
CANADA / JUDGMENT

R. v. Hashemi

2019 BCCA 418

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 418 R. v. Hashemi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hashemi,

2019 BCCA 418

Date: 20191113

Docket: CA46192

Between:

Regina

Respondent

And

Morvarid Hashemi

Appellant

Corrected Judgment: The text of the judgment was corrected on the cover page and at paras. 4, 12, 16, 20, 26, 27 and 29 on December 13, 2019.

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify any undercover officer involved in this investigation. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

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

June 3, 2019 (R. v. Hashemi, Port Coquitlam Docket 98238-1).

Oral Reasons for Judgment

Counsel for the Appellant:

B. Zargarian

Counsel for the Respondent:

A. Clarkson

Place and Date of Hearing:

Vancouver, British Columbia

October 23, 2019

Place and Date of Judgment:

Vancouver, British Columbia

November 13, 2019

Summary:

Following a guilty plea, the appellant was sentenced to 12 months in custody for trafficking in fentanyl to be followed by two years of probation. On appeal, she argues the sentencing judge erred in principle by failing to take into account, as a significant mitigating factor, her mental state during the time of the commission of the offence. She argues exceptional circumstances existed such that a non-custodial term was justified, being the sentence imposed on one of the co-accused by a different judge. Held: Appeal dismissed. The sentencing judge took note of the relevant mitigating and aggravating factors and did not commit a material error or impose a demonstrably unfit sentence.

ABRIOUX J.A.:

Introduction

[1] On March 2, 2018, the appellant, Morvarid Hashemi, pleaded guilty to one count of trafficking in fentanyl between June 29, 2016 and June 28, 2017. On June 3, 2019, she was sentenced to 12 months in custody to be followed by 24 months of probation.

[2] She now seeks the substitution of a suspended sentence on the ground that the judge misapprehended the evidence, erred in her application of the parity and exceptional circumstances principles, and imposed a sentence disproportionate to her moral blameworthiness and personal circumstances.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] The appellant was arrested following an undercover investigation into a fentanyl trafficking line. Multiple parties were arrested, including:

- a. Andrew Leach, the head of the drug trafficking organization;
- b. Merissa Demosten, the manager of the operation; and
- c. Zach Joyce, Mariah Kemp, and Golareh-Sadat Ehtesham-Far, dial-a-dope drivers who operated under Mr. Leach who were paid \$25 an hour.

[5] The offence dates on the Indictment covered the activities of all five parties and spanned from June 2016 to June 2017.

[6] Between November 24, 2016 and January 10, 2017, the appellant trafficked fentanyl six times to an undercover officer, totaling 60 pills. Between May 2, 2017 to June 25, 2017, surveillance and wiretap captured the appellant discussing trafficking drugs with, and seeking instructions from, her superiors on nine occasions.

Antecedents

[7] Both a pre-sentence report and a court ordered psychological assessment were prepared, the latter by Dr. Mel Stangeland.

[8] The appellant was a first-time offender who was born in Iran in 1992. When she was six years old, she fled the country with her mother to escape her father, and the poor state of women's rights. They became stateless in Asia for two years, during which time they suffered incarceration, before being granted refugee status in Canada. Her mother and family friends stated that those years were "extremely dangerous and traumatizing" for the appellant and have impacted her well-being since.

[9] When she grew older, Ms. Hashemi began to suffer with extremely painful periods that frequently resulted in her attending hospital emergency and being prescribed opiates for the pain. She reports having abdominal migraines that, according to the psychological assessment, she believes to be stress-related and which have affected her employability.

