



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Pham, 2013 SCC 15, [2013] 1 S.C.R. 739

**DATE:** 20130314

**DOCKET:** 34897

**BETWEEN:**

**Hoang Anh Pham**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Canadian Association of Refugee Lawyers, Criminal Lawyers' Association of  
Ontario, British Columbia Civil Liberties Association, Canadian Council for  
Refugees and Canadian Civil Liberties Association**

Intervenors

**CORAM:** LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 26)

Wagner J. (LeBel, Fish, Abella, Rothstein, Moldaver and  
Karakatsanis JJ. concurring)

**APPEAL HEARD AND JUDGMENT RENDERED:** January 18, 2013

**REASONS DELIVERED:** March 14, 2013

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R. v. Pham, 2013 SCC 15, [2013] 1 S.C.R. 739

**Hoang Anh Pham**

*Appellant*

*v.*

**Her Majesty The Queen**

*Respondent*

and

**Canadian Association of Refugee Lawyers,  
Criminal Lawyers' Association of Ontario,  
British Columbia Civil Liberties Association,  
Canadian Council for Refugees and  
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*Interveners*

**Indexed as: R. v. Pham**

**2013 SCC 15**

File No.: 34897.

Hearing and judgment: January 18, 2013.

Reasons delivered: March 14, 2013.

Present: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Criminal law — Sentencing — Considerations — Collateral consequences of sentence — Accused sentenced to two years' imprisonment — Sentencing judge not made aware that sentence would result in loss of right to appeal removal order under Immigration and Refugee Protection Act — Court of Appeal refusing to vary sentence to two years less a day — What weight should be attributed to collateral consequences in sentencing? — Whether sentence can be varied by appellate court on basis that accused would face collateral consequences — Criminal Code, R.S.C. 1985, c. C-46, ss. 718.1, 718.2.*

The accused, a non-citizen, was convicted of two drug-related offences. In light of a joint submission by the Crown and defense counsel, the sentencing judge imposed a sentence of two years' imprisonment. Under the *Immigration and Refugee Protection Act*, a non-citizen sentenced to a term of imprisonment of at least two years loses the right to appeal a removal order against him or her. In the present case, neither party had raised the issue of the collateral consequences of a two-year sentence on the accused's immigration status before the sentencing judge. The majority of the Court of Appeal dismissed the appeal and refused to vary the sentence.

*Held:* The appeal should be allowed and the sentence of imprisonment reduced to two years less a day.

A sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. The significance of collateral immigration consequences will depend on the facts of the case. However, it remains that they are but one of the relevant factors that a sentencing judge may take into account in determining an appropriate sentence. Those consequences must not be allowed to skew the process either in favour of or against deportation. Further, it remains open to the sentencing judge to conclude that even a minimal reduction of a sentence would render it inappropriate in light of the gravity of the offence and the degree of responsibility of the offender.

An appellate court has the authority to vary a sentence if the sentencing judge was not aware of the collateral immigration consequences, or if counsel had failed to advise the judge on this issue. Where the matter was not raised before the sentencing judge and where the Crown does not give its consent to the appeal, some evidence should be adduced for consideration by the Court of Appeal. In the case at bar, the sentencing judge was unaware of the sentence's collateral immigration consequences and the Crown had conceded that sentence should be reduced by one day. It was wrong for the Court of Appeal to refuse the sentence reduction based

solely on the fact that the accused had a prior criminal record or on its belief that the accused had abused the hospitality that had been afforded to him by Canada. It is therefore appropriate to grant the variation of the sentence from two years to two years less a day.

### **Cases Cited**

**Referred to:** *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Badhwar*, 2011 ONCA 266, 9 M.V.R. (6th) 163; *R. v. Hamilton* (2004), 72 O.R. (3d) 1; *R. v. Guzman*, 2011 QCCA 136 (CanLII).

### **Statutes and Regulations Cited**

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 5(2), 7(1).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 718, 718.1, 718.2.

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 64.

### **Authors Cited**

Manson, Allan. *The Law of Sentencing*. Toronto: Irwin Law, 2001.

Ruby, Clayton C., Gerald J. Chan and Nader R. Hasan. *Sentencing*, 8th ed. Markham, Ont.: LexisNexis, 2012.

