R. v. Kakfwi, 2017 NWTSC 43 S-1-CR-2017-000022

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

TONY HOWARD KAKFWI

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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.

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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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1 THE COURT: Mr. Kakfwi faces a number of

2 charges, including one pursuant to Section

3 244.2(1)(b) of the Criminal Code, for

4 intentionally discharging a firearm while being

5 reckless as to the life and safety of another

6 person. If convicted of that offence, he will be

7 subject to a mandatory minimum jail term,

8 pursuant to Section 244.2(3) of the Criminal

9 Code.

10 The mandatory minimum penalty depends on the

11 type of firearm used, as it is higher if the

12 offence involves the use of a restricted or

13 prohibited firearm or if the offence is committed

14 for the benefit of a criminal organization. My

15 understanding is that the allegations here are

16 that those situations are not engaged. The

17 applicable mandatory minimum penalty, if

18 Mr. Kakfwi is convicted of the offence, would be

19 four years' imprisonment pursuant to Section

20 244.3(2)(b).

21 Mr. Kakfwi has filed a Notice of Motion

22 challenging the constitutional validity of that

23 four-year mandatory minimum.

24 There may be a typographical error on the

25 Notice of Motion, Mr. Davison. I think you may

26 have referred to ".2". I just noticed this this

27 morning. I think we all know what the challenge

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1 is about, but I thought I would mention it.

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

3 that.

4 THE COURT: I am sure Mr. Green would not

5 build his case around that, but I thought I would

6 mention it.

7 Mr. Kakfwi takes the position that this

8 provision violates Section 12 of the Canadian

9 Charter of Rights and Freedoms. Mr. Kakfwi is

10 asking this Court to decide the constitutional

11 challenge before he is required to enter his plea

12 on the charge. The Crown objects to this and

13 argues the constitutional challenge should be

14 heard only after Mr. Kakfwi is convicted of the

15 charge that triggers this mandatory minimum

16 penalty.

17 The Crown and defence agree that the legal

18 framework that governs the issue as to when the

19 constitutional challenge should be heard was the

20 framework laid out by the Supreme Court of Canada

21 in R. v. DeSousa, [1992] 2 S.C.J. 1997. They do

22 not entirely agree about how that framework

23 operates.

24 Both sides agree that the Court has the

25 jurisdiction to hear a constitutional challenge

26 before trial and a discretion to do so. The

27 Crown argues there is a strong presumption

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1 against doing so and that the defence has not

2 rebutted that strong presumption in this case.

3 Defence takes issue with the Crown's

4 position that the legal framework includes a

5 strong presumption against hearing constitutional

6 issues before trial. On that point, I agree with

7 defence. The use of the term "presumption" may

8 not be entirely accurate in this context. But,

9 in the end, how the test is described does not

10 make much of a difference to the outcome.

11 On my reading of DeSousa, the key is that in

12 deciding on the timing of the hearing of this

13 type of motion, regard must be had to two policy

14 considerations. The first is that it is

15 desirable to avoid fragmentation of criminal

16 proceedings. The second is that there is a need

17 for a proper factual foundation in any

18 constitutional litigation.

19 Both of these policy considerations favour

20 disposition of the type of application brought by

21 Mr. Kakfwi after trial and not before, and, in

22 the ordinary course of things, that is what

23 happens. But the Court may depart from that

24 usual approach. In DeSousa, the Supreme Court

25 said that trial courts should not do so "unless

26 there is a strong reason for doing so" in cases

27 where the "interests of justice necessitate an

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1 immediate decision". DeSousa, at paragraph 17.

2 The Supreme Court went on to give examples

3 of when that might be the case: where the Court

4 itself is implicated in a constitutional

5 violation; where substantial ongoing

6 constitutional violations require immediate

7 action; or where it might save time to decide the

8 constitutional issue before trial. An example of

9 when it might save time to hear a constitutional

10 challenge ahead of time is when there is an

11 apparently meritorious challenge to the law under

12 which the accused is charged and the challenge

13 does not depend on the facts to be elicited

14 during the trial.

15 Unlike some of the cases referred to by

16 defence, such as R. v. Haldenby 1994 CarswellOnt

17 1096, for example, the provision that Mr. Kakfwi

18 seeks to challenge is not the one that creates

19 the offence that he is charged with. It is not

20 as though dealing with the constitutional issue

21 now would avoid the need for a lengthy and

22 complex trial which may fall apart because the

23 charging provision ends up being found

24 unconstitutional. There is no suggestion that

25 hearing the matter ahead of trial would save

26 resources or court time.

