

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING,	) <u>Julian Kim</u>
	) for the Crown
- and -	)
	)
MANVEER SINGH, CURTIS SUGIRA	) <u>Michael P. Cook</u>
NDATIRWA, MARCUS REMINGTON BURT,	) for the accused
	) Curtis Sugira Ndatirwa
accused.	)
	)
	) <u>Judgment Delivered:</u>
	) September 25, 2024

### **SAULL J.**

#### **INTRODUCTION**

[1] On September 5, 2024, I sentenced Curtis Sugira Ndatirwa (Ndatirwa) to 15-years imprisonment for trafficking fentanyl with written reasons to follow. These are those reasons.

[2] Ndatirwa pleaded guilty before me to one count of possession for the purpose of trafficking a controlled substance to wit: fentanyl contrary to s. 5(2) of the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19 (the "***CDSA***").

[3] This is an extremely serious matter as reflected in the sentencing provisions of the **CDSA**. Pursuant to s. 5(3)(a) of the **CDSA**, Ndatirwa is liable to be imprisoned for life.

[4] As part of an agreement with Crown counsel, Ndatirwa has admitted that he is a high-level trafficker of fentanyl, and although not set out in the count to which he has pleaded guilty, he also admits to trafficking in cocaine and methamphetamine in respect of the same transaction, and being in possession of a weapon. All other charges in the indictment against him were stayed by the Crown.

[5] With respect to the co-accused, Marcus Remington Burt ("Burt"), he has had all charges against him stayed by the Crown.

[6] The co-accused Manveer Singh ("Singh") pleaded guilty to one count of trafficking in fentanyl. Singh admitted that he is a high-level drug courier. As such, he was sentenced to 12-years imprisonment by another judge of this Court.

[7] Insofar as Ndatirwa is concerned, the Crown submits that he should be sentenced to 15-years imprisonment. Defence counsel submits that he should be sentenced to 9-years imprisonment.

[8] Over and above the agreements with counsel, three exhibits were filed at the sentencing hearing:

- i. Exhibit S1 - a Pre-Sentence Report respecting Ndatirwa ("PSR")
- ii. Exhibit S2 - 18 Letters of Reference
- iii. Exhibit S3 - Seizing Narrative and Photos

## **FACTS**

[9] The facts underlying the offence are agreed to by counsel and were read into the court record. In summary, the Winnipeg Police Service entered into a **CDSA** investigation that centered around Ndatirwa. Police had been collecting intelligence and conducting surveillance on him for some time when on November 29, 2021, they followed Ndatirwa in his vehicle from a location in Winnipeg, to Deacons Corner in the R.M. of Springfield, just east of Winnipeg on Highway 1. At this location, he met with the co-accused, Singh, a semi-truck driver, who had parked the semi-truck he was driving at that location. Singh handed Ndatirwa two bags and Ndatirwa placed them into his vehicle. This was what is commonly referred to as a "reload" where Singh, a drug courier from B.C., was replenishing Ndatirwa's drug supply.

[10] After putting the two bags into his vehicle, Ndatirwa drove back to Winnipeg where he was stopped and arrested a few blocks from his apartment. A search of his vehicle revealed the following drugs that were seized:

- 2 kilograms of fentanyl;
- 15 kilograms of methamphetamine; and
- 1 kilogram of cocaine.

[11] The co-accused Burt, who was observed going in and out of Ndatirwa's apartment on the previous day, was arrested in the front lobby of the apartment block. A search warrant was sought and granted for the suite. The warrant was executed, and the following items were seized:

- 77 grams of fentanyl;

- 4 kilograms of methamphetamine;
- \$8,000 in cash;
- packaging materials;
- documents in the name of Ndatirwa and Burt;
- scales; and
- score sheets.

[12] Singh was later stopped in his semi-truck by the Brandon Police Service who arrested him and seized the following:

- 410 grams of fentanyl;
- daily logbooks in Singh's name; and
- \$29,440 in cash.

