R. v. Dehal, [2016] B.C.J. No. 540

British Columbia and Yukon Judgments

British Columbia Supreme Court

New Westminster, British Columbia

M.B. Blok J.

Heard: November 6, 2015.

Oral judgment: February 15, 2016.

Docket: X077696

Registry: New Westminster

[2016] B.C.J. No. 540 | 2016 BCSC 479

Between Regina, and Jagtar Singh Dehal

(84 paras.)

Case Summary

Criminal law — Sentencing — Non-Criminal Code and regulatory offences — Controlled drugs and substances — Possession for the purpose of trafficking — Other substances — Imprisonment — Prohibition orders — Firearms — DNA sample — Sentencing considerations — Aggravating factors — Submissions by Crown — Submissions by accused and counsel for accused — Pre-sentence report — Previous record — Unrelated — Sentencing precedents or starting point — Sentencing of accused convicted of possession of ketamine for the purpose of trafficking — Accused picked up cargo containing drugs, which had been shipped from India — Accused sentenced to three years' imprisonment; 10-year firearms prohibition and DNA order — Accused was knowing participant in drug operation and his role was more than that of a drug mule.

Sentencing of an accused convicted of possession of ketamine for the purpose of trafficking. CBSA officers discovered 23.15 kilograms of ketamine in a roller conveyor unit that arrived on a commercial flight from India. The shipment, which was tracked by the RCMP, was picked up and delivered to three locations over three days. The accused attended the last location, disassembled the unit and removed the rollers containing the drugs and transported them to his home. He denied knowledge of the drugs and claimed that he had been manipulated by a friend. At the time of the offence, the accused was 46 years of age. He was married with two children, one of whom died in 2007. He had a high school education. He previously did janitorial and handy work, but was currently unemployed due to injuries sustained in a car accident. He had a problem with alcohol. He had a criminal record that was unrelated to drugs. He had the support of family, friends and acquaintances. The Crown sought a sentence of four to six years' incarceration. The accused sought a conditional sentence of six months less a day.

HELD: Accused sentenced to three years' imprisonment.

A 10-year firearms prohibition and a DNA order were also imposed. The accused was a knowing participant in the drug operation and while he was not a high-level player, his role was more than that of a drug mule. The aggravating factors included the amount of ketamine and the sophistication of the operation. There were no mitigating factors. Sentence: Three

years' imprisonment for possession of ketamine for the purpose of trafficking; 10-year firearms prohibition, DNA order -- Controlled Drugs and Substances Act, s. 5(2).

Statutes, Regulations and Rules Cited:

Controlled Drugs and Substances Act, *S.C. 1996, c. 19, s. 5*(2), s. 5(3), s. 10

Criminal Code, *R.S.C. 1985, c. C-46, s. 109*, s. 487.051, s. 718, s. 718.1, s. 718.2

Immigration and Refugee Protection Act, *S.C. 2001, c. 27, s. 36*, s. 64

Counsel

Counsel for the Crown: M. Loda.

Counsel for the Accused: B. Mohan.

[Editor's note: A correction was released by the Court March 22, 2016; the change has been made to the text and the correction is appended to this document.]

Oral Reasons for Sentence

M.B. BLOK J. (orally)

1 I am about to give oral reasons for sentence in this case. Should a transcript be ordered, I will consider myself at liberty to add case citations and other detail like that to the transcript and to clean up any minor errors, but without changing the underlying reasoning or, of course, the ultimate result.

2 The second comment is directed to Mr. Interpreter, and sir, I occasionally speak too quickly and if you find that I am going too fast, I invite you to hold your hand up, to have me pause, so that you can catch up. I appreciate that your role is a very difficult one and the important thing is that everything is interpreted correctly.

I. Introduction

3 On June 24, 2015, Jagtar Singh Dehal was convicted of possessing ketamine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, *S.C. 1996, c. 19* ("*CDSA*"). He is now before the court for sentencing.

II. Circumstances of the Offence

4 The circumstances of the offence are fully set out in my earlier reasons for judgment and I will not repeat all of those details here. I will instead summarize.

5 On May 25, 2012, officers of the Canada Border Services Agency ("CBSA") intercepted some air cargo at Vancouver International Airport that had arrived on a commercial flight originating in India. The cargo in question was a wooden crate containing a roller conveyor unit.

6 CBSA officers disassembled the roller conveyor unit at their airport facility and discovered, inside each of the unit's nine rollers, approximately two and a half kilograms of ketamine contained within long plastic bags. The total amount of ketamine was 23.15 kilograms.

