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., CANADIAN COUNSEL OF CRIMINAL DEFENCE LAWYERS, TRIAL LAWYERS' ASSOCIATION OF BRITISH COLUMBIA, DIRECTOR OF PUBLIC PROSECUTIONS, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

Interveners

APPELLANT'S FACTUM IN REPLY TO THE INTERVENERS

(Pursuant to the order of Justice Jamal dated December 9, 2021)

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Asking for Crown's position on sentence and negotiating Crown's sentence position pre-trial and post-trial are not the same

1. Alberta argues that in all cases an accused will ask the Crown for their position on sentence and the Crown will provide it. As such, Alberta argues there is no reason for an accused to ask the Crown for its sentencing position other than to receive an assurance of the Crown's position and to then act accordingly.[1] However Alberta's argument does not apply to the case at bar. The appellant did not simply ask for the Crown's position on sentence. The appellant and the Crown entered into resolution discussions with respect to the Crown's sentence range if he were to plead guilty versus if he were to be convicted after trial. Based on these discussions the appellant agreed to enter a guilty plea and a *quid pro quo* was formed.

The public interest test will not apply to all sentencing proceedings

2. Alberta submits that whenever an accused pleads guilty there is usually a *quid pro quo*.[2] Alberta argues that if the existence of a *quid pro quo* triggers the public interest test, then all sentencings will be governed by this test.[3] Alberta misconstrues the appellant's position. In the case at bar, the *quid pro quo* was formed after a negotiated resolution agreement with Crown resulting in the appellant entering a guilty plea. As such, a *quid pro quo* existed in the appellant's situation similar to the case of a joint submission.

3. The appellant submits that the public interest test would only be triggered in non-joint submission cases where the judge is advised that the guilty plea is a result of a negotiated resolution and the judge is inclined to depart from the proposed range. However, much like joint submissions, it will be rare for a judge to depart from the range proposed by counsel.[4] Such occurrences will be the exception and sentencing courts will not be overrun with such cases.

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[1] Factum of Attorney General of Alberta at para. 6.
[2] Factum of Attorney General of Alberta at para. 9.
[3] Factum of Attorney General of Alberta at para. 11.
[4] *R* v *Anthony-Cook*, 2016 SCC 43 ("*Anthony-Cook*") at para. 54.

The judge will not be required to decide whether a negotiated resolution triggers the public interest test

4. Alberta and Ontario submit that a judge should not have to decide whether negotiations were sufficient to trigger the public interest test.[5] Ontario argues that requiring litigation on the extent of plea negotiations would not be an efficient use of court time or resources.[6] With respect, these interveners misconstrue how the public interest test would work in this context. The judge would not be required to probe the extent of resolution discussions.

5. As part of resolution discussions, counsel will turn their minds to whether the sentence will be presented as a negotiated resolution. Counsel will have agreed to this before they step into the courtroom. Similar to joint submissions, it is counsel's responsibility to advise the judge at the outset of a sentencing that the guilty plea is a result of a negotiated resolution. Once alerted, the judge will be on notice that this was a negotiated resolution and not a "casual overture"[7]. This informational step adds mere moments to sentencing proceedings. The trial judge is not asked to balance how much each party gave or received in negotiations or parse the extent of the resolution discussion.

6. Ontario further submits that determining whether a particular plea is a negotiated plea akin to a joint submission is an unwieldy task[8] and that a "bright-line" approach should be used: it is either a joint submission or it is not. The appellant submits a "bright-line" test would improperly exclude from protection plea agreements that the criminal justice system should be promoting.

7. Ontario argues that all situations less than joint submissions are the same. The appellant submits that they are not. Although possibly attractive in its simplicity, the "bright-line" approach would result in undesirable outcomes. For example, counsel enter into

[5] Factum of Attorney General of Alberta at para.13; Factum of Attorney General of Ontario at para. 13.
[6] Factum of Attorney General of Ontario at para. 9.
[7] Factum of Attorney General of Ontario at para. 10.
[8] Factum of Attorney General of Ontario at para. 10.

resolution discussions and negotiate an agreement whereby both counsel agree to propose a 10 month jail sentence with 18 months of probation to follow; counsel agree on 14 out of the 15 probation terms, but contest whether an area restriction is appropriate; this would not be a joint submission. Applying the "bright-line" approach, the efforts of counsel to resolve the matter would not be safeguarded by the public interest test, and the sentencing judge would be at liberty to toss aside the plea agreement.

