Court of Queen's Bench of Alberta

Citation: R v Gaudrault, 2021 ABQB 461

Date: 20210610
Docket: 180323040Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Bradley Michael Gaudrault

Offender

Memorandum of Decision
of the
Honourable Madam Justice K.M. Eidsvik

Introduction

[1] On March 23, 2021, a jury found Bradley Michael Gaudrault guilty of:

> **Count 1**: on or about the 17th day of March, 2018, at or near the Hamlet of Carway, Alberta, did unlawfully import into Canada a substance included in Schedule I to wit cocaine contrary to section 6(1) of the *Controlled Drugs and Substances Act* ("*CDSA*"), and,

Count 2: On or about the 17th day of March, 2018, at or near the Hamlet of Carway, Alberta, did possess a substance included in Schedule I to wit cocaine for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*.

Circumstances of the Offence

[2] In order to convict Mr. Gaudrault of these offences, the following facts, express or implied, were required to have been accepted by the jury. There are also further facts that this Court will accept as proven during the trial. They are as follows:

1. Mr. Gauldrault was the driver of a Nissan Xterra who presented at the Canada border at Carway, Alberta on March 17, 2018.

2. Mr. Gauldrault was the owner of the Nissan Xterra.

3. The Nissan Xterra had 31 bricks of cocaine, a schedule 1 controlled substance, stored in a hidden compartment in the back.

4. The bricks weighed approximately 31 kilograms. Eight samples of the substance of the bricks were identified as cocaine and three of these bricks had the cocaine purity between 72% and 75%. It is a reasonable inference to conclude that all 31 bricks were cocaine.

5. Mr. Gaudrault knew that he was carrying 31 bricks of cocaine in his vehicle and he had control over the cocaine.

6. Mr. Gaudrault possessed the cocaine for the purpose of trafficking. The cocaine was worth somewhere in the range of $1.39 M if sold at the kilo level and more if sold at the gram level.

7. Mr. Gaudrault meant to, and did, import the cocaine into Canada from the United States on March 17, 2018 by driving it across the border in his vehicle.

Mr. Gaudrault's personal circumstances

[3] Mr. Gaudrault is 30 years old. He was born and raised in Halifax mainly by a mother who suffered from a gambling and alcohol addiction, as well as mental illness. He had multiple siblings. He had a traumatic upbringing suffering from poverty, an abusive step-father, and uncertain living conditions. His mother took her own life when Mr. Gaudrault was 19 years old and this had a significant negative impact on him. His life from that point on was in a downward spiral. He dropped out of school and associated with ill-advised people.

[4] Mr. Gaudrault is an alcoholic and cocaine addict. He has rehabilitated somewhat since his arrest. He began using substances heavily after the loss of his mother. He moved in with his father and step-mother although his father also struggled with sobriety.

[5] Mr. Gaudrault eventually finished his GED and moved to Fort McMurray in 2017 for employment purposes, and moved to Calgary in 2018. While in Calgary he worked several jobs including concrete cutting, and as a cook at various pubs and restaurants.

[6] At the time of the offence, Mr. Gaudrault was unemployed and addicted. He found himself in a desperate situation without a stable income to support his habit. He is deeply ashamed of his actions and knows that he has caused pain to his friends and family. He is also aware of the potential pain he could have caused to many if he had been successful in smuggling the cocaine into the country especially after having witnessed his mother's struggles with addiction. He has offered to take any course offered to him to help with his addictions. He would also like to upgrade his school and get into a trade such as welding.

[7] Mr. Gaudrault had many letters of support from his family and close friends in Nova Scotia. Many spoke of his good character and sad circumstance of his mother's suicide. An aunt spoke of his volunteer efforts at SPCAs both in Nova Scotia and Alberta and his pleasure in giving back to the community. They will support him upon his return to Nova Scotia.

Sentencing principles

[8] The sentencing principles that apply here are not controversial and are agreed to between the parties.

