

CANADA / JUDGMENT

R. v. Graham

2022 BCCA 252

COURT

British Columbia Court of Appeal

DECIDED

13 July 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCCA 252 R. v. Graham

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Graham,

2022 BCCA 252

Date: 20220713

Docket: CA46565

Between:

Regina

Respondent

And

James Barrie Graham

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Horsman

On appeal from: An order of the Provincial Court of British Columbia, dated
November 22, 2019 (sentence) (R. v. Graham, Vancouver Docket 247385-1).

Oral Reasons for Judgment

Counsel for the Appellant:

A.C. Nelson

Counsel for the Respondent:

R. Leong

Place and Date of Hearing:

Vancouver, British Columbia

July 13, 2022

Place and Date of Judgment:

Vancouver, British Columbia

July 13, 2022

Summary:

This is a sentence appeal of a six-month custodial sentence for possession for the purposes of trafficking. Held: Appeal allowed. The sentencing judge fell into the error of artificially constraining his ability to impose a proportionate sentence as discussed in *R. v. Choi*, 2022 BCCA 90. In the very particular and specific circumstances of this case, the personal circumstances of the offender justified a sentence of time already served.

- [1] HARRIS J.A.: This is an appeal of a six-month custodial sentence, followed by probation.
- [2] This appeal falls, in my view, to be determined by its very particular facts. It does not raise issues of general significance or general principles.
- [3] Ms. Graham was convicted on August 27, 2019, of possessing a Schedule I substance (methamphetamine) for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [4] The circumstances of the offence were set out by this Court in dismissing her conviction appeal in reasons reported at 2021 BCCA 163:
- [2] On September 12, 2018, the appellant was arrested at the Stadium SkyTrain station with a small clear baggie containing 2.25 grams of methamphetamine in her hand. A search of her purse found:
 - a) nine clear plastic baggies of methamphetamine, the largest of which weighed 6.65 grams and the smallest 0.41 of a gram; the weight of the total amount of methamphetamine (with packaging) was 31.45 grams;
 - b) three clear plastic baggies containing a total of 11.85 grams of marihuana;
 - c) a portable digital scale;

- d) one clean drug pipe and six used methamphetamine pipes with residue;
 - e) a naloxone kit, and
 - f) multiple clear pink and green plastic ziplock baggies in various sizes, most of which were unused or appeared to have been unused.
- [3] No money was found in her possession.
- [5] Briefly stated, Ms. Graham is a transgender woman and was 42 years of age at the time of sentencing. She was on income assistance and receiving disability benefits. She also gained income working in the sex trade. Ms. Graham is a dependent methamphetamine user. She submitted at sentencing that she required drugs to deal with the challenges she faced as a transgendered individual. She also submitted that she suffered post-traumatic stress from a lifetime of trauma, and faced daily barriers as a transgender woman. For the purpose of sentencing, Ms. Graham was treated as a first-time offender. She resided in a partially subsidized apartment in a residential area in Vancouver. She submitted that she would lose her apartment if she were incarcerated, because she would not be able to pay her rent. Ms. Graham argued the loss of her apartment would undermine the progress she was making in building a healthy life and restoring mental well-being. She has worked her way out of a tenuous and marginalized life in the downtown east side ("DTES"). This, she said, together with the professional support she was receiving in coping with her trauma and the progress she was making, supported a suspended sentence.
- [6] At the sentencing hearing, the Crown sought a nine-month jail sentence, along with a period of probation and ancillary orders (a discretionary DNA collection order and a firearms prohibition order). Ms. Graham argued that her personal circumstances were exceptional and urged the sentencing judge to suspend the passing of sentence.
- [7] On a sentence appeal, we are entitled to interfere with a sentence if the judge committed an error in principle in a way that affected the sentence, or if the sentence is demonstrably unfit. An error in principle does not always result in a variation of the sentence. But where an error has been made, an appellate court will undertake its own sentencing analysis, deferring to the judge's factual findings not tainted by the error. It does not need repeating that appellate courts defer to the individualised analysis undertaken by sentencing judges, and respect their expertise in crafting a fit sentence intended to fulfil sentencing principles. It is not sufficient that an appellate court would have imposed a different sentence to what was imposed.
- [8] Here, the Crown contends that we should defer to the sentence imposed by the judge because the reasons disclose no error in principle. To the contrary, the reasons disclose that the judge was sympathetic to Ms. Graham's personal circumstances and the challenges she has faced in her life. At the same time, the reasons properly reflect the seriousness of the offence and the need for denunciation and deterrence. The Crown submits the judge placed great weight on those factors in Ms. Graham's life that serve to reduce the severity of the

sentence, but nonetheless concluded that a custodial sentence at the low end of the range was required. The Crown also submits the judge committed no error in principle in reaching that conclusion, and that the appeal should be dismissed.

