

Date: 20151223
Docket: 13/93
Citation: *Gambin v. Crockwell*, 2015 NLCA 58

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

DEAN GAMBIN, Director of Adult Corrections in
and for the Province of Newfoundland and Labrador
FIRST APPELLANT

AND:

GRAHAM ROGERSON, Superintendent of Prisons in
and for the Province of Newfoundland and Labrador
SECOND APPELLANT

AND:

LEO CROCKWELL RESPONDENT

Coram: Rowe, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G5482

Appeal Heard: October 23, 2015
Judgment Rendered: December 23, 2015

Reasons for Judgment by Rowe J.A.
Concurred in by White and Harrington JJ.A.

Counsel for the First Appellant: Philip Osborne/Mark P.
Sheppard
Counsel for the Second Appellant: Philip Osborne/ Mark P. Sheppard
The Respondent: Self Represented
Counsel (*Amicus Curiae*): Nicholas P.A. Westera

Rowe J.A.:

INTRODUCTION

[1] Leo Crockwell was convicted, following trial by judge and jury, of assault with a weapon, use of a firearm while committing an indictable offence, use of a firearm in a careless manner, mischief, and intentionally discharging a firearm while being reckless as to the life or safety of another person. He was sentenced to a total of four years for all offences, less time served: *R. v. Crockwell*, 2013 NLTD(G) 23, 333 Nfld. & P.E.I.R. 55. On subsequent application, a judge of the Trial Division made a declaration as to the calculation of Mr. Crockwell's statutory remission: *Crockwell v. Gambin*, St. John's 201301G5482 (NLTD) (December 19, 2013). As a result, he was released from prison on December 20, 2013. This is an appeal of the December 19, 2013 decision concerning the calculation of Mr. Crockwell's statutory remission.

[2] The Crown has indicated that if it is successful in this appeal, Mr. Crockwell will not be re-incarcerated. The appeal is important, however, to clarify the law concerning statutory remission for other offenders.

FACTS

[3] The appellants are the Director of Adult Corrections and the Superintendent of Prisons for the Province of Newfoundland and Labrador. They are responsible, *inter alia*, for the custody of persons sentenced to terms of imprisonment, as well as the operation and management of correctional facilities in the province. They are the parties named by Mr. Crockwell as respondents in his originating application.

[4] Mr. Crockwell was sentenced to four years imprisonment less time served. Time served was 26 months and five days; thus, 21 months and 25 days remained to be served, which term was set out in the warrant of committal. For sentences of two years or longer, statutory remission under s. 127(3) of the *Corrections and Conditional Release Act*, SC 1992, c. 20 provides for release of an offender on "the day on which the offender completes two thirds of the sentence". (Similar, but not identical, provisions appear in the *Prisons and Reformatories Act*, RSC 1985, c. P-20, which provides for a parallel system of statutory remission where the sentence is less than two years.)

ISSUE

[5] Is the “sentence” which is to be reduced by one third the total sentence imposed (four years) or is it the time to be served from the date of sentencing (21 months and 25 days)? Mr. Crockwell says four years; the applications judge agreed. The appellants say 21 months and 25 days; they appeal the application judge’s decision.

[6] This is a question of law for which the standard of review is correctness.

AMICUS CURIAE

[7] Before the applications judge, Mr. Crockwell was represented by legal counsel, Nicholas Westera. During the preparation of the respondent’s factum in this appeal, a disagreement arose between Mr. Crockwell and Mr. Westera, leading to Mr. Crockwell dismissing Mr. Westera as his counsel. The key point of difference was Mr. Crockwell’s insistence that certain “preliminary matters” be raised (see below).

[8] Mr. Westera sought leave to withdraw as solicitor of record, which was granted. At the same time Mr. Westera was appointed by the Court as *amicus curiae*, to ensure that a full legal argument would be presented in favour of the application judge’s decision. *Gambin v. Crockwell*, 2015 NLCA 38. (Another example of appointing as *amicus curiae* a lawyer discharged by his client was *R. v. Hart*, 2009 NLCA 10.) Thus, Mr. Crockwell represented himself, notably concerning the “preliminary matters”. Mr. Westera filed a factum and pleaded orally in response to the submissions made on behalf of the appellants.

“Preliminary Matters”

[9] The Court heard Mr. Crockwell on his “preliminary matters” before it dealt with the submissions by the appellants and *amicus curiae*. We reserved our decision on the “preliminary matters”, then heard submissions by counsel for the appellants and by Mr. Westera.

