

## The Top Five - 2004

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



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### ***R. v. Hamilton*, [2004] 72 O.R. (3d) 1**

<http://www.canlii.org/en/on/onca/doc/2004/2004canlii5549/2004canlii5549.html>

This was an appeal to the Ontario Court of Appeal from the trial judge's sentences for two women (Hamilton and Mason) found guilty of smuggling cocaine into Canada from Jamaica. Both women were young, black, single mothers who, at trial, pleaded guilty. The charges were unrelated but since they wanted to rely on the same expert evidence, Hamilton and Mason elected to have a joint sentencing hearing following their convictions.

The Criminal Code sets out the purpose of sentencing and guidelines for determining the appropriate sentence for an offence. Additionally, over the years, the courts have developed guidelines for determining an appropriate sentence. A sentence is considered to be 'fit' if it "reflects the circumstances of the *specific* offence and the attributes (i.e. characteristics) of the *specific* offender" as revealed by the evidence in the proceedings. [Doherty J.A. for a unanimous Court of Appeal at paragraph 2.] Furthermore, the Criminal Code provides that the purposes include making the public aware that certain types of behaviour are not acceptable, deterring would be offenders, separating offenders from society, rehabilitating offenders and in some cases, permitting the offender to make reparation to the victim, and promoting the offender's sense of responsibility and acknowledgement of harm done to the victim. A sentence is not an opportunity to address societal issues such as racism and poverty.

The trial judge imposed conditional sentences on Hamilton and Mason. A conditional sentence is usually imposed for offences requiring minimum punishment. If the offender fulfills all the conditions at the end of the sentence, they will not have a conviction entered on their criminal record. Typically a conditional sentence is comprised of probation or house arrest but not imprisonment. The Crown appealed on the basis that the sentences were inadequate given the seriousness of the offence. The Crown was also concerned that the trial judge based his sentencing on his finding that because of their gender, race and poverty, Hamilton and Mason were vulnerable targets of those seeking to enlist drug smugglers. The judge relied heavily on material that he produced during the hearing and on his professional experiences.

The Ontario Court of Appeal found that the trial judge overstepped his position as a judge and became an advocate on behalf of Hamilton and Mason. The Court of Appeal

did not disagree with the length of the sentences but did find that the judge made an error in handing out conditional sentences.

The Court of Appeal noted that the Criminal Code permits a judge to raise any issue relevant to determining a fit sentence. However, the judge must first determine from counsel their positions as to the relevance of that issue. If counsel take the position that the issue is relevant, then it should be left to them to produce whatever evidence is appropriate, although the judge may make them aware of materials known to the judge which are relevant. If counsel take the position that the issue raised by the judge is not relevant on sentencing, it will be a rare case where the judge will pursue that issue. The trial judge invited counsel to comment on the materials that he had produced. The Crown did not object but did indicate that he was concerned that the judge had introduced the issue of race when the defence lawyer had not brought it up.

The Court of Appeal also observed that the judge's invitation to the parties to comment was an attempt to be fair but he erred in taking on multiple roles - those of advocate, witness and judge. The Court ruled that the judge also erred because he spoke generally of the characteristics of cocaine couriers instead of relying on the specific characteristics of Hamilton and Mason. The Court also found the judge's fact-finding inaccurate. The judge relied on reports and statistics reporting the number of black women in Canadian prisons however, the material was not analyzed or tested in any way. This information should not have informed the determination of a fit sentence. Finally, the judge conducted an inquiry into an issue which had little influence on his final sentencing decision. The Court of Appeal ruled that the judge erred in conducting an inquiry into matters that concerned him rather than conducting a sentencing hearing for the purposes of determining an appropriate sentence.

The Court of Appeal reiterated established principles of sentencing, including the principle that sentencing must result from the circumstances of the specific offence and the specific offender. The appropriateness of the sentence is also determined in light of the gravity of the offence. The degree of the offender's responsibility must be considered, as should the sections of the Criminal Code that provide that an offender should not be imprisoned if a less restrictive punishment would be appropriate.

In reviewing the trial judge's sentences, the Court of Appeal found that the judge erred in concluding that conditional sentences were appropriate on the basis that Hamilton and Mason's responsibility was diminished because of the effects of systemic racism and bias against women. The Court of Appeal stated unequivocally that an offender's membership in a group that has historically been discriminated against does not justify a lesser sentence.

The Court of Appeal found that the judge made other serious errors during the sentencing trial. The judge made several 'findings of fact' that influenced his choice of sentence. The Court of Appeal found that there was no evidence submitted to support these findings. He also relied on personal experience and the relative poverty of Hamilton and Mason to influence his decision. The judge ignored the sentencing

precedents in previous cases with similar facts. In doing all of these things, the Court of Appeal ruled that the judge overstepped his role as an impartial decision maker. Ultimately although the Court of Appeal found that the conditional sentences were inappropriately light, the judges decided that imprisoning Hamilton and Mason for the remainder of their sentences would serve no purpose.