DATE: **20040803**
DOCKET:**C39716/C39715**

COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., DOHERTY and GILLESE JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN — Appellant

- and -

MARSHA ALISJIE HAMILTON and
DONNA ROSEMARIE MASON — Respondents

Jim Leising, Julie Jai and Nick Devlin for the appellant

P. Andras Schreck for the respondent, Hamilton

Leslie Maunder for the respondent, Mason

Andrew M. Pinto and Beverly Jacobs for the Native Women's Association of Canada

Brian Eyolfson and Kent Roach for the Aboriginal Legal Services of Toronto

Donald McLeod and Faizal Mirza for the African Canadian Legal Clinic

Heard: February 9-10, 2004

On appeal from the sentences imposed by Justice S. Casey Hill of the Ontario Superior Court of Justice on February 20, 2003, reported at (2003), 172 C.C.C. (3d) 114.

DOHERTY J.A.:

I

[1] The imposition of a fit sentence can be as difficult a task as any faced by a trial judge. That task is particularly difficult where otherwise decent, law-abiding persons commit very serious crimes in circumstances that justifiably attract understanding and empathy. These two cases fall within that category of cases.

[2] As difficult as the determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the *specific* offence and the attributes of the *specific* offender. Sentencing is not based on group characteristics, but on the facts relating to the *specific* offence and *specific* offender as revealed by the evidence adduced in the proceedings. A

sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.

[3] In the two sentences under appeal, the trial judge lost that narrow focus. He expanded the sentencing proceedings to include broad societal issues that were not raised by the parties. A proceeding that was intended to determine fit sentences for two *specific* offenders who committed two *specific* crimes became an inquiry by the trial judge into much broader and more complex issues. In conducting this inquiry, the trial judge stepped outside of the proper role of a judge on sentencing and ultimately imposed sentences that were inconsistent with the statutory principles of sentencing and binding authorities from this court.

II

Overview

[4] The respondents were caught trying to smuggle cocaine they had swallowed into Canada from Jamaica. Each pleaded guilty to one count of importing cocaine. The charges were unrelated, but as the respondents proposed to rely on the same expert evidence, the charges proceeded by way of a joint sentencing hearing.

[5] At trial, counsel for the respondents indicated they would seek conditional sentences relying on Dr. Doob's expert opinion evidence to the effect that general deterrence had little or no value in sentencing offenders like the respondents, and on the respondents' positive antecedents. The Crown, relying on cases from this court to the effect that cocaine importers – even if they are classified as couriers – should usually receive substantial jail terms, sought sentences of between two and three years.

[6] After a lengthy hearing, the trial judge, in thoughtful and detailed reasons, concluded that the respondents should receive conditional sentences. He rested his conclusion that conditional sentences were appropriate primarily on his finding that the respondents, because of their race, gender, and poverty, were particularly vulnerable targets to those who sought out individuals to act as cocaine couriers. He made these findings based on material he had produced during the hearing and his own experiences as a judge. Ms. Hamilton received a conditional sentence of twenty months on terms that provided for partial house arrest in the first year of the sentence and a curfew for the remainder of the sentence. Ms. Mason received a conditional sentence of two years less a day on terms that provided for partial house arrest in the first fifteen months of the sentence and a curfew for the rest of the sentence.

[7] The Crown appealed. I agree with Crown counsel's submission that the trial judge effectively took over the sentencing proceedings, and in doing so went beyond the role assigned to a trial judge in such proceedings. I am also satisfied that the sentences imposed reflect errors in principle. While I would not hold that sentences of less than two years were inappropriate in all of the circumstances, I would hold that the trial judge fell into reversible error in imposing conditional sentences. On a proper application of the relevant principles of sentencing and the authorities of this court, these offences merited substantial prison terms, despite the mitigating effect of the respondents' personal

circumstances.

III

The offences and the offenders

(a) Ms. Hamilton

[8] Ms. Hamilton, a Toronto resident and a Canadian citizen, travelled to Jamaica in November 2000 with her one-year-old son. Prior to returning to Canada, she swallowed ninety-three pellets containing 349 grams of seventy-eight to seventy-nine per cent pure cocaine having a street value of slightly less than $70,000.00.

[9] Ms. Hamilton came under the suspicion of Customs officials at Pearson International Airport. She was detained and, after passing three of the pellets, was arrested on a charge of importing cocaine. She was taken to the local hospital and eventually told the police that she had swallowed ninety-three pellets containing cocaine. Although the pellets were recovered, some of the ingested cocaine found its way into Ms. Hamilton's bloodstream and she became critically ill. Fortunately, she recovered.

[10] Ms. Hamilton was released on bail a few days after her arrest. She elected trial by judge and jury and was committed for trial in the Superior Court. Although her counsel initially intended to defend the charge based on a *Charter* challenge, on the day her trial was scheduled to begin in the Superior Court, Ms. Hamilton chose to plead guilty. She re-elected trial by judge alone and pled guilty on March 2, 2002.

[11] It was agreed that Ms. Hamilton acted as a courier for compensation and had no financial interest in the cocaine or involvement in its proposed distribution. She expressed remorse for her conduct in her pre-sentence report and at the time of her sentencing. Ms. Hamilton told the author of her pre-sentence report that this was the first and only time she had imported narcotics into Canada and that her decision to do so was "a direct result of her financial hardship." Other than this one comment in the pre-sentence report, there was no evidence before the trial judge as to how Ms. Hamilton came to be involved in the scheme, the nature of the scheme, or the role played by any other individual.

[12] At the time of the offence, Ms. Hamilton was twenty-six years of age. She is a black single mother with three children, ages seven, eight, and two. Ms. Hamilton was born in Canada, but has relatives in Jamaica. She has no criminal record or known criminal associations, and she does not use drugs. Ms. Hamilton was raised by her mother and grandmother in Edmonton, Alberta. She had a happy childhood and continues to have a very good relationship with her mother and her sisters. They were shocked to learn of her involvement in this crime and described it as completely out of character.

[13] Ms. Hamilton quit school in grade nine when she became pregnant with her first child. A second child followed a year later. The father of these children abused Ms. Hamilton and eventually left his family. He provides no assistance, financial or otherwise, to Ms. Hamilton. Ms. Hamilton's third child was born about a year before the offence. The father of this child has returned to Jamaica and also provides no assistance, financial or otherwise, to Ms. Hamilton.

[14] Because of her limited education, Ms. Hamilton has few employable skills. Her ability to work

is also restricted by her childcare obligations. Ms. Hamilton was unemployed at the time the pre-sentence report was prepared, though she had registered with a short-term employment agency.

[15] Ms. Hamilton does not earn any income and she has very limited financial resources. She and her children get by on slightly over $1,200.00 a month.

(b) Ms. Mason

[16] Ms. Mason, a Toronto resident, returned from a holiday in Jamaica on May 14, 2001. Before returning, she swallowed eighty-three pellets of eighty-seven to ninety-one per cent pure cocaine weighing 489 grams. There was no evidence as to the street value of the cocaine smuggled into Canada by Ms. Mason.

[17] Ms. Mason was questioned by Custom officials when she arrived in Canada and was detained based on suspicious circumstances, including a previous trip to Jamaica only four months earlier. Over the course of the evening at the airport and later at the hospital, Ms. Mason expelled ninety-three pellets of cocaine and was arrested and charged with importing cocaine.

[18] Ms. Mason was released on bail a few days after her arrest. She elected trial by judge and jury and was committed for trial in the Superior Court. On the day scheduled for her trial, Ms. Mason pled guilty. She expressed remorse for her conduct at the time of sentencing. Ms. Mason has never offered any explanation for, or any description of her involvement in, the crime. It was agreed that Ms. Mason acted as a courier for compensation and had no financial interest in the drugs or involvement in their proposed distribution in Canada.

[19] Ms. Mason, a single black mother, was thirty-one years old at the time of the offence. She was born in Jamaica, but has lived in Canada since she was seven years old. She has never become a Canadian citizen. Ms. Mason was raised in a strict but happy environment free of any emotional or physical difficulties. She left the family home at age twenty-one and has not had any contact with her parents since approximately two years before the offence.

[20] Ms. Mason completed grade twelve and was described as a good student. She later enrolled in a beauty school and studied hairstyling.

[21] Ms. Mason had two children at the time of the offence, ages eight and ten. A third child was born on January 14, 2003. The fathers of Ms. Mason's first two children do not provide any financial support for the children. There is no evidence as to what support, if any, she receives from the father of her youngest child.

[22] Ms. Mason has worked at various low-paying jobs over the years. When the pre-sentence report was prepared, she was working at a Wendy's Restaurant for $8.00 an hour. She lives in government-subsidized housing and gets by on her salary ($350.00 per month) supplemented by welfare assistance.

[23] Ms. Mason is in good health, does not drink or use drugs, and has never had any psychological problems. She has no criminal record. Ms. Mason is very good with children and regularly attends her church where she is a choir leader.

[24] Persons who know Ms. Mason describe her as an excellent mother and a person with whom others would readily trust their children. Her involvement in this offence is considered to be completely out of character.

[25] Ms. Mason co-operated in the preparation of the pre-sentence report, but on her lawyer's instructions would not discuss the offence.

IV

The reasons for sentence

[26] As will be discussed in more detail below, the sentencing proceedings evolved over several months into an inquiry into a variety of issues, most of which were introduced and pursued by the trial judge. Although all of the issues canvassed during the proceedings were dealt with in the reasons for judgment, not all were ultimately germane to the sentences imposed by the trial judge. For example, the trial judge concluded that Dr. Doob's evidence could play no role in his determination of the appropriate sentence (paras. 165-69).[1] I do not propose to review those parts of the reasons that do not figure in the ultimate dispositions.

