
CANADA / JUDGMENT

R. v. Adamu

2020 BCSC 98

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2020 BCSC 98 R. v. Adamu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Adamu,

2020 BCSC 98

Date: 20200115

Docket: X081401

Registry: New Westminster

Regina

v.

Jamil Ibrahim Adamu

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Sentence

Counsel for the Crown:

H. Russell

Counsel for the Accused:

S. Wright

Place and Date of Trial/Hearing:

New Westminster, B.C.

December 13, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 15, 2020

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Introduction

- [1] At the outset of trial, Mr. Adamu challenged the constitutionality of his arrest and the search incident to it. In reasons delivered on August 1, 2019, indexed at R. v. Adamu, 2019 BCSC 1203, I found that the RCMP had subjectively and objectively reasonable grounds to arrest Mr. Adamu and that the search incident to his arrest was therefore lawful.
- [2] Following my decision, the Crown relied on the evidence given in the voir dire for the purposes of proof at trial, and Mr. Adamu called no evidence. I convicted Mr. Adamu of unlawful possession of heroin mixed with fentanyl and possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [3] The maximum penalty for these offences under s. 5(3)(a) of the CDSA is life imprisonment. Section 742.1(c) of the Criminal Code, R.S.C. 1985, c. C-46 precludes any consideration of a conditional sentence for an offence carrying that maximum penalty.

Circumstances of the Offence

- [4] Briefly, the circumstances of the offences are as follows:
 - (a) In May 2016, the Coquitlam RCMP Drugs and Organized Crime Unit (the "Unit"), received information from a confidential informant that a male was trafficking drugs in the Coquitlam area using a specific telephone number that, through investigation, the Unit associated to Mr. Adamu. Mr. Adamu was also associated with a Nissan Maxima.

- (b) In October 2016, the Unit initiated an undercover operation into individuals believed to be trafficking in controlled substances using a "dial-a-dope" operation involving the Maxima. One of the targets of the investigation was Mr. Adamu; the other was Mr. Adamu's brother, Zakari Adamu. An undercover officer observed drugs available for sale in the Maxima but was unsuccessful in her attempts to purchase drugs from the occupants.
- (c) Between December 1, 2016, and February 28, 2017, the Unit conducted surveillance on Mr. Adamu and his brother. On a number of dates at different times, various officers observed several short meetings between the Adamu brothers, sometimes together and sometimes apart, and unknown persons. The meetings occurred in or around vehicles or involved vehicles driving to various locations. Mr. Adamu was observed in and around the vehicles. The Unit concluded that the meetings were consistent with drug trafficking.
- (d) The Unit obtained a search warrant for premises believed to be associated with Mr. Adamu and/or his brother. Just prior to the execution of the warrant, Mr. Adamu was arrested. He was searched incident to his arrest, and based on the filed Admissions of Fact #2, Mr. Adamu was found with a plastic Chewsome brand candy container with 28 items of individually wrapped drugs. Those items were 21 pieces of crack cocaine weighing 5.17g, two baggies of powder cocaine weighing 0.52g, and five baggies of fentanyl mixed with powder heroin weighing 0.53g. An iPhone and a Samsung cell phone were also seized.
- [5] According to the Admissions of Fact #2, starting at about 7:17 p.m. and for approximately one hour, Sgt. Rettie of the Coquitlam RCMP answered incoming phone calls on the Samsung cell phone just after it was seized from Mr. Adamu. Sgt. Rettie spoke to seven callers who wanted to order drugs, and three others who hung up on him.

Mr. Adamu's Circumstances

- [6] A pre-sentence report was completed on December 10, 2019, by a probation officer at Burnaby Community Corrections.
- [7] Mr. Adamu is currently 24 years old. He was 21 at the time of the offences. His parents separated when he was three years old, and both have re-partnered. After his parents' separation, they shared joint custody, and Mr. Adamu had a stable upbringing. He is part of a large extended family consisting of siblings, half-siblings, and step-siblings.
- [8] As a relatively young man, Mr. Adamu started part-time work as a sports referee. He worked while he was in high school. He was an average student and, after graduation, did not pursue post-secondary education. He held various unskilled jobs. He currently works for a tree removal company, a job he started in the spring of 2019. His employer described him to the pre-sentence report author as reliable and a valuable employee.
- [9] Mr. Adamu lives with his father and step-mother in Burnaby. Both are facing health challenges, and Mr. Adamu told the pre-sentence report author that he supports them in their home and with their medical appointments.

