SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Casey*, 2015 NSSC 187

Date: 20150625
Docket: Amh No. 430792
Registry: Amherst

Between:

Her Majesty the Queen

Appellant

v.

Kesha Melissa Casey

Respondent

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	March 19, 2015 in Amherst, Nova Scotia
Final Written Submissions:	April 30, 2015
Counsel:	Thomas L. MacLaren, for the Appellant Stephanie D. Hillson, for the Respondent

Moir J.:

Introduction

[1] Ms. Casey pleaded guilty to assault with a weapon contrary to s. 267(a) of the *Criminal Code*. Defence and Crown counsel made a joint submission for jail time followed by probation. The jail time was to be ninety days less credit for time served.

[2] The joint recommendation did not include a recommendation for the length of the credit. That was left for the sentencing judge to determine. He allowed a two for one credit for time spent in detention.

[3] The Crown appeals on the ground that the credit exceeds the maximum recently put into the *Code*. Also, no one asked for, and the sentencing court did not provide, an order for taking DNA samples under s. 487.051. Thirdly, the Crown complains that the sentencing judge released written reasons that included "new issues not raised by the Appellant or Respondent at the sentencing hearing."

The Offender

[4] No presentence report was needed. The court had the advantage of a joint recommendation, agreement on the facts of the offence, information about the

offender, and extensive representations about what happened to her during remand. She got out of remand quicker, and started serving her sentence earlier, because a report was not needed.

[5] What I know about Ms. Casey personally is this. Amherst is home, but she moved to Ontario for a time, and moved back to Amherst not long before the offence. She has two young children. She suffers from the bipolar disorder and has the attention deficit (hyperactivity) disorder.

[6] Ms. Casey returned to Nova Scotia with prescriptions for medications that help with her bipolar disorder, as well as ADHD. The record indicates that she had difficulty getting funds for her medications when she returned to Nova Scotia. I infer that she sought income assistance, but there was a delay. In any event, she had been off her medications for some time in July of 2014.

[7] Ms. Kesha Casey's mother, Ms. Kelly Casey, has a home in Amherst. It seems Ms. Kesha Casey's two young children were living with their grandmother in July, 2014. The daughter, her mother, and her two children were at the residence on July 27, 2014.

The Offence

[8] Mother and daughter got into an argument during the afternoon of July 27, 2014. Ms. Kesha Casey grabbed her mother by the arm, she spat on her, then she got a seven inch long knife and threatened to kill her mother. Ms. Kelly Casey struggled to get the knife away from her daughter, but the latter took the opportunity to bite her mother on the arm.

[9] The elder Ms. Casey ordered her daughter out of the home. Along came a family friend who escorted Ms. Kesha Casey away. However, she took the house keys with her.

[10] One of the children witnessed the outburst and assaults.

Treatment in Jail

[11] Judge Scovil sentenced Ms. Casey on August 21, 2014. She had been in the Burnside jail for nineteen days. She endured the agony of being in jail without medication for a major psychiatric illness. This was not for want of trying by Ms. Casey, her lawyer, and Provincial Court judges. Despite their efforts, the institution provided no care.

[12] On August 4, 2014, Ms. Casey told officials at Burnside about her mental illness and the need for drugs. The institution did nothing.

[13] On August 5, 2015, Ms. Casey was brought before Judge John MacDougall. On being advised by counsel about Ms. Casey's illness and the institution's lack of care, the judge remanded Ms. Casey with a written recommendation that she be assessed. The institution did nothing.

[14] On August 11, 2014, Ms. Casey was brought before Judge Patrick Curran, formerly Chief Judge. On being advised by counsel about the illness, the effects of the lack of medication, and concerns for Ms. Casey's ability to instruct counsel, Judge Curran endorsed his recommendation on the remand and he made it clear that the failure of Burnside to provide medical attention was unacceptable. He ordered assessment on a priority basis "in order to obtain her required medication". The institution did nothing.

[15] Counsel advocated for Ms. Casey to Burnside officials. First, Ms. Casey was to see a physician, but the institution lost her paperwork. Then, the institution took the obviously erroneous view that the recommendation was for a criminal responsibility assessment, not for treatment. Ms. Casey was put on a list. She was

put on a waiting list to see a physician, but there would be a further delay while she was referred to a psychiatrist. In other words, the institution did nothing for her.

[16] On August 18, 2014, a compassionate guard succeeded where two judges and a lawyer had failed. On that day, Ms. Casey learned of the death of a close friend. The guard convinced a nurse to finally give Ms. Casey her medication. Until that day, Ms. Casey lived with the agony of untreated bipolar disorder, formerly manic depression, in a jail because the institution did nothing despite the pleas of Ms. Casey and her counsel, and court orders. Apparently, the medication was in the jail dispensary the whole time.

