PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Bailey*, 2020 NSPC 50

Date: 20201127
Docket: 8254205, 8260209, 8260213, 8260217
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

DARCY BAILEY

SENTENCING DECISION

Judge:	The Honourable Judge Elizabeth A. Buckle
Heard:	November 6, 2020
Decision:	November 27, 2020
Charges:	Sections 5(1) & 5(2) *Controlled Drugs and Substances Act* Section 465(1)(c) *Criminal Code* x 2
Counsel:	Angela Nimmo, for the Crown Patrick MacEwen, for Mr. Bailey

Background

[1] I found Mr. Bailey guilty of Conspiracy to Import Cocaine, Conspiracy to Traffic Cocaine and Attempts to Traffic and Possess Cocaine for the Purpose of Trafficking, contrary to s. 465(1)(c) of the *Criminal Code*, R.S.C., 1985, c. C-46, and ss. 5(1) and 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*CDSA*).

[2] Those convictions relate to his 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.

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

Position of the Parties

[4] The Crown seeks a custodial sentence of 13 to 14 years. The Crown emphasises the need for denunciation and general deterrence and relies on the aggravating factors, including the quantity of cocaine and Mr. Bailey's role in the offences.

[5] The Defence argues that the appropriate sentence is a custodial sentence in the range of 8 to 10 years. He emphasizes that Mr. Bailey is essentially a first offender, at the time of the offence he was suffering from a long-standing addiction and his role in the offence was less than his co-accused. He also argues that the otherwise appropriate sentence should be reduced to reflect *Charter* breaches found at trial and the long period during which Mr. Bailey was in the community under strict release conditions.

[6] The Crown and Defence agree that Mr. Bailey should be given credit for the time he has spent in pre-trial custody which they agree is 48 days. The Crown is not opposed to him receiving the maximum enhanced credit allowable under s. 719(3.1), so he has served the equivalent of 72 days.

[7] 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

[8] The facts relating to the offences are set out in detail in my trial decision. In summary, Mr. Bailey agreed to facilitate the importation of 157 kg of cocaine into Canada. Prior to the cocaine entering Canada, he agreed to help 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 his intent was, at the very least, to transport the drugs for sale by someone else.

[9] 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. Bailey tracked the Arica's movements, and researched and sourced equipment. He is a diver, so his skills were important to the scheme. 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 the cocaine, but the authorities intervened, and Mr. Bailey was arrested.

[10] The cocaine was discovered, still in the sea chest on the Arica. Its quantity 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.

Application of *Kienapple*

[11] The two conspiracies have different legal elements which are also distinct from the substantive offences. There is factual overlap, but the factual basis for those convictions is not identical. Therefore, the principle enunciated in *R. v. Kienapple*, [1975] 1 S.C.R. 729, does not preclude conviction for both conspiracies and one of the substantive attempts. There is 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. As such, the charge of attempt to possess cocaine for the purpose of trafficking will be stayed and Mr. Bailey will be sentenced for the remaining three offences. The Crown is not, however, seeking consecutive sentences for those offences.

Mr. Bailey's Circumstances

[12] I have the benefit of a pre-sentence report for Mr. Bailey.

[13] He is 49 years old. He is not currently married but has two children from previous relationships. By all accounts, he maintains a positive relationship with his children. He was raised in a military family, so moved around. He describes his childhood as good and appears to have a very good relationship with his mother and a cousin, who continue to be supportive of him.

[14] He has had stable long-term relationships and some long periods of stable employment, in the lumber industry and the oil and gas industry.

[15] He was in a motor vehicle accident in 2002 and was prescribed Percocet for pain. He continued to be prescribed that medication for about 10 years and became addicted. He tried to reduce his intake, but when he could no longer get enough by prescription, he turned to illegal sources and started to use oxycodone and then fentanyl.

[16] In 2014, his marriage ended and for the next five years, his life was unstable.

[17] He reports that in 2017, he started to see a psychiatrist and tried to deal with his addiction. He was prescribed methadone and eventually moved to suboxone. He reports some success and by 2018 he was able to deal with addiction without those substances. Unfortunately, he relapsed and by May/June of 2018 when he was arrested for these offences, he was again using fentanyl. His addiction at the time of the offences is corroborated by material presented at trial, including text messages showing that he was trying to get substances sent to him in Halifax, evidence that he received a package while here and evidence that personal-use drugs were found in the vehicle he occupied. The tone of the text messages certainly demonstrates some desperation. He reports being drug free since his arrest on these matters in June 2018.

[18] He has been unemployed since 2016, has no assets and at the time of the offences was under significant financial strain.

[19] He has a minor unrelated criminal record from almost 30 years ago, when he would have been around 20 years old.

[20] For much of the past two years, Mr. Bailey has been in the community under very strict terms of release, which for a time included house arrest.

[21] He denies the offences. He advised the author of the pre-sentence report that he had known his co-accused, Mr. Lambert, for only a few months before the arrest

and was trying to disengage from him because "he found out what he was about". The evidence presented at trial does not support his assertion that he was trying to disengage from Mr. Lambert.

Sentencing Principles

General

[22] In sentencing Mr. Bailey, 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

[23] 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

[24] Our Court of Appeal has "consistently and repeatedly" stated that protection of the public, denunciation and general deterrence must be emphasized when sentencing traffickers of Schedule I drugs, like cocaine (for example, 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, at para. 66).

[25] Denunciation is how a sentence communicates society's condemnation of conduct. A denunciatory sentence has been described as, "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." (*M. (C.A.)*, *supra.*, at para. 81).

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

[27] 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.

[28] The goal of specific deterrence is to discourage Mr. Bailey from committing further offences. The Crown does not argue that specific deterrence is a particular concern.

Rehabilitation

[29] Rehabilitation continues to be a relevant objective even in cases requiring that denunciation and deterrence be emphasized (*LaCasse, supra.*, at para. 4). However, it has a reduced impact when sentencing people who participate in trafficking "hard drugs" (*Kleykens, supra.*, at para. 66).

[30] Mr. Bailey is educated, has a good employment history and family support. For most of his life, he has been law-abiding. He has demonstrated that he can provide for himself and his family. He acknowledges his substance abuse but feels he has managed his addiction himself and does not require treatment or counselling. His drug addiction has cost him a great deal and will be a life-long struggle. Rehabilitative efforts need to focus on giving him tools to deal with his addiction and adjust to the challenges that these convictions will pose to his future employment.

Proportionality

[31] 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. Bailey. It also requires that the sentence be severe enough to condemn his actions and hold him responsible for what he has done (*Lacasse, supra.*, at para. 12; and *R. v. Nasogaluak*, 2010 SCC 6, at para. 42).

[32] The proportionality analysis must include an assessment of the gravity of the offence in general and of Mr. Bailey's individual culpability (*R. v. White*, 2020 NSCA 33, at para. 51).

[33] These are very serious offences. The maximum sentence for conspiracy to import cocaine is life imprisonment. This case involved the importation of a large quantity of a dangerous drug.

[34] 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, [*1990], 95 N.S.R. (2d) 109, and perhaps before, the Court has recognized the "creeping evil" and danger of cocaine. In *Butt* (*supra.*, 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.

[35] More than 30 years ago, in *R. v. Smith*, [1987], 1 S.C.R. 1045, at 1053, the Court 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:

> 2. 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. . . .

[36] More recently, in *R. v. Von Holtum*, 2013 BCCA 384, the Court explained why importing cocaine is viewed as more serious than trafficking cocaine:

> [34] 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).

[37] 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 from its inevitable consequences. He characterized cocaine importation as both a violent and serious offence.

[38] The offences I have convicted Mr. Bailey of 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.

[39] The operation in this case was clearly a wholesale commercial one involving bringing a substantial quantity of 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.

[40] I was not persuaded that either Mr. Bailey or his co-accused, Mr. Lambert, were directly involved in obtaining the cocaine from the source country. I was not persuaded that either negotiated the contract or terms of delivery with the seller or made the arrangements in the source country for the importation. It was also not proven that either were "owner-importers" or "owner traffickers".

[41] I was persuaded beyond a reasonable doubt that Mr. Lambert and Mr. Bailey agreed to facilitate the importation into Canada by recovering the drugs and transporting them. The evidence suggests that Mr. Lambert was closer to the source of the cocaine and probably brought Mr. Bailey in because of his diving experience. Mr. Bailey and Mr. Lambert worked together to plan the recovery of the drugs. Mr. Bailey was actively involved in that planning. He was also actively involved in the attempts to recover the drugs by diving in Montreal and in Halifax. Mr. Bailey's role in planning and carrying out the recovery operation were important, and Mr. Lambert trusted him. However, based on the evidence presented at trial, Mr. Lambert had contact with the person who knew where the cocaine was located and had the management or leadership role in the group. Mr. Lambert paid for equipment, travel, boat rentals and hotels, Mr. Lambert gave direction to Mr. Bailey and was clearly more criminally sophisticated than him.

[42] I have no information about the logistics of what was to be done with the cocaine after it was removed from the Arica. The evidence supports an inference that Mr. Bailey was to be involved in the transport of the drugs for financial gain. On June 1, 2018, the day Mr. Bailey left British Columbia to fly to Montreal, he

texted a contact, saying "... best part is when/if I make it back to Vancouver with the package I'm going to pick up I'm looking at a 6 digit payday!".

[43] The Crown has not proven that Mr. Bailey was to be directly involved in the eventual retail sale of the cocaine or was to share in the profits of the sale, but he was certainly going to be paid for his efforts. On June 5, 2018, he texted a contact saying, "If I am in good form by Friday, I could very easily be 500,000 richer". Around the same time, he texted another contact saying, "I'm down her to collect a 4 million dollar score", followed shortly after by, "500,000 is for me". Profit was clearly the motive for the offence.

[44] Mr. Bailey's role was less than his co-accused, Mr. Lambert. He 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. He was a crucial member of that team but was not its leader.

Aggravating and Mitigating Factors

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

[46] The Defence argues for sentence mitigation in two areas that require specific comment. Specifically, that the sentence should be reduced because of *Charter* breaches during the investigation and because Mr. Bailey has been under strict release conditions for the past two years.

Reduction for Charter Breaches

[47] The Defence argues that the sentence should be reduced to reflect findings made at trial that Mr. Bailey's *Charter* rights had been violated. Section 718.2(a) requires a sentencing court to consider reducing a sentence "to account for any relevant ... mitigating circumstances relating to the offence or the offender". In *Nasogaluak, supra*, the Court confirmed that this provides scope when determining a fit sentence, to take into account not only the conduct of the offender, but also that of state actors, regardless of whether the misconduct amounted to a *Charter* infringement or falls short of that standard (at para. 3).

[48] At trial, I found a variety of *Charter* breaches relating to Mr. Bailey:

- ss. 7, 10(a) and (b) resulting from his initial interaction with police;

- ss. 8, 9, 10(a) & (b) related to his arrest, seizure of vehicle, and formal statement; and,

- s. 8 related to judicially authorized searches, production orders and interception of communications.

[49] The Crown argues that these breaches were not systemic, flagrant or egregious and did not sufficiently impact Mr. Bailey's dignity to warrant sentence mitigation. She argues that the facts in *Nasogaluak* are informative of the kind of state action that can operate to mitigate sentence. In that case, police used excessive force when arresting Mr. Nasogaluak, did not report their force and failed to get him the medical attention he requested and required. This was found to be a substantial interference with his physical and psychological integrity and a violation of his s. 7 rights (*supra.*, at para. 38). The Defence argues that the state's treatment of Mr. Bailey was egregious, both because of the pervasiveness of *Charter* breaches in the investigation and because of the specific circumstances surrounding Mr. Bailey's arrest and detention.

[50] The initial breaches relating to Mr. Bailey's statement during his first interaction with police were the result of the officers' failure to recognize that Mr. Bailey was a suspect and was psychologically detained so should have been advised of his right to remain silent, of the reason for his detention and his right to counsel. Those breaches were not flagrant or egregious. The final s. 8 breaches related to judicially authorized searches of his hotel room and residence, production orders for private records and interception of private communication. They resulted from the excision of unconstitutionally obtained information from supporting grounds. These breaches had a significant impact on his privacy rights but did not involve any new *Charter* infringing state conduct and do not warrant sentence mitigation.

[51] The breaches flowing from Mr. Bailey's roadside arrest and the circumstances surrounding his detention and subsequent statement are more serious. The lead investigator did not have reasonable grounds for the arrest. Shortly after the arrest, he became aware that a crucial part of his subjective belief was incorrect, but nonetheless had Mr. Bailey taken into custody and the vehicle seized. At the same time, another officer advised Mr. Bailey that his rights to counsel were suspended due to the ongoing investigation but did not advise the lead investigator, did not hold off questioning Mr. Bailey and did not advise Mr. Bailey of how long his rights

would be suspended. Mr. Bailey was then transported to the police station where he was detained in a cubicle (a small concrete room with a metal table and chairs), wearing wet clothing and a wet dive suit and without access to counsel.

