SUPREME COURT OF NOVA SCOTIA
Citation: R. v. R.M.W., 2008 NSSC 420

Date: 20081023
Docket: CRH 301930
Registry: Halifax

Between:

R.M.W.

Applicant

v.

Her Majesty The Queen

Respondent

Restriction on publication: Restriction on publication pursuant to s. 110(1) of the *Youth Criminal Justice Act*

Judge: The Honourable Justice Arthur J. LeBlanc.

Heard: October 16, 22 and 23, 2008, in Halifax, Nova Scotia

Oral Decision: October 23, 2008

Written Decision: April 1, 2009

Counsel: Chandra Gosine, Esq., for the applicant
Stephen McGrath, Esq., for the Attorney General of Nova Scotia
Mr. Peter Rosinski, Esq., for the Public Prosecution Service

Publishers of this case please take note that section 110(1) of the *Youth Criminal Justice Act* applies and may require editing of this judgment or its heading before publication. The subsection provides:

110(1) Identity of offender not to be published - Subject to this section, no person shall publish the name of a young person, or any other information related to the young person, if it would identify the young person as a young person dealt with under this *Act.*

By the Court:

[1] The applicant, R.M.W., was detained by the Superintendent of Corrections without a warrant or a committal order. The Superintendent claimed that s. 743.5 of the *Criminal Code* required R.M.W. to complete his sentence, which was imposed pursuant to s. 42 of the *Youth Criminal Justice Act*, in an adult institution. The applicant seeks a writ of *habeas corpus* requiring his release from detention at the Central Nova Scotia Correctional facility.

Background

[2] R.M.W. was subject to a youth sentence imposed under para. 42(2)(n) of the *Youth Criminal Justice Act* (*YCJA*) on April 3, 2007. The sentence provided for a total of 914 days, the last third to be served under supervision in the community, with conditions. On June 17, 2008, R.M.W.'s youth sentence was reviewed. Following this review, he was permitted to commence his conditional supervision at an earlier date than that set in the original order.

[3] R.M.W., now an adult and subject to conditional supervision under the revised order, presented a cheque that he knew was fraudulent and was charged

with an offence. On September 3, 2008, he pled guilty to the charge of fraud. Gibson , J.P.C. accepted a joint recommendation and imposed a sentence of one day, being served by R.M.W.'s presence in court, with any breaches of the youth sentence to be dealt with by the Youth Court. Later that day R.M.W. was found to have failed to keep the peace as a result of the adult conviction, resulting in a breach of his conditional supervision order. Based on a joint submission by the Crown and counsel for R.M.W., Williams, J.P.C. imposed a 14 day suspension of R.M.W.'s conditional supervision, pursuant to s. 109. The suspension was to be served in custody in a provincial facility, after which he would resume supervision in the community. Judge Williams issued a committal order limiting R.M.W.'s custodial sentence to 14 days.

[4] Upon completion of his 14 day custodial sentence, R.M.W. was not released into conditional supervision pursuant to the terms of the amended youth court order. Instead, the superintendent kept R.M.W. in custody, on the basis that this required by s. 743.5(1) of the *Criminal Code,* under which the Provincial Court sentence of one day in jail (served by his appearance in court) required R.M.W. to serve the remainder of his original youth sentence as an adult, in a provincial correctional facility.

[5] As a consequence of the Superintendent's decision to retain R.M.W. in custody, R.M.W. made this application for *habeas corpus*, claiming that he should be returned to community supervision.

[6] The Superintendent of the Central Nova Scotia Correctional Facility opposes the granting of a writ of *habeas corpus* on the ground that s. 92(4) of the *Youth Criminal Justice Act* results in the merger of the youth and adult sentences and requires that the youth, R.M.W., serve the remainder of his youth sentence in a provincial correctional facility. The Superintendent maintains that s. 92(4) requires him to retain R.M.W. in an adult facility because he was under a *YCJA* sentence at the time he received a sentence under the *Criminal Code*. Consequently, it is argued, the remainder of the youth sentence imposed on R.M.W. under para. 42(2)(n) of the *YCJA* must be served in an adult correctional facility. Secondly, s. 184 of the *YCJA* provides that the remaining portion of a sentence shall be dealt with under the *Criminal Code* in like manner as if the sentence had been imposed under the *YCJA.*

[7] The Nova Scotia Public Prosecution Service filed a brief in the manner of an *amicus curiae*, providing observations and interpretations of the relevant provisions of the *Youth Criminal Justice Act* and of the *Criminal Code*. Given that this application is not an appeal from sentence, the Public Prosecution Service submission is of assistance to the Court.

[8] On behalf of the Appeals Branch, Mr. Peter Rosinski, Senior Crown Counsel, addressed the interpretation of s. 743.5 of the *Criminal Code* and s. 92(4) of the *Youth Criminal Justice Act*. He argued that "time served" is not a legally recognized sentence and, consequently, there can be no adult sentence and therefore no merger under s. 743.5 of the *Criminal Code*. Secondly, he submitted that a "one day sentence by time served" was not a sentence under s. 92(4) of the *YCJA*, and that the cancellation of the conditional supervision for a further 14 days pursuant to s. 109(2)(b) of the *YCJA* was not a sentence contemplated by s. 92(4). Furthermore, s. 92 clearly provides for the location where a youth is to serve the sentence rather than whether a youth sentence can be changed by virtue of the commission of an offence as an adult. In addition to the foregoing, Mr. Rosinski argued that R.M.W. should not serve the youth sentence in an adult facility because of the additional provisions contained in the YCJA.

[9] For the reasons which I outlined at the conclusion of the hearing, there is no need for me to embark on an analysis of the conflict between the two statutes. Judge Williams sentenced R.M.W. to a period of incarceration of 14 days, and recognized in her decision that upon completion of this period of incarceration, R.M.W. would be returned to community supervision to complete the youth sentence. I intend to defer the issue of whether s. 743.5(1) in effect overrides any existing youth court order made under the *Youth Criminal Justice Act* without the necessity of obtaining the sanction of the court.

[10] The *Correctional Services Act*, S.N.S. 2005, c. 37, makes it clear that no one can be admitted to a correctional facility without a direction from the court. Section 46 provides that "[n]o employee shall admit an offender into a correctional facility unless that offender is the subject of a committal order that states that the offender is to be admitted into a correctional facility." A committal order is defined at s. 2(c) as follows:

> (c) "committal order" means
>
> (i) a court order, including an order of remand, or
>
> (ii) an order issued by a Provincial Director under the *Youth Criminal Justice Act (Canada)*,

> for the committal of a person to a correctional facility or a penitentiary....

[11] Although s. 46 does not specifically state that the offender should not remain in custody for a period longer than provided in the committal order, it is a logical extension of this provision, and consistent with basic principles of the freedom of the individual, that no employee should maintain the offender in a correctional facility once the term of the committal order under which the offender was subject has expired. It would be my view that an individual should not be detained in a correctional facility after the committal order has expired. The power to detain a person in a correctional facility is based not on the legislative interpretation of the Superintendent, or any of the employees of the facility, of the provisions of the *Criminal Code*. It is, rather, based on the terms of the committal order.

[12] The employees of the facility are required to release an offender once the sentence has been served. Subsection 51(1) of the *Correctional Services Act* provides:

> Where an offender is entitled to be released from a correctional facility on a particular day because that offender's sentence has been served, the employee who has authority to release the offender shall release the offender during normal business hours unless the committal order or the regulations specify a different day or time for the release.

[13] The Superintendent claims that it is frequently necessary for correctional facility employees to determine the precise date upon which an offender is entitled to be released, and thus to make calculations with regard to remissions and other such matters. It is my view that such decisions are made under the ambit of a mandate from the court, in the form of the sentence and the committal order, which triggers a consideration of the appropriate time to be allowed for remission. It is necessary to consider the committal order calculate the appropriate remission time pursuant to regulation.

[14] I am unable to agree with the Superintendent's argument that interpreting s. 743.5(1) of the *Criminal Code* is similar to calculating remission time. I believe that there is a difference between the interpretation of the *Criminal Code*, including a determination that it overrides a provision of the *Youth Criminal Justice Act*, and a mathematical calculation of remission time. In reviewing the *Correctional Services Act*, I am unable to come to any other conclusion than that this statute does not invest the Superintendent with any such authority. The duties of the Superintendent are clearly spelled out at s. 39:

> 39 A superintendent shall, in order to ensure the safe and secure operation, management and administration of a correctional facility,
>
> (a) implement policies and procedures;

> (b) authorize and issue standard operating procedures;
>
> (c) authorize and issue post orders;
>
> (d) ensure that offenders are informed of their rights, responsibilities and privileges while in custody;
>
> (e) establish rules governing the conduct and activity of offenders;
>
> (f) ensure that employees are informed of their duties, obligations and expectations of their conduct; and
>
> (g) provide such other correctional services as are required in accordance with this Act and the regulations.

[15] It is doubtful that the Superintendent, in implementing policies and procedures, would be required to interpret the *Criminal Code* or be required to determine whether s. 743.5(1) mandates that an individual in the position of R.M.W. should be detained in custody.

