
CANADA / JUDGMENT

R. v. Rezaie

2010 BCSC 1863

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Rezaie,

2010 BCSC 1863

Date: 20101126

Docket: 24893

Registry: Vancouver

Regina

v.

Saviz Rezaie

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence

Counsel for the Crown:

O. Bick

Counsel for the Accused Rezaie:

D. Geller

Place and Date of Hearing:

Vancouver, B.C.

November 24, 2010

Place and Date of Judgment:

Vancouver, B.C.

November 26, 2010

- [1] THE COURT: On October 22nd of this year, I found Saviz Rezaie guilty of possession of cocaine for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The offence was committed on April 25, 2008. I found his co-accused, Ashkan Bahmani-Mozafar, not guilty of the same offence.
- [2] A complete recitation of my reasons for convicting Mr. Rezaie is available in *R. v. Bahmani-Mozafar*, 2010 BCSC 1736. In overview, the circumstances were that he was found in the back room of a small convenience store on Columbia Street in the downtown eastside area of Vancouver by police officers who were executing a Controlled Drugs and Substances Act search warrant on that store. When the first police officer entered the back room, he found Mr. Rezaie sitting on a chair. Within arm's reach of Mr. Rezaie, underneath a nightstand located behind where he was sitting, the officer located a Ziploc bag containing 60 rocks of crack cocaine that weighed approximately 0.4 grams each.
- [3] No evidence of the value of this crack cocaine was led during trial. During the sentencing hearing, Crown counsel submitted that these were so-called "40 rocks" which, as their name implies, are sold for \$40 each. Counsel for Mr. Rezaie disputed that they were in fact any more than "20 rocks" in value. In the absence of evidence from the Crown to prove this disputed fact beyond a reasonable doubt, I am left with the finding that each rock was worth \$20, for a total value of about \$1,200.
- [4] On a stool next to the chair where Mr. Rezaie had been sitting, the police found \$1,100 in cash, consisting of three 50-dollar bills, 27 20-dollar bills, 15 10-dollar bills, and 35 five-dollar bills. When Mr. Rezaie was searched following his arrest, he was found to be carrying substantial additional amounts of cash - \$2,020 in a wallet that contained no bank cards or identification, \$135 in a rear pocket of his pants, and \$10 in a front pocket.
- [5] In finding him guilty of this offence, I concluded that his proximity to the cocaine and a large amount of cash, as well as his possession of an even larger amount of cash in a wallet devoid of the usual accoutrements of bank cards and identification, were consistent ultimately only with his knowledge and control over the drugs and inconsistent with any other rational explanation.
- [6] Mr. Rezaie is now 29 years old. He has a previous conviction for the same offence of possession for the purpose of trafficking in 2004, for which he received a 12-month conditional sentence.
- [7] He was born in Iran and came to Canada in 1995. His mother had entered the country as a successful refugee claimant in the year before. His father and sister are now also in Canada.

- [8] In an unfortunate oversight on Mr. Rezaie's part, he has not obtained his Canadian citizenship yet, which means that although he is unlikely to be deported as a consequence of this conviction, he still has to go through an administrative process in order to determine his eligibility to remain in Canada.
- [9] He is in a stable relationship of seven years duration with Ms. Debra Ermenko, who gave evidence on behalf of Mr. Bahmani-Mozafar during the trial. Mr. Rezaie and Ms. Ermenko are engaged to be married, but have held off on actually holding their wedding pending the resolution of this matter.
- [10] Mr. Rezaie's parents and Ms. Ermenko have submitted letters to the court on this sentencing in which they emphasize very strongly Mr. Rezaie's contribution to his father's business for the past four years, as well as his contribution to the upkeep of the household that he shares with Ms. Ermenko. They have also referred to the dire economic consequences to them should he be rendered unable to uphold these responsibilities because he is serving a period of imprisonment.
- [11] Mr. Rezaie has also written a letter to the court himself explaining that, as a younger man, he had fallen in with the proverbial "wrong crowd" and had begun experimenting with drugs during the period leading up to his previous offence. He further explained that he met Ms. Ermenko when he was about 22 and after that began to stay away from bad influences and "concentrated on building my life for me and my family." He said that he has been working in his father's trucking business for the last four years.
- [12] Crown counsel seeks a sentence of imprisonment for Mr. Rezaie in the range of 12 to 15 months. He opposes the imposition of a conditional sentence. The Crown also seeks ancillary orders requiring Mr. Rezaie to provide a sample of bodily substances for the DNA data bank, prohibiting him from possessing firearms for life and declaring that the cash found near him and on his person during investigation is forfeited as offence-related property.
- [13] While recognizing that rehabilitation remains a significant consideration for Mr. Rezaie, Crown counsel submits that such relevant matters as:
- the type of substance involved here and the devastation that this substance causes in the downtown eastside,
 - the "not inconsiderable" amount of it that Mr. Rezaie possessed,
 - the seriousness with which Parliament clearly views this offence, and
 - the existence of an identical prior conviction

