
CANADA / JUDGMENT

R. v. Demirovic

2020 BCSC 900

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Demirovic,

2020 BCSC 900

Date: 20200601

Docket: 27391

Registry: Vancouver

Regina

v.

Azra Demirovic

Before: The Honourable Mr. Justice M. Tammén

Oral Reasons for Sentence

Counsel for the Crown:

P. Mann

M. Wiancko

J. Patterson

Counsel for the Accused:

D. Karp

V. L de Jong

Place and Date of Hearing:

Vancouver, B.C.

October 25, 2019,

February 19-20, 2020,

and March 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 1, 2020

Overview

- [1] THE COURT: On May 9, 2019, a jury convicted the accused, Azra Demirovic, after a six-day trial of two counts: Count 1, that on or about May 25, 2016, she did possess heroin for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act [CDSA]; Count 2, on or about May 25, 2016, she did unlawfully import into Canada heroin contrary to s. 6(1) of the Controlled Drugs and Substances Act. In some circumstances, Count 2 would attract a mandatory minimum of imprisonment pursuant to s. 6(3)(a.1) of the CDSA. In the case at bar, the Crown concedes that it cannot prove compliance with s. 8 of the CDSA, the notice requirement. Therefore, there is no mandatory minimum sentence of imprisonment at issue here. Both offences carry a possible potential maximum sentence of life imprisonment.

Facts for Purposes of Sentencing

- [2] Because a verdict was rendered by a jury, I must determine the facts for sentencing purposes. The basic facts are these. In May 2016, the accused took a trip to Thailand. The purpose of her trip was to explore the possibility of bariatric or weight loss surgery. Her plan was to visit a facility or facilities in Thailand with a view to booking, and perhaps during that same trip undergoing, the weight loss surgery. Her belief was that such surgery would be considerably less expensive in Thailand than in Canada. She booked her trip on rather short notice with travel dates of May 19 through May 25, 2016. In her evidence, Ms. Demirovic explained that she had the possible option of extending her stay if it was possible for her to have the weight loss surgery during that trip. If not, she would return at a later time for the surgery.
- [3] When she left Canada, she took with her two large suitcases. The second of these, she said, she took so that she could bring back gifts or souvenirs for family members from Thailand. Before leaving on her trip, she had a conversation with her brother, Jasmin, with respect to the suitcases. Both of the suitcases to which she had access were very old and in poor shape. A discussion with her brother included him advising her that she should take those suitcases

and obtain new ones which would be much less expensive in Thailand, and simply abandon the old suitcases there. At the time, Ms. Demirovic knew that her brother had one prior conviction plus an outstanding charge related to possession or possession for the purpose of trafficking of narcotics.

- [4] While in Thailand, Ms. Demirovic had a second conversation with her brother about suitcases. He advised her of arrangements he had made to acquire new suitcases from a friend of his. At her brother's suggestion, Ms. Demirovic met a man outside her hotel in Bangkok and took possession of two brand new hard-sided suitcases. With these, she returned to Vancouver arriving at Vancouver International Airport ("YVR") on the afternoon of May 25, 2016. A secondary inspection at YVR led to the discovery of a total of 6.93 kilograms of heroin secreted in the suitcases. One contained 3.5 kilograms, the other 3.43 kilograms.
- [5] The wholesale value of the heroin, that is, if sold in the manner in which it is often sold in wholesale at the brick or kilogram level would be approximately \$476,000. The value would be approximately twice that amount if sold by the gram on the street. The heroin was contained in fibreglass slabs, hard panels, which were sewn into the lining of the suitcases. The total weight of the slabs packed with heroin was 4.7 kilograms for one and 4.84 kilograms for the other. Thus, the slabs added over 10 pounds of weight to each suitcase.
- [6] Both the accused and her brother testified in support of her defence that she was the unknowing pawn of the brother in his scheme to import heroin into Canada. Obviously, the jury rejected the accused's evidence with respect to lack of knowledge. I find that the accused was wilfully blind to the fact that the suitcases contained a large quantity of heroin. She permitted her judgment to be seriously clouded by her love for her brother. Ms. Demirovic suspected that her brother was probably arranging to import drugs in the suitcases, but she deliberately refrained from making further inquiries of him because she did not want to have her suspicions confirmed. There is no evidence that the accused received any financial compensation or other personal benefit for bringing the drugs into Canada. Thus, the only motive I can find for the accused doing what she did is love for her brother or misguided family loyalty.

