was to be directly involved in the eventual retail sale of the cocaine or was to share in the profits.

[50] Therefore, in my view, Mr. Lambert was not at the height of the importing or trafficking hierarchy. He was also not simply a mule, carrying drugs over a border for a fee. The "recovery team" was crucial to the scheme to bring the drugs into Canada and he was crucial to that part of the operation.

[51] There is no apparent motive for the offences other than profit. Mr. Lambert was clearly going to be paid for his efforts. The evidence at trial was that his co-accused, Mr. Bailey believed he was there to collect a 4-million-dollar score and "$500,000" would be for him. Mr. Lambert's payment would be at least that, given his role in the operation.

[52] My assessment of Mr. Lambert's offending behaviour in relation to the conspiracy to commit robbery offence is impacted by the fact that he apparently identified the targets and was putting together the teams. The plans involved some sophistication in that they were to include things such as tracking devices. I accept that he did not intend that firearms would be used and did not intend that the offences would be carried out as violent home invasions. I also accept that the seriousness is lessened because the robberies were not carried out. However, as the Provincial Crown pointed out, this was not because Mr. Lambert abandoned the plan but rather because another participant could not leave Nova Scotia.

[53] Again, for this offence there is no apparent motive other than profit.

<u>Aggravating and Mitigating Factors</u>

[54] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender.

[55] Relying on *R. v. Nasolgaluak*, the Defence argues that the sentence should be reduced to reflect findings made at trial that Mr. Lambert's *Charter* rights had been violated. In that decision, the Court said that Section 718.2(a) requires a court to

reduce a sentence "to account for any relevant ... mitigating circumstances relating to the offence or the offender". This provides sentencing judges with some scope to take into account not only the conduct of the offender, but also that of state actors in determining a fit sentence, regardless of whether the misconduct amounted to a *Charter* infringement or falls short of that standard (at para. 3).

[56] The Crown here argues that because I granted remedies for some of the *Charter* breaches, any mitigating effect from those breaches should not be considered on sentencing. The law does not support that submission (*R. v. Kennett*, 2019 NBCA 52; and, *R. v. Foster*, 2018 ONCA 53, (leave to appeal dismissed: [2018] S.C.C.A. No. 127). In *R. v. Foster*, Justice Watt addressed and rejected that argument as follows:

> The error involved a mischaracterization of the request for sentence reduction as a request for two remedies for the same constitutional infringement. No principle forecloses multiple remedies for the same infringement, provided the requisite conditions precedent have been satisfied. But more importantly, sentence reduction is available without demonstration of a *Charter*-infringement predicate. This is made clear by the decision in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206. [para. 125]

[57] In deciding whether to mitigate the sentence to reflect the breaches, it is important to closely examine the breaches I found that specifically relate to Mr. Lambert. They were as follows:

- Breaches of ss. 8 & 9 when he was arrested without reasonable grounds, searched and his vehicle was seized;
- Breach of s. 8 involving the search of his phone; and,
- Breaches of s. 8 arising from judicial authorizations for search of his residence, production of records and interception of communications. The authorizations were found invalid due to insufficient grounds for their issuance after excision of unconstitutionally obtained information.

[58] The most serious of the breaches, in terms of state misconduct, were the continued detention of Mr. Lambert and the seizure of the vehicle which led to the search of his phone. The officer lacked reasonable grounds and knew that a crucial part of his subjective belief had turned out to be incorrect. This unlawful detention continued until the drugs were discovered on the Arica, about two hours. After that,

there were reasonable grounds to detain Mr. Lambert. The remaining breaches did not engage new state action. I accept that the search of his person, his phone, his residence and the intercepted communications all had a significant impact on his privacy. However, in the circumstances, I would not describe any of the breaches as flagrant, egregious or significantly impacting his dignity. Therefore, in my view they do not warrant sentence mitigation.

[59] The Defence has also asked that I give Mr. Lambert enhanced credit for the time he has spent on remand. The request is framed as a request for enhanced credit under s. 719 of the Code. However, the Defence seeks credit greater than one and one-half days for each day spent in custody. The basis of the request includes that Mr. Lambert has not earned sentence remission while on remand and that the conditions of his remand have been particularly harsh. The relevant parts of s. 719 are as follows:

> **719(3)** In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> **(3.1)** Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

[60] In my view, s. 719(3.1) clearly caps the credit I can give at one and one-half days for each day spent in custody. In the absence of a successful constitutional challenge to that provision, I am bound by it and could not give enhanced credit beyond that maximum.

