SCC File No. 39599

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

KERRY ALEXANDER NAHANEE

Appellant

-and –

HER MAJESTY THE QUEEN

Respondent

-and-

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PART I – OVERVIEW

1. Should the principles set out in *R. v. Anthony-Cook*[1] apply when a sentencing judge intends to exceed the range of sentence proposed by the parties? The Criminal Defence Advocacy Society ("CDAS") highlights three points which support the application of the *Anthony-Cook* framework to sentencing hearings involving such an agreement between counsel:

a. Party presentation: The adversarial system is based on "party presentation", which leaves the framing of the issues in dispute to the litigants. This system ensures the role of the judge as an impartial and relatively passive arbiter. Setting a high bar for judges who seek to exceed the range of sentence sought by the parties is consistent with this important construct of our system and works to preserve judicial impartiality.

b. The right to be heard: The principle of *audi alteram partem* ("let the other side be heard as well") is a cornerstone of the adversarial system and a corollary to party presentation. It guarantees the parties the opportunity to fully respond to issues that may affect the outcome of the proceeding. An agreement between the parties to argue for a range of sentence has a fundamental impact on how defence counsel decides to exercise the accused's right to be heard: important decisions are made as to what case law to rely on, what evidence to call, and which sentencing principles and objectives to highlight. Allowing sentencing judges to depart from a proposed range of sentence without notice to the parties violates the *audi alteram partem* principle, as it deprives counsel of the opportunity to revisit important strategic decisions made in this regard.

c. Efficiency: The operation of party presentation and *audi alteram partem* results in the efficient litigation of sentencing hearings. Courts trust counsel to frame the dispute on sentence, and counsel trust the court to makes its decision within the parameters of the arguments made. Allowing sentencing judges to easily depart from an agreed upon range of sentence compromises efficiency in sentencing proceedings, as it encourages the

[1] 2016 SCC 43, [2016] 2 S.C.R. 204.

parties to address unnecessary points in fear of what a judge may do despite the submissions of counsel.

2. CDAS submits that the application of the framework from *Anthony-Cook* to sentencing hearings involving a partial agreement between counsel preserves the integrity of the adversarial system and ensures the proper functioning of party presentation and the *audi alteram partem* principle.

PART II – INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE

3. The appellant raises the following questions in issue:

a. Should the public interest test articulated in *Anthony-Cook* apply to sentencing hearings following a guilty plea that reflect a partial agreement or an agreed-upon sentencing range?

b. Is the failure of a sentencing judge to alert counsel that they intend to exceed the ceiling proposed by Crown an error in principle resulting in fundamental unfairness and warranting appellate intervention?

4. On the first question, CDAS submits that setting a high threshold for judges who intend to exceed the range of sentence sought by the parties is consistent with the system of party presentation. Specifically, applying the public interest test from *Anthony-Cook* promotes trust in, and respect for the out of court process which has resulted in the narrowing of the issues in dispute on sentence.

5. On the second question, CDAS submits that the principle of *audi alteram partem* must be understood as it operates in practice. In the context of sentencing hearings involving a partial agreement between counsel, defence counsel will make strategic decisions about how to exercise the accused's right to be heard based on the Crown's agreement to seek a particular sentence. A sentencing judge who does not give notice of an intention to exceed that sentence runs afoul of the accused's right to be heard by failing to give counsel the opportunity to revisit those decisions.

PART III – STATEMENT OF INTERVENER'S ARGUMENT

Party Presentation: The adversarial system relies on counsel to frame the dispute and judges to remain neutral

6. One of the defining characteristics of the adversarial system is that it driven by the parties, not the adjudicator:[2]

> The Anglo-American "adversarial system" of justice applies to *both* civil and criminal cases. The principle of "party presentation" that governs the adversarial system requires that "courts play the role of 'neutral arbiter' of matters the parties present." […] The adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.[3]

7. In *R. v. Swain,*[4] this Court highlighted the role of the parties in defining the dispute to be resolved:

> In *Phillips v. Ford Motor Co.,* [1971 2 O.R. 637, Evans J.A. stated, at p. 661 [D.L.R.]:
>
> > A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants.
>
> Professor Weiler, in "Two Models of Judicial Decision-Making" (1968) 48 Can. Bar Rev. 406, at p. 412, has characterized the adversarial process as follows:
>
> > An adversary process is one which satisfies, more or less, this factual description: as a prelude to the dispute being solved, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments. This is by contrast with the public processes of decision by 'legitimated power' and 'mediation-agreement', where the guaranteed private modes of participation are voting and negotiation respectively. Adjudication is distinctive because it guarantees to each of the parties who are affected the right to prepare for