27 There is also no suggestion that at this

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1 point the Court itself is implicated in a

2 constitutional violation.

3 But Mr. Kakfwi says that one of the things

4 evoked in DeSousa, the fact that the challenge

5 does not depend on facts to be elicited at trial,

6 does apply to his situation.

7 Mr. Kakfwi's position must be considered

8 against the backdrop of the legal framework that

9 applies to a Section 12 challenge. That

10 framework is set out in R. v. Nur, [2015] 1 SCR

11 773 and R. v. Lloyd 2016 SCC 13. When a

12 mandatory minimum sentence is challenged on the

13 basis that it contravenes Section 12 of the

14 Charter, there are two avenues for arguments.

15 The first is that the mandatory minimum will

16 result in cruel and unusual punishment for the

17 accused who is before the Court. The second is

18 that for other persons in other situations, the

19 mandatory minimum punishment would result in

20 cruel and unusual punishment. One argument rests

21 on the situation of the accused who is actually

22 before the Court, the other rests on a

23 hypothetical situation that could reasonably

24 arise.

25 In a case where the first line of argument

26 is being pursued, the facts of the case will

27 necessarily matter. Arguably, in cases based

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1 solely on the "reasonable hypothetical" line of

2 argument, the facts of this specific case will

3 have little bearing on the issue.

4 In submissions, the Crown pointed out that

5 some facts would necessarily need to be

6 established for this constitutional challenge

7 even if it were to be based exclusive on the

8 "reasonable hypothetical" situation because the

9 mandatory minimum penalty that applies depends on

10 the type of firearm used. I do not think that

11 would present much of an obstacle if it were the

12 only issue because that one fact is very narrow

13 and specific, most likely non-contentious, and,

14 as defence counsel pointed out, could easily be

15 the subject of an admission for the purposes of

16 the constitutional challenge.

17 The greater problem, as I see it, is that it

18 is not certain that the challenge will, in this

19 case, rest solely on the "reasonable hypothetical"

20 branch of the test.

21 In describing the nature of the challenge

22 that he expects to put forward, Mr. Kakfwi's

23 counsel states at paragraphs 15 and 16 of his

24 written submissions:

25 In the particular circumstances of

Tony Kakfwi, it is anticipated

26 that the challenge will be based

completely upon the "reasonable

27 hypothetical" line of argument.

Given the principles at play in

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1 Section 12 litigation, a four year

sentence of imprisonment - while

2 longer than what the defence will

argue is appropriate in his case -

3 would likely not rise to the level

of being "cruel and unusual"

4 punishment in the case of

Mr. Kakfwi.

5

Thus, the outcome of this

6 challenge will not depend upon the

facts of the case at bar but

7 rather will, instead, depend upon

the court's consideration of

8 "reasonable hypothetical"

situations which will be described

9 and offered during argument. This

is accordingly not a situation in

10 which the Court would need an

evidentiary or factual foundation

11 of the sort usually contemplated

when the Supreme Court has urged

12 courts to avoid making rulings in

factual vacuums.

13

14 But, importantly, there is a footnote at the end

15 of that paragraph which reads:

16 All of this is not to say that no

evidence or facts would be placed

17 before the Court if the need

arises. While it is presently

18 intended to argue the challenge on

the basis of "reasonable

19 hypotheticals" as outlined above,

if there is a need for more of a

20 factual foundation to be provided

to the Court that can, in any

21 event, be undertaken as necessary

and appropriate in the

22 circumstances.

23 Counsel used equally careful language during

24 the oral submissions. That is understandable

25 because, as counsel acknowledged, new facts, new

26 evidence, about Mr. Kakfwi 's personal situation

27 could well come to counsel's attention between

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1 now and the time of sentencing if this case ever

2 reaches that stage. Those new facts could affect

3 whether an argument should be made about the

4 impact of the impugned provision in his own

5 personal circumstances.

6 The bottom line is that Mr. Kakfwi is not

7 ruling out, and probably cannot rule out, the

8 possibility that the constitutional challenge

9 could be decided on the basis of a different

10 factual matrix than what would ultimately be

11 established through a trial and/or sentencing

12 hearing process. If that were to happen, the

13 constitutional issue would have to be revisited.

14 In that event, not only the trial process would

15 be fragmented but the actual constitutional

16 challenge would be as well. That is not an

17 efficient use of resources.

18 I understand fully why Mr. Kakfwi cannot

19 commit to limiting his challenge to the

20 "reasonable hypothetical" branch of the test. It

21 would be problematic for counsel to make that

22 commitment for the reasons I have already

23 referred to. But it raises these potential

24 disadvantages and issues as far as the

25 possibility of hearing the constitutional

26 challenge ahead of plea.

