A SUMMARY OF RECENT JUDGMENTS IN CRIMINAL CAUSES OR MATTERS

JULY, 2021
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JUDGE WAYNE GORMAN
PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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EVIDENCE-ONE'S OWN HEALTH

Director of Public Prosecutions -v- T. F., [2021] IECA 120, April 19, 2021, at paragraphs 21 and 22:

> The second ground of complaint was:
>
> > "That the learned trial Judge erred in law and in fact in ruling that the prosecution were allowed to lead evidence from Mr [X] to the effect that the reason for his delay in making the complaint was because he had spent years suffering from mental health issues".
>
> It must be said that this ground was not pressed with any vigour and understandably so, and it should be noted that we deal with it now only for the sake of completeness. The original suggestion had seemed to be that the complainant was, in effect, allowed to give expert evidence about his own health and to attribute the delay in making a complaint to the difficulties that he says he experienced.
>
> We do not believe there is any reason why someone cannot speak about their own health. While it goes without saying that they may not be in a position to offer a formal detailed diagnosis, we cannot see any reason why a witness cannot say, "I was experiencing mental health difficulties over a particular period", or, "I was experiencing restricted mobility". To the extent that the appeal ground remains live, we dismiss it.

SENTENCE-ROBBERY-UTTERING A THREAT AND BREACH OF A RELEASE ORDER

R. v. HALL, 2021 NLPC 0120A02583001, JUNE 28, 2021.

FACTS: The accused pleaded guilty to two counts of robbery, attempted robbery, uttering a threat and breach of release orders. The circumstances involved were described in the following manner (at paragraphs 2 to 5):

> The facts were that on the 25th of October 2020 Mr. Hall entered the Mary Brown's store on Black Marsh Road. He had his hand in his pocket to make it appear he had a gun. He approached the cashier and asked for the money. The cashier told him she could not access the cash, she needed to contact her supervisor. He told her to give him the money or he would "shoot her in the head." The cashier fled and hid. Mr. Hall left the store without obtaining anything. The police responded to the scene and with assistance of the canine unit tracked Mr. Hall to an area behind an apartment building where he was arrested. He was subsequently charged with robbery and uttering a threat and

released from court on a release order dated October 29th. At the time of his appearance for sentencing it was agreed by Counsel that the facts supported a conviction for attempted robbery and not the full offence charged.

On the 30th of January 2021 he entered the Canadian Tire Gas Bar on Topsail road. He was masked and demanded cash from Ms. Seaward the employee working that night. He produced a knife and took 150 dollars from the cash box. He left the store. The police were contacted and Mr. Hall was identified as a suspect as he was a customer at that store and had been an employee at one of the other locations. Police attempted to locate Mr. Hall at his residence where he was required to live pursuant to his October 29th release order and could not locate him. A warrant of arrest was issued for him.

On February the 6th 2021 at 1515 hours Mr. Hall entered the Canadian Tire Gas Bar on Topsail Road again. He was masked and approached the cashier Ms. Whelan. He asked for cigarettes, when she turned to get them he walked behind the counter, asked her to open the cash register when she did he grabbed the money. He said nothing further he grabbed some cigarettes and walked out of the store.

On February 16, 2021, Mr. Hall was arrested without incident at the Waterford Hospital where he was being treated. He was charged with the offences and has been in custody since that time.

HELD: Judge Orr imposed a period of five years and eight months of imprisonment. The individual sentences were as follows:

-For the attempted robbery of October 25, two years;

-For the Charge of Uttering Threats, 6 months concurrent (as the threats were the mechanism and part of the *actus reus* of the robbery);

-For the Robbery of January 30th three years consecutive;

-For the Possession of the weapon 6 months consecutive;

-For the Breach of Undertaking, 1 month consecutive;

-For the second breach of undertaking 1 month concurrent;

-For the robbery on February 6, 2021, three years concurrent (as it was committed within days and at the same location as the previous offence); and

-For the breach of undertaking, 1 month consecutive.

