

CANADA / JUDGMENT

## R. v. Nguyen

2022 BCCA 409

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 409 R. v. Nguyen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2022 BCCA 409

Date: 20221129

Docket: CA44974

Between:

Rex

Respondent

And

Quang Dong Nguyen

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Justice Dickson

The Honourable Mr. Justice Grauer

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

November 17, 2017 (sentence) (R. v. Nguyen, 2017 BCSC 2403,

New Westminster Docket X078026).

## Oral Reasons for Judgment

Counsel for the Appellant:

J.W. Sherren

Counsel for the Respondent:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia

November 29, 2022

Place and Date of Judgment:

Vancouver, British Columbia

November 29, 2022

## Summary:

The appellant applies for leave to appeal sentence, and if granted, challenges his global sentence of 15 years for conspiring to export methamphetamine and to produce it in New Zealand, in addition to three firearm offences committed in breach of a previous firearms prohibition order. He argues the sentencing judge erred by failing to account for the difference in quantity of substance seized by the police in his case in comparison to the cases relied on by the judge, which led to a wrong evaluation of the gravity of the offence. He also argues that the object of the conspiracy to produce methamphetamine was never carried out and therefore lacked an aggravating feature considered in other authorities: Held: Leave to appeal sentence granted but appeal dismissed. The amount of substance is just one factor to assess in determining a fit sentence, and the fact that the object of the conspiracy to produce was never carried out cannot be viewed in isolation. The sentencing judge did not err, and it cannot be said that a 15-year global sentence, after accounting for the additional firearm offences, is unfit.

GRAUER J.A.:

## Introduction

[1] On September 29, 2017, Mr. Justice Greyell convicted the appellant of conspiring to export methamphetamine to New Zealand (count 1), conspiring to produce methamphetamine (count 2), and three firearms offences (counts 3, 4 and 5). As a result of the conviction on the firearms offences, the appellant was, in addition, found guilty of two counts of breaching a lifetime firearm prohibition that had been imposed in 2001.

- [2] On November 17, 2017, the judge imposed the following sentences: 15 years' imprisonment on each of counts 1 and 2, to run concurrently; 2 years' imprisonment on each of counts 3, 4 and 5; and 2 years' imprisonment on the charges from breaching the prohibition order--the four 2-year sentences to run concurrently with each other, but consecutively to the 15-year sentences.
- [3] Taking into account the totality principle, the judge reduced the two concurrent 15-year sentences to 13 years, with the concurrent 2-year sentences to run consecutively, for a global sentence of 15 years' imprisonment.
- [4] The appellant's appeal from conviction was dismissed by this Court on June 4, 2020 (*R v Nguyen*, 2020 BCCA 166). The appellant now applies for leave to appeal from the sentence imposed upon him. If leave be granted, the appellant submits that a fit sentence would be a global sentence in the range of 10 years.
- [5] The foundation of the appellant's position is twofold. With respect to count 1, conspiring to export methamphetamine to New Zealand, the appellant submits that the amount of methamphetamine seized by the police was at least one order of magnitude less than the quantity considered in cases upon which the judge relied, leading to a wrong evaluation of the gravity of the offence. With respect to count 2, conspiring to produce methamphetamine, the appellant maintains that the plan was to act together to produce the drug in New Zealand only if it should prove feasible and practical, and on the evidence, it was questionable whether the object of the conspiracy was realistic. It was never carried out. The appellant says it therefore lacked an aggravating feature considered in other authorities.
- [6] In my view, these grounds merge together. In essence, the appellant maintains that the judge failed to take into account the absence in his case of aggravating factors that existed in cases the judge considered to be comparable, resulting in a disproportionate, and hence unfit, sentence.
- [7] Before examining this argument, I turn to review the circumstances of the offences, the circumstances of the appellant, and the reasons of the sentencing judge.

### **Circumstances of the offences**

- [8] The circumstances are set out in detail in the judge's reasons on conviction (*R v Nguyen*, 2017 BCSC 1918). What follows is a brief summary.
- [9] In December 2012, officers of the Canadian Border Services Agency ("CBSA") intercepted a cardboard box containing 12 Monroe automotive shock absorbers delivered to a FedEx facility in Vancouver, and destined for delivery to Auckland, New Zealand. A waybill attached to the box contained the name and address of the sender and the intended recipient (one Mr. Hoang). Upon inspection at a secure CBSA customs facility, the officers disassembled one shock absorber and found that its cylinder had been filled with

methamphetamine wrapped in black plastic. They then turned the shock absorbers over to the RCMP who found that each of the 12 cylinders contained methamphetamine, to a total of 2,861.6 grams.

- [10] In New Zealand, the police obtained judicial authorization to conduct wiretap surveillance on two phone numbers belonging to Mr. Hoang, one of which was identified on the waybill. The intercepted calls were shared with the RCMP. The judge was satisfied that, together with the physical evidence, they established beyond a reasonable doubt that the appellant and Mr. Hoang were engaged in a common scheme to export methamphetamine to New Zealand (at paras 38, 40).
- [11] The judge was further satisfied that it was clear that Mr. Hoang and the user of the other number (whom he concluded was the appellant) became frustrated and concerned when it became apparent that the shipment of methamphetamine in the shock absorbers was not going to arrive in New Zealand. They therefore decided to move production of the drug to New Zealand, deciding who the "cook" would be, the cook's regime for travelling to and from New Zealand, the number of "soldiers" needed in the production, and the specific recipe, which was sent to Mr. Hoang at the appellant's direction. When the police searched the appellant's residence, they found, among other things, two lists of chemicals in his bedside table drawer, which an expert testified amounted to a "shopping list for making methamphetamine". On this basis, the judge found beyond a reasonable doubt that the appellant and Mr. Hoang had been engaged in a conspiracy to manufacture methamphetamine in New Zealand.
- [12] During their search of the appellant's residence, the police also found an Intratec AB-10 semiautomatic handgun, with a loaded 30-round magazine. In addition, they discovered a plastic bag containing three boxes of 9 mm ammunition compatible with the handgun, two boxes holding 50 rounds, and a third box holding 19 rounds, as well as a flash suppressor that fit the barrel of the semiautomatic handgun. There was also a magazine holding 10 rounds of .22 calibre ammunition.
- [13] The judge concluded at para 101 that the circumstantial evidence established beyond a reasonable doubt that the appellant had knowledge and control of the firearm, magazine and ammunition, and hence was guilty of the possession offences alleged in counts 3, 4 and 5.

#### Circumstances of the appellant

- [14] In his reasons for sentencing, indexed at 2017 BCSC 2403, the judge described the appellant's circumstances as follows:
- [19] Let me turn to the circumstances of Mr. Nguyen as related to me by Mr. Ray, his counsel. Mr. Nguyen is 45 years old. He was born in Vietnam on September 18, 1973. I am told his family were fishermen, and that is how they spent their lives earning a livelihood. Mr. Nguyen had six siblings, three brothers and three sisters. His family left Vietnam when he was 10 years

old. They arrived in Hong Kong where they spent the next four and one-half years in a refugee camp. I am advised that life in the refugee camp was extremely harsh and violent. In 1998 when Mr. Nguyen was 14, his family moved to Canada. I am advised they struggled to make a livelihood picking berries and mushrooms. Mr. Nguyen, who had very little, if any, education, was placed in a school at which he did not often attend and from which he did not graduate. I know little more of his circumstances except that he married and has a son and a daughter, both of whom are at university.

- [20] His children and his wife, as well as numerous friends of the family and relatives, have filed a number of letters with the court, which describe Mr. Nguyen as supportive, a good family man who has been an inspiration to his children and others, and who is supportive to other members of his community. One letter says he got caught up with the wrong people in the context of the present offences. Many of the letters have pleaded with me to give him a chance and be lenient with him.
- [21] Since his arrest on February 25, 2013, Mr. Nguyen has kept the peace and been of good behaviour. He has also obtained employment. I have considered these circumstances, and the supporting letters, in determining what I consider to be an appropriate sentence in this case.
- [15] The appellant has three previous convictions. In 1993, he was convicted of manslaughter and sentenced to one year. On appeal, that sentence was increased to four years.
- [16] In January 1995, the appellant was convicted of trafficking in a narcotic and was sentenced to three months concurrent with the sentence he was still serving on the manslaughter charge.
- [17] In June 2001, the appellant was convicted of producing a controlled substance, cannabis, and was given a one-year conditional sentence. One of the conditions included a lifetime firearm prohibition.

#### The sentencing judge's reasons

- [18] The judge began by reviewing the positions of the Crown and the defence.
- [19] The Crown sought sentences at the upper range because of the number of aggravating circumstances, and suggested 16-18 years on counts 1 and 2, to be served concurrently, and 6 years each on counts 3, 4 and 5, to be served concurrently but consecutively to counts 1 and 2. The Crown sought a further 6 years on the breaches of the prohibition order, to be sentenced concurrently with the 6-year sentences on the firearm offences. In the Crown's submission, taking into account the principle of totality, the appropriate global sentence was 18 years' imprisonment.
- [20] In the defence's submission, the Crown's position was excessive, and a 10-year global sentence was a fit and proper result in the circumstances of the case: 8 years running concurrently on counts 1 and 2, and 2 years consecutive, but concurrent with each other, on

counts 3, 4 and 5, and for the breach of the prohibition order. The mitigating circumstances raised by the defence included some 24 letters filed in support of the appellant by his family and friends, and his conduct following his arrest, as described by the judge in the passage quoted above.

