

CANADA / JUDGMENT

R. v. Delege

2016 BCSC 1964

COURT

Supreme Court of British Columbia

DECIDED

4 October 2016

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2016 BCSC 1964 R. v. Delege IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Delege, 2016 BCSC 1964 Date: 20161004 Docket: 37517-2 Registry: Prince George Regina v. Gijsbertus Ben Delege Steven Andrew Delege Before: The Honourable Mr. Justice Tindale Oral Reasons for Sentence Re: Accused Gijsbertus Ben Delege Counsel for the Crown: C. Fast Counsel for the accused, Gijsbertus Ben Delege, appearing by teleconference: M.R. Jetté Place and Date of Hearing: Prince George, B.C. June 28, 2016 Place and Date of Judgment: Prince George, B.C. October 4, 2016

- [1] THE COURT: The accused, Ben Delege, entered pleas of guilty to Counts 2 and 3 on Court File No. 37517-2 on March 15, 2016.
- [2] Those two counts can be summarized as follows: Count 2: On or about the 20th day of December, 2012, at or near the City of Prince George, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit, cannabis marihuana, in an amount exceeding three kilograms for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act; Count 3: On or about the 20th day of December, 2012, at or near the City of Prince George, in the Province of British Columbia, did, fraudulently, maliciously, or without colour of right, consume electricity, the property of British Columbia Hydro and Power Authority, of a value exceeding \$5,000, and did thereby commit theft contrary to s. 326(1)(a) of the Criminal Code.
- [3] The sentencing submissions were heard on June 28, 2016. At the request of Mr. Delege, the decision on sentence was adjourned until today's date.

Background

- [4] Exhibit 1 on the sentencing hearing is the Crown's statement of facts which includes a summary of the circumstances of these offences and an expert report from James Albert Mummery, a Red Seal journeyman electrician. There was also an expert report from Sergeant Darren Oelke with regard to the value and sophistication of the grow operation found on the property.

- [5] By way of background, the Royal Canadian Mounted Police received a report of theft of electricity on November 29, 2012. This report was in relationship to property located at 11320 Pilot Mountain Road in the City of Prince George, Province of British Columbia ("Property").
- [6] The RCMP investigated this complaint, which included surveillance on the Property on nine different occasions, and on December 20, 2012, the police executed a search warrant at the Property.
- [7] The Property was or had been owned by Steven Delege, the accused's son, since December 9, 2010. The Property consists of approximately four acres of land and a split-level one-storey residence with an attached garage. The accused had been occupying the upper level of the residence on the Property.
- [8] When the police entered the Property, Steven Delege answered the door. He was arrested, as well as was the accused. There was also a third male in the residence, a Kelly Sunduk.
- [9] The accused, after being arrested, was found to have \$6,210 in Canadian currency in his left breast pocket of his jacket. The accused, upon being arrested, said the following to the police: "It was the best grow op ever. Two more weeks and we would have harvested the best crop; Could you not have waited two weeks; Only two weeks from cropping out; They are really nice plants; We do not have guns. We are not bad guys.; The plants are in tomato cages. Slit the cages to get them out; I am the mouse, you are the cat. You got me; It was a smart meter that gave us away. I knew it."
- [10] During the search of the Property, it was discovered that there was a marihuana grow operation that consisted of 1,569 marihuana plants located in the basement. There were three rooms located in the basement which were being used for the marihuana grow operation.
- [11] In one room in the basement, the following was found:
- a) a shelf containing numerous related chemicals and fertilizers;
 - b) a large drying rack with 12 framed screens;
 - c) nine garbage bags full of potting soil under the stairs;
 - d) one garbage bag containing 5.36 kilograms of marihuana leaves or "shake", under the stairs;
 - e) three timers located on the outer wall which were set from 6:00 p.m. to 6:00 a.m.;
 - f) a digital scale on a work bench;
 - g) watering tubs; and
 - h) eight ballasts, including five ballasts on the outer wall and three ballasts on the floor.