[61] However, in *R. v. Dunc*an, 2016 ONCA 754, the Court said that "in the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1) (emphasis added).

[62] I interpret this as simply acknowledging that judges have broad discretion under ss. 718 - 718.2, also recognized in *R. v. Nasogaluak*, to take into account any relevant circumstance in fashioning an appropriate sentence. This discretion does not require resort to s. 719. The Court in *R. v. Nasogaluak* spoke of state conduct in the specific context of police conduct during the investigation. However, the Court does not limit the type of conduct that could be considered. Section 718.2 requires me to consider any "relevant aggravating or mitigating circumstances

relating to the offence or the offender". That is broad enough to include the circumstances of the offender's pre-sentence custody. In virtually every sentencing hearing, the judge considers the offender's background and personal circumstances in arriving at an appropriate sentence. That includes pre and post offence circumstances and often includes the offender's living circumstances, personal hardships etc. That does not cease to be relevant because an offender has been incarcerated. The offender's living situation for the two years prior to sentencing would, in my view, always be relevant. Mr. Lambert has been in custody for that period. It is no less relevant. Pre-trial custody can have a profound impact on an offender in terms of specific deterrence and motivation for rehabilitation. The conditions in which he was living are part of that.

[63] In summary, the *Criminal Code* and decisions of other courts, including the Supreme Court of Canada, instruct me to consider all relevant circumstances in sentencing Mr. Lambert. In my view, the conditions during his remand are relevant.

[64] Mr. Lambert and Deputy Superintendent Bradley Ross from NS Correctional Services both testified about the conditions in the three correctional facilities where Mr. Lambert has been housed (the Central Correctional Facility in Burnside, the North East Correctional Facility in Pictou and the Cape Breton Correctional Facility in Sydney). I also had the benefit of Mr. Lambert's health records for the time he was in custody, although he testified that the records are incomplete.

[65] Mr. Lambert was in various units within the three facilities noted above, including between ten days and three weeks in the Close Confinement Unit (also referred to as segregation and "the hole").

[66] Mr. Lambert's complaints include inadequate access to medical care, general concerns due to being in custody during the pandemic, reduced privileges and frequent lockdowns, unsanitary conditions and poor water quality.

[67] I am not satisfied that Mr. Lambert's medical treatment was inadequate or warrants sentence mitigation. He had a recurring bronchial condition which was reported. He was assessed by nurses who did not observe any symptoms that warranted assessment by a physician. When he reported that his symptoms had not resolved, he was referred to a doctor who prescribed medication. When his symptoms had still not resolved, the prescription was renewed.

[68] Mr. Lambert also complained of frequent lockdowns, reduced privileges, and poor sanitary conditions in all facilities and of poor water quality in the Cape Breton Facility.

[69] Deputy Superintendent Ross described the process and equipment available for cleaning and personal hygiene in the facilities. He denied there were any shortages of supplies or equipment. He also explained the precautions that have been put in place to address the public health directives in place as a result of Covid-19. I accept his evidence about the general procedures and was not persuaded by Mr. Lambert's evidence that any shortcomings in their implementation were sufficient to warrant sentence mitigation.

[70] During lockdowns, inmates are required to remain in their cells. Roving lockdowns refers to a situation where groups of inmates of varying sizes are allowed out for periods of time and then returned to their cells so that other groups can be allowed out. Deputy Superintendent Ross agreed that lockdowns, at least at the Central and North East Facilities, were frequent during Mr. Lambert's pre-trial custody. He said that lockdowns are often caused by altercations between inmates, however, over the last one and a half to two years, they have frequently been caused by a critical staffing shortage at those two institutions. Full or roving lockdowns have been used because there are not enough staff to safely operate the facility with all inmates out of their cells. He testified that it has been common for the facility to have one third less operational staff than required. The situation has been worse on weekends. The shortage of staff has resulted in loss of privileges for inmates, increased time in their cells and less time outside.

[71] The situation was exacerbated for a time by a labour conflict. During that time, correctional staff were refusing to work due to occupational health and safety concerns. This resulted in lockdowns until the situation was addressed.

[72] Covid-19 has also had an impact on the inmate population. Programs and movement in the institution have been significantly restricted to comply with public health directives.

[73] Deputy Superintendent Ross was familiar with the Cape Breton Facility, having worked there for many years. He agreed that the water smelled bad. He testified that the water there was drinkable but said that he would not drink it.

[74] Finally, Mr. Lambert has spent time in the close confinement unit. It wasn't clear how long he'd been there. Mr. Lambert said three weeks and Deputy Superintendent Ross said at least ten days. Mr. Lambert was not put there because of a disciplinary infraction but for his own protection. While in that unit, inmates are in their cells except for up to one hour per day when they are taken outside.

[75] The Crown acknowledged that Deputy Superintendent Ross' evidence about increased lockdowns and poor water was concerning. I share that concern. These are not the conditions in which we expect prisoners to be housed. The lockdowns and loss of privileges resulting from staffing shortages, the time in the close confinement unit and the poor water quality were significant enough to require mitigation of Mr. Lambert's sentence.

[76] In summary I view the aggravating and mitigating factors to be as follows:

Aggravating Factors

- Nature of the substance (cocaine, a Schedule I substance);
- The quantity (157 kg) and the fact that it is of relatively high purity which allows it to be cut resulting in it being more valuable and harming the lives of more people;
- Mr. Lambert's role in the conspiracy, including his knowledge of the specific location of the cocaine and his organizational and leadership role in the group;
- His post-offence effort to corroborate his cover story for the drug offences;
- He began to conspire to commit robberies just four days after being released on bail for the drug offences;
- The conspiracy to commit robbery included multiple plans to do robberies in two provinces;
- He had an organizational role in the planned robberies – he identified targets and was putting teams together;
- Some of the planned robberies involved significant risk of violence – kicking in doors, grabbing a trucker and getting him to talk, entering

residences and Mr. Lambert was aware that some of the people were willing to do home invasions and use weapons;

- The robbery plans were relatively sophisticated – using satellite imagery, trackers, grabbing victims and holding them; and,

- There is a reasonable inference that the robberies would have been carried out but for the fact that one of the people could not leave Nova Scotia and the eventual intervention by authorities.

Mitigating factors:

- Mr. Lambert has pleaded guilty to the conspiracy to commit robbery;

- He has been employed and is relatively young so has prospects for rehabilitation; and,

- The conditions of his pre-trial incarceration.

[77] There is also an absence of some aggravating factors. For the drug offences, there is no evidence of violence or weapons. For the robbery conspiracy, there is no evidence that the intent was to use firearms or engage in home invasions.

Parity / Range of Sentences

[78] Section 718.2 also requires consideration of the principle of parity. Within reason, similar offenders who commit similar offences should receive similar sentences. This requires an examination of the range of sentences imposed for the various offences. The range for a given offence is not the theoretical minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender (*R. v. Cromwell*, 2005 NSCA 137).

[79] Sentencing ranges are important. They are intended to encourage greater consistency between sentences and respect for the principle of parity. However, ultimately, each sentence has to reflect the unique circumstances of that offence and that offender.

[80] To assist in identifying the appropriate range for the drug offences, the Crown referenced the following cases: *R. v. Mendoza-Jaramillo and Galindo-Escobar*, unreported, November 13, 1989 (NBQB); *R. v. Malanca*, 2007 ONCA 859; *R. v.*

Buttazzoni, 2016 ONSC 1287 (varied on appeal by Mr. Buttazzoni, 2019 ONCA 645); *R. v. Couture,* 2009 ONCJ 655; and, *R. v. Grenier,* unreported, NSPC.

[81] The Defence relied on: *R. v. Chevrefils,* 2019 NSPC 16; *R. v. Burnett,* 2019 NSSC 212; *R. v. Terrill*, 2012 ONSC 659; *R. v. Pangman et al.*, 2001 MBCA 64; *R. v. Leslie Hadiken,* 2007, unreported, MBQB; *R. v. Hanano,* 2009, unreported, MBQB; *R. v. Bacon and Scott*, 2012 BCSC 1446 (on appeal, upheld for Scott, 2013 BCCA 397, but varied for Bacon, 2013 BCCA 396); and, *R. v. Sandhu*, 2003 BCSC 2033.

[82] The Federal Crown submits that the circumstances of this case fall close to the upper end of the range identified for importing large quantities of cocaine. In making that argument, they rely on the quantity and quality of cocaine, Mr. Lambert's role in the operation, the nature of the operation, and Mr. Lambert's post-offence conduct.

