

CANADA / JUDGMENT

## R. v. Henareh

2015 BCSC 992

COURT

Supreme Court of British Columbia

DECIDED

9 June 2015

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2015 BCSC 992 R. v. Henareh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Henareh,

2015 BCSC 992

Date: 20150609

Docket: 26235-5

Registry: Vancouver

Regina

v.

Esfandiar Henareh

Restriction on publication: Pursuant to s. 648 of the Criminal Code of Canada

Before: The Honourable Madam Justice Watchuk

Ruling Regarding Materials to be Considered on Sentencing Hearing

Counsel for the Crown:

M. Namazi

Counsel for the Accused:

R. Claus

Place and Date of Written Submissions:

Vancouver, B.C.

March 4, 16, 23, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 9, 2015

## INTRODUCTION

- [1] Esfandiar Henareh has been found guilty on a charge of possession of opium for the purpose of trafficking on March 11, 2011. That charge is count 3 on indictment #26235-2 (the "Indictment"). Counts 1 and 2 charge Mr. Henareh jointly with Aghasi Salamat Ravandi with the offences of importing opium and possession of opium for the purpose of trafficking between March 9 and March 11, 2011. The Crown has stated that it will stay counts 1 and 2 against Mr. Henareh at the conclusion of his sentencing on count 3.
- [2] At the commencement of the sentencing hearing, an issue arose as to what materials the Crown is entitled to rely upon. Mr. Henareh submits that all material relevant to the issue of sentence was contained in the admissions of fact submitted to the court at the time the conviction was recorded. He also says that if the Crown can rely on any additional materials, it must be put to strict proof of the facts alleged.
- [3] The Crown submits that the court should hear submissions on the totality of the circumstances in order to have a full and fair picture of both the nature of the offence and the offender. To do otherwise would leave the court with an unbalanced, inaccurate, and unfair picture of the moral culpability of Mr. Henareh in relation to the offence that he has been convicted of. It further says that the materials sought to be introduced are reliable and trustworthy.

## BACKGROUND

- [4] The Indictment states:

### Count 1 / Chef 1

Aghasi SALAMAT RAVANDI and /et Esfandiar HENAREH, on or between the 9th day of March, 2011 and the 11th day of March, 2011, at or near the City of Richmond, in the Province of British Columbia, did unlawfully import into Canada a controlled substance, to wit: Opium, contrary to Section 6(1) of the Controlled Drugs and Substances Act.

**Count 2 / Chef 2**

Aghasi SALAMAT RAVANDI and / et Esfandiar HENAREH, on or about the 11th day of March, 2011, at or near the City of Richmond and the City of Vancouver, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Opium, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

**Count 3 / Chef 3**

Esfandiar HENAREH, on or about the 11th day of March, 2011, at or near the City of Vancouver, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Opium, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

- [5] In an oral ruling dated December 12, 2013, I granted the application of Mr. Ravandi for severance with the result that his trial proceeded separately on counts 1 and 2 on which he was charged jointly with Mr. Henareh: R. v. Ravandi and Henareh, 2013 BCSC 2374.
- [6] Mr. Ravandi elected trial by judge alone. On January 15, 2015, he was convicted of the offences of importing opium and possession of opium for the purpose of trafficking as set out in counts 1 and 2. The brief circumstances of those offences were that a shipment of 18 kilograms of opium concealed in samovars had arrived at the Vancouver airport on March 9, 2011. On March 11, Mr. Henareh was at the airport location when Mr. Ravandi attended to pick up the opium with a U-Haul truck. After the truck was driven by Mr. Ravandi to another location and parked with the 18 kilograms of opium locked inside, Mr. Henareh and Mr. Ravandi left together in Mr. Henareh's vehicle travelling to Mr. Ravandi's residence. Mr. Henareh was arrested shortly after Mr. Ravandi got out of that vehicle. In the trunk of Mr. Henareh's vehicle were 14 kilograms of opium which form the substance of count 3.
- [7] The trial of Mr. Henareh, who had elected judge and jury, commenced with a voir dire regarding the admissibility of the 14 kilograms of opium located in the trunk of his vehicle. The application to exclude the evidence as a result of a breach of his rights under s. 8 and s. 9 of the Charter was dismissed. The evidence was admitted.
- [8] After an adjournment of the dates set in September 2014, the trial was scheduled to proceed on January 5, 2015. On that date, Mr. Henareh re-elected trial by judge alone and invited the court to enter a finding of guilt to count 3, a charge of possession of opium for the purpose of trafficking.
- [9] At those proceedings on January 5, counsel filed admissions of fact in a document entitled "Admissions on Conviction (Pursuant to Section 655 of the Criminal Code)" ("the Admissions"). The court was advised by counsel for the Crown that the admissions were the "bare bones" elements of the offence in count 3, and were for the purpose of the conviction to be entered that day. She advised that there would be discussions between counsel regarding further admissions setting out more detail.