all suggest that the principles of denunciation and general and specific deterrence require the greatest overall emphasis in this case.

- [14] In support of this position, Crown counsel has provided me with cases involving so-called "hard" drugs, in which a trial court declined to impose a conditional sentence: *R. v. Win*, 2000 BCSC 1929; the Court of Appeal substituted a conventional jail sentence for a conditional one: *R. v. Ahmed*, 2001 BCCA 504; the Court of Appeal declined to interfere with a conventional jail sentence that had been imposed at trial: *R. v. Cook*, 2001 BCCA 225.
- [15] Crown counsel also referred to my own sentencing decision in *R. v. Tabujara*, 2010 BCSC 1568, in which I imposed a conditional sentence for the offence of trafficking in a controlled substance, despite Mr. Tabujara, who was 29 years old, having been previously convicted of possession for the purpose of trafficking in 2004.
- [16] Crown counsel reviewed the significant pre-sentence efforts that Mr. Tabujara had made towards his own rehabilitation, as set out in that decision, and contrasted them with Mr. Rezaie's situation, in order to demonstrate that the sentence that Mr. Tabujara received is not an appropriate one in the present case.
- [17] In response, counsel for Mr. Rezaie noted perceptively that Mr. Tabujara could actually have been said to have been in a somewhat worse situation, in terms of his previous record, than Mr. Rezaie, because Mr. Tabujara also had convictions for breach of undertaking that had resulted in straight-time jail sentences[1]. Counsel for Mr. Rezaie submits that the situations of these two offenders are basically analogous and that Mr. Rezaie should also be an appropriate candidate for a conditional sentence.
- [18] To further demonstrate that conditional sentences can be fit results even when the principles of denunciation and deterrence loom very large, Mr. Rezaie's counsel referred me to the recent decision of our Court of Appeal in *R. v. Pang*, 2010 BCCA 500. There, the court dismissed a Crown appeal from a conditional sentence that had been imposed for the offence of possession for the purpose of trafficking in methamphetamine. Mr. Pang had possessed this drug at the kilogram level and his possession was associated with the exchange of significant sums of cash.
- [19] Despite these aggravating features, the sentencing judge had given significant weight to Mr. Pang's efforts to extract himself from drug addiction, to the strong support that he had received from his family and to his gainful employment in a legitimate family-owned business. In dismissing the Crown's appeal, Frankel J.A. offered the following analysis at paragraph 22:

In the case at bar, the sentencing judge was alive to the principles of deterrence and denunciation. However, he was also alive to the fact that Mr. Pang had become involved in trafficking, not out of greed, but to support his addiction, and was someone who was, with the help and support of family and friends, taking positive steps to turn his life around. In my view, it was not unreasonable for the judge, in the exercise of his discretion, to decide that the purposes and principles of sentencing could be met by imposing a sentence that, rather than separating Mr. Pang from the community, allowed him to remain in the community under strict conditions. It should not be forgotten that the four years Mr. Pang will be under supervision is longer than

the three-year term of imprisonment sought by the Crown.

