COURT OF APPEAL FOR YUKON

Citation: *R. v. Cardinal*,
2013 YKCA 14

Date: 20130918
Docket: YU717

Between:

Regina

Appellant

And

Jonathan George Cardinal

Respondent

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainants or witnesses, referred to in this judgment by the initials F.G. and M.J. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: An order of the Territorial Court of Yukon, dated April 11, 2013 (*R. v. Cardinal*, 2013 YKTC 30), Whitehorse Docket No. 10-11019A, 11-00142.

Counsel for the Appellant:	E. Marcoux
Counsel for the Respondent:	G.R. Coffin
Place and Date of Hearing:	Vancouver, British Columbia September 3, 2013
Place and Date of Judgment:	Vancouver, British Columbia September 18, 2013

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

Summary:

The sentencing judge gave the respondent 1.5: 1 credit for pre-sentencing time in custody. In part, this was based on the appellant's loss of parole eligibility. The Crown appealed on the basis that the judge did not have the decision of the Court of Appeal for British Columbia in R. v. Bradbury, in which the Court held that lack of remission or deferred parole eligibility were not circumstances that justify enhanced credit for time pursuant to s. 719(3.1) of the Criminal Code. The respondent asserts that Bradbury is not binding on this Court and that R. v. Sommers, R. v. Carvery and R. v. Stonehouse should be followed. Held: appeal dismissed. Although technically not bound to do so, it would be unusual for this Court not to follow a decision of the Court of Appeal for British Columbia, but the decision in this case is not inconsistent with Bradbury and the issue does not arise in this case. The Court in Bradbury stated that circumstances that justify enhanced credit under s. 719(3.1) must be "something more than the near-universal loss of remission or parole eligibility common to most accused in remand custody". The sentencing judge went further than considering loss of remission or parole eligibility. He looked at factors, like the time required to obtain various reports and the delay from hearing to sentencing, which were personal and significant to the appellant in this case. They are part of the overall circumstances and are relevant in that context. That context is something more than near-universal circumstances common to most accused in remand custody.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] The respondent pleaded guilty to two counts of sexual assault and was sentenced to two consecutive terms of 26 months in jail, less two years' time served in pre-sentence custody at a ratio of 1.5 days for each day in custody, for a total of 36 months, giving an effective sentence of 16 months. The sentencing judge designated the respondent as a Long-Term Offender, imposed a seven year Long-Term Offender Supervision Order ("LTSO") and made an order under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 [*SOIRA*] for 20 years pursuant to ss. 490.012 and 490.013 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The Crown applies for an extension of time to bring an application for leave to appeal, leave to appeal, an order limiting the credit for pre-sentencing custody to two years and an extension of the sex offender registration to life.

Background

[3] On May 30, 2010, the respondent sexually assaulted F.G. On July 18, 2010, he sexually assaulted M.J. Both victims were quite intoxicated and he appeared to befriend them. The assaults were violent with the respondent choking both women.

[4] The respondent was arrested on July 18, 2010 and released on an undertaking to appear August 10, 2010. He failed to do so. A warrant was issued and was executed while the respondent was in custody in Prince George, British Columbia on other matters. He was returned to the Yukon on or around March 30, 2011. His sentencing took place in Whitehorse on April 4, 2013 with reasons delivered on April 11, 2013 (*R. v. Cardinal*, 2013 YKTC 30).

[5] The Crown does not take issue with the imposition of two consecutive sentences of 26 months or the Long-Term Offender designation and LTSO.

The sentencing reasons

[6] The sentencing judge recited the essential facts of the two assaults and the positions of the Crown and defence. He then turned to the respondent, who is a member of the Shuswap First Nation in Alkali Lake, British Columbia. Three reports were prepared: a Pre-Sentence Report, a *Gladue* Report and a Psychiatric Report.

[7] The judge discussed all three reports at length. They present a sad tale of the respondent's background, with some hope of rehabilitation. The judge balanced this against the seriousness of the assaults and considered the respondent's criminal record. He concluded that the 26-month sentences were appropriate and turned to the Crown's request for the Long-Term Offender designation. At paras. 128, 132 and 133, he stated:

> [128] To properly reflect the gravity of the offences that bring Mr. Cardinal before the Court, I have imposed a sentence that emphasizes denunciation and deterrence as well as separation of Mr. Cardinal from society. However, I also noted that the sentencing principle of rehabilitation should also factor largely in determining a fit sentence. Mr. Cardinal is a young man with a dysfunctional background and, while he has a limited criminal record, there are indicators that he has at times lived a socially acceptable lifestyle. He has

> some healthy and committed supports in the community. I believe that with appropriate treatment, counselling, programming and supports, he will be able to assume a position as a healthy and valued member of the community. As noted by Dr. Lohrasbe, a lengthy period of community supervision will greatly assist in Mr. Cardinal's rehabilitation. This conclusion is supported by Mr. Stevens in the *Gladue* Report. It is predominantly for this reason that I feel a long-term offender designation is appropriate, although I also feel that an LTSO is necessary for the protection of the public.
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> …
>
> [132] Ten years is the maximum supervision order I can impose. Taking into account Mr. Cardinal's youth, his limited criminal history, his other personal circumstances, including *Gladue* factors, and my initial reluctance to impose such a designation in the first place, I find that the appropriate length of the LTSO is a period of seven years.
>
> [133] Frankly, had it not been for the opinions of Dr. Lohrasbe and Mark Stevens as to the need for Mr. Cardinal to have a long period of supervision after his release from custody, which serves, and in fact appears necessary, to assist in his rehabilitation as well as providing protection to the public, I would not have made this designation.

[8] The judge then turned to a consideration of the respondent's time in custody pending sentencing. He began by looking at possible remission time or statutory release had the respondent been sentenced sooner. He quoted s. 129 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 and stated at paras. 145, 147, 148, 151 and 152:

> [145] When I consider the application of statutory release under the *CCRA* to Mr. Cardinal's case, I recognize that I cannot say with any certainty whether Mr. Cardinal would or would not receive his statutory release after serving 2/3 of his sentence. These sexual assaults constitute serious bodily and psychological harm to the victims. The evidence I have before me is not clear one way or the other that Mr. Cardinal's statutory release would likely be denied on the basis of s. 129. As Dr. Lohrasbe has indicated, there is much about Mr. Cardinal's potential for risk that is unknown, although Dr. Lohrasbe makes it clear that there is a substantial risk that if Mr. Cardinal reoffends sexually the harm to the victim could be significant. It is impossible to ascertain what Mr. Cardinal's personal circumstances would have been after he had been provided opportunity to access federal programming.
>
> …
>
> [147] I recognize that offenders released on parole or on statutory release are subject to conditions with which they must be compliant if they wish to remain in the community. By crediting Mr. Cardinal more than 1:1 for his time on remand on the basis of the denial of the opportunity to be paroled or receive statutory release, I am allowing him the equivalent of time in the community, but without such conditions. However, as he will be supervised in

the community pursuant to the terms of the LTSO, I am satisfied that that difference does not amount to such as would cause me to limit his credit. Time in the community subject to conditions is still considerably less restrictive than time spent incarcerated.

[148] Several courts of appeal have now concluded that s. 719(3.1) of the *Code* allows for enhanced credit to be provided for an inmate's pre-sentence custody solely on the basis of the loss of the opportunity to earn remission or parole. (See *R.* v. *Summers*, 2013 ONCA 147; *R.* v. *Carvery*, 2012 NSCA 107 and *Stonefish*[])].

…

[151] In paras. 44-46 of *Stonefish* the Court stated that:

> Circumstances adopted by courts that justify enhanced credit have included:
>
> 1) Conditions in remand facilities such as:
>
> - lack of programming or counselling available on remand - *e.g.*, *R. v. Haly*, 2012 ONSC 2302 (QL) (where a ratio of 1.2:1 was used); *R. v. Mullins (P.E.)*, 2011 SKQB 478, 388 Sask.R. 221; and *R. c. Auger*, 2012 QCCQ 568 (QL);
> - the number of lockdowns the offender experienced during PSC - *e.g.*, *Mullins*; *R. v. Oates*, 2012 ONCJ 461 (QL), but to the contrary, see *R. v. Sayed*, 2012 ONSC 843 (QL);
> - time spent by the offender in solitary confinement − *e.g.*, *R. v. Seymour*, 2011 BCSC 1682 (QL) (time spent there was for his own protection); *R. c. Guo*, 2011 QCCQ 10469 (QL); and
> - harsh circumstances in the remand facility − *e.g.*, *R. v. J.B.*, 2011 BCPC 158 (QL) (double-bunking, exposed to violence); *R. v. Clayton*, 2012 ABQB 333 (QL) (overcrowding, had to sleep on the floor); and *Auger* (no visitors while in PSC).
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> 2) Post-trial delay not attributable to the accused, including delays caused by:
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> - the court − *e.g.*, *R. v. Dingwell (D.A.)*, 2012 PESC 13, 321 Nfld. & P.E.I.R. 263; *R. v. B.R.S.*, 2011 ONCJ 484 (QL); and *R. v. Sabatine*,

