

CANADA / JUDGMENT

R. v. Kardan

2024 BCCA 56

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 56 R. v. Kardan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kardan,

2024 BCCA 56

Date: 20240214

Docket: CA48729

Between:

Rex

Respondent

And

Arash Kardan

Appellant

Before:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Madam Justice Horsman

On appeal from: An order of the Provincial Court of British Columbia, dated
November 8, 2022 (sentence) (R. v. Kardan, North Vancouver Docket 68587-4-C).

Oral Reasons for Judgment

Counsel for the Appellant:

S. Wright

Counsel for the Respondent:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia

February 14, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 14, 2024

Summary:

This is an appeal from a global 34-month sentence imposed for three offences, including possession of drugs for the purpose of trafficking. The appellant says the sentence reflects three errors in principle: (1) the judge erred in treating the distribution of fentanyl as an aggravating factor that warranted a sentence at the high end of the Smith range when that range already assumes the involvement of fentanyl; (2) he erred in relying on post-offence convictions as justification for a higher sentence; and (3) he failed to apply the principle of totality.

HELD: Leave is granted, but the appeal is dismissed. The appellant has not established errors in principle that had a material impact on the sentence. The involvement of fentanyl was but one aggravating factor considered by the judge. There were also other aggravating features at play, and this was a case in which the appellant committed three separate offences, including one involving violence against a police officer. In that context, it was open to him to sentence at the higher end of the range. The judge used the appellant's post-offence conduct for a proper purpose (to assess his character as an offender), and it is clear from a consideration of the reasons as a whole, in the context of the record, that the judge considered and applied the principle of totality. The appellant has failed to establish a proper basis on which to interfere with the sentence.

- [1] DEWITT-VAN OOSTEN J.A.: On November 8, 2022, the appellant, Arash Kardan, received a global 34 months' imprisonment for three offences: possession of drugs (including fentanyl) for the purpose of trafficking; resisting arrest; and assaulting a police officer.
- [2] The first of these offences was contrary to the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The second and third offences were prosecuted under the Criminal Code, R.S.C. 1985, c. C-46.
- [3] Mr. Kardan pleaded guilty to all three offences, which were committed between December 2019 and June 2020.

- [4] The sentencing judge ordered that the 34 months' imprisonment be served consecutive to another global prison term of two years that was imposed a month earlier, on October 12, 2022.
- [5] Mr. Kardan also pleaded guilty to the latter offences, which were committed in September and October 2020, and included unlawful confinement, assault with a weapon, and threats. Mr. Kardan's involvement in these offences included striking the victim in the head multiple times, causing significant bruising to his face. He also threatened and assaulted the victim with a metal object. After the second of two assaults, the victim was left bleeding in an alleyway behind his house.
- [6] The two-year prison term was jointly agreed to by the Crown and the defence, and is not under appeal. Mr. Kardan received pre-sentence credit of 401 days towards that sentence.
- [7] Both sets of offences--the ones for which he was sentenced in October 2022 and the ones at issue in this appeal--arose out of Mr. Kardan's involvement in a dial-a-dope operation in North Vancouver. Mr. Kardan's lawyer described his involvement as a "low-level street distribution position". The Crown did not take issue with that characterization.
- [8] Mr. Kardan asks that the 34-month sentence be reduced to 12 months. He says the judge committed material errors that justify the reduction. From his perspective, a 12-month sentence, when combined with the two years' imprisonment imposed a month earlier, appropriately sanctions him for his participation in the dial-a-dope enterprise.

Factual Background

- [9] The parties filed an agreed statement of facts at sentencing. The circumstances of the offences underlying the 34-month sentence are succinctly set out in the Crown's statement:

From September 2019 to June 2020, the RCMP investigated a drug trafficking operation in North Vancouver. During that period, they observed the appellant on numerous occasions being driven in vehicles and meeting people consistent with dial-a-dope drug trafficking.

On December 18, 2019, when they arrested the appellant, he resisted and got into a physical altercation with the officers. He attempted to swallow the contents of a pill bottle. The police seized 2.66 grams of cocaine, 0.21 grams of fentanyl, and a cell phone from which they answered calls from people requesting to buy cocaine.

In March 2020, the police observed the appellant going to an area in Mahon Park multiple times and retrieving a bag. On March 19, the police seized the bag which contained 10.76 grams of fentanyl, 3.7 grams of heroin, 29.85 grams of MDA and 57.5 grams of cocaine.

On May 7, 2020, the police arrested the appellant. The appellant threw a bag at the arresting officer, striking the officer's face and stunning him. He ran across four lanes of traffic with two officers in pursuit. When the police eventually caught the appellant and searched him, they located \$1060 in cash and a cellphone from which they answered calls from people requesting drugs. A container with 1.98 grams of cocaine was seized from the vehicle that the appellant had been in.

