IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

TONY HOWARD KAKFWI

Transcript of the Oral Ruling delivered by The Honourable Justice L. A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 5th day of June, 2017.

APPEARANCES:

Mr. J. Potter:	Counsel for the Crown
Mr. C. Davison:	Counsel for the Accused

(Charge under s. 244.2, 244.1, 264.1(1)(a) x2, 86(1), 88(1) and 85(1)(a) of the Criminal Code of Canada)

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THE COURT: Mr. Kakfwi faces a number of charges, including one pursuant to Section 244.2(1)(b) of the Criminal Code, for intentionally discharging a firearm while being reckless as to the life and safety of another person. If convicted of that offence, he will be subject to a mandatory minimum jail term, pursuant to Section 244.2(3) of the Criminal Code.

The mandatory minimum penalty depends on the type of firearm used, as it is higher if the offence involves the use of a restricted or prohibited firearm or if the offence is committed for the benefit of a criminal organization. My understanding is that the allegations here are that those situations are not engaged. The applicable mandatory minimum penalty, if Mr. Kakfwi is convicted of the offence, would be four years' imprisonment pursuant to Section 244.3(2)(b).

Mr. Kakfwi has filed a Notice of Motion challenging the constitutional validity of that four-year mandatory minimum.

There may be a typographical error on the Notice of Motion, Mr. Davison. I think you may have referred to ".2". I just noticed this this morning. I think we all know what the challenge

is about, but I thought I would mention it.

MR. DAVISON: Thank you. I'll look into that.

THE COURT: I am sure Mr. Green would not build his case around that, but I thought I would mention it.

Mr. Kakfwi takes the position that this provision violates Section 12 of the Canadian Charter of Rights and Freedoms. Mr. Kakfwi is asking this Court to decide the constitutional challenge before he is required to enter his plea on the charge. The Crown objects to this and argues the constitutional challenge should be heard only after Mr. Kakfwi is convicted of the charge that triggers this mandatory minimum penalty.

The Crown and defence agree that the legal framework that governs the issue as to when the constitutional challenge should be heard was the framework laid out by the Supreme Court of Canada in R. v. DeSousa, [1992] 2 S.C.J. 1997. They do not entirely agree about how that framework operates.

Both sides agree that the Court has the jurisdiction to hear a constitutional challenge before trial and a discretion to do so. The Crown argues there is a strong presumption

against doing so and that the defence has not rebutted that strong presumption in this case.

Defence takes issue with the Crown's position that the legal framework includes a strong presumption against hearing constitutional issues before trial. On that point, I agree with defence. The use of the term "presumption" may not be entirely accurate in this context. But, in the end, how the test is described does not make much of a difference to the outcome.

On my reading of DeSousa, the key is that in deciding on the timing of the hearing of this type of motion, regard must be had to two policy considerations. The first is that it is desirable to avoid fragmentation of criminal proceedings. The second is that there is a need for a proper factual foundation in any constitutional litigation.

Both of these policy considerations favour disposition of the type of application brought by Mr. Kakfwi after trial and not before, and, in the ordinary course of things, that is what happens. But the Court may depart from that usual approach. In DeSousa, the Supreme Court said that trial courts should not do so "unless there is a strong reason for doing so" in cases where the "interests of justice necessitate an

immediate decision". DeSousa, at paragraph 17.

The Supreme Court went on to give examples of when that might be the case: where the Court itself is implicated in a constitutional violation; where substantial ongoing constitutional violations require immediate action; or where it might save time to decide the constitutional issue before trial. An example of when it might save time to hear a constitutional challenge ahead of time is when there is an apparently meritorious challenge to the law under which the accused is charged and the challenge does not depend on the facts to be elicited during the trial.

Unlike some of the cases referred to by defence, such as R. v. Haldenby 1994 CarswellOnt 1096, for example, the provision that Mr. Kakfwi seeks to challenge is not the one that creates the offence that he is charged with. It is not as though dealing with the constitutional issue now would avoid the need for a lengthy and complex trial which may fall apart because the charging provision ends up being found unconstitutional. There is no suggestion that hearing the matter ahead of trial would save resources or court time.

There is also no suggestion that at this

point the Court itself is implicated in a constitutional violation.

But Mr. Kakfwi says that one of the things evoked in DeSousa, the fact that the challenge does not depend on facts to be elicited at trial, does apply to his situation.

Mr. Kakfwi's position must be considered against the backdrop of the legal framework that applies to a Section 12 challenge. That framework is set out in R. v. Nur, [2015] 1 SCR 773 and R. v. Lloyd 2016 SCC 13. When a mandatory minimum sentence is challenged on the basis that it contravenes Section 12 of the Charter, there are two avenues for arguments. The first is that the mandatory minimum will result in cruel and unusual punishment for the accused who is before the Court. The second is that for other persons in other situations, the mandatory minimum punishment would result in cruel and unusual punishment. One argument rests on the situation of the accused who is actually before the Court, the other rests on a hypothetical situation that could reasonably arise.

In a case where the first line of argument is being pursued, the facts of the case will necessarily matter. Arguably, in cases based

solely on the "reasonable hypothetical" line of argument, the facts of this specific case will have little bearing on the issue.

In submissions, the Crown pointed out that some facts would necessarily need to be established for this constitutional challenge even if it were to be based exclusive on the "reasonable hypothetical" situation because the mandatory minimum penalty that applies depends on the type of firearm used. I do not think that would present much of an obstacle if it were the only issue because that one fact is very narrow and specific, most likely non-contentious, and, as defence counsel pointed out, could easily be the subject of an admission for the purposes of the constitutional challenge.

The greater problem, as I see it, is that it is not certain that the challenge will, in this case, rest solely on the "reasonable hypothetical" branch of the test.

