

Date: 20110520
Docket: 11/41
Citation: *R. v. Philpott*, 2011 NLCA 32

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

BETWEEN:

GILBERT PHILPOTT

APPLICANT/APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, J.A.

Application Heard: May 18, 2011
Decision Rendered: May 20, 2011

Counsel for the Appellant/Applicant: Self Represented
Counsel for the Respondent: Stephen Dawson

Welsh, J.A.:

[1] Mr. Philpott, on his own behalf, filed a notice of appeal with respect to the first of two sentences he is serving consecutively. The issue raised in his notice centres around the effect of 53 days he served prior to being sentenced. This decision disposes of questions as to: (1) legal counsel for

Mr. Philpott; and (2) leave to appeal which is required where the appeal relates only to sentence.

Preliminary Matters

[2] Mr. Philpott was refused the assistance of legal aid. I considered the question of whether counsel to represent Mr. Philpott should be appointed pursuant to section 684 of the *Criminal Code*. There are four factors to be addressed. First, the Crown conceded that Mr. Philpott does not have the means to engage private legal counsel. Second, Mr. Philpott was refused the assistance of legal aid.

[3] However, the third and fourth factors do not support the appointment of counsel for Mr. Philpott. I am satisfied that, given the nature of Mr. Philpott's issue, he is able to adequately present his case without the assistance of counsel. He is not arguing that the sentencing judge erred in principle or in law in imposing the sentence which, in fact, was the result of a joint submission following a guilty plea where Mr. Philpott was represented by counsel. Rather, his argument relates to how the sentence is to be calculated and applied in practice. As discussed below, the argument does not satisfy the threshold of a serious issue to be dealt with on the appeal.

[4] In the result, I have declined to order counsel to represent Mr. Philpott pursuant to section 684 of the *Criminal Code*.

Leave to Appeal

[5] This is an appeal as to sentence only and, as such, leave to appeal is required (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is frivolous in the sense of having no arguable basis or sufficient merit. For the following reasons, leave to appeal is denied, and the sentence imposed by the provincial court judge is affirmed. The explanation for this determination is intended not only to provide my reasons, but also, hopefully, to provide Mr. Philpott with the clarification he seeks as to his sentence.

[6] On January 4, 2011, Mr. Philpott pleaded guilty and was convicted under the *Criminal Code* of two charges of assault (section 266), one charge of uttering threats (section 264.1), two breaches of undertakings (section 145(3)), and two breaches of probation (section 733.1). He had been in custody since November 13, 2010, that is, 53 days. The provincial court

judge imposed a sentence of 10 months minus 80 days credit for pre-sentence custody.

[7] On February 25, 2011, Mr. Philpott was convicted under the *Criminal Code* of the indictable offence of assault with a weapon (section 267(a)), and two counts of uttering threats (section 264.1). He was sentenced by the Trial Division judge to 16 months imprisonment. This sentence was to be served consecutively to his earlier sentence.

[8] Mr. Philpott has argued that he was sentenced to 10 months plus 16 months, which amounts to 26 months imprisonment. A sentence of more than two years would fall within the penitentiary system under section 743.1(1) of the *Criminal Code*. The probation order made by the provincial court judge would be rendered invalid since probation can be ordered only where the sentence is for a term not exceeding two years (section 731(1) of the *Criminal Code*). (See, for example: *R. v. Delaney*, 2005 NLCA 39.)

[9] However, it is clear from the provincial court judge's decision that Mr. Philpott was, in fact, sentenced to 10 months less time served prior to sentencing, credited at 1.5 days per day on remand, that is, 80 days. When the 80 days is subtracted from the 10 month sentence, the result is a sentence of 7 months and 10 days. The second sentence of 16 months to be served consecutively results in a total of 23 months and 10 days. This sentence, being less than two years, would fall within the provincial correctional system under section 743.1(3) of the *Criminal Code*. The probation order imposed by the provincial court judge would remain valid.

[10] Mr. Philpott's suggestion that his sentence should be calculated to be 26 months is not consistent with the decision of the Supreme Court of Canada in *R. v. Mathieu*, [2008] 1 S.C.R. 723. Speaking for the Court, Fish J. summarized:

[19] Manifestly, the words "imprisonment for a term not exceeding two years" used by Parliament in s. 731(1)(b) refer to the custodial term imposed at the time of sentence – the actual term of imprisonment imposed by the court after taking into account any time spent in pre-sentence custody.

[11] Fish J. drew attention to two exceptions to the general rule that pre-sentence custody, while taken into account during sentencing, is not part of the sentence imposed on the offender. He wrote:

[7] Although it is possible, on an exceptional basis, to treat the time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence – in the context of a minimum sentence, for example, or of a conditional sentence – these are exceptions that prove the rule. As to minimum sentences, see *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18; regarding conditional sentences, see *R. v. Fice*, [2005] 1 S.C.R. 742, 2005 SCC 32.

[12] These exceptions do not apply to Mr. Philpott's situation. Indeed, his circumstances fall within the general rule. The conclusion follows that, in light of the decision in *Mathieu* and the nature of Mr. Philpott's submissions, the appeal filed by Mr. Philpott is frivolous in the sense that it has no arguable basis or sufficient merit. Accordingly, leave to appeal is denied.

[13] In the result, Mr. Philpott's total sentence is confirmed to be 23 months and 10 days imprisonment, being the combination of 7 months and 10 days (the sentence imposed on January 4, 2011), plus 16 months (the sentence imposed on February 25, 2011). The probation order imposed on January 4, 2011 remains a valid order.

B. G. Welsh, J.A.