Citation: R v Alcera, 2024 MBCA 32
Date: 20240304
Docket: AR23-30-09934

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

B E T W E E N:

HIS MAJESTY THE KING	)	***J. A. Hyman*** *and*
	)	***H. D. P. Crawley***
Appellant	)	*for the Appellant*
	)	
- and -	)	***B. Erratt***
	)	*for the Respondent*
JEREMIAH ALCERA	)	
	)	*Appeal heard and*
(Accused) Respondent	)	*Decision pronounced:*
	)	***March 4, 2024***

MAINELLA JA (for the Court):

Introduction

[1] This is a drug sentence appeal.

[2] The accused pled guilty to conspiracy to traffic in cocaine (see the *Criminal Code*, RSC 1985, c C-46, s 465(1)(c) [the *Code*]) and was sentenced to three years' imprisonment. The Director of Public Prosecutions of Canada (the DPP) sought leave to appeal and, if granted, appealed the sentence.

[3] The DPP advanced two grounds challenging the judge's finding that the accused had low-level involvement in the conspiracy, as well as his

application of the principle of parity (see the *Code*, s 718.2(b)) in light of sentences imposed on the co-accused.

[4] After hearing the appeal, we allowed the DPP's appeal because of a material error as to the application of the principle of parity. The sentence was varied to four and one-half years' imprisonment, but the remaining custodial portion of it was stayed. We further pronounced that our reasons for decision would follow. These are those reasons.

Background

[5] Project Gold Dust was a 2020-2021 investigation (the investigation) of an interprovincial cocaine trafficking network known as "The Company" (the Company). The investigation relied on physical surveillance and judicially authorized electronic surveillance and covert searches.

[6] The investigation revealed that the Company was receiving kilograms of cocaine from British Columbia via two Winnipeg drug dealers—Sherwin Dimaapi (Dimaapi) and Khanh Nguyen (Nguyen)—that was then trafficked locally in ounce-level quantities. The illicit scheme was highly profitable for those supplying or controlling the Company.

[7] The accused was recruited into the ranks of the Company by his older cousin, Joshua Espiritu (Espiritu), who, according to the accused, was "like an older brother" to him and was in charge of the drug network. Over a five-month period in 2020 to 2021, the accused's multi-faceted involvement included "collecting, counting and bundling cash; handling and delivering quantities of drugs up to 1.5 kg; being asked for and offering his opinion on the performance of other network associates, and on the merits of enlisting

new associates; being trusted with an encrypted device; being left in charge of deliveries on a day when his superiors were away." The accused's motivation was financial gain. The remuneration he received was modest, about $800 to $1,000 per month.

[8] On February 10, 2021, the police executed search warrants and effected arrests. The police seized a score sheet to record the Company's drug sales, used wrappers for one-kilogram bricks of cocaine and empty food saver bags, often used to package ounces of cocaine from the accused's residence.

[9] Ten individuals, including the accused, were charged as a result of the investigation. One of these individuals passed away before his charges were resolved.

[10] A contested sentencing hearing was held on March 17, 2023 (see *R v Gardiner*, 1982 CanLII 30 (SCC); the *Code*, s 724(3)(e)). In dispute was the accused's "degree of responsibility" (the *Code*, s 718.1) and whether the range for his sentence should be between five to eight years' imprisonment (see *R v Rocha*, 2009 MBCA 26 at para 64 [*Rocha*]).

[11] The record before the judge as to the accused's involvement in the Company included intercepted communications, other police surveillance, seizures, his statement to police upon arrest, evidence from an expert witness about the drug trade and a pre-sentence report prepared for the accused (the PSR).

[12] The accused asserted that, at best, he was a "glorified courier" in a mid-level cocaine trafficking network who acted out of misplaced loyalty to a family member and who lacked the necessary aggravating indicia of some

decision-making authority or responsibility in the Company to fall within the *Rocha* range of five to eight years' imprisonment. The accused argued that the judge should have deviated downward from the lesser *Rocha* range of three to six years that applied to individuals minimally involved in a mid-level cocaine operation (see *Rocha* at para 64) and, instead, impose a conditional sentence order of two years less a day, followed by three years' supervised probation (see the *Code*, s 742.1). The DPP proposed a five-and-one-half-year sentence.

