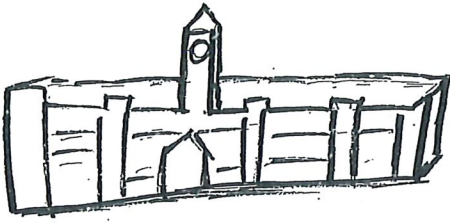


R.v. Sharma 2022 SCC 39

PARLIAMENT

Sentencing reforms of 1995....



here are two gifts for our sentencing judges!

FUNDAMENTAL PRINCIPLE?
s. 718.1 a sentence must be proportionate to
• gravity of the offence +
• degree of responsibility of the offender



SENTENCING JUDGE

Restraint!
• all available sanctions other than prison that are reasonable in the circumstances should be considered for all offenders



WITH PARTICULAR ATTENTION TO CIRCUMSTANCES OF ABORIGINAL OFFENDERS

Conditional Sentence!



IF..... the court may order that the offender serve the sentence in the community...

RESTRAINT

s.718.2(e) A court that imposes a sentence shall also take into consideration the following principles: **all available sanctions other than imprisonment** that are reasonable in the circumstances **should be considered for all offenders**, with **particular attention to the circumstances of aboriginal offenders**.

Conditional Sentence (2003)

742.1 Where a person is convicted of an offence, **except an offence that is punishable by a minimum term of imprisonment**, and the court

- (a) imposes a sentence of **imprisonment of less than two years**, and
- (b) is satisfied that serving the sentence in the community would **not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2**,

the court may, for the purpose of supervising the offender's behaviour in the community, **order that the offender serve the sentence in the community**, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

Conditional Sentence (2006)

742.1 If a person is convicted of an offence, **other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment**, and the court imposes a sentence of **imprisonment of less than two years** and is satisfied that the service of the sentence in the community would **not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2**, the court may, for the purpose of supervising the offender's behaviour in the community, **order that the offender serve the sentence in the community**, subject to the offender's compliance with the conditions imposed under section 742.3.

Conditional Sentence (2015)

741.2 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if ...

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
 - (i) resulted in bodily harm;
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and
- (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
 - (i) section 144 (prison breach);
 - (ii) section 254 (criminal harassment);
 - (iii) section 271 (sexual assault);
 - (iv) section 279 (kidnapping);
 - (v) section 279.02 (participating in persons — material benefit);
 - (vi) section 281 (abduction of person under fourteen);
 - (vii) section 333.1 (motor vehicle theft);
 - (viii) paragraph 324(a) (theft over \$5000);
 - (ix) paragraph 348(1)(c) (breaking and entering a place other than a dwelling-house);
 - (x) section 349 (being unlawfully in a dwelling-house); and
 - (xi) section 438 (arson for fraudulent purpose).

Sharma, 20 year old Ojibwa mother of infant child, carries 2kg cocaine over the border. Pleads guilty. Is good candidate for conditional sentence in community. Judge can't do it as this is an excluded offence. Thus, judge cannot use Restraint principle.

Issues?

Violation of s.15(1) EQUALITY?

Violation of s.7's LIFE, LIBERTY, SECURITY OF PERSON (w/o principles of fundamental justice?)

741.2 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if ...

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
 - (i) resulted in bodily harm,
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and
- (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
 - (i) section 144 (prison breach),
 - (ii) section 264 (criminal harassment),
 - (iii) section 271 (sexual assault),
 - (iv) section 279 (kidnapping),
 - (v) section 279.02 (trafficking in persons — material benefit),
 - (vi) section 281 (abduction of person under fourteen),
 - (vii) section 333.1 (motor vehicle theft),
 - (viii) paragraph 334(a) (theft over \$5000),
 - (ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
 - (x) section 349 (being unlawfully in a dwelling-house), and
 - (xi) section 435 (arson for fraudulent purpose).

THE MAJORITY:

Brown and Rowe writing, with Wagner, Côté and Moldaver concurring

1. NO BREACH OF s.15

- Sharma fails step 1 of s. 15(1) analysis [fails evidentiary burden to show provisions had a disproportionate impact on Indigenous offenders]
- "There is no general, positive obligation on the state to remedy social inequalities or enact remedial legislation, nor is the legislature bound to its current policies."

2. NO BREACH OF s.7

- purpose of limits is to enhance consistency in sentencing; maximum sentences are reasonable proxy for seriousness of offence (thus connected to objective)

THE DISSENT:

Karakatsanis writing, with Martin, Kasirer and Jamal concurring

1. YES BREACH OF s.15

- impairs remedial effect of s.718(2)(e) which directs judge to consider alternative to imprisonment "with attention to the circumstances of Aboriginal offenders"; provisions require judges to impose higher sentences than they otherwise would; they deny offenders sentencing option that better accord with Indigenous visions of justice.
- limits not justified under s.1: a pressing and substantial objective; a rational connection of removing conditional sentences for some crimes; not minimally impairing, nor proportionality between salutary and deleterious effects.

2. YES BREACH OF s.7

- the exclusions are overbroad. Maximum sentences are a flawed proxy for gravity of offence. Impact bears no connection to provision's purposes.