[52] The circumstances, from his perspective, were accurately summarized by his counsel – he was cold and wet, had no idea how long he would be held in that condition, had no idea when he would be permitted to speak to counsel and knew that no one, other than his co-accused who was also in custody, knew he'd been arrested.

[53] A number of police officers, including the sergeant who arrested him and the officers who were charged with transporting and watching him once he was at the station, knew he was wearing wet clothing. Apparently, none saw it as their responsibility to provide him with dry clothes. Two officers testified that they checked on him during the two hours he was held before one of the investigating officers attended. One acknowledged that Mr. Bailey was wet and that arrangements could have been made for clothing, but he did not offer a blanket or clothing. He testified that Mr. Bailey did not say he was cold, and since he was not a "mind reader", he was not aware. He said that if Mr. Bailey had said he was cold, he might have gotten him a blanket but might not have because of the risk of self-harm. Another officer testified that she observed that Mr. Bailey had wet hair, was cold and looked really uncomfortable. She said he had taken the top part of his dive suit off to the midsection. At one point he was on the floor with his legs up on a chair and at another he was curled up on the floor. Despite that, she did not inquire about dry clothing. At some point before the investigating officers arrived, someone gave Mr. Bailey a thin blanket but there is no evidence of who did that or when.

[54] About two hours after his arrest, the officer in charge of the investigative unit arrived and spoke with him. She arranged for him to be provided with dry clothing. She testified that when she entered the cubicle, Mr. Bailey was laying on the floor. He was still wet. He got up slowly and said he was cold and had a sore back and wrist. She testified that she was concerned about his condition and agreed it would not be typical to leave a suspect in a soaking wet dive suit at a police station.

[55] This is not a situation like in *Nasogaluak* where police actively mistreated a prisoner. However, the absence of action in this case amounts to mistreatment and is completely unacceptable. Mr. Bailey was entirely within the control of the police who had a duty to care for him. Any police officer who saw him wearing wet

clothing, whether they believed he was cold or not, should have remedied the situation.

[56] The Crown argues that the impact of these issues is lessened because when Mr. Bailey was given the opportunity to speak with counsel, he declined. I disagree. Even if Mr. Bailey had properly waived his right to speak with a lawyer, it would not lessen the impact of the circumstances of his initial detention or the impact of that initial denial of counsel. Had Mr. Bailey been permitted to speak with a lawyer immediately upon arrival at the police station, part of that lawyer's responsibility would have been to advocate for him and ensure he got some dry clothing. Further, I found that Mr. Bailey did not provide an informed and unequivocal waiver of counsel when given the opportunity later. His initial response when asked whether he wished to speak to counsel was equivocal and subsequently, he clearly stated he did not understand his rights. Despite that, the officer proceeded to take a statement from him.

[57] Sentence reduction as a remedy for state conduct is clearly discretionary. Unlike Mr. Nasogaluak, Mr. Bailey was not beaten by police. However, both pre- and post-*Nasogaluak,* courts have reduced sentences to reflect prejudice caused by state conduct in a variety of circumstances, not just excessive force.

[58] Prior to *Nasogaluak,* these had included delay, actions of the police that fell short of establishing the defence of entrapment, unlawful search of a residence, a judge's failure to allow a defendant to speak to his sentence, arbitrary detention, and, counsel's dual representation of the Crown and the accused (summarized in *Nasogaluak, supra.*, at paras. 50-65).

[59] Since *Nasogaluak,* sentences have been reduced to reflect a similar variety of circumstances:

- Breaches of ss. 8 and 10 resulting from the manner of search, delay in access to counsel and denial of access to counsel of choice. The accused testified he felt belittled and degraded when, during a search of his hotel room, he was left sitting in his underwear on the bed with his hands bound behind his back (*R. v. Campbell*, 2020 ONSC 1339);

- Breach of s. 8 resulting from warrantless searches (*R. v. Barnes* ([2020] N.J. No. 32 (PC); and, *R. v. Kennett*, 2019 NBCA 52);

- Breaches of s. 7 resulting from lost evidence and an arbitrary and irrational delay in charging the accused (*R. v. Lima*, 2016 ONCJ 167), and, lost evidence alone (*R. v. Zarecky*, 2018 ONCJ 191);