- [12] There was another room in the basement which was being used to grow marihuana plants that contained the following:
- a) 1,099 small marihuana plants approximately five inches in height, growing in red and white plastic cups;
 - b) five 1,000-watt high-pressure sodium light bulbs;
 - c) five shrouds;
 - d) six 60-hertz "SunBlaster" fluorescent lights;
 - e) empty plastic cups with potting soil residue;
 - f) plant chemicals;
 - g) two oscillating fans, one large charcoal can filter hooked up to an exhaust fan; and
 - i) White Mylar which covered the walls and ceiling.
- [13] Finally, there was a room in the basement that was being used to grow marihuana plants that contained the following:
- a) 470 marihuana plants in potted soil, approximately 24 to 36 inches in height in the budding or flowering stage of growth;
 - b) 19 1,000-watt high pressure sodium light bulbs;
 - c) 19 shrouds;
 - d) two oscillating fans, two large charcoal can filters hooked up to an exhaust fan and a timer; and
 - f) White Mylar which covered the walls and ceilings.
- [14] Three fingerprint impressions were located on two grow bulbs which were found in a box near the metal electrical fuse box, which were identified to the accused.
- [15] An electrical bypass was located in the garage of the Property. The registered BC Hydro subscriber was the accused.
- [16] James Mummery, in his report dated March 22, 2013, noted the following in relationship to the hydro bypass: It shows cables that have been installed laying on floors, running down walls without support, hanging from rafters, entering into panels without proper grommets, and generally installed in a very poor workmanship manner. These types of installations lead to electrocution and fire hazards from strain on connections improperly bonded to ground and damage to cables from sharp edges.
- [17] Sergeant Oelke, in his report dated March 12, 2013, opined that the level of sophistication of the subject grow operation on a scale of one to 10, with 10 being the highest level of sophistication, was a five.

- [18] Sergeant Oelke further opined that the subject marihuana grow operation was for the purpose of sale for profit. Depending on whether the marihuana was sold by the gram, by the ounce, or by the pound, the value of the marihuana ranged between \$352,800 and \$878,640. Circumstances of the Accused
- [19] The accused is 63 years of age, having been born in April 1953 in Holland. He came to Canada in 1954 with his parents and seven siblings. He grew up in Winnipeg and went to occupational school where he learned carpentry and dry-walling.
- [20] He was married in 1974 and has three children, including Steven Delege. He divorced his wife in the mid-1990s and moved to Houston, British Columbia. The accused moved to Prince George in 2006.
- [21] The accused worked in construction and drywall while in Prince George and built a house. That particular house was sold in 2010 and apparently the profits went into the purchase of the Pilot Mountain Property.
- [22] The accused has two chronic diseases that he suffers from, which are diabetes and chronic obstructive pulmonary disease. Exhibit 4 on this sentencing hearing is a letter dated June 27, 2016, from Dr. Ian Schokking. Dr. Schokking confirms that the accused suffers from diabetes and COPD, as well as hypertension, which requires monitoring.
- [23] The accused is remorseful about his actions. In September 2013, the accused leased property near Hixon, British Columbia, where he now raises cattle. It was because of his cattle that the accused required an adjournment of this hearing in order to settle his affairs.
- [24] The accused has a criminal record which has been marked as Exhibit 2 on this hearing. His criminal record is dated, with the last conviction being in 1996. The accused does not have any convictions for drug-related offences.
- [25] Exhibit 3 on this sentencing hearing is a book of character references for the accused. The book consists of letters from nine people who have written letters on behalf of the accused, which includes friends, family, and his family doctor.
- [26] Alexander Huber wrote one of those letters. He has resided in Prince George for approximately 23 years and has known the accused for a number of years. Mr. Huber in his letter said, in part, the following: I also do not view his character any different given the charges against him, he is a hardworking roughneck, not a career criminal, who will at a moment's notice drop what he is doing and help set up displays at the fair. I do believe he has understood the consequences of his actions and just how severe his actions were, and therefore would not commit any further offences.

- [27] Carli Nachbaur was engaged to Steven Delege, the accused is the grandfather of her children, and she has known him for approximately five years. She said the following in part in her letter: I know 100% that Ben will not reoffend. He has so many positive people in his life that love him and he loves. My kids are his world, they are young and I feel he is now setting a great example of how to be a hard worker and a good person.
- [28] The remaining character reference letters are all positive and describe the accused as a hardworking and caring individual. Position of the Parties Crown
- [29] The Crown argues that a fit sentence for the accused would be between 12 to 15 months in jail on Count 2, and three months in jail concurrent on Count Number 3. The Crown is also seeking a weapons prohibition order pursuant to s. 109 of the Criminal Code and a DNA order.
- [30] Crown argues that the aggravating factors in this case are as follows:
- a) the marihuana grow operation was powered by the theft of electricity;
 - b) the accused's motive was financial;
 - c) the accused was a principal if not the principal in the grow operation;
 - d) the grow operation was an ongoing commercial operation; and
 - e) this was a large-scale grow operation with over 1,500 plants.
- [31] The Crown argues that the mitigating factors in this case are the accused's guilty plea on the first day of trial and his health challenges.
- [32] The Crown argues that this grow operation was an ongoing commercial grow operation with prior crops. Crown argues this because the accused, upon his arrest, made comments such as, "It was the best crop ever."
- [33] Exhibit 1, Tab B are a number of photographs of a calendar found at the Property. The Crown argues that the calendar contains references which are consistent with an ongoing grow operation. For example, the calendar for February 13, 2011, has the word "food" written on it, the March 9, 2011, date has the word "flip" written on it, and on the April 24, 2011, calendar, the word "flush" appears. The Crown concedes that there is no expert evidence as to the meaning of these words; however, they argue that it is supportive of a history of an ongoing grow operation.
- [34] The Crown also argues that the supplemental opinion letter of Sergeant Oelke dated November 8, 2013, supports their argument that this was an ongoing grow operation. Sergeant Oelke in that report states in part the following: Photographs of the grow operation show a thick layer of undisturbed dust on the lampshades, the floor, and the equipment is very stained from water and chemicals. The drying screens have residue on them indicating at least one previous harvest of marihuana bud. The general condition of the grow operation appears very well used and not new.

- [35] The Crown acknowledges that they must prove beyond a reasonable doubt the existence of any aggravating factors pursuant to s. 721(3)(e) of the Criminal Code. The Crown argues that the evidence of an ongoing marihuana grow operation are found in the statement of facts, photographs, and opinions of Sergeant Oelke that have been marked as Exhibit 1 on this sentencing hearing. The Crown asks the court to draw an inference from the facts which they say are not in dispute.
- [36] In *R. v. Pahl*, 2016 BCCA 234, the court at paragraph 55 states the following: Counsel's podium is not the equivalent of the witness box. In speaking to sentence counsel make submissions, they do not give "evidence": *R. v. Cousins* (1981), 22 C.R. (3d) 298 at 301 (Nfld. C.A.); *R. v. Gobin* (1993), 85 C.C.C. (3d) 481 at 484 (Man. C.A.). However, this does not mean that sentencing judges can never accept information provided through submissions as factually accurate.
- [37] Crown relies on the following cases in establishing a range for a fit sentence:
- 1) *R. v. Hanna*, 2015 BCSC 986;
 - 2) *R. v. Koenders*, 2007 BCCA 378;
 - 3) *R. v. Hill*, 2007 BCCA 309;
 - 4) *R. v. Nguyen*, 2002 BCCA 12;
 - 5) *R. v. Kwiatkowski*, 2010 BCCA 238;
 - 6) *R. v. Wallis*, 2007 BCCA 377;
 - 7) *R. v. Anderson*, 2007 BCCA 581; and
 - 8) *R. v. Kwan*, 2016 BCCA 208.
- [38] In *Hanna*, the accused was a 38-year-old first-time offender who was found to be the caretaker of a 1,260-plant marihuana grow operation. The court at para. 23 said the following about the fit range of sentences for this type of case: I agree with Crown counsel that the appropriate range of sentence in this case, absent a mandatory minimum sentence, would be between nine and 15 months in jail. In the circumstances of this case, the appropriate sentence for Mr. Hanna, absent the mandatory minimum, would be in the mid to upper end of that range.
- [39] In *Koenders*, the court, after stating that sentences for commercial production will be more severe than those for non-commercial production, said the following at paras. 21 through 23:

- [21] In my view, the same reasoning underlies the increased need for denunciation and deterrence in offences related to the commercial production of marihuana. The person who becomes involved in the commercial production of marihuana, solely for profit, makes a deliberate decision to operate outside the laws of this country. Unlike most other offences, the production of marihuana is not situational: no one can operate a grow operation without a large amount of planning, deliberation and organization.
- [22] Obviously there are cases that are not driven solely by commercial benefits. Purely non-commercial marihuana grow operations are generally regarded as being the least serious manifestations of the offence of production. Production solely for personal use or solely for the medical use of others will often attract a non-custodial sentence. Thus, as the level of commerciality increases, so does the seriousness of the offence.
- [23] These categories are not rigid because, to echo what was said in Proulx, *supra*, the culpability of the offender must be considered as well as the gravity of the offence. A number of factors affect culpability including: the age of the offender; whether the offender is a principal operator or merely an employee; whether it is a first offence; and the choices the offender faced before becoming involved in the crime. The court will also consider such factors as whether the offender pleaded guilty and if there has been a joint submission. This list is not closed.
- [40] The Crown acknowledges that the accused has a dated and unrelated criminal record. The Crown notes that the accused is a mature man who entered into an ongoing commercial marihuana production operation. The Crown argues that general deterrence is a factor in this case and specific deterrence may not be as important a factor.
- [41] The Crown is opposed to a lifting of the firearms prohibition pursuant to s. 113(1)(b) of the Criminal Code, as they argue that the wording of that section is restricted. It is meant to apply in a limited number of circumstances, such as if someone was employed with the armed forces or a person needs to hunt or trap for subsistence reasons. The Accused
- [42] The accused argues that he should be considered a first-time offender because his record is dated and does not contain any related offences. The accused notes that he entered a guilty plea and he is remorseful for his actions. The accused argues that his age and health issues should be taken into consideration, as well as the reference letters that have been provided which show that he has community support and insight into his crime.
- [43] The accused further argues that this was a moderately sophisticated grow operation. There is no evidence that it was connected to organized crime or that there were any weapons, booby traps, or surveillance equipment at the Property. The accused argues that any jail sentence should be at the lower end of the range for a fit sentence.