On June 18, 2020, the appellant was arrested for driving while prohibited. While handcuffed, he shook out rocks of cocaine from a container and ran away as the officer collected the cocaine. He continued to resist and swore at the officers after they located him. He grabbed the right thumb of one of the officers and bent it in the opposite direction. In addition to 0.34 grams of cocaine recovered from the ground, the appellant had \$1300 cash and a cell phone on which the police received drug orders. The total value of the drugs seized from the appellant's arrests and from Mahon Park was \$7425.

[Emphasis added.]

- [10] Mr. Kardan was 21 years old when he committed these offences. He was 24 by the time of sentencing. He was born in Iran and moved to North Vancouver with his parents when he was nine years old. At the time of sentencing, he had not completed high school, although he wanted to. There was no evidence of mental health or learning challenges.
- [11] The offences were found to have been motivated by profit. There is no indication Mr. Kardan suffers from a substance use disorder. The personal use of drugs did not contribute to his offending.
- [12] Mr. Kardan's lawyer told the judge that money obtained from his involvement in the dial-a-dope operation was used (at least in part) to provide financial assistance to his single-parent mother and sibling, who had been left with significant debt by a now-absent father. However, the judge found there was "no direct evidence" that income earned from drug sales was used to cover his family's living expenses. Mr. Kardan has lived on his own since the age of 18.
- [13] When Mr. Kardan committed the December 2019 and June 2020 offences, he was not a first-time offender. In November 2020, he was convicted of assault causing bodily harm and two counts of common assault. He was sentenced to a suspended sentence and 12 months' probation. The latter offences occurred in July 2018. Mr. Kardan was on bail for those offences when he committed the crimes that underlie the sentence in this appeal.

Reasons for Sentence

- [14] At the November 2022 sentencing hearing, the Crown sought a prison term of three years. The defence sought a term of 12 months. It was common ground that the sentence should be served consecutively to the two-year prison term imposed in October 2022.

- [15] In determining a fit sentence, the judge instructed himself with reference to R. v. Smith, 2017 BCCA 112. The defence agreed it was appropriate to do so. In Smith, this Court established a sentencing range of 18-36 months' imprisonment (or higher), for first-time street level traffickers in fentanyl. The Smith range was intended to give meaningful effect to the paramount principles of denunciation and deterrence.
- [16] There was no evidence that drugs possessed by Mr. Kardan resulted in anyone's death; however, the judge noted that the dial-a-dope operation was "just one of many keeping [the] lethal overdose crisis gripping the lives of vulnerable addicts running at full speed". He described dial-a-dope operations as making "access to drugs as easy as ordering a pizza". Through these schemes, drugs are made "easily available" to individuals who are rendered particularly vulnerable to the potential for lethality because of a substance use disorder.
- [17] At sentencing, the Crown made submissions about the widespread and terrible effects of fentanyl distribution, providing statistics about the number of deaths resulting from British Columbia's opioid crisis during the period in which Mr. Kardan was working in the dial-a-dope operation. The defence took no issue with this information and the judge referred to it in his reasons.
- [18] The judge found the following aggravating factors: (1) involvement in a dial-a-dope operation; (2) Mr. Kardan continued his involvement in drug distribution despite police intervention in both December 2019 and May 2020; (3) he resisted arrest and/or assaulted police officers when confronted; (4) he was trafficking multiple substances, including fentanyl, a drug that has played a central role in the overdose crisis; and (5) he was motivated by profit.
- [19] Mitigating circumstances were found to include: (1) Mr. Kardan's guilty pleas; (2) his youthfulness; (3) his remorse (expressed through his lawyer); and (4) some stability in his life, including support from his family and a previous employer.
- [20] After reviewing various sentencing authorities cited by the Crown and defence, the judge returned to this Court's decision in Smith and stated the following:
- [38] In the end, the Court of Appeal decision in Smith is binding on me. The range of sentence established by the Smith decision is not a straitjacket. Sentencing is an individualized process and sentencing judges have broad discretion to impose a sentence determined by that judge to be fit. Sentencing ranges operate to bring parity to sentences involving similar crimes committed by similar offenders in similar circumstances. Parity in sentences imposed for street-level traffickers in fentanyl seems to be an elusive goal given the diverse range of sentences imposed in the caselaw I have reviewed.
- [39] Keeping the Smith range of sentence in mind, I find that a sentence at the very bottom of that range, 18 months, and reduced further to 12 months based upon the totality principle would be a demonstrably unfit sentence given the aggravating factors in this case. The Crown's position of three-and-a-half years reduced to three years would put Mr. Kardan's

sentence at the very top end of the Smith range. I find some support for a sentence of that length given the fact that fentanyl was involved. Mr. Kardan was undeterred and continued selling after being arrested and having his Mahon Park stash taken from him. This was a dial-a-dope drug line, as I have explained earlier, and Mr. Kardan has a prior criminal record, but no earlier convictions related to drug offences. Taking account of all of the factors in this case, I find that a fit sentence for Mr. Kardan is at or very close to the top end of the Smith range. I find that Mr. Kardan's guilty plea, his young age, and his family support mitigate the sentence slightly below the top end of the range.

