
CANADA / JUDGMENT

R. v. Garie

2022 BCCA 382

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 382 R. v. Garie

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Garie,

2022 BCCA 382

Date: 20221110

Docket: CA47918

Between:

Rex

Respondent

And

Tenzin Jamyang Garie

Appellant

And

The Attorney General of British Columbia

Respondent

Pursuant to the Constitutional Question Act

Before:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Grauer

The Honourable Justice Skolrood

On appeal from: An order of the Provincial Court of British Columbia, dated
November 16, 2021 (sentence) (R. v. Garie, Surrey Docket 231099).

Oral Reasons for Judgment

Counsel for the Appellant:

R.T. Gill

Counsel for the Respondent:

R. Leong

Counsel for the Attorney General of British Columbia:

M.B. Rankin

Place and Date of Hearing:

Vancouver, British Columbia

November 9, 2022

Place and Date of Judgment:

Vancouver, British Columbia

November 10, 2022

Summary:

The appellant on four separate occasions sold cocaine and oxycodone to undercover police officers in a dial-a-dope drug-trafficking operation. He pleaded guilty to trafficking in cocaine and oxycodone, and possession of cocaine and oxycodone for the purpose of trafficking. He sought an 18-month CSO. The judge imposed a nine-month jail sentence. On appeal, he sought a suspended sentence or intermittent sentence, citing the shifting legal landscape following the release of R. v. Sharma, 2022 SCC 39, and a sought to introduce fresh evidence of a change in his personal circumstances arising from the murder of his sister and the impact on his mother. Held: Appeal dismissed. The judge did not err in principle in sentencing Mr. Garie to nine months' incarceration and six months' probation. The judge considered the relevant principles of sentencing. She emphasized denunciation and deterrence having regard to the circumstances of the offences, Mr. Garie's moral blameworthiness and his personal circumstances. A CSO was not a fit sentence. A suspended sentence (or a 90-day intermittent sentence) is not a fit sentence. Evidence of a potential hardship on Mr. Garie's mother has no bearing on the outcome of this appeal, which is to determine whether the judge erred in principle or imposed a demonstrably unfit sentence having regard to the gravity of the offences and Mr. Garie's moral culpability. The sentence imposed was fit as it was proportionate to the gravity of the offences and the moral culpability of Mr. Garie.

STROMBERG-STEIN J.A.:

BACKGROUND

- [1] The appellant, Tenzin Garie, on four separate occasions sold cocaine and oxycodone to undercover police officers in a dial-a-dope drug-trafficking operation. He pleaded guilty to four counts of trafficking in cocaine and one count of trafficking in oxycodone, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c-19 [CDSA]; and one count of possession of oxycodone for the purpose of trafficking and one count of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the CDSA.
- [2] Mr. Garie was sentenced on November 16, 2021. He filed a notice of appeal November 21, 2021. He was granted leave to appeal and released on bail on November 30, 2021.
- [3] Before the sentencing judge, the Crown sought an 18-month sentence and probation. Mr. Garie's position was that a fit sentence was an 18-month conditional sentence order ("CSO") and two years' probation. There was no dispute between the parties that a custodial sentence was warranted. The only dispute was whether it should be a jail sentence or a CSO.
- [4] The judge accepted she was bound by *R. v. Chen*, 2021 BCSC 697, which followed *R. v. Sharma*, 2020 ONCA 478 [Sharma ONCA], declaring ss. 742(1)(c) and (e)(ii) of the Criminal Code invalid. The judge concluded she could impose a CSO, but declined to do so in the circumstances. Instead, she imposed a global sentence of nine months' incarceration followed by six months' probation (six months concurrent for Counts 3, 5, and 7, and concurrent with nine months for Counts 8, 9, 10, and 11).
- [5] Mr. Garie appealed his sentence on the basis the judge erred in principle in declining to impose a CSO, and asked this Court to impose an 18-month CSO and two years' probation. Since this Court was not bound by *Chen*, he challenged the constitutional validity of ss. 742.1(c) and (e)(ii), seeking a declaration pursuant to s. 52(1) of the Constitution Act that the sections were invalid. This issue has been rendered moot by the release of *R. v. Sharma*, 2022 SCC 39 [Sharma SCC], on November 4, 2022, wherein the majority of the Supreme Court of Canada upheld the validity of ss. 742.1(c) and 742.1(e)(ii). The result means a CSO is not presently available for Mr. Garie's offences. However, the federal government has introduced Bill C-5 which is legislation that will, once proclaimed, make a CSO an available sentencing option for Mr. Garie's offences. Bill C-5 is presently in its third reading in the Senate.
- [6] On appeal, Mr. Garie essentially argues that the judge erred in principle in imposing the nine-month sentence, and that the sentence is demonstrably unfit. He submits that since a CSO is not available, a fit sentence would be a suspended sentence or a 90-day intermittent sentence. In support of his position, he seeks to introduce fresh evidence that Mr. Garie's sister was murdered three weeks ago and his mother would suffer hardship if he is incarcerated.