[10] Mr. Crockwell argued that in appealing the decision of the applications judge, the Crown was in effect appealing the sentence imposed on him. Such an appeal of sentence would be out of time, as the sentencing decision was made on February 13, 2013 and the notice of appeal in this case was filed on December 20, 2013. As well, any appeal of sentence by

the Crown would have to be taken on behalf of the provincial Attorney General, whereas this appeal was brought by Messrs. Gambin and Rogerson in their official capacities.

[11] This argument fails as the appeal is not against sentence; rather it is against the applications judge's decision concerning the calculation of statutory remission. The applications judge rendered his decision on December 19, 2013; the notice of appeal was filed on December 20, 2013. The notice of appeal was not out of time.

[12] The appellants were the parties named as respondents in Mr. Crockwell's originating application. As well, the appellants are the officials who have responsibility to administer statutory remission.

[13] Mr. Crockwell argued that the three-year probation order could not be made part of his sentence, as this would be contrary to s. 731(1) of the *Criminal Code*, which provides that a probation order cannot be imposed where the sentence is two years or longer.

[14] I make no comment on this issue, other than to say that it is not before the Court. This appeal is limited to a review of the applications judge's decision. That decision did not address probation, nor did Mr. Crockwell's originating application. (As well, Messrs. Gambin and Rogerson, in their official capacities, do not represent the Director of Public Prosecutions.)

[15] Mr. Crockwell also argued that his appeal against conviction and sentence should be reinstated. A notice of appeal against conviction and sentence was filed on March 11, 2013. However, it was not pursued. In *R. v. Crockwell*, 2014 NLCA 49 (December 2, 2014), Chief Justice Green struck out the notice of appeal. No application to reinstate the appeal is before this Court. Even if there was one, it would not be proper for the Court to deal with such an application in the hearing of this appeal from the applications judge's decision.

ANALYSIS

[16] I turn now to matters dealt with in submission by counsel for the appellants and by *amicus curiae*.

[17] The appellants took the view that while the application judge's decision was clear (that statutory remission should be calculated based on the four year sentence) his reasons for decision were not. (The applications

judge made a brief reference to *R. v. Wust, infra*, but not to other jurisprudence, including that dealt with below.) The appellants framed their submissions with little reference to the application judge's reasons. *Amicus curiae* did the same.

[18] The thrust of the appellants' submissions was that it is settled law that statutory remission is calculated by reference to the term of imprisonment following sentencing and not by reference to the sentence before any adjustment for time served.

[19] I will reproduce the appellants' argument, as it succinctly sets out their position:

The Respondent argues that he should receive remission on his sentence for the time that he spent on remand. The applications judge declared that:

[T]he sentence imposed was four years and that any statutory remission that is to be calculated ought to be calculated on the basis of four years.

The Appellants submit that this declaration is not the correct interpretation of the *Prisons and Reformatories Act* or the *Corrections and Conditional Release Act* as time spent on remand does not form part of the sentence.

Subsection 719(1) of the *Criminal Code* states that:

A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

The Appellants submit that time in custody on remand does not form part of the sentence. In *R. v. Mathieu*, [2008 SCC 21, para. 18] the Supreme Court of Canada held that:

Pre-sentence custody cannot be characterized as a "sentence": if the accused is convicted, the judge does take it into account as a relevant factor in sentencing, but what if the accused is *acquitted*? Whether the pre-sentence custody was part of a sentence for the purpose of the *Code* would thus fall to be determined retroactively in light of the verdict – a subsequent and separate event.

In *R. v. Wust*, [2000 SCC 18, para. 45] the Supreme Court of Canada stated that remission mechanisms do not apply to the period of pre-sentence detention. Rather, pre-sentence detention may be a factor for the sentencing judge to weigh in determining the appropriate sentence. At paragraph 45 of *Wust* the Court stated:

In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. “Dead time” is “real” time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

In *R. v. Stonefish*, [2012 MBCA 116, para. 11-12] the Manitoba Court of Appeal discussed that a sentence commences on the day it is pronounced and that pre-sentence custody is not included in remission or statutory release calculations. The Manitoba Court of Appeal stated:

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 sentencing. At common law and pursuant to s. 719(1) of the Code, a sentence commences on the day it is pronounced. The courts have held that this provision did not provide authority to backdate a sentence to take into account [pre-sentence custody] (*R. v. McDonald* (1998), 40 O.R. (3d) 641 (Ont. C.A.), at 651-52). Instead, jurisprudence developed which took that period of time into consideration by reducing the term of imprisonment when the circumstances justified such a course of action.

The courts across Canada adopted a rule of thumb which gave 2:1 credit for [pre-sentence custody]. The justification for this was based on two realities of remand custody. First, remand time was often worse than that for sentenced prisoners by virtue of poor conditions and the absence of rehabilitative programming in remand facilities. Second, as indicated above, such confinement was not included in remission or statutory release calculations.

In *R. v. Summers*, [2013 ONCA 147, para. 119] the Ontario Court of Appeal also discussed the issue that time in remand custody does not count for the calculation of remission and parole. Rather, s. 719(3.1) of the Criminal Code allows the sentencing judge to consider the time spent on remand to give credit up to a maximum of 1.5:1 for each day spent in pre-sentence custody to achieve a fair and just sanction. The Court stated:

I conclude where I began. In my view, properly construed, s. 719(3.1) of the Code permits a sentencing judge to credit pre-sentence custody up to a maximum of 1.5:1 for each day spend in pre-sentence custody where, on consideration of all relevant circumstances, such credit is necessary to achieve a fair and just sanction in accordance with the statutory scheme for sentencing and punishment set out in the Code. On a proper record, the relevant circumstances that may justify this enhanced credit include ineligibility for remission and parole while in remand custody.

Furthermore, Nova Scotia Court of Appeal in *R. v. C.(L.)* [2012 NSCA 107, para. 85] also reached the same conclusion:

In the end, taking into account the words of ss. 719(3) and (3.1) in their grammatical and ordinary sense and read in the entire context of the legislative scheme and the object of the Act, the legislation provides for judicial discretion to grant credit of up to 1.5:1 for time spent in pre-sentence custody if a judge is satisfied that the circumstances justify it, which includes consideration of the potential loss for the offender of earned or statutory remission and parole. I see no error by the trial judge in her interpretation of the statutory provisions. Accordingly, I would dismiss this ground of appeal.

The Supreme Court of Canada dismissed the appeal from *Summers* [2014 SCC 26, para. 2]. Justice Karakatsanis, writing for a unanimous Court, held that:

Time in a remand centre does not count for the purposes of eligibility for parole, earned remission or statutory release, and this can result in a longer term of actual incarceration for offenders who were denied bail.

Justice Karakatsanis also held [para. 26] that:

Because a sentence begins when it is imposed (s. 719(1)) and the statutory rules for parole eligibility and [statutory release and earned remission] do not take into account time spent in custody before sentencing, pre-sentence detention almost always needs to be credited at a rate higher than 1:1 in order to ensure that it does not prejudice the offender.

In dismissing the appeal from *C.(L.)* [*R. v. Carvery*, 2014 SCC 27, para. 1] the Supreme Court of Canada held that:

Pre-sentence detention does not count towards eligibility for early release or parole, and thus may result in a longer period of incarceration than if the offender were released on bail.

...

The applications judge's decision cannot be reconciled with the fact that a sentence begins when it is imposed and that the rules for statutory release or remission do not take into account the time spent in custody before sentencing. The result is that the applications judge misapplied *Wust*

[20] In his argument, Mr. Westera urged on us an interpretation of the relevant statutory provisions that would support the result arrived at by the applications judge. If the slate were blank, if the issue were novel, his arguments would warrant detailed consideration. But, such is not the case.

[21] Rather, the issue has been settled by the Supreme Court of Canada in *R. v. Wust*, para. 45; *R. v. Summers*, para. 2 and 26; and *R. v. Carvery*, para. 1, quoted above. The Supreme Court of Canada has written definitively on the issue. This Court is required to follow their direction.

[22] The applications judge misread *R. v. Wust*. He made no reference to *R. v. Summers* and *R. v. Carvery*. He erred in law. It is for this Court to correct that error. In this regard, I would adopt what the Supreme Court of Canada stated in *R. v. Carvery*, *supra*, para. 1:

Pre-sentence detention does not count towards eligibility for early release [under statutory remission]

[23] In light of the foregoing, I do not need to deal with a further argument by the appellants that the originating application by Mr. Crockwell was, in substance, a collateral attack on the sentencing judge's decision to give credit for time on remand on a "one-for-one" basis, rather than a "one-and-a-half-for-one" basis. I would say only that it is difficult to envision how Mr. Crockwell could have gotten a judicial decision on the calculation of statutory remission other than by means of an originating application seeking a declaration, as was done here.

CONCLUSION

[24] The appeal is allowed, the application judge's decision is set aside. Mr. Crockwell's statutory remission would have been correctly calculated

by applying the one-third reduction to the term which he was sentenced to serve, i.e. 21 months and 25 days.

M. H. Rowe J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.