[9] First, I need to consider ss. 718, 718.1 and 718.2 of the *Criminal Code* that set out the fundamental purpose and the objectives of sentencing. Section 718 provides as follows:

> 718. The fundamental purpose of sentencing is 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:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[10] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *Criminal Code*, s. 718.1. Parity, totality and restraint are also secondary considerations as outlined in s. 718.2. To help in this regard, a review of cases involving similar situations is helpful. I'll come to those shortly. Nonetheless, sentencing is an individual process, so sentences imposed for similar offences may not be identical.

[11] The Crown and Mr. Gaudrault agree that in drug importation and trafficking cases, denunciation and deterrence are paramount. Under s. 10 of the *CDSA* Parliament has emphasised that sentencing judges must have regard to the societal impact of the illicit drug trade.

[12] The Crown argues that not only should the sentence deter Mr. Gaudrault, but it should also deter others from committing like offences. More specifically, the Crown emphasised the damage caused by cocaine, especially the high volume involved in this case, in our society and the important need to deter its proliferation by the general deterrence of importers and traffickers.

[13] The Defence submits that rehabilitation cannot be lost in the equation especially when sentencing first offenders.

Crown position

[14] The Crown sought a sentence in the range of 12 to 15 years for the importing conviction and 8 to 10 years, concurrent, for the trafficking offence.

[15] On the facts, the Crown submitted that this case should be considered as a serious case of wholesale possession, importing and trafficking of a substantial amount of cocaine (31 kg), a schedule I drug. Counsel pointed out that the value of the cocaine if sold at the kilo level was approximately $1.39 M and if sold at the street level of $3 M. He pointed out the societal harm that this cocaine could have caused, both to users, and to those who become victims of consequent crimes occasioned by those seeking to obtain funds to fuel their addiction.

[16] Further on the facts, the Crown submitted that not only did Mr. Gaudrault know about the hidden trap in his vehicle and the cocaine contained therein, but it is logical to assume that he was involved and knew about the manufacturing of the trap in his vehicle.

[17] On the case law with respect to similar offences, the Crown argued that although there is no starting point for importation offences in Alberta, the range for this offence, on a guilty plea, is 10 to 12 years, as set out in the Alberta Court of Appeal decisions of ***R v Overacker***, 2005 ABCA 150***, R v Truax***, 2021 ABCA 97 and ***R v Cirone***, 1988 ABCA 228. Reference was made to many cases, but the Crown put emphasis on the recent decision of ***R v Mir***, unreported ABPC, February 26, 2021 where Mr. Mir was sentenced to 11 years for importing, and 8 years concurrent, for being in possession for the purpose of trafficking 50 kgs of methamphetamine.

[18] The Crown submitted that the cases relied on by the Defence were distinguishable as they mainly emanated from Ontario and B.C. where the range of sentence for these same offences has been set to be more in the 6-8 year range.

[19] With respect to the possession for the purpose of trafficking conviction, the Crown argued that the starting point is 4.5 years for trafficking or possession for the purpose of trafficking a schedule I drug in wholesale amounts (***R v Januska***, 2015 ABQB 150 at para 19). Considering the amount of cocaine involved however, and relying on ***R v Alcantara***, 2017 ABCA 56, where the offender was sentenced to 13 years for his involvement as an enforcer in a large-scale drug trafficking operation, the range here should be between 4.5 and 13 years.

[20] The Crown submitted that the main aggravating factor here was the significant quantity and nature of the drug. The main mitigating factor is the fact that Mr. Gaudrault had no prior criminal record, although the Crown pointed out that many of the sentencing precedents relied on, the offenders also had no prior record (***Cirone***, ***R v Nassar***, 1988 ABCA 305***, Overacker***, ***Januska***, ***Mir***, and ***Truax***). He also pointed out that many of these decisions involved guilty pleas which could be a mitigating factor, which is not present here.

[21] The Crown conceded in argument that Mr. Gaudrault's difficult background could be considered mitigating here. As well, that there was no evidence of criminal organisation involvement.

[22] In terms of pre-trial bail condition and custody credit, the Crown argued that Mr. Gaudrault should be given 1.5 days credit for 65 days of pre-sentencing custody (97.5 days) and that no credit or mitigation of sentence should be allowed for his bail conditions.