### **POSITION OF THE CROWN**

[13] In asking for a sentence of 15 years, the Crown submits that Ndatirwa, as a high-level drug trafficker, is fastened with a high degree of moral culpability. He is not an addict. His involvement in the trafficking of these drugs is part of a sophisticated venture purely for profit. The authorities are clear that the primary sentencing considerations in cases such as this one are denunciation and deterrence. Rehabilitation is a lesser or secondary consideration.

[14] In its submissions, the Crown emphasizes the very significant danger of fentanyl, and the harm caused by drug dealers preying on vulnerable, addicted people. The Crown takes the position that based on the case law, the amounts of methamphetamine and cocaine seized by themselves, justify a prison sentence in "double digits".

[15] It is noteworthy here that even though Ndatirwa admits that he is a high-level trafficker in fentanyl, in addition to the significant quantity of fentanyl and other drugs found in Ndatirwa's car and in his apartment, there were several other relevant indicia of trafficking in drugs as a high-level trafficker, as evidenced by Exhibit S3: the Seizing Narrative and Photos.

[16] Over and above those already mentioned, the Crown points to several additional factors that should bear on sentence:

- Although Ndatirwa pleaded guilty, he did so only after a preliminary hearing was completed;
- His institutional misconduct that is delineated in the Pre-Sentence Report "PSR" (Exhibit S1);
- When arrested, Ndatirwa was illegally in possession of a weapon to wit: bear spray, which was found under his bed in his apartment;
- The drug operation under consideration here was conducted in a residential area from a large apartment complex, in the heavily populated south end of Winnipeg. It is well known that fentanyl is very dangerous when airborne; and
- Ndatirwa's co-accused, Singh, was sentenced to 12 years as a courier in the same operation. Singh pleaded guilty and had no record.

[17] The Crown submits in addition, the interprovincial connections in this case must be considered as an extremely aggravating factor. As is set out in the PSR, Ndatirwa is not from this province, and only came to Manitoba for the purpose of drug trafficking for this organized venture in order to pay off gambling debts. He was securing drugs from

interprovincial couriers, packaging them and then trafficking them at a high-level from his residence. He was very much in control of this organized venture; far more involved than a courier or mid-level trafficker.

[18] The Crown submits that, out of all of this, their suggestion of a 15-year sentence is “somewhat” low, but acceptable due primarily to the fact that Ndatirwa is a youthful offender with no record, who pleaded guilty, albeit after a preliminary hearing was conducted.

[19] The Crown submits that on her review of the cases: mid-level dealers seem to be getting about 8 to 15 years in Canada right now for fentanyl distribution.

### **POSITION OF THE DEFENCE**

[20] In suggesting that a sentence of 9 years is appropriate, defence counsel put forth a number of factors concerning Ndatirwa that are summarized below:

- He was 22-years of age when the incident arose;
- He has no previous record;
- He is intelligent and well educated, and so is well equipped to move forward after his release, in a positive way;
- He is low risk to re-offend;
- He has a huge support from family and friends. (See: Exhibit S1 and S2);
- He pleaded guilty; and
- the accused’s expression of remorse.

## **LEGAL FRAMEWORK**

[21] In sentencing the accused, I must be ever mindful of the fact that, notwithstanding that sentencing is an individualized exercise, it has a relationship to proportionality, which takes into account parity. As the Supreme Court of Canada stated in ***R. v. Lacasse***, 2015 SCC 64:

[53] ... Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.

[22] Between them, counsel have filed 8 cases for my consideration on this sentencing.

The Crown filed 5 cases, including:

1. ***R. v. Parranto***, 2021 SCC 46;
2. ***R v McLean***, 2022 MBCA 60;
3. ***R v Kamyar***, 2023 MBPC 39;
4. ***R. v. McKay***, 2024 MBPC 19; and
5. ***R. v. Singh***, 2024 MBKB 9.

The defence filed 3 cases including:

1. ***R v Petrowski***, 2020 MBCA 78;
2. ***R v Slotta***, 2020 MBCA 79; and
3. ***R. v. Da Daniel The Nguyen***, 2022 MBQB 130.

[23] Four years ago, in ***Petrowski*** the Manitoba Court of Appeal declined to set a range for trafficking in fentanyl. The Court expressed concern at that time there was not sufficient information available about the consequential harm caused by trafficking in

fentanyl, and no direction from the Supreme Court and other appellate courts across the country. (See: ***Petrowski*** at paras. 31 to 35)

[24] Since then, both the Supreme Court of Canada, in ***Parranto***, and the Manitoba Court of Appeal, in ***McLean***, have provided clear guidance as to which direction the Courts should go when sentencing in cases involving fentanyl.

[25] In ***McLean***, Mainella J.A. said the following respecting the decision in ***Parranto***:

[111] Based on a survey of 11 reported decisions from across Canada (including *Petrowski*), Brown and Martin JJ (on behalf of themselves and two other judges) commented that a national range of approximately “8 to 15 years” (at para 68) has arisen for those involved in the commercial wholesale trafficking of fentanyl in circumstances that would be considered to be mid-level or the beginning of high-level trafficking in Manitoba (see paras 68, 78). A careful review of those 11 decisions confirms that none deal with the situation of a mere courier. All of the cases involved independent dealers, the directing mind of a drug network or someone performing an important task in the trafficking activity with some decision-making authority or responsibility.

[112] In his concurring opinion in *Parranto*, agreed to by two other judges on this point, Moldaver J was of the view that the directing minds of large-scale fentanyl operations were currently receiving sentences in the upper single digits to lower double digits but, given the harmfulness and wrongfulness of fentanyl, it may be appropriate for sentencing judges to apply a “higher range, consisting of mid-level double digit sentences and, in particularly aggravating circumstances, potential sentences of life imprisonment” (at para 101).

[113] The message delivered in *Parranto* is clear: absent some obvious reason that mitigates moral culpability, those who engage in commercial fentanyl trafficking at the mid or high level should receive very lengthy penitentiary sentences. That approach accords with the fundamental purpose and principles of sentencing as set out in the *Code* and the *CDSA*.

[emphasis added]

[26] I note here as well that in ***Parranto***, in upholding the sentence of the Alberta Court of Appeal, Justices Brown and Martin emphasized that future cases involving the



wholesale trafficking in fentanyl “may very well be expected to attract more significant sentences” (at para. 73).

[27] In a separate concurring judgment in *Parranto*, Moldaver J. said the following:

[86] I find it necessary, however, to write separately to raise what I believe to be an issue of overriding concern in these cases. Specifically, I wish to focus on the gravity of largescale trafficking in fentanyl for personal gain and the need to impose severe penalties, ranging from mid-level double digit penitentiary terms up to and including life imprisonment, for those who do so. In *R. v. Friesen, 2020 SCC 9*, this Court held that appellate courts can and should depart from prior sentencing precedents when those precedents no longer reflect “society’s current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders” (para. 35; see also paras. 108 and 110). In my view, society’s understanding of the gravity of largescale fentanyl trafficking has increased such that an upward departure is mandated.

[emphasis added]

[28] He goes on to describe in some detail the dangers posed by trafficking in hard drugs and the danger posed by largescale fentanyl trafficking (*Parranto*, at paras. 87 to 100).

[29] He then concludes with the following:

[101] Ultimately, largescale trafficking in fentanyl is a crime that preys disproportionately on the misery of others — the marginalized and those whose lives are marked by hopelessness and despair. It is a crime motivated by greed and by a callous disregard for the untold grief and suffering it leaves in its wake. Above all, it is a crime that kills — often and indiscriminately. It follows, in my view, that what matters most is that those individuals who choose to prey on the vulnerable and profit from the misery of the Canadian public for personal gain are sentenced in accordance with the severity of the harms they have caused. Fentanyl trafficking, and largescale trafficking in particular, are a source of unspeakable harm. Accordingly, while the range of sentences currently imposed for the directing minds of largescale fentanyl operations straddles the upper single digits and lower double digits, sentencing judges should feel justified, where circumstances warrant, in applying a higher range, consisting of mid-level double digit sentences and, in particularly aggravating circumstances, potential sentences of life imprisonment.

[emphasis added]

[30] In *Petrowski*, decided prior to *Parranto*, Cameron J. speaking for the Court made the following observations in respect of the dangers of fentanyl:

[38] The proportionality analysis requires consideration of the gravity of the offence. Fentanyl is a Schedule I substance (see Schedule I of the *CDSA*). Pursuant to section 5(3)(a) of the *CDSA*, anyone who is convicted of trafficking it in is guilty of an indictable offence liable to imprisonment for life.

[39] Canadian courts have consistently recognised that denunciation and deterrence must be the primary sentencing considerations in cases involving trafficking in Schedule I substances defined in the *CDSA*, such as cocaine, heroin, and methamphetamine. In *White* at paras 74-92, Saunders JA undertook an extensive analysis of Canadian jurisprudence regarding sentences for cocaine and heroin, following which he concluded (at para 92):

From this broad canvass of Canadian case law, it is indisputable that no matter where the crime occurs, persons convicted of trafficking, or possession for the purpose of trafficking, in dangerous and highly addictive substances, can expect to receive lengthy prison sentences. The primary objective being the protection of society requires severe punishment that will expressly denounce such conduct, and deter not only the offender, but any others who may be similarly inclined.

See also *R v Johnson*, 2020 MBCA 10 at para 12; *R v Racca*, 2015 MBCA 121 at para 13; and *R v Grant (IM)*, 2009 MBCA 9 at paras 108-109.

....

[42] In this case, the Court had the benefit of a report authored by Dr. Graham R. Jones dated January 27, 2016 (the Jones report), providing information regarding fentanyl which had been entered as evidence at the sentencing hearing. This report is authored by the same person and appears to contain much of the same information that was considered by the courts in *Felix* and *White*. It is also similar to the evidence provided in other provinces such as British Columbia (*Mann* at paras 16-31); Saskatchewan (*Smith 2019* at paras 81-84); and Ontario (*Loor* at paras 35-39).

[43] Briefly, the report filed in this case establishes:

- Fentanyl is a potent opioid analgesic (pain killer) which also has anesthetic properties at higher doses. Medically, it is used as a surgical analgesic and as an adjunct to anesthesia. It is also available for long-term control of severe pain and for the treatment of breakthrough pain in chronic conditions such as cancer, where the slow release of opioids is not sufficient to control pain;
- Like all opioids, a sufficient dose of fentanyl will cause a reduction in respiration rate which may lead to lack of oxygen to the brain and other organs which, if low enough, may cause brain damage, organ damage, coma and death;

- Toxic concentrations of fentanyl can also cause muscle rigidity, as well as nausea and vomiting, which can be aggravating factors to someone who is already compromised by the primary effects of the drug;
- Fentanyl is 80 to 100 times more potent than morphine and 25 to 50 times more potent than pharmaceutical grade (99% pure) heroin;
- A fatal dose of fentanyl will likely be lower than 2 milligrams for many people and especially a relatively naïve user. In *Felix*, the Court observed that, for inexperienced users, a lethal dose is likely to be under one milligram (see para 15);
- For those who have built up a tolerance to the drug, fatal toxicity can be produced with a sufficient dose;
- Fentanyl has a very high abuse potential and physical dependence will develop after repeated use;
- Fentanyl can be administered intravenously, inhaled or absorbed into the skin. Tablets are not used medically, although a slow-release lozenge is available.

[44] In *Leach*, the Court noted that, in April 2016, the Provincial Medical Health Officer declared a public health emergency in response to an alarming increase in drug overdose deaths in British Columbia, largely attributable to fentanyl (see para 16). Despite this, the Court noted that the evidence established that, “[i]n the first 10 months of 2017, there were 999 fentanyl detected overdose deaths in British Columbia representing a 136% increase in the number of fentanyl detected deaths (423) that occurred during the same period in 2016” (at para 48).

[emphasis added]

[31] In *Slotta* (the companion case of *Petrowski*), the accused appealed a sentence of 8-years incarceration imposed as a result of his guilty plea to one charge of importation of fentanyl. The Court of Appeal dismissed his appeal.

[32] In its reasons, the Court of Appeal noted that the accused was a 32-year-old man, with a prior record, who knowingly engaged in a scheme to import fentanyl into Canada. Despite knowing how dangerous the drug was, he stored it at his home where his partner and two young children resided, thereby revealing a lack of concern for the risk of others.

