File Number: 39599

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

KERRY ALEXANDER NAHANEE

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, CRIMINAL DEFENCE LAWYERS' ASSOCIATION OF MANITOBA, SASKATCHEWAN TRIAL LAWYERS ASSOCIATION INC. AND CANADIAN COUNSEL OF CRIMINAL DEFENCE LAWYERS (JOINTLY), TRIAL LAWYERS' ASSOCIATION OF BRITISH COLUMBIA, DIRECTOR OF PUBLIC PROSECUTIONS, CRIMINAL LAWYERS' ASSOCIATION ONTARIO, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

Interveners

FACTUM OF THE INTERVENER
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RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. With one exception the sentencing judge has full discretion to determine a fit sentence. The exception is when the parties negotiate a joint submission. In such a case, the sentencing judge must accept the joint submission unless it is contrary to the public interest. The public interest test restricts a sentencing judge's discretion, and in some cases will cause the judge to impose a sentence they would consider unfit. Outside this narrow exception, judicial discretion is at the heart of criminal sentencing in Canada.

2. The appellant argues that judges should be bound by the public interest test whenever the parties negotiate a guilty plea. This argument elevates the importance of lawyers' negotiations over that of judicial discretion. Applying the public interest test as broadly as requested by the appellant would subvert the sentencing process enacted by Parliament.

3. The appellant bases his argument on the benefits provided by negotiated pleas. But the Crown and the accused already successfully negotiate guilty pleas without the public interest test backing the results of those negotiations. The reason the public interest applies to joint submissions is that unless judges routinely followed joint submissions, the justice system would collapse. The Attorney General of Alberta does not dispute that negotiated guilty pleas are beneficial to the justice system. It does dispute that the system will collapse unless the public interest test is applied to all negotiated guilty pleas.

Statement of Facts

4. The Attorney General of Alberta takes no position on the facts.

PART II – ISSUES

Question in Issue #1: Are the considerations set out in *Anthony-Cook* applicable to non-joint submissions where the Crown and the accused negotiate sentencing positions that reflect partial agreement or an agreed upon range?

Intervener's Position on Question in Issue #1: *Anthony-Cook* should apply only to joint submissions.

The Attorney General of Alberta will not provide submissions on Question in Issue #2, to avoid duplicating the submissions of the Attorney General of British Columbia.

PART III – STATEMENT OF ARGUMENT

Issue # 1: *Anthony-Cook* should apply only to joint submissions

Negotiated guilty pleas are common

5. Resolution discussions are common.[1] Joint submissions are a subset of resolution discussions.[2] As shown in this case, when resolution discussions do not lead to joint submissions, the Crown and the accused still resolve cases. Thus, it "goes without saying that plea resolutions help to resolve the vast majority of criminal cases in Canada."[3]

6. Nearly all guilty pleas come after some negotiations; the administration of justice expects it. Resolution discussions "permit the system to function smoothly and efficiently."[4] Indeed, it is hard to imagine a defence lawyer pleading their client guilty without asking the Crown for its position. This case is a perfect example of the routine nature of negotiations. The accused presented fresh evidence that showed in entering his guilty plea, he had "relied" upon the Crown's sentencing position.[5] The Court of Appeal dismissed the importance of this evidence, stating, it "speaks only to the fact that the second guilty plea was entered after the appellant was

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[1] *R v Anthony-Cook*, 2016 SCC 43 at para 1
[2] *Ibid* at para 2
[3] *R v Nixon*, 2011 SCC 34 at para 47
[4] *Ibid* at para 1
[5] *R v N*, 2021 BCCA 13 at para 56

assured of the position that would be taken by the Crown on sentencing."[6] Most accused who plead guilty could say the same; there is no reason to ask the Crown for its sentencing position other than to receive an assurance of the Crown's position and act accordingly.

7. Ordinarily, the Crown and accused will discuss many things. Discussions will include the admitted and disputed facts, whether the Crown will drop some charges or accept a plea to a lesser included or other offence, the kind and degree of sentence, whether the accused will pay restitution, the appropriateness of discretionary orders, and probation terms.

8. In the end, the vast majority of conventional sentencings occur after resolution discussions. The discussions may be done hurriedly in the moments before court opens, or may involve detailed written agreements.

A *quid pro quo* occurs in almost all guilty pleas

9. When an accused pleads guilty, there is usually a *quid pro quo*. A *quid pro quo* is "something given or received for something else."[7] Routine negotiations preceding a plea meet this definition. What each side gives and receives depends on factors including the strength and complexity of the Crown's case, the vulnerabilities of witnesses, and the timeliness of the plea.