Disclosing the content of settlement discussions will not be extended beyond what already occurs

8. Alberta argues that settlement privilege cannot be cast aside to allow the judge to measure the *quid pro quo.*[9] As above, the appellant is not asking the court to measure the *quid pro quo*. When the judge is advised that the guilty plea is a result of a negotiated resolution and the judge is considering a possible departure from the range suggested, counsel will have the opportunity to more fully explain the factors that went into resolving the case. Crown can provide more detail as to witness vulnerability issues, frailties with their case, and the impact of the guilty plea on the complainant. Defence can explain concessions made by the accused such as potential *Charter* arguments, disputed evidentiary issues, pre-trial motions or *voir dires* that have been forgone by reason of the guilty plea. The court will be made aware of the circumstances that led to the plea, not the substance of the discussions leading to the plea.[10]

9. Informing the court of the general nature of the resolution discussions (aggravating factors, mitigating factors, strengths and weaknesses in the case, concessions by the accused, the avoidance of multi-day Charter arguments, evidentiary arguments and other motions) already occurs in both joint and non-joint sentencing proceedings. *Anthony-Cook* confirmed what routinely happens in trial courts: in some cases discussion of the *quid pro quo* will be necessary and there is no suggestion in the case law that the sky has fallen as a result. There is also no suggestion that settlement privilege is under threat in either joint or non-joint sentencing situations.

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[9] Factum of Attorney General of Alberta at para.13.
[10] *Anthony-Cook* at para. 53 and 55.

Judicial discretion will not be unduly fettered

10. Alberta argues applying the public interest test to negotiated plea agreements would move the responsibility of determining a fit sentence from the judge to the Crown. This overstates the impact of adopting the appellant's position on this appeal. The judge is being given a sentencing range and can decide where in the Crown's range a fit sentence is, or whether a fit sentence would be the lower sentence proposed by the accused. As mentioned, only in rare situations where the judge considers that neither the accused's proposed sentence nor the Crown's range would result in a fit sentence would they be called upon to apply the public interest test. The Crown is hardly usurping the role of the judge in this process.

11. Alberta submits that nowhere does Parliament suggest the Crown's position should fetter judicial discretion.[11] However, nowhere does Parliament suggest that an agreement by counsel to a joint submission should fetter judicial discretion. The fact is that the law on joint submissions does constrain a judge's discretion as to sentence and so too should the law on non-joint submissions where, as here, Crown and accused have advised the judge that the guilty plea is a result of a negotiated resolution.

12. The discretion of sentencing judges is already impacted by the actions of counsel. Crown determines whether to proceed summarily or by indictment; counsel may negotiate an agreement that Crown lay a new Information and proceed summarily; Crown may accept a plea to a lesser included offence; counsel can control what facts are placed before the judge; counsel can reach an agreement that Crown will not rely on a notice of intention to seek a greater penalty, thereby determining whether the judge is bound by a mandatory minimum sentence.

Impact on the functioning of the justice system is not the only benefit of a guilty plea

13. Alberta argues that the focus should not be on the benefits provided by negotiated guilty pleas. Rather, Alberta submits that the only question is whether the justice system will collapse unless the public interest test applies to all negotiated pleas.[12] The proposed test

[11] Factum of Attorney General of Alberta at para. 18.
[12] Factum of Attorney General of Alberta at para. 24.

appears to have come from a statement of this Court in *Anthony-Cook* about the consequence of not routinely accepting joint submissions. However, as this Court held in *Anthony-Cook*, the impact on the justice system is only one factor that underlies the importance of the public interest test and the deference to joint submissions: When plea resolutions are properly conducted they benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally.[13] The fact is that joint and non-joint submissions assist an overburdened criminal justice system and that should be enough to make sure the law shows restraint before undoing a bargain.

Certainty of outcome will not supersede the public interest test

14. Alberta submits that all the benefits of joint submissions are also realized by non-joint negotiated resolutions, with the exception of the same degree of certainty of outcome.[14] Alberta further argues that certainty is not the ultimate goal of the sentencing process.[15] The appellant agrees certainty is not the goal of sentencing, but it advances the objectives of fairness and efficiency. By applying the public interest test to negotiated plea agreements, the sentencing judge remains the ultimate arbiter of the sentencing process and ensures that certainty of result will not trump the public interest or bring the administration of justice into disrepute.

An appeal court should not be treated as a failsafe

15. Alberta argues that parties can address uncertainty by making their best arguments and creating a record to rely on should either party appeal.[16] However, parties should not have an appellate court in their peripheral vision as they make their sentencing submissions. Suggesting that any errors can be cured on appeal ignores the time, resources, and costs associated with sentence appeals. It is better to lay down an established test to follow than to allow sentencing proceedings to be marked with a "lack of certainty".

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[13] *Anthony-Cook* at para. 35-40.
[14] Factum of Attorney General of Alberta at para. 27.
[15] Factum of Attorney General of Alberta at para. 27.
[16] Factum of Attorney General of Alberta at para. 27.