- [10] Ms. Hashemi had learning difficulties in elementary school, but was able to overcome these and graduate high school on time in 2010. She also assisted as a tutor in the learning disabilities and ESL classes. After high school, she worked for a year-and-a-half with a cabinet company and otherwise has no employment history.
- [11] Ms. Hashemi receives disability benefits, which appears to be due to her medical condition.
- [12] In about 2014, when Ms. Hashemi was 22 years old, she began a common-law relationship with a drug dealer, which ended when he was murdered in 2016. Ms. Hashemi described him as extremely controlling and abusive, including sexual violence and choking her to the point of unconsciousness. Not long after her boyfriend's death, she began working for Mr. Leach. The pre-sentence report refers to Ms. Hashemi being "in and out of addiction" since 2016. Dr. Stangeland notes that prior to her involvement with Mr. Leach, Ms. Hashemi was using marihuana and Percocet daily "and developed a dependence on opioids" while addressing her health concerns. Subsequent to commencing to work for Mr. Leach, Ms. Hashemi became addicted to fentanyl and cocaine.
- [13] Ms. Hashemi self-reported to Dr. Stangeland that she has post-traumatic stress disorder. He stated in his report that "this must be considered as a primary condition in view of her reported childhood history of trauma and her more recent history of abuse within an intimate relationship".
- [14] Following her arrest in 2017, the appellant abstained from illicit drugs and was later placed on a methadone program. At her sentencing hearing, she expressed sentiments of remorse and disgust as to her actions. While on bail for two years pending sentencing, she spent her time at home with her family, working on her recovery.

Reasons for Sentence

- [15] The Crown sought a three-year term of incarceration. The defence sought a suspended sentence, in part on the basis that this was the sentence received by one co-accused, Ms. Ehtesham-Far.
- [16] The judge referred to certain phone calls and recorded conversations arising from the police investigation, which included:
- Mr. Leach urging Ms. Hashemi to push opioids and "greens" (fentanyl) on a customer who was asking her for crystal meth;
 - Ms. Hashemi and Ms. Demosten devising a plan to try and catch Ms. Ehtesham-Far helping herself to drugs; in this call, she also complains about Ms. Ehtesham-Far's inefficiencies in selling drugs;
 - a post-shift "de brief" in which Ms. Hashemi discusses profit margins on Percocet in relation to those customers "who won't touch the greens people who love pills but are just shit scared of the green pills so it's good to have an option for them "; and

d. reporting to Mr. Leach that she has a customer who owes money and who she says needs a "consequence".

[17] The judge referred to the fact that Ms. Hashemi had told the authors of both reports that she was not aware the OxyContin contained fentanyl. This "lack of candour", accordingly, "cast doubt on the truthfulness of other information she self reported to them".

[18] The judge then reviewed the evolution of the public health crisis associated with fentanyl and certain decisions of this Court including R. v. Smith, 2017 BCCA 112 and R. v. Voong, 2015 BCCA 285., noting that:

[43] The issue then is whether Ms. Hashemi's circumstances are exceptional and bring her sentence outside the Smith range and if so, whether a custodial sentence below the range or a non-custodial sentence, can accord with the principles, purposes and objectives of sentencing.

[19] She then referred to certain mitigating factors including:

- a. the significant factor of a guilty plea;
- b. Ms. Hashemi's status as a youthful offender with no criminal record;
- c. her struggles with drug dependency due to a medical condition prior to her involvement in the dial-a-dope operation;
- d. her trauma as a child refugee, with learning and social difficulties at school, which likely contributed to her depression, anxiety, and other disturbances as an adult;
- e. her loving and caring family and support group of friends; and
- f. her expressions of remorse.

[20] The judge then noted certain aggravating factors which included:

- a. Ms. Hashemi regularly trafficked in narcotics, including fentanyl over a period of months. Some of the fentanyl was incorporated into counterfeit OxyContin pills, making them more deadly for those buyers who did not know any better;
- b. the wiretaps demonstrated Ms. Hashemi's high level of commitment to the trafficking operation. She was a loyal, hard-working employee, taking initiative to source out drugs on her own to get the best deal possible, reporting to Mr. Leach about customers who owed money and contemplating consequences, conspiring how to catch a co-worker suspected of helping herself to drugs, ensuring special customers got their desired Percocet and not fentanyl, while at the same time selling fentanyl to less discriminating customers,
- c. Ms. Hashemi's motivation was monetary gain. She needed a job and made the poor decision to choose drug trafficking; and