[16] The *Correctional Services Act* deals with policies and procedures at s. 14:

> 14 (1) The Executive Director may, in accordance with the regulations, establish such policies and procedures as the Executive Director determines are necessary respecting
>
> (a) the provision of correctional services;
>
> (b) the safe and secure operation, management and administration of community corrections;
>
> (c) the monitoring of conditions contained in a court order or conditional release;
>
> (d) the custody and control of an offender in a correctional facility;
>
> (e) the safe and secure operation, management and administration of a correctional facility;

> (f) the admission of an offender into custody;
>
> (g) the assessment, classification and discharge of an offender under supervision or in custody;
>
> (h) programs for an offender under supervision or in custody;
>
> (i) the duties, responsibilities, obligations and conduct of employees; and
>
> (j) any other matter in this Act or the regulations.
>
> (2) The policies and procedures referred to in subsection (1) may apply generally or specifically to
>
> (a) community corrections;
>
> (b) a correctional facility;
>
> (c) a class of offenders; or
>
> (d) a class of persons.

[17] Although there is no case dealing directly with this issue, I note the decision of the Nova Scotia Court of Appeal in *R. v. Bragg*, [1939] 2 D.L.R. 600; 1939 CarswellNS 20, where the court, in considering how long a jailer had a right to retain an accused, cited Lord Chief Justice Denham in *Bowdler's Case* (1848), 17 L.J.Q.B. 243, for the proposition that "[t]he jailer must know the date when he receives him and must, at his peril, keep him for the proper time, no more and no less" (para. 22). The "proper time" is determined by the sentence handed down by the court. However, the jailer has no authority to carry out that sentence without an order from the sentencing court to do so:

> 39 I am unable to find authority for the proposition that a sentence contained in a conviction under a *Summary Convictions Act* in the absence of a statute in the case of a person undergoing imprisonment takes effect when it is pronounced. There seem to be cogent reasons why it should be otherwise. The jailer cannot hold the prisoner until he has a warrant of commitment, even if the sentence is to the same jail. If, in the present case, the prisoner had been in Dorchester penitentiary, I do not think that it could be argued that his term in Sydney jail ran from the date of the pronouncement of sentence. If, without a warrant of commitment, the jailer held the prisoner after the previous sentence had expired, either by efflux of time or by pardon, could he justify under the conviction, in the absence of a warrant? I do not think so. It may be that none of these arguments are conclusive but, on the whole, I am of opinion that the term of imprisonment in every such case depends upon the prisoner being in custody and under the written warrant of commitment which is provided by the statute.

[18] Although the facts in *Bragg* are not identical to the circumstances in the present matter, I am of the view that the principle is the same and has not changed over the many years since *Bragg* was decided. In that case, the accused was convicted by a magistrate for contravening liquor control legislation and was imprisoned in a common jail. The accused appealed the decision to the County Court. The County Court affirmed the conviction. A few months later, the same judge convicted Bragg for an offence related to the first conviction; but, believing that the conviction took effect upon pronouncement, made no warrant of committal, simply imprisoning Bragg for a for a term of six months, to commence November 17, 1938 (paras. 7-8). As a result, Bragg was held for longer than his original three-month sentence without a warrant of committal from the second,

longer sentence. Holding him on the second sentence was improper because there was no warrant of committal authorizing him to be held.

[19] In this instance, the Superintendent was given a committal order to hold R.M.W. for 14 days. Despite the clear and unambiguous terms of this order, the Superintendent interpreted s. 743.5(1), and continued to hold R.M.W. on the basis that there was a merger of the original sentence and the additional one day-sentence imposed by Judge Gibson, which was deemed served by his one day in jail. This was distinct from his decision to cancel the conditional supervision without seeking direction from the youth court or a superior Court. It is fair to say that the Superintendent did not have any authority under the *Criminal Code* or under the *Correctional Services Act* to override the decision of the youth court judge who accepted jurisdiction based on a joint interpretation of both the Crown and counsel for the R.M.W.

[20] The 19th century English common law determined that a warrant of committal is secondary to the court decision containing the sentence. If there were inadequate details the jailer could rely on the warrant. This was not a basis for granting *habeas corpus*. The exception was where full reasons were not given for

the sentence decision, and the warrant of committal was the only apparent source of authority: R.J. Sharpe, *The Law of Habeas Corpus*, 2d edn. (Oxford, 1989) at pp. 29 – 30. This principle does not detract from the necessity of the committal order. It only establishes that the sentencing decision is paramount over the technicalities of the order. As such, if the Superintendent had any doubts or uncertainties about the effect of the youth sentence the adult sentence, the cancellation of conditional supervision, or any combination thereof in relation to s. 743.5 or otherwise, he ought to have requested that the sentence decision from which the committal order was derived, namely the youth court decision transcript which fully and clearly clarified the intent and rationale behind the committal order.

[21] In addition, s. 10(c) of the *Charter of Rights and Freedoms* affords fundamental protection to an individual who is conflict with the state by permitting the validity of his detention determined by way of *habeas corpus*:

> 10 Everyone has the right on arrest or detention [...]
>
> (c) to have the validity of the detention determined by way of *habeas corpus* and be released if the detention is not lawful.

