R v. McCarthy, 2015 NWTSC 10

Date: 2015 02 03
Docket: S-1-CR- 2014-000076

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

PATRICK JOHN MCCARTHY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] The Appellant was sentenced in the Territorial Court of the Northwest Territories on October 8, 2014 on a number of charges. At the time he was sentenced, he had spent 115 days in pre-sentence custody. The Sentencing Judge gave him credit for this time on a ratio of 1:1. The Appellant filed an appeal from this sentence on October 15, 2014. He argues that he should have been given credit for his remand time on a ratio of 1.5:1.

[2] The Respondent agrees with this position and consents to the appeal being allowed. Both parties have filed facta and have indicated that they are content to have the matter dealt with without a hearing. Having now had an opportunity to review the materials filed, I do not find it necessary to hear oral submissions on this matter. I agree that the appeal should be allowed.

B) THE SENTENCING HEARING

[3] At the sentencing hearing, counsel for the Appellant, who is not counsel on the appeal, advised the Sentencing Judge of certain issues that had arisen with the Appellant's conduct during his time in pre-trial custody. This was based on information counsel had obtained from the correctional authorities. The information provided was that some aspects of the Appellant's conduct may have affected his ability to earn remission had he been a serving prisoner during this time. The Appellant's counsel argued that the incidents were not major and that for the most part, the Appellant's behaviour in pre-trial custody had been good. *Transcript of Sentencing Hearing*, p.27, line 14 to p.28, line 26.

[4] In his reply submissions, Crown counsel argued that the issues with the Appellant's conduct should have a bearing on the Sentencing Judge's treatment of the remand time:

> (…) what you have is three incidents over a period of four months, one of them sufficiently serious that significant discipline was taken inside the correctional center and may have resulted in remand time being cut off. Sorry. In enhanced credit being cut off is the information we were given. In my submission, that just can't be categorized as good behaviour. And whether or not you give some enhanced credit, in my submission, it's clear 1.5 to 1 for the entire time wouldn't be appropriate.

Transcript of Sentencing Hearing, p.37, line 23 to p.38, line 7.

[5] In imposing sentence, the Sentencing Judge said the following about the credit she would give to the Appellant for his remand time:

> The time spent in pre-trial custody will be credited at a ratio of one day of credit for one day of time served. So that is 115 days. I see no reason to give more credit given the circumstances of the detention which were reported to me. As Crown mentioned, this was not - - it could not be considered as good behaviour, and given the overall circumstances of the offence, I also find that it is appropriate to grant the credit accordingly at one for one.

Transcript of the Sentencing Hearing, p.45, lines 11-20.

C) ANALYSIS

1. The fresh evidence

[6] The Appellant has applied to adduce fresh evidence on the appeal. This evidence is an Affidavit sworn by the lawyer who represented him at the sentencing hearing. In that Affidavit, counsel deposes that, as he indicated at the sentencing hearing, he obtained the information about the Appellant's conduct while on remand from the correctional authorities. Counsel further deposes that at the end of the sentencing hearing, the Appellant told him that some of the problematic conduct that was referred to did not occur while he was on remand on these charges, but had arisen at an earlier time, when he was a serving prisoner.

[7] As a result, counsel made further inquiries with the correctional center. He obtained a letter from a case manager to clarify the matter. That letter is attached as an exhibit to counsel's Affidavit. The letter clarifies which conduct issues arose while the Appellant was on remand. The letter also indicates that had the Appellant been a serving prisoner during the period when he was on remand, he would have been eligible to earn full remission.

[8] The Crown concedes that the fresh evidence should be admitted on this appeal. That is a fair and proper concession, having regard to the legal test that governs the admission of fresh evidence on sentence appeals. *R.* v. *Lévesque* [2000] 2 R.C.S. 487. Therefore, the application to adduce fresh evidence is granted.

2. The merits of the appeal in light of the fresh evidence

[9] The fresh evidence establishes that some of the information provided at the sentencing hearing about the Appellant's conduct was inaccurate. The transcript of the proceedings shows that this erroneous information informed the Crown's position on how much credit the Appellant should receive for the remand time, and had an impact on the Sentencing Judge's treatment of that issue.