SENTENCE-MENTAL HEALTH ISSUES

R. v. Fabbro, 2021 ONCA 494, July 5, 2021, at paragraph 25:

> For mental health to be considered a mitigating factor in sentencing, the offender must show a causal link between their illness and their criminal conduct. That is, the illness must be an underlying reason for the conduct. And, there must be evidence that a lengthy sentence would have a serious negative effect on the offender such that it should be reduced on compassionate grounds. See *R. v. Megill*, 2021 ONCA 253, at para. 171; *R. v. Hart*, 2015 ONCA 480, at para. 6; and *R. v. Pioriello*, 2012 ONCA 63, 288 O.A.C. 198, at paras. 11-12. In *Hart*, on a Crown appeal, this court upheld the conditional sentence imposed by the trial judge where the mitigating factors included the inference that the appellant's mental health played a causal role in the commission of the offence.

APPEALS-REASONS FOR CONVICTING AND SENTENCE

R. v. KENNEDY, 2021 NLCA 42, JULY 5, 2021.

FACTS: The accused was convicted of the offence of sexual assault. The offence involved non-consensual vaginal intercourse and oral sex. He was sentenced to a period of forty-two months of imprisonment. He appealed against conviction and sentence. He argued that "the trial judge made factual findings or inferences that cannot be supported by the evidence". The appeal of sentence alleges the sentence is unfit because it was based on "sexual activity that was not proven".

HELD: Both appeals were dismissed.

Conviction:

> [22] I am satisfied, for the reasons set out below, that the trial judge's factual findings and inferences were reasonably supported by the evidence.
>
> [28] It is not the role of this Court to determine whether there is a reasonable doubt respecting whether there was vaginal intercourse. The issue for this Court is whether the trial judge made an error of law or fact in his application of the principle of reasonable doubt. At paragraph 24 of *Vokurka*, Hoegg J.A. (quoting Fish J. in *Clark*) noted that appellate courts may not interfere with factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. There was no error made by the trial judge in his application of the principle of reasonable doubt, and no error in inferring that there was oral sex and vaginal intercourse. Those inferences were reasonably supported by the evidence.

Sentence:

> [45] The appeal of sentence alleges the sentence is unfit because it was based on sexual activity that was not proven. I have determined that the trial judge made no errors in his factual findings and inferences, including his finding that the sexual activity included oral sex and vaginal intercourse. The sentence, based on those findings, was not demonstrably unfit.
>
> [46] In *R. v. Freake*, 2012 NLCA 10, the offender, a former boyfriend, was staying with the complainant at her apartment. He admitted engaging in sexual intercourse, but testified it was consensual. The trial judge accepted the complainant's evidence that it was nonconsensual and that during the sexual intercourse the offender held his hand over her mouth. A sentence of four years was imposed. This Court upheld that four-year sentence and stated, at paragraph 23, "The range of sentence for sexual assault involving intercourse in circumstances such as this would be three to five years."
>
> [47] This general range indicates that the three-year six-month sentence imposed in the appellant's circumstances was a reasonable sentence and deference is owed.

CHARTER-SECTION 11(B)-DELAY BETWEEN STAY AND REINSTATEMENT OF CHARGES

R. v. KANDA, 2021 BCCA 267, JULY 7, 2021.

FACTS: The accused was charged with a number of offences on October 2, 2016. The Crown entered a stay of proceedings on October 5, 2016. The police continued to investigate and on February 26, 2019, charges were re-laid. The accused applied for a judicial stay of proceedings to be entered arguing that the total delay from the laying of the charge subsequently stayed should be considered. The trial judge entered a stay of proceedings. The Crown appealed.

The Court of Appeal indicated that the "question is whether, notwithstanding the stay, that ongoing process was sufficient to continue engaging the rights of the respondent that section 11(b) is designed to protect" (at paragraph 8).

