

CANADA / JUDGMENT

R. v. Cheema

2019 BCCA 268

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 268 R. v. Cheema

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Cheema,

2019 BCCA 268

Date: 20190614

Docket: CA45691

Between:

Regina

Respondent

And

Jagdeep Singh Cheema

Appellant

Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

October 1, 2018 (R. v. Cheema, 2018 BCSC 2047, New Westminster

Docket X080234-2).

Oral Reasons for Judgment

Counsel for the Appellant:

R.C.C. Peck, Q.C.

R.A. McConchie

Counsel for the Respondent:

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

June 4, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 14, 2019

Summary:

Appeal concerning the proper application of the test for rejecting a joint submission on sentence. The appellant pleaded guilty to several offences committed to further his mid-level drug operation. The judge rejected a joint submission for a global sentence of five years' imprisonment and imposed a sentence of eight years' imprisonment on the basis that the joint submission did not send a strong message to the appellant and other individuals involved in the drug trade. Held: Appeal allowed, sentence varied to five years' imprisonment less credit for pre-sentence custody. The judge conducted her analysis as though the hearing was a conventional sentencing proceeding and in doing so failed to take several important factors into account and to give clear and cogent reasons for departing from the joint submission. Taking into account the established range of sentences that applied, there was no basis for the judge to depart from the joint submission.

- [1] DICKSON J.A.: This appeal concerns the proper application of the test for rejecting a joint submission on sentence articulated in *R. v. Anthony-Cook*, 2016 SCC 43. The test is stringent, and rightly so. As Justice Moldaver explained in *Anthony-Cook*, joint submissions play a vital role in the efficient operation of the criminal justice system, benefit all of its participants and should be accepted unless they would cause harm beyond their overall value. In other words, a joint submission should not be rejected unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest: *Anthony-Cook* at paras. 1-2, 32, 35, 43.

- [2] The judge below rejected a joint submission for a global sentence of five years' imprisonment following Jagdeep Cheema's guilty pleas to possession of heroin for the purpose of trafficking, possession of heroin and fentanyl for the purpose of trafficking, two counts of unauthorized possession of a restricted firearm and two counts of unsafe storage of a firearm. She did so based on her view that the proposed five-year sentence did not send a strong deterrent and denunciatory message to Mr. Cheema and other like-minded individuals involved in the drug trade. As a result, she imposed a sentence of eight years' imprisonment.
- [3] On appeal, Mr. Cheema submits the judge erred by rejecting the joint submission. In particular, he says, she erred in her approach to the joint submission by, among other things, treating the proceeding as if it were a conventional sentencing and failing to consider factors critical to the public interest. In his submission, taking into account the circumstances, the jointly proposed five-year sentence fell within the range established by the case law and would not bring the administration of justice into disrepute, nor was it otherwise contrary to the public interest. Crown counsel responds the judge did not err because she followed the test set out in *Anthony-Cook* and afforded counsel the opportunity to justify the joint submission, which justification they failed to provide.
- [4] I cannot agree with Crown counsel. For the reasons that follow, I would allow the appeal and vary the sentence to bring it into conformity with the joint submission, namely, five years' imprisonment, less credit for pre-sentence custody.

Background

- [5] On August 3, 2015, police executed a search warrant at Mr. Cheema's residence in Surrey, British Columbia, where he lived with his brother and his parents. In the course of the search, they located over \$5,100 in cash in bundles, drug trafficking paraphernalia, 163.77 grams of heroin (some of which was laced with fentanyl), 83.32 grams of bagged powder cocaine, 41.6 grams of crack cocaine and quantities of MDMA and methamphetamine, as well as four stolen unsecured restricted rifles with readily accessible ammunition and magazines.
- [6] At the gram level, the value of the drugs seized by police was approximately \$41,470. Mr. Cheema possessed the firearms to further his mid-level drug operation, which the judge characterized as "an organized crime operation of some magnitude and sophistication motivated solely by financial gain".
- [7] Mr. Cheema was 23 years old when he committed the offences and 26 years old at the time of sentencing. He dropped out of high school in grade nine and has a limited work history. His criminal record includes a 2009 youth conviction for possession for the purpose of trafficking and a more recent 2016 conviction for assault with a weapon and mischief. On the latter conviction, he was sentenced to two months' imprisonment and 18 months' probation. At the time of the offences, he was subject to a bail order prohibiting him from possessing

any weapons.

