Case Name:

R. v. Azeez

Between
Her Majesty the Queen, and
Christopher Azeez

[2014] O.J. No. 3091

2014 ONCJ 311

Ontario Court of Justice
Toronto, Ontario

Melvyn Green J.

Heard: May 30 and June 17, 2014.
Judgment: June 26, 2014.

(57 paras.)

Criminal law -- Sentencing -- Non-Criminal Code and regulatory offences -- Controlled drugs and substances -- Trafficking -- Other substances -- Particular sanctions -- Probation -- Conditional sentence -- Suspended sentence -- Prohibition orders -- Firearms -- DNA sample -- Sentencing considerations -- Aggravating factors -- Mitigating factors -- Deterrence -- Denunciation -- Rehabilitation -- Submissions -- Submissions by Crown -- Submissions by accused and counsel for accused -- totality principles -- Previous record -- Minor -- Related -- Guilty plea -- Remorse -- Sentencing precedents or starting point -- Health (incl. mental health) -- Addicts -- Drugs -- Seriousness of offence -- Sentencing of accused who pleaded guilty to four counts of trafficking in heroin -- On four separate occasions, accused sold heroin to undercover officer -- Accused sentenced to conditional sentence of two years' less a day and two years' probation for first offence -- Passing of sentence on remaining three offences suspended and accused to serve two years' probation, concurrent, for each -- DNA order and weapons prohibition imposed -- Conditional sentence was appropriate, but only available for first conviction -- Incarceration would return accused to criminal subculture and remove him from therapeutic counselling.

Sentencing of an accused who pleaded guilty to four counts of trafficking in heroin. On four separate occasions between October 2012 and January 2013, the accused completed four

hand-to-hand street-level drug transactions with an undercover officer. The accused was 33 years of age. He had a minor related record. He graduated from high school at the age of 23 and then worked in administrative positions for a few years. In 2007, he began suffering a severe depression and started using marijuana and then heroin. At the time of the offences, he was a heroin addict. His drug dealing was mainly to meet the demands of his addiction. He had since participated in counselling and treatment programs. He remained drug-free and was dedicated to overcoming his addiction. He began attending church regularly and had completed more than 50 hours of voluntary community service through the church. The accused remained in custody for seven days after his arrest. He had been on bail for nearly sixteen months under strict conditions. The Crown sought a sentence of two and one-half years incarceration. The accused sought a lengthy conditional sentence for the first of the four offences and suspended sentences for the remaining three, to be followed by a period of probation.

HELD: Accused sentenced to a conditional sentence of two years' less a day and two years' probation for the first offence. The passing of sentence on the remaining three offences was suspended and he was to serve two years' probation, concurrent, for each of those offences. A DNA order and weapons prohibition were also imposed. The victim fine surcharge was waived given the accused's financial circumstances. A conditional sentence was appropriate. The offence was not one to which a minimum sentence applied and an appropriate sentence was less than two years' imprisonment. Based on his performance on bail, his rehabilitative progress and his community service, the accused was not a risk to public safety. A conditional sentence was a fit disposition for the first of the four offences. While a conditional sentence was only available in relation to the first conviction due to amendments to the Criminal Code, a custodial disposition for the remaining three offences was neither just and appropriate nor legally required. Incarcerating the accused would reintroduce him to the criminal subculture and would sever him from the therapeutic counselling he received. All four offences, considered collectively, did not demand a penitentiary-length disposition. Even if a penitentiary sentence was fit, the mitigative effect of the offender's lengthy and restrictive bail conditions reduced the sentence to one in the reformatory range. The accused's guilty plea, sincere remorse, ongoing mental health issues and his rehabilitative efforts were additional mitigative factors that warranted a sentence of less than two years. Sentence: Conditional sentence of two years' less a day and two years' probation trafficking in heroin and suspended sentence and two years' probation, concurrent, for each of three remaining convictions of trafficking in heroin; DNA order; weapons prohibition.

Statutes, Regulations and Rules Cited:

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 10(1)

Criminal Code, R.S.C. 1985, c. C-46, ss. 718-718.2, s. 718, s. 718.2(c), s. 718.2(e), s. 742.1

Counsel:

I. Bell, For the Crown.

A. Page, For the Defendant.

REASONS for SENTENCE

MELVYN GREEN J.:--

A. INTRODUCTION

1 Christopher Azeez pleaded guilty to four counts of trafficking in heroin, a very serious offence, committed between October 2012 and late-January 2013. He was, at the time, a heroin addict. In the intervening year-and-a-half he has participated in counselling and treatment programs, maintained a drug-free status and dedicated himself to permanently overcoming his addiction. While acknowledging the sincerity of his efforts, the Crown says the gravity of Azeez's offences commands a penitentiary sentence of two and half years' length. The defence takes a radically different view, urging a non-custodial disposition to be served under community supervision.

B. THE HISTORY OF THE PROCEEDINGS

2 The offender, Christopher Azeez, originally elected to proceed by way of a Superior Court trial. At or near the close of the evidence led at his preliminary inquiry, Crown counsel consented to the offender re-electing to be tried before me. He then pled guilty to the four trafficking counts, all of which may be fairly described as hand-to-hand street-level transactions. The first offence, dated October 22, 2012, involved the sale of 0.55 grams of heroin to a Toronto undercover officer for $200. A month later, on November 28, 2012, there was a similar sale of 1.56 grams for $300. The offender sold another 0.41 grams of heroin for $100 on December 13, 2012. And, finally, on January 30, 2013, the undercover officer purchased 13.86 grams (almost half an ounce) of heroin from the offender for $1,700. Although not the subject of his arraignment, the defendant admitted to two further street-level deals in the course of the same series of undercover buys, one in January and another in February 2013. The offender did not initiate the sales. On my reading of the sentencing record, I am satisfied that, throughout, the police were fishing in the same barrel. The offender obliged their repeated requests. He never reached out to them or endeavoured to ramp-up the volume of the transactions.

3 The offender was, at highest, a relatively low-level middleman whose ultimate source, as jointly put in submissions, was the "ringleader" or "brains of the operation". There remains some dispute as to the degree to which the offender's participation in the trade was propelled by commercial motives. It is common ground that the offender was an "addict trafficker" whose dealings were largely animated by his need to finance his dependence on heroin. However, the final offence, involving the sale of a significantly larger quantity of the drug than typifies street-level

transactions, leads the Crown to suggest that the offender was also higher placed in the distribution hierarchy and profit-driven; that is, that the offender was as much entrepreneur as addict-trafficker.

4 Following the offender's "take down", another arrestee participated in a videotaped police interview. The man was neither the "back end" nor "brains of the operation", nor a friend of the offender. Asked several times about the offender, the co-accused consistently advised the police that the offender was a "heavy user" of heroin who "does runs for [the supplier] so he can provide for his habit". In my view, the offender, at least on the final three occasions that bring him before this Court, was something more than a mere "runner as he each time fielded the undercover officer's calls and directed the location of the transaction. Otherwise, I find the co-accused's characterization consistent with the other evidence bearing on the subject. The offender picked up and delivered to street-level buyers. He lived in rent-subsidized housing at the time of the police investigation. There are no indicia of personal enrichment. Ultimately, I find no basis to infer from the sentencing record that, beyond material sustenance, the offender's portion of the return from his dealings went to much more than meeting the demands of his own addiction.

5 The offender was arrested on March 1, 2013. He served seven days in remand custody before being released on a Recognizance. The terms of his release subjected the offender to a very strict "house arrest". It is not suggested that he has done other than comply with these terms for the nearly sixteen months that have since passed. He has not been able to maintain employment while on bail as his terms effectively prohibited him from leaving his house without his mother, who served as his surety. He did not apply to amend this term. On the other hand, I have no reason to assume that either the Crown or a reviewing court would have favourably entertained such application.

C. THE OFFENDER'S CIRCUMSTANCES

6 The offender is currently 33 years of age. He was born in Guyana. Familial distress led to the offender, then three years old, and his three siblings being taken into childcare. Finally, when he was six, his mother was able to reunite with her children and immigrated to Canada. The offender is now a Canadian citizen. He remains close with his family. He lived with his mother while on bail. She attended court throughout the proceedings and is clearly a supportive and positive influence.

7 The offender graduated from high school in 2004, when he was 23. He productively worked in administrative positions for several years until around 2007, when he began to suffer severe depression. He then started using marijuana and, by 2008, heroin. A tenacious addiction soon followed. The offender's criminal record, while relatively minor and somewhat dated, bears some relationship to his current predicament. The offender received a brief conditional sentence for an assault in 2000 and a six-month conditional sentence for possession of drugs in 2008. He has never been subject to a carceral disposition and has no record for violating any court-imposed conditions.

8 I have been helpfully provided with a collection of medical, counselling and rehabilitative records that detail the offender's efforts to address his heroin dependence and various compounding circumstances, and the progress he has achieved. It is clear that the offender endeavoured to

overcome his heroin addiction well before he drifted onto the police radar. In January 2012, he attended at a hospital emergency ward. He had quit using heroin two days earlier (after three years of daily consumption) and was suffering from symptoms (insomnia, nausea, vomiting) conventionally associated with "cold turkey" withdrawal from the drug. An intake note indicates that the offender "wants to stop". The acute diagnosis reads: "opiate withdrawal".

9 Two weeks later the offender was diagnosed with "heroin intoxication" when he appeared at a second emergency ward suffering from an overdose of the drug. "PTSD", "depression" and "pre-suicidal ideation" were noted on the intake form, as was the offender's request for referral to a detoxification centre. A third emergency attendance followed two weeks later. The intake physician's diagnosis reads, "polysubstance intoxication/withdrawal", and the offender was instructed to attend at the Centre for Addiction and Mental Health (CAMH). He did so on February 28, 2012, and expressed interest in joining a weekly group program preparatory to residential treatment. The offender attended a clinic in Scarborough the same day. The reasons for the consultation, as provided by a referring physician, were listed as "severe depression, suicide thoughts, heroin withdrawal". An April 3, 2013 letter confirms the offender's subsequent enrolment in a weekly program with CAMH's "Concurrent Addictions Inpatient Treatment Services".

10 As is all too often the case, the offender's early efforts to rid himself of his addiction proved unsuccessful. By the fall of 2013 (if not considerably earlier) he was again regularly using heroin. He was also trafficking to support his dependence on the drug.

11 Within a week of the offender's release on bail in early March 2013, the offender attended the Mental Health Services division of the North York General Hospital (NYGH). Apart from drug dependence, the documented reasons for the offender's referral include "depression, dysthymia, PTSD, complex trauma, schizophrenia, concurrent disorders". The intake form contains a notation that the offender is "not ready for Addiction Group until properly diagnosed and treated for psychiatric disorders". Within a few days the offender was routinely attending treatment sessions provided by the hospital several times a week. He also participated in near-weekly individual assessment and counselling sessions over the following months and was enrolled in a methadone program, including weekly intoxicants testing. An early-June 2014 letter from the physician supervising the offender's methadone treatment described the offender as a "model patient". His weekly urine drug screens confirmed that he "has been stable and abstinent of all non-prescribed substances [for] close to twelve months".

12 The offender's NYGH physician prepared a report "for legal purposes" on April 29, 2014. The offender had "successfully completed the 10-week Abstinence-Based program" at the hospital. He continued to participate in a weekly aftercare program and, as well, group therapy sessions "to treat his concurrent Post Traumatic Stress Disorder resulting from severe childhood abuse in his country of origin, Guyana". In addition, the offender had remained abstinent (as verified by laboratory testing) from all non-prescribed drugs, including alcohol, for fourteen months while continuing to taper his use of methadone. The physician described the offender as being an "active participant" in

the programs, as having "good insight into his addiction and related issues", and as "very motivated to continue his life with total abstinence". The doctor urged a forensic disposition that would allow the offender "to continue to attend Aftercare and individual follow-up as necessary". Finally, he noted that, "While there is no cure for the disease of Addiction, it is my opinion that Mr. Azeez' prognosis is very good". The clinical psychologist who conducted the offender's PTSD counselling at NYGH independently confirmed the treating physician's account. The program, she explained, "was designed to help trauma survivors deal with the sequelae of trauma", and the offender was an active and caring participant. She too concluded that the offender was "strongly committed to continuing to abstain from using addictive substances".

13 The offender has also been under the care of Dr. Julian Gojer, a highly respected forensic psychiatrist, while on bail. He presented with features of depression and PTSD and completed 28 two-hour group therapy sessions over the course of the past year. Dr. Gojer notes that the offender "took responsibility for actions and was very remorseful", that he was "able to correct faulty thought processes" while "work[ing] towards a positive prosocial future", and that he "showed tremendous insight into how he allowed his past traumatic childhood [to] impact on his making poor choices". Nonetheless, Dr. Gojer cautioned that the offender "still needs treatment" and that he should "continue with it, if he receives a community disposition". By way of prognosis, Dr. Gojer concluded that, "he will continue to do well in treatment and [his chance of] of future offending at this time is low".

14 The offender's post-arrest rehabilitation efforts have gone well beyond treating his addiction alone. He began to attend church services, with his mother, in May 2013, and completed more than fifty hours of volunteer community service through the church. In addition, the offender attends mid-week Bible classes where, according to the pastor, he has been an "excellent student". The pastor also described the offender as a man who is "sincerely sorry" and who has "zeal to live a life of real purpose and productivity". A letter from a very experienced Salvation Army case manager corroborated the offender's embrace of his faith and positive social contributions. She concludes by noting that, "In 30 years of working with offenders I do not recall ever having worked with a client that showed as marked a change in his life and world view". A further letter from the case coordinator of a community health program, addressing the offender's fourteen months of counselling at that facility, spoke of his "deep regrets" and "initiative", and his "transformation and ongoing recovery progress". The author also noted the offender's wish "to register in college and become an Addiction Counselor to help other people struggling with this disease", an ambition she encouraged.

D. ANALYSIS

(a) The Legal Conundrum

15 Trafficking in "hard" drugs ordinarily calls for a substantial sentence of incarceration, particularly where, as here, there are multiple offences and the drug is heroin. In circumstances

where the appropriate sentence is less than two years, courts have occasionally acknowledged that a custodial disposition served in the community by way of a stringent conditional sentence may meet the ends of justice.

16 However just, this disposition is not available to the offender respecting all four of offences as s. 742.1 of the Criminal Code was recently amended so as to preclude conditional sentences for offences of trafficking in drugs such as heroin. The offences to which he has pled straddle the two statutory regimes. Due to the timing of the amendments, a conditional sentence is legally available for the first of the four offences. The latter three offences, including the final sale of almost a half-ounce of heroin, occurred after the amendments came into effect and, as a result, a conditional sentence is not an option in dealing with these charges. No mandatory minimum sentence attaches to any of the offender's crimes. Accordingly, if seemingly ironically, a suspended sentence coupled with a period of probation remains a lawful sentencing alternative.

17 To be clear, Parliament, through the amendments to s. 742.1, has not prohibited community-based sentences for those convicted of the indictable offence of trafficking in drugs or prescribed that all such offenders must suffer a sentence of incarceration. Rather, read properly, the amendments prohibit the service of a sentence of "imprisonment" of less than two years (where such is found the fit disposition) in the community by way of a conditional sentence following such convictions. Read in the larger context of the Code's sentencing matrix, the amendments to s. 742.1 reflect Parliament's determination that where a judge decides that a sentence of imprisonment is not warranted in a case of drug trafficking and that a community supervised sentence is warranted, then that disposition is to be secured by way of suspending the passing of sentence and placing the offender on probation. The case of *R. v. Caputi*, unreptd., July 17, 2013, (Ont. C.J.), involving an offence date *after* the amendments to s. 742.1 came into force, affords one illustration of the imposition of a suspended sentence for trafficking in a Schedule 1 drug, albeit MDMA ("ecstasy") rather than heroin.

18 The use of suspended sentences to address heroin trafficking is undoubtedly a rare occurrence. It is, nonetheless, of more than academic interest. In *R. v. Ward* (1980), 56 C.C.C. (2d) 15, at 18, the Court of Appeal held that, "save in exceptional circumstances, a custodial sentence is required to be imposed following a conviction for trafficking in the more dangerous drugs". In the Crown appeal of *R. v. Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.), at para. 7, Weatherston J.A., on behalf the Court, observed that mere proof of drug rehabilitation between arrest and conviction does not constitute "exceptional circumstances as contemplated by *R. v. Ward*." However, he continued,

> I do not preclude the possibility that a suspended sentence might be proper if there are the additional factors that the trafficking has been casual and has been done solely for the purpose of and limited in quantities sufficient only to support the accused's own dependency.