- [44] The accused does not agree that there were any prior marihuana crops and puts the Crown to prove this beyond a reasonable doubt. The accused argues that there is no expert evidence as to what the meaning of words such as "flip" and "flush" which were found on the calendar on the Property mean in relationship to a grow operation. The accused argues that the fact that there was dust on some of the grow equipment does not indicate that there was a previous crop.
- [45] The accused further argues that because the only vocation available to him is cattle ranching, he should be granted a lifting of any firearms prohibition, because he would need a firearm to protect his cattle. The accused seeks an order pursuant to s. 113(1)(b) of the Criminal Code in that regard.
- [46] The accused relies on a number of cases in establishing a fit range of sentence. Those are:
- 1) R. v. Shokar, 2006 BCSC 1088;
 - 2) R. v. Koenders, 2007 BCCA 378;
 - 3) R. v. Luu, 2007 BCCA 486;
 - 4) R. v. Le, 2008 BCSC 1730;
 - 5) R. v. Lam, 2010 BCPC 47;
 - 6) R. v. Chiu, 2010 BCPC 42;
 - 7) R. v. Lam, 2012 BCPC 488;
 - 8) R. v. Mak, 2013 BCPC 433;
 - 9) R. v. Fan, 2014 BCSC 1092;
 - 10) R. v. Huang, 2014 BCSC 2342;
 - 11) R. v. Frazer, 2015 BCPC 145; and
 - 12) R. v. Kwan, 2016 BCCA 208.
- [47] In Le, the accused, who had a previous conviction for production of marihuana, was convicted in relation to offences involving a marihuana grow operation. There was a hydro bypass, as well as security cameras and barbed wire around the backyard of that residence. The accused's wife and daughter were in the residence, which was considered to be an aggravating factor. The accused received 12 months in jail for that offence.
- [48] In Chiu, the accused was found to be a live-in gardener for a marihuana grow operation of some 1,331 plants. He was 51 years of age with no prior criminal record. The accused had significant financial burdens associated to his children's post-secondary education and his mother's medical costs. The accused received 12 months in jail for that offence.

- [49] In Mak, the sentencing judge took into consideration the fact that the accused "were a great deal less sophisticated than many of those involved in marihuana production."
- [50] The accused acknowledges that a custodial sentence is in order; however, urges the court to use restraint in imposing one. Decision
- [51] The grow operation in question was large, however, only moderately sophisticated. The motivation of the accused was to sell marihuana for profit. The accused was the subscriber for the hydro service and apparently had sold a previous home in order to assist in the purchase of the property. The accused was one of the principals of this marihuana grow operation.
- [52] While I agree with the Crown that Exhibit 1, which includes photographs of calendars found in the residence, as well as a supplemental report of Sergeant Oelke, combined with the statement given to the police by the accused on his arrest, could be used to draw an inference that this was an ongoing grow operation, I am not prepared to draw that inference. I say that because I do not have any expert evidence as to what the words on the calendars mean in relationship to the grow operation, and I am not prepared to guess as to what they could mean.
- [53] Sergeant Oelke, in his supplemental opinion letter, relies on the fact that there is dust on some of the equipment and the fact that the drying screens have residue on them, in coming to the conclusion that there had to have been at least one previous crop. I have no information that Sergeant Oelke is qualified to determine the age of a grow operation based on the accumulation of dust or any information about the accumulation of dust generally on the Property. Also, I have no evidence that the drying screens were new as opposed to used when they came into the possession of the accused.
- [54] Finally, Sergeant Oelke assumes that the hydro bypass was in place since the hydro service was connected in the name of the accused. There is no evidence in that regard.
- [55] The comments made by the accused on his arrest to the police are somewhat ambiguous. The accused's comments could be interpreted as coming from somebody that had already harvested a crop or it could be interpreted as coming from somebody who was merely boasting about his work.
- [56] The accused seeks a lifting or exemption from a firearms prohibition pursuant to s. 113(1) (b), which reads as follows: 113 (1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that . . .
- (b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person, the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or

employment purposes.