[13] The disposition of other co-accused at the time of the accused's sentencing was as follows:

Name	Sentencing Date	Offence	Age and Prior Record	Role in the Company	Sentence
Espiritu	June 27, 2022	Conspiracy to Traffic in Cocaine	26 - No Record	Mid-level operator	6 years–contested sentencing
Matthew Liwanag (Liwanag)	October 6, 2022	Conspiracy to Traffic in Cocaine	26 - No Record	Mid-level trafficker, conduct beyond a mere courier	5 years–joint recommen-dation
Rogelio Delacruz (Delacruz)	November 4, 2022	Conspiracy to Possess Proceeds of Crime Over $5,000	34 - No Record	Cash courier	4.5 years–joint recommen-dation
Louie Lorenzo (Lorenzo)	February 24, 2023	Conspiracy to Possess Proceeds of Crime Over $5,000	28 - No Record	Cash stash person	3 years–joint recommenda-tion (with immigration consequence)

Jamie Graida-Lumarque (Graida-Lumarque)	March 6, 2023	Conspiracy to Traffic in Cocaine	28 - No Record	Mid-level trafficker, conduct beyond a mere courier	3 years—joint recommenda-tion (true plea bargain—triable issue with wire evidence)

[14] The judge was advised that the other three living co-accused, Dimaapi, Nguyen and Johnny Lam (a British Columbia resident who was involved in supplying the Company's cocaine), had all agreed to plea bargains in which each would plead guilty to conspiracy to traffic in cocaine for a joint recommendation of an eight-year sentence. These three co-accused were all in their late thirties or early forties with no prior records. It was accepted that each fell into the range for high-level commercial cocaine trafficking of eight to twelve years' imprisonment (see *R v Grant (IM)*, 2009 MBCA 9 at paras 107-108).

[15] At the time of sentencing, the accused was twenty-five years old. He had no criminal record. He is intelligent and had a number of personal and community supports, including his parents, siblings and his girlfriend who was expecting their first child.

[16] In his decision, the judge said he was not satisfied that the DPP had met its burden of proof to establish that the accused's degree of responsibility put him in the five-to-eight-year *Rocha* range. He explained his finding by saying that, while the accused was entrenched in the Company and performed multiple roles, the intercepted communications between the accused and Espiritu put his "level of involvement in this matter" in context.

[17] The judge said that, while he accepted the conduct of the accused "indicates the high level of confidence and trust reposed in him" by Espiritu, he essentially occupied nothing more than "an entry-level position in this illegal enterprise." The judge's view of the evidence was that the accused's "criminal career was cut short by his arrest" before he was promoted to a more senior position that would have resulted in a "heavier sentence."

[18] The judge recognized that one of the sentencing principles he had to take into consideration was that of parity, which he explained "provides that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". After making a finding as to the accused's level of involvement, reviewing the various aggravating and mitigating factors, and rejecting the accused's submission for a conditional sentence, the judge said:

> The sentences imposed on the other accused caught up in Project Gold Dust, or expected to be imposed by way of joint recommendation in the case of two accused whose sentencing hearings were pending at the time of this hearing, range from three to eight years. In my opinion, a fit and appropriate sentence for [the accused] falls at the low end of that range, as befits his status as a lower-ranking member of this drug network.
>
> I therefore sentence [the accused] to a custodial sentence of three years.

The Accused's Level of Involvement

The Rocha Decision

[19] Before addressing the DPP's argument in relation to the judge's findings as to the accused's level of involvement in the conspiracy, it is

appropriate to say something at the outset about the non-quantitative and quantitative guidance provided in *Rocha* (see also *R v Parranto*, 2021 SCC 46 at para 15 [*Parranto*]).

[20] The non-quantative guidance applies to all drug trafficking cases—not just those involving cocaine. In *Rocha*, it was explained that, in arriving at a fit sentence, a sentencing court is required to assess the offender's level of involvement in the drug crime (see paras 59-63; see also *R v Ducharme*, 2012 MBCA 35 at para 3 [*Ducharme*]). That observation is in keeping with the requirements of ss 718.1 and 724(3)(e) of the *Code* as to what a proportionate sentence is and the requisite proof required for disputed aggravating facts.

[21] *Rocha* was a situation where the offender was caught delivering twenty ounces of cocaine to a street-level dealer on one occasion. This Court noted that, while there was evidence that the transaction represented a "mid-level drug transaction" (*Rocha* at para 62), there was "no evidence . . . called either at trial or at the sentencing hearing to differentiate the level of involvement the [offender] may have had" (*ibid*). The Court went on to say that, "[w]ithout more evidence on the level of involvement [of the offender], it would be inappropriate to sentence him as someone with decision-making responsibility" when it was equally plausible that he was simply delivering the drugs on one occasion for a wholesaler (*ibid* at para 63).

[22] In *R v McLean*, 2022 MBCA 60 [*McLean*], this Court explained further that assessing an offender's level of involvement and, thus, their degree of moral culpability, obliges a sentencing judge to determine the magnitude of the individual's participation in the illicit activity. This

evaluation tasks the sentencing judge with weighing the proven facts in light of "typical markers of moral culpability: intentional risk-taking, consequential harm of the offender's actions and normative character of the offender's conduct" (*ibid* at para 62).

[23] In *McLean*, following up on the comments in *Rocha*, it was also explained that there is a long history in Manitoba of a conscious sentencing policy that views those exercising some decision-making authority or responsibility in a drug crime as having greater moral blameworthiness (relatively) than an offender who, while performing an essential task to perpetuate a serious crime, is acting essentially under the direction of another for little renumeration (see *McLean* at paras 63-65).

[24] In *Rocha*, while this Court used the example of a "mere courier" (at paras 61, 64) to illustrate an offender essentially acting under the direction of another by delivering drugs from one place to another for minimal renumeration, the comment simply illustrated the necessity of a sentencing court determining an offender's level of involvement, in light of the proven facts, in order to impose a proportionate sentence. Principled sentencing, as explained in *McLean*, is about far more than merely labelling an offender (see also *R v Ramos*, 2007 MBCA 87 at para 14 [*Ramos*]). As was noted in *R v Rider*, 2013 MBQB 116, "Labels can sometimes be helpful but not necessarily determinative. Just like a book, those guilty of trafficking-related offences should not be judged merely by their veneer. It is their deed(s) that determines their punishment" (at para 36).

[25] The quantitative guidance in *Rocha* is specific to cocaine-trafficking-related offences. This Court identified two ranges for commercial cocaine trafficking at the mid-level that, as explained in *McLean*, typically involve wholesale behaviour (at para 6).

[26] For mid-level commercial cocaine trafficking, the range of sentence for offenders having greater moral culpability due to their having some decision-making authority or responsibility in the drug crime is five to eight years' imprisonment (see *Rocha* at paras 61-65). Examples of offenders who fall into this range are those who procure drugs, sell drugs, direct others or perform some other ongoing trafficking-related activity, even where their conduct also includes lesser roles, such as acting as a courier or custodian (see *McLean* at paras 63-66; *R v Lewyc-Sullivan*, 2021 MBCA 92 at para 8 [*Lewyc-Sullivan*]; *Ducharme* at para 6). If that aggravating indicia of having some decision-making authority or responsibility in the drug crime is not proven on the criminal burden of proof, the range of sentence is three to six years' imprisonment (see *Rocha* at para 64).

[27] While *Rocha* has been applied regularly in this province for about fifteen years, the DPP invited this Court to refocus *Rocha* by merging the two *Rocha* sentencing ranges into one, which would be three to eight years for all hard drugs save synthetic opioids. The DPP argued one sentencing range would be a better sentencing tool to assess the totality of the conduct of a mid-level trafficker, particularly those who show ongoing and multi-factored participation in a drug network or who straddle multiple levels (e.g., street-level and mid-level drug dealing). Counsel for the accused does not support the revision of *Rocha*. He raised no concerns about the *Rocha* methodology.

[28] While we were not asked to sit as a panel of five judges on this appeal, the DPP says that, despite the central role precedent plays in promoting consistency, certainty, predictability and sound judicial administration, the Supreme Court of Canada signalled in *Parranto* (see para 25) that sentencing ranges or starting points can be revised when necessary.

[29] Whether times have changed so that the approach in *Rocha* "no longer responds to society's current understanding and awareness of the gravity" of drug trafficking and "the blameworthiness of particular offenders or to the legislative initiatives of Parliament" (*R v Friesen*, 2020 SCC 9 at para 35 [*Friesen*]) is a novel point that we do not think is necessary to decide in this case.

[30] We would reiterate that starting points and sentencing ranges are not hard-and-fast rules. While useful to a sentencing judge in applying the principle of parity, a court may deviate from a sentencing range or starting point to achieve proportionality (see *Parranto* at para 40).