- [21] The judge then turned to the principles underlying sentencing set out in sections 718, 718.1 and 718.2 of the Criminal Code, commenting:
- [18] The general principles of sentencing set out in s. 718 of the Criminal Code are mirrored in s. 7 of the CDSA. Counsel agree, and I accept that, given the serious nature of the charges in this case, the principles of deterrence and denunciation are the primary sentencing principles which apply in this case. In any sentencing procedure, the court is required to take into account the individual circumstances of the accused, the nature of the offence and, as I have stated, any mitigating and aggravating circumstances.
- [22] After reviewing the appellant's personal circumstances, the judge then considered the aggravating circumstances arising from his convictions. He concluded that there were seven aggravating factors.
- [23] The first was the nature of the substance: methamphetamine, a "highly dangerous substance with harmful effects upon those who use it" (at para 23).
- [24] The second was the role the appellant played in the conspiracies, which the judge described as at least equal to that of Mr. Hoang, if not superior to him.
- [25] The third was the sophisticated nature of the enterprise. The judge noted at para 28 that it was not a momentary or spur of the moment offence. Rather, the packing of the methamphetamine in the brake cylinders was a sophisticated operation designed to avoid detection, and which required considerable forethought and planning.
- [26] The fourth, as the judge put it at para 29, was that "the conspiracies did not relate to a domestic production, but rather involved the international transport of drugs".
- [27] The fifth was that the enterprise was one in which the appellant engaged for-profit. The judge observed at para 30 that the methamphetamine in question was 94% pure, and would be worth considerably more when sold in New Zealand than if sold in Canada. If the two conspirators had produced an additional 4 kg, as was their plan, the value if broken down into smaller amounts would be some \$4.67 million.
- [28] The sixth was the appellant's criminal record. The judge noted at para 34 that it was dated, but considered that the latter two convictions, for drug offences, were aggravating circumstances because the appellant "obviously did not learn from his prior involvement in prohibited substances and clearly was in breach of the lifetime firearm prohibition imposed in 2001".

- [29] The seventh related to the possession of the firearms and the breach of the firearm prohibition. The judge found at paras 38 and 40 that the appellant kept the firearms in his bedroom for a purpose connected to his involvement in the illicit drug trade, that is, to defend himself from those with whom he dealt.
- [30] The judge then turned to the case law cited by both the Crown and the defence. In his view, the case closest to the appellant's was *R v Oliynyk, Lepage and Ferris*, 2006 BCSC 572. In that case MacKenzie J, as she then was, sentenced Mr. Oliynyk to 18 years' imprisonment for his part in a conspiracy to import cocaine hidden in car parts. Justice MacKenzie noted Mr. Oliynyk's central role in the conspiracy, the large amount of cocaine involved, and the fact that he was undeterred by a previous sentence of 10 years (at para 97).
- [31] Justice MacKenzie sentenced the co-accused Mr. Lepage to 12 years' imprisonment because he was found to have a lesser role, and the co-accused Mr. Ferris to 8 years' imprisonment given the nature of his role. These sentences were upheld on appeal (*R v Lepage*, 2010 BCCA 249). Justice MacKenzie attached to her reasons an appendix listing 15 sentencing cases upon which she relied, which the judge found very helpful in this case.
- [32] The judge then considered the cases relied on by the defence, primarily *R v Tran*, 2014 ONSC 4386, and *R v Nguyen*, 2012 BCSC 1762. He found them distinguishable and unhelpful.
- [33] Taking into account all of the circumstances and applying the totality principle, the judge concluded that a global sentence of 15 years was appropriate. As we have seen, the appellant submits that this was excessive, and that a fit sentence would be a global sentence in the range of 10 years.

### Standard of appellate review

- [34] In *R v Lacasse*, 2015 SCC 64 at para 11, the majority emphasized the importance of giving wide latitude to sentencing judges as they are "in the best position to determine, having regard to the circumstances, a just and appropriate sentence".
- [11] The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

[Emphasis added.]

- [35] Justice Wagner (as he then was), for the majority, went on to identify two separate lines of analysis at para 51:

Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.