[27] The trial judge's decision to impose conditional sentences can be traced through four stages. First, he held (paras. 178, 220) that the sentencing guidelines set down in *R. v. Madden* (1996), 104 C.C.C. (3d) 548 (Ont. C.A.) and *R. v. Cunningham* (1996), 104 C.C.C. (3d) 542 (Ont. C.A.) providing for sentences in the range of three to five years for the importation of cocaine in amounts of "one kilogram more or less", did not have direct application since the amounts of cocaine imported by the respondents were significantly less than one kilogram. The Crown contends that the trial judge wrongly compared the actual weight of the drugs imported in *Madden* with the "purity-adjusted" weight[2] of the drugs imported by the respondents. However, the Crown concedes that this error was not significant since the actual weight of the drugs imported by the respondents was below the "one kilogram more or less" level.

[28] Second, the trial judge held, based on materials he had produced and his own experience presiding in a court that dealt with many cases involving cocaine importation from Jamaica, that the respondents were the victims of systemic racial and gender bias. These biases contributed to the respondents' impoverished circumstances and made them particularly vulnerable to those who sought out persons to courier cocaine to Canada from Jamaica. The trial judge concluded that the systemic racial and gender bias played a role in the commission of the offences and should mitigate the sentence imposed. He said at para. 224:

Since cocaine importation by a courier is not a violent *and* serious offence, as that expression is used in the *Wells* and *Borde* cases, the question naturally arises as to whether systemic and background factors relating to the commission of this offence can more generously serve to mitigate the sentence to be imposed. In my view, systemic and background factors, identified in this case…should logically be relevant to mitigate the penal consequences for cocaine importers conscripted as couriers [underline added, italics in original].

[29] Third, after considering the systemic and background factors and other mitigating factors

relevant to each respondent, the trial judge concluded that sentences in the upper reformatory range were appropriate (para. 231).

[30] Fourth, in deciding that the respondents should receive conditional sentences under s. 742.1, the trial judge again said at para. 234:

Neither Presentence report rejected community supervision as a potential aspect of any sentence imposed. Systemic and background factors relating to the offender's involvement in these crimes militate toward serious consideration of imprisonment to be served conditionally. In all of the circumstances, the sanction of a conditional term of imprisonment does not violate the principles of sections 718 to 718.2 of the *Criminal Code*.

[31] The trial judge justified the imposition of conditional sentences on an alternative basis. After observing that the case law could be read as limiting the availability of conditional sentences for convicted cocaine importers to "exceptional circumstances", the trial judge held that such circumstances existed in these cases, indicating at para. 234:

[I]n the highly unusual circumstances of the excessive delay between plea and sentencing and the test case features of these cases, the terms of imprisonment ought to be served conditionally.

V

The arguments on appeal

[32] The Crown challenges the manner in which the sentencing proceedings were conducted and the fitness of the sentences imposed.

[33] Crown counsel acknowledges that the trial judge has a broad discretion in the conduct of sentencing proceedings. He alleges, however, that the trial judge lost his appearance of impartiality by raising various issues on his own initiative, directing the Crown to locate and produce evidence on those issues, producing his own evidence on some of those issues, and eventually imposing sentences based in large measure on findings that were the product of the material produced by the trial judge and his personal experiences. It is the Crown's contention that, while no doubt well-intentioned, the trial judge effectively took on the combined role of advocate, witness, and judge, thereby losing the appearance of a neutral arbiter.

[34] Insofar as the fitness of the sentences is concerned, the Crown submits that stripped to the essentials, the respondents received conditional sentences because they were poor, black, and female. He submits that none of these factors diminish the seriousness of the offence or justify a conditional sentence. Counsel further argues that the imposition of conditional sentences based on the race and gender of the respondents will only reinforce the prevailing wisdom among drug overlords that young black women make ideal drug couriers, thereby perpetuating and exacerbating the vulnerability of the very group the trial judge sought to assist.

[35] Crown counsel advances several specific alleged errors in principle in support of his submission that the sentences are unfit. He contends that:

- the trial judge made findings of fact pertaining to the respondents' involvement in the crimes that had no basis in the evidence;

- there was no evidence to support the finding that systemic racism or gender bias played a role in the commission of the offence;

- the trial judge improperly used evidence of systemic racial and gender bias to lower the respondents' sentences below sentences which could properly reflect the seriousness of the offences;

- the trial judge improperly used "purity-adjusted" weight to distance the respondents' conduct from the conduct referred to in *Madden* and *Cunningham*;

- the trial judge improperly used Ms. Mason's potential deportation as a mitigating factor; and

- the trial judge improperly concluded that the delay in the completion of the sentencing proceedings and the "test case" nature of the proceedings constituted exceptional circumstances justifying a conditional sentence.

[36] The respondents submit that there was nothing wrong with the way in which the trial judge conducted the sentencing hearing. They contend that a trial judge's obligation to impose a fit sentence may require the judge to go beyond the case as presented by counsel. The respondents submit that through the trial judge's initiative, several important issues, all of which were relevant to the imposition of a fit sentence, were raised and addressed in the course of these proceedings. They rely on s. 723(3) of the *Criminal Code*, which specifically permits a trial judge to raise matters on his or her own initiative at sentencing.

[37] The respondents further contend that the trial judge took pains to raise the issues in a way that would ensure that all parties had a full and fair opportunity to respond to those issues. Counsel argue that it was much better for the trial judge to make counsel aware of the relevant material available to him before using that material, rather than simply relying on it without giving counsel any chance to address its merits. The respondents submit that there is nothing in the conduct of the proceedings or in the nature of the material produced by the trial judge that suggests he had formed firm, unalterable views on the issues he raised with counsel.

[38] The respondents also observe, accurately, that the Crown did not object to the manner in which the proceedings were conducted, but instead fully participated in those proceedings. They strongly contend that as the Crown did not object at trial, it cannot raise these objections on appeal.

[39] With respect to the fitness of sentence, the respondents begin with a submission that the length of the sentences imposed by the trial judge – slightly less than two years – is within the appropriate range having regard to the amounts of cocaine imported by Ms. Mason and Ms. Hamilton. The respondents next argue that the trial judge properly took into consideration the personal mitigating factors. The respondents further submit that the trial judge was obliged to factor his own experience into the assessment of the evidence before him and to place that evidence in its proper social context. In these circumstances, the systemic racial and gender bias suffered by the respondents was properly viewed as a relevant mitigating circumstance. The respondents further submit that if they are correct in

arguing that sentences of less than two years were within the appropriate range, the circumstances of these offenders fully justify conditional sentences. Counsel quite properly remind this court that the trial judge's weighing of the various relevant factors must be accorded deference in this court unless it can be said to be unreasonable.

[40] The respondents submit that, while the trial judge's use of the "purity-adjusted weight" makes eminent sense, its use is irrelevant to the disposition of this case. They assert that even if the weight of the cocaine imported by the respondents is not adjusted to take its purity into account, the weight imported by them is well below the "one kilogram more or less" referred to in *Madden* and *Cunningham* and properly attracts sentences of the length imposed by the trial judge.

[41] Next, counsel for Ms. Mason argues that the risk of deportation is a relevant consideration in deciding where, within the range of appropriate sentences, to fix an offender's specific sentence.

[42] The respondents next submit that while this was not a "test case" in the strict technical sense, the sentencing proceedings were unusually long for reasons that were beyond the control of the respondents and raised issues that had importance far beyond these cases. Counsel assert that during the sentencing proceedings, the respondents were under strict bail terms that placed significant limitations on their freedom. They argue that the length of the delay was unusual and was properly given considerable weight by the trial judge in deciding whether a conditional sentence was appropriate.

[43] Finally, counsel for the respondents submit that even if the trial judge was wrong and that a term of imprisonment at or near two years was necessary when the respondents were sentenced, this court should not send the respondents to jail almost a year and a half after they began to serve stringent conditional sentences.

[44] The interveners support the approach taken by the trial judge.

VI

The conduct of the proceedings

ow the proceedings unfolded

[45] Ms. Hamilton and Ms. Mason entered guilty pleas on March 6 and April 16, 2002, respectively. The proceedings were adjourned for the preparation of pre-sentence reports and to allow the respondents to obtain expert evidence directed at the efficacy of general deterrence as a principle of sentencing in cases like these.

[46] The defence retained Dr. Doob, a respected criminologist. His report was provided to the Crown shortly before July 29, 2002. On July 29th, the Crown requested a brief adjournment to consider its position in light of Dr. Doob's report. On that same day, the trial judge, purporting to act under s. 723(3) of the *Criminal Code*, advised the Crown that he wanted the Crown to produce evidence on what the trial judge referred to as the "certainty of detection". In exchanges with Crown counsel, it became clear that the trial judge was concerned about a number of issues. These included:

· the steps, if any, taken by the Government of Canada to reduce the incidence of drug smuggling from Jamaica;

· the extent to which the Government of Canada used its power to regulate and license air carriers to encourage those carriers to take steps to curtail illicit drug importation;

· Canada's treaty obligations and any protocol obligations applicable to the interdiction of drug smuggling; and

· steps taken at airports in Jamaica and Pearson International Airport to combat drug importation.

[47] During his dialogue with Crown counsel, the trial judge said:

I'm not at all clear, in my mind, what, if anything, Canada has done to the licensing and regulatory scheme for landing rights for airplanes, international flights, in order to make the point with air carriers that we do have illicit narcotic laws that exist and we expect partnership and enforcement.

[48] The trial judge also expressed concern that the airlines could be seen as being "wilfully blind" to the importation of cocaine from Jamaica.

[49] The trial judge candidly acknowledged that his inquiry into the "certainty of detection" issues as part of the sentencing process was "admittedly a new way of looking at the world".

