COURT OF APPEAL FOR YUKON

Citation: *R. v. Frisch; R. v. Pope*,
2013 YKCA 3

Date: 20130227
Nos. YU700, YU701

Docket: YU700

Between:

Regina

Appellant

And

Kevin Peter Frisch

Respondent

- and -

Docket: YU701

Between:

Regina

Appellant

And

Corey Curtis Pope

Respondent

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Hinkson

On Appeal from: Supreme Court of the Yukon Territory, May 17, 2012
(*R. v. Frisch*, 2012 YKSC 41, Whitehorse Registry No. 11-01500)
Supreme Court of the Yukon Territory, May 14, 2012
(*R. v. Pope*, 2012 YKSC 42, Whitehorse Registry No. 11-01505)

Counsel for the Appellant: K.D. Parkkari

Counsel for the Respondent, K.P. Frisch: G.R. Coffin

Acting on his own behalf: C.C. Pope

Place and Date of Hearing:	Vancouver, British Columbia February 8, 2013
Place and Date of Judgment:	Vancouver, British Columbia February 8, 2013
Place and Date of Reasons:	Vancouver, British Columbia February 27, 2013

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] These reasons pertain to two appeals by the Crown from three-month custodial sentences followed by probation, in respect of which leave to appeal was refused with reasons to follow. As discussed below, we refused leave because of the Crown's failure to bring the appeals on for hearing in a timely way.

[2] It should be noted that as these appeals were not heard on their merits, this Court did not consider the fitness of either sentence. Accordingly, the refusal of leave should not be taken as an indication that we consider either sentence to be fit.

Factual Background

[3] Corey Curtis Pope pleaded guilty to a charge of aggravated assault arising out of an incident that occurred on February 25, 2011. The Crown sought a sentence of two years' imprisonment to be followed by three years' probation. Mr. Pope's counsel submitted that a suspended sentence and probation was appropriate. On May 14, 2012, the sentencing judge imposed a sentence of three months' imprisonment to be followed by two years' probation. In addition, Mr. Pope was ordered to pay the victim $3,000.00, as partial compensation for his financial losses. The sentencing judge's reasons are indexed as 2012 YKSC 42.

[4] Kevin Peter Frisch was convicted following a trial on a charge of aggravated assault arsing out of an incident that occurred on July 21, 2010. The Crown submitted that the usual sentencing range was between 12 and 16 months' imprisonment and sought a sentence at the lower end of that range to be followed by a years' probation. Mr. Frisch's counsel submitted that, as recent amendments to the *Criminal Code*, R.S.C. 1985, c. C-46, had made a conditional sentence unavailable, an appropriate sentence would be one substantially outside the usual range, possibly a suspended sentence and probation. On May 17, 2012, the sentencing judge imposed a sentence of three months' imprisonment to be followed

by 18 months' probation. The sentencing judge's reasons are indexed as 2012 YKSC 41.

[5] On May 28, 2012, the Crown filed a notice of application for leave to appeal Mr. Frisch's sentence. On June 4, 2012, it filed a notice of application for leave to appeal Mr. Pope's sentence. As the Crown viewed these appeals as raising similar issues it took steps to have them heard at the same time.

[6] On September 14, 2012, Crown counsel confirmed with a judge of this Court that the two appeals would be ready to proceed in Whitehorse during the week of November 5, 2012. Given the appeals already set for hearing that week and counsel's availability, the matters were placed on the "stand by list" for the afternoon of November 9th, i.e., they would to heard only if another matter set for that time did not proceed.

[7] The Crown filed an appeal book for each matter on September 27, 2012, and its appellant's statements on September 28th. The Crown's position was that both sentences were unfit. With respect to Mr. Frisch, it sought a sentence of between 12 to 16 months' imprisonment to be followed by one years' probation. With respect to Mr. Pope, the Crown sought a sentence of between 12 and 14 months' imprisonment to be followed by a period of probation shorter than 18 months. The Crown also suggested a compensation order in favour of the victim which, if made, would reduce the custodial sentence by one or two months.

[8] Mr. Frisch's counsel filed his reply statement on October 19, 2012, and a supplemental book of authorities on November 5th. Mr. Pope, who by this time was acting on his own behalf, did not file any material.

[9] The appeals did not proceed on November 9, 2012, as the Court heard another matter that day.

[10] As a result of discussions between this Court's registry, Crown counsel and Mr. Frisch's counsel, the appeals were set down to be heard in Vancouver on February 8, 2013.

[11] Prior to the February 8, 2013 hearing the Court advised the Crown that it wished to have an explanation for why it had taken as long as it did for the appeals to come on for hearing. In response, the Crown filed an affidavit setting out what it had done to bring the matters on for hearing.

Discussion

[12] This Court has indicated more than once that when the Crown appeals a non-custodial sentence or one which involves a short term of imprisonment, it has an obligation to obtain an early hearing date. If reasonably possible, an appeal from a sentence which involves a short term of imprisonment should be heard before that term has been served. To that end, the Court's practice is to make early dates available for such appeals. It is clear that with respect to the present matters, the Crown failed to meet that obligation. Indeed, as Crown counsel candidly admitted, he does not have a good explanation for why nearly nine months passed between when the three-month sentences were imposed and the appeals came on for hearing. In particular, he does not have an explanation for why arrangements were not made to have the appeals heard in Vancouver during the summer of 2012.