APPEAL from a judgment of the Alberta Court of Appeal (Martin, Watson and McDonald JJ.A.), 2012 ABCA 203, 288 C.C.C. (3d) 305, 533 A.R. 192, 557 W.A.C. 192, 11 Imm. L.R. (4th) 1, [2012] A.J. No. 672 (QL), 2012 CarswellAlta 1109, affirming a sentence imposed by Barley J. Appeal allowed.

*Erika Chozik and Alias Sanders*, for the appellant.

*Ronald C. Reimer and Donna Spaner*, for the respondent.

*John Norris and Melinda Gayda*, for the intervener the Canadian Association of Refugee Lawyers.

*P. Andras Schreck and Apple Newton-Smith*, for the intervener the Criminal Lawyers' Association of Ontario.

*Lorne Waldman, Clare Crummey and Tamara Morgenthau*, for the intervener the British Columbia Civil Liberties Association.

*Barbara Jackman and Carole Simone Dahan*, for the intervener the Canadian Council for Refugees.

*Matthew S. Estabrooks and D. Lynne Watt*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

WAGNER J. —

## I. Introduction

[1] The central issue in this appeal is whether a sentence otherwise falling within the range of fit sentences can be varied by an appellate court on the basis that the offender would face collateral consequences under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), s. 64, that were not taken into account by the sentencing judge.

[2] Since the Crown conceded that, had it been aware of the collateral consequences at the time of the sentencing hearing, it would have agreed to a sentence of two years less a day, this Court decided at the conclusion of oral argument to allow the appeal and reduce the sentence from two years to two years less a day. The following are the reasons for that decision.

## II. Background

[3] Hoang Anh Pham was convicted on charges of producing marihuana and possessing it for the purpose of trafficking contrary to ss. 7(1) and 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. In light of a joint submission

by the Crown and counsel for the appellant, the Provincial Court of Alberta imposed a sentence of two years' imprisonment.

[4] Mr. Pham appealed the sentence, seeking to have it reduced by one day. He argued that the sentencing judge was not aware of and, for this reason, did not consider the collateral consequences of a sentence of two years' imprisonment on his immigration status. Under the *IRPA*, a non-citizen sentenced in Canada to a term of imprisonment of at least two years loses the right to appeal a removal order against him or her. Considering that a sentence of two years less a day, like the imposed sentence of two years, remained within the range of appropriate sentences, the Crown conceded that the sentence should be reduced by one day. It must be noted that neither the appellant's counsel nor the Crown had raised these issues before the sentencing judge, who apparently was not aware of the collateral consequences.

[5] Despite the Crown's concession, the majority of the Court of Appeal of Alberta refused to vary the appellant's sentence by one day, holding that, in the circumstances, allowing the appeal from a sentence situated within the range of otherwise fit sentences would inappropriately undermine the provisions of the *IRPA* (2012 ABCA 203, 533 A.R. 192, at paras. 24-25). The dissenting judge would have allowed the variation, noting that, had the appellant's counsel been aware of the collateral consequences of a two-year sentence in this case, a joint submission for a sentence of two years less a day would have been agreed upon (para. 33).

### III. Analysis

[6] Proportionality is a fundamental principle of sentencing. Section 718.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[7] LeBel J. explained proportionality as follows in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37:

Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or

mitigating circumstances (s. 718.2(a) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances.

[9] As a corollary to sentence individualization, the parity principle requires that a sentence be similar to those imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b) of the *Criminal Code*). In other words, "if the personal circumstances of the offender are different, different sentences will be justified" (C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at §2.41).

[10] Ultimately, the sentence that is imposed must be consistent with the fundamental purpose of sentencing, which is to contribute to respect for the law and the maintenance of a just, peaceful and safe society. The sentence must have one or more of the objectives of denunciation, general and specific deterrence, separation of offenders from society if need be, rehabilitation, reparations to victims for harm done to them, promotion of a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community (s. 718 of the *Criminal Code*).

[11] In light of these principles, the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such

factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(a) of the *Criminal Code*). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(d) of the *Criminal Code*). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender's rehabilitation.

[12] However, the weight to be given to collateral consequences varies from case to case and should be determined having regard to the type and seriousness of the offence. Professor Manson explains this as follows:

As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation. . . .