HELD: The appeal was allowed and the stay set aside. The Court of Appeal held that the accused's "section 11(b) rights were not engaged during the gap, so that it should not be included in the *Jordan* calculations. The circumstances here were not sufficient to justify departure from what the respondent acknowledges, and the judge accepted, is the general rule that (to quote from the respondent's factum) 's. 11(b) is not engaged during the gap period between when Crown stays the proceedings on a charge and when they bring new charges based on the same facts'… conclude that

there is nothing about the circumstances of this case that would properly exclude it from the general principle that, as stated in *Milani*, the relevant period for the purposes of section 11(b) is where there are active charges outstanding against an accused. The existence of an ongoing investigation after the stay of an original information, whether known to the accused or not, does not create an exception to that general principle in the absence of an element of illegitimacy or manipulation that would properly engage section 11(b) interests and the concerns addressed in *Jordan*" (at paragraphs 9 and 115).

SENTENCE- UNLAWFUL ENTRY, RESISTING ARREST, AND BREACH OF RELEASE ORDER

R. v. A.D., 2021 NLPC 0820A00233, JULY 13, 2021.

FACTS: The accused pleaded guilty to having committed the offences of unlawful entry into a dwelling house, resisting arrest, and breach of release orders (three counts), contrary to section 349, 129 and 145(5)(a) of the *Criminal Code*. Judge Porter described the circumstances involved, in the following manner (at paragraphs 2 to 8):

> The accused had been in a relationship with a Mr. C. On December 3, 2020, the police received two telephone calls. The accused called to advise the police that she was going to go over to C's place to collect her things. C also called the police to complain that the accused was at his place and would not leave. So the police went to C's home.
>
> When the police arrived at C's home, the accused was laying on the lawn. She got up and started to walk away from the police officer. She made a remark about killing herself. That prompted the police officer to tell her that she was being detained under the Mental Health Care and Treatment Act. The accused did not want to be detained, and resisted the efforts of the police officer to take her into his custody.
>
> The accused was put to the ground, and then put in the police car. C gave a statement in which he said that the accused had gone into his home, allegedly to get her phone charger. He had told her to go, and she had refused to leave.
>
> The police took the accused to the hospital, where it was determined that she was not a serious suicide risk. She was released by the police at 18:47.
>
> At 19:31, C called the police again. Less than an hour after the police had released the accused on an undertaking, she had made her way back to his residence. The accused was arrested and held for Court. She was then released by the Court.

At 00:45 on January 1, 2021, C called the police to report that the accused was in his shed. She was still on the Court-ordered release conditions, including a non-contact provision. The police went there, but by then she was gone. She admits to the breach, but claims that C allegedly invited her over to his place celebrate the New Year.

On April 11, 2021, an anonymous caller reported to the police that the accused was in Grand Bank, contrary to her bail conditions. The police arrested her. She claimed to have inadvertently wandered into Grand Bank while she had been walking while looking at her phone. She was detained on West Street, which is pretty well the geographic center of Grand Bank. It is not the outer part of the town. The nearest town is Fortune, some 6 km away.

HELD: Judge Porter imposed a period of eight months of conditional imprisonment, followed by one year of probation.

SENTENCE-CONSPIRACY TO COMMIT THE OFFENCE OF BREAK AND ENTRY

R. v. MAYO, 2021 NLPC 0820A00249, JULY 14, 2021.

FACTS: The accused pleaded guilty to having conspired to commit the offence of break and entry. The circumstances involved were described as follows:

Just after 5:00 a.m. on October 24, 2020, the alarm went off in the grocery store. The police responded and found that there was a footprint visible on the door. Someone had apparently kicked the door open. Inside the office, the safe was open and empty. The store was missing $27,490.00 in cash, and there were thousands of dollars required to repair the damages to the doors and wall of the store. The Insurer paid out a total of $34,300.00 for the loss sustained by the store.