Sentencing

- [8] On April 16, 2018, Mr. Cheema pleaded guilty to possession of heroin for the purpose of trafficking, possession of heroin and fentanyl for the purpose of trafficking, two counts of unauthorized possession of a restricted firearm and two counts of unsafe storage of a firearm. In doing so, he withdrew a Charter application with respect to the search warrant and the sentencing was adjourned. The guilty plea was entered on the Monday originally scheduled for the commencement of a two-week trial, the Registry having been notified on the preceding Friday. The sentence hearing was conducted several months later, on September 10, 2018.
- [9] At the outset of the sentencing hearing, Crown counsel advised the judge of the joint submission proposing a sentence of five years' imprisonment, less credit for pre-sentence custody, together with ancillary orders. The judge confirmed that Mr. Cheema understood she was not bound to follow a joint submission. Thereafter, Crown counsel filed and reviewed an agreed statement of facts, described Mr. Cheema's criminal record and outlined various mitigating and aggravating factors. She also outlined various sentencing principles and authorities in support of the joint submission that a five-year term of imprisonment was appropriate, including *R. v. Nur*, 2015 SCC 15; *R. v. Borecky*, 2013 BCCA 163; *R. v. Wong*, 2012 ONCA 767; *R. v. Nguyen*, 2003 BCCA 291; *R. v. Nazarek*, 2018 BCSC 259; *R. v. Farrell*, 2015 BCCA 477; and *R. v. Bears and Raccio*, 2013 BCSC 478.
- [10] During Crown counsel's submissions, the judge expressed concern that the proposed sentence was "low" in light of the seriousness of the offences, the aggravating factors, the goals of deterrence and denunciation, and what she saw as the omnipresent drug and gun violence in Surrey. In doing so, she asked counsel how the joint submission constituted a fit sentence. In response, in addition to referring to the noted authorities, Crown counsel advised the judge of several factors that were taken into account when the joint submission was negotiated and agreed upon, including: Mr. Cheema's age and limited criminal record; the guilty plea; additional information received from police and admissions from Mr. Cheema. Importantly, Crown counsel also advised the judge that the Crown had concerns regarding the search warrant that led to the discovery of the weapons and the drugs. Defence counsel made similar submissions regarding the considerations that underpinned the joint submission.

Reasons for Sentence

- [11] On October 1, 2018, in reasons indexed as 2018 BCSC 2047, the judge rejected the joint submission and imposed a sentence of eight years' imprisonment.
- [12] The judge began her reasons by reviewing the facts and the aggravating and mitigating factors. As to the latter, she stated:

- [26] In terms of mitigating factors, the accused is young, 23, and has admitted his guilt. Counsel for the accused stresses that the guilty plea is particularly mitigating as the accused chose to admit his guilt in spite of what counsel describes as a triable Charter issue with respect to the search warrant. Counsel argues that this is a crucial factor in deciding whether to accept the joint submission.
- [13] Then the judge turned to her analysis. After noting that the charges were very serious, she described the duty of a sentencing judge in conventional terms, namely, to fashion an appropriate punishment that addresses the principles of sentencing and is proportionate to the offender's culpability. She also noted two principles upon which she focused throughout her reasons: (i) the paramount considerations on the sentencing were protection of the public, deterrence and denunciation; and (ii) she must consider the circumstances of the community as well as Mr. Cheema's circumstances "in determining a fit sentence".
- [14] The judge went on to comment on the well-known negative impact of drug trafficking in Canadian communities generally, and particularly in Surrey. In addition to relying on Crown counsel's statement that there were 200 reported incidents of shootings in Surrey since August 2015, she cited "recent articles about the upcoming municipal elections" as indications that "the top concern of citizens in Surrey is gun violence" (at paras. 32-33). She also stated:
- [34] The courts have a responsibility to respond to the issues facing our communities. The only way we can do that is through sentences that act as a deterrent to the accused and like minded individuals that are involved in the drug trade. The message must be clear: courts will not condone drug trafficking and the violence associated with it. This sentence must be a significant one. It cannot be viewed by people like the accused as the cost of doing business.
- [15] Against this backdrop, the judge framed the issue for determination as whether the joint submission accomplished the goals she identified. After referring to the test in Anthony-Cook and the dangers associated with drug trafficking, she stated:
- [40] Considering all of the circumstances and all of the submissions, and being mindful of the principle enunciated by the Supreme Court of Canada, I am not satisfied that the sentence proposed by counsel satisfies the public interest test. Rather, it is my view that it would bring the administration of justice into disrepute and cause informed, reasonable people to lose faith in the criminal justice system. Accordingly, I cannot accede to the joint submission.
- [41] Having regard to all of the circumstances of this offence, it is my view that a fit sentence is eight years.