[50] On August 7, 2002, Crown counsel told the trial judge that he was trying to find witnesses who could address the "certainty of detection" issues raised ten days earlier by the trial judge. The trial judge wanted to set dates for the hearing of Dr. Doob's evidence. Although dates were available in September, the hearing of Dr. Doob's evidence was adjourned to November 12, 2002 to accommodate defence counsel's schedule.

[51] Some time before November 12th, the Crown produced material in response to the "certainty of detection" issues raised by the trial judge.

[52] A few days before November 12th, the proceedings took a dramatic turn. The trial judge, through his secretary, sent counsel about 700 pages of material garnered from his own researches. The material consisted of reports from various governmental agencies in different countries, statistical information relating to the Canadian population at large and the prison population, law reform material from various countries, and newspaper articles. The material related to three broad areas:

· the extent of cocaine use and the harm caused by its use;

· the "certainty of detection" issues earlier identified by the trial judge and, in particular, "high tech" steps taken in other jurisdictions to combat drug importation through international airports; and

· statistical information and various reports relating to rates of imprisonment generally, rates of imprisonment broken down by gender and race, and rates of imprisonment for drug-related offences; and

· reports relating to racial and gender discrimination in and out of jail.

[53] On November 12th, the trial judge advised counsel that he had decided to produce this material when it became apparent to him that information of the kind contained in his material was "not coming from either side". There had been no suggestion by any party to the proceedings that race or gender had any relevance to the determination of fit sentences for the respondents before the trial judge distributed his material.

[54] The trial judge invited submissions on the admissibility of the material he had produced. Crown counsel indicated that he was "a bit surprised" when he received the material as, in his view, it substantially broadened the scope of the sentencing hearing. Crown counsel observed that the material introduced "a racial issue" into the sentencing proceedings for the first time.

[55] A lengthy discussion ensued between the Crown and the trial judge. After acknowledging that the defence had not raised race, the trial judge said:

But clearly as a trial judge in this port of entry, Brampton, responsible for the Pearson International Airport, I think it is fair to say that having done this for almost nine years, that I have been struck by the number of single mothers, black women who have appeared before me over that time period. And it leads me to wonder whether this is a group that is targeted for courier conscription by the overseers, whether in fact, compared to other narcotics offences or other offences generally, females, female blacks, form a disproportionate group within the population of people sentenced for cocaine importing. Where that takes me I'm not sure, but we should know in sentencing, it seems to me, whether there is a disproportionate effect on any particular group by a sentencing policy [emphasis added].

[56] The trial judge made it clear that he was not suggesting that the respondents' arrests or prosecutions were racially motivated or otherwise tainted by racial or gender bias. The trial judge was, however, concerned that the substantial jail sentences routinely imposed for cocaine importation had a disproportionate effect on a disadvantaged group, namely poor black single mothers, because drug overseers selected their couriers from that disadvantaged group. The trial judge referred to race and gender as part of the "contextual perspective" he was obliged to take on sentencing.

[57] Ultimately, Crown counsel indicated that he wished some time to consider his position on the issue of race as raised by the trial judge. Counsel added:

I'm not suggesting that it is not appropriate for a court to consider that, it's just that I didn't direct my mind to it and it may significantly add to the amount of time I require to re-focus my attention on that issue. …

[58] The sentencing proceedings continued on November 12th, 13th, and 14th. Dr. Doob testified on November 12th and November 13th. On November 14th, the Crown called three witnesses, one from Air Canada and two from Canada Customs, to address some of the "certainty of detection" issues raised by the trial judge. Two of these witnesses were questioned at length by the trial judge.

[59] The sentencing proceedings recommenced on December 19, 2002, and continued on January 20

and January 22, 2003. During these proceedings, the trial judge produced approximately 300 additional pages of material relating to the issues he had raised during the sentencing proceedings. The Crown called one more witness to address some of the "certainty of detection" issues and also filed certain material dealing with those issues as well as the race/gender issues raised by the trial judge. Throughout this part of the proceedings, the trial judge continued to request additional information from the Crown and the Crown continued to attempt to respond to those requests. In the end, the Crown was unable to produce all of the statistical information that the trial judge had requested.

[60] At no stage of the proceedings did the Crown object to the trial judge raising the issues that he raised, or object to the trial judge taking into account the material the trial judge had produced.

[61] The trial judge rendered judgment on February 20, 2003. His reasons made extensive reference to the material he produced and tracked the concerns he expressed when he introduced the issues of race and gender bias into the proceedings.

Did the trial judge go too far?

[62] I will first address the respondents' argument that this court should not reach the merits of this ground of appeal. The respondents contend that the Crown's allegation comes down to one of a reasonable apprehension of bias flowing from the trial judge's conduct of the proceedings. I think this is a fair description of at least part of the submissions made by the Crown in support of this ground of appeal. I am also attracted to the respondents' contention that absent a timely objection by the Crown at trial, this court should not entertain on a Crown appeal an allegation of a reasonable apprehension of bias: *R. v. Curragh Inc.* (1997), 113 C.C.C. (3d) 481 at 487, 515 (S.C.C.).

[63] The Crown's argument does not however rest entirely on the reasonable apprehension of bias claim. Crown counsel contends that the trial judge, in overstepping his role, fundamentally altered the nature of the proceedings. Counsel contends that the trial judge turned the proceedings from one designed to determine a fit sentence for individual offenders, to one designed to enquire into a variety of societal problems which, the trial judge, through his experience, had come to associate with the sentencing of black women who courier drugs into Canada from Jamaica. Crown counsel contends that this fundamental alteration of the essential purpose of the proceeding in and of itself invalidates the result.

[64] I would not accept the Crown's bias argument, however, I think there is merit to the second component of the Crown's submission. The nature of the proceedings was fundamentally changed and this change contributed to the errors in principle reflected in the sentences imposed.

[65] Having read and reread the transcripts, I must conclude that the trial judge does appear to have assumed the combined role of advocate, witness, and judge. No doubt, the trial judge's extensive experience in sentencing cocaine couriers had left him with genuine and legitimate concerns about the effectiveness and fairness of sentencing practices as applied to single poor black women who couriered cocaine into Canada for relatively little gain. The trial judge unilaterally decided to use these proceedings to raise, explore, and address various issues which he believed negatively impacted on the effectiveness and fairness of current sentencing practices as they related to some cocaine importers. Through his personal experience and personal research, the trial judge became the prime source of

information in respect of those issues. The trial judge also became the driving force pursuing those issues during the proceedings.

[66] No one suggests that a trial judge is obliged to remain passive during the sentencing phase of the criminal process. Trial judges can, and sometimes must, assume an active role in the course of a sentencing proceeding. Section 723(3) of the *Criminal Code* provides that a court may, on its own motion, require the production of evidence that "would assist in the determination of the appropriate sentence." Quite apart from that statutory power, the case law has long recognized that where a trial judge is required by law to consider a factor in determining the appropriate sentence and counsel has not provided the information necessary to properly consider that factor, the court can, on its own initiative, make the necessary inquiries and obtain the necessary evidence: *R . v. Wells* (2000), 141 C.C.C. (3d) 368 at 390-91 (S.C.C.); *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 84-85.

[67] Recognition that a trial judge can go beyond the issues and evidence produced by the parties on sentencing where necessary to ensure the imposition of a fit sentence does not mean that the trial judge's power is without limits or that it will be routinely exercised. In considering both the limits of the power and the limits of the exercise of the power, it is wise to bear in mind that the criminal process, including the sentencing phase, is basically adversarial. Usually, the parties are the active participants in the process and the judge serves as a neutral, passive arbiter. Generally speaking, it is left to the parties to choose the issues, stake out their positions, and decide what evidence to present in support of those positions. The trial judge's role is to listen, clarify where necessary, and ultimately evaluate the merits of the competing cases presented by the parties.

[68] The trial judge's role as the arbiter of the respective merits of competing positions developed and put before the trial judge by the parties best ensures judicial impartiality and the appearance of judicial impartiality. Human nature is such that it is always easier to objectively assess the merits of someone else's argument. The relatively passive role assigned to the trial judge also recognizes that judges, by virtue of their very neutrality, are not in a position to make informed decisions as to which issues should be raised, or the evidence that should be led. Judicial intrusion into counsel's role can cause unwarranted delay and bring unnecessary prolixity to the proceedings.

[69] Judges must be very careful before introducing issues into the sentencing proceeding. Where an issue may or may not be germane to the determination of the appropriate sentence, the trial judge should not inject that issue into the proceedings without first determining from counsel their positions as to the relevance of that issue. If counsel takes the position that the issue is relevant, then it should be left to counsel to produce whatever evidence or material he or she deems appropriate, although the trial judge may certainly make counsel aware of materials known to the trial judge which are germane to the issue. If counsel takes the position that the issue raised by the trial judge is not relevant on sentencing, it will be a rare case where the trial judge will pursue that issue.

[70] It is also important that the trial judge limit the scope of his or her intervention into the role traditionally left to counsel. The trial judge should frame any issue that he or she introduces as precisely as possible and relate it to the case before the court. This will avoid turning the sentencing hearing into a *de facto* commission of inquiry.

[71] The manner in which the proceedings were conducted created at least four problems. First, by

assuming the multi-faceted role of advocate, witness, and judge, the trial judge put the appearance of impartiality at risk, if not actually compromising that appearance. For example, the trial judge introduced the issues of race and gender bias into the proceedings, and then, through the material he produced and the questions he addressed to Crown counsel, the trial judge appeared to drive the inquiry into those matters towards certain results. Those results are reflected in his reasons. Looking at the entirety of the proceedings, there is a risk that a reasonable observer could conclude that the trial judge's findings as to the significance of race and gender bias in fixing the appropriate sentences had been made before he directed an inquiry into those issues. At the very least, the conduct of the proceedings produced a dynamic in which the trial judge became the Crown's adversary on the issues introduced by the trial judge.

[72] Although the appearance of impartiality was put at risk by the conduct of these proceedings, the trial judge did take steps to try and preserve the appearance of fairness. He gave counsel clear indications of his concerns and any tentative opinions he had formed. He also provided the material to counsel to which he planned to refer in considering the issues he had raised. This procedure was much fairer to the parties and much more likely to produce an accurate result than had the trial judge simply referred to the material without giving counsel any notice: *R. v. Paul* (1998), 124 C.C.C. (3d) 1 (N.B.C.A.); *Cronk v. Canadian General Insurance Co*. (1995), 25 O.R. (3d) 505 at 518 (C.A.); Ian Binnie, "Judicial Notice: How Much is Too Much?" in *Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 543 at 564-65. Much of the material produced by the trial judge was not suggestive of any particular answer to the questions raised by the trial judge in the course of the proceedings. The scrupulous fairness with which the trial judge conducted the proceedings went some way towards overcoming the potentially adverse effects of the extraordinary role he assumed in the conduct of the proceedings.

[73] The second problem arising from the trial judge's approach is that it produced a fundamental disconnect between the case on sentencing presented by counsel for the respondents and the case of the paradigmatic cocaine courier constructed by the trial judge. From the time he first introduced race and gender into the proceedings, the trial judge spoke in terms of poor black single women who were "targeted" and "conscripted" by drug overseers to act as couriers. The trial judge referred to these couriers as "virtue-tested" by drug overseers and as living "in the despair of poverty". The trial judge also described these couriers as using the small compensation they received from the drug overseers to pay rent, feed children, and support a subsistence level-existence.

[74] Counsel for the respondents chose to provide next to no information about the respondents' involvement in these crimes. Ms. Hamilton indicated she acted out of financial need. Ms. Mason offered no explanation. There was no evidence that these respondents were conscripted, virtue-tested, or paid minimal compensation, nor was there evidence that such compensation was used to pay for the necessaries of life. The reasons for sentence indicate to me that the trial judge based his sentences more on his concept of the typical drug courier than on the evidence pertaining to these two individuals.

[75] A third problem with the trial judge's conduct of the proceedings is that it created a real risk of inaccurate fact-finding. The trial judge introduced a veritable blizzard of raw statistical information. He also produced various forms of opinion on a wide variety of topics. None of this material was analyzed or tested in any way.

[76] It is difficult to know what to make of the statistical data without the assistance of evidence from a properly qualified witness. For example, the trial judge made extensive reference to statistics dealing with the incarceration of black women in Canadian penitentiaries. As I understand his analysis, he concluded that since the percentage of black women in the penitentiary was approximately three times higher than the percentage of black women in the general population, black women were over-represented in the prison population. He inferred from that conclusion support for his further conclusion that sentencing practices as applied to those who imported cocaine from Jamaica reflected systemic social, racial, and gender bias against poor black women.

[77] It is not clear to me what connection, if any, there is between the number of black women in the penitentiary and the relevance, if any, of race or gender to sentencing principles as applied to the crime of cocaine importation. Furthermore, it is not apparent to me that any inference can be drawn from a single statistic indicating that black women make up six per cent of the female penitentiary population and only about two per cent of the general population. That statistic would have to be considered in the context of other statistical information indicating that the percentage of black women in the penitentiary has dropped dramatically over the last eight years (by almost a third), as has the actual number of black women in the penitentiary system. These decreases have occurred despite significant increases in the general black population and significant increases in the overall female penitentiary population. These statistical trends could suggest that current sentencing practices are well on their way to eliminating any over-representation of black females in the penitentiary.

[78] Even the one statistical feature highlighted by the trial judge is of questionable value. The population giving rise to the trial judge's conclusion that black females are over-represented in the penitentiary population is a very small one. As of January 2003, there were twenty-five black women in the penitentiary out of a total population of almost 350,000 black women in Canada. That means that .007 per cent of the female black population in Canada is in the penitentiary. The validity of any inferences drawn from such small numbers must be open to question.

[79] Similarly, the trial judge compared the number of black women appearing before him charged with cocaine importation with the number of black women he saw in his local shopping mall to support his conclusion that black women were over-represented in the population of persons charged with cocaine importation. Absent some expert evidence, I do not think the trial judge could make any informed decision as to the significance of that personal observation in determining the relevance, if any, of race or gender to sentencing practices as applied to cocaine importation.

[80] The trial judge acknowledged that there were other reasons which could explain the over-representation of black women among couriers bringing cocaine into Canada from Jamaica. The population of Jamaica is largely a black population. It seems sensible that those seeking couriers would seek out individuals with some connection to Jamaica and some "innocent" explanation to offer to the authorities for travel to and from Jamaica. Absent any evidence, the trial judge could not make an informed choice from among the various possible explanations for this over-representation.

[81] I do not think the meaning of the statistics introduced by the trial judge or the inferences that could be properly drawn from them is self-evident. There were real risks that these statistics could be misunderstood and misused absent proper expert evidence. Instead of being treated with the caution that all statistics deserve, these statistics – probably because they were introduced by the trial judge –

took on a strong aura of reliability and were treated as if they were self-explanatory.

[82] A fourth difficulty with the way the trial judge conducted these proceedings is evident from his introduction of the "certainty of detection" issues. These issues consumed a good deal of time and effort. In the end, quite properly, they played virtually no role in determining the appropriate sentence. The trial judge summarized the evidence at length (paras. 27-51), but then made only two brief references to it. He referred to the evidence when rejecting the respondents' argument that general deterrence should be discounted as a principle of sentencing (paras. 154-56) and he referred to it in rejecting the Crown's argument that a conditional sentence would deprecate the gravity of the offence of importing cocaine (para. 228). With respect, I see no connection between the "certainty of detection" issues and the question of whether a conditional sentence would deprecate the gravity of the offence.

[83] In the end, the inquiry into the "certainty of detection" issues produced little, if anything, of assistance in the determination of the appropriate sentences. This is not surprising. The complexity of those issues could not be properly identified and explored in a sentencing hearing. A sentencing hearing is not the appropriate forum in which to inquire into Canada's compliance with various treaty obligations. The inquiry into the "certainty of detection" issues did, however, lengthen and complicate the proceedings. The inquiry into these issues also contributed to the impression that the trial judge had decided to conduct an inquiry into matters that concerned him rather than conduct a sentencing hearing to determine the appropriate sentence for these two respondents.

VII

The fitness of the sentences

[84] My disagreement with the sentence imposed by the trial judge is a narrow, albeit significant one. I would not interfere with the length of the sentences imposed, but would hold that the imposition of conditional sentences amounted to reversible error. To explain why I disagree with the trial judge's disposition, I will first address the standard of review, then the analytical approach to be applied in determining the appropriate disposition, and, finally, the specific errors made by the trial judge.

Standard of Review

[85] Sentencing is a delicate case-specific exercise. There is seldom only one fit sentence. Fitness usually describes a range of appropriate sentencing responses. The individualistic nature of the sentencing process, the myriad of factors to be balanced, and the absence of any single "correct" sentencing response in most cases dictates that appellate courts defer to sentencing decisions made by trial judges. That deference is reflected in the now well-established standard of appellate review applicable on sentence appeals. A court will vary a sentence only if it reflects an error in principle, demonstrates a failure to consider a relevant factor or to give appropriate weight to a relevant factor, or is demonstrably unfit: *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 at 499 (S.C.C.); *R. v. McDonnell* (1997), 114 C.C.C. (3d) 436 at 448 (S.C.C.); *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 at 373-74 (S.C.C.).

[86] Some of the language in the authorities referring to the re-weighing of relevant factors would, if

taken in isolation, suggest a relatively broad review on appeal of the fitness of sentence. However, as Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 at 53-54 (Ont. C.A.):

Moreover, this court has held that overemphasizing a relevant factor or failing to give enough weight to a relevant factor may amount to an error in principle. This does not mean, however, that an appellate court is justified in interfering with a trial judge's exercise of discretion merely because it would have given different weight or emphasis to a factor relevant to the sentence. To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground that the trial judge erred in principle [emphasis added, footnotes omitted].

The analytical framework

[87] Sentencing is a very human process. Most attempts to describe the proper judicial approach to sentencing are as close to the actual process as a paint-by-numbers landscape is to the real thing. I begin by recognizing, as did the trial judge, that the fixing of a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender: *R. v. Currie* (1997), 115 C.C.C. (3d) 205 at 219 (S.C.C.); *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 80; *R. v. Proulx*, *supra*, at 485-86; *R. v. Borde* (2003), 172 C.C.C. (3d) 225 at 238 (Ont. C.A.).

[88] The case-specific nature of the sentencing inquiry is reflected in the proportionality requirement, described as the fundamental principle of sentencing in s. 718.1 of the *Criminal Code*:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[89] The proportionality requirement, long a touchstone of Canadian sentencing law (see *R. v. Wilmott*, [1967] 1 C.C.C. 171 at 178-79 (Ont. C.A.)), accepts the "just deserts" rationale for state-imposed punishment. Whatever other ends a sentence may hope to achieve, it must first and foremost fit the specific crime and the specific offender: Andrew Ashworth, *Sentencing and Criminal Justice*, 2nd ed., (London: Butterworths, 1995) at 70.

[90] The "gravity of the offence" refers to the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and any specific features of the commission of the crime which may tend to increase or decrease the harm or risk of harm to the community occasioned by the offence. For example, in drug importation cases, the nature and quantity of the drug involved will impact on the gravity of the offence. Some of the factors which increase the gravity of the offence are set out in s. 718.2(*a*).

[91] The "degree of responsibility of the offender" refers to the offender's culpability as reflected in the essential substantive elements of the offence – especially the fault component – and any specific

aspects of the offender's conduct or background that tend to increase or decrease the offender's personal responsibility for the crime. In drug importation cases, the offender's role in the importation scheme will be an important consideration in assessing the offender's personal responsibility.

[92] In *R. v. Priest* (1996), 110 C.C.C. (3d) 289 at 297-98 (Ont. C.A.), Rosenberg J.A. described the proportionality requirement in this way:

The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good [footnotes omitted].

[93] Fixing a sentence that is consistent with s. 718.1 is particularly difficult where the gravity of the offence points strongly in one sentencing direction and the culpability of the individual offender points strongly in a very different sentencing direction. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account. As indicated in *Priest*, *supra*, factors which may accentuate the gravity of the crime cannot blind the trial judge to factors mitigating personal responsibility. Equally, factors mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the crime committed.

[94] In some circumstances, one side of the proportionality inquiry will figure more prominently in the ultimate disposition than the other. For example, where a young first offender is being sentenced for a number of relatively serious property offences, the sentence imposed will tend to emphasize the features which mitigate the offender's personal culpability rather than those which highlight the gravity of the crimes: *R. v. Priest*, *supra*. If, however, that same young offender commits a crime involving serious personal injury to the victim, the "gravity of the offence" component of the proportionality inquiry will be given prominence in determining the ultimate disposition.

[95] Proportionality is the fundamental principle of sentencing, but it is not the only principle to be considered. Parity, totality, and restraint are also principles which must be engaged when determining the appropriate sentence: *Criminal Code*, ss. 718.2*(b)-(e)*. The restraint principle is of particular importance where incarceration is a potential disposition. That principle is reflected in ss. 178.2*(d)* and (*e*):

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[96] The express inclusion of restraint as a principle of sentencing is one of the most significant features of the 1996 *Criminal Code* amendments[3] statutizing sentencing principles for the first time. As Professor Manson explains:

Restraint means that prison is the sanction of last resort…. Restraint also means that when considering other sanctions, the sentencing court should seek the least intrusive sentence and the least quantum which will achieve the overall purpose of being an appropriate and just sanction [footnotes omitted]. [4]

[97] Counsel on the appeal addressed at some length the potential application of s. 718.2(*e*) to groups, like blacks, who it is alleged have also been the victims of discrimination in the justice system and the community at large.

[98] There can be no doubt that s. 718.2(*e*) applies to all offenders. Imprisonment is appropriate only when there is no other reasonable sanction. The closing words of the section recognize that restraint in the use of imprisonment is a particularly important principle with respect to the sentencing of aboriginal offenders. The restraint principle takes on added importance because the historical mistreatment of aboriginals by the criminal justice system as reflected in the highly disproportionate number of aboriginals sentenced to imprisonment, taken with aboriginal cultural views as to the purpose of punishment, can combine to make imprisonment ineffective in achieving the purpose or objectives of sentencing where the offender is an aboriginal: *R. v. Wells*, *supra*, at p. 385. The restraint principle is applied with particular force where the offender is an aboriginal not to somehow try to make up for historical mistreatment of aboriginals, but because imprisonment may be less effective than other dispositions in achieving the goals of sentencing where the offender is aboriginal.

[99] Parliament has chosen to identify aboriginals as a group with respect to whom the restraint principle applies with particular force. If it is shown that the historical mistreatment and cultural views of another group combine to make imprisonment ineffective in achieving the goals of sentencing, it has been suggested that a court may consider those factors in applying the restraint principle in sentencing individuals from that group: see *R. v. Borde*, *supra*, at p. 236. There was no evidence in the mass of material adduced in these proceedings to suggest that poor black women share a cultural perspective with respect to punishment that is akin to the aboriginal perspective.[5]

[100] In any event, proportionality remains the fundamental principle of sentencing. Section 718.2(*e*) cannot justify a sentence which deprecates the seriousness of the offence. Where the offence is sufficiently serious, imprisonment will be the only reasonable response regardless of the ethnic or cultural background of the offender: *R. v. Wells*, *supra*, at p. 386.

[101] In addition to complying with the principles of sentencing, sentences must promote one or more of the objectives identified in s. 718:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[102] The relevance and relative importance of each of the objectives identified in s. 718 will vary according to the nature of the crime and the circumstances of the offender: *R. v. Lyons*, [1987] 2 S.C.R. 309 at 329; *R. v. Morrisey* (2000), 148 C.C.C. (3d) 1 at 23 (S.C.C.).

[103] If the offence is particularly serious in that it causes or threatens significant harm to an individual or segment of the community, the objectives of denunciation and general deterrence will usually dominate the other objectives identified in s. 718. Prior to the introduction of the conditional sentence, where the objectives of deterrence and denunciation dominated, imprisonment was almost inevitable.

[104] The importation of dangerous drugs like cocaine and others found in Schedule I of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 has always been considered among the most serious crimes known to Canadian law: *Sentencing Reform: A Canadian Approach*. *Report of the Canadian Sentencing Commission, Ottawa Ministry of Supply and Services (1987)*, p. 205. The immense direct and indirect social and economic harm done throughout the Canadian community by cocaine is well known: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 at 235-37 (S.C.C.), *per* Cory J., in dissent on another issue; *R. v. Smith* (1987), 34 C.C.C. (3d) 97 at 123-24 (S.C.C.). The use and sale of cocaine kills and harms both directly and indirectly. The direct adverse health effects on those who use the drug are enormous and disastrous. Cocaine sale and use is closely and strongly associated with violent crime. Cocaine importation begets a multiplicity of violent acts. Viewed in isolation from the conduct which inevitably follows the importation of cocaine, the act itself is not a violent one in the strict sense. It cannot, however, be disassociated from its inevitable consequences. Unlike the trial judge (para. 224), I characterize cocaine importation as both a violent and serious offence: see *R. v. Pearson* (1992), 77 C.C.C. (3d) 124 at 143-44 (S.C.C.).

[105] Cocaine is not indigenous to Canada. Without the cocaine importer, whatever his or her motive or involvement, there would be no cocaine problem. Both before and after the amendments to the sentencing provisions in Part XXIII of the *Criminal Code* and the introduction of the sentencing provision (s. 10) into the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, this court has emphasized the gravity of the crime and, therefore, the need to stress denunciation and deterrence in sentencing all drug importers, even vulnerable first offenders. In *Cunningham*, *supra*, at pp. 546-47, the court, in fixing a range of six to eight years for couriers who smuggle large amounts of cocaine into Canada, said:

We recognize as well that the suggested range will often require the imposition of a severe penalty for first offenders. We are not insensitive to this concern, mindful as we must be that in many instances, couriers tend to be weak and vulnerable, thereby becoming easy prey for those who engage in drug trafficking on a commercial basis.

Sympathetic though we are to the plight of many couriers, such concerns must give way to the need to protect society from the untold grief and misery occasioned by the illicit use of hard drugs [emphasis added].

[106] This court has repeatedly reiterated the approach set out in *Cunningham*, e.g. see *R. v. H. (C.N.)* (2002), 170 C.C.C. (3d) 253 (Ont. C.A.); *R. v. Wilson*, [2003] O.J. No. 144 (C.A.).

[107] Because the sentencing of drug couriers presents one of the more difficult, and unfortunately more common, situations in which the gravity of the offence and the personal responsibility of the offender suggest different dispositions, this court has set out different ranges of sentences to assist trial judges in fixing appropriate sentences in individual cases. The ranges established by this court in *Madden* and *Cunningham* do not have direct application to this case. However, the factors justifying the fixing of those ranges have equal application here. I think it would be helpful to set a sentencing range for the importation of amounts of cocaine below "the one kilogram more or less" range identified in *Madden*.

[108] *Madden* suggests a range of three to five years for the importation of one kilogram of cocaine "more or less". Where the amount of cocaine imported is approximately half of that amount, the bottom end of the range should be adjusted downward. I do not suggest that the adjustment should follow any mathematical formula, but rather that it should recognize that the importation of lesser amounts of cocaine renders the crime somewhat less serious. In my view, where the amount of cocaine imported falls below the amounts described in *Madden*, the bottom end of the appropriate range of sentences should be at or near two years. I see no reason to vary the upper end of the appropriate range.

[109] I use the phrase "at or near" two years in describing the bottom end of the range to recognize that for reasons that have little to do with the principles or objectives of sentencing, there are potentially significant differences between a sentence of two years and a sentence of one day short of two years. When it comes to fixing an appropriate range of sentence, I cannot see any reason to draw a firm line right at the two-year mark. By describing the range as being "at or near two years" rather than two years, no disservice is done to the seriousness of the offence, but sentencing options are widened specifically to include conditional sentences, and, if incarceration is imposed, to include the options presented by confinement in a provincial institution: *R. v. Bunn* (2000), 140 C.C.C. (3d) 505 at 514-16 (S.C.C.). These options can assist the court in tailoring a sentence that fits both the offence and the offender.

[110] My conclusion that sentences at or near two years are within the appropriate range for the importation of the amounts of cocaine in issue on these appeals is consistent with the range described by Durno J. in *R. v. Bennett* (31 July 2003), Brampton 5889/02 (Ont. Sup. Ct.). It is also consistent with the length of the sentences imposed by the trial judge on these respondents.

[111] Fixing the range of sentences for a particular offence, of course, does not determine the sentence to be imposed on a particular offender. The range is in large measure a reflection of the "objective seriousness" of the crime: *R. v. H. (C.N.)*, *supra*, at p. 266. Once the range is identified, the sentencing judge must consider specific aggravating and mitigating factors. The mitigating factors may be so significant as to take the case below the otherwise appropriate range. For example, in *R. v. H. (C.N.)*, the offender's cooperation with the authorities and his belief that he was importing marijuana and not cocaine, along with other more common mitigating factors, justified a sentence that was well below the range of sentence established for the importation of very substantial amounts of cocaine.

