CANADA / JUDGMENT

R. . Luong

2020 BCSC 1332

COURT
Supreme Court of British Columbia

DECIDED
22 June 2020

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2020 BCSC 1332 R. v. Luong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Luong,

2020 BCSC 1332

Date: 20200622

Docket: 25322-2

Registry: Nelson

Regina

v.

Ha Tay Luong

Vinh Cuong Luong

Before: The Honourable Madam Justice Ker

Oral Reasons for Sentence

(re Accused Vinh Cuong Luong)

Counsel for the Crown appearing by videoconference:

D. Meagher

Counsel for the Accused Hay Tay Luong:

A.J. Lagemaat

(as Agent for S. Sugarman, Q.C.)

Counsel for the Accused Vinh Cuong Luong:

A.J. Lagemaat

Place and Date of Hearing:

Vancouver, B.C.

June 22, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2020

[1] THE COURT: Vinh Cuong Luong is before the Court for sentencing, having entered a guilty plea to one count of unlawfully producing a controlled substance, to wit, cannabis (marihuana), contrary to s. 7 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Count 1) and one count of possessing a non-restricted firearm, to wit, a Squires Bingham .22 calibre rifle, without being the holder of a licence under which he may possess the firearm, contrary to s. 91(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] (Count 3).

Circumstances of the Offence

[2] The circumstances of the offence are as set out in the Crown's written submission filed with the court on June 19, 2020, and marked as Exhibit 1 on this sentence hearing.

[3] The offences occurred on January 6, 2017, in Pass Creek, BC.

[4] Between October 21, 2016, and January 5, 2017, Castlegar RCMP conducted an investigation into a residence located on Pass Creek Road in Pass Creek, BC (the "Residence"). On January 6, 2017, based on information from an anonymous source, information about the power consumption at the Residence, observations of a smell of marihuana attributed to the Residence, and other information, police applied for and were granted a search warrant for the Residence.

[5] The police executed the search warrant on January 6, 2017. It was apparent that the Residence was being used as a marihuana grow operation. The items seized from the Residence included 1,239 marihuana plants, 12 pounds of dry marihuana bud, and over $22,000 in cash. The police also seized a .22 calibre Squires Bingham semiautomatic action rifle, which at all material times was a functioning firearm meeting the definition of a non-restricted firearm in s. 84 of the Code. Vinh Cuong Luong does not have a licence to own a firearm.

[6] The accused Vinh Cuong Luong was present at the Residence and was arrested, along with his brother, Ha Tay Luong, and a third person, Suchan Liang. The charges against Ms. Liang were previously stayed by the Crown. I will refer to Vinh Cuong Luong as Mr. Luong in these reasons; if I am referring to Ha Tay Luong, I will use his full name.

[7] Upon his arrest on January 6, 2017, Mr. Luong provided a statement to police in which he advised that:

i. He had been living in the Residence since June of 2016.

ii. He was growing marihuana at the Residence.

iii. He had a licence to grow marihuana. While this licence had expired, his understanding was that he could continue to grow marihuana under this licence.

iv. The licence allowed him to grow 146 plants, and he was over the limit for the licence.

v. He had an FAC [Firearms Acquisition Certificate] in reference to the firearm that had expired in 1998 or 1997.

[8] Therefore, at the material time, Mr. Luong did not have a licence for his firearm, the licence for growing marihuana had expired, and the number of marihuana plants found was far in excess of what the previous licence had permitted.

[9] A qualified drug expert, Assistant Corporal Chuck Brind'Amour, reviewed the circumstances of this investigation and opined that the size of the marihuana crop is not consistent with personal use, and it was grown for the purpose of sale.

[10] There was no victim impact statement or community impact statement provided. The obvious impact of these offences is on the community. In particular, the impact arises from the use of police resources to investigate the offences and the danger of investigating such offences, especially where there is a firearm at the location being searched. Moreover, Mr. Luong had a lapsed licence to grow marihuana and determined to grow marihuana anyway. Even if he was operating under the belief that he could continue to grow marihuana, the number of plants Mr. Luong had was far in excess of what his lapsed licence authorized. This is a blatant violation which, in my view, contributes to undermining the integrity of the licensing system and is something that cannot be condoned.

Circumstances of the Offender

[11] I am told Mr. Luong is 59 years of age. He was born in Vietnam. He fled Vietnam when the war was still on. He came to Canada in 1979 as a refugee. He became a Canadian citizen in 1982.

[12] For all intents and purposes, it appears that Mr. Luong has worked hard since he arrived in Canada. He worked for eight years as a janitor at the University of Calgary. He then moved to BC and became a commercial fisherman. He has a licence as a commercial fisherman for cod, clams, and oysters, and he is a commercial fisherman to this day. Unfortunately, he is not able to pursue his livelihood given the current public health emergency brought on by the coronavirus pandemic.