[10] The fresh evidence establishes that the Appellant would have been eligible for full remission had he been a serving prisoner during the 115 days that he spent on remand. The Supreme Court of Canada has stated that this alone will generally

be a sufficient basis to award credit for remand time on a ratio of 1.5:1, even absent harsh detention conditions. *R.* v. *Summers*, 2014 SCC 26. The Crown concedes that in light of the information now before the Court, the Appellant's conduct is not a basis to deny him enhanced credit for the time he spent on remand.

[11] As both parties noted, in the comments quoted above at Paragraph 5, the Sentencing Judge appears to have based her decision about credit for remand time not only on the information given to her about Appellant's conduct, but also on "the overall circumstances of the offence". She did not specify which of the offenses she was referring to or what aspect of the circumstances she considered had a bearing on the credit that the Appellant should be given for the remand time.

[12] On that aspect of the matter, the Crown concedes that there was nothing about the offenses themselves, or the circumstances of this case, that justified denying the Appellant enhanced credit for his remand time. Specifically, the Crown concedes that there was no indication that the Appellant was particularly dangerous, that early release would not be available to him, or that his remand was the result of particularly bad conduct.

[13] Given this, and in light of the principles articulated in *R.* v. *Summers*, I agree with the Appellant and with the Crown that there is no basis not to grant the Appellant credit for his remand time on a ratio of 1.5:1. For the 115 days he spent on remand, he should have received credit for an additional 57 days. His sentence should be reduced accordingly.

D) RELIEF

[14] The Warrant of Committal sets out the sentences imposed as follows:

June 5, 2014 Yellowknife, NT	s.349(1)(a)CC	12 months
June 16, 2014 Yellowknife, NT	s.129(a) CC	30 days consecutive
June 16, 2014 Yellowknife, NT	s.129(a) CC	30 days consecutive
June 16, 2014 Yellowknife, NT	s.259(4) CC	1 day concurrent

TOTAL: 14 months less 115 days credit for time served in remand custody.

Warrant of Committal dated October 8, 2014, Court file T-1-CR2014-000969/001311.

[15] If this Court had jurisdiction over all four offenses included in the Warrant of Committal, the appeal could be disposed of by increasing the credit granted for the remand time from 115 days to 172 days. This relief is not available in this case, however: the Summary Conviction Appeal Court does not have any jurisdiction to make an order that would have an impact on the sentence imposed on the offence pursuant to section 349(1)(a) of the *Criminal Code*, because it is an indictable offence.

[16] Given this, this Court's only avenue to grant the Appellant relief is to vary the sentences imposed on the summary conviction charges to reduce the overall sentence by 57 days.

E) CONCLUSION

[17] For these reasons, the appeal is allowed, and the sentences imposed on the two-count Information (File #T1CR2014001311) is varied as follows:

1. On count #1, the sentence is varied to 3 days imprisonment, consecutive;
2. On count #2, the sentence is varied to 3 days imprisonment, concurrent.

[18] I direct that the Appellant's counsel prepare a Formal Order reflecting this decision. That Order should be endorsed by the Crown to reflect the Crown's agreement as to its form and content, in accordance with the usual practice in this jurisdiction.

[19] Finally, I note that this Warrant of Committal does not comply with the requirements of Paragraph 719(3.3) of the *Criminal Code*. That provision requires that a sentencing judge state into the record and on the warrant of committal the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted for the remand time, the amount of time credited, if any, and the sentence imposed. I made a similar observation recently in

a decision dealing with another sentence appeal. *R.* v. *Irqqiut*, 2014 NWTSC 87cor.1, at Paragraphs 17-18. As I mentioned in that case, reasons for sentence and warrants of committal should in all cases include all the information required by Paragraph 719(3.3).

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
3rd day of March 2015

Counsel for the Appellant: Charles B. Davison

Counsel for the Respondent: Duane Praught

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU
