

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Han*, 2022 ONCJ 343

DATE: 2022 07 26

COURT FILE No.: Niagara Region 998 21 S0028

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Kandice Han

Before Justice J. De Filippis
Heard on April 8, June 7, and July 7, 2022
Reasons for Sentence released on July 26, 2022

Mr. V. Illiccounsel for the Crown
Mr. V.J. Singh counsel for the accused

De Filippis, J.

[1] The abuse of fentanyl kills. Severe jail sentences are usually imposed for those who traffic in fentanyl to denounce and deter this conduct. These reasons explain why, in this exceptional case, I conclude that house arrest is the right result for this offender.

[2] On January 20, 2021, the defendant was in possession of 15.6 grams of fentanyl for the purpose of trafficking. She was intercepted delivering this drug, on behalf of another person, to a customer of that person. She was in a car with two others. The defendant was caught because the police had been conducting surveillance into drug trafficking by those other individuals. The car was stopped by police and the defendant was found with the drugs. Also found, in the car, was \$2,005 and indicia of drug use. All three persons were arrested. Until this incident, the police were unaware of the defendant. Following this arrest, a search warrant was executed at the residence of the other two individuals. Police seized a small quantity of fentanyl, drug paraphernalia, and a drug debt list at their residence. The police did not seek a search warrant for the home of the defendant.

[3] The defendant is 24 years old. She does not have a criminal record. She pled guilty to the offence. In pleading guilty, the defendant stated that she received a small quantity of fentanyl for her personal use in payment for her services. The Crown cannot confirm

or deny this fact. However, there is no controversy that the defendant was addicted to fentanyl at the time and under the influence of a known local drug dealer.

[4] In addition to the admitted facts noted above, I have the benefit of a presentence report and a lengthy account, written by the defendant, about her transition from childhood to adulthood. I am also in possession of counselling records and education transcripts. This material provides important information about the defendant's background. The Crown cannot confirm or deny this information. It comes primarily from the defendant. It is believable and she was not challenged about her statement. Moreover, it is confirmed, in part, by other sources and documents that are before me. I accept the defendant's account.

[5] The defendant was born into an immigrant family from Korea. Her father worked long hours and her mother ran a strict household. The defendant has two older siblings that she did not associate with growing up. She felt different from her (non-Korean) neighbours. She was lonely. Abandonment soon followed. When the defendant was 13, her mother and sister went to Korea for a return trip. They did not return. Afterward, despite his hard work, the defendant's father went bankrupt, and the family lost their house. Notwithstanding this environment, the defendant worked part time during high school and attended Nipissing University. The defendant continued to experience emptiness and loneliness. She came to live in St. Catharines.

[6] Through a close friend, the defendant was introduced to a local drug dealer. Her friend was dating this man. The man introduced to the defendant to fentanyl, and she soon became addicted. The drug dealer was arrested on other trafficking charges and while on bail, he asked her to deliver fentanyl to one of his customers. Although not a matter within the knowledge of the Crown, the defendant admits that her arrest on the charge before the court was preceded by two other drug deliveries. On each occasion, she was given a small amount of fentanyl for personal use.

[7] Soon after her arrest, the defendant cut ties with her friend and the drug dealer and registered with Community Addiction Services of Niagara (CASON). She attended 24 rehabilitation sessions between June 2021 and February 2022. The defendant was embarrassed and frightened to tell her father and brother about her arrest. While at CASON, she told her brother. He assisted her by funding a residential treatment program for drug addiction. With that completed, she told her father about the events in question. He was shocked and offered to help his daughter. The defendant lives with him again and is employed at his new business at a salary of \$3,200.00 per month.

[8] At the conclusion of sentencing submissions, Defence counsel handed me the following statement prepared by the offender:

Your Honour, Mr. Singh told me that you would ask me if I had anything to say. I am terrified to speak in public, but I have typed something out in addition to what I have already provided.

A lot has happened since I was charged, I feel like I'm reborn. I'm living with my family again after a very long time and while were (sic) all adjusting, it feels comfortable. I feel the caring from both my father and brother. I'm totally moved

out of St. Catharines both physically, and mentally and am eager to move on in my life's journey in Simcoe and working within the family business.

I can honestly say that leading up to sentencing, I felt so many things. I felt stress, fear, as well as relief that this ordeal is over. I am so deeply ashamed of what's brought me here before you but at the same time this horrible situation has help (sic) me find strength and depth within myself to show that I am better than that. In time, my situation instilled within me a compelling force to reconnect with my family. So much good has resulted of this bad situation, and it will only get better.

[9] The Crown argues that a sentence of 4.5 years in the penitentiary is appropriate. In support of this argument, counsel points to the great harm caused by fentanyl abuse and caselaw that imposes severe sentences to reflect this harm. The Crown accepts that the defendant's personal circumstances are greatly mitigating but argues that this cannot displace deterrence and denunciation such that the sentence is below the acceptable range. Counsel adds that since there is nothing exceptional in this case justifying a reformatory term, a conditional sentence is not available.

[10] The Defence submits that a suspended sentence should be imposed or, in the alternative, a conditional sentence order. This submission is anchored in the defendant's limited role in the offence and her personal circumstances, as summarized above (and in greater detail in the written material filed by counsel).

[11] I need not dwell on the caselaw provided to me by counsel. The parties agree, and I understand, that trafficking in fentanyl usually means a penitentiary sentence. Where the parties part company is whether this is an exceptional case justifying a departure from the norm.

[12] Section 5 of the *Controlled Drugs and Substances Act* provides for up to life in prison for this offence. Section 10 of the *Act* states that:

Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

[13] In imposing sentence, I am also guided by Part XXIII of the *Criminal Code*. The following provisions are particularly important:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;

- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

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

[14] Proportionality means that the severity of a sentence will depend on the seriousness of the offence as well as the moral blameworthiness of the offender; see *R v Lacasse* 2015 SCC 64 (CanLII). Personal circumstances are relevant in determining proportionality in light of the seriousness of the offence, but they do not alter the seriousness of the offence: see *R v Schofield* [2019] B.C.J. No. 22 (BCCA).

[15] In 2012 Parliament amended the *Code* by virtue of the *Safe Streets and Communities Act*, with the effect that a conditional sentence would no longer be available for anyone convicted of an offence that carries a maximum sentence of 10 years or more. In *R v Sharma* 2020 ONCA 487, an aboriginal offender challenged this restriction on the availability of conditional sentences on the basis that it violates sections 7 and 15 of the *Charter of Rights and Freedoms*. In a split decision, a majority of the Court agreed. Although the case was argued with respect to aboriginal sentencing issues, the Crown did not ask the Court to limit its judgment to such offenders and the Court did not do so. The Crown appealed the decision in *Sharma* and the Supreme Court of Canada has reserved its decision. It remains the law in Ontario. Accordingly, a conditional sentence is available to the defendant, and I must consider that option.

[16] The docket of many provincial courts, including Niagara Region, is often informed by poverty, mental illness and addiction. Although these factors feed on each other, drug addiction, especially with respect to fentanyl, is the most pressing social problem. It causes misery to the addict, suffering by those who love the addict, much secondary crime, and significant social costs to deter and rehabilitate the addicts. Too many addicts die from an overdose of fentanyl. Therefore, a penitentiary sentence often awaits those who traffic in fentanyl, even addict traffickers.

[17] However, in the present case, I am persuaded that a reformatory sentence is appropriate. In coming to this conclusion, I consider the defendant's guilty plea, the lack of a criminal record, her addiction, and her limited role in the offence. I also note that her significant efforts at rehabilitation have proven successful.

[18] There is an additional factor. The defendant is a *youthful* first offender. This engages the principle of restraint.

[19] In *R v Priest* 1996 ONCA 1381 (CanLII) it was held that in the case of a first offender, the court should explore all other dispositions before imposing a custodial sentence and that if a custodial sentence is appropriate, a first sentence of imprisonment

should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purpose of general deterrence. This principle of restraint is particularly important in the case of youthful first offenders. This was reiterated by the Court of Appeal for Ontario in *R. v. Beauchamp*, 2015 ONCA 260 (CanLII) and again, more recently, in *R v Randhawa* 2020 ONCA 668 (CanLII). In this regard, I note that in *R v Arbuthnot* 2009 MBCA 106 (CanLII) it was held that “youthful” means a person aged 25 years or younger.

[20] Having decided that a penitentiary sentence is not required in this case, *Sharma* means I can consider whether the period of incarceration can be served in the community under terms of house arrest. Section 742.1 of the *Code* lists four criteria that a court must consider before deciding to impose a conditional sentence: (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; (2) the court must impose a term of imprisonment of less than two years; (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[21] The first two criteria are met in this case. As I have noted, the defendant has successfully completed recovery programs and has strong family support, including a place to live and stable employment. She can move forward to a healthy and productive life. These personal circumstances mean community safety should not be endangered by the imposition of a conditional sentence. The difficult question is whether such a disposition meets the fourth criterion set out in the legislation.

[22] Denunciation and deterrence can be reflected through a conditional sentence, even in the most serious offences. The Court of Appeal for Ontario made this clear in *R. v. Kutsukake* [2006] O.J. 3771, a case involving criminal negligence causing death. The Court of Appeal considered the leading case of *R. v. Proulx* 140 C.C.C. (3d) 449 (SCC) and stated as follows:

The Supreme Court of Canada held, at para. 114, that even in the presence of aggravating factors which might indicate the need for denunciation and deterrence, "a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance." Writing for the court, Lamer C.J.C. added at para. 100: A conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[23] House arrest is not jail. It is, however, a significant restriction on liberty. Moreover, unlike jail, there is no remission. The conditional sentence order in this case will be for the maximum term allowable and the house arrest will be for the duration of that term. I note that in *R. v. Ryazanov*, 2008 ONCA 667 (CanLII) the Court of Appeal for Ontario said that:

[75] Conditional sentences should be punitive. As the Supreme Court of Canada stated in *R. v. Proulx*, at para. 117: "[P]unitive conditions such as house arrest should be the norm, not the exception." In my view, that comment applies throughout the duration of a conditional sentence. Therefore, the house arrest conditions should be extended to the full term of the respondents' conditional sentences.

[24] It is also worth mentioning, as a general matter, that I rarely impose a conditional sentence without the electronic supervision program. The defendant has been approved for that program. That means she cannot cheat. As such, the sentence is meaningful and effective. In this regard, I note, again, that the defendant is a youthful first offender.

[25] The defendant will serve a conditional sentence for a period of two years, less one day, in accordance with the electronic supervision program and subject to these terms:

- 1) Report to a supervisor of conditional sentence orders within two days, and thereafter, as required;
- 2) Attend and actively participate in all assessments, counselling, and rehabilitative programs as directed by the supervisor, including substance abuse;
- 3) Agree to the release of any medical or other information necessary to monitor compliance with this order;
- 4) Remain on the property of her residence, home, except as follows:
 - i) Medical emergencies;
 - ii) To go directly, to and from, and be at, religious observance, employment, and education;
 - iii) To go directly, to and from, and be at, medical, dental, or legal appointments, and at assessment, counselling, or rehabilitative programs;
 - iv) For personal shopping for a four-hour period per week;
 - v) Except for medical emergencies, she must provide the dates and times for the forgoing exceptions to the supervisor, in advance of such activities.
 - vi) For any other purpose that may be approved of by the supervisor.
 - vii) Carry her conditional sentence order on his person whenever he is outside the home.

[26] I also impose the following ancillary orders; the defendant will provide a sample of her DNA and will be subject to a section 109 order for ten years. She will pay a victim fine surcharge in the amount of \$200, within six months, or serve two days in jail in default

[27] The door opened by *Sharma* must be restricted to the exceptional case. Otherwise, that decision would overrule decades of established law in Ontario about the penalties for trafficking in hard drugs. I do not read *Sharma* to say that – and one would expect express language if that was the intent.

Released: July 26, 2022

Signed: Justice J. De Filippis