

CANADA / JUDGMENT

R. v. Kim

2023 BCCA 313

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 313 R. v. Kim

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kim,

2023 BCCA 313

Date: 20230804

Docket: CA48242

Between:

Rex

Respondent

And

Billie Onare Kim

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
March 29, 2022 (sentence) (R. v. Kim, 2022 BCSC 518, Vancouver Docket 27841).

Counsel for the Appellant:

T.C. Paisana

S.K. Pringle

Counsel for the Respondent:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia

June 14, 2023

Place and Date of Judgment:

Vancouver, British Columbia

August 4, 2023

Written Reasons by:

The Honourable Justice Skolrood

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals his sentence of ten years' imprisonment in relation to nine counts of possession for the purpose of trafficking and five firearm offences. The appellant was found to be a decision maker and "middle management" in a sophisticated and high-volume dial-a-dope operation known as "Green Planet". One co-accused was found to be the leader of the drug trafficking operation and received an eight-year sentence on the Green Planet charges but 13 years total, on two indictments. The other co-accused received a six-year sentence on the Green Planet charges but nine years total on two indictments. The appellant submits the judge erred (1) in misapplying the parity principle by imposing a harsher sentence on the appellant than those imposed on similar or more serious offenders; and (2) in failing to consider the impact of a custodial sentence on the appellant's family.

Held: Leave to appeal granted, appeal dismissed. The judge did not misapply the parity principle. An important mitigating factor in the cases of both co-accused were that they entered guilty pleas in advance of trial and their sentences were the result of joint submissions. The application of the totality principle reflected the fact that their sentences on the Green Planet charges were part of global sentences that included other unrelated offences, and therefore their sentences relating to Green Planet cannot be viewed in isolation. In addition, the judge acknowledged the impact that a custodial sentence would have on the appellant's family but given the seriousness of the conduct giving rise to the charges, she justifiably gave priority to the principles of deterrence,

denunciation, and protection of the public.

Reasons for Judgment of the Honourable Justice Skolrood:

- [1] On October 22, 2021, the appellant, Billie Kim, was convicted of a total of 13 counts, including nine counts of possession for the purpose of trafficking and five firearm offences (with the parties agreeing on a conditional stay of proceedings entered for one count). The judge's reasons are indexed at 2021 BCSC 2017.
- [2] On March 29, 2022, Mr. Kim was sentenced to a global (cumulative) sentence of ten years' imprisonment. Those reasons are indexed at 2022 BCSC 518.
- [3] Mr. Kim now appeals the sentences imposed. For the reasons that follow, I would dismiss his appeal.

Circumstances of the Offences

- [4] The circumstances of the offences are described in some detail in the judge's reasons on conviction and in her reasons for sentence. I will not repeat all of the details here but will provide an overview.
- [5] On September 14, 2017, a search warrant was executed at a residential unit located in an apartment complex in Richmond, B.C. (the "Unit"). The search of the Unit was the culmination of an investigation labelled "Green Planet", which was conducted by the Delta Police between April to September 2017 and targeted a dial-a-dope operation in Delta and Richmond.
- [6] During the search, police discovered a large amount of drugs and drug paraphernalia in the Unit. As described by the judge (at para. 6), police seized a total of 170.06 grams of opioids and opioid mixtures (heroin, carfentanil, fentanyl, fentanyl analogues, and fentanyl derivatives), 216.43 grams of cocaine (powder and rock), 81.49 grams of methamphetamine, 76.78 grams of oxycodone and acetaminophen, 109.97 grams of Alprazolam (pills and powder), 1,228.08 grams of cutting agents (caffeine and phenacetin), and a total of \$28,863.36 in Canadian currency. The value of the drugs seized was between \$55,815 and \$67,537.
- [7] The police also seized a number of firearms, ammunition, and two body armour vests from the Unit (at para. 8).
- [8] The judge found that the Unit "was being used as a stash site to assemble and package a variety of drugs for street-level distribution" (at para. 6).