- [10] At the time of the pre-sentence report, Mr. Adamu had not told his parents about his arrest and conviction. However, that must have changed in the days following the report as his father attended the sentencing hearing and filed a letter on his son's behalf. In it, Mr. Adamu's father describes his significant health difficulties. He also outlined his wife's battle with cancer. He indicated that Mr. Adamu provides day-to-day assistance around the house, helps with the cooking, and drives them to medical appointments. His father expressed appreciation for Mr. Adamu's assistance and asked that Mr. Adamu not be sentenced to a custodial term.
- [11] For the past five years, Mr. Adamu has been in a stable relationship with a woman who has been supportive of him. She is aware of his conviction and is willing to continue to support him.
- [12] As set out in the pre-sentence report, Mr. Adamu reported that he is addicted to OxyContin, a drug that he started using two years ago. He continues to struggle with his addiction, but has never attended substance abuse counselling or rehabilitation programs. He does not suggest that his addiction motivated his criminal activity.
- [13] Mr. Adamu has no prior criminal record.

Positions of the Parties on Sentencing

- [14] The parties do not appear to dispute that the paramount considerations on this sentencing are deterrence, both general and specific, and denunciation.

The Crown's Submissions

- [15] The Crown says that an appropriate sentence, in the circumstances of this case, is two years' imprisonment.
- [16] The Crown also sought a number of ancillary orders, none of which were opposed by Mr. Adamu.
- [17] The Crown argues that the range established in *R. v. Smith*, 2017 BCCA 112, for a first-time offender engaged in street-level dealing in fentanyl, ranges from 18 to 36 months and possibly higher.
- [18] The Crown relied on *R. v. Lloyd*, 2019 BCCA 128 at para. 27, for the court's finding that an offender assumes the risk of the presence of fentanyl when selling illicit drugs; specific and actual knowledge of the presence of fentanyl is not required. The defence has not suggested that Mr. Adamu was not aware of the presence of fentanyl in the drugs or the risk that there would be fentanyl in the drugs.

- [19] The Crown also referred me to *R. v. Davies*, 2019 BCCA 359. Davies involved surveillance of a dial-a-dope operation over a period of several days. On arrest, Mr. Davies had a larger quantity of drugs than the quantity seized from Mr. Adamu. Mr. Davies came from a dysfunctional family, had difficulty in high school, suffered from anxiety and depression, and had attempted suicide on several occasions. At the time of his arrest, Mr. Davies was in breach of bail terms relating to a serious outstanding charge against him.
- [20] Mr. Davies was sentenced to what was effectively 32 months' imprisonment despite the significant efforts he had undertaken towards his rehabilitation, which were considered mitigating factors.
- [21] Finally, the Crown relied on *R. v. Kirton*, 2018 BCPC 11. The facts in Kirton bear some similarity to the facts in this case. Mr. Kirton, who was 27 at the time of his sentencing, trafficked drugs, including fentanyl, in a dial-a-dope operation. Mr. Kirton had a difficult upbringing. He had a dependent 18-month-old child. He was of Métis ancestry and, as a result, there were relevant Gladue factors.
- [22] The aggravating factors in that case included the financial motivation for Mr. Kirton's crimes, the frequency of the transactions over two days of observation, the fact that fentanyl was trafficked, and the fact that weapons were found. The mitigating factors were that Mr. Kirton pleaded guilty, was a first time offender, had family support, and had a dependent.
- [23] Mr. Kirton was sentenced to incarceration for two years less one day followed by a probation order of 12 months.

Mr. Adamu's Submissions

- [24] Mr. Adamu says that a suspended sentence is appropriate in the exceptional circumstances of this case. He submits that a suspended sentence would satisfy the principles of denunciation and deterrence. Alternatively, he submits that a jail sentence of much shorter duration than that suggested by the Crown is appropriate.
- [25] In particular, Mr. Adamu submits that since his arrest almost three years ago, he has had no further contact with the criminal justice system. Counsel submitted that his behaviour after his arrest demonstrates his remorse and shows that he can be a positive contributor to society.
- [26] Mr. Adamu advised the pre-sentence report author that he had recently lost his best friend. In submissions, counsel advised that the death was due to an overdose and that Mr. Adamu greatly regrets his behaviour and understands the terrible results that can flow from his activities.
- [27] Mr. Adamu addressed the court and advised me that he regrets his behaviour.

- [28] Mr. Adamu relied on three Provincial Court decisions in which street-level traffickers were given suspended sentences: *R. v. Joon*, 2017 BCPC 301; *R. v. Dewat*, 2019 BCPC 183; and *R. v. Wong*, 2019 BCPC 132.
- [29] In *Joon*, the offender was 19 at the time of the offence and had no criminal record. He pleaded guilty. The court found that he had engaged in dial-a-dope drug trafficking solely for monetary gain, but since his arrest, he had led a "pro-social and contributing life", his rehabilitation was "well established", and there was no need in his case for specific deterrence or protection of the public (at para. 41). The court found that his young age outweighed the aggravating factors, and he received a suspended sentence with three years' probation.
- [30] In *Dewat*, the offender was just over 18 at the time of the offence. He pleaded guilty to trafficking in heroin and fentanyl. He was on judicial interim release at the time, awaiting trial in youth court for trafficking in cocaine. He was an addict who became enmeshed in the gang lifestyle, which led to his sale of drugs.
- [31] The offender was involved in a stable relationship, and he and his partner were working together to develop business opportunities. Since his arrest, he had taken courses to advance himself and was also working part time.
- [32] The judge's reasons described the offender as having received a "sharp wake up call" and displaying an "objective and mature attitude towards his wrongdoing" (at paras. 13-14). The offender was described as being guilt-ridden about his behaviour. The circumstances led the sentencing judge to conclude that this was one of those rare and exceptional cases in which a suspended sentence with three years of strict probation terms would be appropriate.
- [33] In *Wong*, the offender was 21 at the time of his offences, which included trafficking in fentanyl. He had previously served a prison sentence for trafficking in cocaine.
- [34] The mitigating factors in the offender's case were that he wrote a sincere letter of apology to the court, he promptly returned from Hong Kong on learning of the charges, he was on the road to a pro-social lifestyle, and he was turning his life around.
- [35] The sentencing judge determined that the offender's circumstances did not warrant a suspended sentence, but in light of his age and the other mitigating factors, sentenced him to one year in jail.
- [36] Mr. Adamu also relied on comments made by Justice Romilly in *R. v. Lui*, 2014 BCSC 1929, about the importance of reformation and rehabilitation as considerations in sentencing young offenders. He submitted that I should consider the impact of a custodial sentence in interrupting, and possibly jeopardizing, the pro-social lifestyle Mr. Adamu had demonstrated since his arrest.

Analysis

- [37] The duty of a sentencing judge is to fashion a just and appropriate punishment that addresses the purposes and principles of sentencing and is proportionate to the culpability of the offender: ss. 718 to 718.2 of the Criminal Code. Any sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [38] The sentencing objectives in s. 718 include: the denunciation of unlawful conduct, general and specific deterrence, the separation of offenders from society where necessary, rehabilitation of offenders, the provision of reparations for harm done to victims or to the community, and the promotion of a sense of responsibility in offenders.
- [39] Because Mr. Adamu trafficked in fentanyl, the starting point for considering an appropriate sentence in this case is the range set by the Court of Appeal in *Smith* of 18 to 36 months or higher. The range was proposed by Justice Newbury at para. 45 of *Smith*, and endorsed by the majority at para. 48. Justice Newbury wrote:
- [45] I agree with the many judges who have stated that denunciation and deterrence must generally be given primacy in sentencing in cases involving Fentanyl. To this end, I would suggest a normal range beginning at 18 months' imprisonment, as the Crown suggests. I would place Mr. Smith's offences at the bottom of this range, in light of the mitigating factors discussed by the court below. I do not believe it is necessary for us to specify the top of the range, although I would suggest it might well exceed 36 months, especially where the offender has a substantial record involving the sale of Fentanyl or otherwise demonstrates an indifference to the human lives he or she is putting at risk. This is a matter that can be worked out in future cases. Obviously, the 'range' may also increase beyond 36 months, or a different range will apply, where the offender is higher up the chain of sale or distribution.
- [40] Justice Harris, writing for the majority in *Smith*, referred to the increasing incidence of fatal overdoses due to fentanyl as a public health crisis, adding:
- [48] fentanyl is a scourge. It poses intolerable risks of accidental overdosing because it is so much more powerful than morphine. Illegally manufactured fentanyl can be particularly and unpredictably potent, even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal; often street drugs have fentanyl cut into them, and it is practically impossible for drug users to recognize whether the drugs they buy contain fentanyl.
- [41] Notwithstanding the normal range of sentence referred to in *Smith*, Justice Newbury recognized the discretion of sentencing judges to impose sentences "lower than the bottom of the normal range for trafficking in Fentanyl" in exceptional circumstances (para. 46).

- [42] The Court of Appeal confirmed in *R. v. Schneider*, 2019 BCCA 310, that a non-custodial sentence may still be available in cases involving fentanyl trafficking. In that case, a homeless drug addict sold a small quantity of heroin containing fentanyl to an undercover police officer. The court, at para. 28, described the appellant's subsequent rehabilitation efforts as exceptional and said at para. 29:
- [29] We are satisfied that in this rare case, the best outcome for the protection of society would be to support the appellant's exceptional rehabilitation efforts through a three-year suspended sentence with strict conditions, which would require continued treatment and monitoring in the community. To do otherwise in the circumstances would, in our view, merely continue the revolving door of imprisonment, release, criminal conduct to sustain addiction, followed by a repeat of the cycle.
- [43] However, the court stressed at para. 11 that such sentences are appropriate only in rare cases of drug trafficking involving exceptional circumstances.
- [44] The issue of exceptional circumstances was discussed by the Court of Appeal in *R. v. Voong*, 2015 BCCA 285, a judgment that begins:
- [1] Those who embark in drug trafficking engage in serious criminal conduct. Absent exceptional circumstances, in British Columbia, they should expect to be sent to prison.
- [45] *Voong* was a combined appeal of four cases, none of which involved fentanyl trafficking. It referred to the normal range of sentence for dial-a-dope trafficking for a first offender or one with a minimal criminal record.
- [46] What might amount to "exceptional circumstances" in a case of a first offence of dial-a-dope drug trafficking was addressed at para. 59. There, the court said that such circumstances might include a combination of the absence of a criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, and remorse and acknowledgement 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. The court said:
- [59] 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 noncustodial sentence.
- [47] One of the respondents in *Voong*, Mr. Galang, was 22 years old with no criminal record, and had recognized his responsibility with an early guilty plea. The Court of Appeal did not substitute imprisonment for the suspended sentence that had been given, although it increased the period of probation from one to three years and added a curfew to the probation conditions.

- [48] In *R. v. Naccarato*, 2017 BCSC 645, the accused was convicted of trafficking in heroin laced with fentanyl, having acted as a courier for a drug trafficker. Ms. Naccarato was 24 at the time of the offence and had no prior criminal record, but was addicted to crystal methamphetamine. She successfully entered an addiction treatment program after the offence. Like Mr. Adamu, she was steadily employed and had the support of her employer.
- [49] Justice Pearlman found the case to be "one of those rare cases where the protection of the public would be better served by a non-custodial sentence" (at para. 93). In coming to that conclusion, he relied particularly on the accused's success in dealing with her own addiction. He imposed a suspended sentence with three years' probation, including a term confining the accused to her residence 24 hours a day, seven days a week, for the first year, except for specified purposes.