- [10] In making the finding of guilt, I noted that the admissions were "drafted with the intent to be admissions of the elements of the offence set out in count 3." The admissions dealt with identity, jurisdiction, the nature of the substance, continuity of exhibits, and the purpose of the possession.
- [11] When the matter later came on for sentencing, counsel for Mr. Henareh advised the court that he objected to the Crown leading further evidence which he characterized as evidence of charges that the Crown will stay in order to suggest an aggravating factor.
- [12] Sentencing was adjourned so that the issue of the materials to be relied upon by the Crown at sentencing could be addressed in written submissions.

#### SUBMISSIONS OF THE PARTIES

- [13] The Crown seeks to rely on materials in addition to those facts contained in the Admissions. It says that:

The circumstances of all three offences are interconnected. All along, the theory of the Crown has been that Henareh and Salamat Ravandi were working together to import opium. The 14 kilograms of opium which is the subject of the offence to which Henareh as been convicted are inextricably linked to the 18 kilograms of opium which were the subject matter of the other two offences charged. There is compelling evidence that demonstrates that connection.

- [14] The facts that the Crown seeks to prove on sentencing include: (i) the co-accused going together to rent the U-Haul van which was used on March 11 to pick up the opium imported on March 9; (ii) that they were together at the airport the day that the opium was picked-up and their interactions with each other that day; (iii) Mr. Henareh's driving when he drove Mr. Ravandi home in the vehicle which was subsequently found to have opium in its trunk; and (iv) the frequent telephone contact between the co-accused as well as between Mr. Ravandi and the shipper of the opium.
- [15] The materials that the Crown submits are relevant on this sentencing include either Exhibit A, the Admissions of Fact signed by counsel in September 2014, prior to the first trial date, with the exhibits appended, or a number of documents marked for identification. Those documents include photographs of the opium imported into Canada on March 9, 2011, emails located on Mr. Ravandi on his arrest, waybills for the opium which is the subject of counts 1 and 2, Mr. Henareh's Visa statement, phone records of calls between the co-accused, and rental documents for the U-Haul used to pick-up the imported opium on March 11. In addition, the Crown seeks to enter transcripts of the voir dire evidence of the lead investigator, or some transcripts from the trial or preliminary inquiry of Mr. Ravandi.

- [16] Mr. Henareh submits that the Crown has failed in its written submissions to demonstrate the relevance of the proposed evidence to the sentence to be imposed for count 3. He says that that evidence is of charges that the Crown will stay at the end of sentencing in order to establish aggravating factors. He further says that the Crown gave no notice of its intention to use additional materials.

## ISSUES

- [17] It is common ground that the sentencing of an offender must include findings of fact regarding the offence and the offender. In this case, an issue arises with regard to evidence regarding counts (1 and 2) involving other offences and which also charged a co-accused whose trial was severed. Those counts as against this offender will be stayed at the conclusion of his sentencing on a separate count (count 3) for another offence which the Crown says is related to counts 1 and 2.
- [18] In determining whether the Crown is limited to relying on the Admissions regarding the elements of the offence, it is necessary to consider: How can the court best determine the circumstances of this offence and offender?; and, What facts and evidence are relevant to the sentencing of Mr. Henareh on count 3?

## RELEVANT STATUTORY PROVISIONS

- [19] The Criminal Code, R.S.C. 1985, c. C-46, provisions regarding sentencing that pertain to the determination of these issues are:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing[.]

723. (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.

(2) The court shall hear any relevant evidence presented by the prosecutor or the offender.

(5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person

- (a) has personal knowledge of the matter;
- (b) is reasonably available; and
- (c) is a compellable witness.