- [9] Mr. Kim was arrested on the balcony of the Unit, and three other males--Mr. Latimer, Mr. Pereira, and Mr. Coddett--were arrested inside the Unit (at para. 6). Mr. Kim was found to have keys to the Unit and the judge found that he had unrestricted access to the Unit, in addition to the ability to regulate who attended and what items were brought in and out of the Unit (para. 10). Surveillance also showed that Mr. Kim was always the first person into the Unit and the last person to leave.
- [10] A second search warrant was executed at Mr. Kim's residence in Burnaby. Police seized a number of items that the judge found demonstrated Mr. Kim's active participation in the Green Planet drug operation, including the master phones used in the dial-a-dope operation, an invoice for the vehicle used to deliver crack cocaine to an undercover police officer in August 2017, and drug paraphernalia (at para. 12).
- [11] The judge found that Green Planet was a sophisticated and high-volume drug trafficking operation, in which Mr. Kim played a significant role (at paras. 13-14). Specifically, the judge found that "[w]hile it is clear that Mr. Kim was not the directing mind of the operation, neither did he play a minor role" (at para. 14). She characterized him as a decision maker who, in effect, "held a middle management position in the criminal enterprise" (at para. 66).

Circumstances of the Offender

- [12] At the time of sentencing, Mr. Kim was 37 years old. He was born in Korea and moved to Canada in 1994 when he was 10 years old. His family initially lived in Calgary but they moved to Coquitlam, B.C. in 2003 when Mr. Kim was 18 years old.
- [13] At the age of 17, Mr. Kim began using cannabis and ecstasy and eventually became addicted to methamphetamine. He left school halfway through grade 12. With his mother's support, he was able to end his drug use.
- [14] After moving to B.C., Mr. Kim became involved with the drug trade. He has one prior conviction for trafficking a scheduled substance, for which he received a sentence in 2007 consisting of three months in jail, 12 months probation, and a mandatory firearms prohibition order under s. 109 of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Kim was bound by this order at the time of these offences.
- [15] Following his release from custody, Mr. Kim obtained his high school diploma and then took business courses at college, eventually transferring to university. In 2012, he and a friend developed a business plan to produce a spice for pepper spray. While that venture failed, causing him to lose money, the judge found that it was evident that Mr. Kim has the skill and ability to obtain legitimate employment (at para. 19).

- [16] Mr. Kim married in 2016 and by early 2017, he and his wife were expecting their first child. Around the same time, he sought a loan from former associates to deal with his business venture losses. When the loan was not forthcoming, he re-entered the drug trade. According to the judge, Mr. Kim's intention was to raise some money and then leave the drug trade within five or six months (at para. 20).
- [17] At his sentencing hearing, Mr. Kim provided a letter in which he advised the court that shortly before his child was born, he was in debt and his business was about to go under (at para. 21). He said he was drinking and using methamphetamine, which resulted in him not thinking clearly. He acknowledged making poor choices in order to try to address his financial problems.
- [18] Over the last few years, Mr. Kim has been engaged in various financial trading activities as well as different part time jobs. He and his wife have since had a second child and he has the ongoing support of both his wife and mother. He states that he is ashamed that he was involved in drug trafficking activity and he professed a desire to be a good father, son, and husband. The judge accepted that Mr. Kim's expression of remorse was genuine (at para. 24).

Reasons for Sentence

- [19] As noted, the judge rejected Mr. Kim's position that he played a minor role in the drug trafficking operation (at para. 64). Rather, she found that he played an active and pivotal role, including mixing and packaging the drugs and maintaining the covert stash site (at paras. 64-65). She described him as "a decision maker in the Green Planet operation" who "held a middle management position in the criminal enterprise" (at para. 66).
- [20] The judge considered the mitigating factors, of which she concluded there were few, most notably his lack of involvement with the courts for ten years, his compliance with his bail conditions, and his sincere apology for the harm his actions have caused (at para. 59). The judge found that the prospects for rehabilitation were good.
- [21] The judge found the aggravating circumstances to be more extensive, including:
- (a) Mr. Kim was engaged in a sophisticated mid-level dial-a-dope operation that distributed an array of harmful drugs throughout Richmond and Delta, (at para. 61);
 - (b) The Unit, which included the "toxic combination of drugs and guns", was located in a densely populated residential building, which therefore posed an unacceptable risk to the safety of other residents (at para. 62);
 - (c) Mr. Kim chose to engage in the criminal activity for financial gain. Although he was capable of obtaining legitimate employment, he opted for quick, easy money (at para. 63);
 - (d) Mr. Kim played a pivotal role in the drug distribution process (at para. 65);

