Citation: R v Dalkeith-Mackie, 2018 MBCA 118 Date: 20181108
Docket: AR17-30-08939

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***R. N. Malaviya*** *and*
	)	***A. Y. Kotler***
	)	*for the Appellant*
Appellant	)	
	)	***A. J. Synyshyn*** *and*
- and -	)	***M. D. Cannon***
	)	*for the Respondent*
JAMIE DONALD CHARLES DALKEITH-MACKIE	)	
	)	*Appeal heard:*
	)	***June 12, 2018***
	)	
(Accused) Respondent	)	*Judgment delivered:*
	)	***November 8, 2018***

LEMAISTRE JA

[1] The Crown seeks leave to appeal and, if granted, appeals the accused's sentence of time in custody equivalent to seven and one-half months' incarceration followed by 18 months' supervised probation concurrent for robbery pursuant to section 343(a) and wearing a disguise with intent pursuant to section 351(2) of the *Criminal Code* (the *Code*).

[2] The Crown asserts that the sentence imposed was demonstrably unfit. It submits that the sentencing judge erred by relying on exceptional circumstances to impose a sentence outside the proper range and did not correctly interpret and apply the sentencing principles in reaching his

decision. The accused argues that his circumstances were exceptional and warranted a rehabilitative sentence. If the appeal is granted and a period of incarceration is imposed, the accused seeks a stay of the period of incarceration.

[3] I have read the dissenting opinion of my colleague, Monnin JA. With respect, I disagree with his conclusion. For the reasons that follow, I would grant leave to appeal, allow the appeal and vary the sentence to 20 months' incarceration for the robbery, less pre-sentence custody of seven and one-half months, and 12 and one-half months concurrent for wearing a disguise, leaving 12 and one-half months remaining to be served. This will be followed by 24 months' supervised probation. I would give the accused credit for the time he has already spent on probation by reducing the period of probation by an equivalent length of time. I would not stay the period of incarceration.

Background

Circumstances of the Offence

[4] The accused and the co-accused planned to rob a convenience store near the accused's home in Brandon. At approximately 6:30 p.m., they covered their faces and entered the store, which was near a school. The accused stood in the doorway while the co-accused, who was armed with a knife, approached the storeowner and demanded money. When the co-accused became involved in a struggle with the storeowner, the accused went behind the counter and stole packages of cigarettes. He tried to flee, but was caught by witnesses and held for the police. The co-accused was also

apprehended at the scene. The storeowner suffered minor injuries as a result of his struggle with the co-accused.

Circumstances of the Accused

[5] At the time that he committed the offence, the accused was 33 years old and living with his mother. A pre-sentence report provided information about his background. His father, who drank heavily, worked on the oil rigs in Alberta and was frequently absent from home. As a result, the accused was raised primarily by his mother. When he was in grade five, the accused was diagnosed with inattentive attention-deficit/hyperactivity disorder. As a teenager, he became involved with negative peers and began to "party". He was "kicked out" of school in grade 12 for fighting, got a job as a warehouse labourer and began to drink more. In 2002, he was convicted of assault and, in 2003, he was sentenced to three years' incarceration for two counts of driving while impaired causing death and one count of driving while impaired causing bodily harm. He was convicted of breaching court orders in 2002 and 2012.

[6] The accused lost contact with his first child, who was born in 2004 while he was in jail serving his three-year sentence. In 2007, he was injured in a motor vehicle accident as a result of which he became depressed and began to drink even more. He also became addicted to cocaine. His second child was born in 2008, but was apprehended from her mother's care while the accused was in custody on this matter. The probation officer assessed the accused as a "[h]igh risk to re-offend."

[7] While in custody prior to his release on bail, the accused participated in programming and cultural activities. He was granted bail and released to

the Behavioural Health Foundation (the BHF), where he resided for one year before he was sentenced. A letter from the BHF explained that, while in the program, the accused set goals, completed workbooks and seminars, took training, participated in work crews, volunteered in the community, "held several positions of responsibility and trust" and obtained employment. He developed cognitive tools and coping skills to reduce the likelihood that he would relapse into drug and alcohol use. He has also been working with Child and Family Services (CFS) to obtain custody of his daughter.

The Sentencing Hearing

[8] While the accused pled guilty to the offences, he minimized his involvement and denied planning the robbery. He claimed that he covered his face with a scarf because it was cold and that the co-accused initiated the robbery and the physical altercation with the storeowner. He said that he "took advantage of the situation" created by the co-accused and stole the cigarettes so that he would go to jail where he could get help.

[9] As a result of the accused's position regarding his degree of participation in the robbery, there was a contested sentencing hearing at which the Crown was required to call *viva voce* evidence. A witness testified that she and her daughter were waiting in a vehicle for her son, who was at the nearby high school. She saw two males approach the convenience store. One of the males (the co-accused) was wearing a balaclava and the other male (the accused) had his hood pulled over his head and tied a pink scarf around his face before going into the store. She found this to be odd because it was a "very warm evening" and she became concerned that they intended to rob the store. The storeowner also testified as to what happened during the robbery

and described the injuries that he sustained during the altercation with the co-accused. Finally, the Crown tendered video surveillance footage from four cameras in the store that captured the events from different angles.

[10] The accused testified that he and the co-accused were drinking beer and that he took seven or eight sleeping pills before they went to the store to get cigarettes. He said that he put on the scarf because he was cold and that he did not know that the co-accused had a knife or intended to rob the convenience store. The accused admitted to lying to the police when the Crown confronted him with the statement that he gave at the time of his arrest. In the statement, he said that he was not with the co-accused all day, that he was outside the store smoking when the co-accused went in and that he had a feeling about what the co-accused intended to do so he put the scarf on his face to conceal his identity. He denied that he had been drinking and said that he had only taken two sleeping pills.

[11] Based on the evidence, the sentencing judge concluded that the accused was "intending to be a lookout" and that "[a]ll of the evidence in [his] view point[ed] towards [the accused] having prior knowledge that a robbery was going to occur". While he suspected that the accused was honest when he said he was "out of it", the sentencing judge did not believe the accused's version of events and found that he was either "deliberately misstating the truth or he truly [did] not recollect his involvement with this incident." Ultimately, the sentencing judge concluded that the accused participated in the robbery knowing that it was going to take place.

[12] At the sentencing hearing, the Crown relied on the two to four-year starting point for armed robbery of a convenience store clerk, as explained in

R v Charlette (JJ), 2015 MBCA 32; and *R v Okemow*, 2017 MBCA 59, to seek a sentence of three years' incarceration for this accused and four years for the co-accused. Counsel for the accused argued that the accused had completely turned his life around since the offence as a result of his time at the BHF. He suggested a sentence of time in custody for the robbery and a consecutive jail sentence by way of a conditional sentence for wearing a disguise, to allow the accused to remain in the community.

The Sentencing Judge's Reasons

[13] The sentencing judge acknowledged the accused's prior record, the "glowing" report from the BHF, his family support and his employment. He noted that the principle of general deterrence must be emphasised when sentencing for the offence of armed robbery and stated that the "[t]argeting of convenience stores is a particular problem, and that makes it an aggravating robbery as the workers inside are vulnerable". He referred to the starting point of two to four years as discussed in *Okemow* and *Charlette* and the need to apply the sentencing principles to the circumstances of the case.

[14] The sentencing judge found that a sentence of 36 months' incarceration was appropriate for the co-accused. He then outlined the aggravating and mitigating factors as they related to the accused and found that the different levels of participation in the offence between the accused and the co-accused, the difference in their prior records and the "differences in the prospects of rehabilitation justifie[d] a significantly different sentence" for the accused. He sentenced the accused to a period of incarceration of time served, being the five months of pre-sentence custody, credited at a rate of 1.5:1, for a total sentence of seven and one-half months of incarceration

followed by 18 months of supervised probation, concurrent on each offence. In doing so, he noted that the accused had "started the process of dealing effectively with his addictions" and stated:

> I believe that this is an exceptional case as described in the Charette [*sic*] case, and that the mitigating circumstances are such that the interests of society in general in having [the accused] continue with his treatment and being able to care for his child is greater than the need for a deterrent emphasis on sentencing.

Issues and Positions of the Parties

[15] The Crown advances three grounds of appeal: 1) the accused's circumstances were not exceptional; 2) the sentence did not reflect the sentencing principles relevant to the offence of armed robbery; and 3) the sentence was demonstrably unfit. In particular, the Crown argues that robberies are regularly committed by individuals with addiction issues and that engaging in treatment following arrest in such circumstances is not unusual. It submits that the accused's success in treatment is noteworthy but not exceptional, particularly when entering the program resulted in his release on bail. Finally, the Crown says that, if a period of incarceration is imposed, it should not be stayed, and that the factors to be considered in making this determination ought to be expanded.

