NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McPherson*, 2019 NSCA 20

Date: 20190314
Docket: CAC 441393
Registry: Halifax

Between:

Drew William McPherson

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Farrar, Bryson and Derrick, JJ.A.
Appeal Heard:	March 14, 2019, in Halifax, Nova Scotia
Written Release	March 15, 2019
Held:	Appeal against conviction dismissed; appeal against sentence allowed, in part, per oral reasons for judgment of the Court.
Counsel:	Appellant in person (via video conferencing) Mark Scott, Q.C, for the respondent

Reasons for judgment: (By the Court)(Orally)

[1] We are unanimously of the view that the conviction appeal should be dismissed. The grounds of appeal against conviction are without merit. It is not necessary to address them further.

[2] With respect to the sentence appeal, one of Mr. McPherson's arguments is that he was not given proper credit for remand. The trial judge found that he had spent 3.5 years on remand or 42 months. In denying Mr. McPherson 1.5:1 credit the trial judge said:

> [36] I see no compelling reason to allow more than one-for-one credit for time served on remand, except for a couple of months remission time which would have been earned serving other sentences.
>
> [37] I therefore award Mr. MacPherson three and a half years of credit time for time served on remand.

[3] In *R. v. Summers*, 2014 SCC 26, the Supreme Court of Canada addressed the circumstances where 1.5:1 credit is justified under s. 719(3.1) of the *Criminal Code*. Section 719(3.1) provides:

> (3.1) Exception - Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody …

[4] After discussing the text in some detail in *Summers*, the Court concluded:

> [79] The process need not be elaborate. The onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention. Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the Crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom early release and parole are simply not available. Similarly, if the accused's conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process.
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> [80] As well, when evaluating the qualitative rationale for granting enhanced credit, the onus is on the offender, but it will generally not be necessary to lead extensive evidence. Judges have dealt with claims for enhanced credit for many

> years. The conditions and overcrowding in remand centres are generally well known and often subject to agreement between the parties; there is no reason this helpful practice should not continue. There is no need for a new and elaborate process — the TISA introduced a cap on the amount of enhanced credit that may be awarded, but did not alter the process for determining the amount of credit to apply.
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> [Emphasis added]

[5] As noted by the Supreme Court, the process need not be elaborate, showing there has been pre-sentence detention will generally be sufficient for an offender to receive 1.5:1 credit for each day spent on remand.

[6] With respect, the trial judge erred in saying "I see no compelling reason to allow more than one-for-one credit".

[7] It was not in dispute that Mr. McPherson spent time on remand – there was some question about whether he should be credited with 42 months or 39 months – but no question he spent a significant amount of time on remand.

[8] That, in itself, was enough for the trial judge to draw the inference that Mr. McPherson lost eligibility for parole or early release, justifying enhanced credit.

[9] If the trial judge had reasons for only granting 1:1 credit for remand time, based on the evidence, those reasons should have been clearly stated in the decision to allow for meaningful appellate review. The failure to do so is an error in principle. On this record, and the trial judge's decision, we are left to speculate on why one-for-one credit was given. We are not prepared to do so.

[10] In *Summers*, the Court cited s. 719(3.2) of the *Criminal Code* which requires that reasons for any credit granted be stated on the record:

> [74] The sentencing judge is also required to give reasons for any credit granted (s. 719(3.2)) and to state "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" (s. 719(3.3)). This is not a particularly onerous requirement, but plays an important role in explaining the nature of the sentencing process, and the reasons for giving credit, to the public.

[11] Here the trial judge did not do so.

[12] As a result, we would allow the sentence appeal and grant credit for remand time at 1.5 for 1. This results in Mr. McPherson receiving 63 months' credit (42 months x 1.5), thereby reducing his sentence from 120 months to 57 months from the date of sentencing being August 10, 2015.

[13] In conclusion, the conviction appeal is dismissed, the sentence appeal is allowed by increasing the credit for time spent on remand.

Farrar, J.A.

Bryson, J.A.

Derrick, J.A.