In describing the nature of the challenge that he expects to put forward, Mr. Kakfwi's counsel states at paragraphs 15 and 16 of his written submissions:

> In the particular circumstances of Tony Kakfwi, it is anticipated that the challenge will be based completely upon the "reasonable hypothetical" line of argument. Given the principles at play in

> Section 12 litigation, a four year sentence of imprisonment - while longer than what the defence will argue is appropriate in his case - would likely not rise to the level of being "cruel and unusual" punishment in the case of Mr. Kakfwi.
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> Thus, the outcome of this challenge will not depend upon the facts of the case at bar but rather will, instead, depend upon the court's consideration of "reasonable hypothetical" situations which will be described and offered during argument. This is accordingly not a situation in which the Court would need an evidentiary or factual foundation of the sort usually contemplated when the Supreme Court has urged courts to avoid making rulings in factual vacuums.

But, importantly, there is a footnote at the end of that paragraph which reads:

> All of this is not to say that no evidence or facts would be placed before the Court if the need arises. While it is presently intended to argue the challenge on the basis of "reasonable hypotheticals" as outlined above, if there is a need for more of a factual foundation to be provided to the Court that can, in any event, be undertaken as necessary and appropriate in the circumstances.

Counsel used equally careful language during the oral submissions. That is understandable because, as counsel acknowledged, new facts, new evidence, about Mr. Kakfwi 's personal situation could well come to counsel's attention between

now and the time of sentencing if this case ever reaches that stage. Those new facts could affect whether an argument should be made about the impact of the impugned provision in his own personal circumstances.

The bottom line is that Mr. Kakfwi is not ruling out, and probably cannot rule out, the possibility that the constitutional challenge could be decided on the basis of a different factual matrix than what would ultimately be established through a trial and/or sentencing hearing process. If that were to happen, the constitutional issue would have to be revisited. In that event, not only the trial process would be fragmented but the actual constitutional challenge would be as well. That is not an efficient use of resources.

I understand fully why Mr. Kakfwi cannot commit to limiting his challenge to the "reasonable hypothetical" branch of the test. It would be problematic for counsel to make that commitment for the reasons I have already referred to. But it raises these potential disadvantages and issues as far as the possibility of hearing the constitutional challenge ahead of plea.

Mr. Kakfwi also relies on another distinct

argument. He argues that it is in the interests of justice to allow the challenge to be heard before plea so that he can know, before he pleads, the penalty he will face. He argues that he is entitled to know his jeopardy before he pleads. In support of that position, he relies on a number of things which he says apply by analogy.

For example, he refers to notice requirements that arise in other areas of our criminal law. The first example is the requirement for the Crown to give an accused notice of its intention to seek a greater penalty on a subsequent offence, as provided for in Section 727 of the Criminal Code. The second example he gives is the requirement for the Crown to give notice to a young person of its intention to apply to have that young person sentenced as an adult if convicted. Mr. Kakfwi argues that similarly, he is entitled to know the extent of his jeopardy more specifically in relation to this charge, before he pleads

I understand the argument, but I think it overlooks the fundamental qualitative difference between those examples and the situation here. In my view, there is a fundamental difference between the Crown being required to provide

advance notice on how it will exercise its discretion, and the Court being asked to decide whether it will declare a law contrary to the Charter. Those are two very different things.

The logical extension of Mr. Kakfwi's position is that anyone who wishes to challenge a sentencing provision, or any provision of the Criminal Code for that matter, would be entitled to a ruling on the issue before plea. That would, in my view, represent a major departure from the general principles outlined in DeSousa.

Mr. Kakfwi also gave the example of the requirements of publicity for Parliamentary proceedings in the enactment of laws and the requirement for laws to be published in the Canada Gazette. Again, I do not find those examples particularly helpful to his argument because they arise in a very different context than the one we are dealing with here.

In addition to other policy reasons that militate against entertaining this type of application before trial, delay is another concern. Every court across the country is acutely aware of the Supreme Court of Canada in R. v. Jordan, [2016] 1 SCR 631. That decision has not made delay less of a consideration in the general landscape of the administration of the

criminal justice system in our country. On the contrary, it has placed it at the forefront more than ever before. That factor does not assist Mr. Kakfwi's position.

Defence counsel is quite correct in pointing out that this case has proceeded very expeditiously up until now. The events giving rise to the charge arose in November 2016. The matter is now before this Court. We are a long ways away from the presumptive ceiling of 30 months established in Jordan. At the same time, it is very clear that proceeding now to schedule the hearing of the constitutional challenge will create additional pre-trial delays. We can never predict what factors may have a further impact in the future on the scheduling of this trial.

The resources of this Court are already very stretched. We are a circuit court that only has four resident judges. We have a heavy caseload, not just in criminal matters but also in civil and family matters. There continue to be a very high rate of jury trial elections in this territory. There currently are a number of pending cases, including several homicides and other cases, that are expected to require several weeks of court time. Under these circumstances, the Court must be careful in how it uses its time

and resources, and it must be careful in exercising its discretion in a matter that will inevitably add several months of pre-trial delay on a case that, on its face, involves serious allegations.

So, in summary, I disagree with the defence's position that the interests of justice entitle Mr. Kakfwi to know before plea whether he will be subject to the mandatory minimum jail term in the event of a conviction. I am not persuaded that, to use the words of DeSousa, that this is a case where there is a strong reason to depart from the usual practice, that the constitutional challenge to the penalty section should be entertained at the sentencing stage. I am not persuaded that the interests of justice necessitate an immediate decision, and, for those reasons, I will not entertain the constitutional challenge to Section 244.2(3) at this stage. That issue should be decided if and when Mr. Kakfwi is convicted of the offence that gives rise to that mandatory minimum sentence.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter