Case Name:
R. v. [redacted]

Between
Her Majesty the Queen, and
[redacted]

[2016] O.J. No. 25

Ontario Court of Justice
Toronto, Ontario

M.L. Hogan J.

January 6, 2016.

(10 paras.)

Counsel:

Ms. A. Martin, for the Director of Public Prosecution Service.

Mr. A. Stastny, for the defendant, [redacted]

Reasons for Sentence

1 M.L. HOGAN J.:-- This is the matter of [redacted] who pied guilty in front of me on September 9, 201. 5 to one count of trafficking in cocaine on January 16, 2015. The matter was remanded to November 2, 2015 for the preparation of a pre-sentence report. On November 2, 2015 I heard submissions on sentence from both Crown and Defense counsel and adjourned the matter to today's date for a decision as to the appropriate sentence.

2 The facts are briefly as follows: Ms. [redacted] was contacted by cellphone on January 16, 2015 by an undercover police officer. She agreed to sell him crack cocaine and arranged to meet him at the Peanut Plaza on Don Mills Rd., in the City of Toronto. She subsequently drove to that location,

met the undercover officer and sold him 1.69 grams of crack for $160. Ms. [redacted] pied guilty to this one trafficking but on consent the facts of two subsequent traffickings on January 19, 2015 and February 4, 2015 were read in. The facts of these subsequent traffickings were essentially identical to the first with 1.77 grams of crack being sold for $160. and 1.60 grams of crack being sold for $130.

3 Ms. [redacted] was arrested on February 4, 2015. She was [redacted] at the time of these incidents and a first offender. The pre-sentence report indicated that she spent the first 15 years of her life on the [redacted] Her mother was employed on a [redacted] and her father resided in [redacted] As a result, at the age of 6, she went to live with her [redacted] who became responsible for her care until she left at the age of 15 to reside in [redacted] with her [redacted] Ms. [redacted] while in the care of her grandmother, was responsible for taking care of not only her siblings but the other children in the house. She suffered hardships and physical punishment at the hands of her grandmother, including having little to eat. At age 15, she flew to [redacted] unaccompanied and lived briefly with her father, step-mother and two half-siblings. Her [redacted] had an issue with alcohol, and was physically abusive and on one occasion sexually inappropriate to her. As a result, she was removed from his home and placed in foster care, where she remained until the age of 18. She presently lives [redacted] Her father was charged and as part of the court disposition he was prohibited from having contact with [redacted] The author of the pre-sentence report at page 3 of the report stated that, "She was assessed in 2013 by a psychiatrist to have a disorder where symptoms include flashbacks, nightmares, severe anxiety. On September 12, 2015 the subject obtained [redacted] She applied for refugee status for fear of persecution from her native country as a result of her [redacted] '. In 2013 she obtained her Ontario Secondary School Diploma and is planning to register at a local college in 2016 to begin studies to become a [redacted] She is presently employed at a [redacted] earning $11/hr. working the 5 a.m. to 12 pm shift, a job she began in approximately March, 2015. Prior to this, her counsel indicated she was prohibited from working due to her Refugee Claimant status.

4 Crown counsel submitted that an appropriate sentence would be a period of custody in the intermittent range. She based her position on the fact that this was a commercial trafficking not an addict trafficking situation and she questioned whether Ms. [redacted] understood the impact of her actions on others.

5 Defense counsel submitted that an appropriate sentence would be a suspended sentence with two years probation. He submitted that the probation conditions should include a curfew for the first 9 - 12 months and that she should be required to complete community service hours in the 75 - 100 hour range. He submitted that "exceptional circumstances" exist in this case that support a suspended sentence and probation.

6 I agree with Defense counsel's submission that "exceptional circumstances exist" and that a suspended sentence with a 2 year period of probation is appropriate.