10. The earlier the guilty plea is made, the stronger its mitigating weight, but even a plea on the trial date is mitigating because it relieves witnesses from testifying.[8] No matter how strong the Crown's case, a guilty plea "is a waiver of the "most fundamental right of any criminal accused" to a fair and public trial, spares victims and witnesses the trauma of testifying in open court and brings certainty in a process where there is always litigation risk."[9] Thus, a "guilty plea always has some value."[10] A judge's failure to consider a guilty plea mitigating is an error in principle.[11] Practically speaking, resolutions discussions will reflect this.

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[6] *Ibid* at para 55
[7] Merriam-Webster. (n..d.). "Quid pro quo". In *Merriam-Webster Dictionary/* Retrieved January 27, 2022, from https://www.merriam-webster.com/dictionary/quid pro quo
[8] *R v Martineau*, 2021 ABCA 401 at paras 24-26
[9] *Ibid* at para 28
[10] *R v SLW*, 2018 ABCA 235 at para 33; *R v Burback*, 2012 ABCA 30 at paras 21-22
[11] *Martineau, supra* note 8 at para 24; *SLW, supra* note 10 at para 33; *Burback, supra* note 10 at para 21

11. So a conventional sentencing hearing after a guilty plea typically reflects that something has been given or received for something else – in other words, a *quid pro quo.* If the mere existence of a *quid pro quo* is enough to trigger the public interest test, then virtually all conventional sentencings after a guilty plea will be governed by the public interest test.

Litigating the amount of *quid pro quo* is not the purpose of a sentencing hearing

12. The goal in every sentencing is a fit sanction, organized around the principle of proportionality.[12] The goal is not to determine the degree of *quid pro quo* between the parties.

13. There is no value for a judge to try to measure the degree of *quid pro quo.* Either the parties have a joint submission or not. A judge should not have to decide whether the *quid pro quo* in any given case triggers the public interest test. Too many variables are at play to decide how much each party gave or received in negotiations. And the negotiations should not even be before the judge: settlement privilege applies to criminal cases, and binds both Crown and the accused.[13] Settlement discussions are privileged because they encourage negotiations.[14]

14. The circumstances in which the privilege can be set aside are narrow. These include when the negotiations contain illegal statements or show prosecutorial misconduct; when adducing their contents proves that a resolution was reached; or permitting the accused to make full answer and defence.[15] The circumstances in which the privilege can be set aside do not include a judge measuring the *quid pro quo*.

15. When a judge questions the suitability of a joint submission, both parties should explain the considerations that led to their proposal, to avoid "the risk that the trial judge will reject the joint submission."[16] But even then, the parties are not expected to disclose their negotiating positions or the substance of their discussions that led to the agreement.[17]

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[12] *R v Parranto*, 2021 SCC 46 at paras 10, 111, 234
[13] *R v Delchev*, 2015 ONCA 381 at paras 24-27
[14] *R v Shyback*, 2018 ABCA 331 at para 28
[15] *Ibid* at para 29, citing D Layton and M Proulx, *Ethics and Criminal Law*, 2d ed. (Toronto: Irwin Law, 2015) at p 432; also see *Delchev, supra* note 13 at para 28, citing *Sable Offshore Energy Inc. v Ameron International Corp*., 2013 SCC 37 at para 12
[16] *Anthony-Cook, supra* note 1 at paras 53-55
[17] *Ibid* at para 55

16. If the judge is considering exceeding the Crown's recommendation, the Crown does not have the same motivation to explain what led to its position in a conventional sentencing, as it has in a joint submission. Joint submissions provide considerable certainty of sentence. "Agreements that are certain are attractive to the Crown "because there is less risk that what Crown counsel concludes is an appropriate resolution of the case in the public interest will be undercut."[18] But in a conventional hearing, the Crown does not get this risk mitigation. Thus, the Crown should not be expected to convince the judge to not exceed its position. Likewise, the accused should not have to convince the judge to not go lower than his or her position.

Applying the public interest test to conventional sentencings ignores Parliament's will

17. The public interest test is "an undeniably high threshold."[19] That the proposed sentence is unfit, or even demonstrably unfit (itself a "very high threshold") is insufficient reason for a judge to reject a joint submission.[20] Rather, a judge may reject a joint submission only if the submission is "so unhinged from the circumstances of the offence and the offender" that its acceptance would lead the informed public to believe "that the proper functioning of the justice system had broken down."[21] If this test applied to conventional sentencings, then the judge could not exceed the Crown's submission unless it was similarly "unhinged." This would move the responsibility of determining a fit sentence from the judge to the Crown.