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[2] *Re Charkaoui,* 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 50.
[3] E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada, 2nd Edition,* 16:71. Book of Authorities [Tab 1].
[4] *R. v. Swain,* [1991] 1 S.C.R. 933, [1991] S.C.J. No. 32.

> themselves the representations on the basis of which their dispute is to be resolved.[5] [emphasis added]

8. As this Court explained in *R. v. Mian*, the system of party presentation ensures that the judge remains neutral, independent, and for the most part, passive:

> Our adversarial system of determining legal disputes is a procedural system "involving active and unhindered parties contesting to put forth a case before an independent decision-maker" (*Black's Law Dictionary* (9th ed. 2009), *sub verbo* "adversary system"). An important component of this system is the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present: (*Greenlaw v. United States,* 554 U.S. 237 (U.S. Sup. Ct. 2008) at p. 243, *per* Ginsburg J.)
>
> A fundamental reason for maintaining this system is to ensure that judicial decision-makers remain independent and impartial and are seen to remain independent and impartial. When a judge or appellate panel of judges intervenes in a case and departs from the principle of party presentation, the risk is that the intervention could create an apprehension of bias. This kind of departure from the usual conduct of an appeal could lead the court to be seen to be intervening on behalf of one of the parties, thus impugning the impartiality of the court. As this Court has said, "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (citation omitted]. It is for this reason that an important tenet of our appellate system is for the court to respect the strategic choices made by parties in framing the issues (see *W.(G.),* at paras. 17-18).[6] [emphasis added]

9. In the context of civil proceedings, the system of party presentation produces what has been termed the "judicial contract" – the framing of the issue in dispute, to be decided by the judge within that framework. Through this contract, the judge hearing the matter must seek the truth, which "lies somewhere between the two competing versions given by the opposing parties; it does not lie in the aspects that are not raised by either side."[7]

10. Similarly, in a criminal trial, judges generally defer to the tactical decisions of counsel in order to preserve their neutrality. As this Court explained in *T.(S.G.)*:

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[5] *R. v. Swain, supra,* at para. 34.
[6] *R. v. Mian,* 2014 SCC 54, [2014] 2 S.C.R. 689, at paras. 38-39.
[7] *PF Résolu Canada inc. c. Hydro Québec,* 2020 SCC 43, 453 D.L.R. (4th) 1, at para. 265.

> In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel: see generally *R. v. Lomage* (1991), 2 O.R. (3d) 621 (Ont. C.A.), at pp. 629-30. There is a "strong presumption" that defence counsel are competent in advancing the interests of their clients: *see R. v. B.(G.D.),* 2000 SCC 22 at para. 27; *Hodgson,* at para. 99. Moreover, counsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease to be a neutral arbiter and instead become an advocate for one party. For these reasons, this Court has previously held that the burden to raise evidentiary issues properly rests on the shoulders of counsel: *Hodgson,* at para. 98.[8] [emphasis added]

11. Sentencing hearings, for the most part, also reflect the adversarial process and the system of party presentation. In *R. v. Hamilton*,[9] Justice Doherty described the role of sentencing judges generally as one of "neutral, passive arbiter," with some qualification: there are instances where sentencing judges are permitted, and in fact required, to take a more active role and make inquiries.[10] The following passage from *Hamilton*, cited with approval by the Quebec Court of Appeal in *Baptiste c. R*, explains the limitations of that qualification:

> [67] Recognition that a trial judge can go beyond the issues and evidence produced by the parties on sentencing where necessary to ensure the imposition of a fit sentence does not mean that the trial judge's power is without limits or that it will be routinely exercised. In considering both the limits of the power and the limits of the exercise of the power, it is wise to bear in mind that the criminal process,