Positions of the Parties

- [7] Crown counsel submits that a fit sentence is nine years' imprisonment. Crown says the British Columbia Court of Appeal has established a range of six to 12 years and, given the large amount of heroin, the middle of that range is appropriate. Crown also relies on cases from other provinces, in particular, Alberta and Ontario, and submits that outside of British Columbia, the range extends to 14 years.
- [8] The defence submits that a fit sentence is a suspended sentence with three years' probation. The defence says there are extreme mitigating factors, indeed, exceptional circumstances, present here such that a suspended sentence is appropriate. In addition to *R. v. Voong*, 2015

BCCA 285 [R. v. Voong], and its consideration of exceptional circumstances, the defence relies heavily on two cases: R. v. Manhas, 2019 BCSC 1293, where a suspended sentence was imposed for conspiracy to export MDMA; and R. v. Nguy, 2002 BCCA 93, where a two-year conditional sentence was imposed for conspiracy to export heroin.

Background of the Offender

- [9] Ms. Demirovic was 28 years old at the time of the offences, 31 now. She was born in Serbia on March 2, 1988. She spent her formative years there with her parents and her younger brother, Jasmin. Her father is Muslim. Her mother is Christian. When the accused was eight years old, her father fled to a refugee camp in Bosnia in order to escape the Serbian draft. Sometime later, Ms. Demirovic, along with her mother and brother, fled Serbia to Bosnia where they were reunited with her father and they spent three years living in various refugee camps before moving to Vancouver. After arriving in Canada, a second brother was born, Dino.
- [10] Due to a language barrier, Ms. Demirovic struggled in school and did not graduate. She completed school as far as Grade 11. Both while in high school and since leaving school, she had a reasonably long and steady work history. She commenced working assisting her mother doing cleaning jobs. While in high school, she worked at two different fast food restaurants. In addition, from the age of 15, she has been involved in community work, in particular, volunteering with the Immigrant Services Society of British Columbia. She is also an active member of her church, The Love Family Christian Assembly. She does volunteer work at the church and is part of a women's group that does volunteer work on Saturdays. Since leaving high school, Ms. Demirovic's work history has included working at a call centre and in retail sales. She worked for a considerable time at Purolator Courier.
- [11] In December 2012, she suffered a significant workplace injury to her lower back. She was unable to work for a time and it was during that time that she first commenced suffering from depression and gained approximately 100 pounds. In December 2015, she returned to the workplace, but very shortly thereafter on December 19, 2015, she was in a car accident which caused her to be off work again for a time. She has spent some time working and some time receiving disability benefits since then. She regained employment at a place called Cioffi's, but was then involved in two further car accidents, one in November 2017 and one in September 2018.
- [12] After this offence, but prior to trial, Ms. Demirovic took courses to upgrade her education and continued to work as much as she was able. She was in a final car accident post-conviction in September of 2019. Because of the various car accidents, Ms. Demirovic suffers from a variety of ailments and medical conditions, including: muscle tension headaches, depression, anxiety, and sleep disturbance. After September 5, 2019, the final car accident, she was unable to work for several months. In December 2019, she began working for a new company, Pravada Floors, working in their accounting department.

[13] Ms. Demirovic has no criminal history.

[14] The background and personal circumstances of Ms. Demirovic are certainly sympathetic, but in my view, not exceptional as that term is traditionally used in the sentencing context. In *R. v. Voong*, at paragraph 59, Madam Justice Bennett said this:

Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and 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. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.

[15] Obviously, the list set out at paragraph 59 is non-exhaustive and it is always open to a sentencing judge to consider some other combination of unique factors as constituting exceptional circumstances and thus, warranting consideration of a sentence outside an identifiable range. However, it is generally not sufficient for an accused to point to some combination of past hardships overcome and volunteer or community work as amounting to exceptional circumstances. Usually, some level of real remorse and demonstrated significant efforts at rehabilitation is required. In this case, there are certainly mitigating factors and other aspects of Ms. Demirovic's background that lead me to conclude I should sentence the accused at the low end of any possible range I can identify.

Principles of Sentencing

[16] Section 718 of the Criminal Code R.S.C. 1985, c.C-46 [Criminal Code] sets out the fundamental purpose and objectives of sentencing. Section 718.1 codifies the well-known principle of proportionality. Section 718.2 sets out some other sentencing principles. Subsection (a) contains a non-exhaustive list of potential aggravating factors, none of which has any application in the present circumstances. Section 718.2(b) through (e) reads as follows:

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (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 and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Thus, subsections (d) and (e) codify judicial restraint in sentencing. Subsection (b) is a codification of the parity principle.

- [17] I turn next to what I perceive as problematic with the proposed Crown range. The cases from Alberta relied upon by the Crown are not helpful. There is an acknowledgment in those cases that there is limited jurisprudence in that province on range of sentence for importing heroin. Alberta uses a starting-point system, quite different from the approach in British Columbia, and the cases submitted by Crown note that the Alberta Court of Appeal has not set a starting point for importing Schedule I substances in any event.
- [18] The cases from Ontario are of some interest, but at the end of the day, of little more utility than the Alberta cases. The Ontario Court of Appeal did say in *R. v. Sidhu*, 2009 ONCA 81 that absent exceptional or extenuating circumstances, first offenders who import large amounts of high grade heroin into Canada for personal gain should expect to be sentenced to lengthy periods of imprisonment, in the 12 to 17-year range. However, there are numerous examples of sentencing judges in the Ontario Superior Court dramatically departing from that range, including provincial jail sentences being imposed for drug importation. Thus, the potential range of sentence in Ontario seems inordinately broad to be of any assistance in British Columbia.
- [19] Crown was unable to direct me to any British Columbia Court of Appeal case that set out even a broad sentencing range for a courier who imports a large amount of heroin into Canada. Crown relied on the Court of Appeal decision of *R. v. Carpenter*, 2002 BCCA 301 [Carpenter], and the Supreme Court decision of *R. v. Grossman*, [1998] B.C.J. No. 63 [Grossman], as supporting a range of six to 12 years. Those cases did not set out such a range. Carpenter, in dealing with that question, merely found that the sentence in that case appeared to fall within the range for similar offences and offenders. The proposed Crown range at trial had been eight to nine years. The actual sentence imposed was six years, primarily based on Gladue factors. Newbury J.A. remarked that the sentence was more than what she might have imposed.
- [20] Newbury J.A. also noted that the case of Grossman contained a helpful summary of recent cases dealing with drug importation. In Grossman, a courier who imported 1.6 pounds of high grade heroin into Canada received a sentence of six-and-a-half years. After reviewing a number of recent cases, the trial judge said the Court of Appeal decision of *R. v. Isaza*, (1993) 86 C.C.C. (3d) 19 [Isaza], suggested that the range of sentence for importing cocaine is six to 12 years. With respect, Isaza said no such thing. At paragraph 38, the court said this:

Counsel for both Crown and the respondent referred us to many cases where this court has reviewed the sentence imposed upon persons involved in couriering drugs. Without reviewing those cases at length it is enough to say they demonstrate that the appropriate range of sentence in a case such as this has been held to be six to twelve years

[21] The court then cited five cases, including two prior decisions of that court that upheld sentences of 12 years. After commenting that both of those cases predated the 1987 decision of *R. v. Smith*, [1987] 1 S.C.R. 1045 in which the seven-year minimum was declared invalid by the Supreme Court of Canada, the court said:

The appropriate range of sentence would therefore appear to be six to seven years.

[22] I am well aware of cases in which those involved in a sophisticated scheme to import large quantities of heroin into Canada have received sentences upwards of 10 years. Indeed, if I were sentencing the accused's brother for his role in this scheme, based on his own evidence, that would be the likely sentence. However, I must look to cases involving similar offenders to this accused. The two most comparable cases cited by Crown are *R. v. Bermudez*, 2004 BCPC 618 [Bermudez] and *R. v. Dyal*, 2007 BCSC 623 [Dyal].

[23] In *Bermudez*, Watchuk P.C.J., as she then was, sentenced a 38-year-old mother of three to four years' imprisonment following a guilty plea. The amount of heroin was 1.64 pounds. The accused acted as a courier, for which she was to be paid \$9,000.

[24] In *Dyal*, Davies J. sentenced a 47-year-old mother to nine years for her role in a sophisticated scheme, which resulted in the importation into Canada of 11.4 kilograms of heroin. The accused had been found guilty by a jury. Davies J. found that the motive was profit and the accused was a fully willing participant. Of note, Davies J. identified a potential range of anywhere between three and 14 years.

[25] *Dyal* and *Bermudez* are helpful cases since, broadly speaking, they involve significant similarities to both offence and offender before me today. Both involve sentences for female non-Indigenous first offenders acting as couriers of a large amount of heroin being imported into Canada through comparatively sophisticated means.