18. Applying the public interest to all negotiated pleas would contradict Parliament's will. Parliament has "explicitly vested" sentencing judges with discretion to determine the kind and degree of punishment.[22] In conventional sentencing hearings, judges look at the circumstances of the offender and the offence, and the applicable sentencing principles.[23] Parliament instructs judges to consider many principles.[24] But nowhere does Parliament suggest the Crown's position should fetter judicial discretion.

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[18] *Ibid* at para 38
[19] *Ibid* at para 34
[20] *Ibid* at paras 27-29, 47-48; *Parranto, supra* note 12 at para 118, citing *R v Lacasse*, 2015 SCC 64 at paras 52-53
[21] *Anthony-Cook, supra* note 1 at paras 31, 34
[22] *Parranto, supra* note 12 at para 13, referring to *Criminal Code*, RSC 1985, c C-46, s 718.3(1)
[23] *Anthony-Cook, supra* note 1 at para 48
[24] *Criminal Code*, RSC 1985, c C-46, ss 718-718.21

19. Rather, Parliament refers to the Crown's position only once: to tell judges they cannot accept a guilty plea unless they are sure the accused understands the judge "is not bound by any agreement made between the accused and the prosecutor."[25] Professional duty places the same obligation on defence counsel. In Alberta, a lawyer cannot enter into a plea agreement with the Crown unless they tell their client "of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea."[26]

20. Applying the public interest test to conventional sentencings also contradicts established common-law principles. Sentencing judges have "a broad discretion" to craft individualized and proportionate sentences.[27] The ultimate issue for the judge is:

> For *this* offence, committed by *this* offender, harming *this* victim, in *this* community, what is the appropriate sanction under the *Criminal Code*?[28]

If the Crown's position sets a ceiling, then the judge's right to answer these questions is fettered.

21. Unless the *Criminal Code* dictates otherwise, the sentencing judge has discretion over which sentencing objectives in s. 718 to prioritize, such as denunciation, deterrence and rehabilitation, and how much weight to afford to the secondary sentencing principles in s. 718.2.[29] Absent a joint submission, the parties should not be permitted to impose priorities on the judge.

Lawyers are partisan advocates

22. The appellant says it is reasonable to use the Crown's position as a cap because the Crown embodies the public interest.[30] The Attorney General of Alberta does not dispute that the Crown has an important role in sentencing, but many factors go into the Crown's position - the public interest is just one of them. Though the sentencing judge should give the Crown's submission serious consideration, the judge remains paramount - the "buck stops with the

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[25] *Criminal Code*, RSC 1985, c C-46, s 606(1.1)(b)(iii)
[26] The Law Society of Alberta, *Code of Conduct,* Alberta: Law Society of Alberta, 2020, r 5.1-8(b)
[27] *Parranto, supra* note 12 at para 115
[28] *Parranto, supra* note 12 at para 113, citing *R v Gladue*, [1999] 1 SCR 688 at para 80 (emphasis in original)
[29] *Parranto, supra* note 12 at para 230
[30] Appellant's Factum at para 46

sentencing judge."[31] In the end, the judge has the duty to impose a sentence that protects society, and contributes to respect for the law and the maintenance of a just, peaceful and safe society.[32]

23. The appellant argues that a lawyer will be wary of accepting a Crown offer that is "too good to be true" or that if they accept such an offer, their "confidence that a sentencing judge will accede to such a proposal should be lowered."[33] But the criminal justice system is adversarial - a defence lawyer is a partisan advocate for their client and has no duty to help a third party like the Crown.[34] If the Crown makes a "too good to be true" offer, a lawyer cannot be expected to tell the Crown to increase its offer so the judge is less likely to exceed it. Nor should the lawyer tell the Crown of mistakes it has made in assessing its case. And it is impractical, if not impossible, for a judge to decide whether to apply the public interest test by trying to measure the accused's level of reliance on the Crown's position.

The justice system does not rely on the application of the public interest test to conventional sentencings

24. The public interest test applies to joint submissions because in some cases the parties need to resolve cases with compromises that require a high degree of certainty. Unless judges routinely accepted joint submissions, "our justice system would be brought to its knees, and eventually collapse under its own weight."[35] Thus, the focus should not be on the benefits provided by negotiated guilty pleas, but whether the justice system will collapse unless the public interest test applies to all negotiated pleas.