Defence Position

[23] The Defence submitted that an appropriate sentence for Mr. Gaudrault was 7 years for the importation offence and 5 years concurrent for the trafficking offence. In addition, 124 days credit should be credited both for harsh conditions during time served, including some during COVID where conditions were (are) particularly difficult. Defence also sought some mitigation of sentence for the strict bail conditions Mr. Gaudrault endured.

[24] Defence pointed out that this offence was not motivated by greed like several cases before the Court, but rather stems from extremely difficult circumstances in Mr. Gaudrault's life which led to poverty and addiction in his life. He is young, has no prior record, and is keen to rehabilitate himself.

[25] With respect to the facts, there is no evidence that Mr. Gaudrault was involved in the manufacturing of the trap door. Nor, as conceded by the Crown, is there evidence that he was involved in a criminal organisation. He was simply a courier and was caught on this one occasion attempting to cross the border. There is no evidence of other importation instances.

[26] The Defence pointed out that the maximum penalty for an importation conviction under s. 6(1) of the *CDSA* is life and minimum, pursuant to s. 6 (3)(1.a), is 2 years. The maximum for trafficking is life but there is no minimum that applies here in light of the fact none of the circumstances here engage s. 5(3)(a)(i) or (ii) of the *CDSA* which sets out minimum sentences.

[27] In terms of the sentencing cases, Defence submitted that sentencing is an individual process – "specific cases are not to be treated as precedents" (see ***R v Johnas***, 1982 ABCA 331 at para 31).

[28] The Defence argued that many cases raised by the Crown can be distinguished. For instance, ***Overacker***, should be distinguished since double the amount of drugs was involved, the involvement of a criminal organisation was implicated and the offender admitted that this was his 4th crossing. In ***Truax***, even though the Court of Appeal indicated that the range for wholesale drug importing sentences should be 10-12 years, Mr. Truax was actually sentenced to six years. Further, ***Mir*** should be distinguished since the amount of drugs imported there (50 kg) was significantly more than here.

[29] Defence counsel submitted that the following Alberta cases are relevant in this sentencing matter: ***R v Gambilla***, 2015 ABQB 571, where 6 and 6.5 years sentences were ordered for the two offenders for importing almost 2 kg of cocaine (and 4.5 years concurrent was ordered for possession for the purpose of trafficking); ***R v Yousif***, 2010 ABPC 26 where a 7 year sentence was ordered for the importation of 3 kgs at the Calgary airport; and ***Januska***, where a 6 year sentence was imposed for importing a package of cocaine.

[30] Defence counsel also made reference to a number of Ontario and B.C. cases and in particular: ***R v Lawson***, 2003 OJ No 5040 where the Court of Appeal of Ontario indicated that the range of sentences for 1st offender couriers is in the range of 6 to 8 years; ***R v Epp***, 2006 BCCA 570 where the Court of Appeal reduced Mr. Epp's sentence from 14 years to 10 years for importing 100 kg of cocaine on the basis, that as a courier, he was not as morally culpable as

offenders who are high up on the drug hierarchy chain. The Court pointed out that the amount of drugs, while a factor in sentencing, should not be overemphasised. ***R v Suelzle***, 2009 BCPC 15 where a sentence of 10 years was imposed for planning and organising the importation of 100 kg of cocaine in two shipments across the border, and, ***R v Kang***, 2009 BCSC 1827 where a sentence of 8 years was imposed for a similar amount of cocaine (100 kg) but where the offender was "solely a transporter of drugs" as compared to being involved at a high level.

[31] In terms of mitigating factors, the Defence submitted that these include the fact that Mr. Gaudrault had no criminal record, he was not on judicial interim release at the time of the offence, he was not involved in a criminal organisation, he was a one-time hired transporter, he has accepted the verdict and expressed remorse, he has the support of his family and friends, and he was motivated by addiction.

[32] In terms of credit, Defence counsel argued that Mr. Gaudrault should be credited 1.5 for 1 days for time served prior to the trial (13 days in custody – so 20 days credit) and 2 for 1 credit for time served after the verdict, pre-sentence because of his time in Remand during COVID conditions (52 days in custody to May 13, 2021 – so 104 days credit). These hardships included no visitors, no phone access, multiple lockdowns, and close quarters causing issues with respect to isolation. Mr. Gaudrault indicated to the Court that when he first arrived in Remand he was put into the gang unit since it was the only healthy unit available.