[16] The accused argues that the sentencing judge was well aware of the appropriate sentencing range of two to four years' incarceration for armed robbery and was entitled to exercise his discretion to impose a lower sentence in light of the nature of the accused's involvement in the offence, as distinct from the co-accused, and his rehabilitative efforts. He asserts that, in the

circumstances of this case, if this Court imposes a period of incarceration, it ought to be stayed.

Analysis

The Sentencing Judge's Decision

[17] Sentencing ranges and starting points are intended to assist sentencing judges in applying the principles of sentencing "by guiding the exercise of that discretion" (*R v Lacasse*, 2015 SCC 64 at paras 2, 57). However, deviation from "the proper sentencing range does not in itself justify appellate intervention" due to the discretionary nature of the application of sentencing ranges and starting points (*ibid* at para 11). An appellate court may only vary a sentence where there is a "material error or where the sentence is demonstrably unfit" (*R v Houle*, 2016 MBCA 121 at para 11).

[18] In *Charlette*, Hamilton JA considered the starting point when sentencing for armed robbery and concluded (at para 46):

> In other words, the starting point for a judge's analysis when sentencing an offender with no previous criminal record for robbery of a taxi driver when armed with a weapon is a sentence between two and four years, depending on the circumstances of the offence and the offender, unless there are mitigating factors that call for an emphasis on rehabilitation rather than deterrence, denunciation and protection of the public.

[19] In *Okemow*, Mainella JA explained that the two to four-year starting point is not limited to cases involving taxi drivers (at para 112):

> An armed robbery of a 24-hour retail location, such as a convenience store, gas station, pharmacy or fast-food outlet, is aggravating because the workers in those stores are vulnerable. They are often working alone and are in possession of cash or other valuable items, such as cigarettes. As Carlson PJ noted in *R v Mandzuk*, 2007 MBPC 34, such locations are "soft targets" and the victims of such robberies "are deserving of special protection of the law" (at para 34).

[20] The two to four-year starting point presumes a mature accused with no criminal record and prior good character, and is adjusted for any relevant aggravating or mitigating circumstances relating to the offence or the offender (see *R v JRA*, 2012 MBCA 48 at para 5).

[21] In light of the serious nature of the offence of armed robbery and the fact that "[i]t is, unfortunately, a common crime . . . it is well accepted that the sentencing objective of general deterrence is of paramount importance" (*Okemow* at para 111). This requires a sentencing judge to "focus . . . more on an offender's conduct than any circumstances particular to that offender" (*R v McMillan (BW)*, 2016 MBCA 12 at para 12).

[22] Generally, a reduction in sentence is not warranted simply because an accused was the lookout or the getaway driver during an armed robbery. Circumstances which may warrant a lower sentence include different criminal records and "aggravating circumstances that apply to the principal but not the getaway driver, such as assaultive behaviour by the principal" (*R v McIvor*, 2018 MBCA 29 at para 29).

[23] In cases involving exceptional circumstances, sentencing judges may impose a community-based sentence for an offence that ordinarily attracts a lengthy period of incarceration in order to emphasise the principle

of rehabilitation, rather than the principles of deterrence and denunciation (see *R v Burnett*, 2017 MBCA 122 at para 27). However, a finding of exceptional circumstances is not required in order to reduce a sentence below a starting point or sentencing range (see *Lacasse* at paras 57-58). This would unduly limit the "exercise of judicial discretion to impose an individualized sentence in light of the circumstances and the relevant sentencing principles and objectives" (*R v Sass; R v Zammit*, 2018 MBCA 46 at para 5; see also *Burnett* at paras 9-10).

[24] As explained in *Burnett* (at para 28):

> Exceptional circumstances can arise from the way in which an offence is committed or from the circumstances of the offender or a combination thereof (see *R v Gutoski*, 1990 CarswellMan 1 at para 12 (CA); and *Scanlon* [*R v Scanlon*, 1995 CarswellMan 332 (CA)] at para 13). A sentencing judge's assessment of whether there are exceptional circumstances is a holistic exercise based on an evaluation of the totality of the circumstances and all of the relevant sentencing objectives and principles (see *Tran* [*R v Tran (A)*, 2015 MBCA 120] at para 20). Ensuring the overall proportionality of a sentence when considering if an offender has demonstrated exceptional circumstances is important because, if a sentence does not reconcile in a principled fashion the interests of the individual and parity, it cannot be proportional (see *Lacasse* at para 53).

[25] The principle of proportionality is the fundamental principle of sentencing and ensures that a sentence reflects the gravity of the offence and does not exceed what is appropriate, given the moral blameworthiness of the offender (see *R v Ipeelee*, 2012 SCC 13 at para 37).

[26] Generally, exceptional circumstances will only be found in the clearest of cases involving multiple mitigating factors or a highly unusual motive for committing the offence (see *Burnett* at para 29).

[27] The sentencing judge in this case referred to the two to four-year starting point applicable when sentencing an offender for armed robbery of a vulnerable victim and the importance of general deterrence. He also outlined the aggravating circumstances of the offence. He determined that the accused "was part of the planning, disguised himself, and knew that [the co-accused] would be armed with a knife". However, he distinguished the accused's participation as a lookout from that of the co-accused and found that the accused "did not engage in any physical altercation with the store owner." Finally, he found a number of mitigating factors including the accused's criminal record, which had nothing "of any significance since [2003] and nothing related to this incident"; his drug addiction at the time of the offence; and the rehabilitative steps he had taken since his arrest. While the sentencing judge did not have the benefit of this Court's decision in *Burnett*, he found this to be an "exceptional case" where the mitigating circumstances warranted an emphasis on the principle of rehabilitation, rather than deterrence, and imposed a sentence of time in custody followed by probation.

[28] In my view, the circumstances of the offence in this case are not exceptional. The accused and the co-accused, who was armed with a knife, entered a convenience store with their faces covered, intending to rob the store of cigarettes. While the co-accused engaged the storeowner in a physical altercation, the accused initially stood in the doorway, then took advantage of the altercation to steal cigarettes and flee.

[29] There is no question that the accused had taken positive steps towards rehabilitation at the time of sentencing—he was employed, had made progress in addressing his drug and alcohol addictions and was working towards obtaining custody of his daughter. In my view, the accused's circumstances were sympathetic and significantly mitigated what would otherwise have been an appropriate sentence, but they did not meet the high threshold required in order to be exceptional (*Burnett* at paras 27-33). What he had done is what is expected of individuals with addictions who engage in criminal acts.

[30] The circumstances of the offence are serious and the moral blameworthiness of the accused is high. The armed robbery was planned and the accused wore a scarf to conceal his identity while he committed the offence. In my view, the accused's circumstances supported a reduction in sentence from the starting point of two to four years, but deterrence and denunciation remained important in the overall circumstances of this case. In *Burnett*, Mainella JA concluded (at para 34):

> I have been persuaded that [the sentencing judge in *Burnett*] made a material error that necessitates appellate correction. As in the cases of *R v Rutter*, 2017 BCCA 193; and *Racca* [*R v Racca*, 2015 MBCA 121], the sentencing judge overemphasised the principle of rehabilitation of the accused. With respect, his analysis of proportionality was too narrow. Proportionality is a much wider inquiry than simply looking at an individual's circumstances and the effect of a sentence on him or her (see *Lacasse* at paras 53-54; and *R v Ipeelee*, 2012 SCC 13 at paras 36-39). When punitive aspects, such as denunciation and general deterrence, are paramount because of the seriousness of the offence, coupled with a high degree of moral blameworthiness of the offender, as is the case here, "they cannot shift the emphasis to restorative objectives and rehabilitation" (*R v Golden*, 2009 MBCA 107 at para 111 per

> Freedman JA; see also *R v Hamilton* (2004), 186 CCC (3d) 129 at para 103 (Ont CA)).

[31] In my opinion, the sentencing judge in this case made the same error in principle as the sentencing judge in *Burnett*, and the error impacted the sentence in a material way. This error gives this Court the jurisdiction to vary the sentence pursuant to section 687 of the *Code* if that sentence is not fit (see *R v Cook (N)*, 2014 MBCA 29 at para 91).

The Imposition of a Fit Sentence

[32] I am of the view that the differences between the accused and the co-accused did not warrant such disparate sentences. While I agree with the sentencing judge that the progress the accused had made following his arrest and the fact that he did not engage in physical violence during the robbery warrant a more lenient sentence than the 36-month sentence that was imposed on the co-accused, I would not reduce it by 28 and one-half months.