- [9] Both parties have applied to admit further evidence. In the particular circumstances of this case, I would admit it, while recognizing that not everything that is contained in that further evidence is admissible. I do not rely on any inadmissible parts of that evidence.
- [10] In my view, this appeal turns on whether the judge erred in principle by constraining his ability to impose a proportionate sentence by requiring a demonstration of "exceptional circumstances" as a precondition for departing from the otherwise applicable sentencing range. In other words, the judge treated the sentencing range as a judicial straitjacket, thereby limiting his discretion to craft a proportionate and individualized sentence in circumstances that would have justified a sentence below the bottom of the range.
- [11] This Court has explained the role of sentencing ranges and their relationship to "exceptional circumstances" in *R. v. Choi*, 2022 BCCA 90, in terms I think are directly applicable here. In that case, Justice Fitch said:
- [3] But sentencing ranges are tools, not judicial straitjackets, and sentencing is an individual process that takes account of the unique circumstances of the offence and the offender, and how the objectives of sentencing can best be achieved in a given case. This Court acknowledged as much in *Smith*, citing *R. v. Lacasse*, 2015 SCC 64 at paras. 57-58 [*Lacasse*] .
- ...
- [17] The judge clearly understood the appellant's claim that his circumstances were exceptional turned largely on his youth and status as a first offender. Citing *R. v. Ruiz*, 2019 BCCA 323 at paras. 17-19 [*Ruiz*], the judge recognized that there is no litmus test for exceptional circumstances and that his duty was to evaluate the circumstances of the offence and of the offender to decide whether a sentence below the range identified in *Smith* was warranted
- ...
- [22] I wish to make this final observation. This case was argued, in the trial court and on appeal, on the footing that the trial judge was required to find exceptional circumstances to impose a sentence below the bottom end of the range identified in *Smith*. Neither counsel referred to *R. v. Parranto*, 2021 SCC 46 at para. 40 [*Parranto*], where the Court emphasized that an appellate court should not artificially constrain the ability of the sentencing judge to impose a proportionate sentence by requiring a demonstration of "exceptional circumstances" when departing from a range (see also *Friesen* at paras. 111-112.)

- [23] The sentence must, of course, be proportionate to the gravity of the offence and the degree of responsibility of the offender: Criminal Code, R.S.C. 1985, c. C-46, s. 718.1. The relationship between the proportionality principle and the existence of exceptional circumstances was discussed most recently in Ruiz and in R. v. L.S.N., 2020 BCCA 109. In the latter case, the Court said this:
- [50] Proportionality is the cardinal principle of sentencing: Lacasse at para. 12. All sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: R. v. Proulx, 2000 SCC 5 at para. 54; Friesen at para. 30.
- [51] Sentencing judges exercise a broad, case-specific discretion in determining the weight to be accorded to the sentencing principles set out in s. 718 and 718.2 of the Code. Sentencing judges also exercise a broad discretion in determining how those principles are best achieved in a particular case. But the resulting sentence must respect the fundamental principle of proportionality: R. v. Nasogaluak, 2010 SCC 6 at para. 40; R. v. Ipeelee, 2012 SCC 13 at para. 37.
- [52] Sentencing is, of course, an individualized process. Exceptional circumstances--often rooted in an offender's disadvantaged background--may inform the assessment of an offender's moral culpability. The moral culpability of a significantly disadvantaged offender may be attenuated in the face of circumstances a sentencing judge considers to be exceptional.
- [53] Of particular note in this case are the systemic and background factors that have played a role in bringing Indigenous persons like the respondent before criminal courts. These background circumstances may be found to attenuate an Indigenous offender's moral culpability, including in very serious cases like the one at bar. In addition, the applicable sentencing objectives may be achieved in different ways and through the adoption of different methods in the case of a disadvantaged Indigenous offender: R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; Ipeelee at paras. 59, 84-86.
- [54] Exceptional circumstances do not, however, oust the proportionality principle. They simply permit the taking into account of case-specific considerations that could conceivably justify departure from a conventional sentencing range in order to craft a proportionate sentence. As this Court noted in R. v. Padda, 2019 BCCA 351 at para. 36, characterizing an offender's circumstances as exceptional "is simply 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."
- [24] Friesen and Parranto provide helpful analytical clarity in cases where exceptional circumstances are raised as justifying a departure from a generally applicable range. The task of the sentencing judge in such cases is not to determine whether the offender has met some ill-defined exceptional circumstances threshold test, but to fashion a proportionate sentence.

- [12] The important point that emerges from this discussion is that the term "exceptional circumstances" is simply a generalized description of the type of circumstances that justify imposing a sentence that is outside a conventional range. Judges should not be artificially constrained in imposing a proportionate sentence by an overly rigid insistence on a demonstration of exceptional circumstances. Respectfully, I think the judge here imposed that constraint on himself and so fell into error.
- [13] The judge quite properly identified the variety of sentencing principles that inform a fit sentence. He was right to recognize that those who embark on trafficking can generally expect to serve a custodial sentence. And he rightly recognized the importance of deterrence and denunciation in crafting a sentence, especially where the offence occurred close to a community suffering from the consequences of addiction and drug trafficking. Moreover, the judge was clearly sympathetic to Ms. Graham's personal circumstances, the trauma she has suffered, the steps she has taken to address the many barriers she faces in her life, and the risk that a custodial sentence would lead to the loss of her home and set back the course of her personal journey to greater health and well-being. Indeed, the judge's references to being conflicted in imposing a custodial sentence, that he took no pleasure in doing so, and the concern he expressed during submissions about the consequences for Ms. Graham of a custodial sentence, strongly suggest that he would not have imposed a custodial sentence if he thought he could justifiably have avoided doing so.
- [14] To explain why I conclude the judge erred in principle, it is necessary to track his chain of reasoning. The judge began by noting as a general principle that, absent exceptional principles, those who embark on drug trafficking should expect to be sent to prison. He recognized the need to consider this proposition in light of the principles of sentencing. After describing the circumstances of the offence, he said at para. 6:

The case law suggests that if this were a dial-a-dope method of trafficking, or possessing drugs for the purpose of trafficking in a dial-a-dope operation, the range would be six to eighteen months for a first-time offender. That is noted in *R. v. Voong*.

- [15] In the next paragraph he explains that with that range in mind, a custodial sentence is appropriate absent exceptional circumstances. This language is, I think, indicative of the error identified in the case law discussed above. The judge has articulated the issue in a way that suggests he is clothing himself in a judicial straitjacket. He is artificially treating the need to identify "exceptional circumstances" as a necessary precondition to depart from the range.
- [16] The judge provided a sympathetic account of Ms. Graham's personal circumstances. He notes the support Ms. Graham has in the community, and that she is on a positive trajectory in regard to her physical and mental health. Here, however, I think the judge fell into an error.

- [15] It is encouraging that Ms. Graham has those supports in the community, and, hopefully, those supports will gain traction. What is concerning is that those supports existed at the time of the offending behaviour, so these supports are not something new that have just developed since, which would be, one could characterize and perhaps slot under the language used in Voong, of objectively identifiable steps towards rehabilitation. They are significant and objectively identifiable steps, but again the concern is they pre-exist the offending behaviour.
- [17] In my opinion, the error in this paragraph is that the judge gives inadequate weight to an important personal circumstance that affects both Ms. Graham's moral culpability and future prospects. In short, he suggests that one cannot "slot under the language used in Voong" the fact that she had taken objectively identifiable steps towards rehabilitation, because those steps and that support were occurring or in place before the offence. Respectfully, this reflects a mechanistic application of the notion of exceptional circumstances discussed in Voong. It also does not adequately weigh the significance of these steps, not as an aspect of rehabilitation as such, but as part of continuing significant and identifiable gradual progress in mental and physical recovery. While it is a concern that the timing of the offence suggests a relapse or uneven progress, the judge should have placed more weight on this factor and erred in not doing so.
- [18] As the judge approached stating what the sentence he imposed would be, he reasoned as follows:
- [17] I find sentencing Ms. Graham to be difficult because I think that Crown counsel has fairly stated the range, and taken a reasonable position on sentence. I am also sympathetic to the challenges that Ms. Graham has faced up to this point in her life, and the challenges that she continues to attempt to grapple with.
- [18] As was stated in R. v. Gibbon, 2006 BCCA 219, however, have to essentially park my sympathies and simply sentence Ms. Graham, based on the principles of sentencing as apply to her in the circumstances of the offence. I bear in mind that six- to 12-month range of sentence, absent exceptional circumstances, and note that exceptional circumstances as described in R. v. Voong, include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of harm done to society, as being examples, in a non-exhaustive list.
- [19] I cannot conclude that Mr. Graham's circumstances are exceptional to the point of justifying a non-custodial sentence. That said, I do note that her rehabilitation is something that this court should encourage, and provide a sentence that does emphasize rehabilitation, under the circumstances.

