The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 3 of 2018

B E T W E E N:

J.R.

Appellant

- v -

THE QUEEN

Respondent

Before:	**Baker, President**
	Bell, JA
2	**Smellie, JA**

Appearances:	Charles Richardson, Compass Law Chambers, for the Appellant; Cindy Clarke, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **21 June 2018**
Date of Judgment: **14 August 2018**

J U D G M E N T

Conspiracy to import fentanyl – level of sentence – discount for assistance – section 27 Misuse of Drugs Act 1972 – further discount on appeal in exceptional cases only - whether to adjourn sentence when intention to give evidence for Crown – meaning of basic sentence.

BAKER, P

Introduction

1. J.R. ("the Appellant") is now aged 27. On 20 July 2017, following her earlier plea of guilty to conspiracy to import a controlled drug, namely fentanyl, contrary to

section 4(3) of the Misuse of Drugs Act 1972, as read with section 230(1) of the Criminal Code, she was sentenced to seven years' imprisonment. At the March sitting of this Court we granted the Appellant leave to appeal out of time and directed that we required the assistance of the Crown on the practice of giving a defendant credit for assisting the police and the prosecution both in this and other jurisdictions. We have now had the benefit of that assistance.

The Facts

2. On 15 December 2016 the Appellant arrived in Bermuda on a commercial flight from Toronto. Prior to leaving Canada she had ingested 45 pellets of fentanyl. She was accompanied by a man called Craig Lawrence. They cleared H.M. Customs and were met by a male who informed them that his car was full and gave them money for a taxi to take them to a guest house. No accommodation was available there and the male who had met them at the airport then took them to the Hamilton Princess Hotel where they were booked in and remained until 20 December. On that day, following a 911 emergency call, the Appellant was found in an unresponsive state and taken to the King Edward VII Memorial Hospital, where she vomited a pellet of fentanyl that had burst. She told the medical staff that she had swallowed 45 pellets of cocaine and had excreted the other 44. None of the other 44, which she said had been handed to Lawrence, were recovered. She remained in hospital for nine days. Following her release she was arrested and interviewed.

3. During the interview under caution on 31 December 2016 the Appellant said she had been recruited by Lawrence and another person in Canada to travel to Bermuda to take out US$10,000.00, as this was the legal amount. She said that on the night before her travel a female and Lawrence collected her and took her to a motel where they met some other people and had some drinks. After that, three of them, including Lawrence, took her into a bathroom and gave her some pellets which they told her she had to swallow to take them to Bermuda. Her initial reaction was not to, but Lawrence told her she had to if she wanted to go

back home. She reluctantly did so, at first attempt vomiting them but then being forced to swallow them with water. She said she did not know what was inside the pellets but was told "it was just marijuana."

The Sentence

4. Acting Justice Wolffe was faced with a difficult sentencing exercise. Following submissions on sentence, the Appellant was asked if she had anything to say and she made a number of points, expressing remorse at participating in an event into which she said that she had been manipulated. Fentanyl was a drug that was new to her and following some research she now appreciated just how dangerous it was and that she was lucky to have survived. She was concerned about the damage the other 44 pellets could do to others, which was why she had felt it right to disclose their existence. She was scared for her own safety and that of her family. She had paid a high price but was keen to do all that she could to rectify the damage that she had done. The judge was obviously concerned about the element of pressure that nevertheless fell well short of a defence of duress, because he asked her to enlarge on what made her fearful when Lawrence told her she could not go home unless she swallowed the tablets. She replied that there were five other males, whom she did not know, surrounding her at the time, and that she felt very intimidated. Asked why she did not go to the authorities on arrival in Bermuda, she said she was too scared and was told it was marijuana inside the pellets anyway.

5. The judge in passing sentence noted the plea of guilty and the Appellant's previous good character and remorse. He said that fentanyl was so potent as to require a higher class than heroin and cocaine and that a clear message needed to go out to those who might be thinking of supplying fentanyl. He took as his starting point the case of *Teartia Smith* [2005] Bda. L.R. 13 in which it was said that the range for importing 339.6 gms of diamorphine was 18-21 years and 14 years was reduced to 9 years for the defendant's cooperation. He said the Appellant was entitled to a normal discount for what he described as "solid

mitigation" and a further discount for her "diminished responsibility" which he did not accept should be as high as one third.

6. I think in referring to diminished responsibility the judge had in mind paragraph 61 of the psychiatric report of Dr Seb Henagulph in which he said that on account of her mental state at the material time the Appellant "did indeed have diminished responsibility for her actions as per section 55(g)(iii) of the Criminal Code Act 1907, and this may be considered as mitigating circumstances when considering sentencing." From the starting point, mitigation and diminished responsibility took the judge to 10-12 years. He then applied a section 27E discount of 35% which took him to 6-8 years and imposed a sentence of 7 years. Section 27E of the Misuse of Drugs Act provides for credit to be given for assistance to the investigation and prosecution of any offender. Fentanyl is, surprisingly, not a drug listed in schedule 5 as requiring a mandatory uplift of 50% to the basic sentence. This oversight no doubt exists by reason of fentanyl's recent emergence on the dangerous drugs scene, but the omission is clearly one that should be rectified.

The Appeal

7. The reason why leave to appeal was given was to consider whether the Appellant was given sufficient credit for her assistance and the appropriate procedure for granting it. We were told that the practice in Bermuda is that where a defendant gives assistance to the police and indicates that he is prepared to give evidence for the Crown against another person involved in the same criminal activity, he is given a discount when he is sentenced and a further discount on appeal after he has given evidence against that other person. The prosecution did not object to the Appellant appealing out of time and submitted that the appeal should be allowed and that under the authorities the Appellant now fell into a category in which a discount of between 50% and 65% should be given resulting in a sentence of between three years and nine months and five and a half years which should be substituted for that of seven years.

The Chronology

8. It is necessary to recount the chronology of events as they unfolded. The importation occurred on 15 December 2016 and the Appellant was arrested on 29 December 2016. She was interviewed under caution on 31 December 2016 over 51 minutes and gave the police a full and apparently frank account of what had occurred since the start of her involvement in Canada. On 13 February 2017 she pleaded guilty in the Supreme Court. On 16 February 2017 she made a witness statement with a view to giving evidence against her co-defendant Lawrence. On 4 April 2017 she was interviewed by members of the Royal Canadian Mounted Police ("the RCMP") in the Commercial Organized Economic Crime office of the Bermuda Police Service ("the BPS"). They were interested in the Canadian end of the conspiracy and the individuals involved there. The Appellant was frank and helpful. On 20 July 2017 the Appellant appeared before Acting Justice Wolffe and was sentenced. For reasons that are not apparent, the BPS never told the prosecution that the Appellant had been assisting the Canadian police and the judge appears not to have been made aware of this. Six days later on 26 July 2017 the Appellant was again interviewed by the RCMP. This time a member of the BPS, DC Swainson, was present. Immediately before the interview she participated in what is described as a photo lineup, no doubt for identification purposes in Canada. The reason for the further interview was that the RCMP were still conducting their criminal investigation into conspiracy to export a controlled substance and criminal negligence causing bodily harm. The RCMP were primarily concerned with description of individuals. Otherwise the interview added little to the previous one. The next relevant event was the trial of the Appellant's co-defendant Lawrence and a man called Martin who was also alleged to have been involved. That took place in January and February 2018 and the Appellant gave evidence for the prosecution in accordance with her witness statement. The defendants were both acquitted but, we were told, not because of any failure on the part of the Appellant to give evidence in accordance with what she had told the police.

The Law

9. Both the Appellant and the prosecution submit that the Appellant is entitled to a further discount of at least 15% for having given evidence at the trial of Lawrence and Martin in accordance with the practice in Bermuda. The first point to be made is that all relevant matters are ordinarily taken into account at the time of sentencing. Should an appeal be necessary it must be brought within the time prescribed by the Rules (21 days – see rule 3/3). Whilst the Court has power to enlarge the time it will only do so for good reason. There is no automatic right for a sentence to be reconsidered or adjusted long after it has been imposed.