> The respondent Holt did not satisfy these criteria. His addiction at the time of the offence was only "slight to moderate". There was no evidence of a causal connection between his addiction and his trafficking. He was clearly engaged in the commercial distribution of the drug: he imported and prepared the product, held himself out as an "ounce to up to a kilo man", travelled internationally to source his supply, and sold two ounces to an undercover officer in the transaction that led to his arrest.

19 While theoretically opening the door to suspended sentences for heroin trafficking, an appreciation of *Holt* requires some contextualization. On the one hand, heroin trafficking was at least as publicly stigmatized and judicially condemned when *Holt* was decided as it has been in the intervening decades. On the other hand, conditional sentences were not yet part of the Canadian sentencing armory when *Holt* was authored. A community-supervised disposition could, at the time, only be attained by medium of a suspended sentence. However, despite the introduction of a conditional sentencing regime in 1985, the comments in *R. v. Holt* with respect to the availability of a suspended sentence for heroin trafficking in cases involving "exceptional circumstances" (however narrowly construed) has never been overturned or explicitly qualified by subsequent appellate authority.

(b) The Parties' Positions

20 Relying on this line of authority, and in view of the offender's rehabilitative progress and the importance of counselling continuity, the defence urges a global sentence served in the community by way of a lengthy conditional sentence for the first of the four offences and suspended sentences for the remaining three, to be followed by a period of probation.

21 The position advanced by Crown counsel is decidedly different. While conceding that the offender's circumstances are "sympathetic", he maintains the view that a low-end penitentiary sentence is the appropriate tariff in light of the primacy of the sentencing goals of deterrence and denunciation in heroin trafficking cases. Even if the offender's circumstances are properly characterized as so exceptional as to warrant a reformatory-length sentence of less than two years, he takes the position, on two bases, that a global community-supervised disposition is not a legally fit one. First, he says that such a sentence would effectively mean that, contrary to settled sentencing jurisprudence, the last three offences would attract not only non-carceral but non-custodial dispositions. And secondly, he says that any aggregate disposition should be driven by the most serious offence (here, the final transaction involving the sale of almost a half-ounce of heroin), and that this crime in particular warrants a lengthy period of imprisonment which, in light of the amendments to the Code's conditional sentencing provisions, must now be served in jail rather than in the community. Put otherwise, the Crown invokes, if silently, the ancient legal maxim *dura lex sed lex* - the law is harsh, but it's the law.

(c) The Law and its Application

(i) The Governing Law

22 Efforts to rank drugs used for non-medical purposes on the basis of their relative harm is something of a mug's game, made all the more challenging by the bias inevitably introduced through the distinction drawn between licit and illicit drugs. For sentencing purposes, at least in Ontario, the debate is long settled. As said by the Court of Appeal in *R. v. Sidhu* (2009), 94 O.R. (3d) 609, at para. 12, "heroin is the most pernicious of the hard drugs - it is the most addictive, the most destructive and the most dangerous". Unsurprisingly, the tariff for heroin trafficking in this province reflects this characterization. In *R. v. Bahari*, [1994] O.J. No. 2625, at para. 6, the Court of Appeal held that, "unless there are exceptional circumstances a penitentiary term should be imposed for the sale of heroin". (See also the sister case of *R. v. Farizeh*, [1994] O.J. No. 2624 (C.A.), at para. 5.). Appellate authority in at least some other provinces have adopted a less harsh approach; in the very recent case of *R. v. Cisneros*, [2014] B.C.J. No. 745, at para. 14, for example, the British Columbia Court of Appeal agreed with the Crown's submission that in the circumstance of a *non-using, purely commercial* cocaine and heroin distributor involved in a "dial-a-dope" operation, "the ordinary sentencing range for a first offender in a crime of [this] nature ... is approximately 6-9 months' imprisonment". One country. Different visions of just sentencing.

23 In addressing the vexing question of the appropriate sentence in the matter before me, attention must be paid to the meaning and application of the phrase "exceptional circumstances". As further said in *R. v. Sidhu, supra*, at para. 14, even in the context of large-scale heroin distribution "sentencing is not an exact science and ... trial judges must retain the necessary flexibility to do justice in individual cases". The doing of "justice in individual cases" finds statutory purchase in the proportionality principle prescribed in s. 718.1 of the Code's sentencing regime and in universal judicial endorsement of the proposition that the crafting of an appropriate sentence is and must be an individualized exercise. Watt J.A. eloquently made the point in the following manner for the Court of Appeal in *R. v. Jacko* (2010), 101 O.R. (3d) 1, at para. 90:

> Sentencing "ranges" ... are not immovable or immutable. ... To consider a range of sentence as creating a de facto minimum sentence misses the point [and] ignores the fundamental principle of proportionality ... . *Individual circumstances matter*. [Emphasis added.]

24 No contrary authority has expressly displaced the general rule respecting the tariff for heroin trafficking in Ontario in the twenty years since *Bahari* and *Farizeh* were decided. Nonetheless, penological and judicial thinking about the predicament of addiction-driven criminals has evolved. This, in turn, impacts on the question of whether the umbrella of "exceptional circumstances" is sufficiently elastic to shelter addicts both motivated and equipped to overcome their dependencies.