- [20] In the same vein, counsel for Mr. Rezaie emphasized in his submissions that a properly structured conditional sentence can be a very onerous and restrictive one and that the court has the comfort at all times of being able to review and modify the conditions, or even to terminate the conditional aspect and substitute a conventional jail sentence, if the circumstances require it. Counsel submitted that in his own experience many offenders actually seek to avoid conditional sentences because of these restrictive features, as well because of the fact that no earned remission of the length of sentence is available, unlike conventional jail sentences.
- [21] Turning first to the ancillary orders, it is not disputed that, as a result of his previous related conviction, s. 109(3) of the Criminal Code requires me to prohibit Mr. Rezaie from possessing any firearm, cross-bow, restricted weapon, ammunition, and explosive substance for life. Accordingly, I will make that order.
- [22] Next, the offence of which Mr. Rezaie has been found guilty is a secondary designated offence within the meaning of s. 487.04 of the Criminal Code. That means that I must consider, pursuant to s. 487.051(3), whether it is in the best interests of the administration of justice that samples of his bodily substances be taken from him for DNA data-banking purposes. That subsection also requires me to take into account, among other considerations, the person's criminal record, the circumstances surrounding the commission of the offence and the impact such an order would have on the person's privacy and security of the person.
- [23] Counsel for Mr. Rezaie submits that there would be little utility in making a DNA order here, given the nature of this offence and of Mr. Rezaie's past conviction. This was the reasoning process that had found favour with the trial judge in *R. v. Awasis*, 2009 BCCA 134. Finch C.J.B.C., in rejecting that reasoning and finding that the trial judge had erred in principle by refusing to make the order, engaged in the following analysis beginning at paragraph 48:
- [48] In considering "the nature of the offence", the judge held that its investigation was unlikely to benefit from DNA evidence. It was a theme of his reasons that ordinarily DNA evidence is of little utility in investigating street-level drug trafficking. He recognized that whether there was evidence at the scene of the crime that would yield a DNA profile was not necessarily relevant. He observed that he had never seen DNA evidence used in cases of trafficking cocaine.
- [49] However, the reasons for judgment appear to express doubt as to whether it would ever be in the best interests of the administration of justice to order DNA sampling with respect to offences of this nature, unless there were other reasons to make such an order.
- [50] With respect, in the absence of a constitutional challenge, the learned sentencing judge was bound to accept Parliament's determination that an order authorizing the forensic analysis of the DNA of a person convicted of offences contrary to s. 5 of the CDSA is capable of

furthering the purposes of the DNA data bank in advancing related state interests. In *R. v. Hendry et al* the Ontario Court of Appeal put it this way: " the fact that the offence of which the accused was convicted is not ordinarily one where DNA evidence might be found is not necessarily relevant. The legislation has already struck a balance by limiting the reach of the DNA data bank orders to persons convicted of serious offenses, being those designated as primary or secondary offenses".

- [51] Parliament has seen fit to include possession for the purpose of trafficking as a designated offence. So far as the nature of the offence is concerned, nothing in the judge's reasons appears to acknowledge that fact.
- [52] In addition, as explained above, the purposes of the DNA legislation are broader than simply identifying the offender should she reoffend. In *R. v. Jordan*, 2002 NSCA 11, Cromwell J.A. (as he then was) said:

The fact that DNA identification was not, or is not, likely to be useful with respect to the offender, may tend to show that obtaining the samples will not further the legislation's identification purpose. However, such evidence does not negate the testing of the offender in relation to the legislation's other purposes.

- [53] The judge also considered the nature of the offence in relation to the other state interests outlined in *Briggs*. He held, first, that a DNA order would have no deterrent effect. With respect, the judge took too narrow a view of this issue. In *R. v. Jordan* (*supra*) Cromwell J.A. said:
- [35] The DNA provisions may be seen as furthering the objective of deterrence -- both general and specific. The fact that reliable identification may result from DNA analysis and, therefore, that the risk of apprehension and conviction is increased may, itself, deter criminal activity. In other words, the increased effectiveness of criminal investigation as a result of DNA technology will, as La Forest, J. put it in *Thomson Newspapers v. Canada* . . . "...enhance the law's potency as a deterrent to potential wrong doers." It has been noted that the retention of samples in a DNA data bank furthers the objective of specific deterrence of those whose samples are placed in the bank.
- [54] Even if the judge was correct that in general, possessors of cocaine for the purpose of trafficking are not thinking about having to give a DNA sample, those who have already given DNA samples may be deterred from committing further offences, especially offences where DNA evidence is often utilized. For example, drug users may be deterred from committing certain kinds of property crimes to support their drug habits.
- [55] In addition, the judge was of the view that the principle that the DNA data bank would serve to exonerate the innocent was "disingenuous", because an innocent person under investigation could simply give a DNA sample then to exonerate herself. Moreover, "not finding DNA on crack cocaine does not prove anything and would not really exonerate the innocent".