7 The case was turned over to the RCMP for further investigation. The RCMP arranged a controlled delivery with respect to the shipment. They did so by removing most of the contents of the ketamine bags and replacing them with a placebo substance. A tracking device and silent alarm were installed in one of the rollers. The roller conveyor unit was then reassembled, returned to its crate and the crate returned to the carrier for release to the consignee. The RCMP then carried out 24 hour surveillance on the shipment from the time it was returned to the carrier.

8 The shipment was picked up on May 31, 2012 and transported to three different locations between May 31 and June 2, 2012. The latter location was an address on East 36th Avenue in Vancouver. Mr. Dehal attended at that location, driving a car registered in his wife's name, shortly before midnight on June 2-3, 2012.

9 In the earlier reasons for conviction, I summarized the ensuing events as follows [as read in]:

> ... shortly before midnight on June 2-3, 2012 Mr. Dehal attended at a back alley behind East 36th Avenue and dismantled the roller conveyor unit, taking only those parts (the rollers) that contained the drug bags. He transported the rollers to a workshop behind his home in Surrey, and as he approached his neighbourhood he carried out a number of unusual maneuvers, the only purpose for which, I conclude, was to counter any surveillance taking place. ...
>
> On Mr. Dehal's arrival at his house he parked his car in such a way that the trunk of the car was as close as possible to the door of the workshop. Although the workshop had exterior light fixtures on the south and west sides, there were no bulbs in the fixtures. The two windows of the workshop were covered with cardboard. Mr. Dehal put all nine rollers in the workshop. He had no cutting tools immediately at hand. He proceeded to remove an end bearing on each of three rollers, which enabled him to remove long bags containing placebo substance that had the appearance of illicit drugs. Two of the empty rollers were placed neatly against a wall and cupboard, and the three end bearings were placed on top of a group of boxes, with two stacked together, in a tidy fashion that I conclude is inconsistent with Mr. Dehal's assertion that he was shocked and surprised and thinking his friend had defrauded him, and is more consistent with an unhurried, methodical dismantling of the rollers by someone unsurprised by their contents. The third roller contained a sample of ketamine as well as an alarm and tracking unit and associated wires. Only on seeing the tracking unit and wires did Mr. Dehal cease his dismantling of the rollers, again suggesting that he was not at all surprised by the drug bags he had already found. The removal of the end bearing on the third roller triggered the alarm, and police were on scene within moments. When the first officer arrived on the scene Mr. Dehal was outside the workshop, closer to the workshop than to the house, and walking away from the workshop.

> For the reasons discussed earlier, in the circumstances of this case I do not accept that a drug trafficker or traffickers would entrust a highly valuable drug shipment to an unwitting person, whether to avail themselves of his handyman skills or otherwise, because the risk to the drug shipment, and to one of the traffickers in particular, would be too great. The situation compels the conclusion that Mr. Dehal was a knowing participant.

10 Expert evidence given by Sergeant Scott Rintoul established that the quantity of ketamine that was intercepted had a value of $115,000 (using the lower end of the estimated price range) if sold by the kilogram, $404,500 if sold by the ounce, and $1.15 million if sold in single doses of 100 milligrams each.

III. Circumstances of the Offender

11 A presentence report ("PSR") provided much of the information concerning Mr. Dehal's personal circumstances.

12 Mr. Dehal is currently 49 years old. He was 46 on the date of the offence. He was born in India and came to Canada when he was 20, when he married his wife. They had two children together, a son born in 1989 and a daughter born in 1993. The son had muscular dystrophy and was confined to a wheelchair. The son died in 2007, at 17 years old, due to complications from his condition. The evidence indicates that the son's death had a devastating effect on the family and on Mr. Dehal in particular.

13 Mr. Dehal presently does not live with his wife and adult daughter due to a recent conviction for domestic violence, the sentence for which prohibits contact. He resides with his sister-in-law and sometimes resides with his parents. Mr. Dehal's wife and daughter were, however, present during the sentencing hearing, as was his father and a friend, and the Court was told they are supportive of him.

14 Mr. Dehal told the author of the PSR that he completed Grade 12 in India, although I do note that in his testimony at trial Mr. Dehal said he did not finish high school. He has done janitorial work, worked at a foundry, fixed appliances, and built cedar fences and outdoor furniture. He also did handyman work and appliance service calls on a cash basis, in addition to his regular janitorial work. At the time of trial he was not employed because of injuries suffered in a car accident. It appears from the PSR that he is still unemployed and that he has not been employed since 2012.

15 Mr. Dehal has had problems with alcohol going back a number of years. He attended a residential treatment centre in 2000. In his testimony at trial he said he had a drinking problem prior to his son's death in 2007, but quit drinking at that point because he promised his son he "would not do anything wrong in this world". However, in the PSR he is reported to have told the author that he was alcohol-free from 2000 to 2007 and only resumed drinking after his son's death, an account also reported by Mr. Dehal's father.

16 Mr. Dehal's daughter told the PSR author that her father is verbally abusive when drinking, though Mr. Dehal denied that. At least some aspects of his criminal record, which I will discuss shortly, appear to be alcohol-related.

17 Mr. Dehal told the PSR author that he is now on Antabuse, a medication that causes a severe reaction to any alcohol intake. Sentencing materials filed by the defence also show he took some alcohol or counselling programs as a result of his February 2015 conviction for uttering threats to his wife.

18 Mr. Dehal has a criminal record that is unrelated to drugs. He has two alcohol-related driving convictions, three convictions for theft, three convictions for assault, one conviction each for mischief and

uttering threats, and two convictions for breach-type offences. His prior sentences have involved fines, periods of probation, six in all, a three-month conditional sentence order and one day in jail.

19 As reported in the PSR, Mr. Dehal attributes the current offence as being the result of being manipulated by a friend, though he continues to maintain he had no knowledge of the presence of drugs.

20 Defence counsel filed numerous letters of support for Mr. Dehal. There are 29 letters from friends, six letters from relatives, including his wife and daughter, and six letters from acquaintances. There were six further letters of support filed for this sentencing but prepared for a different case (the conviction for uttering threats against his wife), an offence that took place while Mr. Dehal was on bail for the current offence.

21 The letters of support attest to Mr. Dehal's charitable work, including providing wheelchairs to the needy in India, his volunteer work at the temple, and his good reputation in the community. He was described as a hard worker who was willing to help others. Most of the letters asserted that Mr. Dehal "has never been involved with anything to do with the drug business", something the Crown picked up on as demonstrating "blind support" insofar as these supporters failed to acknowledge Mr. Dehal's criminality.

22 When Mr. Dehal was asked if he had anything to say before sentence was imposed, he said that he felt very shameful and that he wanted to rehabilitate himself. He referred to the loss of his son some years ago, but says that he has his wife and adult daughter and he wanted to live for them. He said that he promised he would rehabilitate himself.

IV. Positions of the Crown and Defence

A. Crown

23 The Crown spent some time outlining the nature of ketamine, referring both to the expert evidence of Sergeant Rintoul and to a recent Court of Appeal case, *R. v. Kwok*, *2015 BCCA 34*, in which the court also described the nature of ketamine.

24 Crown noted that ketamine is a Schedule I drug, which puts it in the same category as cocaine and heroin, but acknowledged that it is a less dangerous or harmful drug than either cocaine or heroin. Crown said ketamine was better equated to MDMA (ecstasy) in terms of dangerousness.

25 Crown recognizes that Mr. Dehal was not a mastermind of the drug operation, but said the fact that he was entrusted with such a valuable drug shipment shows that he was a knowing and trusted associate, whose mechanical skills were needed to remove the drugs from their secret location.

26 Crown submits that denunciation and deterrence ought to be the primary sentencing considerations in this case.

27 Crown said the cases have not established a clear range of sentences for ketamine, but submits that, using MDMA cases as a guide, the general range was between two years less a day for lower amounts and up to 12 years in jail for "massive" amounts. Crown submits that, considering Mr. Dehal's role and the quantity of drugs involved, the range in this case was between four and six years. Crown submitted the court ought to sentence Mr. Dehal to jail for a period of five years.

28 Crown submitted that the following are the aggravating factors in this case:

a) the nature of the substance, being a Schedule I drug aimed at youthful consumers, and where one of its uses is to make women vulnerable to sexual assault;

b) the significant amount of drugs possessed, which was 23.15 kilograms. Crown noted Sgt. Rintoul's evidence that the quantity was such that it would not have been marketed only locally and so it was likely destined for further distribution across Canada;

c) the method of concealment of the ketamine and the other circumstances of the case indicate that the operation was sophisticated, and while Mr. Dehal has not been charged with or convicted of importing the drug, his possession was closely linked, both geographically and temporally, to the importing of the drug into Canada;

d) Mr. Dehal's role, using his mechanical skills, was an essential one needed by the drug operation to get the drugs into circulation; and

e) this was a drug venture requiring a number of people to arrange for the importing of the drugs into Canada as well as the transport and distribution of the drugs once over the border. Crown submitted that society is put in greater danger by this type of joint operation involving numbers of people with sophisticated elements to it.

29 Crown submits that the only mitigating factor is Mr. Dehal's alcohol dependency. Mr. Dehal does not have the mitigating factors seen in other cases, such as remorse, being a youthful offender, an acknowledgment by the offender of harm that drugs cause, or participating in drug activity due to drug addiction.

30 On the matter of the defence sentencing position of a six-month less a day conditional sentence order, Crown concedes that, technically speaking, a CSO is available here, but emphasizes the following:

a) Mr. Dehal has made no expression of remorse or any acknowledgment of the offence;

b) he has not acknowledged his offending in the community in any manner, (and such an acknowledgment would foster his rehabilitation);

c) any steps he has taken to rehabilitate himself relate only to his domestic violence conviction and do not relate to this offence;

d) currently Mr. Dehal is not employed and is not to have any contact with his wife or daughter due to court-imposed conditions; and

e) Mr. Dehal's recent breach history shows he does not make obeying the law a priority of his.

31 Crown emphasizes that, in any event, a sentence in the six-month range would be far short of the range indicated by the case authorities.

B. Defence

32 The defence noted that Mr. Dehal was not a target of the investigation. Counsel said there was no evidence Mr. Dehal was a major player in this operation, and instead the evidence shows he was a mere lackey or foot soldier. The defence urged the court to impose a sentence proportionate to Mr. Dehal's limited role and which recognizes he is an otherwise contributing member of society with strong family and community support.

33 Counsel also emphasizes that Mr. Dehal's immigration status in Canada will be jeopardized by any

custodial sentence of six months or longer. Not only will he be subject to removal, Mr. Dehal would also be denied any right of appeal if he were to receive a custodial sentence in excess of six months.

34 Defence counsel submits that an appropriate sentence in this case is a conditional sentence order of six months less a day, plus three years of probation under strict conditions that would include house arrest. This would put him under supervision for three and a half years, a significant period of time.

35 Defence counsel also emphasizes the following:

a) Mr. Dehal is a first-time drug offender;
b) his role was as a "mule" or "proverbial dupe";
c) he has already been punished to the extent he has been shamed in front of his family;
d) he has committed no further crimes in the time since his arrest, save for the uttering threats incident; and
e) ketamine, though a Schedule I drug, is "far more innocuous" than cocaine or heroin.

36 In arguing in favour of a conditional sentence order, defence counsel said denunciation and deterrence can be adequately expressed through such a sentence, and that a CSO is appropriate here because:

a) Mr. Dehal had a limited role in the drug operation;
b) there was no premeditation or involvement with other conspirators;
c) Mr. Dehal has no related criminal record;
d) he has been shamed in the community and with his family;
e) he has ample community support; and
f) he was on bail for three years "mainly without issue" and while on bail (and presumably with permission) travelled to India and back.

37 Returning to the issue of proportionality, defence counsel said that imposing a custodial sentence in excess of six months would result in Mr. Dehal being deported from Canada, his home for 30 years, and separated from his family, which counsel submits is a consequence that is out of proportion to his offence.

V. Discussion

A. Statutory Considerations

38 Given that ketamine is a Schedule I drug, s. 5(3) of the *CDSA* prescribes a maximum punishment of life imprisonment for this offence. There is no suggestion here that this maximum sentence is engaged, but it does give some indication of the seriousness with which Parliament views this offence.

39 Section 10 of the *CDSA* sets out the fundamental purposes of sentencing under that Act. It says:

> 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.

40 Section 10 of the *CDSA* also sets out certain circumstances deemed to be aggravating circumstances, but none of those circumstances is present here.

41 The general purpose and principles of sentencing are set out in *Criminal Code* ss. 718, 718.1, and 718.2. I will not repeat all of those here, but I of course have taken them all into account.

42 Section 718 says:

> 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 or to the community

43 Section 718.1 states that:

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

44 Section 718.2 sets out a number of further principles, including the principle that a sentence should be increased or reduced to reflect aggravating or mitigating circumstances.

B. Analysis

The Nature of Ketamine

45 I begin my analysis by discussing the nature of ketamine, as Crown and defence differed somewhat on this point.

46 The Court of Appeal in *Kwok* discussed the nature of ketamine in some detail, and here I refer to paras. 34 to 38 in *Kwok*:

> [34] At the trial and sentencing hearing, two experts testified on the use and abuse of ketamine. In addition, the Canada Gazette setting out the regulation amendment that moved ketamine from the *Food and Drug Regulations, C.R.C., c. 870,* to the CDSA was filed as an exhibit (*Food and Drugs Act*, Regulations Amending the Food and Drug Regulations (Ketamine) Canada Gazette Part II, Volume 139, No. 19). This document outlined the uses and abuses of the drug. The drug is legally used as a non-barbiturate anaesthetic in humans and animals, and in Canada, primarily animals. It states:

> Ketamine is commonly referred to as "special k", "kit kat", and "cat valium" on the streets, and has become popular as a "party or club drug" due to its dissociative effects; it creates the illusion of an "out of body experience". It is also used as a "date rape" drug. Ketamine seizures by police have been increasing in recent years.
>
> ...
>
> Canada is a signatory to United Nations drug control conventions, and as such has an obligation to meet international requirements. Although ketamine is not currently listed in any of the United Nations drug control conventions, it has been recommended for critical review by the World Health Organization's Expert Committee on Drug Dependence with a view to determine if it should be added to the Schedules of the Conventions. A number of countries have already elected to impose strict controls over ketamine, including the United States, Australia, Belgium, Italy, France, Greece, Luxembourg, and China.

[35] Sergeant Rintoul testified during the trial that this amount of ketamine could produce up to 10,000,000 doses of the drug at $5.00 per dose for a maximum street value of $50 million dollars. Ketamine is used legally in Canada primarily as an analgesic for veterinary use, and for children and the elderly. It is used illegally as a "party" or recreational drug, sometimes in combination with other drugs. He testified that ketamine is the "number-one drug of abuse amongst adolescents in China".

[36] He also gave evidence about the nature of those involved in importing and trafficking this amount of drugs. He testified that an employee would not typically be privy to the entire scope of the operation. An employee would only be informed of their specific role, to protect the entire operation from being compromised in the event that the employee is compromised. Sergeant Rintoul also testified that "trust is paramount". He said that in cases involving a significant financial investment, those organizing the operation would only involve people they know and trust.

[37] Mr. Pon, a toxicologist, testified at the sentencing hearing that ketamine can give its user a euphoric, out-of-body experience. It is often combined with MDMA. Ketamine, while not physiologically addictive, has been known to exacerbate pre-existing mental illness, including schizophrenia, if used for long periods. There are very few deaths linked with ketamine, and usually they have been caused by ketamine used with other drugs. There are a few instances in which people taking the drug have remained in a catatonic state.

[38] The Crown, relying on the passage from the Canada Gazette, pointed out in its submissions the use of the drug as a date rape drug. None of the appellants contested this characterization of the drug before the sentencing judge.

47 I recognize that the excerpts I have just read rely, at least in part, on the evidence in that case, but Sgt. Rintoul gave similar evidence in this case. Specifically, in his testimony at this trial, Sgt. Rintoul said ketamine is a synthetic drug that is not that prevalent here, though it is on the rise. He said ketamine is not produced in Canada and the world's supply comes from either India or China. Vancouver, as a port of entry, is a transshipment point for ketamine. Vancouver is not a big enough market to traffic a lot of ketamine, and there are substantially more law enforcement drug analyses of ketamine in Ontario and Quebec. For these reasons, he said it is not likely that a large shipment, that is, a shipment in excess of 20 kilograms, would stay in the Vancouver area and instead it would likely be destined for eastern Canada.

48 Sgt. Rintoul said ketamine is a fast-acting anaesthetic, usually used in veterinary applications but also used in humans in certain circumstances. In legitimate uses it is injected. In illicit uses, it is in powder form and, most commonly, is taken orally or snorted. It became popular in rave subculture, along with

MDMA, and is a social or party drug. The demographic of users is young people, aged from around 16 to 35 years old.

49 In illicit uses, it depresses the system and provides symptoms of euphoria, hallucinations, and a floating sensation. With large doses, the user may experience an out-of-body experience called a "K-hole". Its effects last two to four hours.

50 In cross-examination, Sgt. Rintoul said:

* ketamine has a moderate to low degree of physical dependency;
* he has no direct knowledge of any ketamine overdoses or deaths in Canada;
* while cocaine and heroin have a far more negative effect on society in general, ketamine is not benign and is a problem in society because, for example, it makes people vulnerable to sexual assaults.

51 Based on the foregoing, I conclude that ketamine is a Schedule I drug that is used by young people as a social drug, and by some as a date rape drug. The evidence in this case supports the same conclusion as was reached by the Court of Appeal in *Kwok*, where the court said:

> [114] Ketamine is a less dangerous drug than heroin or cocaine. It is perhaps closest to MDMA (or ecstasy), which is also a Schedule I drug. It appears to be more harmful to health than marihuana, a Schedule II drug.

Mr. Dehal's Role

52 Defence submits that Mr. Dehal was a mere dupe in the drug operation. I have found, however, that he was a knowing participant and not an unsuspecting dupe. I note as well that his use of counter-surveillance driving measures while transferring the drugs from Vancouver to Surrey suggests a level of sophistication inconsistent with that of a mere dupe or limited-involvement participant. While he was not, as Crown acknowledges, a mastermind or high-level player in the drug operation, he was nonetheless a trusted and necessary component in that operation. The circumstances show Mr. Dehal was trusted with an enormous quantity of drugs and that his services were needed to both move the drugs and to remove them from their place of concealment. As a result, I view his role as being more than merely that of a drug mule.

Aggravating and Mitigating Factors

53 I find the following to be the aggravating factors in this case:

a) The amount of drugs possessed, which was 23.15 kilograms. This is a very significant amount; and

b) The sophistication of the drug operation generally, as evidenced by the method of concealment of the drugs, the involvement of a number of other individuals in unpacking the shipment and moving it around, the counter-surveillance manoeuvres used and the fact that the quantity of drugs was such that it was likely destined for further shipment or distribution in other parts of Canada.

54 I do not agree that Mr. Dehal's proximity to the active importation is an aggravating circumstance. He

was neither convicted nor charged with importation, and to consider Mr. Dehal's proximity to the importation activity as an aggravating factor, as urged by the Crown, seems to me to be sentencing him indirectly for an offence for which he was never charged, much less convicted.

55 I am also unconvinced that the nature and uses of the drug are, in and of themselves, to be considered as a standalone aggravating circumstance. Although this issue was not developed in submissions, I note that Parliament has itself assessed the inherent dangerousness of various drugs by categorizing them into the *CDSA* schedules and prescribing the penalties available for each. Within each *CDSA* schedule, consideration must of course be given to the nature and dangerousness of the drugs or drug in question, but I conclude that these are part of the general circumstances of the case and are not to be separately considered under the rubric of aggravating or mitigating circumstances.

56 Similarly, I do not consider Mr. Dehal's problems with alcohol to be a mitigating circumstance because, on the evidence, those problems have no connection with the offence. I do, however, take these into account when considering the general circumstances of the offender.

Range of Sentences

57 In submitting that the appropriate sentencing range was between four and six years, the Crown referred to the following cases:

* *R. v. Kwok*, *2015 BCCA 34*;
* *R. v. Fraser*, *2009 BCCA 179*;
* *R. v. Choi*, *2013 ONSC 5082*;
* *R. v. Aghabeigi*, *2004 BCCA 263*;
    * *R. v. Ho*, (May 3, 2005) Richmond, 46144-4C (B.C. Provincial Court); and
    * *R. v. Matwijec*, (August 10, 2012) North Vancouver, 54665-2C (B.C. Provincial Court).

58 Defence counsel cited the following cases:

* *R. v. Nesbitt*, *2012 BCCA 243*;
* *R. v. Pang*, *2010 BCCA 500*;
* *R. v. Kreutziger*, *2005 BCCA 231*;
* *R. v. Schneider*, *2007 BCCA 560*;
* *R. v. Kozma*, *2000 BCCA 440*;
* R. v. Presidente, *2012 BCSC 1636*;
* *R. v. Nguyen*, *2014 BCSC 1076*;
* *R. v. Dhillon*, *2013 BCSC 1769*;
* *R. v. Pabla*, *2013 BCSC 1588*;
* *R. v. Toor*, *2006 BCCA 347*; and
* *R. v. Charlie*, *2008 BCCA 44*.

59 There are not many cases involving the trafficking of large amounts of ketamine. *Kwok* is one of those cases. In *Kwok*, Mr. Kwok, Mr. Ng, and Mr. Lau were found guilty of drug offences involving over 1,000 kilograms of ketamine. The ketamine was hidden in packages amongst a shipment of coffee mugs Mr. Kwok and Mr. Ng purchased in India, sent to Hong Kong and then shipped to Canada. The sentencing judge found, as an aggravating factor, that the operation involved a "criminal organization". She sentenced Mr. Kwok and Mr. Ng to 12 years for possession for the purpose of trafficking and 16 years concurrent for importation. Mr. Lau was sentenced to 10 years for possession of ketamine for the purpose of trafficking.

60 On appeal, the Court of Appeal noted there is no established range for the importation of ketamine in such a large amount. I pause to note that I am, of course, mindful that the conviction in the case at bar is for possession for the purpose of trafficking, not importation. In *Kwok*, the Court determined that the trial judge erred in finding the group to be a criminal organization and in imposing sentences more appropriate for cocaine than for ketamine. I pause here to refer again to the conclusion of the Court of Appeal that ketamine is less dangerous than heroin or cocaine, and that it is perhaps best compared to MDMA (ecstasy).

61 In reviewing the sentences, the Court of Appeal determined that in light of the organizational roles of Mr. Kwok and Mr. Ng, the appropriate sentence for the possession for the purpose of trafficking offences was eight years. For his lesser role as a driver and handler, and taking into account his two prior drug-related convictions, the Court sentenced Mr. Lau to six years in prison.

62 Crown concedes that *Kwok* represents a high water mark for sentences for the trafficking of ketamine, given the sophistication of that operation and the enormous amount of drugs at issue in that case, but nonetheless submits that *Kwok* provides guidance for sentencing in ketamine trafficking cases where substantial amounts are involved.

63 The cases cited by both counsel vary widely in the sentences imposed and in the underlying circumstances. The sentences imposed range from nine months to eight years in jail, and with a number of the cited cases involving conditional sentence orders between 12 months and two years less a day. I must say, however, that the circumstances in some of the cases were so different from those in the case at bar that they offered little guidance other than very general guidance. Some cases involved just a fraction of the drug quantity at issue in this case (for example, *Schneider*, *Kozma*, *Presidente*, and *Charlie*), some involved, primarily at least, different drugs (*Fraser* - cocaine; *Nguyen* - marihuana; and *Aghabeigi* - opium), and one case (*Dhillon*, where an 8 1/2 year sentence was imposed) involved both a more serious offence (importing) and a different drug (cocaine). Other distinguishing features in the cited cases included guilty pleas, youthful offenders, lengthy periods on bail without offending further, a conclusion that the offender had fully rehabilitated himself, and matters of that sort. Amongst the MDMA cases, said by the Court of Appeal in *Kwok* to be the most comparable, it is also important to bear in mind that all of them were decided at a time when MDMA was classified as a Schedule III drug.

64 Based on my consideration of these cases and the MDMA (ecstasy) cases in particular, I conclude that the range of sentences in cases of possession of multi-kilogram amounts of ketamine for the purpose of trafficking is from two to eight years. I would add, however, that because cases at the lowest end of that scale predated the change in classifying MDMA (ketamine's comparator), to a Schedule I drug, it seems likely that the lowest end of the range is now somewhat greater than two years.

65 From my review of these authorities, it is also clear that the length of sentence urged by the defence -- six months less a day -- is far outside the range.

66 In arguing for this substantially lesser sentence, defence counsel relies in large part on the adverse immigration consequences that might or will happen to Mr. Dehal should he receive a sentence of six months or more.

67 Counsel noted that Mr. Dehal is a permanent resident of Canada, who has lived in this country for many years and whose family also lives here. On this point, counsel referred the court to ss. 36 and 64 of the *Immigration and Refugee Protection Act*, *S.C. 2001, c. 27*, which read as follows:

> 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
>
> ...
>
> 64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
>
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

68 While there was some debate at the sentencing hearing about how these provisions are actually applied, for the purpose of sentencing I have assumed Mr. Dehal will be subject to deportation proceedings, without right of appeal, should he receive a sentence of six months or more.

69 In *R. v. Pham*, *2013 SCC 15*, the Supreme Court of Canada said:

> [13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.
>
> [14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> [15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.
>
> [16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

70 Quite simply, the sentence urged by the defence would skew the sentencing process to a wholly inappropriate extent. If it were a matter of adjusting by a day, a week, or perhaps even a month in order to prevent collateral immigration consequences, I would consider it, but we are far beyond that point. A

sentence of the duration proposed by the defence would mean that immigration consequences would dominate the sentencing exercise and the resulting sentence would not be proportionate to the gravity of the offence and the degree of responsibility of Mr. Dehal.

71 I will, of course, take into account Mr. Dehal's likely immigration consequences as part of my consideration of his general circumstances.

72 I should note as well -- to deal with some of the other cases cited by the defence -- that Mr. Dehal's case does not have the unusual features that evidently influenced the very lenient sentences imposed in such cases as *Nesbitt* and *Kreutziger*.

73 I turn to some of the sentencing cases I found most helpful.

74 In *Matwijec*, the offender sold two kilograms of MDMA to an undercover officer on two occasions. I note that MDMA was then a Schedule III drug. The factors emphasized in the sentencing reasons were the offender's involvement as a mid-level trafficker in a sophisticated operation, mitigated by his guilty plea, lack of criminal record, and lengthy period spent on bail without any breaches or further offences. Provincial Court Judge Milne imposed a sentence of two years less a day.