[33] Defence pointed to ***R v Deakin***, 2020 ONCJ 202***, R v Kandhai***, 2020 ONSC 1611 and ***R v Hearns***, 2020 ONSC 2365 where there was discussion of the particular hardship of COVID in the prison system, the potential of a departure from the usual range of sentence and therefore the imposition of shorter sentences. This issue was also recognised by Justice Burrows in ***R v EF***, 2021 ABQB 272 where the impact of COVID was recognised as a factor that would render a sentence harsher.

[34] Defence also sought pre-trial credit for the stringent judicial interim release conditions (***R v Downes***, 2006 CanLii 3957 (ONCA)***, R v Lau***, 2004 ABCA 408 and ***R v Hilderman***, 2005 ABQB 864).

[35] Mr. Gaudrault was on strict bail conditions between March 29, 2018 and March 27, 2019. During this period, he, amongst other normal conditions, was not allowed to leave the jurisdiction (to visit his family in Nova Scotia in particular) and had a 10 pm to 6 am curfew. Defence argues that these conditions should be treated as a highly mitigating factor to his overall sentence.

Discussion and Analysis

[36] I commend counsel for the Crown and Defence for having done a thorough canvassing of the appropriate cases and factors that I must consider in sentencing Mr. Gaudrault, as I have summarised.

[37] On the facts that were proven beyond a reasonable doubt, as I mentioned at the outset, I agree that in order for the jury to have convicted here, it must have found that Mr. Gaudrault knew of the 31 kg that was hidden in his vehicle when he crossed the border at Carway. Further, that he knew that this amount of drugs would be used for trafficking purposes. However, I cannot conclude that the Crown has proven beyond a reasonable doubt that Mr. Gaudrault was implicated in manufacturing the trap where the drugs were placed. Or, in other words, as the

expert described at trial, whether Mr. Gaudrault was involved in a Walmart or a Dollar Store operation. Indeed, the Crown is not alleging that he was involved in any crime organisation. I can only sentence on what has been proven. What has been proven, is that he was a one-time courier of a large amount of cocaine. He was young, from a troubled background, suffering from addiction, unemployment and poverty when the offence occurred. He is remorseful and recognises the gravity of his offence – especially having witnessed the ravages of addiction first hand with his parents. He is a first-time offender.

[38] I recognise that I am bound by our Court of Appeal rulings setting out that the range of sentence for this level of wholesale importing is in the 10 to 12 year range (as set out in ***Overacker*** and recently affirmed in ***Truax***, and applied in ***Mir***). However, I am also cognisant of the many other Alberta decisions that have sentenced in the 6 to 7 year range for similar offences (with albeit lower amounts of drugs involved) including 6 years in ***Truax***, 6 years in ***Januska***, 6 and 6.5 years in ***Gambilla*** and 7 years in ***Yousif***.

[39] It is notable that in our adjacent province, British Columbia, sentences for importing triple the quantity of drugs (100 kg), in similar courier type circumstances, are in the 8-10 year range (***Epp, Suelzle***, and ***Kang***). Further, that this range, and even lower (6 to 8 years), is what is imposed in Ontario in relatively similar circumstances (***Lawson, see also R v Cunningham*** (1996) 27 OR (3d) 786 and ***R v Beckford***, 2021 ONCA 56 – but where amounts imported were less).

[40] With respect to the possession for the purpose of trafficking conviction, I note that all of the cases have imposed concurrent sentences for this conviction when an importing conviction and sentence is also involved. Both the Crown and Defence agree that this is appropriate here. The starting point, as discussed above is 4.5 years, and generally the sentences for the possession conviction are lighter or the same as, than the importation conviction. For instance, in ***Truax***, the importation sentence was 5 years for both the importation and possession for the purpose (although the global sentence was 6 years because of the criminal organisation convictions).