Application to adduce fresh evidence

- [7] Mr. Garie seeks to adduce fresh evidence. It is after-the-fact evidence. The Crown opposes the application on the basis the evidence is unnecessary. This Court may admit fresh evidence under s. 687(1) of the Criminal Code. The four criteria for admitting fresh evidence are set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759; see also *R. v. Lévesque*, 2000 SCC 47.
- [8] Mr. Garie and his mother have filed recent affidavits. Mr. Garie's affidavit says that around October 17, 2022, his sister was the victim of a double homicide in Burnaby, British Columbia. Since then, he and his brother have assumed responsibility for providing care and financial assistance to their mother who has taken a leave from her employment. Mr. Garie seeks to serve his sentence in the community because a prison sentence would cause hardship for his mother. His mother says in her affidavit that a potential hardship could arise due to a change in her personal circumstances due to her daughter's death.
- [9] I discuss below the relevance and admissibility of this evidence in the context of the submissions made on Mr. Garie's behalf.

Circumstances of the offences

- [10] Mr. Garie pleaded guilty to seven drug trafficking offences connected to a dial-a-dope drug operation being investigated by Surrey RCMP. On four occasions Mr. Garie sold an undercover police officer cocaine and oxycodone.
- [11] As part of the RCMP investigation, police officers called a telephone number that was known to be an active dial-a-dope drug line. An undercover officer spoke with a person named "Gino", later identified as Mr. Garie, and set up a meeting to buy drugs at Elements Casino in Surrey. On July 4, 2018, Mr. Garie arrived in a BMW and sold the undercover officer one gram of cocaine for \$120. On August 30, 2018, the undercover officer called the same number and requested to purchase 3.5 grams of cocaine and two oxycodone pills. They met at the same location, and Mr. Garie, driving a black Nissan Sentra, sold the undercover officer the cocaine and oxycodone for \$380. On September 13, 2018, again at the same location, the undercover officer purchased 3.5 grams of cocaine for \$220. At this meeting, Mr. Garie arrived in a different Nissan Sentra. He had a bag of drugs between his legs. The undercover officer asked if he could purchase an ounce of cocaine and Mr. Garie told him he could for \$1,900. On September 20, 2018, an undercover officer called the same telephone number and set up a meeting in Surrey. Mr. Garie was driving a white Nissan Altima. The officer purchased 0.5 grams of cocaine and two oxycodone pills for \$200. Mr. Garie and his female passenger were arrested. Following a vehicle search, police seized 25 oxycodone pills, 23 grams of cocaine and \$1,485 from Mr. Garie's wallet. There was a BlackBerry phone on the floor of the vehicle with the same number that had been called to reach Mr. Garie. Thirty minutes after the arrest, a call was received on that telephone from someone ordering drugs.