10. Next it is necessary to look at the law on giving a defendant credit for providing assistance and the procedure for applying it. Section 55(2)(g)(v) of the Criminal Code requires the Court to have regard to "any assistance the offender gave to the police in the investigation of the offence or other offences". This is one of a number of specified mitigating circumstances. Additionally section 55(2)(g)(vi) requires the Court to have regard to "an undertaking given by the offender to co-operate with any public authority in a proceeding about an offence, including a confiscation proceeding." There is a separate provision for offences under the Misuse of Drugs Act 1972. Section 27E of that Act provides:

> *"**Sentencing discounts for assistance***
> *27E Where a person charged with an offence under this Act gives assistance to the investigation and prosecution of any offender—*
>
> *(a) in the same case in which he is charged, such person may be rewarded with a discount not exceeding fifty per cent of the basic sentence; and*
>
> *(b) in a case other than that for which he has been charged, the person may be rewarded with a discount not exceeding seventy-five per cent of the basic sentence."*

Thus the position is that in respect of all offences there is a general provision requiring the Court to pay regard to assistance given by the defendant to the

investigation of the offence or other offences, but in respect of drug offences there is a discretion to take it into account, provided it relates to the investigation *and prosecution*, but with a ceiling of 50% or 75% depending on whether the case fall within (a) or (b). The extent of the discount depends very much on the level and value of the assistance, the highest levels being reserved for what have been described in the authorities as "supergrass" cases.

11. The operation of section 27E was considered in *Miller v Davies* [2014] Bda LR 15.That was an appeal from the Magistrates' Court to the Supreme Court by the prosecution. The defendant pleaded guilty to importing cannabis resin. She was sentenced to 6 months' imprisonment having been given a 50% discount for co-operation with the police. The Chief Justice allowed the appeal, increasing the sentence to 8 months by reducing the discount to just under 35%. The defendant had assisted the police to investigate another offender in relation to the matter with which she was charged but she had neither assisted the police to prosecute the other person nor given evidence against them at the time of sentence. Accordingly the criteria in section 27E were not met and credit for co-operation could only be given as a general mitigating factor under section 55(2)(g).

12. The Chief Justice said this at paragraph 29:

> *"It flows from this analysis that where an offender wishes to obtain a significant discount on the basis that his assistance has resulted in the arrest, prosecution and/or conviction of another person, or some equivalent substantial public benefit, the route to achieving the appropriate discount may well often be by way of adducing fresh evidence on appeal. The proof of the assistance pudding will always be in the eating, and the evidential pudding will rarely be ready for consumption until after the assisting defendant has himself been convicted and initially sentenced."*

13. These words have been interpreted to mean that as a matter of general practice where a defendant has given assistance to the police or prosecution implicating others, whether in the same or other criminal conduct, any discount on sentence should be awarded in two stages, the first, at the point of sentence, taking into account the information and assistance he has given and the second on appeal after he has given evidence for the prosecution at the trial of another or others. It is necessary to examine whether this is an appropriate practice.

14. The only other recent Bermuda authority to which we were referred is *K v R* [2017] Bda LR70. That case involved assistance given by an offender after he had been sentenced. He gave the police information that led to the recovery of a firearm, but the firearm was unrelated to the case for which the offender had been convicted. This Court allowed his appeal out of time and reduced his sentence. Clarke JA in a judgment, with which Kawaley AJA and I agreed, said:

> *"Generally speaking it is not appropriate to give an appellant, such as the present one, a discount over and above that which is appropriate in the light of the information or evidence that he has provided simply on the grounds that this may encourage other persons to provide information. Those who provide information should receive a discount appropriate to the information that they have provided – no more and no less. The fact that such a discount is available is of itself an incentive to persons other than the appellant to do so.*
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> *That said, the present case may be regarded as something of a development of the usual approach to discounts. Heretofore they have in practice been confined to those who have provided assistance towards the prosecution of criminals as opposed to those who have identified the whereabouts of guns and ammunition. In our view it is appropriate for this appellant to be afforded some discount for the revelation of the whereabouts of the pistol in this case and, also, some further discount because he has, in effect, secured at least two others to offer assistance, with the possibility of several more to follow. He has, therefore, done more than simply provide information."*

15. *K v R* was not a drug case and therefore section 27E did not apply. The Court was concerned with assistance to the police on a broader basis because the recovery of guns and ammunition is of assistance in the investigation of offences. The Court was there exercising its common law power to give credit for assistance, given statutory recognition by section 55(2)(g)(v). This power would have been exercisable, had the assistance then been given, at the point of sentence, or on a subsequent appeal, as in the event it was.