[112] If the appropriate range includes potential imprisonment, and if the trial judge, in determining where within that range the offender should be placed, excludes the need for a sentence of two years or more, the trial judge must then consider whether to impose a conditional sentence: *R. v. Proulx*, *supra*, at p. 479. If the prerequisites of s. 742.1 of the *Criminal Code* are met (as they were in these cases), the trial judge must decide whether a conditional sentence is consistent with the statutory scheme of sentencing described in ss. 718 to 718.2: *R. v. Proulx*, *supra*, at p. 479. Where the offender has been convicted of importing cocaine, the assessment of whether a conditional sentence is appropriate often comes down to the question of whether a conditional sentence can adequately reflect the gravity of the offence and thereby provide sufficient denunciation and general deterrence. No doubt, conditional sentences with appropriate punitive terms can provide denunciation and general deterrence. Imprisonment, however, remains the most forceful and effective expression of those objectives: *R. v. Proulx*, *supra*, at pp. 492-94.

[113] If a sentence of less than two years is appropriate, there is no presumption that conditional sentences are unavailable for those convicted of importing cocaine. However, the reality is that the crime of importing cocaine is so serious and harmful to the community that conditional sentences will, in the vast majority of cases, not adequately reflect the gravity of the offence or send the requisite denunciatory and deterrent message: *R. v. Ly and Nguyen* (1997), 114 C.C.C. (3d) 279 (Ont. C.A.); *R. v. Berbeck*, [1997] O.J. No. 2434 (C.A.); *R. v. Holder*, [1998] O.J. No. 5102 at paras. 46-50 (Ct. J.). Conditional sentences for those who import dangerous drugs like cocaine into Canada will usually be a viable sentencing option only where, in addition to the usual mitigating factors, there are one or more extraordinary mitigating factors such as cooperation with the authorities in their attempts to identify and arrest those behind the drug trade.

ne errors in principle

(i) The findings of fact

[114] The trial judge concluded that conditional sentences were appropriate largely because the personal responsibility of the respondents for their crimes was significantly diminished by the effects of systemic racial and gender bias. In the trial judge's view, society had to take its share of the responsibility for the respondents' crimes (paras. 188, 221). On the trial judge's approach, society assumed its share of responsibility for the respondents' conduct through a mitigation of the penalty imposed on the respondents.

[115] The trial judge made several findings of fact which were specific to the respondents' involvement in their offences. He relied on these findings to support his conclusion that their personal culpability was significantly reduced. He found as a fact that:

· the respondents were "conscripted" by the "drug distribution hierarchy" to participate in their crimes (para. 198);

· the involvement of the respondents was the result of "virtue-testing" by "drug operation overseers" (para. 195);

· the respondents were paid relatively minimal amounts and used those amounts to provide the bare necessities for their families (para. 191); and

· the respondents' children would be "effectively orphaned" if the respondents were incarcerated (para. 198).

[116] Although the rules of evidence are substantially broadened on the sentencing inquiry, factual findings that are germane to the determination of the appropriate sentence and are not properly the subject of judicial notice must be supported by the evidence. There was no evidence to support the findings of fact outlined immediately above.

[117] The respondents chose not to offer any explanation for, or description of, their involvement in the crimes, apart from Ms. Hamilton's indication that she acted out of financial need.[6] The trial judge had no information as to how the respondents came to be involved in this scheme, what their prior association or relationship was with the individuals who may have hired them, when or where the importation plans were formed, what amount of compensation was paid to the respondents, or how the respondents proposed to use that compensation. He also had no information concerning the care of the children if the respondents went to jail. All of this information was uniquely within the knowledge of the respondents. If the respondents were conscripted – that is, compelled to engage in this activity – they could have said so. If they agreed to be involved in the crimes only after repeated requests, they could have said so, just as they could have provided other details concerning their involvement in the scheme and the compensation they received. Similarly, if the effect of the respondents' imprisonment on the children was as drastic as the trial judge held it to be, I would have expected the respondents to have led evidence to that effect.

[118] The Crown's concession that the respondents were couriers did not constitute an admission that they possessed every characteristic that the trial judge ascribed to couriers. Nor do I accept the contention that requiring the respondents to lead the kind of evidence described above works any hardship on them. This kind of evidence has been given in other cases: e.g. see *R. v. Bennett*, *supra*. Safety concerns arising out of implicating others in the scheme can be addressed if and when they arise. In any event, concerns about the potential safety of the offender should he or she provide certain evidence, do not justify assumptions that have no basis in the evidence.

[119] The trial judge did not purport to base the findings of fact outlined above on any material that actually related to these respondents. Instead, he relied on his experiences in sentencing other individuals who couriered cocaine from Jamaica. He applied those generalizations to these respondents (paras. 179-83, 191-98). In doing so, he relied on *R. v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.). I read that authority as prohibiting the very kind of fact-finding made by the trial judge.

[120] In *R. v. S. (R.D.)*, the accused was charged with assaulting a police officer. The accused was black and the police officer was white. The outcome of the trial turned entirely on the credibility of those two individuals. In the course of her reasons for judgment, the trial judge observed that police officers had been known to mislead the court in the past and that police officers had been known to overreact when dealing with racial minorities. She acquitted the accused and the Crown appealed arguing that her comments demonstrated a reasonable apprehension of bias against the Crown.

[121] The majority of the Supreme Court of Canada rejected the bias allegation. In the course of doing so, the court addressed the extent to which trial judges can use personal judicial experience and judicial understanding of the applicable social context in the course of the fact-finding process. Major J., in dissent, speaking for the three members of the court who would have accepted the bias argument, observed at para. 13:

The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached [emphasis added].

[122] Cory J., speaking for himself and Iacobucci J., joined the majority in rejecting the bias argument. However, he approached the use of judicial experience and social context in a manner that was consistent with that applied by Major J. In referring to trial judges' credibility assessments, Cory J. said at para. 129:

On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence [emphasis added].

[123] Cory J. then addressed the trial judge's reasons at para. 150:

However, there was *no* evidence before Judge Sparks that would suggest that anti-black bias influenced *this particular police officer's reactions*. Thus, although it may be incontrovertible that there is a history of racial tension between police officers and visible minorities, there was no evidence to link that generalization to the actions of Constable Stienburg. The reference to the fact that police officers may overreact in dealing with non-white groups may therefore be perfectly supportable, but it is nonetheless unfortunate in the circumstances of this case because of its potential to associate Judge Sparks' findings with the generalization, rather than the specific evidence [underline added, italics in original].

[124] I think the trial judge fell into the error described by Cory J. While his generalizations concerning the way in which persons like the respondents come to be involved in couriering cocaine from Jamaica, the amounts they are paid for that service, and the use to which they put those amounts may be true as generalizations, there was no evidence that they had any application to the facts of this case.

[125] Justices L'Heureux-Dubé and McLachlin, speaking for four members of the majority on the bias issue, took a somewhat wider view of the use that trial judges could make of information garnered through personal judicial experience and judicial understanding of applicable social context. Their view is the minority view on this issue. However, even on their analysis, fact-finding has to ultimately have some basis in the evidence. They observed at para. 56:

While it seems clear that Judge Sparks *did not in fact* relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks *had* chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to taken into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background [underline added, italics in original].

[126] *R. v. S. (R.D.)* draws a distinction between findings of fact based exclusively on personal judicial experience and judicial perceptions of applicable social context, and findings of fact based on evidence viewed through the lens of personal judicial experience and social context. The latter is proper; the former is not.

[127] The proper use of personal experience and social context can be demonstrated by reference to Ms. Hamilton's evidence concerning the motive for her crime. She testified that she acted out of dire financial need. The fact that a crime was committed for financial gain can, in some circumstances, mitigate personal responsibility, and, in different circumstances, it can increase personal responsibility. The trial judge was required to determine what weight should be given on sentencing to Ms. Hamilton's admitted financial motive for committing the crime. In making that assessment, he was entitled to put her statement as to her motive in its proper context by recognizing, based on his experiences and the operative social context, that individuals in the circumstances of Ms. Hamilton often find themselves in very real financial need for reasons that include societal factors, like racial and gender bias, over which those individuals have no control. Used in this way, the tools of personal judicial experience and social context help illuminate the evidence. This use can be contrasted with the trial judge's use of his experience in other cases to make the specific finding of fact that these respondents were conscripted – that is, compelled by drug overseers to engage in this criminal activity – when there was no evidence as to how the respondents came to be involved.

[128] The limits on judicial fact-finding based on prior judicial experience and social context are necessary for at least two reasons. First, fact-finding based on a judge's personal experience can interfere with the effective operation of the adversary process. It is difficult, if not impossible, to know, much less explore or challenge, a trial judge's perceptions based on prior judicial experiences or his or her appreciation of the social issues which form part of the context of the proceedings. Second, fact-finding based on generalities developed out of personal past experience can amount to fact-finding based on stereotyping. That risk is evident in this case. The trial judge appears to have viewed all poor black single women who import cocaine into Canada from Jamaica as essentially sharing the same characteristics. These characteristics describe individuals who, because of their difficult circumstances, have virtually no control over their own lives and turn to crime because they are unable to otherwise provide for their children. While this may be an apt description of some of the individuals who turn to cocaine importing, it is stereotyping to assume that all single black women who import cocaine into Canada fit this description.

(ii) The relevance of systemic racial and gender bias

[129] The trial judge took findings of fact for which I have found there was no evidence and combined them with what he described as the "systemic and background factors" of the respondents to

mitigate the length of their sentences (para. 224) and to justify conditional sentences (para. 234). The phrase "systemic and background factors" referred to the trial judge's findings that the respondents were the subjects of societal racial and gender bias. The combined impact of the trial judge's specific findings of fact and his use of racial and gender bias is evident in para. 224:

In my view, systemic and background factors, identified in this case…should logically be relevant to mitigate the penal consequences for cocaine importers conscripted as couriers.

[130] In making his findings with respect to the "systemic and background factors", the trial judge relied on his personal observations in sentencing cocaine couriers and conclusions drawn from the material he produced during the sentencing inquiry. He reasoned that institutional racism and gender bias contributed to the respondents' poverty and their inability to escape that poverty through legitimate means. He further held that those circumstances made the respondents ideal targets for those seeking individuals willing to take the risk of bringing cocaine into Canada for relatively minimal compensation. Finally, the trial judge held that single black women were over-represented among those who acted as cocaine couriers. This line of reasoning led him to hold at para. 193:

The cocaine importation proscription has a differential impact on African Canadians in large measure because of social and economic inequalities.

[131] I can accept the trial judge's observation that in his jurisdiction black women make up a higher percentage of the population charged with cocaine importation from Jamaica than do black women in the general Canadian population. At trial, Crown counsel conceded this kind of over-representation. I also have no difficulty accepting the self-evident observation that individuals in difficult economic circumstances with few prospects for improvement make ideal targets for criminals seeking individuals willing to bring cocaine into Canada from Jamaica for relatively little compensation. Nor do I think that anyone can take issue with the general assertion that racial and gender bias can contribute to the economic plight of individuals like the respondents. That is, of course, not to say that racial and gender bias must be taken as accounting for the poverty of all single black women who find themselves in the same position as the respondents. Each case must be assessed individually on the basis of the material placed before the sentencing court.

[132] However, it is the criminal drug overseer who chooses couriers from among those whose economic condition makes them possible candidates. To the extent that economic circumstances makes one a potential courier, the pool of potential couriers is obviously large and not limited to blacks or women. If black women are over-represented among those who courier drugs into Canada from Jamaica, it must be because the criminal drug overseers choose individuals fitting that description in a disproportionate number. There was no suggestion in the material adduced before the trial judge that black females are over-represented among those hired to courier drugs from places other than Jamaica, or among those hired to smuggle other forms of contraband into Canada. This suggests to me that the obvious explanation for the over-representation of black females among cocaine couriers is the correct explanation. Jamaica is a predominantly black country. Presumably, those selecting couriers are more likely to select individuals with some connection to Jamaica and some plausible, innocent explanation to offer for their trip to Jamaica because experience tells them that these individuals have a better chance of avoiding detection than would other individuals whose economic circumstances would make them equally willing to take the chance. The direct cause of over-representation of black women

among drug couriers is found in the selection processes of those who hire them.

[133] The fact that an offender is a member of a group that has historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence. Lower sentences predicated on nothing more than membership in a disadvantaged group further neither the principles of sentencing, nor the goals of equality.

[134] A sentencing judge is, however, required to take into account all factors that are germane to the gravity of the offence and the personal culpability of the offender. That inquiry can encompass systemic racial and gender bias. As the court explained in *R. v. Borde*, *supra*, at p. 236:

However, the principles that are generally applicable to all offenders, including African-Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence.…

[135] Reference to factors that may "have played a role in the commission of the offence" encompasses a broad range of potential considerations. Those factors include any explanation for the offender's commission of the crime. If racial and gender bias suffered by the offender helps explain why the offender committed the crime, then those factors can be said to have "played a role in the commission of the offence".

[136] It is explicit in the case of Ms. Hamilton and implicit in the case of Ms. Mason that their impoverished circumstances and poor economic prospects played an important role in their decision to commit these crimes. The reason for their desperate financial circumstances was relevant on sentencing. On the evidence, the respondents were not poor because they did not want to work, were irresponsible or because they had led a lifestyle beyond their means. The respondents were in dire economic circumstances for two main reasons. First, they assumed the responsibilities of parenthood at a very early age thereby substantially limiting their economic and educational prospects. Second, at an almost equally young age, they were burdened with the full responsibility for raising young children when the fathers of their children abandoned them.

[137] The respondents did not try to forge any evidentiary connection between institutional racial and gender inequality and their particular circumstances. There was no attempt to bring the generalizations set out in the material relied on by the trial judge home to the lives of these respondents. Absent that kind of evidence, the trial judge could not find that the respondents' difficult economic circumstances were the direct result of systemic racial and gender bias. In any event, I do not think it is particularly helpful or necessary to try to attribute the respondents' economic circumstances to systemic societal racial or gender bias. What is important for the purpose of sentencing is that the respondents' very difficult economic circumstances, the underlying causes of their crimes, are very real and are to a large extent the product of circumstances that are either beyond their control, or for which they cannot be faulted.

[138] As indicated earlier, an offender's explanation for a crime committed for money can enhance or mitigate personal culpability. The respondents' explanation for their crimes, heard by a judicial ear attuned to the realities of the lives of persons like the respondents, warranted some mitigation of the respondents' personal culpability.

[139] How should the respondents' dire economic circumstances be taken into consideration? Clearly, they do not affect the seriousness of the offence. The crime of importing cocaine is no less serious because the importer did it for reasons which attract empathy and mitigate personal culpability. Because factors which go to explain the reason for the offender's commission of the crime do not reduce the seriousness of the crime, those factors must be given less weight in cases like these where the seriousness of the offence is the pre-eminent consideration on sentencing. The same factors could be given more weight in cases involving less serious crimes where the personal responsibility of the offender takes on more significance.

[140] Even where the crime committed is very serious, however, factors going to personal culpability for the crime must still be considered. For the reasons outlined above, the circumstances which led the respondents to commit these crimes entitle them to some mitigation. It must, however, be stressed that consideration of the circumstances which led an offender to commit a crime is only part of the overall assessment that must be made in determining personal culpability for the purposes of imposing a sentence which complies with the proportionality principle. Our criminal law rejects a determinist theory of crime. The respondents had a choice to make and they made that choice knowing full well the harm that the choice could cause to the community. The economic circumstances of the respondents made their choice more understandable than it would have been in other circumstances, but it remains an informed choice to commit a very serious crime. The blunt fact is that a wide variety of societal ills – including, in some cases, racial and gender bias – are part of the causal soup that leads some individuals to commit crimes. If those ills are given prominence in assessing personal culpability, an individual's responsibility for his or her own actions will be lost.

[141] There is nothing unique or new in the approach to sentencing outlined above. Trial judges have always entertained submissions to the effect that an offender is basically a good person whose crime is the product of a combination of circumstances, some of which are beyond the offender's control or responsibility. Put in the language of proportionality, these arguments are directed at lessening the personal culpability of the individual offender. If the trial judge accepts such arguments, the sentence imposed will be less onerous than it would have been but for those arguments. As Durno J. put it in *R. v. Bennett*, *supra*, a case very much like these cases, at pp. 14-15:

The offender's background is always a relevant factor on sentencing. A sentence must be appropriate for both the offence and the offender. A person with a disadvantaged background, who has been subjected to systemic prejudices or racism, or was exposed to physical, sexual or emotional abuse, may receive a lower sentence than someone from a stable and peaceful background, where the offence is in some way linked to the background or systemic factors. The relevant factors in one person's background will be case specific. A single factor will rarely be determinative.

[142] Evidence of the respondents' economic circumstances and the causes of those circumstances were potentially relevant to sentencing in a second way. One of the purposes of sentencing is to get at the root causes of the criminal activity and where possible eliminate that cause. If the cause of criminal activity can be addressed in probation terms relating to things such as job training, the fact that the offender's economic circumstances are the result of factors beyond his or her control would offer support for the claim that the sentence should be tailored to include probationary terms which address the underlying causes of the criminal activity. In cases involving serious crimes like this one, those terms would usually follow some period of imprisonment. Counsel for Ms. Hamilton suggested

the kind of probation terms I have outlined above. None were imposed.

[143] For the reasons set out above, the trial judge erred in holding that systemic racial and gender bias justified conditional sentences. Those factors provided part of the context for the respondents' explanation for their commission of the crimes. That explanation could not detract from the seriousness of the crimes, the principal reason the proportionality principle usually requires incarceration of drug importers.

[144] The trial judge's imposition of conditional sentences is also inconsistent with existing jurisprudence, holding that conditional sentences will seldom be available for drug importation. If the trial judge accurately identified the prototypical drug courier, then on his analysis conditional sentences must become the norm for those caught couriering cocaine into Canada from Jamaica. That approach undermines the seriousness of the crimes and the harm done by those crimes to Canadian society, and it is in direct conflict with decisions from this court that were binding on the trial judge.

(iii) The imposition of conditional sentences and the fundamental purpose of sentencing

[145] Section 718 provides:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions.
…

[146] The imposition of conditional sentences for these offences is inconsistent with the fundamental purpose of sentencing in at least three ways. First, while conditional sentences derogate from the ability of the sentence to adequately denounce the conduct or deter others, the conditional sentences imposed here do nothing to advance the restorative objectives identified in s. 718 that are usually furthered by conditional sentences. They did not provide for reparation for the harm done to the community by the respondents and did not promote a sense of responsibility by the respondents for their conduct.

[147] Second, the imposition of conditional sentences for these offences goes hand in glove with the philosophy of drug overseers as described by the trial judge. The recruitment of young black poor women with no criminal records to carry cocaine into Canada from Jamaica could be encouraged by a sentencing policy that treats the very factors which make them attractive as couriers as justifying a non-custodial sentence. The number of persons who are prepared to take the significant physical risk associated with smuggling cocaine into Canada, particularly after ingesting it, can only be increased if the likely disposition is a conditional sentence. The conditional sentences imposed on these respondents can only reinforce in the minds of drug overseers the wisdom of their recruitment philosophy. In doing so, it increases the vulnerability of persons like the respondents. For these reasons, conditional sentences neither contribute to respect for the law, nor to the maintenance of "a just, peaceful and safe society".

