Citation: *R.* v. *Lee*, 2007 YKTC 70 Date: 20070919
Docket: T.C. 06-00708A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Luther

REGINA

v.

JACOB KWONG SANG LEE

Appearances:
Eric Marcoux Counsel for Crown
John Conroy Counsel for Defence

REASONS FOR SENTENCING

[1] LUTHER T.C.J. (Oral): The accused before me today has pled guilty to two counts. Count 3, on or about the 17th day of February, 2007, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that he did traffic in a substance included in Schedule I, to wit: cocaine, contrary to s. 5(1) of the *Controlled Drugs and Substances Act*. Count 4, on or about the 17th day of February, 2007, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that he did traffic in a substance included in Schedule II, to wit: cannabis marihuana, contrary to s. 5(1) of the *Controlled Drugs and Substances Act*.

[2] The trafficking in each instance was the transporting of 5.2 kilograms of cocaine and approximately 45 kilograms of marihuana, or 100 pounds, from B.C. into this Territory. The vehicle that the offender was driving was searched by the RCMP after they obtained a warrant, and in this model year 2000 white van, they discovered, amongst restaurant supplies, these illegal substances. The offender was cooperative with the police. There was no evidence of any weapons.

[3] The offender is a 47-year-old male born in Hong Kong, coming to Canada in 1974, obtaining citizenship in 1981, and moving to this Territory in 2001. He is a restaurant operator, father of two, stepfather of three adult children, and by indications from the letters of reference, a hard-working individual, sociable and good to his family.

[4] The offender does have a very significant and troubling record, including, in 1991, from Vancouver, B.C., possession of a narcotic for the purpose of trafficking, s. 4(2) of the *Narcotic Control Act*, for which he was given a fine of $800 or, in default, 30 days. This apparently involved a very small amount of heroin.

[5] Most troubling is the record from Washington, U.S.A. in December of 1994. On his record, there are listed five counts: conspiracy to import heroin, conspiracy to distribute heroin, travel in aid of racketeering, importation of heroin, possession of heroin with intent to distribute, for which he was sentenced, according to U.S. law, to a total of 235 months imprisonment. This apparently involved two kilograms of heroin imported into the U.S. from Asia. These crimes had nothing to do with Canada. In the year 2000, this offender was treaty-transferred to B.C. from the U.S. In March 2001, he was placed on parole, and the Court notes this warrant expiry date is 2013.

[6] Naturally, there was a considerable amount of work that needed to be done by both counsel, and the Court accepts the submission that this offender pled guilty at an early opportunity.

[7] There are not an abundance of mitigating factors in this case. The most aggravating factor is that this parolee, who was serving a very long sentence, for totally selfish reasons, proceeded to bring into this Territory a substantial quantity of cocaine and marihuana with total and utter and callous disregard for the well-being of vulnerable citizens of the Yukon Territory. This offender was prepared to ease his own 16-hour work days by a nefarious retirement plan which would result in many addicts' years of 24 hour per day enslavement. I am sure that he was sorry that he got caught. This offender made a catastrophic mistake, an evil error of judgment. In his letter of August 2007, there is not even a hint of remorse.

[8] This is the biggest drug case, prosecution, in the history of the Yukon and must be met with a sentence which clearly emphasizes denunciation and deterrence. The purpose and principles of sentencing are well laid out in the *Criminal Code* and s. 718:

a) to denounce 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 and to the community.

In this particular case, the Court is giving tremendous priority to (a), (b) and (c); however, not losing sight of the other principles set out in s. 718 or s. 718.2.