27 Mr. Kakfwi also relies on another distinct

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1 argument. He argues that it is in the interests

2 of justice to allow the challenge to be heard

3 before plea so that he can know, before he

4 pleads, the penalty he will face. He argues that

5 he is entitled to know his jeopardy before he

6 pleads. In support of that position, he relies

7 on a number of things which he says apply by

8 analogy.

9 For example, he refers to notice

10 requirements that arise in other areas of our

11 criminal law. The first example is the

12 requirement for the Crown to give an accused

13 notice of its intention to seek a greater penalty

14 on a subsequent offence, as provided for in

15 Section 727 of the Criminal Code. The second

16 example he gives is the requirement for the Crown

17 to give notice to a young person of its intention

18 to apply to have that young person sentenced as

19 an adult if convicted. Mr. Kakfwi argues that

20 similarly, he is entitled to know the extent of

21 his jeopardy more specifically in relation to

22 this charge, before he pleads

23 I understand the argument, but I think it

24 overlooks the fundamental qualitative difference

25 between those examples and the situation here.

26 In my view, there is a fundamental difference

27 between the Crown being required to provide

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1 advance notice on how it will exercise its

2 discretion, and the Court being asked to decide

3 whether it will declare a law contrary to the

4 Charter. Those are two very different things.

5 The logical extension of Mr. Kakfwi's

6 position is that anyone who wishes to challenge a

7 sentencing provision, or any provision of the

8 Criminal Code for that matter, would be entitled

9 to a ruling on the issue before plea. That

10 would, in my view, represent a major departure

11 from the general principles outlined in DeSousa.

12 Mr. Kakfwi also gave the example of the

13 requirements of publicity for Parliamentary

14 proceedings in the enactment of laws and the

15 requirement for laws to be published in the

16 Canada Gazette. Again, I do not find those

17 examples particularly helpful to his argument

18 because they arise in a very different context

19 than the one we are dealing with here.

20 In addition to other policy reasons that

21 militate against entertaining this type of

22 application before trial, delay is another

23 concern. Every court across the country is

24 acutely aware of the Supreme Court of Canada in

25 R. v. Jordan, [2016] 1 SCR 631. That decision

26 has not made delay less of a consideration in the

27 general landscape of the administration of the

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1 criminal justice system in our country. On the

2 contrary, it has placed it at the forefront more

3 than ever before. That factor does not assist

4 Mr. Kakfwi's position.

5 Defence counsel is quite correct in pointing

6 out that this case has proceeded very

7 expeditiously up until now. The events giving

8 rise to the charge arose in November 2016. The

9 matter is now before this Court. We are a long

10 ways away from the presumptive ceiling of 30

11 months established in Jordan. At the same time,

12 it is very clear that proceeding now to schedule

13 the hearing of the constitutional challenge will

14 create additional pre-trial delays. We can never

15 predict what factors may have a further impact in

16 the future on the scheduling of this trial.

17 The resources of this Court are already very

18 stretched. We are a circuit court that only has

19 four resident judges. We have a heavy caseload,

20 not just in criminal matters but also in civil

21 and family matters. There continue to be a very

22 high rate of jury trial elections in this

23 territory. There currently are a number of

24 pending cases, including several homicides and

25 other cases, that are expected to require several

26 weeks of court time. Under these circumstances,

27 the Court must be careful in how it uses its time

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1 and resources, and it must be careful in

2 exercising its discretion in a matter that will

3 inevitably add several months of pre-trial delay

4 on a case that, on its face, involves serious

5 allegations.

6 So, in summary, I disagree with the

7 defence's position that the interests of justice

8 entitle Mr. Kakfwi to know before plea whether he

9 will be subject to the mandatory minimum jail

10 term in the event of a conviction. I am not

11 persuaded that, to use the words of DeSousa, that

12 this is a case where there is a strong reason to

13 depart from the usual practice, that the

14 constitutional challenge to the penalty section

15 should be entertained at the sentencing stage. I

16 am not persuaded that the interests of justice

17 necessitate an immediate decision, and, for those

18 reasons, I will not entertain the constitutional

19 challenge to Section 244.2(3) at this stage.

20 That issue should be decided if and when

21 Mr. Kakfwi is convicted of the offence that gives

22 rise to that mandatory minimum sentence.

23 .................................

24 Certified Pursuant to Rule 723

of the Rules of Court

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Jane Romanowich, CSR(A)

27 Court Reporter

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