- [56] With respect, the judge appears to have overlooked an important way in which the data bank can be used to exonerate an innocent person. DNA found at the scene of a crime believed to be that of a perpetrator can be subjected to forensic analysis and compared to the entries in the data bank. If Ms. Awasis' DNA was in the data bank and was not a match, that would tend to suggest she was not the perpetrator of the crime. This would benefit her if she would otherwise have been suspected or investigated (see *R. v. Briggs* (supra) at para. 23). Moreover, in *R. v. Ku*, 2002 BCCA 559, this Court expressly rejected the argument accepted by the sentencing judge.
- [57] The judge was bound to accept that exonerating the innocent is a legitimate purpose served by the DNA data bank. It may be argued that the unlikelihood of DNA evidence playing a role in street-level drug trafficking cases made it unlikely that Ms. Awasis would be exonerated by it in the future. However, it would be speculation to suggest that this aspect of the administration of justice would be served to an unusually high or low degree in this case.
- [58] The judge accepted that a convicted offender had a reduced expectation of privacy with respect to her identity and that the sampling process is minimally invasive. The privacy interests of the accused were "not a major consideration here".
- [59] There is now a series of cases where DNA orders have been made for secondary offences, including the trafficking of controlled substances . . . These cases have uniformly rejected the argument that the subject crime would not be amenable to investigation using DNA evidence, and have placed a high importance on the utility, in a broad sense, of maintaining the DNA data bank.
- [24] I find this reasoning directly applicable to the present case, and accordingly I will order that Mr. Rezaie provide the number of samples of his bodily substances that are reasonably required for the purposes of forensic DNA analysis.
- [25] Finally, I think it flows inevitably from the basis of my findings in convicting Mr. Rezaie partially on the basis of his access to and possession of the large amounts of cash, that this money is offence-related property within the meaning of s. 16 of the CDSA and as a result I am ordering that it be forfeited to the Crown.
- [26] Turning now to the sentence itself for the offence, I start by emphasizing that, while case authorities are of course helpful to ensure that the sentence imposed is similar to those that have been imposed on similar offenders in similar circumstances, arriving at a fit sentence is ultimately always an individualized process, one that takes account of the particular circumstances of the offence and of the offender, the aggravating and mitigating features, and the principles of sentence that deserve the greatest emphasis in view of those matters.