Circumstances of the offender

- [12] Mr. Garie was 26 years old at the time of sentencing. He had no criminal record. He complied with his promise to appear.
- [13] He was born in Surrey, British Columbia, the third of three children. When Mr. Garie was five years old, his parents separated due to his father's alcohol use disorder. His mother stated Mr. Garie had a normal childhood but was affected by the separation, became withdrawn in high school, and his grades suffered. She said his father was physically abusive toward her and verbally abusive toward the children. Mr. Garie reports he does not have a good relationship with his father, but his father was not abusive toward him. He has a good relationship with his mother and his siblings. He lived his entire life at his family home, but had moved in with his then-girlfriend at the time of the sentencing hearing. Mr. Garie provided letters of reference and of support from his mother, sister and girlfriend at the time of sentencing.
- [14] Mr. Garie does not have mental health issues. He reports he has the "odd social drink" and that alcohol misuse has never been an issue with him. He was a recreational marihuana user until 10 months before sentencing. Mr. Garie reports he was recruited to sell cocaine and oxycodone by an older relative, and did so for six to eight months. He never used the drugs he was selling. He earned approximately \$1,000 a week selling drugs, and he saw it as an easy way to make money. The Crown described Mr. Garie as a low-level trafficker.
- [15] Mr. Garie completed his grade 12 education and was an average student. Since graduating, he has been employed as a landscaper's assistant, a mover, and construction worker. His employer at the time of sentencing described him as a skilled, dependable labourer with potential, and indicated Mr. Garie would have the opportunity to obtain further training in his field, including entering the Red Seal program and taking future management courses. At the time of sentencing, Mr. Garie was earning \$29.00 per hour.

Sentencing reasons

- [16] The sentencing judge considered the circumstances of the offences and the offender. She was guided by the principles and purpose of sentencing as set out in ss. 718, 718.1 and 718.2 of the Criminal Code and s. 10(1) of the CDSA. The judge recognized the principle of proportionality, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; and the principle of parity, that a sentence must be consistent with sentences for similar offences and offenders. She recognized sentences must not be unduly long or harsh, and that she must look to all available sanctions, other than imprisonment, that are reasonable in the circumstances.
- [17] The judge noted s. 10(2) of the CDSA required her to consider, as an aggravating factor, the fact that Mr. Garie was involved in trafficking substances included in Schedule I of the CDSA.

- [18] The judge stated she was bound by Chen, and proceeded on the basis that a CSO was an available sentence for Mr. Garie.
- [19] The judge concluded, after reviewing the authorities provided by the Crown and defence counsel, that the clear authority from this Court is that, absent circumstances that take the offender or the offence out of the ordinary, a custodial sentence is a fit sentence for dial-a-dope trafficking in hard drugs, where the offender is not an addict and has participated for profit. She concluded the baseline sentence for offences like Mr. Garie's, for a first-time offender, is six months' incarceration. The judge rejected Mr. Garie's argument that the law has developed away from this line of reasoning.
- [20] The judge identified as aggravating factors that Mr. Garie was trafficking in Schedule I drugs; he was involved in a dial-a-dope operation; he was involved in the operation for at least three months, and by admission closer to six to eight months; he claimed the ability to procure one ounce of cocaine; he was involved only to make easy money; and that he was not using drugs and had no mental health issues.
- [21] The judge identified as mitigating circumstances that Mr. Garie was a youthful first offender; he had a somewhat difficult childhood but was brought up in a "positive, pro-social home"; he had family support; he was gainfully employed with a company supportive of his prospects; he pleaded guilty and accepted responsibility; and he appeared to be "travelling on a pro-social trajectory" since the offence.
- [22] The judge found the mitigating circumstances were "not really out of the ordinary" and Mr. Garie must "bear responsibility for his actions because his decision to deal in drugs was essentially a business decision". She noted he was "not fueling his own addiction or dealing with mental health issues". She found a CSO would not satisfy the sentencing principles of general and specific deterrence. As such, she concluded he bore more responsibility for his offences, especially in the context of an ongoing opioid crisis. She noted he chose to sell "serious drugs despite the opioid crisis that [was] in the news on a daily basis and the number of deaths there have been from the opioid crisis". The judge described Surrey and the Lower Mainland as "overrun" with the type of drugs Mr. Garie was trafficking, and observed that dial-a-dope operations make it easy to distribute these drugs in residential areas, and to people who are addicted.
- [23] Having regard to the purpose and principles of sentencing, and all the relevant factors applicable in Mr. Garie's circumstances, the judge determined a fit sentence was a global sentence of nine months incarceration followed by a six-month probation order.