16. What both *Miller v Davies* and *K v R* illustrate is that there are circumstances in which an appellant's sentence may be varied on appeal, if appropriate out of time, in consequence of assistance given to the authorities. It is, however a jurisdiction that in our judgment should be sparingly exercised. We would not go as far as Kawaley CJ in *Miller v Davies* to say that generally a defendant who implicates a co-defendant should not get the full discount until he has given evidence against him. The *ratio* in *Miller v Davies* was that the sentencing judge gave the defendant an unjustified discount and in consequence the Crown's appeal was allowed as the sentence was manifestly inadequate.

17. In principle a defendant should be sentenced on the basis of all relevant information at the time of sentence. The purpose of an appeal is to correct errors, not to let the defendant or the prosecution have a second bite at the cherry. An appellate court will only interfere if there has been some error of principle or the sentence is manifestly excessive or inadequate. Fresh evidence is not ordinarily admissible if it was available at the time of sentence. The particular issue that falls for decision in the present case is how to give credit to a defendant who has assisted the police in implicating a co-defendant, indicating that he will give evidence at the co-defendant's subsequent trial. There are three possible options. The first is to delay passing sentence until after the subsequent trial. The second is to pass sentence in the ordinary way following the plea of guilty, giving the defendant credit for his assistance and assuming that he will keep his word and

give evidence at the subsequent trial. The third is to divide the credit, giving part at the time of sentence and the remainder following the trial if he keeps his word and gives evidence against his co-defendant.

18. There are disadvantages to each option. The case for the third option is the construction of Section 27E of the Misuse of Drugs Act 1972 favoured by Kawaley CJ in *Miller v Davies*. This arises because the section uses the words "assistance to the investigation *and prosecution"* as against section 55(2)(g)(v) which refers only to assistance. On the basis that "*and prosecution"* must add something to the broad words "assistance in the investigation", the Chief Justice concluded that full credit could not be given until evidence had been given at the trial. I doubt if the draughtsman intended to create this distinction with section 55(2)(g)(v). There could be reasons, quite unconnected with the defendant, why the co-defendant's trial does not take place. There is another important distinction between section 55(2) and section 27E; the former is mandatory, the latter discretionary. Thus assistance in the investigation must in all cases be treated as mitigation. In drug cases, any assistance must relate not just to the investigation generally but also to the prosecution of an offender. In my view the words "investigation and prosecution of any offender" should be read together. But in order to qualify for the whole of the section 27E discount it may not, depending on the circumstances, be necessary to go so far as giving oral evidence at the trial. As in the present case the making of a witness statement would ordinarily be sufficient to qualify as assistance with the investigation and prosecution. It is notable that in making the statement the Appellant gave the usual warranty that its contents were true and that she would be liable to prosecution if anything in it was not true. The judge in passing sentence has to weigh up the quality and quantity of any assistance provided by a defendant. In the present case the Appellant had provided a witness statement containing the usual warranty and there was no reason to suppose that she would not give evidence in accordance with its contents at the subsequent trial of Lawrence, and in the event she did. In my judgment that was plainly assistance to the

investigation and prosecution of Lawrence. The judge plainly thought so because he applied section 27E. No suggestion was made to the Appellant at the hearing that she would receive a further discount after giving evidence.

19. Ordinarily any assistance by a defendant will be given before rather than after sentence. That is particularly so where the assistance relates to the offence with which the defendant is charged. The Court then faces a dilemma. Should the defendant be sentenced there and then or should sentence be deferred until the trial of others has been completed? It is obviously desirable, where practicable, that all those involved in the same criminality should be sentenced at the same time when the judge has a complete picture of their relative culpability. There is, however, a problem when a defendant who has pleaded guilty is to give evidence at the trial of another or others, as he is open to the allegation that he has an incentive to give false evidence. He is likely to be cross-examined on this basis. It is true that a similar allegation may also be made against an accomplice who has already been sentenced, but where he has nothing further to gain the allegation is likely to carry less weight.