[26] I turn next to issues with the defence position. The primary issue with the position of the defence is that it represents such a gross departure from any potential range, indeed any other comparable decision. I acknowledge the wisdom of what was said in *R. v. Lacasse*, [2015] 3 S.C.R. 1089 at paragraph 58:

The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.

- [27] If I had found exceptional circumstances, I might have considered a sentence of less than two years. However, a suspended sentence would almost certainly fail to meet the sentencing objectives of denunciation and deterrence. As noted at paragraphs 23 and 32 of *R. v. Proulx*, [2000] 1 S.C.R. 61 a suspended sentence is not a denunciatory sentence. Its primary purpose is rehabilitation and it is not meant to be punishment.
- [28] Both Manhas and Nguy are unique cases and are of very limited assistance. Neither case involves a conviction for importation of a large quantity of heroin into Canada. In Manhas, the accused was sentenced for her minor, non-essential role in a conspiracy to export MDMA into the United States. Following conviction at trial, she received a suspended sentence. Nguy was a case of conspiracy to export heroin from Canada to the United States. Following a guilty plea, the accused received a conditional sentence of two years less a day, which sentence was upheld on appeal.
- [29] I accept the defence submission that both exporting and importing Schedule I controlled substances are punishable by a maximum of life imprisonment. However, I note the following: (1) one of the major factors that informs sentences for importing such substances as cocaine and heroin into Canada is the fact that those drugs are not available in Canada, absent their importation from source countries; and (2) more importantly, conspiracy sentences in general tend to be lower than sentences for the corresponding completed offences. In my view, I must look to cases where offenders were sentenced for the crime of importing a large quantity of heroin into Canada, that is, an amount clearly not intended for personal use. Prior to the unfortunate proliferation of the synthetic opioid, fentanyl, heroin was viewed by the courts as the most pernicious of the hard drugs, primarily because of its highly addictive qualities and the massive social cost of the havoc wreaked by its street distribution.

Aggravating and Mitigating Factors

- [30] The aggravating factors present here are the large quantity of heroin and the somewhat sophisticated means of secretion to effect the importation.
- [31] The mitigating circumstances are these: the accused has no criminal record, indeed, she is someone with a track record of giving back to the community through volunteer work and, of course, there is the absence of a profit motive.

Conclusion

- [32] What, then, is a fit sentence for Ms. Demirovic? This case bears significant similarities to Bermudez. The quantity of heroin is far greater. However, just as crafting a fit sentence goes beyond a mathematical exercise, sentencing in drug cases cannot be reduced to a tariff-based system which depends wholly on the exact quantity of drugs. In both cases, the amount imported was substantial, consistent with a commercial enterprise. Unlike Ms. Bermudez, Ms. Demirovic did not plead guilty. However, unlike that accused, Ms. Demirovic

was not motivated by profit or monetary gain.

[33] Ms. Demirovic, please stand.

[34] On Count 2, importing heroin, I sentence you to four years' imprisonment. On Count 1, possession of heroin for the purpose of trafficking, I sentence you to three years' imprisonment. The sentences are to be concurrent one with the other.

[35] Please be seated.

[36] With respect to ancillary orders, pursuant to s.109 --

[37] MS. MANN: My Lord, if I may, s. 109(3)(c) of the Criminal Code, the 10-year mandatory firearms prohibition.

[38] THE COURT: I am looking at s. 109(2), is that not the one that applies?

[39] MS. MANN: Yes.

[40] THE COURT: I do not see a sub (c) for either (2) or (3). I thought it was s. 109(2).

[41] MS. MANN: s. 109(2), My Lord, is for a first offence. That is correct.

[42] THE COURT: All right. Pursuant to s. 109(2), there will be a 10-year prohibition on possessing any firearm, crossbow, restricted weapon, ammunition, and explosive substance.

[43] Section 487.051(3) makes a DNA order discretionary. I decline to make such an order.

[44] Pursuant to s. 737(2), there will be a victim fine surcharge of \$200.

[45] Pursuant to s. 16(1)(a) of the Controlled Drugs and Substances Act, I make a forfeiture order with respect to all drugs, packaging materials, and the suitcases. I decline to order forfeiture of the cellular telephone seized from Ms. Demirovic.

[46] Are there any other ancillary orders, Ms. Mann?

[47] MS. MANN: No, there is not. Thank you.

[48] THE COURT: Mr. Karp, anything?

[49] MR. KARP: No, thank you, My Lord.

[50] THE COURT: All right.

"Tammen J."

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