SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Heath*, 2019 NSSC 309

Date: 20191011
Docket: CRBW 474109
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Murray Marvin Heath

LIBRARY HEADING

Judge:	The Honourable Justice Mona M. Lynch
Heard:	September 30, 2019 in Bridgewater, Nova Scotia
Written Decision:	October 11, 2019
Subject:	Extrinsic Evidence on Sentencing
Summary:	Mr. Heath was found guilty of trafficking in Hydromorphone from events in June 2016. On sentencing, the Crown made an application to introduce evidence of the circumstances on June 5, 2019 which form the basis of new charges against Mr. Heath. Mr. Heath entered not guilty pleas to the new charges and is scheduled for trial. In the application, the Crown relied on s. 725(1)(c) of the *Criminal Code* and the common law to admit such evidence.
Issues:	(1) Is the evidence admissible pursuant to s. 725(1)(c) of the *Criminal Code*? (2) Is the evidence admissible pursuant to the common law exception to admit evidence of other offences at a sentencing hearing?

Result: The evidence would be admissible under s. 725(1)(b) or (b.1) with the consent of Mr. Heath. It is not admissible under s. 725(1)(c) or under the common law exception for extrinsic evidence at sentencing.

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Heath*, 2019 NSSC 309

Date: 20191011
Docket: 474109
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Murray Marvin Heath

Judge:	The Honourable Justice Mona M. Lynch
Heard:	September 30, 2019, in Bridgewater, Nova Scotia
Counsel:	Joshua Bryson, Crown Michael Power, Q.C., Defence

By the Court:

Background:

[1] After a trial on February 11, 2019, Murray Heath was found guilty of trafficking in Hydromorphone from events on June 27, 2016. The matter was adjourned for preparation of a Pre-Sentence Report to May 22, 2019 for sentencing. Sentencing was then adjourned to July 17, 2019 and further to September 30, 2019.

[2] On July 15, 2019, the Crown filed a Notice of Application to call evidence in relation to four new offences against Murray Heath from June 5, 2019. The charges are two breaches of a recognizance for failing to keep the peace and be of good behaviour and failing to refrain from possession of non-prescription drugs. There is also a charge of possession of Hydromorphone and a separate charge for possession of Cocaine.

[3] The Crown sought to call an RCMP officer to provide evidence. Mr. Heath objected to the evidence from the police officer being heard before submissions were made regarding the admissibility of such evidence.

[4] The Crown made the Application pursuant to s. 725(1)(c) of the *Criminal Code* or the residual common law exception to tender evidence of other offences.

[5] The Crown wants to use the evidence to show Mr. Heath's character and to counter the defence request for a non-custodial sentence. The Crown will be seeking a sentence of two years in a penitentiary whether the evidence is admitted or not.

[6] Mr. Heath opposes the Crown's application. Mr. Heath has entered a not guilty plea to all the charges and is awaiting trial in Provincial Court.

Issue:

[7] 1. Is the evidence admissible pursuant to s. 725(1)(c) of the *Criminal Code?*

2. Is the evidence admissible pursuant to the common law exception to admit evidence of other offences at a sentencing hearing?

Analysis:

1. Is the evidence admissible pursuant to s. 725(1)(c) of the *Criminal Code?*

[8] While the Crown indicated that they were only proceeding on the residual exception to tender evidence of other untried offences, it is worth considering s. 725. Section 725 of the *Criminal Code*:

> **Other offences**
>
> **725 (1)** In determining the sentence, a court
>
> > (a) shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences;

(b) shall consider, if the Attorney General and the offender consent, any outstanding charges against the offender to which the offender consents to plead guilty and pleads guilty, if the court has jurisdiction to try those charges, and shall determine the sentence to be imposed for each charge unless the court is of the opinion that a separate prosecution for the other offence is necessary in the public interest;

(b.1) shall consider any outstanding charges against the offender, unless the court is of the opinion that a separate prosecution for one or more of the other offences is necessary in the public interest, subject to the following conditions:

(i) the Attorney General and the offender consent,

(ii) the court has jurisdiction to try each charge,

(iii) each charge has been described in open court,

(iv) the offender has agreed with the facts asserted in the description of each charge, and

(v) the offender has acknowledged having committed the offence described in each charge; and

(c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

Attorney General's consent

(1.1) For the purpose of paragraphs (1)(b) and (b.1), the Attorney General shall take the public interest into account before consenting.

No further proceedings

(2) The court shall, on the information or indictment, note

(a) any outstanding charges considered in determining the sentence under paragraph (1)(b.1), and

(b) any facts considered in determining the sentence under paragraph (1)(c),

and no further proceedings may be taken with respect to any offence described in those charges or disclosed by those facts unless the conviction for the offence of which the offender has been found guilty is set aside or quashed on appeal.