Application of the Authorities to Mr. Adamu

- [50] Mr. Adamu was steadily employed at the time of the offences. He was not driven to drug trafficking by a need to support his own drug habit, by other economic circumstances, or by mental health issues. There was no evidence that Mr. Adamu's childhood circumstances provided an explanation for his criminal behaviour.
- [51] The fact that greed drove his offences must be seen as an aggravating factor.
- [52] Mr. Adamu was not trafficking at the street level. He was involved in a sophisticated dial-a-dope operation, which is also an aggravating factor: *Voong* at paras. 16-18.
- [53] It is also concerning that in the almost three years since his arrest, and up until days before the sentencing submissions, Mr. Adamu had not told his parents about this arrest. This, coupled with the fact that the pre-sentencing report did not contain any expressions of Mr. Adamu's remorse for selling fentanyl or recognition about the risks to our society of doing so, suggests that Mr. Adamu has not truly accepted responsibility for his criminal behaviour.
- [54] Mr. Adamu's age, lack of a criminal record, productive life since his arrest, and the support that he provides to his family are all mitigating factors. Although Mr. Adamu did not plead guilty at the earliest opportunity, he invited a conviction after his Charter challenges were unsuccessful and, as a result of the admission he then made, avoided the need for a trial.
- [55] In my view, the cases relied on by Mr. Adamu, in which exceptional circumstances were found warranting suspended sentences, are all distinguishable.
- [56] Mr. Adamu was three years older than the offender in *Dewat*. There is no evidence that Mr. Adamu has had the kind of sharp wake-up call suggested by that case.
- [57] There was no evidence of any efforts by Mr. Adamu to turn his life around and engage in a pro-social lifestyle. While he is currently employed, he was also employed at the time of the offence. He has not taken any steps to improve his circumstances since his arrest.

- [58] I do not have the positive character references that were filed in R. v. Chesshire, 2019 BCSC 2070. His father's letter focused on the financial and other support that Mr. Adamu provides to him and to his father's wife. He does not write about Mr. Adamu's remorse for his offences or that Mr. Adamu understands the impact his offences have on society as a whole or on his family's circumstances. It is of note that Mr. Adamu's offences occurred after his father suffered some serious health difficulties.
- [59] I am not satisfied that Mr. Adamu has truly turned his life around. I note that the author of the pre-sentence report did not record any expression of remorse from Mr. Adamu. When asked to discuss the circumstances of his offence, he was reluctant to do so. Although he expressed remorse at the sentencing hearing, he did so after hearing counsel's submissions that emphasized remorse as a key factor in sentencing, and was not persuasive.
- [60] Finally, although Mr. Adamu's drug addiction arose after his arrest and was not the motivation for his trafficking, he has taken no steps to deal with it and only expressed a future willingness to engage in addiction counselling to the pre-sentence report author. The fact that he has started using drugs since his arrest contrasts the offenders in the exceptional circumstances cases, who did the opposite.
- [61] On all the evidence, I am not satisfied that Mr. Adamu's circumstances are of the exceptional nature warranting a sentence outside the Smith sentencing range.
- [62] Having regard to the principles of sentencing, the authorities cited by the parties, Mr. Adamu's circumstances, and the circumstances of his offences, I am of the view that it is appropriate to sentence him to an 18-month term of imprisonment. I have put Mr. Adamu at the low end of the range to take into account the fact that he was 21 at the time of the offences.

Sentence

- [63] Mr. Adamu, please stand. Mr. Adamu, I sentence you to 18 months in custody.
- [64] There will be a weapons prohibition. Pursuant to s. 109 of the Criminal Code, you are prohibited from possessing any firearm, including a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance for a period of ten years, and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
- [65] Possession of a controlled substance for the purpose of trafficking is a secondary designated offence. After considering the factors set out in s. 487.051(3), I am satisfied that it is in the best interest of the administration of justice to make an order in Form 5.04 authorizing the taking of samples of bodily substances from you for the purpose of registration in the national DNA databank. The samples will be taken from you while you are in jail, and you must submit to the taking of samples.

[66] Pursuant to s. 16 of the CDSA, I am satisfied, on a balance of probabilities, that the items listed in the draft forfeiture order are property related to the offences for which you were convicted. I have signed the order that they be forfeited to Her Majesty the Queen to be disposed of, in accordance with the directions of the Ministry of Public Works and Government Services.

[67] You may sit down, Mr. Adamu.

"MacNaughton J."

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