Decision Under Appeal

[17] On August 21, 2014, three days after Burnside finally gave Ms. Casey her medication, she pleaded guilty and was sentenced. Judge Scovil gave an oral decision. He said he was allowing a two for one credit on remand time. He said he would provide supplementary reasons in writing, and he provided the written decision on October 27, 2014.

[18] The oral decision did not mention s. 719 of the *Criminal Code*. However, the written decision was to be about the two for one credit. Counsel were given the opportunity to refer the court to authorities. Whether the judge could have done

anything had he changed his mind is not something I have to decide, but the approach he took furthered the ends of justice. On the day of the oral decision, Judge Scovil said, "I'm not prepared to set sentencing off while she's in custody", but "I'm not prepared to articulate what I think … would be … the rationale for my decision today." His approach let Ms. Casey start serving her sentence, while giving the judge time to intelligently articulate his reasons on the two for one credit.

[19] The written decision deals with s. 719. It begins with a statement of the facts that extensively covers the information that was placed before the court in August. The sentencing judge took the view that these facts raised issues as to "whether there has been a breach of Ms. Casey's rights under Section 7 of the *Canadian Charter of Rights and Freedoms*" and "if that has occurred, what is a proper remedy under Section 24(1)."

[20] The judge referred to paras. 86 and 87 of *R. v. Morgentaler*, [1988] S.C.J. 1 for the proposition that legislation precluding appropriate medical treatment when one's life or health is in danger violates the right to life, liberty, and security of the person. He spoke of "challenges faced by those within the [justice] system suffering from mental illness", and referred to the Ashley Smith inquiry and the Hyde inquiry.

[21] Against that background, Judge Scovil concluded Burnside's withholding of Ms. Casey's medications violated her constitutional right to security in two distinct ways:

> There are several ways in which Ms. Casey's security of person has been violated by the state in relation to this matter. The withholding of drugs which were important to treat her mental health issues had a direct bearing on the security of her person. In addition, the withholding of medically prescribed drugs used to treat her bipolar condition potentially could negatively impact her ability to instruct counsel and as a result, her counsel would not be in a position to properly assist in the conduct of her trial.

[22] The sentencing judge then referred to *R. v. Nasogaluak*, 2010 SCC 6 and quoted paras. 63 and 64, which he said enlightened "The question of Section 24(1) and how it interplays with sentencing". This includes, in para. 64 of *Nasogaluak*:

> … the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s. 24(1) of the *Charter*, may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender. In that case, the validity of the law would not be at stake, the sole concern being the specific conduct of those state agents.

Judge Scovil concluded, "given the egregious conduct of the state, the appropriate remedy here is that the Accused be given credit at two days for each day served in custody."

Credit for Time Served

[23] The Crown argues that it was an error to give Ms. Casey a two for one credit because it exceeds the one for one norm in s. 719(3) and the one for one and one-half maximum in s. 719(3.1).

[24] Ms. Casey supports the sentencing judge's interpretation of *Morgentaler* and *Nasogaluak*, his conclusion that Ms. Casey's constitutional right to security was violated by state agents at Burnside, and his conclusion that exceeding the statutory maximum credit for time served was the sole effective s. 24 remedy for the egregious violation. Her counsel also referred me to *R. v. Donnelly*, 2014 ONSC 6472 and *R. v. Gowdy*, 2014 ONCJ 696.

[25] None of the cases referred to for Ms. Casey concerned the statutory credit for time served. They concerned minimum sentences: in *Nasogaluak*, the minimum fine for impaired driving; in *Donnelly*, the minimum period of incarceration for making child pornography for publication, and; in *Gowdy*, the minimum period of incarceration for internet luring.

[26] *Nasogaluak* held that state misconduct affecting the offender or the offence may reduce sentence. It held that usually resort to s. 24(1) was unnecessary because the misconduct, whether or not it amounted to a constitutional violation,

was something to be taken into account on sentencing. It left open the question of an exceptional reduction below a statutory minimum as a s. 24(1) remedy.

[27] In the decision under appeal, our Provincial Court embraced sentence reduction below statutory minimums as a s. 24(1) remedy in "exceptional cases" where the reduction is "the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender." So did the Ontario Superior Court of Justice in *Donnelly* and the Ontario Court of Justice in *Gowdy* and two other decisions cited at para. 16 of *Gowdy*.

[28] I also embrace this proposition. In my view, Justice Nordheimer's discussion of *Nasogaluak* at paras. 58 to 69 in *Donnelly* shows the logic of an exceptional departure from a statutory minimum sentence when it is necessary to remedy the state's egregious violation of an accused's constitutional right. His discussion at paras. 82 to 91 is enlightening for the connection made between mental illness and "effective" remedy where state action has worsened the effects of mental illness.

[29] The principle of exceptional departure from minimum sentences as a s. 24(1) remedy extends logically to maximum credits for time served. There is, I think, an approach that is less intrusive on parliamentary supremacy, and I will discuss that

next. However, we have here an egregious violation by the state of Ms. Casey's constitutional rights while she was in jail. The only effective remedy is one that goes to the time she spent living under that violation.

[30] Do s. 719(3) and (3.1) apply here? In my view, the correct interpretation of the 2009 amendments is that they do not apply when there were egregious violations by the state of an accused's constitutional rights during pretrial detention.

[31] Before 2009, s. 719(3) read:

> In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

This provision has its origin in the 1973 *Bail Reform Act*, but it reflected a practice of some courts. See *R. v. Sloan*, [1947] O.J. 43 (C.A.).

[32] How much credit was in the discretion of the sentencing judge, but it was usually more than one for one. John Laskin J.A. explained the enhanced credit this way in *R. v. Rezaie*, [1996] O.J. 4468 at para. 25:

> Although this section is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good reason. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's

> liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody awaiting trial. For these reasons, pre-trial custody is commonly referred to as "dead time", and trial judges, in deciding on an appropriate sentence, frequently give credit for double the time an accused has served.

[33] The 2009 amendments did two things. They added this phrase to the *Bail Reform Act* provision: "but the court shall limit any credit for that time to a maximum of one day for each day spent in custody." And, despite that new phrase, they partly revived the enhanced credit with the new s. 719(3.1):

> Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

Subsection 515(9.1) is for cases in which the person awaiting trial is detained primarily because of prior convictions. Subsections 524(4) and (8) are for violations of release conditions.

[34] The amendments restrict the credit to a formula "for each day spent in custody". They have to be interpreted in accordance with Professor Driedger's principle as adopted in *Re. Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. 2 at paras. 20 to

23. As with mandatory minimum sentences, the new limits on credit for time served

> … must be understood in the full context of the sentencing scheme, including the management of sentences provided for in the Corrections and Conditional Release Act … .

R. v. Wust, 2000 SCC 18 at para. 23.

[35] We see that Parliament curtailed credit for dead time. The context does not include, nor would it, unlawful detention or detention that includes egregious violations of constitutional rights. The context includes the *Criminal Code*, which provides for lawful detention, statutes providing for correctional facilities, and the *Constitution Act*. Set in that context "each day spent in custody" means each day spent in lawful detention during which the accused is afforded her constitutional rights.

[36] In other words, the 2009 curtailment of credit for "each day spent in custody" had everything to do with credit for dead time and nothing to do with credit for violations of constitutional rights during pretrial or prehearing detention.

[37] In conclusion, the sentencing judge made no error when he gave Ms. Casey credit of two days for every day she spent in pre-sentence detention living with the agony of being deprived of her anti-bipolar medication.

DNA Order

[38] No one mentioned an order under s. 487.051 during the sentencing hearing. It was mandatory. Ms. Casey submits we should remit the question back to the sentencing judge, who has the power to correct clerical errors and similar oversights. I think it is more practical to allow the appeal on this point. I will sign the required order.

New Issues in Later Decision

[39] As I read the record, the constitutional issue was not explicitly raised by the defence or explicitly referred to by the sentencing judge at the sentencing hearing. I accept that the Crown did not understand that the sentencing judge would be writing on the relationship between s. 24(1) of the *Charter* and s. 719(3) and (3.1) of the *Code*. However, two points need to be made.

[40] In the oral reasons the credit for time served exceeded s. 719(3.1) and the judge expressed the need to articulate his reasons for that later. The only possible bases were constitutional or interpretative. In those circumstances, the invitation to provide further submissions was meaningful, although an explicit reference to the maximum credit would have been helpful.

[41] Secondly, the Crown had the opportunity to address the issues on appeal. The prejudice to it is minimal, and no other practical remedy appears. As I said, the choice to get the period of incarceration started before full articulation of the reasons furthered the ends of justice.

Conclusion

[42] The ground of appeal about a DNA order is allowed, but the other grounds are dismissed. Mr. MacLaren may send me a draft of the required order.

Moir J.