75 In *Pang*, the offender was found in possession of 1.35 kilograms of methamphetamine having a street value of, at the outside, $135,000. It must again be remembered that methamphetamine was classified as a Schedule III drug at that time. The offender was a crystal meth addict who had become involved in trafficking to support his drug habit. He admitted the offence following a ruling on a *voir dire*. The sentencing judge imposed a conditional sentence of two years less a day, influenced by the substantial steps the offender had taken to rehabilitate himself. The Court of Appeal dismissed a Crown sentence appeal.

76 Finally, in *Pabla* a search of a residence disclosed an MDMA pill-press operation with a large quantity of powdered MDMA or other controlled substances totalling 14.3 kilograms and 6.9 kilograms of MDMA tablets. Again, at the relevant time MDMA was classified as a Schedule III drug. The offender was convicted of conspiracy to produce MDMA and production of MDMA. The offender's role in the drug operation was characterized as that of a worker, though he was also found to have had significant involvement in planning and deliberation, and it was also determined that he was involved because of his dependent relationship with his dominant older cousin. He was 20 years old at the time of the offence and he had mental health challenges. He conducted himself very well during his lengthy time while on bail. Madam Justice Dickson, as she then was, concluded by saying:

> [46] But for Mr. Pabla's youth, mental health challenges, remorseful attitude, and associated excellent prospects for rehabilitation, I would have imposed a lengthier term of imprisonment to be served in a penitentiary. Taking into account all of the factors present in this case and discussed above, however, I conclude that a sentence of two years less one day imprisonment is appropriate on both counts, to be served concurrently.

77 Ultimately, however, the offender himself asked for a two-year penitentiary sentence in order to avail himself of programs, and the sentencing judge obliged.

78 I find *Pabla* to be the closest to the present case on the facts. A similar quantity of comparable drugs was involved, although the production offences were somewhat different than the PPT offence in the present case, and the involvement of the offender in *Pabla*, who was described as a worker, seems somewhat greater than Mr. Dehal's proven involvement here. On the other hand, the drugs in *Pabla* were

then categorized in a different and lesser *CDSA* schedule, and Mr. Dehal does not have the mitigating factors of youth, mental health challenges, the influence from a domineering relative, or an offence-free time while on bail, though as to the latter, it is fair to note that his offences while on bail were not related to drugs. Just as Dickson J. ultimately concluded in *Pabla*, I conclude the present case calls for a penitentiary sentence.

79 This conclusion eliminates the need to consider a conditional sentence. I will say, in any event, that particularly given the quantity of drugs at issue in this case, I consider that the sentencing objectives of denunciation and deterrence would not be adequately met by a conditional sentence, and Mr. Dehal's offending (though unrelated to drugs) while on bail and his breach offences would not give me confidence that he would abide by the strict conditions I would have had to impose. So even if a fit sentence had been two years or less, I would not have imposed a conditional sentence in this case.

80 I have given careful consideration to all of the factors in this case. Although Mr. Dehal has not accepted his criminal behaviour in this case, which typically would be the first step towards rehabilitation, I conclude he is not likely to reoffend. Nonetheless, as noted earlier, the large quantity of Schedule I drugs at issue here, together with the degree of Mr. Dehal's involvement in the drug operation, calls for a penitentiary sentence. But for the likely adverse immigration consequences to Mr. Dehal, I might have been inclined to impose a sentence closer to the range urged by the Crown. As it is, I conclude that a fit and proper sentence is three years' imprisonment.

81 There are some ancillary orders. The only two mentioned by counsel were these, which I now make. There will be a firearms prohibition for 10 years pursuant to s. 109 of the *Criminal Code*, as that prohibition is mandatory. In addition, pursuant to s. 487.051 of the *Criminal Code*, there will be an order requiring Mr. Dehal to provide a sample suitable for DNA testing. Though this offence is a secondary designated offence, I am satisfied that a DNA order is appropriate here.

82 No mention was made of any necessary forfeiture orders, so I will conclude my reasons and look to counsel to see if there are any other matters they wish to raise.

83 MS. LODA: No, thank you.

84 THE COURT: All right. Thank you very much.

M.B. BLOK J.

* * * * *

CORRECTION

Released: March 22, 2016

Please be advised that the attached Reasons for Judgment of the Honourable Mr. Justice Blok dated April 8, 2014, have been corrected as follows:

> On the cover page, the year of the hearing date was incorrectly noted as 2016. The actual date of hearing was of November 6, 2015. The hearing date has been corrected accordingly.