[33] The accused was involved as a lookout, but he also participated in planning the robbery and, while the co-accused was engaged in a struggle with the storeowner, he stole cigarettes. Unlike the co-accused, the accused did not have a significant and related record. However, he was not a first offender but, rather, had spent three years in custody for an offence related to alcohol use that resulted in two deaths and bodily harm to another. Both the accused and the co-accused entered guilty pleas, but the accused denied participating in planning the robbery, resulting in the need for the Crown to call *viva voce* evidence at the sentencing hearing. In my view, it was the accused's success in addressing his drug and alcohol addictions at the BHF while on bail that set him apart from the co-accused in terms of their prospects for rehabilitation.

[34] I agree with the sentencing judge that the offences are sufficiently interrelated to warrant concurrent sentences, however, the Court in *R v Wozny*, 2010 MBCA 115, emphasised the need for transparency and explained (at para 68):

> While there would appear to be a discretion permitted sentencing judges to impose one sentence for a series of offences (see s. 728 of the *Code*), it is preferable that a separate sentence be imposed for each conviction, and the sentences may, of course, be made concurrent. See this court's decision in *R. v. Thorpe* (1976), 32 C.C.C. (2d) 46. In Manitoba, it is not enough to simply impose a "global" sentence for a series of offences. Rather, the sentencing judge must indicate the specific penalty for each offence. The reason for this was explained by Chartier J.A. in *Traverse* [*R v Ladouceur and Traverse*, 2008 MBCA 10], at paras. 36-41, and by Steel J.A. in *Draper* [*R v Draper*, 2010 MBCA 35], at paras. 32-33.

[35] The co-accused was sentenced to 36 months' incarceration. In light of the seriousness of the offence, the relevant sentencing principles including the need to emphasise deterrence and denunciation, the circumstances of the accused, the aggravating and mitigating factors, the need to ensure that the accused does not receive a "free ride" on a concurrent offence (*Wozny* at para 44), and the significant rehabilitative steps taken by the accused since his arrest, in my view, an appropriate sentence would be 20 months' incarceration for the robbery and 12 and one-half months' incarceration concurrent for wearing a disguise. The accused has spent the equivalent of seven and one-half months in pre-sentence custody. I would credit the accused for the time spent in pre-sentence custody on the robbery leaving 12 and one-half months remaining to be served.

[36] I agree with the sentencing judge that supervised probation following the period of incarceration is appropriate to promote the accused's ongoing efforts towards rehabilitation but, due to the accused's long standing addiction issues and the need to ensure the protection of the public, I would order a period of two years' supervised probation. I would reduce the probationary period by the amount of time that the accused has spent on probation since the date of sentencing.

Reincarceration

[37] While no materials were provided confirming the information, counsel for the accused advised that, since being sentenced, the accused has graduated from the BHF and has his own residence in Winnipeg. He is employed full time and continues to work with CFS to obtain custody of his daughter, who currently lives with his mother. In the circumstances, the accused argues that reincarceration would negatively affect his rehabilitation and he seeks a stay of the period of incarceration.

[38] While the accused has continued on the rehabilitative path since the date of sentencing, this is not, in my view, sufficient to justify a stay of his sentence, given the seriousness of the offence and the need to emphasise deterrence and denunciation. Thus, I would not stay the incarceratory portion of the sentence.

[39] The Crown argues that this Court has been taking a narrow, offender-centric approach to the issue of reincarceration and seeks to have larger, systemic concerns considered in the analysis. This argument has been made in another case and is currently under consideration by the panel on that

case. Therefore, it is not necessary, in my view, to determine the policy issue in this case.

Conclusion

[40] I would grant leave to appeal and allow the appeal. I would vary the accused's sentence to 20 months' incarceration for the robbery less pre-sentence custody of seven and one-half months and 12 and one-half months concurrent for wearing a disguise. The remaining period of incarceration to be served is 12 and one-half months. This will be followed by two years' supervised probation on the same terms and conditions imposed by the sentencing judge, with the period of probation being reduced by the time spent on probation since the date of sentencing.

leMaistre JA

I agree: Beard JA

MONNIN JA (dissenting):

[41] With respect, I cannot agree with the majority's disposition of this appeal.

[42] I concede that the sentence imposed is lenient but I do not agree that the sentencing judge committed an error in principle in imposing it, nor do I find the sentence to be unfit. I also find this to be a case of exceptional circumstances as that has been described in some sentencing decisions.