- [21] In his reasons, the judge commented that "[the] notion that sending those who traffic in lethal toxic drugs like Mr. Kardan to jail for significant periods of time will deter others from trafficking deadly drugs has been an unqualified failure". Nonetheless, he understood that he was obliged to consider the principles of denunciation and deterrence in assessing a fit sentence, and he did so.
- [22] Judicial criticism of the principle of general deterrence is not new. However, I note that in *R. v. Bissonnette*, 2022 SCC 23, the Supreme Court of Canada re-affirmed that the principles of denunciation and deterrence have legitimate roles to play at sentencing. Consequently, all lower courts, including this Court, are obliged to give those principles meaningful effect:
- [46] the penological objective of denunciation requires that a sentence express society's condemnation of the offence that was committed. The sentence is the means by which society communicates its moral values. This objective must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity
- [47] As for the objective of deterrence, it has two forms. The first, specific deterrence, is meant to discourage the offender before the court from reoffending. The second, general deterrence, is intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted. When this objective is being pursued, the offender is punished more harshly in order to send a message to the public or, in other words, to serve as an example. General deterrence is an objective that must be weighed by a court, but the effectiveness of which has often been questioned. These legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders

[Internal references omitted; emphasis added.]

Discussion

- [23] Sentence appeals are reviewed applying a highly deferential standard. This Court may only interfere where it is shown that an error in principle has materially affected the sentence, or the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Friesen*, 2020 SCC 9 at para. 26.

- [24] Mr. Kardan challenges his 34-month sentence on three bases.
- [25] He says the judge erred by: (1) treating the involvement of fentanyl as an aggravating factor that justified a sentence close to the top end of the Smith range, when that range already assumes the involvement of the drug; (2) treating convictions for conduct that post-dated the offences for which Mr. Kardan was sentenced as an aggravating factor; and (3) failing to apply the totality principle.
- [26] In my view, none of the alleged errors in principle have been established.
- [27] It is not disputed that one of the drugs trafficked by Mr. Kardan was fentanyl and in those circumstances, it was appropriate for the judge to take guidance from the Smith range. At the same time, he correctly instructed himself that Smith is not a "straitjacket", and that he had a "broad discretion" to ensure that any sentence imposed on Mr. Kardan was individualized.
- [28] It is also clear that the involvement of fentanyl was not the only feature of the case that led to a sentence close to the top of the range. Mr. Kardan's first challenge to the sentence fails to account for other aggravating factors identified by the judge, as well as the fact that he was sentenced for three separate offences, one of which involved the use of violence during the course of an arrest. The judge was alive to the fact that Mr. Kardan had no prior drug convictions. There is no indication from the reasons that he failed to appreciate Mr. Kardan's first-time offender status specific to that offence.
- [29] In response to the second alleged error in principle, I interpret the judge's consideration of the circumstances surrounding the September and October 2020 offences as focused on Mr. Kardan's conduct and character as an offender, namely, the incorrigible nature of his continued engagement and willingness to participate in illegality. The fact that Mr. Kardan continued to engage with the dial-a-dope operation and offend after being twice arrested by the police (something he admitted to), was highly relevant to an assessment of him as an offender, including his rehabilitative prospects and the need for specific deterrence.
- [30] The approach taken here is consistent with this Court's ruling in *R. v. Pete*, 2019 BCCA 244, that convictions arising from conduct that occurs later in time can be considered for purposes of assessing an offender's moral culpability and prospects for rehabilitation (at para. 40). I am not persuaded the judge erroneously treated the September and October 2020 offences as prior convictions that justified an increased sentence, or as an aggravating circumstance per se: *Pete* at para. 40. Instead, it was what those offences said about Mr. Kardan's mindset and his behaviour as an offender that was of interest to the judge, and this information appropriately informed the individualized assessment of a fit sentence.
- [31] The third challenge to the sentence alleges that the judge failed to apply the totality principle. In particular, Mr. Kardan says the judge gave no meaningful consideration to the fact that the 34-month term would be served consecutive to the two-year sentence imposed in October 2022. Relying on cases such as *R. v. Punko*, 2010 BCCA 365, Mr. Kardan contends

that once he had assessed a fit sentence for the three offences before him, the judge should have taken "one last look" to see whether the two-year prison term combined with the consecutive sentence exceeded Mr. Kardan's overall culpability. Mr. Kardan says the judge did not do this and it resulted in a sentence that unreasonably departs from the principle of proportionality.