[13] I am also told that Mr. Luong has owned and operated a Vietnamese restaurant in the past and, once this public health emergency passes, it is his intention to look into doing that again.

[14] Mr. Luong has two adult children, aged 23 and 25. Both are in university here in Vancouver. His mother was in a long-term care facility but is now in the hospital with advanced stages of stomach cancer. Regrettably, there is a family meeting today. His mother is in the final stages and so Mr. Luong is dealing with some difficult personal circumstances. He has other family here in Vancouver. His brother who is the co-accused lives in Nelson but is coming to Vancouver today to participate in this family meeting, as I understand.

[15] Mr. Luong has one prior criminal conviction for the same offence - unlawful production of a controlled substance - from September 27, 2011. A one year conditional sentence of imprisonment was imposed as well as a 10 year firearms prohibition order pursuant to s. 109(2) of the Code.

Crown and Defence Positions

[16] The parties have made a joint submission as to the sentence the Court ought to impose. They seek a 24-month suspended sentence on Counts 1 and 3, and a $1,000 fine on Count 3. For the period of the 24-month suspended sentence, they submit that Mr. Luong ought to be bound by a probation order with a number of terms that they have put forward. The Crown also seeks a number of ancillary orders, and the defence does not oppose those orders.

[17] No authorities were provided to set out the range of sentence for the Court. The Court was advised that the proposed sentence in this case was at the very lowest end of the range for this offender and this offence. Mr. Luong has one prior conviction for the same offence, production of a controlled substance, from September 27, 2011. I am advised and accept that the range of sentence ordinarily imposed in circumstances similar to this would be 12 months' imprisonment or more.

The Principles of Sentencing

[18] The principles of sentencing have evolved in the Canadian common law and are now largely codified in Part XXIII of the Code. Section 718 of the Code provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. As set out in s. 718, the objectives of sentencing include the denunciation of unlawful conduct, deterrence of the offender and others from committing

other offences, separation of the offender from society where necessary, rehabilitation of the offender, reparation for harm done, and promotion of a sense of responsibility in the offender, including acknowledgment of the harm done.

[19] Section 718.1 of the Code articulates the most basic principle of sentencing: the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[20] Section 718.2 of the Code sets out a number of specific principles. A sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. An offender should not be deprived of liberty if a less-restrictive sanction is appropriate. All reasonable sanctions other than imprisonment should be considered if they are reasonable and consistent with the harm done, with particular attention to the circumstances of Aboriginal offenders. Where consecutive sentences are imposed, the total sentence should not be unduly long or harsh. A sentence should be increased and reduced to take account of any mitigating or aggravating circumstances.

[21] Additional principles of sentencing in relation to drug offences are set out in s. 10 of the Controlled Drugs and Substances Act. Section 10(1) refers to the importance of encouraging rehabilitation and treatment in appropriate circumstances.

Aggravating and Mitigating Factors

[22] As for aggravating and mitigating factors, the aggravating circumstance is that Mr. Luong has a prior conviction for the same offence, albeit the matter is now somewhat dated. As I noted earlier, he was convicted on September 27, 2011, of one count of production of a controlled substance and received a one-year conditional sentence order and a s. 109(2) firearms prohibition for 10 years.

[23] The mitigating circumstances are significant. This is a guilty plea. Mr. Luong has been on bail for three and a half years without incident. The Crown has outlined further mitigating circumstances unique to this case, including the age of the case and the fact that the officers involved in this investigation are now in other jurisdictions; this would present difficulties in getting them here to testify to matters, which would only be exacerbated by the current difficulties arising from the public health emergency wrought by the novel coronavirus pandemic and the limitations it has created for court operations and inter-provincial travel. I accept that these are valid reasons for proceeding in the fashion that the matter is now being presented.

Legal Framework

[24] The parties have jointly recommended a sentence for Mr. Luong. As explained in R. v. Manca, 2019 BCCA 280 at para. 29:

[29] The principles governing joint submissions are well established. Where the Crown and defence agree to recommend a particular sentence in exchange for a guilty plea, the sentencing judge may only depart from the recommendation where the "proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest": R. v. Dunkers, 2018 BCCA 363 at para. 38, citing R. v. Anthony-Cook, 2016 SCC 43 at para. 32.

[25] With reference to the legal framework governing joint submissions, I am satisfied that the recommendation put forward by the Crown and the defence in respect of Mr. Luong should be accepted.

[26] This is a recommendation that has been carefully considered by counsel who understand the background to the prosecution much better than the Court. In formulating a joint recommendation in exchange for a guilty plea, they will necessarily have taken into account the evidentiary strengths and weaknesses of the case as well as other interests relevant to the administration of justice.