The store has video surveillance cameras. The recordings showed a person breaking in by breaking the glass panel out of the door of the store. The burglar was seen in the office, using the six digit code to open the safe. It was clearly an "inside job", in the sense that only a small number of employees had the code for the safe, and that the safe code was changed often, including whenever there were changes in the staff at the store.

While the burglary cast a shadow over all of the staff who had had access to the safe, the focus soon narrowed to the accused. She had been overheard complaining about being short of cash, and the surveillance camera had recorded her taking pictures of the safe. She was polygraphed, and found to

> be "deceptive". She then confessed to having given the six digit code for the safe to her boyfriend, who had then allegedly given it to the person who had actually gone into the store and opened the safe and taken the missing money.

HELD: Judge Porter imposed a period of six months of conditional imprisonment, followed by one year of probation.

COSTS AGAINST THE CROWN

R. v. BILLIARD, 2021 NLCA 44, JULY 15, 2021.

FACTS: The accused was charged with the offences of operating a motor vehicle while impaired by alcohol and while having a blood alcohol content exceeding 80 milligrams of alcohol in 100 millllilitres of blood, contrary to the former sections 253(1)(a) and (b) of the *Criminal Code*.

On the day before the date set for trial, the Crown decided not to call any evidence and the charges were dismissed. The accused and his counsel had travelled to the Province from Alberta to appear at the trial. The accused applied for an order of costs against the Crown. The order was granted by the trial judge and subsequently affirmed on appeal to the summary conviction appeal court. The Crown appealed to the Court of Appeal.

HELD: The appeal was allowed and the order of costs was set aside. The Court of Appeal indicted that "[t]here was no evidence that Crown counsel acted in bad faith or with an improper motive" and that costs therefore should not have been ordered (at paragraphs 28 to 31):

> Mr. Billiard also submits that Crown counsel failed to meet the standard of reasonable conduct because he and his counsel were not advised until the day before the scheduled trial that the Crown intended not to call any evidence. This would not ordinarily have been unusual or problematic. A final review of the evidence and law by Crown counsel just prior to trial is to be expected, and may lead to a conclusion by counsel "on the steps of the courthouse" not to proceed with the charges. While this may cause inconvenience for the accused and the court, and may result in what turns out to be unnecessary expense to be incurred by the accused, in the absence of some special consideration such as bad faith, this could not be said to constitute a departure from reasonable standards expected of the Crown.
>
> The issue was exacerbated in this case because Mr. Billiard, who was working in Alberta, had chosen to be represented by counsel located in Alberta. That choice resulted in time and expenses related to travel…

> Had Mr. Billiard chosen to be represented by local counsel, the issue would not have arisen. His choice was, of course, open to him, but cannot form the basis for a conclusion that the Crown should be responsible for those costs absent a marked and unacceptable departure from the reasonable standards expected of the prosecution.
>
> Both the trial and appellate judges erred in the application of the legal standard to the facts. Their conclusions demonstrate a misapprehension of the law, which sets a high threshold before an order for costs may be made against the Crown in a criminal matter.

DRIVING PROHIBITIONS

Morrison, R. v [2021] EWCA Crim 917, June 11, 2021, at paragraph 30:

> Beyond the legislative requirements the relevant principles are now well established on the authorities. In summary, in assessing the appropriate period of disqualification, it is important to bear in mind, first, that the risk represented by the offender is reflected by the level of his culpability which attaches to his driving. There is a basic public protection purpose. Secondly, the main purpose of disqualification is forward looking and preventive, rather than backward looking. Disqualification is still an important element of the overall punishment for the offence and is intended to deter offenders and others. The court has a wide discretion in considering the appropriate length of disqualification. There is no formula by which a court can measure the right length. It is a judicial decision which should be tailored to the offender and the offence. It should not be so long that it disproportionately adversely affects the prospects of rehabilitation. In short, a balance has to be struck. The court should not disqualify for a period that is longer than necessary.