25 Addicts are neurologically rewired by their dependence. As said in *R. v. Preston, infra*, "heroin addicts must invariably support [their] addiction with some form of criminal activity". Their

crimes - typically burglaries, soliciting, drug store robberies and, most frequently, street-level trafficking - are driven by the need to finance their pharmacologically induced cravings. They do not have the same degree of moral liberty as those who deal drugs for purely commercial motives and, as courts have long recognized, their moral blameworthiness is accordingly attenuated. Section 10(1) of the *Controlled Drugs and Substances Act* (the *CDSA*), which came into force after *Bahari* and *Farizeh* were decided, signals Parliament's recognition of addicts' distressing circumstances and the role of rehabilitation and, where warranted, treatment in the crafting of a fit sentence and, ultimately (if traction is secured), the protection of society. The provision reads:

> Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for [a drug] offence ... is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society *while encouraging rehabilitation, and treatment in appropriate circumstances*, of offenders and acknowledging the harm done to victims and to the community. [Emphasis added.]

26 The rationale for an "exceptional" approach to the sentencing of addict offenders was seminally advanced in *R. v. Preston* (1990), 79 C.R. (3d) 61. Wood J.A., on behalf of a five-member panel of the British Columbia Court of Appeal, wrote:

> Without making any real effort to draw a distinction between cases of possession on the one hand, and those of trafficking or possession for the purpose of trafficking on the other, this Court and other Courts of Appeal across the country have repeatedly stressed the need to impose deterrent sentences in drug cases.
>
> ...
>
> While I am content to accept, at least for the purposes of this case, that sentences of incarceration can have a deterrent effect in cases of trafficking and trafficking related offences, including importing, where the offender or potential offender is not an addict, I have grave doubts that the same can be said in cases of possession where the offender who is to be specifically deterred, or the potential offender who is to benefit from the so-called general deterrent effect of such a sentence, is addicted to the substance in question.
>
> ...
>
> What then is the proper approach for the court to take when sentencing in a case such as this? When the benefit to be derived to society as a whole, as a result of the successful rehabilitation of a heroin addict, is balanced against the ultimate futility of the short-term protection which the community enjoys from a sentence of incarceration, I believe it is right to conclude that the principle of deterrence should yield to any reasonable chance of rehabilitation which may show itself to

> the court imposing sentence. To give the offender a chance to successfully overcome his or her addiction, in such circumstances, is to risk little more than the possibility of failure, with the result that the cycle of addiction leading to crime leading to incarceration will resume, something that is inevitable, in any event, if the chance is not taken. On the other hand, as has already been pointed out, if the effort succeeds the result is fundamentally worthwhile to society as a whole.
>
> ...
>
> A court would only be justified in giving more weight to the possibility of rehabilitation, rather than deterrence, where there is a reasonable basis for believing that the motivation for such change is genuine and there is a reasonable possibility that it will succeed. There will undoubtedly be many cases in which no such prospect exists, and in such cases it would be an error in principle to allow the factor of deterrence to be overshadowed by the illusion of rehabilitation.
>
> The respondent Preston was 41-year old heroin addict convicted of three counts of possession of the drug. She had amassed twenty-three prior convictions, including four for heroin trafficking, had served several lengthy reformatory sentences, and her few attempts at treatment had, to that stage, proved futile. Accepting her motivation to reform as genuine, the Court dismissed the Crown appeal and affirmed the propriety of the suspended sentence and probation (including treatment) imposed at trial.

27 While *Preston* involves offences of heroin possession, its more general proposition respecting the sentencing of addicts has been repeatedly re-affirmed and broadly applied by the British Columbia Court of Appeal, including in cases of trafficking in significant amounts of "hard" drugs. (See, by way of example only: *R. v. Bonner*, 1991 CanLII 2307; *R. v. Bergen*, [1996] B.C.J. No. 488; *R. v. Arsenault*, 2004 BCCA 401; *R. v. Glickman*, [2011] B.C.J. No. 1355; and *R. v. Bay*, [2011] B.C.J. No. 1356.) More importantly for the matter at hand, the Ontario Court of Appeal has also endorsed the reasoning in *Preston*. In *R. v. N.H.(C.)* (2002), 170 C.C.C. (3d) 253, at para. 31, for example, Rosenberg J.A., writing for the Court, relied expressly on s. 10 of the *CDSA* and *R. v. Preston* in holding that,

> ... the importance of s. 10 is to encourage courts to recognize the particular problem that in many cases persons convicted of drug offences are themselves victims of the drug culture and dependent upon drugs as addicts or users. I think s. 10 recognizes a view that had become increasingly prevalent that, *especially for the addict trafficker, the public interest -- including the protection of the*

> *public -- is best served by the treatment and rehabilitation of the offender.* [Emphasis added.]

28 The case of *R. v. Greene*, [2002] O.J. No. 5976, at para. 5-6, reflects the Court of Appeal's adoption of another facet of the *Preston* decision:

> The appellant is addicted to cocaine and has been for a very long time. It is unrealistic to expect that he will succeed at overcoming that addiction either on the first or second attempt or even after many attempts. As Wood J.A. said for a five-person court in *R. v. Preston* [citation omitted] in relation to a heroin addict:
>
> > Indeed, to expect a perfect result would be unrealistic, for it seems unlikely that a pattern of conduct and a lifestyle that has persisted for over 20 years can be changed overnight. There are bound to be relapses on the long road to recovery from any substance addiction.
>
> The courts must not be overly critical of an offender in the position of this appellant. What is important is that he has made and continues to make efforts at curbing his addiction.

29 And more recently, in *R. v. Lazo*, 2012 ONCA 389, in addressing the appropriate sentence for an addict trafficker who had successfully completed a drug treatment program, the Court, at paras. 7-8, once again reaffirmed the key take-away from *Preston*:

> *... Successful treatment of addiction is the best means of addressing drug crime. The public interest is served by diverting individuals in the appellant's situation into drug treatment programs that address the addictions which fuel their criminal activity.* [Emphasis added.]

30 Cole J. traversed much of this same terrain in *R. v. Dzienis*, [2012] O.J. No. 3123 (C.J.). His review of the authorities led him to conclude that,

> [T]he Ontario Court of Appeal has now said that an addict trafficker need not be incarcerated where (a) there is evidence that they are making "genuine" efforts to deal with their substance addiction, and (b) there is evidence that there is a "reasonable possibility" that those efforts will be successful.

I think this an accurate statement of the law respecting the sentencing of addict traffickers in Ontario.

31 Apart from considerations arising from the offender's drug-dependent status at the time of his

offences, determination of both the length and quality of an appropriate disposition commands attention to the full range of factors bearing on sentencing. The principle of proportionality is central to this calculus, as is the need for a sanction that has both deterrent and denunciatory force given the nature and quantity of the drug involved. These latter sentencing objectives must, of course, be weighed along with those preferencing rehabilitation and restraint, particularly where, as here, the offender is relatively youthful, has never previously been incarcerated and demonstrates considerable rehabilitative promise. As famously said by the Court of Appeal in *R. v. Priest* (1996), 110 C.C.C. (3d) 289, at para. 23:

> [I]t is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence.
>
> (To similar effect, see also the following Court of Appeal decisions: *R. v. Vandale and Maciejewski* (1974), 21 C.C.C. (2d) 250, at 251-2; *R. v. Hayman* (1999), 135 C.C.C. (3d) 338, at 346; and *R. v. Borde* (2003), 172 C.C.C. (3d) 225, at para. 36.)

32 As for the sentencing norm of restraint, the law in Ontario endorsed the principle long before it was codified in s. 718.2(e) of the Code. In *R. v. Priest, supra*, at para. 18, for example, the Court of Appeal observed that, "it has been an important principle of sentencing in this province that the sentence should constitute the minimum necessary intervention that is adequate in the particular circumstances". (See, also, *R. v. Stein* (1974), 15 C.C.C. (2d) 376, at 377; and *R. v. Batisse* (2009), 93 O.R. (3d) 643, at paras. 32-33.)

(ii) Applying the Law

33 All four offences, considered collectively, do not in my view demand a penitentiary-length disposition to honour the goals of denunciation and general deterrence in light of the countervailing considerations highlighted in *Priest, supra,* and similar authorities. Even if a low-end penitentiary sentence, as urged by the Crown, was an otherwise fit result, the mitigative effect of the offender's lengthy and very restrictive bail reduces the ultimate global disposition to one in the reformatory range: *R. v. Downes* (2006), 205 C.C.C. (3d) 488 (Ont. C.A.), esp. at paras. 25-29 and 33; *R. v. Panday* (2007), 226 C.C.C. (3d) 349 (Ont. C.A.), esp. at para. 28; and *R. v. Irvine* (2008), 231 C.C.C. (3d) 69 (Man. C.A.), esp. at para. 27. The offender's plea of guilty (although not at the very earliest opportunity), sincere remorse, ongoing struggles with mental health issues and rehabilitative industry are additional mitigative factors that persuasively argue for an aggregate sentence of less than two years.

34 A reformatory-length sentence frequently invites consideration of the propriety of the term being served in the community by way of a conditional sentence. As earlier noted, recent

amendments to s. 742.1 of the Code disqualify the offender's final three offences from the ambit of conditional sentencing. His first offence, however, meets no such bar.

35 It is here helpful to return to first principles. In *R. v. Proulx*, [2000] 1 S.C.R. 61, the foundational authority in this area of the law, several Attorneys General urged the Supreme Court to recognize that conditional sentences were inappropriate for some offences, such as trafficking in "certain narcotics" (undoubtedly including heroin). Writing on behalf of a unanimous Court, Chief Justice Lamer, at paras. 81-83, firmly rejected this approach:

> [W]hile the gravity of such offences is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances, it would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences. ...
>
> This Court has held on a number of occasions that sentencing is an individualized process, in which the trial judge has considerable discretion in fashioning a fit sentence. The rationale behind this approach stems from the principle of proportionality, the fundamental principle of sentencing, which provides [in s. 718.1] that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the "punishment fits the crime". ...
>
> My difficulty with the suggestion that the proportionality principle presumptively excludes certain offences from the conditional sentencing regime is that such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that full consideration be given to both factors. [Emphasis in original.]

36 Leaving aside certain here-immaterial exemptions, the criteria governing qualification for a conditional sentence, as prescribed by the version of s. 742.1 in force at the time of the offender's first offence, are fourfold:

(1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
(2) the term of imprisonment imposed must be less than two years;
(3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
(4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in the Criminal Code.

The first two pre-conditions are readily satisfied in the instant case. Based on his performance on bail and the wealth of evidence confirming his rehabilitative progress, I am equally convinced that the offender's service of his sentence in the community poses no appreciable risk to public safety: see *R. v. Proulx, supra*, at paras. 66ff. As then instructed by *Proulx*, at para. 90, "serious consideration should be given to the imposition of a conditional sentence in all cases where [as here] the first three statutory prerequisites are satisfied" (emphasis in original).

37 The fourth criterion necessarily imports consideration of the sentencing "objectives" set out in s. 718 of the Code. These include denunciation, deterrence, rehabilitation and restoration. As to the former pair, *Proulx* makes abundantly clear, at para. 99, that a conditional sentence is a "punitive sanction", and one capable of effectively serving both deterrent and denunciatory goals. (See, also, paras. 102-107). In *R. v. Jacko, supra*, the Court of Appeal, at para. 80, held that even where (as, at least arguably, in the matter before me) "the paramount sentencing objectives [are] deterrence and denunciation" a conditional sentence remains an available sentencing option. The Court explained:

> It is well-settled that the prominence of these sentencing objectives does not, on its own, foreclose a conditional sentence order as a sentencing alternative, since a properly crafted conditional sentence can give full voice to both objectives.
>
> (I add, if parenthetically, that it is general rather than individual deterrence that must here be factored into the calculus. The offender's pro-social conduct and compliance with the bail court's order while on his lengthy Recognizance persuade me that there is only modest concern for specific deterrence in any disposition here imposed).

38 In addressing the final prerequisite, the *Proulx* court, by way of "Summary", directs an approach, at para. 113, that is particularly apt to the situation before me:

> *Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration.* In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; ... [Emphasis added.]
>
> (See, also, at para. 100 in *Proulx*, and the Court of Appeal's re-affirmation of this proposition in *R. v. Kutsukake* (2006), 213 C.C.C. (3d) 80, at para. 15.)

39 Applying this appellate guidance, I have no difficulty concluding that a conditional sentence is

a fit disposition for the first of the offender's four offences. More difficult to operationalize is my parallel conclusion that, upon a balanced application of the controlling principles and in what I find to be the exceptional circumstances that prevail in this case, a sentence served under community supervision is the appropriate and just *global* disposition with respect to all four offences. The legal challenge, then, is to craft a sentence that secures this global result without torturing or evading the statutory or common law directives that govern the disposition of a case involving the repeated sale of what the Court of Appeal has characterized as "the most addictive, the most destructive and the most dangerous" drug.

40 In other circumstances - that is, those in which the offender could avail himself of a conditional sentence respecting all four offences - an appropriate disposition could be fashioned through orthodox resort to the principle of totality. "Totality" may be properly seen as an application of the more general principle of proportionality so as to ensure that the cumulative sentence imposed on persons convicted of multiple offences is "not unduly long or harsh" (as put in s. 718.2(c) of the Code) or disproportionate to the moral blameworthiness of the offender. (See, for example, *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 42.) In practice, I would first decide the offender's appropriate global sentence and then determine the fit allocation for each of the four constituent offences, whether they should then run concurrently with or consecutive to an anchor disposition, and then tailor them to ensure that they aggregated to the sanctioned total penalty. This approach follows the Court of Appeal's instructions in *R. v. Jewell* (1995), 100 C.C.C. (3d) 270, at 279. (Subsequent cases offer some refinements: *R. v. Stuckless* (1998), 41 O.R. (3d) 103 (C.A.); *R. v. Mascarenhas* (2002), 60 O.R. (3d) 465 (C.A.), at paras. 8, 32-33); *R. v. Smith*, 2011 ONCA 748; and *R. v. R.B.* (2013), 114 O.R. (3d) 465 (C.A.), at para. 30.)

41 In the case at hand, however, a custodial sentence imposed for any of the last three offences, whether structured concurrently or consecutively, would necessarily entail a carceral rather than community-based disposition and thus defeats what I view as the appropriate resolution of this matter. To be clear (and for reasons I will soon develop), I do not find that a custodial disposition for any of the three latter offences is just and appropriate or legally required. I say this mindful of the Court of Appeal's caution in its brief endorsement in *R. v. Bankay*, 2010 ONCA 799 respecting "disguised" conditional sentences.

42 The offender, if incarcerated, will inevitably be reintroduced to a criminal subculture and one in which drugs are notoriously available. He will be severed from the therapeutic counselling from which he has greatly benefited and, as well, the continuity of care that his doctors indicate he still requires to fully overcome his drug dependence. His hard-earned gains will almost inevitably be jeopardized. Conversely, the protection of society advanced through his rehabilitation will once again be at risk should he fall prey to his compulsions and return to the criminality that brings him before this court. Neither deterrence nor denunciation demands such retrograde results as the price of a proportionate sentence, particularly where these very objectives can be achieved by way of a fit non-carceral global disposition. With all due respect, I am of the opinion that, if adopted, Crown counsel's position that the three last offences must attract sentences of incarceration imperils a just

result in the unusual circumstances of this case. It is also inconsistent with the clear message of a unanimous Supreme Court in *R. v. Knott*, [2012] 2 S.C.R. 470, at para. 43: "The sentencing objectives set out by Parliament in ss. 718 to 718.2 of the *Criminal Code* are best achieved by preserving - not curtailing - a sentencing court's arsenal of non-custodial sentencing options".

43 In my view, a resolution to the quandary presented by the instant mix of fact and amended law may be found by fashioning a sentence that respects the spirit if not the letter of the principle of totality and, as well, the exceptionality of the offender's circumstances.

44 Consistent with the first step endorsed in *R. v. Jewell*, *supra*, the Manitoba Court of Appeal in *R. v. Taylor* (2010), 263 C.C.C. (3d) 307, at para. 11, directed that:

> When sentencing on multiple offences, the judge must first determine whether any or all of the sentences are to be served concurrently or consecutively. This determination has nothing to do with the overall length of the sentence and more to do with the nature and the quality of the criminal activity. If the offences are sufficiently interrelated or have a reasonably close nexus, the judge will impose a sentence with concurrent dispositions.
>
> In my view, the offender's four offences are so "sufficiently interrelated or have [such] reasonably close nexus" that they, in the ordinary course and as said at para. 12 in *Taylor*, "merit concurrent dispositions". The gravamen of the four offences is here indistinguishable: the hand-to-hand, street-level distribution of the same dangerous drug to an undercover officer who, in each case, initiated the deal. The offender's moral blameworthiness is essentially constant. While the amounts involved in each transaction vary, the offender, driven by his own addiction, did no more than fill the undercover officer's orders to the degree that the resources of his own supplier afforded him the capacity to do so. Given the consistent pattern of conduct and product, treatment of the offences by way of concurrent sentences is not inappropriate. Put otherwise: consecutive sentencing is not required.

45 Approached in this manner, the objectives set out in ss. 718-718.2 of the Code can be fully honoured through the imposition of a substantial sentence of imprisonment for a single offence. In my view, and for the reasons I have earlier endeavoured to explain, the offender's circumstances satisfy those conditions, dictated by statute and the wisdom of *Proulx*, predicate to a community-based disposition. His first offence, then, here attracts a conditional sentence, and one of two years less a day so as to reflect the denunciation and deterrence warranted by the occurrence of all four offences and the offender's repeated pattern of unlawful conduct. A two-year period of probation follows this disposition, so as to provide for a total of four years of graduated community supervision.

46 The passing of sentence is suspended with respect to the three remaining offences. For the reasons I have developed earlier, consecutive sentences are not appropriate in this case. The necessary freight of denunciation and deterrence are adequately borne by the conditional sentence imposed for the first-in-time offence. And I am satisfied that the criteria for the application of "exceptional circumstances" set out in *R. v. Holt, supra*, are here met. Accordingly, a suspended sentence is warranted respecting the last three charges. In addition, he is directed to comply with probation orders of two-years' duration with respect to each of these offences, concurrent with each other and with the two-year term of probation that follows the completion of his conditional sentence.

47 To be clear, the intent of the global disposition here imposed is to acknowledge the need for a significant measure of punishment and deterrence without subverting the restorative and rehabilitative goals that inform the same project - that of crafting a sentence that reflects both the gravity of the offence and the offender's moral blameworthiness and prospect of normative reclamation. It is also recognizes, as said by the Court of Appeal in *R. v. N.H.(C.), supra*, that, "especially for the addict trafficker, the public interest -- including the protection of the public -- is best served by the treatment and rehabilitation of the offender".

48 For the first eight months of his conditional sentence the offender is subject to strict house arrest: he is required to remain in his home at all times. The only exceptions are for scheduled appointments with his conditional sentence supervisor, scheduled counselling and/or treatment, scheduled medical and dental appointments or emergencies, when he is in the immediate and continuous company of his mother, or when authorized in writing by his conditional sentence supervisor. He is to provide his conditional sentence supervisor with a schedule of his treatment, counselling and medical appointments.

49 For the intermediate eight months of his conditional sentence, the offender is subject to a curfew. But for when he is in the immediate and continuous company of his mother, he is to remain in his home between 10pm and 6am every day. He is also to actively pursue his education and/or seek and maintain lawful employment.

50 For the final eight months of his conditional sentence, the offender is neither subject to house arrest or a curfew. He is to continue to actively pursue his education and/or seek and maintain lawful employment. He is also required to comply with a number of "general conditions" that apply throughout the duration of his conditional sentence.

51 By way of "general conditions", the offender is to keep the peace and be of good behaviour. He is to continue to attend for counselling and/or treatment for addiction and mental health related issues, as directed by his conditional sentence supervisor, and to sign such releases as may be necessary to allow his supervisor to monitor his attendance and progress in any treatment and/or counselling program, including methadone maintenance. He is not to possess or consume any drug listed in a *Schedule* to the *Controlled Drugs and Substances Act* unless he has been issued a lawful

prescription for that drug.

52 As to the offender's four concurrent probation orders: He is to report to probation forthwith upon completion of his conditional sentence and thereafter as directed by his probation officer. He is to pursue his education and/or seek and maintain lawful employment. He is to comply with all the "general conditions" that attach to his conditional sentence order, but for the substitution of the words "probation officer" for "conditional sentence supervisor" and "supervisor".

53 To assist those superintending the offender while under community supervision, I direct that a copy of my Reasons and copies of the letters and reports detailing the offender's treatment and counselling history and current assessment be attached to both his Conditional Sentence and Probation Orders.

54 By way of ancillary orders, the offender is to provide a sample of his bodily substance for purposes of DNA analysis and archiving. He is also prohibited from possessing any firearms, ammunition, explosives and any other prohibited device listed in s. 109 of the Criminal Code for a period of ten years.

55 Finally, in view of the undue hardship it would cause given the offender's current financial circumstances and the dates of the offences' occurrence, I waive the victim fine surcharge that would otherwise apply.

(iii)Endnote

56 The offender's situation is not only exceptional but close to if not unique. Other addict offenders, if all too rarely, may exhibit a similar degree of rehabilitation and genuine reform, but there are likely few if any left "in the system" whose offences straddle the amendments to s. 742.1. While I cannot predict the future compass or content of "exceptional circumstances", it is most likely that those hereafter convicted of multiple counts of heroin trafficking and who wish to avoid a sentence of incarceration will be compelled to advance a Charter-based challenge to those passages in the amendments to s. 742.1 that deny drug trafficking offenders resort to conditional sentences. *R. v. B.(T.M.)* (2013), 299 C.C.C. (3d) 503 (Ont. S.C.) affords one illustration of an analogous, if unsuccessful, effort to pursue this course of constitutional engagement.

E. CONCLUSION

57 The offender pled guilty to four counts of trafficking in heroin. He is sentenced to imprisonment for two years less a day, by way of a conditional sentence, for the chronologically first of these four offences. A two-year term of probation follows this probation order. The passing of sentence is suspended with respect to the three remaining offences, and the offender is directed to complete a two-year period of probation for each of these offences, concurrent to each other and to the term of probation attaching to the first-in-time offence. DNA and weapons prohibition orders complete this disposition.

MELVYN GREEN J.