Date: 2014 12 23
Docket: S-1-CR 2013- 000056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

SAMUEL IRQQIUT

Appellant

- and –

HER MAJESTY THE QUEEN

Respondent

Corrected judgment: A corrigendum was issued on January 8, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This is a sentence appeal arising from proceedings held in the Territorial Court on April 18, 2013. The Respondent agrees that the appeal should be allowed, and both parties have asked that the matter proceed on the basis of written submissions, without an oral hearing.

[2] Having reviewed the materials submitted, and for the reasons set out in this Memorandum, I agree that the appeal should be allowed.

II) BACKGROUND

[3] The Appellant was sentenced for several offenses on April 18, 2013. It is not necessary to go into the specifics of those offenses because this appeal is not about

the fitness of the sentence ultimately imposed. The only issue here relates to the credit that was given to the Appellant for the time he spent in pre-trial custody.

[4] The key facts that are relevant to that issue are not disputed. By the time he was sentenced, the Appellant had spent a total of 62 days in custody at the North Slave Correctional Center. The procedural history of the matter was such that, pursuant to section 719 of the *Criminal Code*, the Sentencing Judge had discretion to grant him enhanced credit for this remand time.

[5] At the sentencing hearing, the Appellant's counsel provided information to the Sentencing Judge about the programs that were and were not available to the Appellant while on remand status. He also provided information, obtained from the Appellant's case manager, confirming that the Appellant would have been eligible for remission had he been a serving prisoner during the time he was on remand. On that basis, counsel argued that enhanced credit should be given to the Appellant for the remand time.

[6] The following exchange took place during the submissions of the Appellant's counsel:

> MR. FALVO: It was Your Honour who detained him after a show cause hearing, and my notes indicate that he was detained on the secondary grounds [sic] but with no mention of his record. So if that's the case, if he was not detained because of his record, I would submit that he would be eligible for 1.5 to one credit. I would defer to Your Honour's notes and the notations on that point. But he has served since February 16th, which is 34 days, which would be 51 days if he were given 1.5 to one credit.
>
> THE COURT: Sorry, what were the numbers again?
>
> MR. FALVO: 34 days, which would be 51 if it was 1.5 to one to take into account early remission that he could have had.

Transcript of the Sentencing Hearing, page 20, lines 9-20.

[7] While counsel correctly identified the period of time when the Appellant was on remand, he made a mistake when he added up the days, arriving at a total of 34 days instead of 62. That mistake, in turn, impacted on the calculation of what the credit would be if it was granted on an enhanced basis. Neither the Sentencing Judge nor the Crown noticed that error.

[8] In his Reasons for Sentence, the Sentencing Judge referred to several things. He talked about the circumstances of the offenses the Appellant was being sentenced for; he noted aggravating and mitigating factors as well as the relevant sentencing principles; he referred to the sentencing principles he considered most relevant. He then outlined the sentences he was imposing for each of the five charges that were before the Court. The total sentence he arrived at was eight months and 30 days, followed by a year's Probation. *Transcript of Sentencing Hearing*, page 26 , lines 13-25.

[9] The Sentencing Judge did not state how much credit he was giving the Appellant for the remand time. The Warrant Committal that he signed sets out the sentences imposed for each offence and includes the following notation: "Total: 8 month and 30 days minus 51 days pre-trial custody". The words on the Warrant of Committal are typed, except for the number "51", which is handwritten. The Sentencing Judge's initials appear next to that number. *Warrant of Committal dated April 18, 2013*.

[10] The Appellant filed a Notice of Appeal in this Court on May 23rd, 2013. He later filed an application for bail pending appeal which was heard on August 19, 2013. On the Crown's consent, the Appellant was released on a Recognizance with the following conditions:

> 1. Keep the peace and be of good behaviour
>
> 2. Notify the court or the RCMP in advance of any change of name, address or employment.
>
> 3. Abstain absolutely from the consumption of alcohol.
>
> 4. Report regularly to the RCMP Detachment in Yellowknife between the hours of 9:00AM and 12:00PM on Fridays.
>
> 5. Submit to a breath test on demand from the RCMP.
>
> 6. Surrender yourself to the RCMP at least 72 hours before you are required to attend in court.
>
> 7. Reside at the Salvation Army

Recognizance of Bail dated August 19, 2013

III) ANALYSIS

[11] On the whole of the record, there is a compelling inference that the Sentencing Judge agreed with the submission that the Appellant should get credit for the remand time on a ratio of 1.5:1, and that in calculating how much credit this amounted to, he relied on the numbers that the Appellant's counsel gave him during submissions. The amount of credit that appears on the Warrant of Committal corresponds to the numbers stated by counsel, and the Sentencing Judge had asked counsel to repeat those numbers. Moreover, had the Sentencing Judge intended to give credit for the remand time on a ratio less than 1:1 (51 days credit for the actual remand time of 62 days), it can be expected that he would, in his Reasons for Sentence, have explained why.