[148] It was argued that the imposition of conditional sentences did promote respect for the law in that the conditional sentences could counter the legitimate belief among members of the black

community that blacks were treated unfairly and unnecessarily harshly by the criminal justice system. This argument assumes that the black community looks at the criminal justice system exclusively from the perspective of the offender. The black community, like the rest of Canada, knows only too well the harm caused by cocaine. The black perspective must include those who are the direct and indirect victims of the harm done by cocaine. Viewed from that perspective, I would not assume that members of the black community would regard the imposition of non-custodial sentences for those who import cocaine into their communities as a positive step towards racial equality in the criminal justice system.

[149] Third, the routine imposition of conditional sentences for offenders like the respondents who smuggle cocaine into Canada undermines significantly the possibility of gaining the cooperation of these persons in the investigation and arrest of higher-ups on the drug-distribution chain. It is generally accepted that the flow of cocaine into this country can be curtailed if the authorities can get at those who hire the couriers and drug distributors. The chance of avoiding jail is usually the best thing that the authorities have to offer drug couriers in exchange for their cooperation. That cooperation has always been recognized as a very important mitigating factor: e.g. see *R. v. H. (C.N.)*, *supra*. If couriers like the respondents can expect to receive conditional sentences, there is very little incentive for them to cooperate with the authorities in attempts to apprehend those who hired them.

(iv) The use of the purity-adjusted weight

[150] The trial judge adjusted the weight of the cocaine imported by the respondents downward to reflect the purity of that cocaine. He also referred to the purity-adjusted weight in interpreting the applicability of the ranges of sentences described in *Madden* and *Cunningham*. In the end, however, the trial judge found that those ranges were not applicable without regard to any downward adjustment of the weight to take into account the purity of the cocaine imported by the respondents. I agree with that conclusion, but will briefly address his observations on the use of the purity-adjusted weight.

[151] I agree with the trial judge that the purity of the cocaine imported, while usually not known to the courier and therefore irrelevant to personal culpability, can have some effect on the seriousness of the specific offence (para. 174). The purer the cocaine, the wider its potential distribution and therefore the greater the harm it may cause in the community. However, I do not think that the purity of the cocaine imported will be a particularly significant factor in assessing the seriousness of the offence. Certainly, there should be no mathematical-like reduction in the seriousness of the offence based on the exact purity of the cocaine. I see little difference, for the purposes of assessing the seriousness of the crime, between cocaine that is eighty per cent pure and cocaine that is ninety per cent pure.

[152] I also do not agree with the trial judge's tentative view (para. 176) that the range of sentencing referred to in *Madden* should be read as referring to the importation of nearly pure cocaine. The ranges set in *Madden* and *Cunningham* were based on weight. Purity was not a factor. In deciding whether a particular case fits within the *Madden* range or the *Cunningham* range, the relevant comparison is between the weights referred to in those cases and the weight of the cocaine imported in a particular case.

[153] In so holding, I do not suggest that the purity of the drug is irrelevant. If the weight of the

cocaine imported brings it within the *Madden* range, its purity will have some relevance to the determination of where in the range the sentence should fall. In cases where the purity is low and the weight near the bottom end of the "a kilogram more or less" amount referred to in *Madden*, the offence may fall outside of the *Madden* range entirely.

(v) Deportation as a consideration on sentencing

[154] In reviewing the mitigating factors applicable to Ms. Mason, the trial judge said at para. 233:

She is subject to automatic deportation, and, if sentenced to 2 years' imprisonment or more, is without a right of appeal.

[155] Ms. Mason did not face automatic deportation upon conviction. Her conviction, however, would make her "inadmissible" under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and could trigger steps resulting in her deportation. If Ms. Mason were to receive a sentence of more than two years and was ordered deported as a result of her conviction, one of the avenues by which she could challenge that deportation would be lost by virtue of the length of the sentence imposed: *Immigration and Refugee Protection Act*, s. 64(2).

[156] The case law referable to the relevance of deportation in fixing an appropriate sentence addresses two very different situations. In the first situation, it is acknowledged that imprisonment is the only appropriate sentence and that deportation from Canada will inevitably follow upon completion of the sentence. In the second situation, it is argued that a certain kind of sentence should be imposed to avoid the risk of deportation from Canada. In the first situation, the certainty of deportation may justify some reduction in the term of imprisonment for purely pragmatic reasons: *R. v. Critton*, [2002] O.J. No. 2594 at paras. 77-86 (Sup. Ct.). In the second situation, the risk of deportation cannot justify a sentence which is inconsistent with the fundamental purpose and the principles of sentencing identified in the *Criminal Code*. The sentencing process cannot be used to circumvent the provisions and policies of the *Immigration and Refugee Act*. As indicated above, however, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender: *R. v. Melo* (1975), 26 C.C.C. (2d) 510 at 516 (Ont. C.A.).

[157] Ms. Mason does not fit exactly within either category of case. She faces the risk of deportation regardless of the sentence imposed upon her. That risk arises from her conviction and there is no evidence that the length or type of sentence imposed will affect the risk of deportation. I also agree with Crown counsel's submission that the risk of deportation cannot be quantified on this record. It is clear, however, that if Ms. Mason were to receive a sentence of two years and if she was ordered deported, her ability to challenge that deportation order would be adversely affected by the length of the sentence.

[158] I would not characterize the loss of a potential remedy against a deportation order that might be made a mitigating factor on sentence. I do think, however, that in a case like Ms. Mason's there is room for consideration of the potentially added risk of deportation should the sentence be two years or more. If a trial judge were to decide that a sentence at or near two years was the appropriate sentence

in all of the circumstances for Ms. Mason, the trial judge could look at the deportation consequences for Ms. Mason of imposing a sentence of two years less a day as opposed to a sentence of two years. I see this as an example of the human face of the sentencing process. If the future prospects of an offender in the circumstances of Ms. Mason can be assisted or improved by imposing a sentence of two years less a day rather than two years, it is entirely in keeping with the principles and objectives of sentencing to impose the shorter sentence. While the assistance afforded to someone like Ms. Mason by the imposition of a sentence of two years less a day rather than two years may be relatively small, there is no countervailing negative impact on broader societal interests occasioned by the imposition of that sentence: see *R. v. Lacroix*, [2003] O.J. 2032 (C.A.).

(vi) The test case quality of the proceedings and the delay in the completion of the proceedings

[159] After concluding that conditional sentences were appropriate, the trial judge went on to hold at para. 234 that if the case law limited conditional sentences for drug importation to exceptional or extenuating circumstances, conditional sentences were justified in these cases because of

the highly unusual circumstances of the excessive delay between plea and sentencing and the test case features of these cases.…

[160] These were not test cases. They did not arise to test the criminality of the offenders' conduct or the constitutionality of the applicable legislation.

[161] I also cannot agree that there was "excessive delay" in these proceedings. The sentencing proceedings were lengthy primarily because of the expert evidence that the defence chose to lead and the accommodation of defence counsel's schedule in the hearing of that evidence. The proceedings were also lengthened by the issues raised by the trial judge and embraced by the respondents. Given the nature and number of these issues, the time needed to complete the sentencing proceedings was not inordinate and cannot be characterized as "excessive delay".

[162] In considering what effect, if any, to give to the length of the proceedings, it is also important to observe that none of the delay is attributable to the Crown.

[163] The fact that the respondents were on bail pending sentence and subject to significant restrictions on their liberties is a factor on sentencing. However, there is nothing in the nature of these proceedings or the time needed to complete them which justifies a conditional sentence.

VIII

<u>The appropriate sentence</u>

[164] Where a trial judge commits an error in principle, the sentence imposed is no longer entitled to deference and it falls to the appellate court to impose the sentence it thinks fit: *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 at 103 (Ont. C.A.). Applying the analysis described earlier in these reasons, and bearing in mind the gravity of these offences and the circumstances tending to mitigate the personal culpability of the respondents, I think a term of imprisonment of twenty months would have been an appropriate sentence for Ms. Hamilton and a term of imprisonment of two years less a day would have

been an appropriate sentence for Ms. Mason.

[165] The ultimate question is, however, should these respondents be sent to jail now? They have served close to seventeen months of their conditional sentences. There is no suggestion that they have not complied with the terms of those sentences or that they have committed any further offences. This court has recognized both the need to give offenders credit for conditional sentences being served pending appeal and the added hardship occasioned by imposing sentences of imprisonment on appeal. The hardship is readily apparent in these cases. Had the respondents received the appropriate sentences at trial, they would have been released from custody on parole many months ago, and this sad episode in their lives would have been a bad memory by now.

[166] This was a significant appeal for the administration of justice. The decision of the trial judge raised important issues that required the attention of this court. Appeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event. The administration of justice would not be served by incarcerating the respondents for a few months at this time. They have served significant, albeit, inadequate sentences. To impose now, what would have been a fit sentence at trial, would work an undue hardship on the respondents. The administration of justice is best served by allowing the respondents to complete their conditional sentences.

[167] I would grant leave to appeal and dismiss the appeals.

RELEASED: "DOC" "AUG 3 2004"

"Doherty J.A."

"I agree Dennis O'Connor A.C.J.O."

"I agree E.E. Gillese J.A."

---

[1] This court had held that similar evidence given by the same expert was properly rejected in *R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321.

[2] Purity adjusted weight is determined by multiplying the weight of the drug by the purity stated as a percentage.

[3] S.C. 1995, c. 22.

[4] Allan Manson, *The Law of Sentencing*, (Toronto: Irwin Law, 2001) at 95.

[5] In *R. v. Spencer* (C39850), heard with these appeals, there was evidence from a family counsellor employed by the Jamaican Canadian Association. She testified that the black community was a diverse group with a broad range of cultures and beliefs. She also testified that to her knowledge, the Jamaican community did not have a different view about sentencing and personal responsibility for criminal conduct than did other Canadians.

[6] Counsel for Ms. Hamilton said his client was trying "to gain some extra money".