[9] The Supreme Court of Canada considered s. 725 in *R. v. Larche*, 2006 SCC 56. Sections 725(1)(b) and (b.1) apply to outstanding charges against an accused. However, 725(1)(c) allows the court to take into consideration facts that could constitute the basis for a separate charge that has not, or not yet, been laid (para. 20). While ss. 725(1)(b) and (b.1) require the Crown and the offender to consent, no such consent is required for s. 725(1)(c) (para. 23). Fish J. considered the purpose of s. 725(1)(c) and 725(2):

> 25 First, s. 725(1)(*c*) dispels any uncertainty whether a sentencing judge can take into account as aggravating factors other uncharged offences that satisfy its requirements.
>
> 26 Second, s. 725(2) then protects the accused from being punished twice for the same offence: incrementally, as an aggravating circumstance in relation to the offence charged, and then for a second time should a separate charge subsequently be laid in respect of the same facts. This protection is essential, since the usual safeguards would not apply: The accused, if later charged with offences considered by the trial judge under s. 725(1)(*c*), could neither plead autrefois convict nor, unless charged with what is found to be "the same delict", invoke the rule against multiple convictions set out in *Kienapple* v. *The Queen*, [1975] 1 S.C.R. 729.
>
> 27 I stated at the outset that s. 725(1)(*c*) was the only true exception to the rule that offenders are punished in Canada only in respect of crimes for which they have been specifically charged and of which they have been validly convicted. I do not consider subs. (1)(*b*) and (*b*.1) to be true exceptions to that rule because they both relate to *separately charged offences* for which offenders may be punished only (1) *with their consent* and (2) if they *agree to plead guilty* (para. (*b*)) or, *"agre[e] with the facts asserted"* and *"acknowledg[e] having committed the offence"* (para. (*b*.1)).
>
> 28 As we have seen, s. 725(1)(*c*) permits a court, in determining the sentence, to consider any fact that forms part of the circumstances of the offence even if it could form the basis for a separate charge. These uncharged but proven offences, if they are considered at all, will invariably be treated as "aggravating circumstances" within the meaning of s. 718.2(*a*) and related provisions of the *Criminal Code* . It is true, of course, that not all aggravating circumstances, or factors, are crimes in themselves. The offender's previous convictions, for example, and the vulnerability of the victim due to infirmity or age, are not offences in themselves. But, like uncharged offences that may be considered under s. 725(1)(*c*), they are aggravating as opposed to mitigating circumstances because they warrant *more severe — not more lenient* — sentences.

Therefore s. 725(1)(c) cannot be used in the present case to allow the Crown to present evidence surrounding the new offences because Mr. Heath has been charged with the offences, has entered pleas of not guilty and is awaiting trial. If

s. 725(1)(c) could be used, Mr. Heath would be entitled to the protection under s. 725(2) and no further proceedings could be taken in respect of the outstanding charges.

2. Is the evidence admissible pursuant to the common law exception to admit evidence of other offences at a sentencing hearing?

[10] The Crown relies primarily on the Supreme Court of Canada case of *R. v. Angelillo*, 2006 SCC 55, and *R. v. Edwards*, 2001 CanLII 24105 (ONCA).

[11] In *Angelillo* the Crown sought to introduce evidence in the Quebec Court of Appeal that they were unaware at the time of the sentencing. Mr. Angelillo was under investigation again for incidents that occurred after his guilty pleas. Mr. Angelillo later faced new charges from these incidents.

[12] Charon J. for the majority found:

> 5 Although I have concluded that the fresh evidence is relevant and I recognize that, in principle, evidence of facts tending to establish the commission of another offence of which the offender has not been convicted can in certain cases be admitted to enable the court to determine a just and appropriate sentence, I would, for the reasons that follow, dismiss the appeal. Since the fresh evidence constitutes the basis for outstanding charges against Mr. Angelillo for which he has not yet stood trial, it can be admitted only in the context of the procedure provided for in s. 725(1)(*b*) or (*b*.1) *Cr. C.* The conditions for that procedure include a requirement that the offender's consent be obtained. Furthermore, I feel that the Crown has not shown due diligence. Accordingly, the Court of Appeal's decision not to admit the fresh evidence is affirmed and the appeal is dismissed. [emphasis added]

[13] Mr. Heath is in the same position as Mr. Angelillo. The new charges are outstanding and he has not stood trial. The only way to admit the fresh evidence is under s. 725 (1)(b) or (b.1) of the *Criminal Code*. That way Mr. Heath has the benefit of the protections in s. 725(2) and he cannot be punished twice for the same act.

[14] The Crown submits that Justice Charon dismissed the appeal because the Crown had not shown due diligence. I do not read paragraph 5 of *Angelillo* to say that. Justice Charon clearly stated that since the fresh evidence constituted the basis for outstanding charges, the evidence could only be admitted under 725(1)(b) or (b.1).

[15] In *Angelillo*, Justice Charon goes on to make a few general comments regarding the relevance of evidences of acts the have resulted neither in charges nor in convictions (para. 17).

[16] Justice Charon reviews the ways that evidence capable of showing the offender has committed another offence can be admitted at the sentencing hearing. The first of those is evidence of prior convictions (para. 24). The second way is under s. 725 (1)(b), (b.1) or (c) (para. 25). Justice Charon notes that since the evidence resulted in new charges against Mr. Angelillo that s. 725(1)(b) or (b.1) could have been invoked with the consent of Mr. Angelillo. Paragraph (c) could not be used because the facts did not form "part of the circumstances of the offence" (para. 26). She notes that when the conditions of s. 725 are met, consideration of the other offences does not violate the offender's rights because of the protection provided in s. 725(2) (para. 26).

[17] She then states at paragraph 27:

> 27 Third, if none of the paragraphs of s. 725(1) are applicable, the evidence in the instant case may be the type of extrinsic evidence that was in issue in *Edwards*. As Rosenberg J.A. recognized, there may be situations in which evidence that relates to one of the sentencing objectives or principles set out in the *Criminal Code* shows that the offender has committed another offence but *never been charged with or convicted of it.* Such facts may nevertheless be relevant and must not automatically be excluded in every case. As is often the case, the admissibility of the evidence will depend on the purpose for which its admission is sought. For example, let us assume that — as happens too often, unfortunately — a man is convicted of assaulting his spouse. The fact that he abused his spouse in committing the offence is an aggravating circumstance under s. 718.2 (a)(ii). Section 718 requires the court to determine the appropriate sentence that will, among other things, denounce unlawful conduct, deter the offender from re offending, separate the offender from society where necessary, and promote a sense of responsibility in the offender and acknowledgment of the harm he or she has done. It is therefore important for the court to obtain all relevant information. This is why several provisions of the *Criminal Code* authorize the admission of evidence at the sentencing hearing. [emphasis added]

[18] The Crown submits that it is an either/or situation where the evidence could be led if the offender had never been charged or had never been convicted. As a result, the evidence can be admitted here because Mr. Heath has not been convicted. I do not agree with the Crown's interpretation of para. 27 in *Angelillo*. Justice Charon is setting out the ways the evidence can be admitted and reserves the type of extrinsic evidence in *Edwards* to evidence of an offence for which an

offender has neither been charged nor convicted. If the offender has been charged, the procedure is set out in s. 725 of the *Criminal Code*. If the offender has been convicted, the evidence is admissible as a prior conviction. Also, Justice Charon only goes to the *Edwards* analysis where none of the paragraphs in s. 725(1) are applicable. Here, as in *Angelillo*, 725(1)(b) and (b.1) are applicable.

[19] Charon J. goes on to outline situations such as prior domestic violence where the offender has been neither charged nor convicted but the facts would be relevant to sentencing objectives and principles (para 30). Further at para. 32:

> 32 If the extrinsic evidence is contested, the prosecution must prove it. Since the facts in question will doubtless be aggravating facts, they must be proved beyond a reasonable doubt (s. 724(3)(*e*)). The court can sentence the offender only for the offence of which he or she has been convicted, and the sentence must be proportionate to the gravity of that offence. In addition, the judge can and must exclude otherwise relevant evidence if its prejudicial effect outweighs its probative value such that the offender's right to a fair trial is jeopardized. Finally, the court must draw a distinction between considering facts establishing the commission of an uncharged offence for the purpose of punishing the accused *for that other offence*, and considering them to establish the offender's character and reputation or risk of re‑offending for the purpose of determining the appropriate sentence for *the offence of which he or she has been convicted*. In my example, the sentence imposed on a violent offender may well be more restrictive than the sentence imposed on an offender who has committed an isolated act, but this is in no way contrary to the presumption of innocence. The sentence may also be more restrictive in the case of a repeat offender if the Crown presents evidence of the offender's criminal record, but this does not violate the offender's right, guaranteed by s. 11(*h*) of the *Charter* , not to be "punished . . . again". In both cases, again from the standpoint of proportionality, the more severe sentence is merely a reflection of the individualized sentencing process. [emphasis added]

[20] It is clear from the above that in *Angelillo* the Supreme Court of Canada was setting out the procedure for facts relating to offences that had not been charged and that the procedure under s. 725(1)(b) or (b.1) is to be used if an outstanding charge is being considered.

[21] In *Edwards*, Rosenberg J. discussed the admissibility and use of evidence of other criminal acts in determining the sentence to be imposed for attempted murder. In *Edwards* the evidence which the Crown sought to introduce was evidence of prior violent conduct in a previous domestic relationship which occurred in another country and earlier assaults against the victim of the current charge. There were no outstanding charges against Mr. Edwards. For some of the evidence, charges had been laid and withdrawn. The sentencing judge did not

admit the evidence and the Crown appealed. Rosenberg J.A. resolved the issues of principle in para. 4:

> [4] For the reasons that follow, I would dismiss this appeal. In summary, I would resolve the issues of principle as follows:
>
> 1. Evidence of uncharged and untried offences is admissible for the limited purpose of showing the background and character of the offender.
>
> 2. The trial judge has a discretion to refuse to admit evidence of other uncharged and untried offences. [emphasis added]
>
> . . .

[22] The evidence sought to be introduced in the *Edwards* case did not relate to outstanding charges. The analysis of Justice Rosenberg is in relation to uncharged and untried offences. The analysis is not in relation to outstanding offences for which the offender is awaiting trial and has a presumption of innocence.

[23] The Crown also referred to *R. v. Roberts,* 2006 ABCA 113, where evidence was admitted in relation to two prior acts of pointing a firearm where neither incident was reported to the police.

[24] The Crown referred to *R. v. Heron*, 2017 ONCA 441, where the Ontario Court of Appeal found nothing to indicate that the sentencing judge's consideration of a breach of bail conditions had any impact on the sentence imposed. They found that s. 725 was not engaged in that case but they do not go through an analysis of *Angelillo* and *Edwards*.

[25] The Crown also relied on *R. v. Benjamin,* 2018 QCCS 593, where the court allowed evidence of a pending charge of breach of bail conditions to be admitted at the sentencing hearing. The court found the evidence admissible under *Angelillo* and *Edwards*. However, those cases were not dealing evidence in relation to an outstanding charge.

[26] I do not agree that *Angelillo* and *Edwards* support the admission of the evidence against Mr. Heath.

[27] This is also not a case like *Lees v. The Queen*, [1979] 2 S.C.R. 749, where evidence of a potential but untried offence was admissible because the offender had tendered evidence of good character. Also, *Lees* was decided before s. 725 of the *Criminal Code* was enacted.

[28] The procedure to admit the evidence regarding an outstanding charge for which the accused is awaiting trial is under s. 725 of the *Criminal Code* with the protections that section provides. Otherwise, if Mr. Heath disagreed with the evidence from the police officer, he would have to testify or call evidence. This could jeopardize his right to remain silent under s. 7 of the *Canadian Charter of Rights and Freedoms*. If he takes the stand, any contradictions could be used at his trial on the offences (s. 13 of the *Charter*). Mr. Heath is presumed innocent of the outstanding offences until proven guilty (s. 11(d) of the *Charter*). Mr. Heath should only be punished for crimes for which he has been specifically charged and validly convicted (*Larche* para.1).

[29] Therefore, I find that the only way that evidence of the outstanding charges against Mr. Heath could be admitted would be under s. 725(1)(b) or (b.1) with his consent.

[30] If I did consider the factors set out by Justice Rosenberg in *Edwards* at para. 64:

> (a) There is little any nexus between the trafficking offence which is scheduled for sentencing relating to events in June 2016 and events in June 2019. The events are three years apart;
>
> (b) While I have not heard the evidence, the offences of breach of recognizance and trafficking in Hydromorphone are not similar. The possession of Hydromorphone and cocaine charges are similar;
>
> (c) Mr. Heath is scheduled for trial on the new charges and should not have to defend the allegations twice and perhaps testify twice;
>
> (d) The sentencing has been prolonged as the sentencing had to be adjourned to hear the application by the Crown to admit the evidence in relation to the new charges;
>
> (e) There is a danger that the sentence hearing will appear to be diverted from imposing a fit sentence for trafficking in Hydromorphone;
>
> (f) Mr. Heath has not introduced evidence of good character;
>
> (g) The cogency of the evidence is not known.

[31] Weighing the above factors, the evidence would not be admissible. I am also concerned that the prejudicial effect of the evidence would outweigh its probative value.

Conclusion:

[32] Evidence that Mr. Heath breached the conditions of his recognizance and possessed Hydromorphone and Cocaine on June 5, 2019 is not admissible at the sentencing hearing in relation to the charge of trafficking in Hydromorphone from June 27, 2016.

Lynch, J.