COMMUNICATION OFFENCES

In its report, *Modernising Communications Offences: A final Report* (HC 547, Law Com No 399, July 20, 2021), the Law Commission of England has recommended that the following new or reformed criminal offences be enacted (at page 9):

> (1) a new "harm-based" communications offence to replace the offences within section 127(1) of the *Communications Act 2003* ("CA 2003") and the Malicious Communications Act 1988 ("MCA 1988");
>
> (2) a new offence of encouraging or assisting serious self-harm;
>
> (3) a new offence of cyberflashing; and,

(4) new offences of sending knowingly false, persistent or threatening communications, to replace section 127(2) of the CA 2003.

The Commission recommends that "it should be an offence for a person to send or post a communication (letter, electronic communication, or 'article', in the sense of 'object') that is likely to cause harm to a likely audience, intending that harm be caused to that likely audience. 'Harm' for this purpose is defined as psychological harm amounting to at least serious distress" (at page 10).

HEARSAY-DECLARATIONS AGAINST PENAL INTEREST

R. v. YOUNG, 2021 ONCA 535, JULY 26, 2021.

FACTS: The accused was charged with importing a controlled substance. At her trial, she sought to introduce a statement her late father made to her half-sister taking responsibility for the drugs that were found in the accused's luggage.

The Ontario Court of Appeal indicated that "[t]heir father was a cocaine addict and convicted drug dealer and trafficker with a long criminal record. He allegedly confessed to the appellant's half-sister that he had arranged for the drugs to be given to the appellant and had used her to bring them back to Canada. He said he owed a lot of money to his drug dealer and had been forced to provide them services. He begged his daughter not to tell the appellant 'yet' about what he had done and promised to come to court to confess. He also said he was concerned for his own safety. Because the appellant's half-sister was concerned that telling the appellant might endanger their father or the appellant, she complied. Less than four months later, their father died from a cocaine and fentanyl overdose" (at paragraph 3).

The application judge refused to admit the statement. The accused was then tried and she was convicted. She appealed from conviction.

HELD: The appeal was allowed and a new trial ordered. The Ontario Court of Appeal concluded that "[t]he application judge misapprehended the evidence in applying the declaration against penal interest exception to the hearsay rule. On the totality of the evidence, the hearsay statement was admissible under that exception. Because this evidence was critical to the appellant's defence, its exclusion led to a miscarriage of justice" (at paragraph 6).

Declarations Against Penal Interest:

The Court of Appeal noted that the "criteria for the declaration against penal interest exception to the hearsay rule were distilled by Watt J.A. in *R. v. Tash*, 2013 ONCA (at paragraph 24):

> i. the declaration must be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result;
>
> ii. the vulnerability to penal consequences must not be remote;
>
> iii. the declaration must be considered in its totality, so that if, upon the whole tenor, the weight of it is in favour of the declarant, the declaration is not against his or her interest;
>
> iv. in a doubtful case, a court might consider whether there are other circumstances connecting the declarant with the crime, and whether there is any connection between the declarant and the accused; and
>
> v. the declarant must be unavailable because of death, insanity, grave illness that prevents the declarant from giving testimony even from a bed, or absence in a jurisdiction to which none of the court's processes extends.

This Case:

In ruling that the statement should have been admitted, the Court of Appeal concluded as follows (at paragraphs 31 to 35):

> Here, I conclude that the application judge materially misapprehended evidence that was crucial to deciding whether to admit the hearsay as a declaration against penal interest. He concluded that Mr. Young should not have apprehended a vulnerability to penal consequences because he "must have had confidence in the fact that his statement to Ms. Winchester <u>would remain confidential</u> given his caution to her that she should not tell [the appellant] about what he had said to her" (emphasis added). But this finding ignores a critical sentence in Ms. Winchester's affidavit, in which she stated that her father "specifically begged me not to tell [the appellant] <u>yet</u> and promised he would attend Court for her and <u>let the Court know what he had done</u>" (emphasis added). Thus, Mr. Young did not ask his daughter not to tell the appellant what he had done; he asked her not to tell her <u>yet</u>. It was a request to delay telling, not a request to never tell. More importantly, the delay was to allow Mr. Young to confess his crime in court.