. . .

The mitigating effect of indirect consequences must be considered in relation both to future re-integration and to the nature of the offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel. Here, one can include loss of financial or social support. People lose jobs; families are disrupted; sources of assistance disappear. Notwithstanding a need for denunciation, indirect consequences which arise from stigmatization cannot be isolated from the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate to the offence. [Emphasis added.]

(*The Law of Sentencing* (2001), at pp. 136-37)

[13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.

[14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

[16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

[17] In *R. v. Badhwar*, 2011 ONCA 266, 9 M.V.R. (6th) 163, the offender was convicted of criminal negligence causing death while street racing and failure to stop at the scene of an accident. He was sentenced to 30 months (less 5 months for pre-trial custody) on the first count and 12 months consecutive on the second. On appeal, he did not seek a reduction of his global sentence of 37 months; rather, he asked the court to adjust his sentence to 23 months and 19 months consecutive in order to avoid the collateral consequences of a sentence of 24 months or more, namely the loss of his immigration appeal rights. I agree with Moldaver J.A. (as he then was), who, in refusing to grant the adjustment, wrote the following, at paras. 42-45:

In seeking to have his sentence adjusted, the appellant does not suggest that the trial judge erred in imposing a penitentiary sentence on the charge of criminal negligence causing death — nor could he. This court ... upheld a 30 month sentence for [the offence of criminal negligence causing death while street racing] in respect of Mr. Multani (2010), 261 O.A.C. 107 (Ont. C.A.).

Significantly, in Multani's case, the court refused to give effect to Mr. Multani's submission that the sentence of 30 months should be reduced to 23 months for reasons relating to his immigration status. At para. 3 of the decision, the court noted that "while the deportation consequences of the sentence may be a proper factor to consider in determining the appropriate sentence in certain cases, immigration consequences cannot take a sentence out of the appropriate range."

That principle applies equally to the appellant. In his case, somewhat ironically, he seeks to benefit from the fact that he was convicted of two offences and therefore can seek the adjustments he is requesting without interfering with the overall length of his sentence — something Mr. Multani could not do given that he was only convicted of the single offence of criminal negligence causing death.

No matter how one chooses to come at the issue, the bottom line remains the same. Courts ought not to be imposing inadequate or artificial sentences at all, let alone for the purpose of circumventing Parliament's will on matters of immigration.

[18] It follows that where a sentence is varied to avoid collateral consequences, the further the varied sentence is from the range of otherwise appropriate sentences, the less likely it is that it will remain proportionate to the gravity of the offence and the responsibility of the offender. Conversely, the closer the varied sentence is to the range of otherwise appropriate sentences, the more probable it is that the reduced sentence will remain proportionate, and thus reasonable and appropriate.

[19] I adopt the position asserted by Doherty J.A. in *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at paras. 156 and 158:

. . . the risk of deportation cannot justify a sentence which is inconsistent with the fundamental purpose and the principles of sentencing identified in the *Criminal Code*. The sentencing process cannot be used to circumvent the provisions and policies of the *Immigration and Refugee Act*. As indicated above, however, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender  
....

...

. . . If a trial judge were to decide that a sentence at or near two years was the appropriate sentence in all of the circumstances for [the offender], the trial judge could look at the deportation consequences for

[the offender] of imposing a sentence of two years less a day as opposed to a sentence of two years. I see this as an example of the human face of the sentencing process. If the future prospects of an offender . . . can be assisted or improved by imposing a sentence of two years less a day rather than two years, it is entirely in keeping with the principles and objectives of sentencing to impose the shorter sentence. While the assistance afforded to [the offender] by the imposition of a sentence of two years less a day rather than two years may be relatively small, there is no countervailing negative impact on broader societal interests occasioned by the imposition of that sentence . . . . [Citations omitted.]

[20] Accordingly, the sentencing judge is not compelled in all circumstances to adjust a sentence in order to avoid the impact of collateral immigration consequences on the offender. It remains open to the judge to conclude that even a minimal reduction, i.e. from two years' imprisonment to two years less a day, would render the sentence inappropriate for the particular offence and the particular offender. Collateral immigration consequences are but one relevant factor amongst many others related to the nature and the gravity of the offence, the degree of responsibility of the offender and the offender's personal circumstances.