- [27] This individualized process is particularly important in determining whether or not a conditional sentence should be imposed, because, as we see from the cases referred to, there is considerable appellate deference to the sentencing judge's specific analysis and conclusion about whether denunciation and deterrence can be met adequately by a conditional sentence.
- [28] With respect to the circumstances of this offence, I would characterize it as possession for the purposes of a street-level crack cocaine trafficking operation that appears, in the context of the downtown eastside, to have been relatively extensive and lucrative.
- [29] With respect to the circumstances of the offender, Mr. Rezaie is still quite a young man. His record, while directly related to the present offence, is not extensive. He has the strong support of his fiancée and parents and they express a degree of financial dependence upon him.
- [30] Unfortunately, unlike in Mr. Tabujara's situation, I do not know if Mr. Rezaie's involvement in this offence stems from his own addiction or purely from a profit motive. I infer from the information in his letter to the court that he may have had substance abuse problems to some degree in the past, but it is not clear whether they contributed to the situation as of the offence date of this matter in 2008. I also do not know, again unlike in Mr. Tabujara's situation, if Mr. Rezaie has undertaken any rehabilitative efforts, either with respect to addiction or avoiding committing offences generally, since this offence was committed.
- [31] In addition, I am also concerned that Mr. Rezaie claims to have worked with his father's business for the last four years. This is a period that includes the date of the present offence. This causes me to question whether he was actually engaged in work with his father during the offence period and whether, if he was, the continuing availability of that work has any meaningful relationship to the possibility of his future offending, given that it did not enable him to avoid committing the present offence.
- [32] The same reservations must be expressed with respect to his relationship with Ms. Ermenko. Nothing in her submission to the court, or indeed in Mr. Rezaie's own letter, assists me to situate this offence within his overall life circumstances and the development of this relationship, particularly as they may concern his drug use or involvement in drug trafficking.
- [33] All of this is also in contrast to the situation in Tabujara, in which I had confirmation, in the form of a pre-sentence report, of the sincerity and legitimacy of all of that offender's rehabilitative efforts; in particular confirmation of the hands-on involvement of his family in ensuring his future good behaviour.
- [34] I should also say that the information that was available to me in Tabujara was the same kind of information that was before the trial judge and that persuaded him to impose a conditional sentence, despite the seriousness of the offence, in the Pang decision.

- [35] The mitigating factors here include Mr. Rezaie's relative youth, his lack of an extensive criminal background and his apparently strong connection to his family and his fiancée.
- [36] The aggravating factors include the identical prior conviction, the relatively extensive nature of the possession and the insidious and harmful nature of the substance that was possessed.
- [37] While, as Crown counsel fairly pointed out in his submissions, rehabilitation still looms large for Mr. Rezaie, I think that, on the information I have, denunciation and deterrence must be given greater weight. The only inferences that emerge on the evidence available to me at this point are that (1) Mr. Rezaie did not learn anything from being allowed to serve his previous sentence in the community that enabled him to avoid repeating the offence and (2) that the sentence imposed for the present offence must ensure that he clearly understands the absolute need to cease any future involvement in the drug trade.
- [38] I am aware, as a fundamental principle emerging from the decision of the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61, that conditional sentences can certainly address denunciation and deterrence effectively, and that it is only when those principles are "particularly pressing" that a conventional jail sentence will be a better way of addressing them than a conditional one.
- [39] I should also make it clear that there is no presumption that successive conditional sentences will not be available to an offender. Everything depends on the circumstances of the individual case and on whether the Proulx analysis leads the judge to a conclusion that a conditional sentence is consistent or inconsistent with the applicable sentencing principles.
- [40] However, when a second conviction for the same offence occurs after a conditional sentence was imposed the first time, as in this case, a sentencing judge will need information about the causes of the new offence and what has been done or is being done by the offender to address them, in order to be satisfied that another community-based sentence will still address all of the applicable and pressing principles of sentence. That is the information that I had in *Tabujara* and that I am unfortunately lacking here.
- [41] In all of the circumstances, I am driven to the conclusion that the needs of denunciation and deterrence are particularly pressing here, given the circumstances of the offence and of the previous identical conviction, and that, in the absence of any basis to be confident that a conditional sentence can be structured in a way that will address them as well as a conventional sentence can, that a sentence of actual incarceration is required.
- [42] In arriving at the length of this sentence, I have kept in mind Mr. Rezaie's family obligations and the benefits to his long-term rehabilitation of being employed in a family business and living in a stable relationship.

[43] I have decided, as a result of those considerations, to impose a shorter period of incarceration than the Crown has asked for or that I would otherwise have considered, in the hopes of keeping the interruption of Mr. Rezaie's responsibilities as brief as is still consistent with the principles that need to be emphasized and in an effort not to jeopardize the rehabilitative benefits of productive employment and family support.

[44] Would you stand, please, Mr. Rezaie. Accordingly, I sentence you to imprisonment for a period of six months.

"Schultes J."

[1] [1] I also observe that Mr. Tabujara had received a conventional jail sentence for his prior related conviction, rather than a conditional one, which might indicate that it was a more serious one than Mr. Rezaie's prior conviction.

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