SUPREME COURT OF YUKON

Citation: *R. v. Mulholland*, 2013 YKSC 77

Date: 20130812
S.C. No. 13-AP003
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Appellant

And

SAMUEL MULHOLLAND

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Eric Marcoux — Counsel for the Appellant
Karen Wenckebach — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a Crown appeal from the sentencing decision of Chief Judge Cozens of the Territorial Court made on June 26, 2013. The Crown submits that the chief judge erred in law by:

a) providing enhanced credit pursuant to s. 719(3) and (3.1) of the *Criminal Code*, for the time Mr. Mulholland spent in presentence custody, at the rate of 1.5 to 1; and

b) by not applying the majority decision in *R. v. Bradbury*, 2013 BCCA 280.

[2] The appeal was argued on August 8, 2013. At the end of the hearing, Crown counsel informed me that there is another matter to be decided in the Territorial Court in the very near future involving the presentence custody credit issue. Therefore, Counsel invited me to provide a summary of my decision on the appeal, briefly indicating my rationale, on the understanding that more comprehensive written reasons would follow later. Counsel suggested that this might be of assistance to the Territorial Court in deciding the other matter.

[3] On the basis, I am acceding to that proposal in this brief memo.

[4] I dismiss the appeal on both grounds.

[5] On the first ground, I am not persuaded that the Chief Judge erred in applying the credit of 1.5 to 1. In that regard, I prefer the reasoning in *R. v. Carvery,* 2012 NSCA 107; *R. v. Stonefish*, 2012 MBCA 116; *R. v. Summers*, 2013 ONCA 147; and *R. v. Johnson*, 2013 ABCA 190, to that of the majority of the British Columbia Court of Appeal in *Bradbury*, cited above.

[6] At para. 48 of *Bradbury*, the majority stated:

> "48 I also agree with the other appellate decisions that the exception in ss. (3.1) does not require "exceptional" circumstances and that circumstances that will justify enhanced credit must be personal to the individual offender. In my opinion, however, circumstances that would justify enhanced credit must have a qualitative characteristic; that is, a characteristic that is individual to the offender but also distinct from those characteristics that are universal to, or almost universally held, by other similarly situated offenders. Examples of commonly held circumstances might include the lack of programs, the conditions of the remand institution, and the loss of remission or parole eligibility. Individual qualitative circumstances might include the imposition of segregated or protective custody through no fault of the accused, the harsh effect of remand conditions

> because of a particular health issue by an accused, or a delay in the proceedings that is not attributable to the accused. Stated otherwise, circumstances to justify enhanced credit must be ones that are outside of the common experience of most offenders in remand custody."

[7] First, the loss of remission or parole eligibility does have an aspect of being an "individual qualitative circumstance", simply by virtue of the fact that it is not automatic and must be earned by each offender. While it may be correct to say that the vast majority of offenders earn such remission, the result is nevertheless not an automatic outcome. Second, with great respect, I find it difficult to distinguish between a circumstance which must be "outside of the common experience of most offenders in remand custody" and an "exceptional" circumstance, which the majority agreed is not required.

[8] On the second ground, I am not persuaded that the Chief Judge was required by *stare decisis* or any other legal rule or principle to apply the majority decision in *Bradbury.*

[9] My additional written reasons will follow.

_____

GOWER J.