7 My reasons for this decision are as follows: Ms. [redacted] is a first offender, she was only [redacted] at the time of these offences, she pled guilty, she spent 3 days in jail on these charges prior to being given bail, due to her refugee claimant status she was not allowed to work at the time of the offence and thus had few financial resources, she has had a very difficult life to date, including being mistreated by her grandmother - her primary caregiver, being sent on her own at age 15 to Toronto from [redacted] to live with her father, stepmother and 2 half-siblings, subsequently being [redacted] by her father and then being placed in foster care. She was assessed in 2013 by a psychiatrist as having a disorder where symptoms include flashbacks, nightmares and severe anxiety. Since the time of the offence he has been able to move forward in a productive and constructive manner with her life. She now lives in [redacted], she obtained Permanent Resident status on September 12, 2015, she is working, she plans to begin studies to become a Registered Massage Therapist, and she has not been in trouble since she was arrested and charged with these offences. The pre-sentence report was very positive and indicated that Ms. [redacted] is amenable. to attending counselling to further address her trauma and that she accepted responsibility and expressed regret and remorse for her actions. I find that all of these factors constitute exceptional circumstances. The Crown position of custody in the intermittent range, I find is not reasonable in these circumstances. Ms. [redacted] has already spent 3 days in jail - five days on an enhanced credit basis. These five days of custody for a young first offender can certainly satisfy the sentencing principles of denunciation and deterrence. I find, in addition, that returning Ms. [redacted] to jail will most likely jeopardize the steps she has already taken toward rehabilitation as she will be placed in an environment with other convicted offenders, the majority who will likely be older and more enmeshed in the criminal culture. Jeopardizing her rehabilitation will be detrimental to the protection of the public.

8 The issue of exceptional circumstances in sentencing for drug offences has been addressed in recent jurisprudence - particularly in this jurisdiction and in British Columbia. In my recent decision of *R. v. Moniz,* released on November 4, 2015 and I believe as yet unreported, I canvassed many of these more recent cases wherein non-custodial sentences have been imposed. I stated in the *Moniz* case at para. 12:

> There is more recent caselaw involving possession for the purpose and/or trafficking of crack, and/or heroin in this jurisdiction and other jurisdictions where very different sentences have been imposed. I refer here particularly to the Ontario cases of *R. v Azeez,* [2014] O.J. No. 3091, *R. v. Dzienis,* [2012] O.J. No. 3123, and *R. v. Lazo,* 2012 ONCA 389, and to the British Columbia cases 9f. *R. v. Voong* 2015 BCCA 285, *R. v. Oates,* 2015 BCCA 259, *R. v. Dickey,* [2015] B.C.J. No. 223 and *R. v. Cisneros,* [2014] BCCA 154. The *Azeez* case was decided by Mr. Justice Green of the Ontario Court of Justice and involved 4 sales of heroin to an undercover officer. The total amount of heroin trafficked in the 4 sales was approximately 16.38 gm. ... Mr. Azeez was an addict trafficker and was ultimately sentenced to a conditional sentence of 2 years less a day on the first trafficking plus 2 years' probation, concurrent, for each of the three remaining

> convictions for trafficking in heroin. Due to new legislation having been passed, a conditional sentence. was only available for the first trafficking.

And at para. 14 and 15 of the Moniz case I. stated:

> "I note also the British Columbia cases referenced above of *R. v. Voong,* and *R. v. Dickey.* These cases also dealt with Dial-a-Dope enterprises in Vancouver. In the *Voong* case at paras. 16 and 17 the Dial-a-Dope enterprises were described by the British Columbia Court of Appeal as follows:
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> > 'This Court recently discussed the serious nature of the 'dial-a-dope' offence in *R. v. Oates;* 2015 BCA 259 at paras. 19 - 20, citing Henderson J.'s decision in *R. v. Franklin,* 2001 BCSC 706. 'The customer calls a cell phone number, places an order and then the dealer travels to a location for the drug exchange to take place. In other words, the drugs can be obtained with the ease of 'home delivery'. This type of trafficking is particularly insidious, and permits the drug trade to infiltrate communities to a greater degree'. In Franklin, Henderson J. pointed out the easy access to drugs made available by the dial-a-dope model of selling drugs. He concluded that dial-a-dope required forethought and planning - a vehicle, a cell phone, a drug supplier and circulation of the knowledge that drugs are available at the phone number.'
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> Despite the Court's characterization of the serious nature of the Dial-a-Dope scenario the sentences in the *Voong* case were suspended sentences with probation for two of those who were addicts dealing to support their habits - the third was sentenced to six months imprisonment with probation since the Court felt significant efforts had not been taken towards rehabilitation. All three of these individuals had prior records. The fourth individual was not an addict and was involved purely for commercial purposes but was a first offender. He was given a suspended sentence and probation. ... in *Voong* the Court stated the range as six to 18 months, unless there were extraordinary circumstances that would take them out of the ordinary sentencing range."

In the *Voong* case, *supra,* at para. 59, the court, noting that serious attempts at rehabilitation constituted exceptional circumstances, particularized some of these circumstances as follows:

> "Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgment of the harm done to society as a result of the offences, as opposed to harm done to the offender as a

> result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence."

The court in Voong stated further at para. 60 - 63:

> "A CSO was considered a sentence of imprisonment because of the strict and punitive conditions that could be imposed. As we have seen above, a suspended sentence can attract similar strict conditions, but only if they are aimed at protection of the public and reintegration of the offender into society. Rehabilitation clearly plays a significant role in both of those conditions. A suspended sentence can achieve a deterrent effect, as noted above, as well as a denunciatory effect. And, as Esson J.A. stated in Chang, [2002] B.C.J. No. 2787 the fact of being arrested, tried and convicted, can also address these principles. In other words, the stigma of being a convicted drug trafficker and the consequences of that conviction - for example, restricted ability to travel outside of Canada and exclusion from many forms of employment - may also play a deterrent effect. Thus, while it is an error to simply substitute a suspended sentence for a CSO, as they are not governed by the same principles, that does not end the inquiry into whether these non-custodial sentences are fit. The issue then for each of these appeals becomes whether there were sufficient exceptional circumstances to justify going outside the normal range of sentence and imposing a non-custodial sentence."

I note also the case, cited by Defense counsel in his submissions, of R. v. Orr and Lai, 2015 CarsweIIBC 2065, a judgement of Justice Rideout of the British Columbia Provincial Court. This case was decided following the release of the Voong decision and applied the principles set out therein. This was another dial-a-dope case involving a plea to trafficking in cocaine by Mr. Lai and a plea by Mr. Orr to aiding and abetting the trafficking in cocaine. Suspended sentences were imposed coupled with significant periods of probation which included performing 100 and 75 hours of community service respectively. The circumstances that the court deemed to be exceptional for Mr. Lai were; he was 21 at the time of the offence, had no criminal record, was employed on a part-time basis but was endeavouring to secure full-time employment, lived with his mother and was her principal caregiver and used drug proceeds to pay their living expenses, had pled guilty, and had reconfigured his life. Mr. Lai's prospects for rehabilitation were deemed to be ultimately good. Mr. Orr's circumstances deemed to be exceptional by the court were; he was 22 at the time of the offence, had no criminal record, was gainfully employed and his prospects for ongoing full-time employment remained positive, and 2 years had passed without any involvement in criminal activity. He ad changed his peer associations and become closer to his family. In this case Mr. Orr

was found guilty following a trial *but* Justice Rideout found he was accepting responsibility for his actions. Mr. Orr's prospects for rehabilitation were also deemed to be ultimately good.

In considering the appropriate sentence for Ms. [redacted] I am mindful as well of the comments of Justice Le Bel writing for the Court in the Supreme Court of Canada case of *R. v. Nasogaluak,* 2010 SCC 6 at paras. 43 and 44:

> "The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a 'fit' sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case *(R. v. Lyons,* [1987] 2. S.C.R. 309; M. (C.A.), [1996] 1 S.C.R. 500; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines arid principles in the Code and in the case law.
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> The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code.* But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing, Thus, a sentence falling outside the regular range of appropriate sentences.is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred."

9 I find. based on all the factors noted above in para. 7 that exceptional circumstances do exist in Ms. [redacted] case, that recent jurisprudence supports a suspended sentence where exceptional circumstances exist, that such a sentence will be more likely to protect the public, and being mindful of the comments noted above in *Nasogaluak, supra,* that a suspended sentence with a lengthy probation period is the appropriate sentence for Ms. [redacted]

10 Therefore, I am imposing a suspended sentence with a 2 year term of probation, to include curfew and community service conditions. I will hear submissions from counsel as to the specifics of these conditions and as to any additional terms of probation and ancillary orders.

M.L. HOGAN J.