[31] In our view, while it is unnecessary to decide the merits of the DPP's request to merge the two sentencing ranges set out in *Rocha* into one, many of the concerns the DPP raised about *Rocha* turn on the error in principle of simply focusing on labelling an offender, instead of the broader analysis that *McLean* and other cases require to properly assess moral culpability. *Rocha* is not an invitation to simply sentence offenders based on labelling one role they may have played in a drug crime. As occurred in *Rocha* at para 61, a deeper analysis of an offender's conduct to ascertain their moral culpability, by looking at the magnitude of the individual's participation in the illicit activity

as a whole and in light of the criminal burden of proof, is required (see also *McLean* at paras 61-66).

Analysis of the Judge's Finding as to the Accused's Level of Involvement

[32] The DPP says that the judge's finding of the accused having an important and trusted role in the Company cannot be reasonably reconciled with his other finding that the accused should be sentenced in terms of the three-to-six-year *Rocha* range as he occupied an entry level position in the Company. As the DPP puts it in their factum, the judge "failed to recognize that this proven level of ongoing enthusiastic involvement far exceeded what is necessary to engage the upper *Rocha* range" (footnote omitted).

[33] An appellate court cannot lightly interfere with a sentencing decision; the standard of review is highly deferential (see *Parranto* at para 29). Appellate courts must generally defer to reasonable exercises of a sentencing judge's discretion. An appellate court can intervene to vary sentence only when it is demonstrably unfit or there was a material error in its crafting (see *Friesen* at para 26).

[34] The judge's finding as to the accused's level of involvement is reviewable on a standard of palpable and overriding error (see *R v Brown (C)*, 2016 MBCA 115 at para 5; *R v Kunicki*, 2014 MBCA 22 at para 17; *R v Brown (TC)*, 2012 MBCA 60 at para 2).

[35] This is a close call, but we are of the view that the judge's finding as to the accused's level of involvement in the Company should be afforded deference.

[36] If one looks at the accused's intentional risk-taking, the consequential harm of his actions and the normative character of his conduct, one is struck by how trusted he was by his confederates, how deeply entrenched he was in the operations of a sophisticated criminal venture and how willing he was to commit serious and consequential crimes to the community, involving a dangerous drug, simply due to his own avarice and familial loyalty to Espiritu. There is no question that the accused's serious, reoccurring and premeditated conduct meant his moral blameworthiness was high.

[37] It would not have surprised us on these facts if the judge had accepted the DPP's position that, while the accused never had a leadership role in the Company, he was so involved in the ongoing trafficking-related activities of this mid-level drug network that, despite being a courier or custodian, he had sufficient decision-making authority to be sentenced in the five-to-eight-year range, as set out in *Rocha* as a highly trusted associate (see *McLean* at paras 63-66; *Lewyc-Sullivan* at para 8; *R v Racca*, 2015 MBCA 121 at para 18).

[38] However, images in the drug trade are often translucent, as opposed to transparent. As was said in *R v Bisson*, 2018 MBCA 92 [*Bisson*], there is often "no bright line" (at para 6) in ascertaining an offender's degree of responsibility. A sentencing judge therefore has to make a judgment call in light of the admissible evidence and the burden of proof.

[39] What is ultimately determinative to us is the reasonableness of the judge's interpretation of the intercepted communications. He found that there was no evidence of the accused directing other members of the Company;

there were several instances where Espiritu recognized the accused was a "novice" in the drug trade and needed instruction; and, fortuitously, the accused was arrested just before he was to be promoted to a greater role in the Company by Espiritu. The DPP noted that some intercepted communications of the accused could not be decrypted because of the technology used. While the accused's use of an encrypted device is an aggravating fact, the content of communications that cannot be decrypted cannot be speculated about.

[40] In our view, the judge's interpretation of the intercepted communications was reasonably open to him on the record. Thus, for the purposes of appellate review, we cannot say there was an insufficient evidentiary foundation to justify his conclusion as to the accused's level of involvement despite how entrenched and valuable he was to the Company's operations (see *Ducharme* at paras 5-6; *Ramos* at paras 12-15). Our role is not to reweigh the evidence or retry the case, even if we may disagree with a factual conclusion (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 3, 23).

[41] In summary, a palpable and overriding error as to the accused's level of involvement has not been demonstrated by the DPP. We also note that even if the judge had misapplied the relevant sentencing range in *Rocha*, by a faulty characterization of the accused's level of involvement, that may not have been, by itself, sufficient reason to vary the sentence (see *McLean* at para 81; *Parranto* at para 30; *Friesen* at para 37; *Bisson* at para 8; *R v Delacruz*, 2017 MBCA 10 at para 4).

