

Sabsay

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

TOBAN ZARYSKI

Before Justice Paul H. Reinhardt
Heard on 2 December 2010, 20 & 25 January 2011
Reasons for Judgment released on 11 February 2011

Andre Chamberlain & Elizabeth O'Grady for the Crown
Lorne Sabsay for the accused

REINHARDT J.:

[1] On 2 December 2010, Toban Zaryski pleaded guilty before me to two offences, in the City of Toronto in the Toronto Region:

That he did, on or about 23 September 2009, traffic in a controlled substance, to wit: METHAMPHETAMINE (N, α -dimethylbenzene ethanamine), its salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogues,

Contrary to Section 5(1) of the *Controlled Drugs and Substances Act*, thereby committing an offence contrary to Section 5(3) (a) of the said Act, and further;

That he did, on or about 1 October 2009, have in his possession for the purpose of trafficking a controlled substance, to wit: METHAMPHETAMINE (N, α -dimethylbenzeneethanamine) its salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogues,

Contrary to Section 5(2) of the *Controlled Drugs and Substances Act*, thereby committing an offence under Section 5(3) (b) of the said Act.

[2] The admitted facts were that on 23 September 2009 Mr. Zaryski trafficked 3.4 grams of methamphetamine to an undercover police officer and when his residence at 222 St. Leonard's Street in Toronto was searched pursuant to a search warrant on 1 October 2009, he was found to have in his possession 461.81 grams of methamphetamine. The defence also permitted the Crown to read in other surrounding factors, including that found on the premises were 4 litres of GHB, 231.26 grams of ketamine, 122 tablets of MDMA, 1 hit of LSD

and 4 scales.

[3] When the plea was entered, the Crown submitted that the appropriate sentence was in the penitentiary range, while the defence submitted that the defendant was a young addict trafficker who had, with the help of his family, medical treatment, counselling and his extended community in Harriston, Ontario turned his life around and therefore should be considered eligible for a conditional sentence.

[4] In this case, I have accepted the argument and submissions advanced by defence counsel and have concluded that the appropriate disposition is a conditional sentence of two-years-less-a-day followed by three years probation. These are my reasons.

1: The Evidence

[5] In this sentencing hearing I heard from Toban Zaryski's father, James Zaryski, as well as Toban himself.

[6] I also received a detailed medical/legal report of 3 September 2010 and a follow-up report of 15 January 2011 from Dr. Duncan James Macdonald, M.D., Dip. Psych. FRCP(C), a senior psychiatrist, now in private practice in Hanover, Ontario and a Consultant Psychiatrist for the Central Grey Bruce Community Mental Health Team.

[7] Dr. Macdonald's resume is impressive, with awards that include a Travelling Fellowship from the Ontario Mental Health Foundation and a year as a Visiting Lecturer in Psychiatry at the University of Edinburgh in Scotland. From 1967 to 1969 he was the Director of the Community Mental Health Clinic at Toronto Western Hospital. From 1973 to 1996 he was the Director of the Community Health Clinic at Cambridge Memorial Hospital. From 1996 to the present he has been in private practice while serving as a Consultant Psychiatrist for the Central Grey Bruce Community Mental Health Team.

[8] Dr. Macdonald has been Toban Zaryski's attending psychiatrist since January of 2010, seeing him frequently for two-hour sessions and has authored an authoritative report that was tendered as part of a compendium of defence documents that are Exhibit 1 in this proceeding.

[9] Included in the defence documents exhibit are letters of support from Stewart Leatherdale, MSW, RSW, the Program Director of the Westover Treatment Centre, Thamesville, Ontario; The Reverend Dennis D. Wright, Minister of the Knox-Calvin Presbyterian Church, Harriston, Ontario; Laura Marshall, Manager of the Queen's Bush Bistro, Mount Forest, Ontario and Vesna Stojacic, President, Veky's International Cuisine, Listowel, Ontario.

2: Who is Toban Zaryski?

[10] From the testimony I heard and the extensive documentation filed a picture emerges.

[11] Toban was born on 13 March 1979 into a successful and well-placed southern Ontario family. His father James, today in his sixty-six year, is a retired school-teacher, farmer, home renovator and seed-corn salesman. His, Aunt Linda is a psychologist/therapist who has been employed at the Donwood's Institute in Toronto among other places.

[12] Toban is now thirty-one. He grew up in Harriston, Ontario, a small town of approximately 4,000 people where he attended school until his upper secondary school years, when he attended Norwell Collegiate in Palmerston, Ontario.

[13] He is the third child in his family.

[14] Toban was good student, and he graduated from grade 13 with an 87 point grade-point average. He attended the University of Toronto and again excelled achieving an Honours Degree in European History and Political Science in 2002.

[15] While attending University, Toban lived in Toronto and was employed as a cook and chef at East Side Mario's and the Bayview Golf & Country Club, among other places. After graduating from university he lived with his grandmother in North Toronto after his grandfather's death and assisted her around the house and in tending her extensive flower gardens.

[16] However, Toban's life, despite some very promising aspects, has also had a darker side. Being the son of a teacher, attending the same school where his father taught, provided significant conflict for Toban, according to Dr. Macdonald.

[17] In Dr. Macdonald's opinion, being the son of a teacher, Toban was closely watched by his peers and in significant ways he felt he was an outsider, singled out by his peers and isolated.

[18] In addition, Toban suffered from a severe misalignment of his jaw, which required him to undergo major reconstructive surgery which left him with a somewhat distorted face.

[19] According to Dr. Macdonald, this disfiguration considerably effected Toban as a teenager. Contemporaneously with his physical difficulties and pain, he began hanging out with drug users at his school and experimented extensively. He told Dr. Macdonald that at this time in his life he experienced a sense of personal shame because of his physical appearance and because he had begun a secret life beyond his parent's awareness or understanding.

[20] While attending University and then living with his grandmother, he was able to achieve significant successes as a student and as a chef, but also developed a significant drug dependency and narrowed his social network to a few drug using university friends.

[21] For ten years he maintained this addictive life-style for the sake of getting high, and retaining his small circle of drug-using friends. In this way, he felt he belonged and was accepted despite his unusual physical appearance and isolation.

[22] As a drug-dependant user, he became aware of whatever substances were available, including crystal meth, GHB, marihuana, ecstasy, cocaine and ketamine. Using these chemicals daily provided him with a circle of friends and a fragile if dependant social connectedness.

[23] However, in Dr. Macdonald's view, this lifestyle came at an incredible cost, both because of physical degeneration, and because of his resort to selling drugs and cooperating and consorting with dealers in order to support his addiction. While living with his grandmother, he would store drugs for these new "false friends" in a location "above suspicion".

[24] Physically, he lost forty pounds, and he developed swelling and pain in his legs and arms, and developed difficulties in sleeping because of multiplicity of the alien chemicals in his system.

[25] Since his arrest on these charges, he has returned to Harriston to reside with his parents on the family farm.

[26] He has been living at home for over thirteen months, and his father describes the time as a remarkable re-building of Toban's health and his relationships with his family and the wider community in Harriston. James Zaryski testified that during his son's time back on the family farm, there "hasn't been a harsh word spoken." He stated that prior to his arrest and return to live with his parents, Toban was distant, abrupt, discourteous and physically underweight and unkempt. He had severely swollen ankles and arm and was listless with no ability to interact with others. He had maxed out his credit cards and was \$15,000.00 in debt.

[27] James Zaryski testified that his son has consistently, since mid-January of 2010 attended weekly treatment sessions with Dr. Macdonald at the Hanover Hospital as well as more intensive residential addiction rehabilitation and aftercare treatment and counselling from the Westover Treatment Centre. For his parents, this has resulted, according to James Zaryski, of a very much restored and rejuvenated son, who is social and affectionate. He attends the Knox-Calvin Presbyterian Church in Harriston and participates as a volunteer in their community-based self-help programs.

[28] James Zaryski testified that his son has consolidated all his debts and taken out a personal loan amortized over the next five years at 4.5%, which he is paying back with monthly payments while working at two jobs, and is also contributing towards household expenses for food and petrol.

[29] James Zaryski also testified that during the spring of 2010, the court documentation for his son's case was somehow lost, and Toban was no longer on any form of bail but there was no noticeable change in his son's community involvement, attendance at medical appointments, aftercare, employment and volunteer obligations.

[30] To summarize his testimony, James Zaryski testified that, in his view, his son has had an "epiphany"!

[31] Toban Zaryski expressed his remorse. As a result of his treatment and counselling, he can now see that his drug dependency and resultant behaviour and dealing did a great deal of harm to himself and worked a severe hardship on his extended family, friends and those to whom he sold drugs.

3: The Legal Framework

3.1: The Legislative Framework, The *Criminal Code*, Part XXIII, SENTENCING

[32] In 1996 the Parliament of Canada added a sentencing “chapeau” to Part XXIII of the *Criminal Code*. It included the codification of the mandated purpose in sentencing as well as the principles to assist in the interpretation and application of this purpose. It reflected Parliament’s direction to judges to consider restorative principles and the need to fashion sentences that respond to the individual circumstances and needs of the offender. It codified the basic principle that curial deference should be given to the sentences imposed by trial courts and when taken in conjunction with the novel tool of the “conditional” sentence in section 742, the sentencing amendments to the *Code* reflect a strong message to trial and appellate courts to use restraint when considering the appropriateness of using incarceration as a sanction:

718. 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 that have one or more of the following objectives:

- (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 acknowledgment of the harm done to victims and to the community.

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

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's

spouse or common-law partner or child, or

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence;

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(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.

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

[33] In addition to this framework, where a sentence of imprisonment is imposed that is less than two years, the court may order that the sentence be served in the community:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and

(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[34] The legislation also reflected the then-current thinking of the Supreme Court of Canada on the guiding principles and practice of sentencing in Canada as articulated by Chief Justice Antonio Lamer in *R. v. C.A.M.* (1996), 105 C.C.C. (3d) 327 and other cases.

32: The Conditional Sentencing Case Law

[35] It wasn't until the Supreme Court of Canada released its decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Proulx*, [2000] 1 S.C.R. 61 that a clear sense emerged of how the new sentencing tool of the "conditional" sentence dovetailed with the codified "chapeau" of the mostly traditional sentencing principles. In those cases, the Supreme Court of Canada provided strong judicial authority for the interpretation that Parliament was mandating and encouraging restraint on the part of judges when considering the use of incarceration in sentencing.

[36] In *Gladue*, at paragraph fifty-four, Justice Peter Cory stated:

¶ 54 Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in *McDonald*, supra, at pp. 429-30:

A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . .

. . . An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation. Imprisonment has failed to satisfy a basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled: "Toward Unity: Criminal Justice and Corrections" (1969) as "to protect society from crime in a manner commanding public support while avoiding needless injury to the offender". [Emphasis added; footnote omitted.]

[37] In *Proulx*, Chief Justice Antonio Lamer completes the point, at paragraphs 16, 17, 21 and 22:

¶ 16 Bill C-41 is in large part a response to the problem of over-incarceration in Canada. It was noted in *Gladue*, at para. 52, that Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third highest among industrialized democracies. In their reasons, Cory and Iacobucci JJ. reviewed numerous studies that uniformly concluded that incarceration is costly, [page 79] frequently unduly harsh and "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals" (para. 54). In *Gladue*, at para. 57, Cory and Iacobucci JJ. held:

Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of

imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions¹.

¶ 17 Parliament has sought to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(d) and (e). Section 718.2(d) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", while s. 718.2(e) provides that [page80] "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". Further evidence of Parliament's desire to lower the rate of incarceration comes from other provisions of Bill C-41: s. 718(c) qualifies the sentencing objective of separating offenders from society with the words "where necessary", thereby indicating that caution be exercised in sentencing offenders to prison; s. 734(2) imposes a duty on judges to undertake a means inquiry before imposing a fine, so as to decrease the number of offenders who are incarcerated for defaulting on payment of their fines; and of course, s. 742.1, which introduces the conditional sentence. In *Gladue*, at para. 40, the Court held that "[t]he creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration".² [Emphasis added.]

¶ 21 The conditional sentence was specifically enacted as a new sanction designed to achieve both of Parliament's objectives. The conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders. The offenders who meet the criteria of s. 742.1 will serve a sentence under strict surveillance in the community instead of going to prison. These offenders' liberty will be constrained by conditions to be attached to the sentence, as set out in s. 742.3 of the Code. In case of breach of conditions, the offender will be brought back before a judge, pursuant to s. 742.6. If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.

¶ 22 The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence.

3.2.1: Application to Offences under The *Controlled Drugs & Substances Act*

3.2.1.1: The Crown Approach

[38] The Crown submits that the appropriate sentence in this case should be three years in the penitentiary.

[39] Ms. O'Grady, in her submissions, takes no issue with the basic facts outlined by the

defence. She accepts that Mr. Zaryski has done a good job in responding to his therapy, treatment and counselling. But she suggests that the magnitude of the drugs involved precludes a sentence of less than two years.

[40] Ms. O'Grady also points out that even if the appropriate sentence for Mr. Zaryski were less than two years, the fundamental sentencing principles as set out in Section 10 of the *Controlled Drugs & Substances Act*, point towards straight time:

Sentencing

Purpose of sentencing

10. (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

Circumstances to take into consideration

(2) If a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person

(a) in relation to the commission of the offence,

(i) carried, used or threatened to use a weapon,

(ii) used or threatened to use violence,

(iii) trafficked in a substance included in Schedule I, II, III or IV or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years, or

(iv) trafficked in a substance included in Schedule I, II, III or IV, or possessed such a substance for the purpose of trafficking, to a person under the age of eighteen years;

(b) was previously convicted of a designated substance offence; or

(c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, a designated substance offence.

Reasons

(3) If, under subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in paragraphs (2)(a) to (c), but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.
1996, c. 19, s. 10; 1999, c. 5, s. 49.

[41] The Crown also points out that since 2005 Methamphetamine has been moved from Schedule III to Schedule I of the *Controlled Drugs & Substances Act*, and is therefore classified in the same category as Opium & Cocaine.

[42] She also points out that in addition to the charges to which he pleaded guilty, Mr. Zaryski was found to have had a multiplicity of drugs at his residence. She submits that the

volume of methamphetamines alone (461.8 grams) should rule out a sentence of less than two years.

[43] In her legal argument, Ms. O'Grady points to three recent judgments by judges of this court dealing with methamphetamine to support her position: *R. v. Villanueva* [2007] O.J. No. 858 (Ian MacDonnell, as he then was), *R. v. Paper* [2010] O.J. No. 1131 (Beverly Brown) and *R. v. Pitvor* [2010] O.J. No. 433 (Gary Hearn).

[44] In *Villanueva*, The accused pleaded guilty to trafficking 168.28 grams of meth, possession for the purposes of 1006 grams of meth, trafficking in 1 and ½ kilos of a substance held out to be meth, and possession of \$8,940 in proceeds.

[45] During discussions with undercover officers, Mr. Villanueva, who is of Filipino heritage, stated that he had basically "cornered the market" in relations to Filipino crystal meth users in Scarborough, and was hoping to make inroads on the gay community with his next big deal.

[46] In his pre-sentence report, he stated that he owned and operated with his father window cleaning business but found the drug business a way of feeling "invincible" and to make a lot of money for his family.

[47] The Crown sought a sentence in the range of 7 to 8 and ½ years while the defence sought a sentence of 2 years less a day, to be served in the community. Justice MacDonnell concluded that the appropriate sentence in that case was in the range of five and ½ years.

[48] In reaching this conclusion Justice MacDonnell stated a number of sentencing principles relating to trafficking in drugs and specifically methamphetamine:

35 Because the sentence imposed on an offender must be similar to those imposed on similar offenders who have committed similar offences, 5 the parties have referred to a large number of sentencing cases in support of their conflicting positions. Few of those cases deal with sentences for trafficking in methamphetamine. There appear to be two reasons for this. First, the parties take the position that the movement of methamphetamine from Schedule III to Schedule I in August 2005, which increased the maximum penalty for trafficking from ten years to life imprisonment, makes sentences imposed for pre-August 2005 offences less relevant to the determination of Mr. Villanueva's sentence. Second, there are simply far fewer decisions of the Ontario Court of Appeal dealing with methamphetamine trafficking than with other hard drugs, and none subsequent to the increase in penalty.

45 I do not accept the logic of the general proposition advanced by the Crown that methamphetamine traffickers should be subject to harsher sentences than couriers who import cocaine. Importing has always been considered to be a more serious offence than trafficking. Until it was struck down on constitutional grounds, s. 5(2) of the Narcotic Control Act provided for a minimum period of incarceration of seven years for importing any narcotic. Relatively recently, in *R. v. Lee and Wu*, supra, the Court of Appeal reaffirmed that "importation is the most serious of all the drug offences". (*Emphasis added*)

46 The principal justification offered by the Crown for a different approach in relation to methamphetamine is that harsh sentences are imposed on cocaine couriers because cocaine is not indigenous to Canada and therefore if the border can be controlled, the cocaine problem can be controlled. Methamphetamine, on the other hand, is produced domestically, and thus the focus of deterrence efforts should be on those who manufacture and sell it. Accepting, for the sake of argument, the logic of the reasoning that would make the range of penalty for cocaine couriers applicable to those who manufacture methamphetamine, I fail to see how that reasoning extends to traffickers.

47 While there may be a case for holding that the dangers of crystal methamphetamine are the same as or greater than those of heroin or cocaine, and thus that the range of sentence for heroin or cocaine trafficking should be applied to methamphetamine trafficking, that case has not been made here. The evidence establishes that crystal methamphetamine is a hard drug that presents a serious and increasing danger to society, but it falls short of permitting a comparative assessment of those three drugs to determine which poses the greatest risk. (*Emphasis added*)

48 Subject to those comments, I accept that in light of the paucity of cases dealing with sentencing in methamphetamine cases in the 19 months since methamphetamine was reclassified, a consideration of the sentences imposed in relation to other Schedule I substances can be helpful. A review of those sentences makes clear that persons who deal in substantial quantities of hard drugs at the mid-level or higher of the trafficking hierarchy can expect to receive substantial penitentiary terms. The length of the term will depend on all of the circumstances of the case.

[49] In *Paper* the accused entered pleas of guilt before Justice Beverley Brown to 8 counts of possession for the purpose of trafficking in powder methamphetamine, crystal methamphetamine, oxycodone, codeine, ketamine, LSD, GHB and ecstasy in the following quantities:

- 20. 6 grams of methamphetamine powder
- 41.8 grams of crystal methamphetamine
- 36.5 grams of ketamine
- 300 pills, including oxycodone, Tylenol 3 with codeine and morphine
- 2. 5 litres of GHB
- 300 tablets of LSD
- 330 pills of MDMA

[50] In a similar fashion to Mr. Zaryski, Ms. Paper did not plead to, but permitted to be read in as facts on sentencing that she had other drugs in her residence. They included 220.3 grams of marijuana, 29.9 grams of cannabis resin or hash and 200 valium pills (schedule IV drug, diazepam).

[51] Justice Brown also heard evidence that Ms. Paper was a commercial trafficker and not addicted at the time of the offences. She was gainfully employed full-time as a professional and had substantial savings from her professional work as well as her trafficking.

[52] Justice Brown specifically noted that there was no acknowledgement whatsoever by the accused that the drugs she possessed and sold could cause harm to others.

[53] In the result, Justice Brown found that the reformatory range was not appropriate and that a conditional sentence would not meet the ends of justice, because Ms. Paper had not demonstrated that she would be unlikely to reoffend if permitted to serve her sentence in the community.

[54] In *Pitvor*, the accused pleaded guilty to one count of possession for the purposes of trafficking in methamphetamine on 24 July 2008, and breach of recognizance with respect to the use and possession of a cell phone in the period 16 January to 16 December 2009.

[55] The admitted facts were that Ms. Pitvor had in her possession nine individual packages of almost one ounce each of methamphetamine with a street value of \$25,000 and cash in the amount of \$9,625.

[56] In the result, Justice Hearn felt compelled to give Ms. Pitvor a sentence of 2 and ½ years, despite acknowledging that she was a prime candidate for rehabilitation and was unlikely to reoffend.

[57] In these cases my colleagues weighed the prospects of rehabilitation versus the seriousness of the offence, and concluded that the seriousness of the offence either trumped rehabilitation, or due to the lack of remorse or suitability for serving the sentence in the community precluded a conditional sentence.

3.2.1.2: The Defence Approach

[58] The defence submits that I should look carefully at both binding and persuasive authority that suggests that the appropriate sentence would be a sentence of two years less a day, to be served in the community, followed by three years probation.

[59] Cited in the defence casebook are leading appellate cases from British Columbia and Ontario, as well as some significant trial decisions from my colleagues in this province: *R. v. Pang* [2010] B.C.J. No. 2573 (BCCA), *R. v. Taromi* [2010] O.J. No. 3174 (OCJ), *R. v. Pirouz* [2009] B.C.J. No. 201 (BCCA), *R. v. Veneman* [2009] O.J. No. Xxx (OCJ), *R. v. Schreinert* [2002] O.J. No. 2015 (OCA), *R. v. Kerr* [2001] O.J. No. 5085 (OCA), *R. v. Wellington* [1999] O.J. No. 569 (OCA) and *R. v. W. (J.)* [1997] O.J. No. 1380 (OCA).

[60] In *Pang*, the British Columbia Court of Appeal upheld a trial judge's decision to grant a conditional sentence where the accused had been involved in a series of drug transactions with third parties prior to his eventual arrest. In a twenty-two day police investigation the accused, Mr. Pang, was observed by officers in multiple high-quantity drug deals with third parties involving seizures by police of sums of money as high as \$55,000 and as much as one kilogram of methamphetamine from those third parties.

[61] On 7 February 2007, police searched Mr. Pang's apartment and recovered 1.35 kilograms of methamphetamine. Mr. Pang was found guilty of having in his possession at

his apartment 1.35 kilograms of methamphetamine for the purposes of trafficking, with a street value estimated to be between \$67,550 and \$135,000.

[62] In upholding the trial judges sentence, the court stated, in part:

22 In the case at bar, the sentencing judge was alive to the principles of deterrence and denunciation. However, he was also alive to the fact that Mr. Pang had become involved in trafficking not out of greed, but to support his addiction and was someone who was, with the help and support of family and friends, taking positive steps to turn his life around. In my view, it was not unreasonable for the judge, in the exercise of his discretion, to decide that the purposes and principles of sentencing could be met by imposing a sentence that, rather than separating Mr. Pang from the community, allowed him to remain in the community under strict conditions. It should not be forgotten that the four years Mr. Pang will be under supervision is longer than the three-year term of imprisonment sought by the Crown.

[63] In *Taromi*, Justice Joseph Bovard was dealing with the sentencing of an accused who was found guilty after trial of two counts of trafficking in heroin and two counts of possession of the proceeds of crime resulting from those sales.

[64] In the proceeding, the Crown was seeking a sentence of three and ½ years in the penitentiary and the defence was seeking a sentence of two years less a day, to be served in the community.

[65] Justice Bovard reviewed the particular circumstances of Ms. Taromi's case which included the fact that she had responded favourable to treatment and had been drug-free and not breached her bail. He found that she was working steadily and going to school and that with strong parental support her life had stabilized. He concluded that she would be an "exemplary" candidate for a "community-supervision based sentence". In concluding that she should receive a conditional sentence he stated:

72 Notwithstanding Ms. Taromi's remarkable efforts and success at ridding herself of her heroin addiction, her drug and crime-free state are fragile. Incarceration would expose her to exactly the type of persons who could drag her back into drug addiction and crime. This would destroy all of the positive work that she has done to straighten herself out and would put the public at risk. (Emphasis added)

73 Based on all of the circumstances of this case and on the law cited above, I am persuaded that a conditional sentence of two years less one day is the appropriate sentence in this case. I find that considering all of the circumstances, in this specific case, the nature of the abuse visited on Ms. Taromi by her boyfriend, her remarkable recovery from it, and the very likely positive future that she has, constitute exceptional circumstances that justify a sentence outside the normal range of sentences for these types of offences. In any event, based on some of the jurisprudence cited above, there is a strong argument that even if I have erred in finding that exceptional circumstances exist in this case, this sentence is nevertheless justified in these particular circumstances.