- (e) The drugs being trafficked included fentanyl (which the judge and the Supreme Court of Canada characterized as "public enemy number one": see *R. v. Parranto*, 2021 SCC 46 at para. 93) and an even more dangerous analogue, carfentanil. Further, the judge noted that Mr. Kim was engaged in this activity in the midst of a public health crisis involving devastating impacts on the community (at para. 68);
 - (f) The presence of firearms within the Unit was indicative of an intention to use them for illicit purposes relating to the drug trafficking operation (at para. 70); and
 - (g) Mr. Kim was in possession of these firearms even though he was subject to a court-ordered firearms prohibition (at para. 70).
- [22] The judge noted the importance of considering the broader societal context within which the offences occurred, specifically the harm brought about by the trafficking of hard drugs, the consequences of which "extends far beyond the harms caused to purchasers" (at para. 26). In particular, she noted the following observations from the Supreme Court of Canada and this Court:
- [28] While the harms caused by trafficking in heroin, cocaine, and methamphetamine pose a grave threat to the community, "that threat pales in comparison to the one posed by fentanyl and its analogues" (*Parranto* at para. 93). As Justice Moldaver (concurring) observed, "fentanyl has altered the landscape of the substance abuse crisis in Canada, revealing itself as public enemy number one" (at para. 93). As noted by the majority at para. 70 of *Parranto*, "the offender's willingness to exploit at-risk populations and communities" is a factor that may inform the court's assessment of the gravity of the offence in sentencing; "choices which demonstrate a reckless disregard for human life increase not only the gravity of the offence but the moral culpability of the offender" (*Parranto* at para. 70).
- [29] The observations in *Parranto* reiterate those made in various decisions in British Columbia in recent years. In *R. v. Smith*, 2017 BCCA 112 [Smith], Madam Justice Newbury, dissenting (not on this point), recognized that British Columbia has "one of the worst, if not the worst, problems of Fentanyl abuse in Canada" (para. 44). This is demonstrated by the fact that since April 14, 2016, B.C. has been in a public state of emergency because of the opioid pandemic and the resulting surge in overdose-related deaths: see *R. v. Niederhumer*, 2022 BCCA 88 [Niederhumer] at para. 36; *R. v. Toth*, 2017 BCSC 501 [Toth] at para. 37. As noted by our Court of Appeal, the staggering numbers of overdose deaths in this province are "largely attributable to fentanyl": *Niederhumer* at para. 36.
- [23] Of particular significance to this appeal, the judge referred to the sentencing decisions of Mr. Kim's co-accused, Mr. Latimer and Mr. Pereira, as well as others engaged in the Green Planet operation, which she found to be "particularly instructive" (at paras. 38, 46-49).
- [24] Mr. Latimer, who was found to be the directing mind of a drug trafficking network, received a global sentence of 17 years with respect to the charges set out in two indictments, the reasons for which are indexed as *R. v. Latimer*, 2021 BCSC 1443. On the Green Planet

charges, Mr. Latimer entered a plea to possession of fentanyl for the purpose of trafficking and was sentenced to eight years. He also entered a plea to unlawful possession of a loaded prohibited or restricted firearm and received a concurrent five-year sentence. Those sentences were also to run concurrent to the sentences imposed on the other indictment, which included a number of drug and firearms offences.

- [25] Mr. Pereira received a global sentence of nine years with respect to the charges arising from two indictments, the reasons for which are indexed as *R. v. Pereira*, 2020 BCSC 1664. With respect to the Green Planet charges, Mr. Pereira entered a plea to possession of fentanyl for the purpose of trafficking and received a sentence of six years, to run concurrently with the nine years imposed with respect to the other indictment involving drug trafficking charges. The judge also found that though Mr. Pereira had keys to the Unit (like Mr. Kim), Mr. Pereira attended the Unit less frequently and had a lower role than Mr. Kim (at paras. 10, 66).
- [26] The judge also referred to the sentence imposed on Mr. Coddett, who was also arrested inside the Unit. He entered a plea to drug and weapons charges in Provincial Court and received a global sentence of seven-and-a-half years, the reasons for which are indexed as *R. v. Coddett* (28 June 2019), Richmond 62066-1 (B.C.P.C.). Mr. Coddett was found to have no role in the decision making, planning, directing, or controlling of the Green Planet operation (at para. 48).
- [27] Finally, the judge considered the sentence imposed on Mr. Pikientio, who was a dialer in the dial-a-dope operation. Mr. Pikientio entered a plea to drug trafficking on the Green Planet charges and possession for the purposes of drug trafficking on a separate indictment. He was described as being, at best, in the mid-level or lower aspects of the related trafficking organization and received a sentence of seven years, with three years attributable to the Green Planet charges (at para. 49). Those reasons are indexed as *R. v. Pikientio*, 2020 BCSC 1693.
- [28] The judge then considered the governing sentencing principles and while she found that Mr. Kim's prospects for rehabilitation were good, she found that the principles of deterrence and denunciation, as well as the need for public protection, were of paramount importance (at para. 71). She stated that there was a demonstrated need to separate Mr. Kim from society in order to protect the public (at para. 74).
- [29] The judge acknowledged that Mr. Kim's incarceration would have an impact on his young family, but noted that those were the consequence of his poor choices. She cited *R. v. Tam*, [1994] B.C.J. No. 3097, 1994 CanLII 2181 (C.A.), where the Court quoted the following words of the trial judge:
- [5] I am asked to treat the accused with mercy but the mercy the court must exercise is the mercy of society and not that which an individual judge might desire to exercise because of the sympathy he feels for the family of the accused and for the innocent baby who will be yet one more of the social victims of what has occurred.