- d. Ms. Hashemi was not deterred from drug trafficking until she got caught--neither Mr. Joyce's arrest, Ms. Kemp's overdose, nor the customer whose parents found out about the drug-line convinced her to stop.
- [21] Having referred to denunciation and deterrence as being the primary sentencing principles engaged for drug trafficking offences, while cognizant of the need to consider rehabilitation prospects, the judge concluded:
- [108] I am not satisfied that Ms. Hashemi's circumstances are "above and beyond the norm" or that she has truly turned her life around. I find that the seriousness of Ms. Hashmi's offence and the aggravating factors outweigh the mitigating aspects and as a result, a period of incarceration is required.
- [109] I am however mindful of Ms. Hashemi's youth, her compliance while on bail and the important step she has taken by abstaining from fentanyl and I do not wish to undermine her rehabilitation by causing her to lose hope.
- [110] It is this balancing of Ms. Hashemi's circumstances, the circumstances of the offence and the need to deter and denounce her conduct, with the value to society in Ms. Hashemi's rehabilitation as a law-abiding citizen, which in my view, justifies a custodial sentence outside the Smith range.

Analysis

- [22] An appellate court may interfere with a sentence imposed by a lower court only where there has been a material error that has impacted the sentence in that the sentence would have been different absent the error or where the sentence is demonstrably unfit: *R. v. Agin*, 2018 BCCA 133 at para. 56. A material error includes a failure to consider a relevant factor or an erroneous consideration of aggravating or mitigating factors: *R. v. Lacasse*, 2015 SCC 64. An appellate court may not intervene because it might have weighed the factors differently: *R. v. May*, 2018 BCCA 391 at para. 27.
- [23] A demonstrably unfit sentence is one that constitutes an unreasonable departure from the principle of proportionality, which is assessed on both an individual basis and in relation to the sentences imposed for similar offences in similar cases: *Lacasse* at para. 52. Great deference is owed to the decisions of sentencing judges. In the absence of an error that has impacted the sentence, appellate courts should not interfere with the sentence imposed, unless it meets the high standard of being demonstrably unfit: *R. v. Daigle*, 2017 BCCA 86; *Agin* at para. 57.
- [24] Ms. Hashemi recognizes that the judge took certain mitigating circumstances into account in imposing the custodial sentence. However, she says the judge committed various errors that resulted in a failure to appreciate the appellant's mental state at the time of the offence and the extent of her moral blameworthiness. In particular, Ms. Hashemi argues that the judge made a fundamental error at para. 67 of the Reasons when she stated:

[67] I have no evidence of Ms. Hashemi's mental state over the months that she committed the offences. At the time of the assessment, some one year later, Dr. Stangeland said at pg. 9, "there do not appear to be any active psychotic symptoms such as hallucinations or delusions." In his concluding section and breakdown of risk factors, Dr. Stangeland states at pg. 15, that Ms. Hashemi is "currently suffering from a serious depressive disorder." Dr. Stangeland does not draw any connection between Ms. Hashemi's mental health and her criminal actions and says instead at pg. 16:

"I do not see Moravid (sic) as someone who is actively criminal in her intent. Her involvement in drug trafficking seems to have been a matter of convenience in a time of need. Her decision to get involved was influenced by her circumstances and her associates. At the same time, it was a choice that she made, not one that was forced on her."

[25] Ms. Hashemi submits that the judge erred when she stated there was "no evidence of [her] mental state over the months she committed the offence" and that Dr. Stangeland's opinion that she was "currently suffering from a serious depressive disorder" should be restricted to the time frame of his assessment being April 2018, approximately one year after her arrest.

[26] This error, it is argued, failed to recognize that there was the necessary nexus between Ms. Hashemi's mental state prior to her becoming involved with Mr. Leach --that is, her addiction to opiates due to her medical condition and the abusive relationship which had recently ended--and her participation in the dial-a-dope operation. She submits that had this nexus been recognized by the judge, then a non-custodial sentence was warranted due to the existence of exceptional circumstances.