- [36] In *R v Agin*, 2018 BCCA 133, the four-judge majority of this Court, in a decision authored jointly by Madam Justice Stromberg-Stein and Mr. Justice Fitch, gave this summary of the principles surrounding appellate review of sentences:
- [56] Appellate intervention is justified when an appellate court identifies a material error that has impacted the sentence, in that the sentence would have been different absent the error. The court will then assess the fitness of the sentence by conducting its own sentencing analysis. If the sentence is unfit, the court may vary the sentence and impose a fit sentence.
- [57] Where there is no error, or the error had no impact on the sentence, appellate intervention can still be justified if the sentence is demonstrably unfit.
- [37] In *Lacasse* at para 52, Justice Wagner confirmed the "very high threshold that applies to appellate courts" in determining whether a sentence is demonstrably unfit. He approved descriptions of that threshold as "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate" or a "substantial and marked departure" from the sentences customarily imposed on similar offenders who committed similar offences in similar circumstances. At para 58, Justice Wagner confirmed that the inquiry into the fitness of the sentence must ultimately circle back to proportionality and the specific circumstances of each case.
- [38] With this in mind, I now turn to consider the appellant's position on appeal.
- Did the judge fail to take into account the amount of the substance to be exported, and the remoteness of the object of the conspiracy to produce methamphetamine, resulting in an unfit sentence?
- [39] With respect to the conspiracy to export methamphetamine, the appellant points out that the methamphetamine seized by the police from the packages to be shipped to New Zealand amounted to 2.861 kg. This contrasts with *Oliynyk*, which involve the seizure of 32 kg of cocaine (sentence of 18 years to the "primary offender", who had only recently finished serving a 10-year sentence, for possession of 13 kg of cocaine for distribution).
- [40] Similarly, the appellant notes, in *R v Montgomery*, 2018 BCCA 27, which involved the importation of 97 kg of cocaine, the principal offender was sentenced to 14 years' imprisonment, while in *R v Mehan*, 2015 BCSC 1488, the principal offender in a conspiracy to import cocaine totaling 218 kg was sentenced to 13 years' imprisonment.
- [41] On this basis, the appellant asserts that the sentencing judge erred in assessing 15 years as a fit sentence by applying a range applicable to conspiracies of much greater scale without adjustment for the quantity of substance. In effect, the appellant is saying that the judge placed insufficient weight on, or ignored, the factor of the amount of substance involved.

- [42] With respect to the conspiracy to produce methamphetamine, the appellant notes that the object of the conspiracy was never carried out in that no drugs were manufactured, transported, or distributed as a result. As such, the appellant asserts, it lacks the aggravating features of other conspiracies in the authorities considered by the judge.
- [43] I am unable to agree that the judge erred in his treatment of these factors.
- [44] As to the first, the amount involved is but one circumstance of the many that the judge must consider in determining the fitness of the sentence. Its importance will vary depending upon all of the circumstances, but its primary importance is to distinguish between those who deal in small amounts primarily for their own use and those who deal with large quantities for distribution: see *R v Saulnier* (1987), 21 B.C.L.R. (2d) 232 at 237 and *R v Bacon*, 2013 BCCA 396 at para 80(5). See also *R v Epp*, 2006 BCCA 570, where this Court reduced a sentence on the basis that the sentencing judge had erred by over-emphasizing the quantity of cocaine, and rejected the proposition that a comparatively higher sentence was justified by a comparatively greater amount of substance. Of significance in *Epp* were that the offender was a transporter not owner of the drugs and had no drug-related record.
- [45] Here, although the quantity was less than that considered in the cases upon which the appellant relies, it remained a large amount of a highly addictive and destructive Schedule 1 substance destined for international distribution for the purpose of reaping a significant profit. Mr. Nguyen was a principal with a drug-related record.
- [46] As to the second, it cannot be viewed in isolation. Rather, it emphasizes the sophistication of the enterprise as a whole. When the methamphetamine in the shock absorbers could not be delivered, the appellant devised a plan to produce the substance in New Zealand and took steps to further that enterprise on an international scale for a substantial profit.
- [47] Moreover, we are dealing with a global sentence, and so the serious firearm offences must also be taken into account.
- [48] Was the global sentence nevertheless unfit because of a failure to give adequate attention to the amount of the substance or the fact that the conspiracy to produce was unfulfilled?
- [49] I am unable to say that it was. As noted above at para 36, the inquiry must focus on proportionality, being the gravity of the offence and the offender's degree of responsibility, in the context of the specific circumstances of each case.
- [50] In my view, the appellant's moral blameworthiness in this case was high, and the gravity of the offence was considerable. Just as Justice MacKenzie said of Mr. Oliynyk at para 95, the appellant was motivated by profit, and had no moral reservations about his activities and the destruction they would cause to users, their families, and society. The appellant's role in the conspiracies was significant and ongoing, and the plans were sophisticated. Given all of the circumstances that the judge carefully considered, including the many aggravating factors described above, the sentence he arrived at cannot be considered a substantial and marked departure from sentences imposed for comparable offenders committing comparable

offences. Comparing this case to Oliynyk, for instance, it is noteworthy that the sentence on the conspiracy counts, 13 years after totality, is significantly less than the 18 years imposed on Mr. Oliynyk.

## Disposition

[51] I conclude in all of the circumstances that the judge made no error and the 15-year global sentence was fit. I would therefore grant leave, but dismiss the appeal.

[52] HARRIS J.A.: I agree.

[53] DICKSON J.A.: I agree.

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

"The Honourable Mr. Justice Grauer"

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