- Breaches of s. 8, 9 and 10(b) resulting from state conduct that was relatively technical and was not deliberately unlawful (*R. v. Blanchard*, 2010 NLTD(G) 123);

- Breaches of s. 8 resulting from strip search (*R. v. Ebanks*, 2012 ONSC 5002)

- Breaches of ss. 8 & 9 resulting from unlawful entry into storage locker and arbitrary detention (*R. v. Lam*, 2014 ONSC 5355); and,

- Breach of ss. 8 & 10 resulting from pre-arrest search and questioning (*R. v. Williams*, 2015 ONSC 322)

[60] In this case, as a result of the post-arrest breaches, I excluded the evidence seized from the vehicle and Mr. Bailey's statement. However, the fact that I granted a trial remedy for these breaches does not preclude me from considering them on sentencing (*R. v. Kennett, supra*; and, *R. v. Foster*, 2018 ONCA 53, (leave to appeal dismissed: [2018] S.C.C.A. No. 127)).

[61] I am satisfied that these breaches also warrant sentence mitigation. Mr. Bailey suffered hardship or punishment at the hands of the state. The way he was treated falls short of how we expect people in police custody to be treated.

Reduction to Reflect Impact of Release Conditions

[62] The Defence also argues that the sentence should be reduced because Mr. Bailey has spent about two years on very strict bail conditions, including time on house arrest. Time spent under this type of strict release conditions can be a relevant mitigating factor on sentence (*R. v. Knockwood,* 2009 NSCA 98; *R. v. Downes,* (2006) 79 O.R. (3d) 321 (C.A); and, *R. v. Nghiem*, 2009 BCCA 170). The Nova Scotia Court of Appeal, in *Knockwood,* said that strict terms of release do not automatically result in sentence reduction. Rather, the "… *impact* of strict release conditions may be considered or "put into the mix", together with all other mitigating factors, in arriving at a fit sentence." (*Knockwood*, *supra.*, at para. 33). Justice Saunders, writing for the Court, went on to say that the impact of the particular

conditions of release on the accused must be demonstrated in each case and that "there must be some information before the sentencing court which would describe the substantial hardship the accused *actually suffered* while on release because of the conditions of that release." (*Knockwood, supra.,* at para. 34).

[63] Mr. Bailey was initially released on a curfew and his conditions were subsequently made more rigorous, including house arrest. Because he resided in British Columbia and his trial took place in Nova Scotia, he was subjected to rigorous reporting obligations and relatively complex travel obligations/restrictions.

[64] The only information I have about any hardship these conditions caused him is what I can infer from comments in the pre-sentence report and various discussions during the trial about logistical challenges caused by his conditions. It is also reasonable to conclude that, while the conditions are not intended to be punitive, they can provide collateral deterrence and denunciation (eg. *Nghiem, supra.*, at para. 16).

[65] 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 substantial 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. Bailey's role in the conspiracy, including his actions in tracking the vessel and the importance of his skills to the operation; and,
- His post-offence effort to have information deleted from his cell phone.

Mitigating factors:

- Mr. Bailey is essentially a first offender;
- He has had stable employment for lengthy periods;
- He has family support;

- He struggles with addiction which contributed to the offence;
- The actions of the police following his arrest; and,
- He has been under strict conditions, including curfew or house arrest for about two years.

[66] There is also an absence of some aggravating factors such as violence, weapons or the threat of violence.

Parity / Range of Sentences

[67] Section 718.2 also requires me to consider the principle of parity which says that, within reason, similar offenders who commit similar offences should receive similar sentences. Ultimately, each sentence has to reflect the unique circumstances of the specific offence and specific offender. However, respect for the principle of parity is encouraged by situating a given case within the range of sentences generally imposed for a given offence. This promotes consistency, fairness and rationality in sentencing. The range for a given offence is not the theoretical minimum to maximum but is narrowed by the context of the offence and the circumstances of the offender (*R. v. Cromwell*, 2005 NSCA 137).

[68] To identify the appropriate range for these offences, I have reviewed all of the cases relied on by the Crown and Defence and some others: *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; *R. v. Grenier*, unreported, NSPC; *R. v. Chevrefils*, 2019 NSPC 16; *R. v. Burnett*, 2019 NSSC 212; *R. v. Terrill*, 2012 ONSC 659; *R. v. Vermette*, 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); *R. v. Sandhu*, 2003 BCSC 2033; *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 *R. v. Lambert*, 2020 NSPC 39.