[30] Taking into account all of the circumstances and the authorities cited by both parties, the judge arrived at her disposition of a ten-year global sentence (at para. 81).

Issues on Appeal

[31] On appeal, Mr. Kim submits that the sentencing judge erred in two respects:

- (a) in misapplying the parity principle by imposing a harsher sentence on Mr. Kim than those imposed on similar and more serious offenders; and
- (b) in failing to consider the impact of a custodial sentence on Mr. Kim's family.

Standard of Review

[32] The standard of review on a sentence appeal was succinctly stated by Justice Stromberg-Stein in this Court's recent decision in *R. v. Garie*, 2022 BCCA 382:

[24] The basis for appellate intervention in sentencing is narrow: *R. v. Lacasse*, 2015 SCC 64; *R. v. Friesen*, 2020 SCC 9. An appellate court will only interfere with a sentence where there has been an error in principle impacting the sentence, or where the sentence is demonstrably unfit: *Lacasse* at paras. 41-4; *Friesen* at para. 26. An error in principle includes an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor: *Friesen* at para. 26. A sentencing judge is entitled to significant deference in weighing and balancing factors relevant to crafting a fit sentence; appellate intervention is warranted only where a sentencing judge has exercised their discretion unreasonably, not merely because an appellate court would have weighed the factors differently: *Lacasse* at para. 9; *R. v. Nasogaluak*, 2010 SCC 6 at para. 46.

Discussion

(1) Did the judge misapply the parity principle?

[33] The parity principle, as codified in s. 718.2(b) of the Criminal Code, requires a sentence to be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Individualization, however, must also inform the sentencing process and requires the judge to consider and assess the gravity of the offence, the offender's degree of responsibility, and the unique circumstances of each case: *R. v. Parranto*, 2021 SCC 46 at para. 12; *R. v. Lacasse*, 2015 SCC 64 at para. 58.

[34] Mr. Kim submits that his global ten-year sentence is irreconcilable with the principle of parity. Specifically, he submits that his sentence stands in stark contrast to the global eight-year sentence imposed on Mr. Latimer, the leader of the drug trafficking operation, on the charges relating to Green Planet. Mr. Kim submits that every aggravating factor in his case applies with equal or greater force to Mr. Latimer. The only unique features in Mr. Latimer's case were that he entered a guilty plea and that there was a joint submission on sentence. Mr. Kim submits that these factors cannot justify such a substantial and marked disparity in sentence.