ISSUES

- 1) Did the judge err in principle impacting the fitness of the sentence?
- 2) Is the sentence demonstrably unfit?

Standard of review

- [24] The basis for appellate intervention in sentencing is narrow: *R. v. Lacasse*, 2015 SCC 64; *R. v. Friesen*, 2020 SCC 9. An appellate court will only interfere with a sentence where there has been an error in principle impacting the sentence, or where the sentence is demonstrably unfit: *Lacasse* at paras. 41-4; *Friesen* at para. 26. An error in principle includes an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor: *Friesen* at para. 26. A sentencing judge is entitled to significant deference in weighing and balancing factors relevant to crafting a fit sentence; appellate intervention is warranted only where a sentencing judge has exercised their discretion unreasonably, not merely because an appellate court would have weighed the factors differently: *Lacasse* at para. 9; *R. v. Nasogaluak*, 2010 SCC 6 at para. 46.
- 1) Did the judge err in principle?
- [25] The judge reviewed the relevant authorities provided by counsel to determine the appropriate range of sentence of 6 to 12 months for a first offender engaged in a dial-a-dope drug trafficking operation for profit. The judge recognized the particular insidious threat dial-a-dope drug trafficking operations pose to the safety of the community because the method of distribution makes drugs more readily accessible. As explained in *R. v. Gill*, 2013 BCCA 320:
- [22] It is well known that dial-a-dope operations enable a pervasive and rapid dissemination of illicit narcotics that wreak destruction to both the individuals who use them and to our community. The proliferation of these operations has significantly increased accessibility to these drugs, and their harmful effects.
- [26] The judge described the community where she presided as "overrun" with these drugs, recognizing in particular the impact of cocaine and oxycodone.
- [27] The judge particularly noted that against the backdrop of ongoing problems and tragedies associated with narcotic use and opioids, this Court has repeatedly affirmed the need to impose a carceral sentence for deterrence and denunciation. As noted in *R. v. Tran*, 2007 BCCA 613:
- [6] There is a line, fairly long now, of cases from this Court in which, absent an out of the ordinary circumstance, a custodial sentence has been found to be a fit sentence on a conviction of trafficking in a hard drug in what is referred to as a "dial-a-dope" scheme, where the offender is not an addict and has participated simply for profit.
- [28] As this Court recognized in *Gill*, this approach has not been altered in subsequent decisions: *R. v. Rastgoei*, 2008 BCCA 242 at paras. 38-43; *R. v. Ali*, 2010 BCCA 4 at para. 12; *R. v. Laurila*, 2010 BCCA 535 at paras. 6-7; *R. v. Ash*, 2010 BCCA 604 at para. 22; *R. v. Barrick*, 2012 BCCA 83 at para. 13; and *R. v. Ladret*, 2012 BCCA 401 at paras. 5-8.

- [29] The judge applied the appropriate sentencing principles. She concluded the paramount sentencing principles were deterrence and denunciation. She considered the prospect of rehabilitation by Mr. Garie's pro-social life pre- and post-conviction. She did not err by emphasizing deterrence and denunciation, having regard to the nature of the offences and Mr. Garie's moral blameworthiness.
- [30] The judge's conclusion that Mr. Garie's circumstances did not warrant a departure from this clear line of authority was correct, and in any event is entitled to deference. She properly concluded that the need for deterrence and denunciation is more pressing in a case such as this, where Mr. Garie bears personal responsibility for choosing to become involved in the dial-a-dope operation for profit. I note the Court's comments in *R. v. Oates*, 2015 BCCA 259, with respect to the message a non-carceral sentence would send to the community in the context of a drug trafficking offence, stating:
- [25] This approach does not commend itself to me as a general rule of thumb, as it fails to reflect the other way of viewing this -- such an approach makes the recruitment of financially compromised individuals without a drug offence record attractive to the persons higher up in the illegal drug trade. Further, it lowers risk to the individual taking the decision to pursue, in the words of Franklin, "high profits... with little effort".
- [31] It is likely Mr. Garie will not be back before the courts again. However, it is not because of steps he has taken in his rehabilitation. He is simply back to where he was on a law-abiding path before he chose to embark on for-profit criminal activity.
- [32] The judge made no error in concluding that, in Mr. Garie's case, a CSO was inconsistent with the fundamental purpose and principles of sentencing, having regard to the gravity of the offences and the high moral blameworthiness of Mr. Garie. The judge considered the relevant Proulx factors, including endangerment to the safety of the community, in coming to this conclusion. In weighing and balancing the relevant sentencing factors, the judge did not err in emphasizing denunciation and deterrence over rehabilitation. In fact, at the sentencing hearing, Mr. Garie conceded his offences should be punished by an 18-month sentence, and the only issue was where he would serve it. It is not for this Court to reweigh the relevant factors.
- [33] In my view, there were no errors in principle impacting the fitness of the sentence imposed. The judge did not err in determining that a CSO was not an appropriate sentence for Mr. Garie, having regard to the relevant principles of sentencing, the gravity of the offences and his moral blameworthiness.
- 2) Was the sentence demonstrably unfit?
- [34] Mr. Garie submits the sentence is harsh and excessive, having regard to his circumstances. Mr. Garie acknowledges he was driven by a profit motive when he participated in the dial-a-dope operation, but he argues other aspects of his life, pre- and post-offence, ameliorate the impacts of the aggravating factors weighing in favour of incarceration.

- [35] In assessing whether a sentence is demonstrably unfit, the "very high threshold" has been described as "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate" or a "substantial and marked departure" from the sentences customarily imposed on similar offenders who committed similar offences in similar circumstances: Lacasse at para. 52.
- [36] The nine-month prison sentence, followed by six months' probation, in Mr. Garie's case, is far from being demonstrably unfit. If anything can be said, it is very lenient. The judge crafted a sentence that she considered was proportionate to the circumstances of the offences and the degree of responsibility of Mr. Garie, considering the relevant purpose and principles of sentencing. She was best positioned to make assessments with respect to the impact of the offences in Surrey in light of the ongoing drug problem in that community. There is no basis for this Court to interfere with the sentence imposed on Mr. Garie.

Is a suspended sentence or 90-day intermittent sentence a fit sentence?

- [37] Mr. Garie argues the legal landscape has changed since Sharma. He suggests a CSO is not available, so this Court can look to a suspended sentence. He concedes, in normal circumstances, a suspended sentence would be "outside normal boundaries", but suggests it would not be unreasonable in the circumstances because of a fundamental change in his circumstances arising from his sister's murder and his mother's need for help.
- [38] In Sharma SCC, the majority of the Court, in the context of an Indigenous offender and Gladue considerations, remarked on the availability of a suspended sentence where a conditional sentence was unavailable:
- [80] It is true that suspended sentences are "primarily a rehabilitative sentencing tool", whereas conditional sentences "address both punitive and rehabilitative objectives" (Proulx, at para. 23). Suspended sentences are not irrelevant to applying s. 718.2(e). Proulx does not prohibit judges from using suspended sentences "to endeavour to achieve a truly fit and proper sentence in the particular case" (Gladue, at para. 33). Where conditional sentences are unavailable, judges may give effect to s. 718.2(e) by considering suspended sentences with openness and flexibility.
- [39] It is my view that contrary to the position argued on appeal by Mr. Garie's counsel, the Supreme Court of Canada cannot be taken in this passage to endorse a suspended sentence for every offender who does not qualify for a CSO. In fact, the majority in Sharma SCC upheld the custodial sentence imposed on Ms. Sharma notwithstanding her significant personal circumstances.
- [40] This Court has recognized that rehabilitation is an important sentencing goal, and in some cases of drug trafficking involving "exceptional circumstances" rehabilitation may be better served by a suspended sentence and a probation order. See, for example, *R. v. Voong*, 2015 BCCA 285 at para. 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 non-custodial sentence.