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[8] *R. v. T.(S.G.),* 2010 SCC 20, [2010] 1 S.C.R. 688, at para. 36.
[9] *R. v. Hamilton,* 186 C.C.C. (3d) 129*,* 72 O.R. (3d) 1*,* at paras. 66-70.
[10] See also *R. v. Wells,* 2000 SCC 10, [2000] 1 S.C.R. 207, at paras 54-55, regarding the limited inquisitorial power of a sentencing judge concerning *Gladue* factors: "It is to be expected in our adversarial system of criminal law that counsel for both the prosecution and the accused will adduce this evidence, but even where counsel do not provide the necessary information, s. 718.2(e) places an affirmative obligation upon the sentencing judge to inquire into relevant circumstances […] Having said that, it was never this Court's intention, in setting out the appropriate methodology for this assessment, to transform the role of the sentencing judge into that of a board of inquiry."

> including the sentencing phase, is basically adversarial. Usually, the parties are the active participants in the process and the judge serves as a neutral, passive arbiter. Generally speaking, it is left to the parties to choose the issues, stake out their positions, and decide what evidence to present in support of those positions. The trial judge's role is to listen, clarify where necessary, and, ultimately, evaluate the merits of the competing cases presented by the parties.
>
> [68] The trial judge's role as the arbiter of the respective merits of competing positions developed and put before the trial judge by the parties best ensures judicial impartiality and the appearance of judicial impartiality. Human nature is such that it is always easier to objectively assess the merits of someone else's argument. The relatively passive role assigned to the trial judge also recognizes that judges, by virtue of their very neutrality, are not in a position to make informed decisions as to which issues should be raised, or the evidence that should be led. Judicial intrusion into counsel's role can cause unwarranted delay and bring unnecessary prolixity to the proceedings.
>
> [69] Judges must be very careful before introducing issues into the sentencing proceeding. Where an issue may or may not be germane to the determination of the appropriate sentence, the trial judge should not inject that issue into the proceedings without first determining from counsel their positions as to the relevance of that issue. If counsel takes the position that the issue is relevant, then it should be left to counsel to produce whatever evidence or material he or she deems appropriate, although the trial judge may certainly make counsel aware of materials known to the trial judge which are germane to the issue. If counsel takes the position that the issue raised by the trial judge is not relevant on sentencing, it will be a rare case where the trial judge will pursue that issue.
>
> [70] It is also important that the trial judge limit the scope of his or her intervention into the role traditionally left to counsel. The trial judge should frame any issue that he or she introduces as precisely as possible and relate it to the case before the court. This will avoid turning the sentencing hearing into a *de facto* commission of inquiry.[11] [emphasis added]

12. These authorities make clear that sentencing judges should remain cognizant of their neutral and relatively passive role in the adversarial process. Where sentencing judges depart from the range of sentence proposed by the parties, they risk undermining their impartiality. Applying the public interest test from *Anthony-Cook* to sentencing hearings involving a partial agreement between counsel will ensure that judges only do so in rare cases, and with very good reason.

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[11] *Baptiste c. R.,* 2021 QCCA 1064, 175 W.C.B. (2d) 550, at para. 36.

13. Any concerns that applying the public interest test from *Anthony-Cook* in these circumstances may interfere with judicial independence are ill-founded. As seen in *Mian* and other cases above, party presentation preserves judicial independence and impartiality. Indeed, in a healthy adversarial system, the expectation that judges will decide within the parameters of the parties' positions is not a threat to their independence, but rather, a testament to it.

Audi Alteram Partem in Practice: Defence decisions on how to exercise the right to be heard are influenced by the Crown's position

14. The principle of *audi alteram partem* is a cornerstone of the adversarial system and guarantees the parties' right to be heard by the decision maker:

> The *audi alteram partem* rule, which is a component of the principles of natural justice and procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal.[12]

15. CDAS submits that *audi alteram partem* must be understood in practice, not just in the abstract. As discussed above, it is an important function of the adversarial system that parties can agree not to argue certain issues. *Audi alteram partem* guarantees the right to be heard on the issues that remain in dispute, which must be decided upon by the judge.

16. Defence counsel will make decisions about how to exercise the accused's right to be heard based on how the dispute on sentence has been framed. Based on the Crown's agreement to seek a certain sentence, and the degree to which the defence position differs, defence counsel will make a series of strategic decisions about how to conduct each individual sentencing hearing. These decisions may include whether to call *viva voce* evidence, either from the accused or other witnesses, whether to request a pre-sentence report or psychological assessment, how lengthy to be in oral submissions, and which issues to focus on in submissions. These strategic decisions will be different for each individual case.