724. (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.
- (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
- (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
  - (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
  - (c) either party may cross-examine any witness called by the other party;
  - (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
  - (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.
725. (1) In determining the sentence, a court
- (a) shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences;
  - (b) shall consider, if the Attorney General and the offender consent, any outstanding charges against the offender to which the offender consents to plead guilty and pleads guilty, if the court has jurisdiction to try those charges, and shall determine the sentence to be imposed for each charge unless the court is of the opinion that a separate prosecution for the other offence is necessary in the public interest;
- (b.1) shall consider any outstanding charges against the offender, unless the court is of the opinion that a separate prosecution for one or more of the other offences is necessary in the public interest, subject to the following conditions:
- (i) the Attorney General and the offender consent,
  - (ii) the court has jurisdiction to try each charge,
  - (iii) each charge has been described in open court,
  - (iv) the offender has agreed with the facts asserted in the description of each charge, and
  - (v) the offender has acknowledged having committed the offence described in each charge; and
- (c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

- (2) The court shall, on the information or indictment, note
- (a) any outstanding charges considered in determining the sentence under paragraph (1)(b.1), and
- (b) any facts considered in determining the sentence under paragraph (1)(c),
- and no further proceedings may be taken with respect to any offence described in those charges or disclosed by those facts unless the conviction for the offence of which the offender has been found guilty is set aside or quashed on appeal.

726.1 In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.

## DISCUSSION AND CONCLUSION

- [20] Counsel have provided thorough submissions regarding the admissibility and relevance of evidence regarding the offence at sentencing proceedings. On reflection, the issues can be narrowed considerably.
- [21] It is necessary to state first that this ruling is not for the purpose of finding the facts that will form the circumstances of the offence on sentencing. It is only to determine broadly the materials which the Crown can put before the court, and whether the Crown is restricted to relying on the Admissions. Any discussion of the proposed evidence is solely to illustrate the principles.
- [22] As stated above, it is essential in a sentencing to make findings of fact regarding the circumstances of the offence and the offender. Those findings serve a number of purposes in determining the appropriate sentence. Most importantly for this matter, they will assist in determining the degree of responsibility of the offender. If Mr. Henareh was not involved in the importation of the 18 kilograms of opium, his degree of responsibility is likely less than if he had other experience with imported opium. His relationship with Mr. Ravandi is relevant in that regard. Whether Mr. Henareh was involved in the importation of the 14 kilograms of opium is also relevant.
- [23] In order to make those findings, the applicable Criminal Code provisions are largely mandatory. The court must give the Crown and the defence an opportunity to make submissions regarding facts relevant to the sentence and the court shall hear any relevant evidence presented by either side: ss. 723(1), (2).
- [24] Section 726.1 broadens the mandate of the court as it states that any relevant information must also be considered.

- [25] Relevance has been interpreted in the following cases. In *R. v. Adam*, 2007 BCSC 764 at paras. 82-90, counsel for two of the accused sought to introduce DVDs and magazine articles as contextual evidence. Mr. Justice Romilly considered the law on relevant evidence:
- [82] It is trite law that all credible and trustworthy evidence is admissible at a sentence hearing. This includes hearsay evidence, unless that evidence is seriously disputed by the accused: *R. v. Albright*, [1987] 2 S.C.R. 383; *R. v. Miller* (6 December 1988), Prince George 14636 (B.C. Co.Ct.). This does not mean, however, that the defence or the Crown should be allowed to enter irrelevant evidence at a sentence hearing.
- [86] It is a well known rule of law that all relevant evidence is to be received by the trier of fact unless the evidence is rendered inadmissible by a particular rule of exclusion. The principle was summarized by McLachlin J. (as she then was) in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609:

In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground.

- [87] The onus is on the party tendering the evidence to prove relevance by showing a factual nexus between the evidence and a fact in issue. In *R. v. Cloutier*, [1979] 2 S.C.R. 709, Pratte J. said at 731:

For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

- [26] Evidence is relevant if it has logical, probative value: *R. v. Morris*, [1983] 2 S.C.R. 190 at 201. Put another way, evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely: *R. v. Truscott* (2006), [2006] O.J. No. 4171 at para. 22, 213 C.C.C. (3d) 183 (C.A.); and *R. v. J.(J.-L.)*, 2000 SCC 51 at para. 47. Evidence will be irrelevant if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings: *R. v. Truscott* at para. 22.
- [27] Relevance is contextual in that it depends on the facts, the parties' positions, and the other evidence adduced and so a court will often receive the evidence conditionally and determine the relevance of the evidence after the evidentiary picture has been fully developed. That does not mean, however, that a court should hear evidence on the chance that it might somehow, at some time, in some way become relevant in the proceedings. See *R. v. Truscott* at para. 23; and *R. v. Arp*, [1998] 3 S.C.R. 339.

- [28] All relevant evidence is admissible subject to judicial discretion to exclude matters that may unduly prejudice, mislead, or confuse the trier of fact or that are otherwise subject to exclusion on clear grounds of law or policy: *R. v. Watson* (1996), 30 O.R. (3d) 161 at 171-172 (C.A.), citing *R. v. Corbett*, [1988] 1 S.C.R. 670 at 714, LaForest J. dissenting. See also *R. v. Morris* at 191-192; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609-612.
- [29] At para. 63 of *R. v. Edwards*, [2001] O.J. No. 2582, 155 C.C.C. (3d) 473 (C.A.), Mr. Justice Rosenberg stated:
- [63] In my view, evidence that discloses the commission by the offender of other untried offences is admissible for the purpose of showing the offender's background and character as that background and character may be relevant to the objectives of sentencing. That being said, the trial judge must have a discretion to refuse to admit the evidence where necessary to ensure that the accused has a fair hearing.
- [30] In *R. v. Angelillo*, 2006 SCC 55 at paras. 31-32, the Supreme Court of Canada discussed the issue of evidence to be admitted on sentencing:
- [31] I cannot agree with Fish J., who would admit no evidence of acts tending to establish the commission of another offence in respect of which the offender has not been charged, except in the context of s. 725(1)(c). Under that provision, as is explained in *Larche*, the court may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge. I concede that there may be cases in which such facts are also relevant to the offender's character or reputation. But it is not always easy to tie evidence of reputation or character to a separate offence. Nor does such evidence always form part of the circumstances of the offence - sometimes it only forms part of the circumstances of the offender. With respect, if Fish J. were right, a pre-sentence report setting out facts demonstrating that the offender has a violent character, is a drug addict, has no respect for the court's authority or has not learned his or her lesson could violate the presumption of innocence, since such facts could very well tend to establish the commission of various offences, including assault, possession of narcotics and breach of recognizance. I do not believe this to be the effect of the presumption of innocence. The presumption does not constitute a general exclusionary rule of evidence that precludes the admission of all extrinsic evidence relevant to sentencing for the offence in issue on the basis that it might establish the commission of another offence. This does not mean that the offender has no procedural protection where extrinsic evidence is concerned. There are a number of other principles that assure the offender's right to a fair trial. I will explain this.
- [32] If the extrinsic evidence is contested, the prosecution must prove it. Since the facts in question will doubtless be aggravating facts, they must be proved beyond a reasonable doubt (s. 724(3)(e)). The court can sentence the offender only for the offence of which he or she has been convicted, and the sentence must be proportionate to the gravity of that offence. In addition, the judge can and must exclude otherwise relevant evidence if its prejudicial effect outweighs its probative value such that the offender's right to a fair trial is jeopardized.

Finally, the court must draw a distinction between considering facts establishing the commission of an uncharged offence for the purpose of punishing the accused for that other offence, and considering them to establish the offender's character and reputation or risk of re-offending for the purpose of determining the appropriate sentence for the offence of which he or she has been convicted. In my example, the sentence imposed on a violent offender may well be more restrictive than the sentence imposed on an offender who has committed an isolated act, but this is in no way contrary to the presumption of innocence. The sentence may also be more restrictive in the case of a repeat offender if the Crown presents evidence of the offender's criminal record, but this does not violate the offender's right, guaranteed by s. 11(h) of the Charter, not to be "punished ... again". In both cases, again from the standpoint of proportionality, the more severe sentence is merely a reflection of the individualized sentencing process.

[Emphasis in the original.] [Underlining added]

- [31] Any disputed fact that is relevant must be proved by the party seeking to rely upon it on a balance of probabilities. If the Crown seeks to establish the existence of an aggravating fact, it must prove that fact beyond a reasonable doubt.
- [32] A court must consider outstanding charges if certain conditions are met, including that the Crown and defence consent. Although at the time of sentencing counts 1 and 2 will be outstanding charges, the defence does not consent to those charges being considered at sentencing. They cannot therefore be considered: Criminal Code, s. 725(1)(b.1).
- [33] The "circumstances of the offence", although a phrase that is frequently present in sentencing reasons, appears in the Criminal Code for the purposes of sentencing only in s. 725(1)(c). Pursuant to that provision, the court may consider the facts forming part of the circumstances of the offence that could constitute the basis for a separate charge. However, s. 725(1)(c) does not apply to these circumstances since the facts intended to be relied upon by the Crown do form the basis for separate charges already part of the Indictment in counts 1 and 2.
- [34] Although section 725 does not have application to this case, the case of *R. v. Larche*, 2006 SCC 56, is instructive regarding the meaning of "circumstances of the offence":
- [54] Both *res gestae* and the phrase "while committing" are narrower than the expression "facts forming part of the circumstances of the offence" employed in s. 725(1)(c). The "circumstances" of an offence are more than the immediate transaction in the course of which it transpires. Thus, in addition to encompassing the facts of a single transaction, s. 725(1)(c) also applies, in my view, to the broader category of related facts that inform the court about the "circumstances" of the offence more generally.
- [55] "Facts" (or uncharged offences) of this sort that have occurred in various locations or at different times cannot properly be said to form part of the transaction covered by the charge for which the offender is to be sentenced. Recourse to s. 725(1)(c) may nevertheless be had

where the facts in question bear so close a connection to the offence charged that they form part of the circumstances surrounding its commission. In determining whether they satisfy this requirement of connexity, the court should give appropriate weight to their proximity in time and to their probative worth as evidence of system or of an unbroken pattern of criminal conduct.

- [35] Sentencing proceedings must therefore include consideration of the relevant facts, evidence, and information that are necessary in order to find the facts to determine the circumstances of the offence and the offender. Although it may be possible to find those facts solely from the elements of the offence, it is not possible in this case. In addition to the facts relevant to conviction, there are other facts relevant to sentencing.
- [36] In order to sentence Mr. Henareh to an appropriate and fit sentence, evidence in addition to the Admissions filed regarding the elements of the offence is necessary. That additional evidence is relevant to the circumstances of the offence and his circumstances, in particular to his degree of responsibility.
- [37] It was the intention of the Crown, as stated at the commencement of the trial when the Admissions were filed, that there would be further discussions between counsel regarding admissions of more detailed facts. Although those discussions did not result in further admissions, it cannot be said that the Crown did not clearly state its intention. It may be that the extent of the detail sought was not expected by Mr. Henareh.
- [38] The Crown does not now seek to, nor can this court, sentence Mr. Henareh for the offences set out in counts 1 and 2. The offender must be punished only for the offence in issue: Angelillo at para. 23. However, some of the evidence of the circumstances of and conduct underlying those offences is relevant to the circumstances of the offence and offender before the court. The relevance of any contested evidence and information sought to be admitted will be determined at the sentencing hearing after hearing from counsel as to the application of these principles to the particular item.
- [39] This ruling then determines that the Crown is not limited to relying on only those facts contained in the Admissions. All facts relevant to the circumstances of the offence and offender will be considered by the court. The proof of any disputed fact is on the party alleging it on a balance of probabilities. If the Crown seeks to establish an aggravating fact, it must prove it beyond a reasonable doubt.
- [40] With regard to proof of any of the items, it is not understood that reliability is in issue. If that issue arises, it can be dealt with at the hearing. As stated in s. 723(5) of the Criminal Code, hearsay evidence is admissible subject to argument if that issue arises regarding any particular item.

[41] It is beyond the scope of this ruling to determine the admissibility of each of the documents sought to be entered by the Crown. I request counsel to communicate prior to the sentencing hearing with regard to any anticipated objections to the materials entered as Exhibits A, B, C, C1, D, and D1, and those listed by the Crown in its written submissions as intended to be relied upon at the sentencing hearing.

"The Honourable Madam Justice Watchuk"

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Prepared on 29 October 2026 · Esheria