25. Most of the benefits of joint submissions also apply to conventional hearings. The "most obvious benefit" for the accused in a joint submission is that the "Crown agrees to recommend a sentence that the accused is prepared to accept …[which] is likely to be more lenient than the accused might expect after a trial and/or contested sentencing hearing."[36] The accused gets the

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[31] *R v Webb*, 2013 ABCA 136 at para 3
[32] *Criminal Code*, RSC 1985, c C-46, ss 718, 718.3(1)
[33] Appellant's Factum at para 46
[34] *R v Swain*, [1991] 1 SCR 933 at p 971-972; *R v Stinchcombe*, [1991] 3 SCR 326 at p 333; *R v Neil*, 2002 SCC 70 at paras 24, 31; The Law Society of Alberta, *Code of Conduct*, Alberta: Law Society of Alberta, 2020, r 5.1-1
[35] *Anthony-Cook, supra* note 1 at para 40
[36] *Ibid* at para 36

same benefit in a conventional sentencing after a guilty plea because of the mitigating effect of the plea. Most of the other benefits to an accused in joint submissions also apply: whether the submissions are joint or conventional, accused persons "who plead guilty promptly are able to minimize the stress and legal costs associated with trials. Moreover, for those who are truly remorseful, a guilty plea offers an opportunity to begin making amends."[37]

26. Equally, most of the benefits to the Crown from joint submissions are also achieved in conventional hearings. There is a guaranteed conviction despite any flaws in the case; information beneficial to other investigations may remain secure; victims and witnesses are spared trial; and victims may obtain some comfort.[38]

27. The only benefit the parties do not get in a conventional sentencing is the same degree of certainty of outcome. But certainty of outcome is not an objective recognized by Parliament, nor is it "the ultimate goal of the sentencing process."[39] In Alberta, as in British Columbia, the Court of Appeal has not endorsed a public interest test for conventional sentencings. Yet this lack of certainty does not impair the ability of the Crown and the accused to resolve cases. This case and all the others in which appellate courts hear routine appeals of sentences imposed after conventional hearings shows that. The parties address uncertainty by making their best arguments and creating a record to rely on should either party appeal. Thus, lack of certainty in a conventional sentencing is no impediment to the smooth functioning of the justice system.

The public interest test should apply only to full agreement on sentence, not a range

28. The Alberta Court of Appeal has consistently found that in a conventional sentencing, the Crown's submission cannot fetter the judge's discretion.[40] That said, in one case the Court raised the theoretical possibility that a jointly submitted range might be like a joint submission, without deciding the issue.[41] To be clear, the Court of Appeal has not said that a jointly submitted range

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[37] *Ibid* at para 36
[38] *Ibid* at para 39
[39] *Ibid* at para 43
[40] *R v Hood*, 2011 ABCA 169 at para 15; see also *Burback, supra* note 10; *R v Lewis*, 2012 ABCA 289; *Webb*, *supra* note 30; *R v Fead*, 2017 ABCA 222; *R v RGB*, 2017 ABCA 359; *R v TB*, 2021 ABCA 17
[41] *Burback, supra* note 10 at paras 12-14

is in fact equivalent to a joint submission. But a full consideration of the issue shows it is impractical to equate a jointly submitted range to a joint submission.

29. If the parties put forth a jointly submitted range, they still subject their submissions to the judge's discretion. The Crown will argue for the higher end of the range, and the accused will argue for the lower end. In effect, the parties still make individual submissions. For the judge to determine where in the range to impose sentence, they still have to decide the gravity of the offence, the degree of the offender's responsibility, which objectives in s. 718 to prioritize, and how much weight to afford the secondary principles in s. 718.2. If the range limits the judge, then their ability to decide these issues is artificially constrained. Essentially, the judge would have to decide what to prioritize, without the right to give full effect to their beliefs.

30. No certainty comes from a jointly submitted range. From the Crown's view, the accused is only saying that if the judge follows the range, they will not appeal sentence on the ground of fitness. But fitness is not the only ground of appeal. Appellate intervention is also justified if a sentencing judge erred in principle, and the error affected sentence. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor.[42] Thus, when the parties jointly submit a range, and the judge imposes a sentence higher than the *low* end of the range, the accused is still free to appeal by arguing the judge erred in principle. So the Crown gets no certainty even if the judge accepts the joint range.

Conclusion on Question in Issue #1

31. The considerations in *Anthony-Cook* should only apply when the Crown and the accused propose the same sentence, and make it clear they are putting this proposal forward as a joint submission, and not coincidentally through individual submissions.

PART IV – COSTS

32. The Attorney General of Alberta does not seek costs and submits the ordinary rule that costs are not awarded against interveners should apply.

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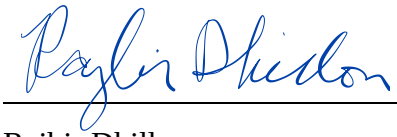
[42] *Parranto, supra* note 12 at para 118

PART V – ORDER SOUGHT

33. The Attorney General of Alberta takes no position on the disposition of the appeal.

All of which is respectfully submitted, January 31, 2022.



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PART VII – TABLE OF AUTHORITIES AND LEGISLATION

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