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[12] *Telecommunications Workers Union v Canada (Radio-Television and Telecommunications Commission),* [1995] 2 S.C.R. 781, [1995] S.C.J. No. 55, at para. 30.

17. CDAS submits that permitting sentencing judges to exceed the range of sentence submitted by the parties without notice is a direct violation of the *audi alteram partem* principle, because it denies counsel the opportunity to revisit the strategic decisions made, and the opportunity to add, or even change, the record. More fundamentally, it denies the accused the right to respond to the possibility of a more severe deprivation of liberty.

18. It is submitted that no matter how complete counsel's submissions appear to have been, it is impossible for a sentencing judge to know whether there is case law, evidence, or issues that counsel have decided not to make part of the record because of the known position of the Crown. It is important for sentencing judges to be reminded that the adversarial process has been at work before the parties enter the courtroom, resulting in a partial agreement through which the dispute on sentence has been defined.

Efficiency: Trust in counsel to frame the dispute is crucial for efficiency in sentencing proceedings

19. This Court's decision in *Anthony-Cook* emphasized the trust that should be placed in counsel to fully represent the interests of the Crown and the accused in a sentencing hearing. The high threshold of the public interest test in assessing joint submissions was deemed appropriate, in part, because of this level of trust:

> Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest and seeing that justice is done (*R. v. Power,* [1994] 1 S.C.R. 601 (S.C.C.), at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, the Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online). Rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.,* rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).[13]

[13] *Anthony-Cook, supra* note 1, at para. 44.

20. Joint submissions on sentence are an example of the operation of the adversarial system outside of the courtroom, in the form of discussions and negotiation between Crown and defence before presenting an agreed-upon sentence to the court. *Anthony-Cook* reassures sentencing judges that despite the fact that those discussions take place in their absence, the adversarial nature of the parties, combined with the ethical duties of counsel, works to produce fair agreements.

21. Efficiency in sentencing proceedings similarly requires trust between judges and counsel. As discussed above, the system of party presentation requires the court to trust counsel to frame the dispute on sentence. Likewise, counsel must have confidence that the judge will make their decision within the parameters set out by the parties. Erosion of this trust comes at the cost of efficiency in court proceedings. Without it, counsel are required to guess at, and unnecessarily address, what a sentencing judge *may* do if they are in disagreement with the range of sentence proposed by the parties. As highlighted in *Hamilton*, leaving counsel to wonder whether a sentencing judge will intrude into their role by reframing the issue in dispute risks "unwarranted delay" and "unnecessary prolixity to the proceedings."

22. Trust in the system of party presentation, and the strategic decisions of counsel as to how to exercise the accused's right to be heard, not only preserves judicial independence, but also optimizes efficiency in court proceedings. It gives counsel the confidence to narrow the issues and record to address what is really in dispute. Requiring sentencing judges to decide – except in rare cases – within the parameters of the sentencing range argued by the parties will promote this kind of efficient approach to sentencing hearings.

Conclusion

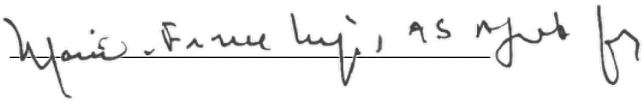
23. At its core, Canada's adversarial system of justice is driven by the parties, and requires courts – as neutral arbiters – to trust counsel to thoroughly explore and represent the parties' respective interests, both in and outside of the courtroom. Sentencing hearings involving a partial agreement between counsel illustrate a combination of in-the-courtroom and out-of-the-courtroom adversarial process. Counsel must be trusted to vigorously and ethically defend the parties' interests throughout that process, resulting in positions on sentence that should, for the most part,

define the outer parameters of the sentencing judge's decision. Setting a high bar for judges to exceed the sentence recommended by the parties, and always requiring notice to counsel, is in keeping with these fundamental tenets of the adversarial system.

PARTS IV & V – COSTS AND ORDER SOUGHT

24. CDAS does not seek costs, and asks that no costs be awarded against it. No order is sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of January 2022.



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PART VII – TABLE OF AUTHORITIES

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