[43] In arriving at my conclusion that the sentence was not unfit, I have considered the circumstances of the offence but, moreso, I look to what the accused has achieved on his path to rehabilitation since committing the offence. I am also mindful of what Wagner J (as he then was), wrote in *Lacasse*, referred to in my colleague's reasons, in stating that a finding of exceptional circumstances is not required in order to reduce a sentence below a starting point or sentencing range (at paras 57-58):

> Tariffs differ from sentencing ranges in that tariff-based sentencing is theoretically the opposite of sentence individualization, which the ranges allow: Thomas [D.A. Thomas, *Principles of Sentencing* (2nd ed. 1979)], at p. 8. On the other hand, the principle underlying the two approaches is the same: ensuring that offenders who have committed similar crimes in similar circumstances are given similar sentences. The same is true of the starting-point approach, which is used mainly in Alberta but sometimes also in other Canadian provinces: *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 69. Ultimately, whatever mechanism or terminology is used, the principle on which it is based remains the same. Where sentencing ranges are concerned, although they are used mainly to ensure the parity of sentences, they reflect all the principles and objectives of sentencing. Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as

guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case:

> Even when an appellate court has established a range, it may be that a fact pattern will arise, which is sufficiently dissimilar to past decisions that the "range", as it were, must be expanded. The fundamental point is that a "range" is not a straitjacket to the exercise of discretion of a sentencing judge.

(*R. v. Keepness*, 2010 SKCA 69, 359 Sask. R. 34, at para. 24)

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. LeBel J. commented as follows on this subject:

> A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

(*Nasogaluak* [*R v Nasogaluak*, 2010 SCC 6], at para. 44)

[44] I am of the view that one of the prime objectives in dealing with offenders is that of rehabilitation. I am also of the view that, in the

circumstances of this case, the sentencing judge, an experienced judge, was clearly motivated in imposing the sentence that he did by what the accused achieved since the time he committed the offence to which he pled guilty.

[45] Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017), with respect to the matter of rehabilitation, states the following (at paras 1.46-1.47):

> If retribution demands punishment to fit the offence, rehabilitation mandates punishment to fit the offender.
>
> > One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the court impose sentences that are just and appropriate.
>
> It should be noted that even in the most serious cases, when the evidence itself implies continuing dangers to society, there ought to be evidence before the court of any rehabilitative potential. The Ontario Court of Appeal has said that:
>
> > Assistance in rehabilitation is not compatible with (forfeiture and fines or imprisonment in lieu of fines) provisions which have as their objective depriving an offender of the proceeds of crime by making him or her pay their monetary equivalent.
>
> The importance that is ordinarily given to rehabilitation is premised on the idea that offenders can be "treated" and presumably cured of criminal tendencies. Because each offender is unique in terms of the required "treatment", advocates of rehabilitation argue for judicial discretion to fashion individualized sentences. Another logical implication of the rehabilitation theory of punishment is that sentences ought to be indeterminate because different offenders will respond to treatment at different speeds. Unfortunately, through sentencing, individual liberties are restrained by claims to knowledge and therapeutic effectiveness that we do not possess. Moreover, we require offenders to submit to "treatment" without any clear

> evidence of a causal connection between their criminality and their "condition".
>
> [footnotes omitted]

[46] The accused was fortunate that he was released on bail to the BHF. In my view, the BHF offers and conducts a stringent and demanding program with a view to dealing with an offender's drug addiction. The accused was not only a participant in their program while on bail, but he continued with the program between the time of his sentencing and the hearing of the appeal, and was more than successful in dealing with his addiction. By doing so, he has demonstrated that he has turned his life around and has achieved a degree of rehabilitation that, unfortunately, we witness too seldom.

[47] I am satisfied that, in imposing the sentence that he did, the sentencing judge properly focussed on the rehabilitation of the accused and fairly and appropriately balanced that with the principles of denunciation, deterrence and protection of the public. In my view, all of these principles are, in this case, properly trumped by the accused's demonstrated successful rehabilitation.

[48] One might say that the accused received a break that he should not have received. However, it must be recognised, as the sentencing judge would have, that the accused achieved the success that he did by commitment, perseverance and hard work.

[49] Therefore, in the context of these circumstances and this accused, I am satisfied that the sentence imposed was a fit an appropriate one and would accordingly dismiss the appeal.

Monnin JA