[20] Just stand up for a second, Ms. Graham. I can tell you, it gives me absolutely no pleasure to impose a custodial sentence albeit at the very bottom of that range of six to 12 months. It will be a six-month sentence of incarceration, and there will be probation attached.

[Emphasis added.]

[19] Read fairly, these sentences disclose that the judge considered that he had no alternative to sentence in the range unless he concluded that there were exceptional circumstances within the meaning of Voong, as he understood it. In approaching the matter in this way, he artificially constrained his analysis of what would be a proportionate sentence in all of the circumstances. This is an error in principle, as set out above.

[20] It is also clear to me that the error affected the sentence imposed. Had the judge not considered himself constrained or placed himself in a judicial straitjacket, I am persuaded the judge would have sentenced below the range.

[21] The Crown submits that the sentence is fit in any event. This is so because of the importance of deterrence and denunciation, given Ms. Graham's moral culpability and allowing for her personal circumstances. It submits that a sentence at the low end of the range is appropriate and proportionate.

[22] As I am of the view that the judge's error affected the sentence, we must sentence afresh with due deference to the judge's error-free conclusions. It is evident that the judge was sympathetic to Ms. Graham's personal circumstances. I adopt his description of those circumstances, and do not intend to repeat them here.

[23] For my purposes, it is sufficient to say that I do not dispute the range discussed in this case. I accept the importance of deterrence and denunciation. Most commonly, a custodial sentence will be imposed for an offence of this seriousness. Ms. Graham was convicted after trial. She cannot take the benefit of an early guilty plea. She is properly sentenced as a first-time offender.

[24] Embracing all of that, we should recognize, nonetheless, that Ms. Graham has lived a life marked by trauma. She has suffered badly, and faced many barriers as an obviously transgendered woman. Even though I have no doubt the prison authorities would do all in their power to accommodate Ms. Graham in prison, her fear of facing further trauma if further incarcerated is both understandable and reasonable. Ms. Graham is a vulnerable and marginalized person. Her personal circumstances have led to drug dependency, and to supplementing her income in the sex trade. Critically, she is working hard to make progress on her mental health and well-being. No doubt her progress is uneven and a work in process. She has struggled to get out of a life lived in SROs in the DTES. She now lives in an apartment. Her housing is, I think it reasonable to infer, a critical foundation of the progress she is making in her life. If she were sentenced to a further prison term, she is at risk of losing her apartment. I am satisfied that if this occurred, all of the progress Ms. Graham has made in trying to build a healthy life will likely be jeopardized. Even a short prison sentence

could amount to a life sentence of deprivation, further marginalization and trauma.

[25] In all of these circumstances, I am persuaded that Ms. Graham's particular personal circumstances justify the imposition of a sentence below the range that would otherwise apply.

[26] In all of these circumstances, I conclude that a further custodial sentence would be disproportionate. The Crown, very fairly, has said that if a new sentence is to be substituted, it should be for time served: namely, 32 days. I agree.

[27] Accordingly, I would allow the appeal, set aside the six-month custodial term of the sentence, and substitute a custodial sentence of time served. I would not alter the other terms of the sentence.

[28] HUNTER J.A.: I agree.

[29] HORSMAN J.A.: I agree.

[30] HARRIS J.A.: The appeal is allowed on the terms I have set out.

"The Honourable Mr. Justice Harris"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/22/02/2022BCCA0252.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-graham-2022>

Prepared on 28 October 2026 · Esheria