[41] The aggravating and mitigating factors here are not controversial. On the aggravating side, I accept that 31 kg is a very large quantity of drugs being brought into our society, that this amount would have sold for a very large amount of money and caused a great deal of havoc. There is no mitigating factor of a guilty plea as is seen in many of the cases. The fact that there is no criminal organisational involvement is an important factor, although again not necessarily aggravating or mitigating. Further, the fact that this is Mr. Gaudrault's first offence is a factor to consider but not necessarily mitigating or aggravating.

[42] In terms of mitigating factors, I agree that his relative youth, his very difficult background, remorse (which I accept as genuine), incentive to rehabilitate, the fact he was motivated by addiction, not greed, are mitigating factors. I also note the supportive comments about Mr. Gaudrault's good character as noted in the many letters of support from his family, friends, and, somewhat unusually, from the Remand Centre. I also accept that living with bail conditions that included a curfew and travel restrictions is a mitigating factor here.

[43] With respect to the credit for time served, both parties agree that 1.5 to 1 credit should be allowed for the time served up to the time of the conviction. The difference of the parties' position lies in the amount of credit allowed for the time spent in Remand during the COVID pandemic. The authority quoted by the Defence, which I will not repeat, is clear that this is a reasonable consideration to consider, and I will do so here. The mental and physical anguish

suffered by the population at large during the COVID pandemic has been significant – this has been exacerbated while in custody.

Sentence

[44] Considering all of the factors that I have discussed, including the need for the denunciation and deterrence of these crimes, an appropriate sentence that reflects Mr. Gaudrault's involvement in the importation of cocaine at the Carway border, is eight and a half years in a federal penitentiary, and a concurrent sentence of seven years for possession for the purposes of trafficking this large amount of cocaine.

[45] I distinguish the ***Overacker*** case both because of the amount of drugs being imported but also because of the multiple times that he admitted to perpetrating this crime, the involvement of organised crime and the "vital role" that Mr. Overacker played in it. Also, the Court noted that that offender was not personally vulnerable due to an addiction or financial difficulties but was gainfully employed and decided to make more money (see para 24). A first-time offender involved in one crossing, like here, is very different (although I also recognise that there was no guilty plea here like in ***Overacker***).

[46] I also note that although ***Truax*** repeated that the range for importing with no record, with a guilty plea, as between 10 -12 years, the Court in effect lowered the range to 5 years in certain cases for the importation and possession for the purpose convictions (one extra year was added for the organised crime aspect – so the global sentence was 6 years). Also, I distinguish ***Truax*** from the case before me, since in ***Truax***, there were multiple importing trips (4) and there was a conspiracy to import conviction and criminal organisational involvement which was not proven or alleged here. I note that the sentence in ***Truax*** was significantly mitigated on account of the very sad Gladue factors. Here, Mr. Gaudrault found himself in very difficult circumstances leading up to the time of the offence, which also calls for the mitigation of his sentence. Finally, like in ***Truax***, the sentence was after trial, so there was no mitigating guilty plea.

[47] I have also considered in this sentence the mitigating fact of a curfew and travel restrictions for 1 year that Mr. Gaudrault dealt with – although it was not a significant mitigating factor and is distinguishable from a situation such as 24-hour house arrest.

[48] With respect to credit for pre-trial custody I will allow 1.5 to 1 day's credit for the initial custody period (20 days) and 2 to 1 credit for the period after the verdict (up to today's date – or 158 days according to my calculations). In my view, the extra harsh conditions that Mr. Gaudrault faced in Remand during COVID is reason for the extra .5/day recognition in his sentence. The total is 178 days credit so that the total time left to serve is approximately 8 years.

Conclusion

[49] To summarize, I sentence Mr. Gaudrault to 8 and a half years on count 1, and 7 years, to be served concurrently, on count 2. I also allow a credit in the amount of 178 days for pre-sentencing detention.

[50] I also make a Consent Order for forfeiture of the cocaine, two cell phones, and his passport that was seized at the border. In addition, I grant the s. 109 and s. 487.451 ancillary Orders.

Heard on the 13th day of May, 2021.
Dated at the City of Calgary, Alberta this 9th day of June, 2021.

K.M. Eidsvik
J.C.Q.B.A.

Appearances:

Kent Brown
Dominic Puglia
for the Crown

Sean Fagan and Rosie Murphy
for the Offender