- [41] The use of the phrase "exceptional circumstances" has been reconsidered by this Court, and is said to refer to "a shorthand means of identifying the kind of personal circumstances which justify going outside a conventional range in order to craft an appropriate individualised proportionate sentence": *R. v. Padda*, 2019 BCCA 351 at para. 36. See also *R. v. Choi*, 2022 BCCA 90. The personal circumstances of the offence or offender may increase or reduce a range of sentence to ensure that the sentence is proportionate and reflects the offender's moral blameworthiness: *Voong* at para. 58. As the Court summarized in *Choi*: "The task of the sentencing judge is not to determine whether the offender has met some ill-defined exceptional circumstances threshold test, but to fashion a proportionate sentence": at para. 24 (emphasis added).
- [42] This comparative assessment of the relevant caselaw makes clear there are no personal circumstances in Mr. Garie's case that might compel this Court to consider the imposition of a suspended sentence. Mr. Garie has not demonstrated the sort of rehabilitative efforts this Court has recognized when considering the imposition of a suspended sentence. More importantly, this has been raised in first instance on appeal. No one suggested to the sentencing judge that a non-custodial sentence was appropriate. Both Crown and defence counsel agreed a custodial sentence of 18 months was warranted: the Crown suggesting incarceration and the defence suggesting a CSO. No one suggested a suspended sentence was a fit sentence.
- [43] The fresh evidence that Mr. Gary seeks to admit, being the potential hardship to his mother arising from the murder of Mr. Garie's sister, is the basis for his submission that this Court should impose a suspended sentence.
- [44] But evidence of a potential hardship on Mr. Garie's mother has no bearing on the outcome of this appeal, which is to determine whether the judge erred in principle or imposed a demonstrably unfit sentence having regard to the gravity of the offences and Mr. Garie's moral culpability. The fresh evidence could not be expected to affect the result of this appeal. While the situation is tragic, it does not give rise to the sort of exceptional personal circumstance that would justify going outside the identified generally applicable range of sentence to craft a non-custodial sentence in a case such as this. Such evidence cannot be used to reduce an otherwise fit sentence to a point where it is no longer fit and proportionate to the gravity of the offence and the moral culpability of the offender.
- [45] In these circumstances, although I have considered the fresh evidence in the context of the submissions made on Mr. Garie's behalf, I would not admit it.
- [46] However, even had this Court admitted this fresh evidence, it could not have affected the outcome of this appeal for the reasons I have just discussed.

DISPOSITION

[47] The judge did not err in principle in sentencing Mr. Garie to nine months' incarceration and six months' probation. The judge considered the relevant principles of sentencing. She emphasized denunciation and deterrence having regard to the circumstances of the offences, Mr. Garie's moral blameworthiness and his personal circumstances. A CSO is not a fit sentence. A suspended sentence (or a 90-day intermittent sentence) is not a fit sentence. The sentence imposed was fit. It was proportionate to the gravity of the offences and the moral culpability of Mr. Garie.

[48] I would dismiss the appeal.

[49] GRAUER J.A.: I agree.

[50] SKOLROOD J.A.: I agree.

"The Honourable Madam Justice Stromberg-Stein"

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