Conflating contested sentencing hearings with negotiated resolutions

16. The Director of Public Prosecutions ("DPP") argues that the procedure in contested sentencings is fundamentally different from the procedure in joint submission sentencings. They argue that certain material is placed before the judge in contested sentencing hearings: pre-sentence reports, *Gladue* reports, letters of support for the accused, and victim impact statements.[17] However, such material is not the exclusive domain of contested sentencing hearings. It is also placed before the judge in joint sentencing proceedings. Counsel is required to provide the court with *Gladue* information if applicable to their client. A victim has a right to provide a victim impact statement irrespective of the parties' position on sentence. Joint submission cases are not as straightforward as argued by the DPP. They can be complex and contentious, involving poking and prodding from the judge, and volumes of case authorities and sentencing materials from counsel to justify their position.

17. The DPP makes reference to contested sentencing hearings that involve disputed evidentiary issues.[18] However, if counsel are not in agreement as to the facts at sentencing and a *Gardiner* hearing[19] is required, then counsel will not be in a position to advise the court that they have reached a negotiated agreement. The public interest test would not apply. Cases where counsel have agreed to a sentence range and have agreed upon the facts to present to the court at sentence will not be treated in the same way as a fully contested hearing.

18. The DPP argues that while all guilty pleas benefit the justice system to some extent, "the benefits realized from a joint submission far exceed those from cases resolved on a contested basis."[20] The DPP argues that contested sentencings "take much more time and require the expenditure of significantly more judicial resources."[21] This conflates a

[17] Factum of DPP at para. 9
[18] Factum of DPP at para. 9.
[19] *R* v *Gardiner,* [1982] 2 S.C.R. 368
[20] Factum of DPP at para. 11.
[21] Factum of DPP at para. 11.

contested sentencing with negotiated resolutions where counsel have agreed to the facts and have negotiated their sentencing positions.

Section 606(1.1) is not a substitute for notice of an intention to depart from a suggested range

19. The DPP argues that there is no need for a judge to advise an accused that she is jumping the Crown as s. 606(1.1) of the *Criminal Code* already puts the accused on notice that the judge is not bound by any agreement between counsel.[22] However, s. 606(1.1) is not part of the sentencing provisions of the *Criminal Code*: it is a procedural step allowing a court to accept a guilty plea. This section applies to all guilty pleas, including those that result in joint submissions. As this Court held in *Anthony-Cook*, if a judge is intending on rejecting a joint submission, notice must be given to counsel. The procedural requirements of s. 606(1.1) are therefore not a substitute for notice of intention to jump a joint submission, and they should not be a substitute for notice to jump a proposed range.

20. The DPP argues that no court has considered whether notice of an intention to exceed a range of sentence is required if a comprehensive s. 606(1.1) plea inquiry has occurred.[23] As it can be assumed that the courts in Ontario, the Northwest Territories, and Saskatchewan are complying with s.606(1.1), this submission ignores the law from those provinces that it is mandatory for a judge to give notice of an intention to depart from a range, separate and apart from a s.606(1.1) inquiry. In any event, s. 606(1.1) is not an issue in the appellant's case and the Court should decline an interpretation of this section until the issue is before the Court.

21. The DPP refers to *R* v *Kravchenko*, 2020 MBCA 30 and argues that the trial judge's warning that "she was considering 'jumping' the Crown's submission in conjunction with compliance with the requirements of section 606(1.1) entitled her to impose a proportionate sentence outside the proposed range."[24] In *Kravchenko*, however, after the judge indicated she was struggling with the ranges offered (6 years by Crown and 4 years

[22] Factum of DPP at para. 11.
[23] Factum of DPP at para. 21.
[24] Factum of DPP at para. 21.

by defence) and indicated she was considering 10 years, she adjourned the sentencing, ordered pre-sentence reports, and allowed counsel to make further submissions at the continuation.[25]

22. In *Kravchenko*, the judge gave fair warning to the parties that she was considering jumping the Crown's submission. The parties also had an opportunity to address her concerns by obtaining more information about the accused's explanation for the offence and to provide submissions as to the range of sentence for aggravated assault in Manitoba.[26]

23. The Manitoba Court of Appeal held that assuming appropriate caution has been taken to ensure that the requirements of s. 606(1.1) of the *Criminal Code* are complied with, fair warning has been given of the possibility of departure from the range suggested by counsel, and the parties have had a fair opportunity to respond, the judge is entitled to impose a proportionate sentence outside the range.[27] The obligation to give fair warning to counsel was in addition to the procedural requirement of s. 606(1.1). It was not a substitute.