> 2012 ONCJ 310 (QL) (request for further submissions and time spent drafting reasons);
>
> - the need to obtain a pre-sentence report or a *Gladue* (*R. v. Gladue*, [1999] 1 S.C.R. 688) report or a psychiatric assessment − *e.g*,. *R. v. House (Z.C.)* (2012), 319 Nfld. & P.E.I.R. 197 (NL Prov. Ct.); *R. v. Sharkey*, 2011 BCSC 1541 (QL); and *R. v. Mozumdar*, 2012 ONCJ 151 (QL);
> - multiple court appearances for the purposes of sentencing − *e.g.*, *R. v. Przybyla*, 2012 ABPC 183 (QL); and
> - the Crown − *e.g.*, *R. c. Lefrançois*, 2012 QCCQ 5655 (QL).
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> 45 There are also a number of cases which have identified circumstances where denying enhanced credit was justified. Such circumstances included delay caused by the offender and where an offender had a history of breaching court orders. In addition, where offenders have deliberately protracted their remand detention or otherwise endeavoured to manipulate the system, judges may well discount the credit ratio. See *R. v. Leggo (R.)* (2012), 317 Nfld. & P.E.I.R. 252 (NL Prov. Ct.); *R. v. Morris*, 2011 ONSC 5206 (QL); *J.B.*; *Johnson*; and *Sabatine*.
>
> 46 None of the above factors are especially exceptional and I would conclude that the circumstances that justify enhanced credit in s. 719(3.1) of the *Code* need not be exceptional...
>
> [152] Therefore I am providing Mr. Cardinal credit for his two years in remand custody at the rate of 1:5 to 1, for a total of 3 years.

[9] The judge added at paras. 154–158:

> [154] It is clear that Mr. Cardinal's performance while in custody fluctuated from acceptable to unacceptable. By no means was his performance exemplary, but it also was not continuously or even mostly negative. Even by applying the criteria in *Vittrekwa*, I would have provided Mr. Cardinal some credit above 1:1 for his time on remand due to loss of the potential to earn remission. I would also have provided him additional credit for the time he has spent in custody awaiting the preparation of the psychiatric assessment, the PSR and the *Gladue* Report, as well as for the time he has spent awaiting the preparation of this decision.
>
> [155] I also consider Mr. Cardinal's Aboriginal background and the particular circumstances of his life, as well as the positive prospects he has

> for rehabilitation, as set out in the Psychiatric Report, the PSR and the *Gladue* Report as being circumstances that justify enhanced credit as per [s. 719(3.1).] As a result, in applying the principles of s. 718.2(d) and (e), I would also have provided him some enhanced credit.
>
> [156] We cannot, as judges who are tasked with imposing fair and just sentences, fail to take into consideration the harm that was done to Aboriginal families and communities through governmental policies such as the residential school system − harm that Canada has apologized for causing. The requirement to do so is implicit in a consideration of the purposes and principles of sentencing relevant in determining a fair and just sentence which, always, of course, consider[s] the particular circumstances of the offence and the offender. By failing to consider Aboriginal status in determining the credit to be given an offender for his or her time in remand custody, the effect could well be the imposition of sentences that result in an offender spending more time in custody than would be fair and just, and would make a mockery of the apology Canada has offered to Aboriginal peoples.
>
> [157] Justice requires that we "get right on crime", and I have no difficulty stating that "getting tough on crime" does not always mean that we are getting it right.
>
> [158] After taking all these circumstances in account, I would also have granted Mr. Cardinal 1.5:1 credit for his time on remand were he to be serving his time as a sentenced prisoner in WCC [Whitehorse Correctional Centre].

Positions of the parties

[10] The Crown states the judge erred in granting the respondent 1.5 for 1 credit for time spent in custody because he did not have the benefit of the decision of the Court of Appeal for British Columbia in *R. v. Bradbury*, 2013 BCCA 280, in which a majority refused to follow *R. v. Summers*, 2013 ONCA 147, *R. v. Carvery*, 2012 NSCA 107 and *R. v. Stonefish*, 2012 MBCA 116. The majority held that loss of remission or eligibility for parole is not a circumstance that would justify granting increased credit for time spent in custody pursuant to s. 719(3.1) of the *Criminal Code*.

[11] The Crown also observes that pursuant to s. 490.013 (2.1) of the *Criminal Code*, the respondent's registration as a sex offender must be for life because he was convicted of two designated offences.

[12] The respondent states that this Court is not bound by *Bradbury* and that we should follow the decisions of the appeal courts in Ontario, Manitoba and Nova Scotia. He notes that at the sentencing hearing, the Crown asked for a 20-year registration under *SOIRA*.