On Appeal

- [16] Mr. Cheema contends that the judge erred in principle by treating the proceeding as if it were a conventional sentencing and failing to approach it as an individualized process. He says she also failed to consider critical factors under the public interest test, including the benefits joint submissions provide to the justice system and to the Crown. Further, he says, she considered irrelevant and unproven matters by relying on what she saw as the community of Surrey's preference for significant sentences in the context of drug-related violence. Finally, he says, she failed to raise the possibility of allowing Mr. Cheema to withdraw his guilty plea, which was unfair and contrary to the procedure enunciated in *Anthony-Cook*.
- [17] The Crown responds that the judge correctly stated and applied the test from *Anthony-Cook* when she declined to impose the five-year sentence jointly proposed by counsel. According to Crown counsel, she properly considered the fundamental principles of sentencing, her reference to Surrey's drug-related violence was unobjectionable and she took Mr. Cheema's individual circumstances into account. He also submits that the judge cannot be faulted for failing to consider factors not put before her by counsel and argues counsel failed to demonstrate adequately that the joint submission would not bring the administration of justice into disrepute. For example, he says, counsel failed to identify any substantial benefits to the Crown and the justice system achieved by the joint submission and submits that, given the timing of the guilty pleas, those benefits were limited in any event.
- [18] Finally, the Crown emphasizes that Mr. Cheema was represented by counsel at the hearing and he did not seek to withdraw his guilty pleas before the judge, nor has he sought to do so on appeal. In these circumstances, citing *R. v. Bear*, 2018 SKCA 22, Crown counsel submits Mr. Cheema's argument that the appeal should be allowed because the judge failed to offer him an opportunity to withdraw his guilty plea is "disconnected from the practical relief he now seeks".

Analysis

Standard of Review

- [19] The applicable standard of review is uncontentious. Absent an error of law or an error in principle that has an impact on the sentence, this Court should only intervene to vary a sentence if it is demonstrably unfit. Where appellate intervention is justified, the role of this Court is "to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate": *R. v. Lacasse*, 2015 SCC 64 at paras. 11, 43-44; *R. v. Agin*, 2018 BCCA 133 at paras. 55-57.

Joint Submissions on Sentencing

- [20] As Justice Moldaver explained in *Anthony-Cook*, resolution discussions between Crown counsel and defence counsel are essential to the smooth and efficient functioning of the criminal justice system. Joint submissions often result from these discussions and provide significant benefits to the Crown, the accused, the public at large and the administration of justice. The near-certainty associated with joint submissions allows the Crown to avoid taking flawed cases to trial and encourages accused persons to cooperate. In addition, a joint submission might result in a more lenient sentence for an accused than would otherwise be expected, minimize the stress and costs associated with trials and offer the accused an opportunity to make amends. Most importantly, joint submissions provide a degree of certainty to all concerned that the benefits underlying the agreement will be respected, which has been described as an "instrumental feature" of the criminal justice system: *R. v. Faulkner*, 2018 ONCA 174 at para. 103; *Anthony-Cook* at paras. 36-40; *R. v. Dunkers*, 2018 BCCA 363 at paras. 38-40.
- [21] In *Dunkers*, this Court recognized that such arrangements also benefit other justice system participants:
- [40] [Joint submissions] also provide benefits to victims, witnesses, and the criminal justice system at large. For cases with horrific and difficult facts, victims and witnesses obtain some comfort in being spared the emotional and psychological cost of a trial. From an administrative perspective, guilty pleas save precious time, resources and expenses that can be directed towards other matters.
- [22] Given the foregoing, a judge presented with a joint submission must approach the sentencing task differently than on a conventional sentence hearing. Under the conventional approach, the judge focuses on the circumstances of the offender and the offence, and the applicable sentencing principles. However, when assessing a joint submission, the judge must consider factors beyond the typical sentencing principles and should not "reverse engineer" a joint submission by determining the sentence that would have been imposed after a trial and comparing it to the jointly proposed sentence. Rather, the analysis should begin with the basis for the joint submission, including the important benefits to the administration of justice, and ask whether there is something apart from the length of the sentence that engages the public interest or repute of the justice system: *Anthony-Cook* at paras. 32, 42, 44, 48; *R. v. Belakziz*, 2018 ABCA 370 at para. 18. This approach enables a full appreciation of the basis and justification of the jointly proposed sentence: *R. v. McInnis*, 2019 PECA 3 at para. 78.
- [23] In *Anthony-Cook*, the Court made it clear that joint submissions should only be rejected if the proposed sentence "would bring the administration of justice into disrepute or is otherwise contrary to the public interest". This occurs only where that sentence "would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system". This deferential approach recognizes that Crown and defence counsel

have a high degree of knowledge of the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. Accordingly, counsel are well-placed to arrive at a joint submission that reflects the interests of the accused and the general public at large: Anthony-Cook at paras. 32, 44, 48.

