

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING)	
)	<u>Janna A. Hyman and</u>
)	<u>Katheryn M.T. Henley</u>
)	for the Crown
)	
- and -)	
)	<u>Ethan J. Pollock</u>
)	for the accused
NATHANIEL CABAL,)	
)	
)	
)	<u>Judgment Delivered:</u>
accused.)	October 31, 2023

KEYSER J.

[1] Nathaniel Cabal ("Cabal") has pled guilty to conspiracy to traffic in cocaine. He was arrested as part of Project Divergent, an investigation initiated by the RCMP Federal Serious and Organized Crime Unit in July 2018. This project targeted mid-level and high-level drug traffickers and smugglers in Manitoba who had interprovincial and international connections. A civilian agent was recruited in

July 2020 and soon thereafter met Cabal and started doing business with him and others.

[2] Cabal was ultimately involved in five sales of one kilogram each of cocaine and one sale of half a kilogram of cocaine for total sales of \$356,000 with the agent. These transactions occurred between December 7, 2020 and July 9, 2021. Exhibit S1 on the sentencing was an Agreed Statement of Facts filed pursuant to s. 655 of the **Criminal Code**. The Agreed Statement of Facts sets out the particulars of the various buys which took place with the agent, as well as an acknowledgement from Cabal that he was a high-level dealer and that he had access to multiple suppliers for kilogram level cocaine trafficking. Exhibit S2 was the Pre-Sentence Report ("PSR") of Cabal.

[3] The Crown filed a book of authorities setting out the parameters of sentencing for high-level traffickers in Manitoba. As was established in **R. v. Grant (I.M.)**, 2009 MBCA 9 ("**Grant**") followed by **R. v. Rocha**, 2009 MBCA 26, the ranges for trafficking in hard drugs are:

- mere couriers, three to six years' imprisonment;
- those trusted beyond a mere courier, five to eight years' imprisonment;
- those who are suppliers or at the top of the drug distribution network, eight to 12 years' imprisonment (**Grant**, paras. 106-108).

Although not a hard and fast rule, there should be some factors outside the norm to justify going outside these ranges. The Crown submits that the appropriate sentence for Cabal is one of eight and a half years incarceration based on prior case law and the sentences received by the coaccused in this Project. The defence

argues that individualized sentencing requires no more than six years incarceration based on Cabal's lack of prior record and substantial rehabilitation since his arrest.

[4] The PSR concludes that Cabal is a very low risk to reoffend. He has no previous record and has not reoffended while on bail. He is currently employed at the Pony Corral restaurant and his boss is very happy with his work and attitude. The PSR further demonstrates that Cabal had a normal, if strict, upbringing in a religious family. His use of cocaine started when his last relationship ended, according to him, and this soon became daily usage. In addition, he began gambling excessively.

[5] After being charged, Cabal attended the Rapid Access to Addictions Medicine Program ("RAAM") and was expected to go into a treatment centre, but once he was rejected by the Winnipeg Drug Treatment Court he declined to follow through with this. Only as sentencing approached did he get an Addictions Foundation of Manitoba ("AFM") assessment and begin a 10-week community rehabilitation program. Nonetheless, Cabal asserts that he stopped using cocaine on his own after his arrest and has not gone back. This would seem to be questionable if his use prior to arrest was as heavy as he suggests. He also has not gone to counselling for gambling and has continued to gamble from time to time. The PSR notes he is on antidepressant medications and his psychiatrist, Dr. Peter Rosenthal, has diagnosed him with depression, anxiety, substance use disorder and a gambling addiction.

[6] In ***R. v. Banayos***, 2017 MBQB 175, Perlmutter A.C.J.Q.B quoted from ***R. v. Sem***, 2005 MBQB 208, at paragraph 15 of his decision as follows:

[15] Cocaine is a hard drug. It is highly addictive. It is a cancer on society. For those who become addicted, the result is a downward spiral in their lives which adversely affects not only the addict but his or her family and society generally. There is a direct connection between addiction to cocaine and criminal activity in the community caused by the need for addicts to be able to fund their habits. There is a cost to employers of addicts, and an unnecessary drain on the medical and social resources within the community which are otherwise overtaxed.

Those who provide cocaine are parasites on society. They prey on the vulnerable and the weak and continue to do so when those become addicted. They cause havoc to families and society in the ways I have just mentioned. There is a hierarchy such that the kingpins in this nefarious business generally are well isolated from detection, relying upon middlemen and street-level couriers.

Perlmutter A.C.J.Q.B went on to say that:

[34] ... Mr. Banayos's moral culpability is particularly high given his obvious profit motive, the destructive nature of cocaine, his efforts to avoid detection, including the use of intermediaries, and the number of transactions with which he was involved over a period of time ...

Banayos did have a related record and did not plead guilty, which differs from Cabal. He was sentenced to nine years for conspiracy to traffic in cocaine, which was lowered to eight years after a last look, because Banayos was also getting a consecutive sentence for money laundering.

[7] Denunciation and deterrence are the most important sentencing considerations in situations such as this. To his credit, Cabal has no prior record and has entered a guilty plea to the charge which is an indication of remorse. Having said that, the case against him was very strong as it relied on a police agent, recorded conversations and photographed encounters. There are

substantial aggravating factors. As already noted, Cabal is a high-level dealer of cocaine who was involved in six transactions involving a total of five and half kilograms of cocaine. He was the person who negotiated the price to pay and thus had a high level of control over the product. He advised the agent that he could provide multiple kilograms of cocaine if needed. He also used different forms of encrypted communications which denotes a high level of sophistication.

[8] In the case of ***R. v. Devloo and Ong***, 2018 MBQB 140, the accused were involved in the trafficking of four kilograms of cocaine for the amount of \$212,000 over one and a half months. They were found to be high-level traffickers of cocaine. In Ong's case, his counsel argued that a mitigating factor was that he was also addicted to cocaine and that that was a major factor in his involvement. However, Suche J. found that he did not fit the profile of someone whose life had been taken over by an addiction. She noted his everyday ability to function well and that he was engaged in a very sophisticated commercial activity in which he was a member of the management team. Ong was facing the prospect of deportation as a result of his criminal activity. However, Suche J. commented that his substance abuse and rehabilitative potential "pale in comparison to the primary focus of denunciation and deterrence, and do not justify a sentence below the range." (at para. 27) She sentenced him to eight years' incarceration.

[9] Similarly to Ong, Cabal may have indeed been consuming cocaine on a daily level, but he also was able to function well on a daily basis and be involved in a sophisticated commercial activity. Coupled with the representation that he

stopped using cocaine on his own without professional intervention, it would appear that his addiction was not as all-consuming as he tried to portray. It is also somewhat contradictory to his psychiatrist's assessment of him as suffering from a substance abuse disorder.

[10] Defence counsel filed its own Book of Authorities, but conceded that none of the cases were particularly appropriate. Some were decided before the Court of Appeal set out the ranges in ***Grant*** and thereafter. Others like the case of ***R. v. Calanza***, 2010 MBQB 240, involved a mid-level offender who acted as a courier on one occasion. He received a three year sentence. In ***R. v. Brown***, 2012 MBQB 29, the accused sold five ounces of cocaine to an undercover agent and was found to be mid-level. He received a sentence of five years' incarceration. None of the cases provided by the defence involved accused who acknowledged that they were high-level dealers. Defence counsel asserted that his cases were provided for the purpose of promoting individualized sentencing.

[11] Several co-accused of Cabal have dealt with their cases. Artjom Gotting made the introductions between the agent and Cabal. He had a prior related record and was sentenced to a total of 10 years. Zuhair Zarif was involved in the second buy of cocaine only. He had a related record and received a sentence of seven years.

[12] It is true that since Cabal has been on bail he has not reoffended. He has reconnected with family and his church. He has worked hard and is well regarded at his workplace. However, he has not addressed his substance abuse issues until

very recently and has not dealt professionally at all with his gambling. In addition, there is a high degree of moral blameworthiness attached to this commercial operation. The factors identified in Cabal's case do not in my view lead to a sentence lower than the suggested range of 8 - 12 years. In view of the modest progress he has made, I am prepared to sentence him to eight years' incarceration.

[13] The Crown has requested a number of ancillary orders to which defence counsel do not object. Cabal has been convicted of a secondary designated offence and thus, having received no indication that this would not be appropriate, he will provide bodily samples for DNA storage and analysis. I also make a s. 109 weapons prohibition for 10 years. There will lastly be an order of forfeiture of items seized except for a computer and two car keys which will be returned to Cabal.

_____ J.