[12] There was ample justification for the Appellant to receive enhanced credit for his remand time. This is especially so in light of the guidance that has since been given by the Supreme Court of Canada on this issue in *R.* v. *Summers*, 2014 SCC 26.

[13] Since the actual remand time was 62 days and not 34, the credit, calculated on a ratio of 1.5:1, should have been 93 days instead of 51. As the Crown fairly concedes, that difference is not insignificant and the appeal should be allowed.

[14] As far as the Relief that should be granted by this Court, the Crown writes in its Factum:

> Ninety-three days of remand credit should be awarded. Considering the approximately 3 months of remand credit, the approximately 4 months that the appellant served between April 18 and August 19, 2013, and the remission he may have earned during that period, the respondent takes the view that the appellant has served the custodial portion of his sentence.
>
> *Respondent's Factum*, Paragraph 25.

[15] That is a fair position for the Crown to take, and I agree that it is the correct way to dispose of this appeal.

[16] The Sentencing Judge included Probation for one year as part of the Appellant's sentence. That aspect of the sentence was not raised in this appeal. I realize that, but for the significant delay in this matter being dealt with, the whole of the sentence would be over by now. That said, one of the conditions of the Probation order is that the Appellant actively participate in counselling directed by

his probation officer, including anger management and alcohol abuse counselling. This is geared to the Appellant's rehabilitation and, ultimately, to the protection of the public. Consequently, I will not interfere with that aspect of the sentence.

[17] There are two aspects of this matter which warrant further comment. The first is that neither the Reasons for Sentence nor the Warrant of Committal were in compliance with section 719 of the *Criminal Code*. That provision requires certain things to be reflected in the record when credit is given for remand time at a sentencing:

> s.719
>
> (…)
>
> (3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.
>
> (…)
>
> *Criminal Code*, R.S.C. 1985, c. C-46

[18] These requirements ensure clarity and transparency as to the use that is made of remand time on sentencing. In this case, the intention of the Sentencing Judge could be inferred from the transcript of the sentencing hearing. There could be cases, however, where that is not so, and where a real issue arises as to how much remand time a sentencing judge has taken into account, on what ratio credit was granted, or both. This is why Reasons for Sentence and Warrants of Committal should in all cases include all the information required by Paragraph 719 (3.3).

[19] I also feel compelled to make additional comments about the delay in this matter getting dealt with. It is incomprehensible that a simple and straightforward matter such as this one could not have been dealt with much more expeditiously by the Appellant's counsel, especially considering that there were indications early on in the process that the Crown would not be contesting the appeal.

[20] As I already noted, the Notice of Appeal was filed in May 2013. The transcript of the sentencing hearing was filed in July 2013. Once the transcript was filed, all the information necessary to dispose of this appeal was available.

[21] The matter remained pending for some time without being moved forward by the Appellant's counsel. The Crown filed its Factum in July 2014, even though the Appellant had not yet filed his.

[22] When the general list of pending criminal matters was called at List Scheduling on September 5, 2014, the Appellant's counsel advised the Court that he was waiting for his materials to be bound at the printers. He undertook to prepare the documents necessary to have the matter considered by the Court on the basis of a written application.

[23] Over two months later, on November 21, 2014, the general list was called again. The Appellant's counsel had still not filed anything. He also did not appear at List Scheduling, or send an agent to speak to the matter.

[24] The Appellant's counsel finally did file his Factum on December 1, 2014. It consists of an adoption of, and agreement with, the facts, issues, analysis and relief sought outlined in the Respondent's Factum. It is difficult to understand why this could not have been done within weeks of the Respondent filing its Factum.

[25] As already noted, the delay has not been without consequence for the Appellant, even though he was released on bail pending appeal. He has been bound by conditions placing restrictions on his freedom since August 2013. Now that the appeal related to the custodial part of his sentence has been dealt with, his period of Probation will start and he will be bound, for another year, by the conditions of that order. And quite apart from any impact the delay in this matter may have had on the Appellant himself, inordinate delays like the ones that occurred in this case reflect very badly on the administration of justice as a whole.

IV) CONCLUSION

[26] The sentence appeal is allowed and the custodial portion of the sentence is hereby varied to time served. The period of Probation will take effect as of today's date.

[27] The draft Order submitted with the written application is not in proper form. To avoid further delays in this matter, I direct the Clerk to prepare a revised Order for my review. Once filed, a copy will be sent to counsel.

"L.A. Charbonneau"

L.A. Charbonneau
J.S.C.

Dated this 23rd day of December 2014.

Counsel for Appellant: Paul Falvo
Counsel for Respondent : Blair MacPherson

Corrigendum of the Memorandum of Judgment

of

The Honourable Justice L.A. Charbonneau

The citation has been amended to read:

CITATION*:* *Irqqiut. v. Her Majesty the Queen 2014 NWTSC 87.cor1*

1. In the Citation the spelling of Irqqiut was incorrect and has now been amended.

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THE HONOURABLE JUSTICE L.A. CHARBONNEAU