74 I find that the principles of general and individual deterrence, as well as denunciation and rehabilitation can be achieved through a conditional sentence with very strict conditions. And I find that in this particular case such a sentence is consistent with the principles of sentencing cited above.

[66] In *Kerr*, the Ontario Court of Appeal overturned a trial judge's decision to sentence the accused to eighteen months incarceration, and converted the sentence to a conditional sentence for the same period, where the accused had entered pleas to three counts of trafficking in heroin and one count of improper storage of a firearm.

[67] The 27 year-old appellant had begun using various street drugs at the age of sixteen and began heroin use at the age of nineteen, when he took the drug to alleviate pain from a serious bowel operation. He stopped using drugs for a year, and then became addicted again after a subsequent operation also caused a great deal of pain. The trial court found that his sale of drugs was to feed his own addiction.

[68] At the sentencing hearing in 2001, the court received a letter and heard testimony from a Dr. Jollymore, who had treated the accused for heroin addiction since 6 November of 2009. The letter from Dr. Jollymore dated 28 December 2000, indicated that the accused had made considerable progress toward rehabilitation in the fourteen months of his treatment, and that incarceration would only negate his progress. In his letter he stated:

I initially evaluated James Kerr on November 6, 1999, following an "emergency" call from his father. At that time, he had been released on bail from several drug-related charges. A condition was that he seeks treatment for his addiction.

Mr. Kerr presented as a quiet, soft-spoken individual who understandably was nervous. He proceeded to give a history of being addicted to opiates with a four-year escalating requirement for their use. He initially began using opiates to relieve a chronic gastro intestinal problem. He admitted to having used other illicit substances before that, but had a lengthy period of being drug free before he started using heroin in 1995.

He has attended this clinic as scheduled since that date. His drug screens have been clean for illicit use throughout this period, and he appears to be making a sincere effort in his rehabilitation. He is currently on 20 mgms of methadone daily. He continues to be stable, is gaining a good insight into his addiction, and has re-established his relationship with his family.

Incarceration would be a deterrent to Mr. Kerr, who is making steady progress in his rehabilitation. Drugs are readily available in jail, and Mr. Kerr would have great problems enduring the tougher aspects of prison society. Mr. Kerr, at this point, is making a worthwhile contribution to society. A jail sentence could only negate the progress he has made.

Although I recognize the punitive requirements he must face for his mistakes, I hope consideration can be given for the positive steps Mr. Kerr has taken.

It would be more beneficial to Mr. Kerr and society if he were to be put on probation with strict conditions. He could continue in his rehabilitation, do community service or whatever the court deems appropriate, outside of incarceration.

I would be willing to continue to monitor him and to co-operate with the courts as required. [Emphasis added]

[69] After a careful review of the case law, Madam Justice Rosalie Abella, as she then was, speaking for the court, stated:

15 It is true that sentencing judges have wide discretion and are entitled to considerable deference in the imposition of sentences. But in my view, the application

by the trial judge of a presumption against the possibility of a conditional sentence constituted an error in principle. By relying exclusively on general deterrence, he appeared to disregard the evidence suggesting that not only had this particular offender made dramatic and, to date, successful efforts to confront his addiction since being charged, there was also a real risk that his genuine progress would be entirely undermined by incarceration. The likelihood of re-offending, in other words, would be enhanced by incarceration and the continued possibility of rehabilitation for this young addict would be profoundly impaired.

16 The trial judge's rejection of the availability of a conditional sentence, and his corresponding unwillingness to take into sufficient account the particularly positive steps taken by this offender, constituted an inappropriate fettering of his own discretion. In my view, any risk to the safety of the community in imposing a conditional sentence in this case can be addressed by the imposition of appropriate conditions. In fact, based on the evidence, the long-term prospects for the community's safety are better served by not incarcerating the appellant, since this is the approach most likely to maintain the appellant's progress and prevent the risk of re-offending.

4: Analysis

[70] Both counsel acknowledge that there is a paucity of methamphetamine trafficking sentencing cases since methamphetamine was elevated to a Schedule I substance in 2005. Moreover, there have been no clear Ontario appellate rulings, such as for example, the Ontario Court of Appeal decisions in *R. v. Cunningham* (1996), 104 C.C.C. (3d) 542, *R. v. Madden* (1996), 104 C.C.C. (3d) 548 and *R. v. Hamilton & Mason* (2004), 186 C.C.C. (3d) 129, with regard to the importing of cocaine, that suggest that a conditional sentence should not be employed in methamphetamine trafficking cases.

[71] To recap that line of cases, in *Hamilton & Mason* the accused H. arrived in Canada from Jamaica having swallowed 93 pellets of cocaine, weighing approximately 349 grams. The cocaine had a street value of almost \$70,000. The accused became critically ill from ingesting these drugs into her system. At the time of sentencing, H. was an unemployed, 26-year-old black woman, living in Canada, with family in Jamaica. She was the single mother of three children under the age of eight years. She had no prior record. It was agreed that H. was a courier for compensation and had no financial interest in the cocaine or involvement in its proposed distribution. She expressed remorse to the author of the pre-sentence report and said that she had acted out of financial hardship.

[72] In concluding that the trial judge had erred in granting conditional sentences to these two accused, Justice David Doherty, speaking for the court, stated:

¶ 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 co-operation 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 co-operation. That co-operation has always been recognized as a very important mitigating factor: e.g. see *R. v. H. (C.N.)*, supra. If couriers like the respondents

[page176] can expect to receive conditional sentences, there is very little incentive for them to co-operate with the authorities in attempts to apprehend those who hired them.

[73] By virtue of the lack of directly congruent appellate authority, in considering the wisdom of a conditional sentence for Mr. Zaryski, I must look to the reasoning and principles in the leading Supreme Court of Canada cases, cases that are decided in Ontario trial courts, and persuasive decisions from other provinces, as well as authoritative reasoning on different facts from our Court of Appeal.

[74] The reasoning set out in *Gladue* and *Proulx*, supra, shows a cautious restraint in considering the use of incarceration in sentencing. In these cases, it is clear that the Supreme Court wants trial judges to consider whether rehabilitation can be accomplished in a prison setting. Secondly, they suggest that a strict conditional sentence followed by a strict probation conditions may achieve denunciation and deterrence objectives outside of a jail setting.

[75] This is clearly reflected in the reasoning of the British Columbia Court of Appeal in paragraph 22 of *Pang*, supra, as well as the Ontario Court of Appeal in *Wellington*, supra, at paragraph 13, where Justice Feldman states:

13 This court has not changed its policy of significant sentences for importing drugs into Canada with the advent of conditional sentences. However, where the sentencing judge determines that the appropriate duration of sentence in all the circumstances is less than two years, then the propriety of a conditional sentence to be served in the community instead of in custody must be considered in the usual manner. Therefore, although statistically conditional sentences will be less frequent in certain types of cases including drug trafficking and importing, the approach which a sentencing court is to take when considering imposing a conditional sentence in any particular case is the same for all offences. The court is not to begin with a rule that the circumstances of the case itself must be rare or unusual. Rather, each case must be approached on the basis that it will be considered on its particular facts taking into account the nature of the offence, the circumstances surrounding the commission of the offence, as well as the personal circumstances of the offender.

[76] In *Kerr*, Justice Abella, at paragraph 15, supra, adds that where a trial judge rejects the availability of a conditional sentence, genuine rehabilitative progress might be entirely undermined by incarceration.

[77] In *Taromi*, supra, Justice Bovard concluded that a conditional sentence of two years less a day was appropriate. In reaching this conclusion, he stated that the following mitigating circumstances were significant:

1. Ms. Taromi committed the offences under extreme pressure from Mr. Hatamabadi who had repeatedly abused her.
2. Ms. Taromi does not have a criminal record.
3. Ms. Taromi has been subject to bail conditions for 3 years and 8 months and has not breached her bail or been charged with a criminal offence. For 2 1/2 years she was subject to a curfew and a twice a month reporting condition.

4. Ms. Taromi's personal life has vastly improved. She weaned herself off of her addiction to heroin and is living a drug-free life. She is working steadily and going to school. She lives with her parents who support her and her life has stabilized. She has removed the causes and conditions of her criminal activity. Her behaviour indicates strongly that she would be an exemplary candidate for a community-supervision based sentence.

5. Ms. Taromi's Pre-Sentence Report is positive.

6. Ms. Taromi has been honest with the court and with the probation officer in that she admitted things that go against her penal interest, which she could have kept to herself.

[78] Justice Bovard then continues in his reasons:

72 Notwithstanding Ms. Taromi's remarkable efforts and success at ridding herself of her heroin addiction, her drug and crime-free state are fragile. Incarceration would expose her to exactly the type of persons who could drag her back into drug addiction and crime. This would destroy all of the positive work that she has done to straighten herself out and would put the public at risk. (*Emphasis added*) [*Emphasis added.*]

[*Emphasis added.*]

73 Based on all of the circumstances of this case and on the law cited above, I am persuaded that a conditional sentence of two years less one day is the appropriate sentence in this case. I find that considering all of the circumstances, in this specific case, the nature of the abuse visited on Ms. Taromi by her boyfriend, her remarkable recovery from it, and the very likely positive future that she has, constitute exceptional circumstances that justify a sentence outside the normal range of sentences for these types of offences. In any event, based on some of the jurisprudence cited above, there is a strong argument that even if I have erred in finding that exceptional circumstances exist in this case, this sentence is nevertheless justified in these particular circumstances.

74 I find that the principles of general and individual deterrence, as well as denunciation and rehabilitation can be achieved through a conditional sentence with very strict conditions. And I find that in this particular case such a sentence is consistent with the principles of sentencing cited above.