Other Jurisdictions

20. It is helpful to look at the practice of giving discounts for assistance and how it is applied in other jurisdictions. As Kawaley CJ pointed out in *Miller v Davies* at paragraph 25, there is now a very different statutory scheme in England and Wales from the common law and statutory position in Bermuda - see sections 73-75A of the Serious Organised Crime and Police Act 2005. But the type of assistance that can be rewarded and the amount of the discount are not restricted. It would be quite exceptional for the discount to exceed 75% and high levels of discount are reserved for supergrass cases. Whether to sentence a defendant before or after he gives evidence for the Crown is in the discretion of the judge.

21. In Australia there is a statutory scheme for reduction of sentence for co-operation with law enforcement agencies – see Crimes Act 1914. If the promised co-operation is refused the Director of Public Prosecutions may appeal against the inadequacy of the reduced sentence.

22. In Canada there is statutory mitigation like that of the Criminal Code in Bermuda. It was observed by the Court of Appeal for Saskatchewan in *R v [S.B.], [C.J.], [T.D.], and [R.M.]* 1994 CanL11 3881 (SK CA) that "Insofar as an accused is prepared to implicate himself further and solve outstanding crimes there is both a saving to the public purse and one more indicium the person is prepared to leave crime behind." This illustrates the link between assistance to the authorities and the plea of guilty and remorse.

23. In Jamaica the position is governed by The Plea Negotiations and Agreements Act 2017. The court has a discretion to impose a lesser sentence than otherwise in the light of assistance of a broad description. There is a list of factors the court is required to take into account. There is provision for post sentence review by the sentencing judge on a reference by the prosecutor and the sentence can be varied up or down.

24. In Cayman there is no statutory provision, but the preferred course where one defendant has pleaded guilty and is to give evidence for the Crown is to defer sentencing until the conclusion of all the proceedings in the case, as this allows the court to assess all the circumstances of the offence and the value of his evidence for the purposes of mitigation - see Smellie J. in *Campbell v R.* 1997 CILR Notes -15 citing *R v Palmer* (1994) 99 Cr.App.R.83. As in England and Wales there is, however, plainly a discretion and the Court has to balance the risk of an allegation that a defendant's evidence is tainted by the desire to reduce his sentence against the need to know the true value of his assistance. See *Burrell and Suberan v R* 2012 (1) CILR Note 13.

25. In Bermuda the only statutory provisions relating to credit for assistance are the general provisions in section 55 of the Code to treat assistance as a mitigating factor, and the more specific provision relating to drug offences in section 27E of the Misuse of Drugs Act 1972. The practice of dividing the discount for giving assistance into two parts, the first at the time of sentence and the second on appeal after evidence has been given against a co-defendant seems to have arisen following the observations of Kawaley CJ in *Miller v Davies.* For the reasons I have given it is not a course that is required by the Misuse of Drugs Act or adopted, as far as counsel's researches have shown, in any other jurisdiction, and is not one that should ordinarily be followed. As indicated in paragraph 17, the purpose of an appeal is to correct errors, and not to exercise the function of the sentencing judge. At the point of sentence the judge has to take into account all relevant factors known at that time. If the offender is to give evidence against a co-defendant or someone else involved in the same criminality there are two courses open. Either the judge must past sentence there and then or he must defer sentence until the trial of the other or others is concluded. He has a discretion to exercise. In doing so he will need to take all relevant factors into account including the nature of the evidence that he is likely to give, the need to have a clear picture of the relative responsibility of all those involved in the criminality, how soon the outstanding trial is likely to take place, whether the defendant had made a witness statement and the danger of an allegation that his evidence is tailored to achieve a more lenient sentence. In *R v Sinclair, The Times* 18 April 1989, CA. O'Connor L.J. said it was undesirable to say what must be done in every case because circumstances are so infinitely variable, although in England and Wales the practice has been generally to defer sentence.

26. Where the discretion is exercised to sentence there and then, the judge will have to weigh up the value of the defendant's assistance and his proposed evidence on the assumption that he gives it in accordance with his witness statement. In *Osborne v Delgado* Criminal Appeal No 13 of 1991 the defendant misled the sentencing judge into believing that he would be willing to give evidence against

other accused. At their subsequent trial he admitted that his cooperation with the police was feigned in order to get a lesser sentence and that his witness statements to the police were untrue. Roberts P saw no reason why in a clear case the reduction in sentence obtained by the defendant's misconduct should not be restored on appeal, although he could not be punished merely for misleading the court. He distinguished *R v Stone* (1970) 54 Cr. App. R. 364 on the ground that at the time when it was decided the Crown had no right of appeal in England.