Parity

[42] Parity is a principle of sentencing that must be taken into consideration to arrive at a proportionate sentence. Section 718.2(b) of the *Code* provides:

Other sentencing principles **718.2** A court that imposes a sentence shall also take into consideration the following principles:	**Principes de détermination de la peine** **718.2** Le tribunal détermine la peine à infliger compte tenu également des principes suivants :
. . . **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;	. . . **b)** l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

[43] As was explained in *McLean*, "proportionality is not determined in a vacuum; it is assessed both on an individual basis 'and by comparison with sentences imposed for similar offences committed in similar circumstances'" (at para 108).

[44] However, perfect parity in sentencing is neither attainable nor desirable; sentencing is an individualized process (see *R v M (CA)*, 1996 CanLII 230 (SCC) at para 92). Seldom are two offenders so alike that a "sentence in one can be taken 'off the peg' for use in the other" (*R v FCG*, 1997 CanLII 23073 (MBCA) at para 9; see also *R v Reader (M)*, 2008 MBCA 42 at para 13 [*Reader*]). Some disparity in sentences for similar offenders

committing similar crimes is to be expected (see *R v Cook (N)*, 2014 MBCA 29 at para 83).

[45] In light of the reality that the background and criminality of two offenders are never identical, what is determinative on a sentence appeal, given the deferential standard of review, is whether a substantial disparity in sentences is rationally justified by the circumstances (see *McLean* at para 108; *R v LM*, 2008 SCC 31 at para 36; *Reader* at para 13; *R v Ipeelee*, 2012 SCC 13 at para 79).

[46] In a situation like this one where there is a joint criminal venture, fairness requires that sentences be understandable when viewed together (see *R v Bingley*, 2021 BCCA 444 at paras 13-14, 39-42; *R v Dritsas (K)*, 2015 MBCA 19 at paras 17-21; *Rocha* at paras 55-60; *Reader* at paras 14-21; *R v Woo*, 2007 MBCA 151 at paras 7-9 [*Woo*]). The sentences must also be consistent with sentences ordinarily given for mid-level commercial cocaine trafficking given the ranges set out in *Rocha*.

[47] In our view, there is an adequate foundation in the record to consider the DPP's submission. We have been provided with sentencing transcripts from the co-accused's sentencing hearings (see *R v Demeter*, 2022 BCCA 115 at paras 60-63; *R v Sass*, 2018 MBCA 46 at para 42). No concern was raised by the accused as to the adequacy of the record to properly assess the judge's application of parity.

[48] Applying the principle of parity did not task the judge with crafting the accused's sentence by a "detailed and minute analysis" of the cases of the co-accused or other drug traffickers generally (*R v Beaulieu (HAW)*, 1997 CanLII 23034 (MBCA) at para 8). However, simply saying that the range of

sentences for the co-accused previously sentenced or to be sentenced was three to eight years' imprisonment, in our respectful view, was inadequate in the circumstances. In particular, the sentence imposed on the accused cannot be rationally justified in relation to the sentences imposed on Liwanag, Delacruz and Lorenzo, whose conduct in the Company are most comparable to that of the accused.

[49] Our first concern is that the sentences imposed on Liwanag, Delacruz and Lorenzo arose from joint recommendations. The salutary effects to the administration of justice that arise from a joint recommendation as to sentence, in terms of certainty and efficiency, justify what is typically a "more lenient" disposition than what "the accused might expect after a trial and/or contested sentencing hearing" (*R v Anthony-Cook*, 2016 SCC 43 at para 36).

[50] Where the application of the principle of parity involves a co-accused sentenced by way of a joint recommendation, the sentencing judge is required to assess what gave rise to the joint recommendation in order to decide what weight should be given to it (see *Reader* at paras 16-19). For example, the sentence of Graida-Lumarque was a departure from the five-to-eight-year *Rocha* range because of a triable issue in relation to the admissibility of intercepted communications against him. Accordingly, that sentence was of little relevance to the other co-accused arrested in the investigation.

[51] While the judge referred generally to other sentences arising from the investigation, he failed to appreciate that those co-accused having the degree of responsibility closest to the accused were sentenced by way of a joint recommendation which should have been a signal to him that their

sentences were lenient for comparison purposes to the accused (see *R v Buffone*, 2021 ONCA 825 at paras 28-31; *Reader* at para 17; *Woo* at paras 8-9). For example, the sentencing judge in the case of Liwanag described the five-year joint recommendation as "a bit of a break" and at the "low end of the range", but she was prepared to go along with it because of Liwanag's multiple mitigating circumstances.