- [57] The submissions made by the accused are that he requires a firearm for the purpose of protecting his cattle. There is no evidence before me that this is the only vocation open to him, but rather, this is the vocation that he has chosen to follow at this point. The submissions made generally on behalf of the accused indicate that he has a variety of skills which may allow him to support himself in the future in a different vocation.
- [58] In the circumstances of this case, it would not be appropriate to make an order pursuant to s. 113(1)(b) of the Criminal Code.
- [59] The principles of sentencing are found in s. 718 of the Criminal Code of Canada and read as follows: 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [60] Other sentencing principles are found in s. 718.2 of the Criminal Code of Canada which requires the court to take into consideration any relevant aggravating or mitigating circumstances. Of importance in this case are the principles found in s. 718.2(d) and (e) which read as follows:
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
 - (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances . . . should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [61] A conditional sentence is not available on Count 2.
- [62] The aggravating factors in this case are as follows:
- 1) this is a large grow operation, which I acknowledge is only moderately sophisticated;

- 2) there was the theft of hydro which was done in a manner that could have caused a fire or electrocution or other harm to persons or property;
 - 3) the accused was the principal operator of the grow operation; and
 - 4) the motivation of the accused was financial and this was a commercial grow operation.
- [63] The mitigating factors are the guilty plea of the accused, as well as his age and his health issues.
- [64] I accept the submissions of the accused that there is no indication that this operation was connected to organized crime. There were no weapons, surveillance, equipment, or booby traps on the Property.
- [65] I also accept that the accused is remorseful. Based on the character reference letters, it appears he has learned his lesson and was, up until this offence, generally a productive member of society. The accused clearly has significant support in the community.
- [66] While specific deterrence in this case is not a significant factor, in my view, general deterrence and denunciation are significant factors. I have been provided with a number of cases on sentencing which, in my view, establish a fit range of sentence of between nine to 15 months in jail. The accused does have a previous criminal record. However, there are no convictions relevant to this proceeding, and his last conviction prior to this incident was in 1996.
- [67] The accused is 63 years of age and has significant health issues.
- [68] Mr. Delege, if you could just stand up for a moment, please. In my view, considering all of the above factors, including the accused's age and health issues, a fit sentence, sir, would be nine months in jail on Count Number 2, and three months in jail concurrent on Count Number 3. So I will sentence you to nine months in jail, sir, in total.
- [69] I will also make an order on Count 2, pursuant to s. 109 of the Criminal Code, as follows: Sir, I prohibit you from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition, and explosive substance for a period of 10 years after your release from imprisonment, and I prohibit you from possessing any prohibited firearm, restricted firearm, prohibited weapon, and prohibited device and prohibited ammunition for life.
- [70] Finally, Count 2 of the indictment, I will also make an order pursuant to s. 487.051 of the Criminal Code for the taking of a DNA sample.
- [71] Sir, do you have any weapons that you need to surrender?
- [72] All right. Thank you, sir.
- [73] MR. FAST: Thank you, Your Honour.

- [74] THE COURT: Anything further?
- [75] MR. FAST: My Lord, there is the victim fine surcharge. At the time, it was discretionary, if the offender -- if there's exceptional circumstances that would make an undue hardship, to not impose it, but it was \$100 on each count.
- [76] THE COURT: All right, any submissions in that regard?
- [77] MR. JETTÉ: No, thank you.
- [78] THE COURT: All right, I am sorry, \$100?
- [79] MR. FAST: A hundred dollars on each count, yes.
- [80] THE COURT: I think in the circumstances, I am not inclined to make that order, given the jail sentence that Mr. Delege has received and some of his issues with supporting himself. Thank you.
- [81] MR. FAST: Thank you, My Lord.
- [82] THE CLERK: Count 1?
- [83] THE COURT: Has Count 1 been dealt with?
- [84] MR. FAST: No, Crown enters a stay of proceedings on Count 1. "The Honourable Mr. Justice Tindale"

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Prepared on 26 October 2026 · Esheria