The Level of Discount

27. It remains to consider the appropriate level of discount for assistance. In *Carrie Spencer v The Queen* Criminal Appeal No 13 of 1988 this Court said:

> *"A number of cases have established that, where an accused person can properly be described as a "supergrass," a discount of 50% to 75% may properly be given. Such a discount ought only, however, to be allowed when an accused has given help, or has adduced evidence, in relation to a number of offences other than that with which he was himself charged. (Such an allowance would, for example, reduce a sentence of 20 years to about 5 to 10 years).*
>
> *Where an accused person has been of assistance to the police and has given evidence only in relation to the same offences as those with which he has been charged, a discount of something like 30% to 50% would be appropriate. (This would reduce a sentence of 20 years to about 10 to 14 years)."*

28. Roberts P in *Brown v The Queen* Criminal Appeal No 4. Of 1994 reiterated the levels of discount stated in *Spencer*, but added that it was important to note that in all the reported cases in which a discount has been granted, the person who benefits from the discount has either given evidence himself, or has provided information as a result of which others have been prosecuted. These levels of

discount have now been given statutory force in relation to offences under the Misuse of Drugs Act 1972, albeit with upper limits of 75% and 50%.

29. Section 27E requires the Court to reward the Appellant with a discount of the basic sentence. It is therefore necessary to identify the basic sentence. Kawaley C.J. said at paragraph 24 in *Miller v Davies:*

> *"I would also adopt the view of the English Court of Appeal in R v Sehitoglu and Ozakan [1998] 1 Cr. App. R.(S) 89 to the effect that the correct approach is to determine a global discount taking into account both the guilty plea and any relevant assistance given to the authorities. This rule of sentencing practice was summarised by the learned editors of Archbold 2010 at paragraph 5-95 as follows:*
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> > *"….the sentencer should determine the final sentence by calculating a single discount taking into account all the relevant factors, including the plea of guilty and the assistance given to the authorities.""*

30. In *Sehitoglu* counsel had submitted that the starting figure should be established by deciding what would have been the appropriate sentence after taking into account all the other mitigation including any plea of guilty. This was rejected by the Court of Appeal as being contrary to what Lord Lane CJ had said in *R v King* (1985) 7 Cr. App. R. (S) 227. Forbes J giving the judgment of the court said that the starting figure should be established by deciding what would have been the appropriate sentence had the matter been contested. As he pointed out, invariably in these cases the offence or offences are admitted and the defendant has pleaded guilty.

31. In the present case the judge gave the Appellant a discount of 35% under section 27E, having already discounted from a starting point of 18-21 years for the plea of guilty and the other mitigating circumstances described. That approach does not accord with the English practice adopted by the Chief Justice in *Miller v*

Davies. Section 27 contains other references to basic sentence which I think make its meaning clear. Section 27A provides for increased penalty zones with higher penalties for certain offences committed within those zones. The Court is required first to determine the sentence (the basic sentence) in accordance with ordinary principles and then an uplift must be added. I think it is clear that determining the sentence in accordance with ordinary principles means deciding what sentence would have been after taking into account all the aggravating and mitigating circumstances applicable. In other words, what the sentence would have been absent the uplift. Under section 27B where the drug is prescribed under schedule 5 of the Act the Court is required to add 50% to the basic sentence. This was explained in *R* v *Brown* Crim. App. No 9 of 2016 and recently confirmed in *R v Swan* Crim. App No 10 of 2017. In my judgment the phrase basic sentence must have the same meaning in each of sections 27A, B and E and that meaning is made clear in section 27A. Accordingly the judge was correct in his approach. The discount had to been given from the basic sentence and not from a sentence that had already been discounted for other mitigation.