[9] It is my opinion that sentencing here must go beyond that of previous Yukon cases and in my view is more similar to *R*. v. *Jefferies*, 1996 B.C.C.A., B.C.J. No. 369. The Court affirms the principles from 25 years ago laid out by Judge Stuart in *R*. v. *Curtis*, [1982] Y.J. No. 4. Paragraph 11:

> In sentencing for any offence, local conditions and problems are relevant sentencing considerations. In sentencing drug offences in Yukon, local conditions and problems are relevant considerations.
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> People in remote Yukon communities are usually less aware of the destructive potential of drugs. Residents of these communities do not have access to the same preventive and curative resources. Limited professional resources to counsel against experimenting with drugs and the absence of extensive recreational activities, makes anyone in isolated communities relatively easy prey for drug traffickers. In small remote northern communities especially, the destructive and disruptive impact of even small amounts of drugs can be severe. Alcohol has well established its viciously destructive and insensitive capacity to undermine the spirit and well-being of life in small northern communities. Drugs pose an even greater threat.
>
> The vulnerability of people and their communities in Yukon to the destructive potential of drug abuse, prompts the court to clearly signal by severe deterrent sentences that drug offences in Yukon are particularly condemnable.

[10] In *R*. v. *Callahan*, [1990] Y.J. No. 64, a decision of Judge Lilles from 1990:

> Further, and most importantly, the impact of a major drug supplier such as Callahan on a Territory such as the Yukon with its small population base and rural values is likely to be significant. In Montreal, Mireault may be considered to be nothing more than a small-time supplier. In relation to what goes on in Montreal on a daily basis, his activities could be considered quite modest.

[11] Taking a look at the decision in *R*. v. *Do*, [2000] Y.J. No. 150, paragraph 11:

> It is clear that Xuan Man Do was primarily dealing cocaine, a deadly drug which has been a plague in the Yukon for many years.

Paragraph 13:

> It is significant that Xuan Man Do was not merely a street-level trafficker. Rather, he was an entrepreneur, and operating on a level not previously seen in the Yukon. The courts have a public duty to denounce this sort of wrongdoing, and to the extent which this is possible, to deter Xuan Man Do and others also. In other words, to deliver a message that, in the final analysis, crime does not pay.

[12] I want to emphasize that crime does not pay for the immediate, nor should it be paying for someone's retirement.

[13] In paragraph 16, Judge Barnett recognized that this was a young man who had no previous convictions and that he pled guilty, and that he had already served the equivalent of a 20-month sentence, but, on the other hand, he was the main player in Whitehorse in a very serious criminal enterprise and that his guilty plea is more recognition of the writing on the wall than any true repentance and remorse.

[14] Paragraph 18:

> If Xuan Man Do had not already served the equivalent of a 20-month sentence, I would consider that a global sentence between six and seven years would be fit. The sentence on Count 1 that I now impose is 54 months.

[15] It is my opinion that the importation of cocaine and marihuana is not always more serious than trafficking, especially if it involves transportation of these drugs to the North. The Court notes that over the years there has been a change in the minimum penalties for importation of drugs. One must accept the realities of life in the North and the vulnerability of many of its citizens. The Court does recognize that this present

offender was not a kingpin, but nonetheless, he was a major courier. Given the age difference between him and Mr. Do, and given the very significant record of this offender, the sentence, in my view, should be more than that was imposed on Mr. Do.

[16] The Court notes that like *R.* v. *O'Brien*, [2002] Y.J. No. 130, there is a similarity here. In *O'Brien,* at paragraph 9, Chief Judge Faulkner said:

> It must be said that this was not the perhaps more usual and somewhat pathetic case of the addict seeking to sustain his habit. Rather, this was a purely for profit, commercial operation.

[17] Earlier this afternoon I brought to counsel's attention a very recent case from the B.C. Court of Appeal in *Furey,* that is *R.* v. *David Brendon Furey*, a decision of the BCCA from the 18th of July, 2007, [2007] B.C.J. No. 1901, and I outlined to them the concerns that I had with the joint submission on sentence. Counsel largely addressed these concerns to my satisfaction.

[18] During the break, I had occasion to re-examine a relatively recent decision of the Newfoundland Court of Appeal, *R.* v. *Jody Keith Druken,* [2006] N.J. No. 326.