[69] The theoretical sentencing range for these offences is broad. However, the substantial quantity involved in this case narrows that range. From my review of the authorities, sentences for importing or conspiracy to import cocaine in the

hundreds of kilograms, absent unusual circumstances, are in the range of 12 to 22 years (*Mendoza-Jaramillo and Galindo-Escobar, supra; Malanca, supra; Buttazzoni, supra, Couture, supra; Grenier, supra;* and, *Lambert, supra).*

[70] The cases provided by counsel that resulted in sentences below that range involved significantly lower quantity and/or other distinguishing circumstances. In *Terrill* (*supra*), a sentence of six years was imposed. The offender was a 64-year-old grandmother with no criminal record who had imported approximately 3 kg of cocaine. Her role was strictly as a mule. In *Sandhu, supra,* a sentence of nine years was imposed. The offender was a 35-year-old trucker with no criminal record who was paid to transport a container holding 45 kg of cocaine. His role was strictly as a courier.

[71] Sentences for possession for the purpose of trafficking or trafficking cocaine in the tens to hundreds of kilograms are typically in the 8 to 15 year range (see: *Oddleifson, supra*; *D'Onofrio, supra*; *Bacon, supra*; and, *Chevrefils, supra*). The only case provided to me that resulted in a sentence below that range involve unique features that are not present here. In *Bacon and Scott, supra,* a sentence of three and a half years was imposed for Mr. Scott. He and his co-accused 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 his co-accused, but played no role in the potential financing of the purchase. He was 56 years old with no criminal record. The sentencing judge and appeal court acknowledged the sentence was outside the normal range, but it was upheld on appeal due to the unique circumstances.

[72] The sentencing range for importing is higher than for trafficking or possession for the purpose of trafficking. However, there is overlap and, where cases involve similar quantities of the same substance, they inform each other. For example, in *Buttazoni, supra,* the Court of Appeal said that the most relevant precedent for the purpose of sentencing was *D'Onofrio, supra,* notwithstanding that Mr. Buttazoni was convicted of conspiracy to import whereas Mr. D'Onofrio was convicted of trafficking.

[73] To determine where the circumstances before me fit in the applicable range, it is important to briefly review the circumstances in the cases that inform the range:

- 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 were each sentenced to 22 years.

- In *Malanc, supra*, the accused was convicted of conspiracy to import and importing cocaine. The importation involved the transport of 270 kg of cocaine 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 *Couture, supra*, the accused pleaded guilty to importing 120.7 kg of cocaine. He was a truck driver with no criminal record who agreed to transport the cocaine from the U.S. for a fee of $28,000. His role was essentially that of a courier. He was sentenced to 12 years in custody.

- In *Buttazzoni, supra*, three accused, Buttazoni, Dalloo and Ramlall, were involved in the importation of 112 kg of cocaine which entered Canada in a shipping container. 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, Mr. Buttazzoni's 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 *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 treated as a breach of trust.

- In *R. v. Bacon and Scott, supra,* Mr. Bacon's role was more significant than Mr. Scott's and he was described as a career criminal. He was originally sentenced to 12 years, but that was increased to 14 years on appeal.

- In *D'Onofrio, supra*, the accused was found guilty after trial of possession for the purpose of trafficking almost 112 kg of cocaine. He had a previous dated record for the same offence involving multi-kilos. He was a courier, but the Court concluded he must have been close to the importation. He was sentenced to 15 years which was upheld on appeal.

- *Grenier, supra,* and *Chevrefils, supra,* are recent related cases from Nova Scotia. Mr. Grenier pleaded guilty to importing and possession for the purpose of trafficking of 250 kg of high purity cocaine. He 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 cocaine that Mr. Grenier had imported. He was a trusted courier who was closely connected to the importation. He was 60 years old, had a dated but related criminal record but had never been sentenced to a penitentiary term. He was sentenced to 10 years.

- *Lambert, supra,* was Mr. Bailey's co-accused. He was convicted of the same offences but also pleaded guilty to a conspiracy to commit robbery. His global sentence, prior to reduction for totality, credit for pre-trial detention and mitigation for the circumstances of his pre-trial detention, was 18 years, with 14.5 years attributed to the drug offences. Mr. Lambert was 36 years old. He had a criminal record which did not include serious drug offences and had never been sentenced to a penitentiary term. Mr. Lambert was not directly involved in obtaining the cocaine from the source country and was not an "owner/importer" or "owner/trafficker". However, he had direct access to information about where the drugs were located,

> agreed to facilitate the importation and had an organizational/leadership role in the recovery/transport group.