32. The Appellant gave considerable assistance in respect of the offence with which she was involved but there was no evidence that she gave assistance with regard to any other offences. We have been provided with transcripts of two interviews with the RCMP. The sentencing judge had neither of these and he should have been provided with the first one as the interview took place some months before sentence. Where the fault lies is unclear but the result is that the judge was unaware of the extent to which the Appellant had assisted with regard to matters relating to the importation of December 2016 and the others who were involved. Bearing in mind these interviews and the Appellant's witness statement, her undertaking to give evidence in the trial of her co-defendant and another she was entitled to a discount at the upper end of the section 27E(a) level i.e. approaching 50%. I do not accept that she falls into the supergrass category. In order to do so it would be necessary for the court to have clear evidence of the nature of the assistance provided and the offences to which it related. We made

it clear in March that, if it existed, such evidence was required from the Canadian authorities but it has not been forthcoming. All that we have been told is that they would not assist. Nothing more.

Other Mitigation

33. The Appellant pleaded guilty at the first opportunity and has no previous convictions. There was also an element of pressure from Lawrence and others which did not in my judgment fall within the description "diminished responsibility" in section 55(2)(g) of the Code, for "diminished responsibility" has to be associated with age or mental or intellectual capacity. The Appellant is an intelligent adult who in her own words was naïve and foolish. Mr Richardson submitted that the Appellant thought she was swallowing cannabis and that in the light of *R v Bilinski* (1988) 86 Cr. App. R. 146 this should have been taken into account. There are two difficulties with this submission. First she pleaded guilty to conspiracy to import fentanyl and it seems to me that the importation of fentanyl was an integral part of the conspiracy (agreement) to which she pleaded guilty. It does not lie in her mouth now to say that she thought it was cannabis, as might have been the case if she had simply been charged with conspiracy to import a controlled drug. The second difficulty is that the point does not appear to have been taken before the judge other than in passing by the Appellant immediately before she was sentenced, and even then it is not clear when she was told it was marijuana, although she did say in interview this was at the point of swallowing the pellets. When in hospital she said she thought it was cocaine. Had she thought it was cannabis she should not have pleaded guilty to conspiracy to import fentanyl. Mr Richardson submits she was badly advised and the plea was equivocal. That would have involved evidence and an application for leave to appeal out of time. No such application has been made and it seems to me far too late to do so now.

Conclusion

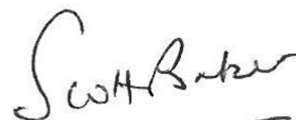
34. With a starting point of 18-21 years I would not disagree with the judge's conclusion that what he described as solid mitigation (her plea of guilty and genuine remorse, her previous good character, low risk of reoffending and the extent of her personal responsibility in the conspiracy) brought the figure to which the section 27E discount was to be applied down to 10-12 years. Although he did not refer to it as such this was the "basic sentence" within the meaning of that section. To that had to be applied a discount towards the top of the range for assisting in the investigation and the prosecution of others involved in the same criminality. I would allow the appeal and substitute a sentence of five and a half years' imprisonment for that of seven years. It might be said that the Appellant is fortunate that fentanyl is not a drug listed in schedule 5. Had it been, the Court would have been obliged to apply the mandatory uplift under section 27A.

35. In future the sentencing judge must decide whether to adjourn sentence until after the defendant has given evidence for the prosecution at the trial of a co-defendant or proceed to pass sentence straight away. It is not good practice to split the discount for assistance into two parts, leaving the second part to be given by the Court of Appeal. There will still be occasional cases like *K v R* in which an appeal out of time is necessary to meet the interests of justice, but those cases are unlikely to involve an appellant who has given evidence against an accomplice.

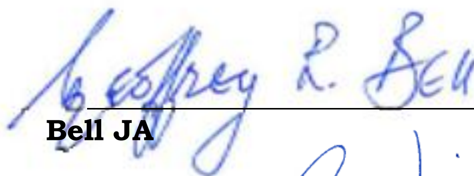
Postscript

36. After our draft judgments had been submitted to counsel for editorial/typographical corrections, but before they had been handed down, Mr. Richardson, on behalf of the Appellant, emailed the Court contending that there was further material that had not been supplied to the Court for which the Appellant would have been given additional credit. Mr. Richardson was given 14

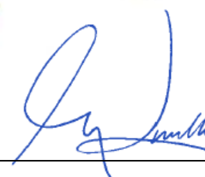
days (subsequently extended) to put affidavit evidence before the Court and make written submissions. No additional evidence has been provided.



Baker P



Bell JA



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