[19] That case also dealt with the issue of joint submission. Paragraphs 17 to 19 read as follows:

> To summarize, a sentencing judge should depart from a joint submission by counsel only if accepting the submission would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.
>
> In making this determination, the question of whether the sentence is unreasonable must be considered. This requires an assessment of the facts as presented to the court, normally in the form of an agreed statement. Counsel must provide sufficient facts to permit the sentencing judge to determine whether the sentence is reasonable in the circumstances. The court is bound by the agreed statement of facts; the sentencing judge cannot "find" additional

> facts. As well, any inferences the judge may draw must follow clearly from what it set out in the agreed statement. It is preferable that counsel provide a factual basis for the judge to assess the proposed sentence that does not require the judge to draw factual inferences.
>
> The acceptable range of sentence must be such that the accused has an incentive to plead guilty, i.e. a *quid pro quo*. That requires an adjustment down from the normal range of sentence to take account of the accused's agreement to forego his right to a trial. Of course, there must be some minimum, having regard to the facts of each case, below which a proposed sentence cannot be accepted.

[20] The joint submission proposal of eight years less the six months, taking into account time spent in custody, is, in my view, somewhat low; however, I do not think that it brings the administration of justice into disrepute, nor do I think it would otherwise be contrary to the public interest. My feeling is that a global sentence of ten years would have been more appropriate, but nonetheless, considering the principles laid out by both the Newfoundland Court of Appeal and the B.C. Court of Appeal, the Court is satisfied to impose the sentence as recommended by both counsel, that being seven years, six months.

[21] This sentence will run consecutive to any period of imprisonment to which the offender is already subject, and that will be on Count 3. The sentence on Count 4 will run concurrently to Count 3. That sentence will be the same, seven years, six months.

[22] Given the fact that this offender is going to be looking at many years in custody, the Court feels that the imposition of a victim surcharge is relatively meaningless, and as such, I will not impose it. Under s. 109 of the *Criminal Code*, the Court makes an order, the duration of which will be ten years. Furthermore, all items seized, which have not been returned, are subject to forfeiture to Her Majesty the Queen.

[23] Are there any questions, then, for the Crown or the defence?

[24] MR. CONROY: I think we had said seven years five months, but we are not going to quibble about a month.

[25] THE COURT: Okay. Mr. Marcoux.

[26] MR. MARCOUX: Nothing to add.

[27] THE COURT: Okay.

[28] THE CLERK: The remaining charges?

[29] MR. MARCOUX: Yes, of course. As for the remaining counts for Mr. Lee, I ask that a stay of proceedings would be entered.

[30] THE COURT: Okay, that is Counts 1 and 2 for him.

[31] MR. MARCOUX: Yes.

[32] THE COURT: How about for Frank Yat Fan Tse, what is the situation there?

[33] MR. MARCOUX: Yes, in light of Mr. Lee's admission, and considering the lack of evidence showing that Mr. Tse was more than a mere passenger, I will also direct a stay of proceedings on all charges against Mr. Tse.

[34] THE COURT: Okay. And is there anything else then on this particular case?

[35] MR. CONROY: I do not think so, Your Honour.

[36] THE COURT: Okay. Mr. Lee, will you stand please. You have made a very major mistake. You are going to be paying a heavy penalty for that. It is most important that you get your life together, do whatever training you can take part in in the federal institution. You are going to be an older man when you get out, you could be approaching 60 years of age, but whatever temptation there might be in the future, do not take the easy and criminal way, do you understand that?

[37] THE ACCUSED: Yes.

[38] THE COURT: That is all.

[39] THE CLERK: I just have a question, Your Honour, sorry, in regards to the sentence, previously it was eight years having been given credit for seven months?

[40] THE COURT: Six months.

[41] THE CLERK: Six months?

[42] THE COURT: Yes.

[43] THE CLERK: So the sentence is now seven years, six months on each count?

[44] THE COURT: Yes.

[45] THE CLERK: Which count is the s. 109 to apply to, both counts?

[46] THE COURT: Yes.

[47] THE CLERK: Thank you.

[48] THE COURT: It still only runs for ten years.

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LUTHER T.C.J.