[21] The reasons of Doyon J.A. in *R. v. Guzman*, 2011 QCCA 136 (CanLII), provide an illustration of this approach to the treatment of collateral immigration consequences in sentencing. In that case, the Quebec Court of Appeal was asked to grant a minimal variation of a sentence to ensure that the sentence would not have adverse consequences for the offender's immigration status. Doyon J.A. declined to acquiesce in this request, stating that, in light of the facts of the case, a reduction of

the sentence, even a modest reduction of one day, would be both unfit and inconsistent with the principles of sentencing. He held as follows, at paras. 102-3:

[TRANSLATION] In summary, the status of the appellants and the impact of the prison sentences on their right to appeal to the Immigration Appeal Division are relevant circumstances and must be taken into consideration. However, given the circumstances in which the offences were committed, their seriousness, the profile of the appellants, and the objectives and principles of sentencing set out in the *Criminal Code*, I am of the view that the sentences inflicted on the appellants are fit even if they are not reduced by one day, as the appellants seek.

. . . the near total lack of factors suggesting a real possibility of rehabilitation and change of behaviour on the part of the appellants convinces me that, even if the judges had been aware of all of the relevant facts, they would not have imposed sentences of less than two years' imprisonment solely to allow the appellants to preserve their right of appeal. [Emphasis added.]

[22] In sum, collateral immigration consequences may be just as relevant in sentencing as the collateral consequences of other legislation or of circumstances specific to the offender.

[23] Where the issue of immigration consequences is brought to the trial judge's attention and the trial judge applies the proper sentencing principles but nonetheless decides on a two-year sentence, then, absent fresh evidence, deference is owed to that decision. Where this issue has not been raised before the trial judge and the Crown does not give its consent, an affidavit or some other type of evidence should then be adduced for consideration by the Court of Appeal.

[24] An appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue. In such circumstances, the court's intervention is justified because the sentencing judge decided on the fitness of the sentence without considering a relevant factor: *M. (C.A.)*, at para. 90. As I explained above, however, the aim of such an intervention is to determine the appropriate sentence in light of the facts of the particular case while taking all the relevant factors into account. Although there will be cases in which it is appropriate to reduce the sentence to ensure that it does not have adverse consequences for the offender's immigration status, there will be other cases in which it is not appropriate to do so.

[25] In the case at bar, the sentencing judge was not aware of the sentence's collateral immigration consequences, and the appellate court accordingly had the authority to intervene. The Crown conceded both in the Court of Appeal and at the hearing in this Court that a reduced sentence of two years less a day remains within the range of otherwise fit sentences and that the imposed sentence of two years' imprisonment should be reduced by one day. The Crown also agreed that the reduced sentence is the one that the sentencing judge would have imposed in the case at bar had he been aware of the collateral immigration consequences (*R.F.*, at para. 69). It was wrong for the Court of Appeal to refuse the one-day reduction solely on the basis that the appellant had a prior criminal record or that it felt that he had "abused the

hospitality that [had] been afforded to him by Canada” (para. 24). It is therefore appropriate to grant the variation of the sentence sought by the appellant.

#### IV. Conclusion

[26] For these reasons, the Court allowed the appeal at the conclusion of the hearing and reduced the sentence of imprisonment from two years to two years less a day.

*Appeal allowed.*

*Solicitors for the appellant: Chozik Law, Toronto; Alias Sanders, Calgary.*

*Solicitor for the respondent: Public Prosecution Service of Canada, Edmonton.*

*Solicitors for the intervener the Canadian Association of Refugee Lawyers: Simcoe Chambers, Toronto; Refugee Law Office, Toronto.*

*Solicitors for the intervener the Criminal Lawyers’ Association of Ontario: Schreck Presser, Toronto; Berkes Newton-Smith, Toronto.*

*Solicitors for the intervener the British Columbia Civil Liberties Association: Waldman & Associates, Toronto.*

*Solicitors for the intervener the Canadian Council for Refugees: Jackman Nazami & Associates, Toronto; Refugee Law Office, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties Association: Gowling Lafleur Henderson, Ottawa.*