If the judge does not alert counsel of an intention to exceed the range, counsel will not direct their submissions to that possibility

24. The DPP argues that in a non-joint sentencing proceeding, counsel will advance all their submissions in support of their position on sentence.[28] However, just as procedural fairness requires that a judge provide parties the opportunity to address an intended departure from a true joint submission, fairness also demands that same opportunity to be heard where the judge intends to depart from a proposed range of sentencing. In a non-joint sentencing, the parties will be directing argument primarily to the positions taken by the opposing party. Generally, the points of disagreement between the parties on sentence form the basis of their submissions. Unprompted by the judge, defence counsel would not

[25] *R* v *Kravchenko*, 2020 MBCA 30 at para. 17.
[26] *Ibid* at para. 31.
[27] *Ibid* at para 32.
[28] Factum of DPP at para. 13.

be expected to say "Let me also tell you why a sentence higher than the Crown's range is not appropriate." That would not be an efficient use of court time.

25. The DDP argues that in a contested sentencing it is difficult to see what more the parties could add if given an opportunity.[29] However, it is impossible to know what more could have been said in that precise moment, let alone if counsel were provided time to further consider the judge's concerns. Additional case law may be presented; defence and Crown may further advise the judge of further facts regarding the accused, the witnesses, the victim, or other weaknesses in the case. Particularly regarding the Crown case and its witnesses, defence may not be aware of information possessed by the Crown that now assumes relevance in the context of a judge giving notice they may exceed the Crown's range. This is another example of the disadvantage defence has vis-à-vis the Crown, as it is impossible for defence to make submissions on facts that may only be revealed once the trial judge gives notice. As the Alberta Court of Appeal said in *R. v. Keough*:

> As a matter of practice, most judges naturally enter into an exchange with counsel, as the judge did in *Abel,* where he or she intends to depart from the range, or the common sentence in a joint submission. In such cases, the parties should have an opportunity to argue against a higher sentence. Providing such an opportunity is not an onerous obligation, and would naturally occur in the vast majority of cases. Not only does notice provide an offender the opportunity to address why a higher sentence is not fit, but the Crown may provide useful information as to the reasons for its submission. Similarly, in the case where a judge intends to impose a sentence less than that requested by an offender, an offender may wish to indicate why he has agreed to the sentence suggested. Indeed, a suggested range by the parties may indicate an agreement between counsel akin to a joint submission and the judge should consider the representations from that point of view. Argument may impact the judge's final decision of a fit sentence.[30]

26. The DPP refers to the dissent in *Keough* and argues that an offender cannot be legitimately surprised if a judge imposes a sentence outside the range suggested by counsel.[31] However the majority in *Keough* held that although sentencing takes place in

[29] Factum of DPP at para. 23.
[30] *R* v *Burback* 2012 ABCA 39 at para. 14.
[31] Factum of DPP at para. 18.

an adversarial context, it is anticipated that in most cases the sentence imposed will fall at the boundaries, or within the range of sentences recommended by counsel:

> While there is no legal requirement that the sentencing judge stay within that range, or adopt the recommended structure of the sentences, it is of concern when that is not done… 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 being a neutral arbiter and instead become an advocate for one party. The accused is entitled to reasonable notice of the jeopardy he faces, and a fair opportunity to make submissions. The Crown is also entitled to a reasonable opportunity to explain its position. Where the Crown makes a recommendation that the accused finds to be acceptable or fair, both sides may believe the point is not in contention, and the accused may not make any submissions on the point; a subsequent sentence inconsistent with that recommendation can catch both parties by surprise. An accused who receives a sentence outside the recommended range may in such circumstances harbour a feeling of unfairness and injustice.[32]

27. The DPP argues that notice of an intention to exceed the Crown's range is an inefficient use of judicial resources.[33] They submit that there may be cases where the judge reserves and comes to the conclusion that the range proposed by counsel is outside the proper range. In such cases the judge would be required to advise counsel and further court time would be needed for further submissions. However, the scenario put forth by the DPP also occurs in joint sentencing proceedings: a judge may reserve, come to the conclusion that the joint submission is contrary to the public interest, and then invite counsel to make further submissions to address the court's concerns. As submitted above, it will be the rare case that the judge intends to depart from the range proposed by counsel.

28. The answer to the DDP's numerous rhetorical questions as to when a judge needs to give notice is simple: when she is intending on going outside the sentencing range offered by counsel.[34] It takes little time for the judge to say "I am struggling with counsels' positions, I need to hear more." It takes significantly less time than a sentence appeal.

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[32] *R* v *Keough*, 2012 ABCA 14 at para. 19.
[33] Factum of DPP at para. 22.
[34] Factum of DPP at para. 27.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"*Michael J. Sobkin*"

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TABLE OF AUTHORITIES

CASES	PARA(S) IN FACTUM
R v Anthony-Cook, 2016 SCC 43	3,8,13
R v Burback, 2012 ABCA 30	25
R v *Gardiner,* [1982] 2 S.C.R. 368	17
R v Keough, 2012 ABCA 14	26
R v *Kravchenko*, 2020 MBCA 30	21,22,23