[52] It is also important to highlight that the accused was convicted of a more serious offence (punishable by life imprisonment) than Delacruz and Lorenzo, who were convicted of an offence for which the maximum punishment is ten years' imprisonment.

[53] Finally, we recognize that the sentences of the accused and Liwanag must be different to reflect the judge's factual determination that the accused's level of involvement was just shy of what was necessary to fall within the five-to-eight-year *Rocha* range, unlike Liwanag. However, a careful review of the transcripts of the two cases persuades us that Liwanag was only marginally more involved in the Company, for a period about half a year longer, than the accused. In the circumstances, a two-year chasm between the sentences of Liwanag and the accused cannot be justified on any principled basis given that both accused have reasonably similar personal circumstances—both pled guilty and each performed multiple and important roles in the operations of the Company.

[54] In our view, the judge failed to properly consider the sentencing principle of parity in a way that materially affected the accused's sentence.

Resentencing the Accused

[55] If the untainted findings of the judge are applied, mindful of the relevant sentencing objectives and principles (including parity), we are persuaded that a fit sentence in all of the circumstances would be one of fifty-four months' (four and one-half years) imprisonment. We acknowledge that this sentence is lenient in light of the aggravating factors, but we are of the view that, despite giving priority to the objectives of denunciation and deterrence, the principle of restraint has resonance in this case because of the accused's positive antecedents, which will be commented on momentarily.

[56] The accused was sentenced by the judge on April 12, 2023, and was released from custody on day parole on November 9, 2023. Varying his sentence by increasing it, gives rise to the question of reincarceration (see *R v Burnett*, 2017 MBCA 122 at paras 38-42 [*Burnett*]).

[57] The judge was satisfied that the accused was a "good candidate for rehabilitation". He accepted that it was "unlikely [that the accused was] to ever become reinvolved in criminal behaviour." We agree. The accused's PSR is highly positive. The accused is ashamed of his actions, both for himself and his loved ones, and he is genuinely contrite and has real insight into why he went down an anti-social path. The accused was assessed as a low risk to reoffend and possessed no concerning criminogenic risk factors. The accused is currently gainfully employed as a factory worker and is supporting his family. He has severed his relationships with his co-accused and displayed maturity. He was a model inmate while in custody and no issues of concern have been raised by parole officials since his release on day parole.

[58] As Healy JCQ (as he then was) noted in *R c Bibeau*, 2011 QCCQ 6970, in an appropriate case, what can be described as compassion or mercy can play a part in tempering the harshness of the law to "allow hope to flourish if there is a chance of success" (at para 12). Following this line of thought, Dickson J (as she then was) said in *R v Holt*, 2012 BCSC 408, that "On occasion, justice without clemency may be injustice. Injustice in any form is to be assiduously avoided. As Shakespeare and others have observed over the centuries, we are elevated when mercy seasons justice" (at para 12).

[59] It is not necessary for us to attempt the difficult task of defining when compassion or mercy should temper punishment; often judges know it when they see it based on long experience. What is obvious to us after taking a careful and thorough look at this case is that, despite the seriousness of the offence and the lack of delays in the appellate process, when we consider the objectives underlying a fit sentence by virtue of s 718 of the *Code* and s 10 of the *Controlled Drugs and Substances Act*, SC 1996, c 19, we are satisfied that reincarcerating this accused now, for what would be less than half a year before he is eligible for day parole as a first-time offender, would not better protect society or contribute to respect for the law than if he remains on release in the community under strict conditions of parole. Furthermore, in terms of the impact of reincarceration on the accused's rehabilitation, it would be pointless and counter-productive, both to the accused and society in general, to reincarcerate him as that would occasion too much disruption of his life and that of his young family. We were satisfied that in the circumstances, reincarceration would not serve the ends of justice (see *Burnett* at para 38).

Disposition

[60] In the result, leave to appeal sentence was granted and the DPP's sentence appeal was allowed. The accused's sentence for conspiracy to traffic in cocaine was varied to fifty-four months' (four and one-half years) imprisonment, as of the date of original sentencing, but the remaining custodial portion was stayed. The ancillary orders previously made remain.

Mainella JA

Pfuetzner JA

Edmond JA