[79] In many ways, the case at bar has significant similarities to the three cases I have referred to, *Pang*, *Taromi* and *Kerr*, where conditional sentences were ordered or upheld.

[80] In addition, I have concluded that the facts in Mr. Zaryski's case can be distinguished from the facts in *Paper* in a number of ways, as pointed out by counsel. There the accused was not an "addict-trafficker" but maintaining a middle-class life-style and job with substantial savings. She was not a suitable candidate for community supervision, according to Justice Brown, because of breaches of her bail. She ran a commercial drug business and encouraged her clients to move to harder drugs. She did not appreciate or acknowledge the harm that her sale of drugs did cause others, and remarkably, advocated the use of "rave" drugs. According to Justice Brown, in her pre-sentence report she did not appear remorseful.

[81] I think that this case can also be distinguished from *Pitvor*, where police surveillance over a number of months revealed Ms. Pitvor and her associates in a number of trans-

actions, with packaging and proceeds suggesting multiple other transactions. Ms. Pitvor was also found to have breached her recognizance on many occasions prior to her trial.

[82] This is also not like *Villanueva* in which many transactions were observed in an undercover and surveillance effort that Justice MacDonnell concluded showed Mr. Villanueva to be a significant supplier of methamphetamine to the Filipino community who was seeking to move into becoming the supplier of methamphetamine to the gay community in Toronto. The final transaction that was negotiated with Mr. Villanueva involved a proposed sale of 2 and ½ kilograms for \$60,000.

[83] I specifically reject the Crown's assertion that the volume of drugs in this case requires a penitentiary sentence.

[84] I also consider it a distinguishing factor here that unlike with Mr. Villanueva, there was no indication that Mr. Zaryski was involved in other than a street-level selling either through ongoing police surveillance or from Mr. Zaryski's dealings with undercover officers.

[85] Nonetheless, in this case, there are serious aggravating factors:

- (1) Mr. Zaryski was convicted of trafficking in methamphetamine and possession for the purpose of trafficking in methamphetamine.
- (2) The methamphetamine seized pursuant to the search warrant was a very large quantity, 461.81 grams.
- (3) Other controlled drugs seized included and admitted as "surrounding circumstances" were 4 litres of GHB, 231.26 grams of ketamine, 122 tablets of MDMA, 1 hit of LSD.
- (4) Methamphetamine is a Schedule I Substance.

[86] However, there are also a number of persuasive mitigating factors:

- (1) Mr. Zaryski was an addict for some ten years prior to his arrest, and had become a trafficker to feed that habit.
- (2) He was seriously in debt and physically emaciated and unhealthy, his life in a shambles, in the period immediately prior to his arrest.
- (3) His only Criminal Record entry is for simple possession in 2002 for which he received a \$400 fine.
- (4) Mr. Zaryski was subject to strict bail conditions originally including seeking treatment for his addiction, which were extinguished in 2010 when the original information in this case was lost, and yet he continued his treatment with Dr. Macdonald, and the Westover Treatment Centre aftercare despite no legal obligation to do so and voluntarily attorned to the jurisdiction of the court.
- (5) Mr. Zaryski has thrived in his family home in Harriston, Ontario, working at two part-time jobs and re-uniting with his parents and the surrounding community.
- (6) Mr. Zaryski's life has stabilized, and he is living drug-free and according to Dr. Macdonald, in his report, part of Exhibit 1 in this proceeding, recommendations, and can be rehabilitated:

In that he has sought help and followed through with his treatment with me and with the rehabilitation in Westover, I feel that he has made re-

markable progress in taking back his own personal life and beginning to understand himself as a person.

I do not believe that his extensive use of drugs has permanently damaged his cognitive abilities. In other words, I believe that he can develop new skill, develop directedness to his life that will prevent relapse.

- (7) In his statement to the court, Mr. Zaryski has expressed, in my view, sincere remorse and shown to me recognition of the harm he has caused to others in his past criminal conduct.

[87] In the result, I am prepared to accept the defence submissions that the appropriate sentence for Mr. Zaryski is one of two-years-less-a-day, and also able to find that if I order Mr. Zaryski to serve that in the community, he does not now pose a danger to the safety of the community, and to have him serve his sentence in the community is consistent with the fundamental purpose and principles of sentencing as set out in the *Criminal Code*, Section 718 to 718.2, and does not offend the principles set out in the *Controlled Drugs and Substances Act*, Section 10(1).


[88] I will also order that Mr. Zaryski perform 240 hours of community service, the maximum permitted under the *Criminal Code*, and serve his conditional sentence under house arrest.

[89] Finally, I order that following his conditional sentence, he be placed on probation for a further three years.

[90] I indicated at the outset of this sentencing hearing that I would make the ancillary orders requested by the Crown, namely a DNA order, and Section 109 order for 10, years, and a forfeiture order.

[91] Counsel are invited to address the court on the details of the conditional sentence and probation orders.

Released: 11 February 2011


Signed: "Justice Paul H. Reinhardt"