- [35] Mr. Kim also notes the difference in his sentence and that of Mr. Pereira, who received a global six-year sentence on his Green Planet charges, even though Mr. Pereira and Mr. Kim played similar roles in the operation. Like Mr. Latimer, Mr. Pereira entered a guilty plea on the charges and there was a joint submission. However, Mr. Kim again submits that this does not justify the significantly different sentences.
- [36] Mr. Kim cites *R. v. Christie*, 2004 ABCA 287, where the Court noted the importance of the parity principle in sentencing, particularly where the offence was a joint venture (at para. 40). The Court also observed that where comparisons are being made to a sentence that was the subject of a joint submission, the sentencing judge must still consider the individual circumstances and whether different considerations exist. The Court cannot "simply say that because it was a joint submission, no weight can be placed on it in determining the appropriate sentence for a co-accused" (at para. 46).
- [37] Mr. Kim also cites *R. v. Sidhu*, 2011 BCCA 246, where this Court confirmed that, pursuant to the parity principle, similar sentences should be imposed for co-accused involved in a joint criminal enterprise, unless there is a clear distinction in culpability (at para. 20). Mr. Kim submits that no such distinction exists here, particularly as between him and Mr. Pereira, given that they played similar roles in the drug operation. With respect to Mr. Latimer, Mr. Kim submits that Mr. Latimer has a much higher degree of culpability than Mr. Kim given his role as the directing mind of the operation.
- [38] In my view, the judge did not misapply the parity principle. While it is clear that Mr. Kim, Mr. Latimer, and Mr. Pereira were all jointly involved in the Green Planet drug operation, there are a number of circumstances that justify the different sentences imposed.
- [39] The sentencing judge in *Latimer and Pereira* (Associate Chief Justice Holmes in both cases) found the guilty pleas to be an important mitigating factor in that they resulted in considerable savings of court time and resources (*Latimer* at para. 35; *Pereira* at para. 17). In oral submissions, counsel for Mr. Kim pointed to the fact that the guilty pleas were not early guilty pleas, specifically, the pleas were entered after voir dires had been conducted and therefore judicial resources had already been expended. However, the sentencing judge in *Latimer and Pereira* clearly accepted the guilty pleas and the circumstances surrounding those pleas as mitigating factors. In *Latimer*, the judge noted that the pleas came after "an extensive and challenging process of negotiations" that resulted in "very substantial savings of court times" (at para. 35). In *Pereira*, she noted that though the pleas were not early, in that they came two years after the charges, they were entered "in the face of a scheduled further year of pre-trial applications followed by trials of considerable duration", resulting in "very significant savings for the criminal justice system" (at para. 17). It is clear, therefore, that the guilty pleas in the cases of Mr. Latimer and Mr. Pereira were important mitigating factors and it was open to the sentencing judge in this case to consider the differences in circumstances when sentencing Mr. Kim. I would add that Mr. Pereira was not charged with firearm offences and he did not have a criminal record, both of which are also distinguishing features.

- [40] Further, as noted, the sentences of both Mr. Latimer and Mr. Pereira were the result of joint submissions which, in the case of Latimer, the judge described as "very skilfully calibrated to reflect the applicable principles and to reflect the complex circumstances" of Mr. Latimer's offences (at para. 42). It is also worth noting that for Mr. Latimer, the cumulative sentence jointly proposed by Crown and defence counsel totalled 29 years' imprisonment, but was reduced to 17 years based upon the totality principle (at para. 5).
- [41] The application of the totality principle reflected the fact that Mr. Latimer's sentence, as well as Mr. Pereira's sentence, on the Green Planet charges were part of global sentences that included other related offences. When sentencing offenders for multiple offences, the Court must be mindful of the need to ensure that the total sentence imposed is just, appropriate, and proportionate: *R. v. Li*, 2009 BCCA 85 at paras. 26-28.
- [42] Given the particular circumstances surrounding the global sentences imposed on Mr. Latimer and Mr. Pereira, the specific sentences imposed in respect of the Green Planet charges cannot be viewed in isolation. Thus, simply comparing those sentences to the sentences imposed on Mr. Kim is of no assistance in determining the appropriateness of Mr. Kim's global disposition.
- [43] In my view, the judge properly considered the sentences of the other offenders involved in the Green Planet operation, along with all of the other relevant circumstances relating to Mr. Kim and the offences for which he was convicted, in arriving at a global sentence that she determined to be fit and appropriate. Mr. Kim has not established that the judge erred in doing so and I would therefore not accede to this ground of appeal.
- (2) Did the judge fail to consider the impact of a custodial sentence on Mr. Kim's family?
- [44] Mr. Kim submits that the judge gave insufficient weight to the collateral consequences that would result from a lengthy custodial sentence, in particular the significant adverse impact on his young family. He submits that the judge erred in finding that any such impact must yield to the "collateral consequences that society as a whole will suffer" as a result of his drug trafficking activities (at para. 78).
- [45] The assessment of the various factors informing the sentencing process, and the weight to be attached to those factors, is central to the individualized sentencing analysis and falls squarely within the discretion and purview of the sentencing judge. While collateral consequences may be relevant to determining an appropriate sentence, such circumstances cannot overwhelm or detract from the fundamental objective of sentencing, which is to impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. Pham*, 2013 SCC 15 at paras. 12-14.
- [46] The judge was aware of, and indeed acknowledged, the impact that the sentence would have on Mr. Kim's family (at paras. 78-79). However, given the seriousness of the conduct giving rise to the charges, she gave priority to the principles of deterrence, denunciation, and protection of the public, which was within her discretion to do.

[47] Mr. Kim has not demonstrated that the judge erred in failing to impose a lesser sentence by reason of the impacts on his family.

Disposition

[48] Accordingly, I would grant leave to appeal sentence but dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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