[27] In my view, the recommended sentence appropriately balances the aggravating and mitigating factors in this case and reasonably seeks to achieve proportionality under s. 718.1 of the Code. In the circumstances, I see no principled basis on which to depart from the joint submission. The proposed sentence will not bring the administration of justice into disrepute or otherwise be contrary to the public interest: R. v. Anthony-Cook, 2016 SCC 43 at para. 32.

[28] Indeed, as the Ontario Court of Appeal recently noted in R. v. Fuller, 2020 ONCA 115 at para. 16, a joint submission on sentence following a guilty plea should only be rejected in rare cases because such positions are, as Anthony-Cook emphasized, "vitally important to the well-being of our criminal justice system, as well as our justice system at large". The case at bar is a perfect example of that observation.

[29] Mr. Luong, would you please stand.

[30] In the totality of the circumstances, I am satisfied that the joint submission is appropriate.

[31] I will suspend the passing of sentence for 24 months. During that time, you will be bound by a probation order. The suspended sentence and probation order are imposed on both Counts 1 and 3 and are to be served concurrently. In addition, there will be a $1,000 fine on Count 3 that needs to be paid by June 22, 2021, so you have a year to pay that fine.

[32] The conditions of the probation order are as follows:

i. You must keep the peace and be of good behaviour.

ii. You must appear before the court when required to do so by the court.

iii. You must report by telephone to a probation officer at Nanaimo Community Corrections, 101-17 Church Street, Nanaimo, BC, V9R 5H5, telephone number 250-741-3744 or 1-800-793-4832, by 3:00 p.m. tomorrow, June 23, 2020. If the office is closed, you must try again the next business day and continue calling until you have spoken to a probation officer and received further direction to report. After that, you must report as directed by the probation officer.

iv. When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without written permission from your probation officer.

v. You must not possess or consume drugs, except in accordance with a medical prescription.

vi. You must not possess any marihuana seeds, metal halide lights, light bulbs of more than 250 watts, sodium vapour lights, ballasts, capacitators, light timers, or diesel generators, save for the exception of being present in a licensed grow operation operating pursuant to the terms of a valid licence.

[33] So I am just going to pause and explain to Mr. Luong, that does not mean you can take marihuana seeds or any of those items to a licensed grow operation. Do not be dealing with those items, okay. You can be in a licensed grow operation when presumably visiting a family member, but do not be taking seeds to a grow operation for them, do not be taking metal halide lights to them, all right?

[34] There are also going to be three ancillary orders. The first one is a mandatory lifetime firearms prohibition pursuant to s. 109(3) of the Code. The order prohibits you from possessing any firearm, prohibited firearm, restricted firearm, cross-bow, restricted weapon, prohibited weapon, ammunition, and explosive substance. As I said, the duration is life, so no more firearms, no more ammunition.

[35] The second ancillary order is a forfeiture order for all of the items seized, save personal documents, and counsel have drafted the forfeiture order and will be submitting it to the court for me to sign in the next day or two.

[36] Finally, Count 1, which is unlawfully producing a controlled substance (marihuana), is a secondary designated offence under the Code for the purposes of DNA orders, and so pursuant to s. 487.051(3) of the Code, I will be making the DNA order. I understand that the defence is not opposed to the imposition of this order. I will add this caveat: given the current circumstances of the public health emergency, I am directing that you provide a sample of your DNA pursuant to this order at a time and location determined by your probation officer. The DNA sample is to be provided on or before June 22, 2021.

[37] Nobody addressed the issue of the victim fine surcharge which is now back in force, I think. Mr. Meagher, do you have any submissions on that or --

[38] MR. MEAGHER: I think the -- my -- the position that I've been taking is that it doesn't apply in this case, so the old victim surcharge was --

[39] THE COURT: Oh, right.

[40] MR. MEAGHER: -- struck down.

[41] THE COURT: Right.

[42] MR. MEAGHER: The new one doesn't apply because it is not retroactive.

[43] THE COURT: Thank you. Thank you for reminding me. Is there anything else that is required from --

[44] MR. LAGEMAAT: Nothing further from me, My Lady.

[45] THE COURT: Thank you, Mr. Lagemaat. Mr. Meagher, I think you have some directions to make with respect to the other counts and the other accused?

[46] MR. MEAGHER: Yes, that's correct. Crown will enter a stay of proceedings on the balance of the information -- balance of the indictment, I should say.

[47] THE COURT: All right, so there will be a stay with respect to Ha Tay Luong on all four counts of the indictment, and you are also directing a stay with respect to Count 2 and Count 4 on the indictment with respect to Vinh Cuong Luong.

[48] MR. MEAGHER: That's correct.

[49] THE COURT: Right, okay. Thank you.

"Ker J."

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