- [32] In my view, there is no merit to this third ground of appeal. On a fair reading of the reasons, considered in the context of the record, the judge understood the need to consider the totality principle and did so.
- [33] Sentencing submissions on both sets of offences were heard at the same time, before the same judge. He was familiar with the entirety of the circumstances, the interrelatedness of the two sets of offences, and the parties' positions in respect of both files. The parties made submissions on the principle of totality with explicit reference to both sets of offences.
- [34] When the Crown stated its position on the second set of offences, it raised the principle of totality with explicit reference to the first set:

And again, Your Honour, my submission was that, but for totality, Your Honour should consider a three-and-a-half-year sentence outside of the Smith range, but on the basis of totality of his pleas on the -- the provincial offences, a three-year sentence is appropriate on the drug charge with the concurrent time on the assault and obstruct allegations.

And again, Your Honour, that is my submission here, that the Smith range should be exceeded slightly and then reduced for totality, so which would ultimately give us the three years at the top of the Smith range, but that's already at a reduced number. It should be higher and then reduced to three years for totality, given his plea and given his sentence on the provincial matter.

[Emphasis added.]

- [35] The submissions of counsel for Mr. Kardan did the same:

So I've yet to tell Your Honour what my position is. So as my friend indicated earlier, my position in this matter is that Mr. Kardan should be sentenced to a period of incarceration of 18 months, which is in the Smith range, which I say applies in this case. And I would be asking that that be reduced on totality, given his other file as well, to a period of 12 months, so saying a sentence of 18 months is appropriate and within the range and that that's reduced to take into account the number of years that Mr. Kardan will be serving in custody for someone who hasn't spent any time in custody to this -- to this date.

So this is somebody who's not spent time in prison, he's very young still and he was younger at the time of the offences. This -- you know, he volunteered himself into custody and he's taking responsibility, and he's facing significant jail time, three -- I'm asking that on totality the sentence be three years.

So I would say that Mr. Kardan's case is less egregious than that of the cases provided by the Crown. His circumstances, I would say, are what support my position on sentence, and that on totality a period of three years, when combined with the provincial file, should be imposed, so this will address both specific and general deterrence and denunciation.

[Emphasis added.]

- [36] In addition, everyone understood that the global sentence for the second set of offences would be served consecutively. This was common ground. It is plain from the October 2022 submissions and the November 2022 reasons that the judge's assessment of a fit sentence was expected to take the prior sentence into account. Indeed, in his reasons, the judge calculated the effect of the combined sentences, recognizing that it amounted to a combined four years and 10 months' imprisonment, less the credit assigned for pre-sentence custody.
- [37] Given this context, I agree with the respondent Crown that the record does not support the contention that the judge failed to consider the totality principle in the context of both sets of offences. Judges are not obliged in their reasons to identify everything they considered, explain each of their findings, or detail each aspect of their reasoning process: *R. v. R.E.M.*, 2008 SCC 51 at paras. 15-20. The fact that there is no discussion of totality in the reasons with explicit reference to the two prosecution files, does not mean the judge failed to analyse the principle correctly: *R. v. Nelson*, 2021 BCCA 192 at para. 46. It was subsumed in the positions put before him for both sets of offences and ultimately, he imposed a sentence less than that sought by the Crown.
- [38] The conduct that underlies the 34-month sentence is aggravated. Although youthful, Mr. Kardan distributed drugs, including fentanyl, as part of an organized illegal scheme in North Vancouver. He appears to have stashed drugs, including fentanyl, in a public park. He was motivated by profit. He did so while subject to bail for other offences. In addition to the inherently serious nature of the drug distribution and the palpable risks to public safety associated with that activity, Mr. Kardan was resistant, confrontational, and acted with violence when confronted by the police. In those circumstances, considered as a whole, it was open to the judge to impose a 34-month sentence, even with the preceding two-year term. In the circumstances of this case, he was correct to prioritize denunciation and deterrence (both general and specific), and I see no material error in principle.

Disposition

- [39] Mr. Kardan has not established errors that had a material impact on the sentence, justify setting the 34-month term aside, and allow this Court to sentence afresh.
- [40] Accordingly, I would grant leave to appeal the sentences imposed on November 8, 2022, but dismiss the appeal.
- [41] GRIFFIN J.A.: I agree.

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

[43] GRIFFIN J.A.: Leave to appeal the sentence is granted, but the appeal is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

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