[22] In *Re Day* (1983), 62 N.S.R. (2d) 67 (S.C.), the court held that s. 10(c) "does not change the existing law other than to entrench the right to *habeas corpus* in the Constitution" (para. 13). While this is correct as regards the scope and purpose of *habeas corpus* under this provision, it appears that the constitutionalization of s. 10(c) has added emphasis to the approach to be taken when applying other *Charter* rights. In *R. v. Gamble*, [1988] 2 S.C.R. 595, Wilson J., for the majority, stated, at para. 66:

> A purposive approach should, in my view, be applied to the administration of Charter remedies as well as to the interpretation of *Charter* rights and, in particular, should be adopted when *habeas corpus* is the requested remedy since that remedy has traditionally been used and is admirably suited to the protection of the citizen's fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice. The superior courts in Canada have, I believe, with the advent of the *Charter* and in accordance with the sentiments expressed in the *habeas corpus* trilogy of *Miller*, *Cardinal* and *Morin*, displayed both creativity and flexibility in adapting the traditional remedy of *habeas corpus* to its new role...

[23] It is clear, then that a purposive approach is necessary when considering an application for *habeas corpus*. Furthermore, I am satisfied that R.M.W.'s ss. 7 and 9 *Charter* rights have been violated, and that the violation is not saved by s. 1. Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[24] R.M.W., being held for longer than was set out in his committal order was deprived of his liberty. In *Gamble*, *supra*, at p.69, Wilson, J. said:

> ... In the 1985 *habeas corpus* trilogy of *Miller, Cardinal* and *Morin* and later in *Dumas v. Leclerc Institute* this Court expanded *habeas corpus* to cover three different deprivations of liberty in a prison setting. One of these is a continuation of the deprivation of liberty that has become unlawful.... In *Miller* this Court recognized the need to adapt the important remedy of *habeas corpus* "to the modern realities of confinement in a prison setting" (p. 641)....

[25] In *Gamble* the continued custody was unlawful because of issues surrounding the eligibility of parole after the revision of a statutory scheme. Here the issue is clearer. The terms of R.M.W.'s sentence were precise and provided for R.M.W. to continue his conditional supervision thereafter. The failure of the Superintendent to comply with this sentence order was a deprivation of R.M.W.'s liberty.

[26] An infringement off an individual's liberty is permissible if it is deprived of "in accordance with the principles of fundamental justice", in the words of s. 7. What constitutes a principle of fundamental justice may be informed by sections

subsequent in the *Charter*. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer, J. (as he then was) said, for the majority, at para. 29:

> Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

[27] I believe s. 9 is also relevant to the issue at hand. It provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." R.M.W. was imprisoned and the question to be determined is whether his imprisonment or detention was arbitrary. In *R v. Hufsky*, [1988] 1 S.C.R. 621, the Supreme Court of Canada held that an official's exercise of discretion is arbitrary, holding "if there is no criteria, express or implied, which govern its exercise" (para. 13). The superintendent did not have discretion to interpret the *Criminal Code* and to detain a prisoner contrary to the youth court disposition. In my view, in the absence of discretion to make a decision, the decision cannot be anything but arbitrary. As a result, R.M.W. was arbitrarily detained, violating s. 9. The violation of s. 9

indicates that the deprivation of liberty was not in accordance with the principles of fundamental justice, resulting in a violation of s. 7.

[28] Having found violations of ss. 7, 9 and 10(c) of the *Charter*, it is necessary to consider whether the violations or infringements can be saved under s. 1, which provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[29] To engage s. 1, the superintendent's action must have limited R.M.W.'s rights as prescribed by law. The Supreme Court of Canada considered this requirement in *R v. Therens*, [1985] 1 S.C.R. 613, per Le Dain, J. , dissenting, at para. 60:

> Section 1 requires that the limit be prescribed by law, that it be reasonable, and that it be demonstrably justified in a free and democratic society. The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.

[30] The unanimous court confirmed this analysis in *R v. Thomsen*, [1988] 1 S.C.R. 640.

[31] In *Hunter v. Canada (Commissioner of Corrections)*, [1997] 3 F.C. 936 (F.C.T.D.), a commissioner's directive that among other things, imposed monitoring of inmates' phone calls, was found to be "prescribed by law" because the authority to create the directive flowed from particular statutory provisions and there was "no disruption in the chain of statutory authority flowing from the *Act* and the *Regulations* to the limits in Commissioner's Directive 085" (para. 70).

[32] In the present matter, the Superintendent's authority to hold R.M.W. was nonexistent. The continued detention of R.M.W. was not prescribed by law, and accordingly the violation of 7, 9 and 10(c) cannot be justified under s.1 of the *Charter*.

[33] The application for a writ of *habeas corpus* is therefore successful. I direct that the applicant be released from the custody of the Central Nova Scotia Correctional facility.

J.