Discussion

SOIRA

[13] Section 490.013 (2.1) of the *Criminal Code* states:

> An order made under subsection 490.012(1) applies for life if the person is convicted of, or found not criminally responsible on account of mental disorder for, more than one offence referred to in paragraph (*a*), (*c*), (*c.1*), (*d*) or (*e*) of the definition "designated offence" in subsection 490.011(1).

[14] The section is mandatory. The respondent was convicted of two sexual assaults. They are designated offences. His registration under *SOIRA* must be for life.

Time served

[15] In *Bradbury*, the majority refused to follow the decisions of three other appellate courts. The minority, Madam Justice Prowse disagreed and applied the decision of the Manitoba Court of Appeal in *Stonefish*. The Ontario and Nova Scotia decisions are pending before the Supreme Court of Canada, with the appeals tentatively scheduled to be heard in January 2014.

[16] The positions of the parties on the applicability of *Bradbury* potentially raise a matter of comity because this Court is comprised mainly of judges of the Court of Appeal for British Columbia. In that court, one division of the court is bound to follow the decision of another division except in very limited circumstances. In my view, although this Court technically is not bound to follow a decision of the Court of Appeal for British Columbia, it would be unusual, and I would be reluctant, not to do so, but the issue does not arise on this appeal because I conclude that the decision in this case is not inconsistent with *Bradbury*.

[17] The court in *Bradbury* was concerned with credit based on the loss of remission or parole eligibility. Madam Justice D. Smith held that justifiable circumstances for granting more than 1 for 1 credit did not include "universally-applicable" factors, such as the loss of remission or parole eligibility (at para. 19). She also made it clear that the circumstances justifying more than 1 for 1 credit did not have to be exceptional. They must be "something more than the near-universal loss of remission or parole eligibility common to most accused in remand custody" (at para. 21).

[18] I do not think it can be said that the law on the point is settled in Canada, but more importantly, in the present case, the sentencing judge did not rest his decision to grant 1.5 to 1 credit solely on the basis of lost remission or parole opportunity. The judge certainly did consider the respondent's potential loss of remission and parole eligibility, but he went further.

[19] At para. 154, the judge stated he would have given the respondent credit for time spent in custody while various reports were being prepared. The respondent was placed in custody on March 30, 2011. He pleaded guilty on January 27, 2012. Between those dates, the respondent took steps to obtain counsel and obtained disclosure from the Crown.

[20] On January 27, 2012, the Crown obtained an order for a Long-Term Offender assessment, part of which included a psychiatric assessment. The latter is dated April 12, 2012; the Long-Term Offender assessment was ready on May 18, 2012. The Crown concedes that increased credit should be given for the period January 27 to May 8, 2012.

[21] The respondent requested a *Gladue* Report on June 15, 2012. It was delivered in January 2013. In my view, in the circumstances of this case and considering the extensive reference by the sentencing judge to the *Gladue* Report, it was of considerable significance to the sentencing process.

[22] A Pre-Sentence Report was ordered by the court on October 9, 2012. It also was delivered in January 2013. The judge referred extensively to this report. In my view, in the circumstances of this case, it was of considerable significance to the sentencing process.

[23] The sentencing hearing was on January 29, 2013. Oral reasons were delivered on April 4, 2013. The Crown concedes the respondent should be given increased credit for this period.

[24] The judge also made it clear that he considered the respondent's Aboriginal background and "the positive prospects he has for rehabilitation" as "circumstances that justify enhanced credit". The Crown asserts that these are matters that are taken into account at first instance when determining the appropriate sentence and should not be considered again in the context of credit for time served pre-sentence. In my view, this is too narrow an approach. Section 719(3.1) of the *Criminal Code* mandates consideration of the "circumstances" to determine whether they justify increasing the credit for time served. The circumstances in this case to which the judge referred in para. 155 were the respondent's Aboriginal background, the particular circumstances of his life and the positive prospects he has for rehabilitation "as set out in the Psychiatric Report, the PSR and the *Gladue* Report".

[25] These factors, like the time required to obtain the various reports and the delay from hearing to sentencing, were personal and significant to the respondent in this case. They are part of the overall circumstances and are relevant in that context. That context is something more than the near-universal circumstances common to most accused in remand custody.

[26] In my view, the judge's approach was not inconsistent with *Bradbury*. He did not err in concluding that the circumstances justified giving the respondent 1.5 for 1 credit for the time he spent in custody. His decision to do so must be seen in the overall context of his approach to the respondent, an approach that included time in jail and supervision in the community for seven years under a LTSO.

Conclusion

[27] I would extend the time for bringing an application for leave to appeal, grant leave to appeal, order that the respondent's registration under *SOIRA* be for life, but otherwise dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Groberman"