[33] The Court noted further that Slotta had a drug addiction and was not the primary actor in the offence.

[34] In ***Kamyar***, the accused pleaded guilty to possessing fentanyl for the purpose of trafficking. In a pre-sentence *Gardiner* hearing, Devine P.J. found that he was at the high end of mid-level fentanyl trafficking. She was not satisfied that the accused was a high-level trafficker. The accused was 22-years of age and had no record. He was sentenced to 11 years.

[35] The Crown advised the Court that prior to the *Gardiner* hearing, her position as to sentence had been 15 years, but taking into account Kamyar's guilty plea, his age, and lack of record, she revised that position to 13 years.

[36] In her closing remarks Devine P.J. stated:

[65] I am imposing a sentence of 11 years. This sentence reflects the seriousness of the offence, the high level of moral culpability of the offender, and gives effect to the clear direction from the Supreme Court and the Manitoba Court of Appeal that sentences for trafficking in fentanyl must increase to address the lethal nature of the crime. In Manitoba, the drug is killing and oppressing an already-oppressed populace of drug users. [see: also *McLean*]

[emphasis added]

[37] In ***Nguyen***, Justice Suche found after a *Gardiner* hearing that Nguyen was trafficking to support his drug addiction; he was selling small amounts (less than a quarter or half ounces), and falls into the category of a "street level" dealer.

[38] He pleaded guilty to a series of charges arising from two incidents, including five firearms offences, and one charge of possession of fentanyl for the purpose of trafficking. The amount of fentanyl involved was 36.71 grams. He was sentenced to 8½-years.

[39] ***Nguyen*** is a pre-***Parranto*** case and there is now more clarity since ***Petrowski*** and ***Slotta*** were decided to provide more definitive guidance as to quantum of sentence for mid-level fentanyl trafficking that reflects "a contemporary understanding of the gravity of the offence." (See: ***McLean*** at para. 117)

[40] It also provides the basis for a Court to ascertain what sort of a range of sentence is appropriate for cases such as this one, where the accused is a high-end dealer in fentanyl.

[41] As noted above, Ndatirwa's co-accused, Singh, pleaded guilty to trafficking in fentanyl and was sentenced to 12-years imprisonment. He had no record and had expressed sincere remorse. In addition, the plea and sentence in his case would potentially have significant immigration consequences.

[42] In his case, there is no suggestion that he was the directing mind of the criminal operation with which he was involved. He was sentenced as a high-level courier.

### **DECISION**

[43] A synthesis of the cases put before me leads me to conclude that an appropriate range of sentence for a high-level trafficker in fentanyl, in the Province of Manitoba, is or should be 15-years to life imprisonment. In this regard, I point out that the upper end of this suggested range has already been set pursuant to s. 5(3)(a) of the **CDSA**. At the same time, mid-level traffickers of fentanyl in this province, who are less morally capable than high-level traffickers, are arguably liable of to a range of sentences of 8 to 15-years.

(See: **McLean**, at para. 111 and para. 122)

[44] In this case, I have given due considerations to the submissions of counsel regarding mitigating factors and aggravating factors referred to above (at paras. 14 to 19 of these reasons).

[45] I have considered the submissions of both counsel, the case law submitted, and the statutory provisions relevant to sentencing, which I am required to consider in arriving at my conclusion.

[46] In my opinion, the request by defence counsel for a sentence of 9-years imprisonment is far too low. Instead, in all of the circumstance, I am imposing a 15-year sentence of imprisonment as a fit and proper sentence.

[47] Ndatirwa will be given credit towards that sentence at the rate of 1.5 days for each day in custody up to September 5, 2024, when he was sentenced, leaving a sentence of 3,966 days going forward from that date.

[48] I am also granting the ancillary orders requested by the Crown in respect of the lifetime weapons prohibition pursuant to s. 109 of the ***Criminal Code***, the DNA testing, and the forfeiture of all seizures, including but not limited to any controlled drugs seized by the Winnipeg Police Service at the arrest of Ndatirwa or seized from his apartment.

[49] Costs and surcharges are waived.

\_\_\_\_\_ J.