> This crucial part of Mr. Young's statement — which the application judge did not address in his reasons — materially changed the nature of the statement from one in which the declarant had an expectation it would be kept confidential, and thus would not have exposed him to penal consequences, to one in which the declarant only asked the recipient to delay telling the appellant and promised to publicly confess his crime in court. Had Mr. Young reneged on his promise, the obvious inference is that he understood that Ms. Winchester would come forward, which indeed she did when he died. Thus, when Mr. Young's complete statement is considered, Mr. Young certainly should have apprehended a vulnerability to penal consequences by making his statement to Ms. Winchester.
>
> Nor was Mr. Young's vulnerability to penal consequences remote. Mr. Young promised to come to court to confess his crime. This was not a vague promise to say something at some indeterminate time. The appellant had been arrested and charged. The legal process had begun. His time to confess would come soon.
>
> Finally, that Mr. Young's statement was allegedly made to his adult daughter, albeit one with whom he had a difficult relationship, does not detract from these conclusions. Even though Mr. Young's statement was to his daughter, his qualification as to timing combined with his promise to confess in court showed that he appreciated his vulnerability to penal consequences was real and not remote.
>
> I conclude that the application judge materially misapprehended the evidence relevant to criteria (i) and (ii) of *Tash* and erred in excluding the hearsay statement.

CHARTER-SECTION 7 AND 11(D)-SECTION 33.1 OF THE *CRIMINAL CODE*

In ***R. v. Brown***, 2021 ABCA 273 July 29, 2021, the accused was charged with a number of offences, including the offence of aggravated assault. He argued that section 33.1 of the *Criminal Code* violated sections 7 and 11(d) of the *Charter* by preventing him from raising the defence of non-mental disorder automatism by reason of intoxication.

Section 33.1 states as follows:

> *(1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in (2).*
>
> *(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.*
>
> *(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.*

The application judge concluded that section 33.1 infringed section 7 and 11(d) of the Charter. A declaration of unconstitutionality was issued. At the accused's trial, he was permitted to raise the automatism defence. He was acquitted.

The Crown appealed.

The Alberta Court of Appeal described the issue raised by the appeal in the following manner:

> The issue on this Crown appeal is whether s. 33.1 of the *Criminal Code* is unconstitutional. That section…provides that "self-induced intoxication" is not a defence to any general intent offence involving interference with the bodily integrity of another person because such an accused departs markedly from the standard of reasonable care generally recognized in Canadian society.

The Court of Appeal concluded that section 33.1 was constitutionally compliant (at paragraphs 49 and 87):

> In summary, s. 33.1 is a constitutionally compliant response to a problem that has been known in the criminal law for generations. It is not contrary to the principles of fundamental justice to hold persons accountable for what they

> do when they voluntarily become extremely intoxicated and cause injury to others…In conclusion, the appeal should be allowed. The declaration of invalidity of s. 33.1 should be set aside. A conviction should be entered on the lesser and included offence under count 1 of aggravated assault. The matter should be returned to the trial court for sentencing.

In a concurring opinion, Khullar J.A. held that section 33.1 violates section 7 of the *Charter*, but is saved by section 1 (at paragraph 166):

> I have had the opportunity to read the reasons of my colleagues, and I disagree with their analysis of s 7 of the *Charter* as I find that s 33.1 of the *Criminal Code* breaches the principles of fundamental justice. In the end, though, I agree that s 33.1 of the *Criminal Code* is constitutional as it is saved under s 1 of the *Charter*. However, I think this is a hard and close case. Parliament made a difficult judgment call. It has chosen to hold people criminally responsible for violence arising from self-induced intoxication in a particular context and to deter people from such intoxication because it might lead to violence. It did so after examining a number of other options and it made a considered defensible choice.