[83] Many of the cases provided by the Defence do not involve importing. As noted above, importing is seen as more serious than trafficking or possession for the purpose of trafficking. The Defence argues that the trafficking decisions are informative of the range because Mr. Lambert's conduct was at the low end of culpability for conspiracy to import. I accept that those sentences, when they involve similar quantities of the same substance, can be a useful reference in locating the proper range for the related crime of importing. For example, in *Buttazoni*, the Court of Appeal said that the most relevant precedent for the purpose of sentencing was *R. v. D'Onofrio,* 2013 ONCA 145, notwithstanding that Mr. Buttazoni was convicted of importing and conspiracy to import whereas Mr. D'Onofrio was convicted of trafficking.

[84] From my review, the cases demonstrate that sentences for importing cocaine in the hundreds of kilograms, absent unusual circumstances, are in the range of 12 - 22 years, depending on the aggravating and mitigating factors.

[85] To determine where the circumstances before me fit in that range, it is important to briefly review the circumstances in some of these cases:

- In *Mendoza-Jaramillo and Galindo-Escobar* (*supra.*), two pilots pled guilty to importing and possessing 500 kilograms of cocaine for the purposes of trafficking. They were deemed "professional couriers" and they both received 22 years custody.

- In *Buttazzoni* (*supra.*), three accused were involved in the importation of 112 kg of cocaine. The cocaine entered Canada in a shipping container which was intercepted by police. The cocaine was removed, and the container delivered to Ontario. Mr. Dalloo made the arrangements to import the cocaine and pleaded guilty to the substantive offence of importing. He had a prior related record and was sentenced to 15 years in custody. Mr. Buttazzoni and Mr. Ramlall were convicted after trial of conspiracy to import and possession for the purpose of trafficking of the cocaine. At trial, Mr. Buttazoni, who had one prior related conviction, was sentenced to 17 years in custody and Mr. Ramlall, who had no prior record, was sentenced to 15 years. On appeal by Mr. Buttazzoni, his sentence was reduced to 15 years because the sentencing judge had failed to acknowledge the significant difference in the level of involvement between Mr. Buttazzoni and Mr. Dalloo (at para. 66). Mr. Dalloo had pleaded guilty to importing and without him the cocaine would not have come to Canada. Mr. Buttazzoni and Mr. Dalloo had a similar financial interest, had worked together as partners once the cocaine reached Ontario and Mr. Buttazzoni had arranged for the container's safe delivery. However, he had not been involved in obtaining the cocaine from the source country.

- In *Couture,* the accused pleaded guilty to importing 120.7 kg of cocaine. He had no record and was sentenced to 12 years in custody. He was a truck driver who agreed to transport the cocaine from the U.S. for a fee of $28,000.

- In *Malanca* (*supra.*), the offender was convicted of conspiracy to import and importing cocaine. The importation involved the transport of 270 kg of cocaine from Jamaica to Canada by plane. He was 27 years old at the time of his conviction and had no prior criminal record. He was originally sentenced to life imprisonment which, on appeal, was reduced to 19 years in custody.

- In *Von Holtum* (*supra.*), the accused, who was a baggage handler at the Vancouver International airport, was convicted of importing 50 kg of cocaine. He was initially sentenced to 10 years which was increased on appeal to 12 years. He was 47 years old with no criminal record and was the sole caregiver for his ailing mother. He used his position and security clearance to facilitate the offence, so his offence was seen as a breach of trust.

- In *Sandhu* (*supra.*), the accused was convicted of importing 100 lb (45 kg) of cocaine and was sentenced to 9 years in custody. The accused was 35 years old and had no criminal record. He was a trucker who had been paid to transport a container that held the cocaine. His role in the offence was that of a courier or mule.

- In *Terrill* (*supra.*), the offender was convicted of importing approximately 3 kg of cocaine and was sentenced to 6 years in custody. She was 64 years old with no criminal record. She came through Pearson International Airport from Trinidad with the cocaine concealed in her luggage. She was the quintessential mule. In imposing the sentence of 6 years, the judge noted that it was at the very low end of the range.

- In *Bacon* (*supra.*) and *Scott* (*supra.*), the two offenders were convicted of conspiracy to traffic cocaine for agreeing to purchase 100 kg. from a police agent. Mr. Scott was the middleman between the agent and Mr. Bacon, but played no role in the potential financing of the purchase, had no previous record and was previously of good character. He was sentenced to three-and-a-half years, which the sentencing judge acknowledged was outside the normal range. That sentence was upheld on appeal due to the unique circumstances. Mr. Bacon's role was more significant, and he was described as a career criminal. He was originally sentenced to 12 years, but that was increased to 14 years on appeal.

- The related cases of *Grenier* (*supra.*) and *Chevrefils* (*supra.*) are both from Nova Scotia. Mr. Grenier pleaded guilty to importing and possession for the purpose of trafficking of 250 kg of high purity cocaine. He had sailed a small vessel containing the cocaine from the Caribbean to Nova Scotia. He had no prior record and was 69 years old at the time of sentencing. He was sentenced to 13 years in custody. In imposing that sentence, the Judge acknowledged that the sentence of 15 years recommended by the Crown would have been appropriate but for the accused's age. Mr. Chevrefils was found not guilty of importing cocaine but guilty of possession for the purpose of trafficking the 250 kg. of cocaine that Mr. Grenier had imported. He was sentenced to 10 years in custody. He was a trusted courier who was closely connected to the importation. He was 60 years old and had a dated but related criminal record. He had never been sentenced to a penitentiary term.

[86] In *Chevrefil* (*supra.*), I reviewed the cases where offenders had been sentenced for possession for the purpose of trafficking or trafficking cocaine in the tens or hundreds of kilograms and concluded that, they were typically in the 8 to 15 year range (see: *R. v. Oddleifson*, 2010 MBCA 44 (leave to appeal conviction to the Supreme Court of Canada, refused, [2010] S.C.C.A. No. 244)*; R. v. D'Onofrio,* 2013 ONCA 145; and, *Bacon, supra.*).

[87] The Provincial Crown acknowledges that sentences for conspiracy to commit robbery where the robbery is not carried out tend to be lower than for those where the robbery is completed, but submits that the circumstances here put Mr. Lambert at the high end of the applicable range.

[88] He suggests the range, where the substantive offence has not been committed, is between 18 months and 5 years. He acknowledges that lesser sentences have been imposed, but only in exceptional cases such as where the accused had no prior record, did not know the plan involved weapons, showed remorse and had good prospects for rehabilitation. In suggesting that range the Crown has provided a number of cases, many from Nova Scotia: *R.* v. *Thompson*, [1989] N.S.J. No. 113 (C.A.); *R.* v. *Guatto, MacInnis and Tobin*, [1977] N.S.J. No. 509 (S.C., A.D.); *R.* v. *Halsey*, 2014 NSSC 347; *R.* v. *Sutherland*, 2019 NSPC 17; *R.* v. *Tran*, 2010 ONCA 471; *R.* v. *Binns*, [2009] O. J. No. 6015 (Sup. Ct. J.); *R.* v. *Rhidar*, 2010 ONCJ 430; *R.* v. *Dao*, 2010 ONCJ 290; and, *R.* v. *Harrison*, 2012 ABPC 259.

[89] No two cases will be the same. When I consider all the circumstances, I find the cases that are most useful as precedents for the drug offences are *Buttozzoni* (*supra.*) and *Grenier* (*supra.*). The quantity in this case is more than in *Buttozoni* and less than in *Grenier*. Mr. Grenier's role in the importing was significant. He was the actual importer, which in the circumstances required considerable planning and commitment. However, he was not proven to have been the owner of the drugs. Mr. Buttozoni's role in the conspiracy was similar to Mr. Lambert's. Neither were proven to have been responsible for getting the drug from the source country, but both facilitated the importation and had important roles once the drugs were in Canada. Mr. Buttozoni had a related criminal record. Mr. Lambert has more convictions but has a less serious drug record.

[90] I would distinguish the decision in *Terrill* (*supra.*). Ms. Terrill was a 64-year old grandmother with no record who was used as a mule to bring in 3 kg. of cocaine.

[91] The circumstances here are also more aggravating than those in *Scott* (*supra.*), *Couture* (*supra.*), *Sandhu* (*supra.*) and *Von Holtum* (*supra.*). In those cases, the offenders did not have prior criminal records. *Scott* (*supra.*) was a unique case for a variety of reasons. The offenders in *Sandhu* (*supra.*) and *Couture* (*supra.*) were mere couriers and *Sandhu* had significantly less quantity. *Von Holtum* (*supra.*) had the aggravating factor of a breach of trust, but the quantity was significantly less.

[92] I would also distinguish *Mendoza-Jaramillo and Galindo-Escobar* (*supra.*) and *Malanca* (*supra.*). The quantity in those cases was significantly more and both were the actual importers responsible for transporting the drugs.

[93] For the Conspiracy to Commit Robbery, the range suggested by the Crown is supported by the caselaw. In *Thompson* (*supra.*), the two accused planned to attend the victim's residence and rob him of drugs and money. They went to the residence but did not follow through. They both had related records. After subtraction of an unreported amount of remand time, they were sentenced to 32 months and 26 months respectively. This sentence was upheld by the Court of Appeal. Mr. Lambert's criminal record is much less extensive and none of the planned robberies reached the point where the robbers were at the door of the victim. However, there were multiple plans and they were more sophisticated than the plan in *Thompson*.

Restraint and Totality

[94] Finally, I have to consider the principles of restraint and totality contained within s. 718.2. Restraint requires that the punishment should be the least that would be appropriate in the circumstances. This principle applies in all cases, including those where denunciation and deterrence must be emphasized.

[95] Totality applies where consecutive sentences are imposed. It says the combined sentence should not be unduly long or harsh. A sentence needs to be just and reflect the moral blameworthiness of the offender but not be so crushing that it removes hope and undermines rehabilitation.

[96] Our Court of Appeal has directed that when sentencing for multiple offences, a sentencing judge should first determine the appropriate sentence for each individual conviction and then go on to decide whether the sentences should be consecutive or concurrent before ultimately taking a last look at the total sentence and reducing it if need be to reflect totality (*R. v. Adams,* 2010 NSCA 42).

[97] The Provincial Crown submits that the sentence for the conspiracy to commit robbery should be consecutive to the sentence I impose for the drug offences.

Conclusion

[98] Denunciation and deterrence require that Mr. Lambert be sentenced to a significant period of incarceration. Given the quantity of cocaine and Mr. Lambert's role in the offences, the sentence suggested by the Defence would be below the appropriate range. The sentence recommended by the Crown is within the range, but at the upper end. Those cases where similar sentences have been imposed involved greater quantities, greater culpability and are somewhat dated.

[99] Prior to considering totality, credit for pre-trial custody or any mitigation for the conditions he experienced during his pre-trial detention, I would say that the appropriate global sentence for Mr. Lambert for the drug offences and the conspiracy to commit robbery would be 18 years in custody. However, I would reduce that sentence by one year as mitigation for the conditions of his pre-trial custody. Resulting in an appropriate sentence of 17 years.

[100] Before considering totality, I would apportion that sentence as follows:

- 14 years for conspiracy to import cocaine;
- 10 years concurrent for conspiracy to traffic cocaine;
- 10 years concurrent for attempt to traffic; and,
- 3 years consecutive for conspiracy to commit robbery

[101] I must then take a last look at this sentence and assess whether it respects proportionality by not exceeding Mr. Lambert's overall culpability, given the gravity of the offences and his degree of moral blameworthiness.

[102] I have concluded that the overall sentence should be reduced somewhat to reflect totality. Mr. Lambert's sentence has to reflect his culpability for both the drug offences and the conspiracy to commit robbery but take into account the reality that this will be his first penitentiary sentence and it will be significant. I am satisfied that the principles of sentence can be addressed by a global sentence of 16 years less credit for pre-trial custody.

[103] To accommodate the totality principle, I would reduce the sentence for the conspiracy to commit robbery to two years, consecutive to the 14-year sentence for conspiracy to import cocaine.

[104] Mr. Lambert has already served 837 days of pretrial custody. His pre-sentence custody is not counted toward eligibility for conditional release. Therefore, I will give him enhanced credit of 1. 5 days for each day he has served (s. 719(3.1)). That amounts to a total credit of 1,256 days which will be subtracted from the sentence.

[105] The result is a global sentence of 16 years, less 1,256 days credit, for a go forward sentence of 12 years and 204 days.

[106] I also make the following orders:

- Mr. Lambert is prohibited from possessing weapons, firearms, ammunition and explosive materials for life;
- He will provide a sample of his DNA for the DNA databank; and,
- I will sign a consent Forfeiture Order for various seized items when it is presented to me

Elizabeth Buckle, JPC.