- [24] Nevertheless, as the judge recognized, joint submissions are not sacrosanct. For this reason, where the jointly proposed sentence is, for example, unduly lenient or harsh, a judge may depart from it. In such circumstances, the judge should provide clear and cogent reasons for doing so to ensure the parties understand why the joint submission was unacceptable, guide future resolutions and facilitate appellate review: Anthony-Cook at paras. 3, 25, 60; Criminal Code, R.S.C. 1985, c. C-46, s. 606(1.1)(b)(iii).

Discussion

- [25] I agree with Crown counsel that there is no merit to the argument that the appeal should be allowed because the judge did not ask Mr. Cheema if he wanted to withdraw his guilty pleas. As in Bear, the argument is made in the abstract and unconnected to the relief sought on appeal. I also agree that the judge considered Mr. Cheema's individual circumstances and I am not persuaded that she impermissibly relied on extraneous reports regarding the concerns of Surrey citizens. The impact of drug crime is notorious and the judge was entitled to consider local conditions: R. v. Francis, 2008 BCCA 309 at paras. 13, 22; R. v. Herrell, 2014 BCCA 114 at para. 22.
- [26] However, in my view, while the judge stated the test in Anthony-Cook correctly, she did not apply it. Rather, she conducted her analysis as though she was dealing with a conventional sentencing proceeding. Contrary to the Court's direction in Anthony-Cook, she assessed what she saw as a "fit" sentence based on considerations of deterrence, denunciation and protection of the public and, in doing so, failed to consider the significant systemic benefits that flowed to the justice system and the Crown from the joint submission. As Crown counsel below acknowledged, there was a potential flaw in the Crown's case in connection with the search warrant, which concern she identified as a factor in the agreement reached by counsel. In addition, Mr. Cheema's guilty pleas saved valuable time, resources and expenses from an administrative perspective despite the fact that it was not entered until the first day of the scheduled trial. However, the judge did not take these important factors into account.
- [27] Nor did the judge give "clear and cogent reasons" for departing from the joint submission. The proposed five-year sentence fell within the sentencing range established in the case law, as counsel below fully explained at the hearing. Despite that explanation, the judge cited no authority to justify the eight-year sentence she imposed relative to the five-year sentence jointly proposed by counsel. Instead, she seemingly relied primarily on her view that drug trafficking and associated violence are problems of epic proportion and that, in consequence, a strong message must be sent to Mr. Cheema and others of like mind.

- [28] The serious nature of drug trafficking and weapons offences cannot be doubted. This Court has found that the range of sentences for weapons offences such as these is between 30 months to seven and a half years, and the range for drug offences with the presence of weapons as an aggravating factor is approximately one year to more than five years. For example, in *Borecky*, a seven-year sentence was imposed for offences similar to those in this case, although the offender possessed more firearms and drugs than Mr. Cheema possessed, did not plead guilty, had a lengthy related record and little hope of rehabilitation. In *Borecky* and the other authorities cited by counsel, the paramount need for deterrence and denunciation was acknowledged and addressed in the range that was set.
- [29] In my view, given the established range of sentences that applied, it cannot reasonably be argued that the joint submission was unhinged from the circumstances of the offences and the offender to an extent that would bring the administration of justice into disrepute. As in *Anthony-Cook*, there was no basis for the judge to substitute her opinion as to an appropriate sentence for the considered agreement reached by counsel based on their knowledge and negotiations with respect to the guilty pleas.

Conclusion

- [30] The judge erred in principle in rejecting the joint submission. A well-informed member of the public, armed with the knowledge of the circumstances of the offence and offender, would not conclude the joint submission represented a breakdown of the effective operation of the criminal justice system.
- [31] It follows that I would allow the appeal and vary the sentence to bring it into conformity with the joint submission, namely, five years' imprisonment, less credit for pre-sentence custody.
- [32] HUNTER J.A.: I agree.
- [33] BUTLER J.A.: I agree.
- [34] DICKSON J.A.: The appeal is allowed. The sentence is varied to five years' imprisonment, less credit for pre-sentence custody.

"The Honourable Madam Justice Dickson"

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