[27] I do not accept this argument for several reasons, which include:

- a. it takes out of context two sentences from a lengthy paragraph in the comprehensive Reasons, including what the judge referenced later in the same paragraph, being Dr. Stangeland's comment that "[a]t the same time, it was a choice that she made, not one that was forced on her";
- b. the judge did recognize that Ms. Hashemi suffered trauma as a child refugee and had learning and social difficulties in school, which likely contributed to her depression, anxiety, and other disturbances as an adult;
- c. the judge also recognized that prior to her involvement with the dial-a-dope operation, the appellant experienced periods of addiction or drug dependency. However, it was not until after she started working with Mr. Leach that she became addicted to cocaine and OxyContin and was using illicit drugs on a regular basis;
- d. the appellant's evidence, as noted in the Reasons, was that she did not want to be a financial burden on her parents and "started selling drugs for Mr. Leach explaining "it seemed like a good idea at the time";

- e. the judge agreed with the appellant's mother's assessment "that Ms. Hashemi became involved in the drug trade due to her lack of judgment"; and
- f. the judge's assessment was that she did not agree that the appellant was a victim of life's circumstances, "although it is obvious from the psych assessment and her submissions in court that [she] feels she is a victim".

[28] In my view, the judge clearly took into account all relevant mitigating factors, including the appellant's mental state at the time she engaged in the dial-a-dope operation. While it is accurate that Dr. Stangeland was of the opinion Ms. Hashemi had cognitive limitations, the judge recognized that this alleged deficiency did not prevent the appellant from completing high school at the appropriate age and tutoring children on a part-time basis.

[29] The judge also properly considered and distinguished the circumstances of the other co-accused and dial-a-dope sellers employed by Mr. Leach, noting:

[105] In determining a fit sentence for Ms. Hashemi, I have paid close attention to the sentences of the various co-accused and in particular, Ms. Ehtesham-Far. I agree with the Crown's submission that nothing significant turns on which of the two engaged in a larger amount of sales, since this would have been driven by the operational decisions of the undercover officers as to who to buy from and when. I find however there are many factors that distinguish Ms. Hashemi's circumstances from Ms. Ehtesham-Far's.

[106] The personal circumstances that led each of them to the decision to sell drugs for Mr. Leach are very different: It was Ms. Ehtesham-Far who went in addicted, having been sexually abused by her step-father, and was then raped by and exchanged sex with Mr. Leach for drugs. For Ms. Hashemi, the decision to work for Mr. Leach was purely financial.

[30] Recently in *R. v. Schneider*, 2019 BCCA 310 this Court noted:

[10] This Court has commented on the need to keep the sentencing goals of general deterrence and denunciation paramount when sentencing offenders involved in the trafficking of fentanyl, due to its deadly nature and the escalating crisis it presents in our communities: *R. v. Smith*, 2017 BCCA 112. In *Smith*, this Court identified a sentencing range of 18 to 36 months' imprisonment, or more, for street-level trafficking in fentanyl.

[11] This Court has also recognized that rehabilitation is an important sentencing goal. In some rare cases of drug trafficking involving exceptional circumstances, rehabilitation may be better served by a suspended sentence and a probation order, which may still have a general deterrent and denunciatory effect: *Voong*. As Bennett J.A. for the Court held:

[59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. 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.

[Emphasis in original.]

- [31] The aggravating factors were also appropriately considered by the judge. The appellant's conduct was most serious, occurred over many months, and indicated a high level of involvement in the operation that went beyond being solely a seller.
- [32] The custodial sentence of three years sought by the Crown, that is the top end of the Smith range, may well have been a fit sentence. That being said, the judge considered the appellant's significant mitigating circumstances in deciding that a 12-month custodial sentence, that is one well below the Smith range, was fit. She did so within the context of concluding that exceptional circumstances warranting a non-custodial sentence were not present.

Disposition

- [33] In my view, the judge committed no reviewable error in reaching these conclusions. She did so having carefully reviewed the evidence and applying the appropriate legal framework. I see no basis on which this Court should interfere with the sentence imposed and I would dismiss the appeal.
- [34] GARSON J.A.: I agree.
- [35] DEWITT VAN-OOSTEN J.A.: I agree.
- [36] GARSON J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Abrioux"

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