[74] Where an offender fits in the applicable sentencing range will be significantly impacted by his role in the offence and whether he has a prior record for similar offences (*D'Onofrio, supra,* at para. 6).

[75] Mr. Bailey has a very dated and unrelated criminal record. Given the gap principle, he is essentially a first offender. The Defence argues that Mr. Bailey's conduct was at the low end of culpability for conspiracy to import. Specifically, he argues that Mr. Bailey's conduct is most like that of Mr. Chevrefils, a trafficker who was close to the importation. The Crown argues that Mr. Bailey played an important role in the planned importation. Mr. Lambert trusted him with essential information about the location of the cocaine and he used his skills and expertise to help plan the operation and assemble the required equipment.

[76] Mr. Bailey's circumstances and the relative gravity of his offending behaviour mean that he should receive a lower sentence than his co-accused, Mr. Lambert. His role in the offence was less, unlike Mr. Lambert, he essentially has no criminal record, and he has suffered from serious addiction which contributed to the life circumstances that made him vulnerable to involvement in the offence.

[77] The gravity of his offence is also less than that in the cases of *Grenier*, *supra, Mendoza-Jaramillo and Galindo-Escobar*, *supra* and *Malanca*, *supra.* The quantity in those cases was significantly more and all were the actual importers responsible for transporting the drugs.

[78] His circumstances and role in the offence are also less aggravating than that of Mr. Buttazzoni. The quantity involved here is more, but Mr. Buttazzoni had a serious and related criminal record and had more managerial responsibility.

[79] Mr. Bailey's culpability is, however, greater than the offenders in *Chevrefils, supra*, *Couture*, *supra*, and *Von Holtum, supra.* Mr. Chevrefils was trusted and close to the importation, but the evidence established only that he was a hired courier. Unlike Mr. Bailey, he was not involved before the drugs arrived or in any planning. Similarly, Mr. Couture was a hired courier. Finally, Mr. Von Holtum had the aggravating factor of a breach of trust, but the quantity was significantly less.

<u>Restraint</u>

[80] Finally, I have to consider the principle of restraint 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, and is particularly important when dealing with someone with little or no previous record

Conclusion

[81] Denunciation and deterrence require that Mr. Bailey be sentenced to a significant period of incarceration.

[82] Prior to considering credit for pre-trial custody or any mitigation resulting from *Charter* breaches or Mr. Bailey's release conditions, I would say that the appropriate sentence for Mr. Bailey is 12.5 years. In reaching that conclusion, I have been particularly influenced by his absence of prior record, his subservient or deferential role in the operation as compared to Mr. Lambert, and his history of addiction.

[83] Where judges have exercised their discretion to reduce sentence as a result of state action, there is no clear formula for quantum. Based on my review, it appears to depend on the seriousness of the state conduct, the nature and extent of the impact on the accused and the quantum of the otherwise appropriate sentence. In *Kennett, supra*, a 30-month sentence was reduced by five months as a result of the unconstitutional searches of the phone and residence. In *Ebanks, supra*, a 30-month sentence was reduced by six months as a result of the unconstitutional strip search. In *Campbell, supra*, an eight-month sentence was reduced by two months as a result of the degrading treatment of the offender during the search of his hotel room. Similarly, when bail conditions are considered, the amount of the resulting reduction is within the discretion of the sentencing judge and there is no mathematical formula for the calculation (*Nghiem, supra*, at para. 16; and *Downes, supra*, at paras. 33 – 37).

[84] I have concluded that a sentence reduction of one year, primarily as mitigation for the *Charter* breaches, is appropriate. I view the police conduct following Mr. Bailey's arrest as serious. It negatively impacted Mr. Bailey and the administration of justice. To a lesser degree, that reduction also reflects the impact of Mr. Bailey's terms of release.

[85] As a result, the appropriate sentence is 11.5 years, less credit for 72 days of pretrial custody.

[86] I would apportion that sentence as follows:

- 11 years and 110 days for conspiracy to import cocaine;
- 9 years concurrent for conspiracy to traffic cocaine; and,
- 9 years concurrent for attempt to traffic.

[87] I also make the following orders:

- Mr. Bailey 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.