[13] This Court habitually sits in Whitehorse for one week during the first quarter of each year and, more recently, has scheduled an additional one-week sitting there in the fall, if the case-load warrants. However, as the majority of the judges of this Court also sit on the Court of Appeal for British Columbia, Yukon appeals are regularly heard in Vancouver. A Yukon appeal can be set down to be heard in Vancouver any time the Court of Appeal for British Columbia is in session there, including the one-week sittings in July and August.

[14] More than 20 years ago, this Court, in *R. v. Nelson*, [1992] Y.J. No. 171 (C.A.), admonished the Crown for failing to bring on its appeal from a short custodial sentence in a timely way. In April, Mr. Nelson received an aggregate sentence of three months' imprisonment to be followed by three years' probation. The Crown appealed, but that appeal did not come on for hearing until November, some six months later. The appeal was dismissed on the basis that the sentence imposed

was not unfit. However, Mr. Justice Hinds went on to indicate that, even if the sentence had been found to be unfit, it would not have been appropriate to allow the appeal. In that regard, he stated:

> [36] There is another matter deserving of comment. Assuming (contrary to the conclusion I have reached) that the sentence was unfit, should the respondent be returned to jail? Reincarceration imposes a considerable additional burden upon an accused who has served a portion of his or her term of imprisonment prior to the time that a sentence appeal is heard: see *R. v. Inwood* (1989), 48 C.C.C. (3d) 173 (Ont.C.A.), at p. 184.
>
> [38] Absent special circumstances, the court is often reluctant to reincarcerate a person, particularly if that person is satisfactorily performing terms of a probation order and is making progress towards rehabilitation. In this case there was an opportunity for the sentence appeal to have been brought on for hearing in June, 1992 when a division of this Court was sitting in Whitehorse, or in July or August when a division of this Court was sitting for one week in each of those months in Vancouver to deal with urgent matters during long vacation. Unfortunately the Crown, which had the responsibility for this appeal, did not apply for it to be heard during the foregoing months. It was not heard until October, 1992, several months after the respondent had been released from prison. In my opinion, it would not have been just in the circumstances of this case to reincarcerate the respondent.
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> [Emphasis added.]

[15] Similar views were expressed by this Court in *R. v. Koe* (1994), 47 B.C.A.C. 315 (Y.T.C.A.). Mr. Koe received a suspended sentence and two years' probation in the fall of 1993. The Crown appealed and secured a hearing date some nine months later, during a sitting-week in Vancouver in August of 1994. After concluding that the sentence imposed was not unfit, Madam Justice Ryan went on to refuse leave because of the Crown's failure to bring the matter on for hearing sooner. In that regard, she stated:

> [14] To this point I have dealt with this application by the Crown to appeal sentence on the merits. I note that it has taken nine months to bring this case to a hearing. Some of that delay is attributable to the defence but the Crown ought not to accede to such delay. Although there are problems particular to the Yukon in bringing on these appeals expeditiously, a nine month delay between sentencing and a Crown appeal is unacceptable. We have dealt today, in *R. v. McQuade*, [1994] B.C.J. No. 1999, with such a delay and dismissed the appeal as untimely. If delay is occasioned by difficulty obtaining transcripts or obtaining the consent of defence counsel or finding the accused to serve him with any material, application should be made to this Court for directions rather than simply letting the delay occur. If they do

> not, the Crown must accept that the consequences of the delay may be dismissal of the Crown's case for the reasons we have given in *McQuade*.
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> [Emphasis added.]

[16] What occurred in *R. v. McQuade*, [1994] B.C.J. No. 1999 (C.A.), is that in April Mr. McQuade was given an aggregate sentence of one day's imprisonment to be followed by three years' probation. The Crown's appeal came on for hearing in August, approximately four and one-half months later. In the course of dismissing that appeal, Mr. Justice Goldie said this:

> [17] However, in the view I take of this matter, this appeal must be dismissed on the basis of the Crown's failure to proceed expeditiously in challenging a sentence which placed the respondent at large as soon as it did.
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> [18] Some 16 days after the sentences were imposed the Crown filed its notice of application for leave to appeal. Mr. McQuade was served four days later on April 26. A hearing date was obtained approximately 50 days later, that is, some time prior to June 15. The transcript was filed June 30 and the appeal heard August 16, that is to say, 131 days after sentence.
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> . . .
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> [20] In these circumstances, if the Crown wished to test the fitness of these sentences it was incumbent on it to expedite the appeal. The registry is always prepared to provide a hearing date in advance of filing the transcript in cases such as this. What is unacceptable is the time which was allowed to go by at virtually every step in the appeal process.
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> [21] This Court's concern with appeals against sentence which are not brought on until after the sentence has been served is well known.
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> [22] In the case at bar it is not fair to Mr. McQuade to re-arrest him and incarcerate him for a two year sentence after what has taken place.
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> [Emphasis added.]

[17] To enable the Crown to bring appeals of this nature on quickly, this Court has adopted the same practice as the Court of Appeal for British Columbia, namely, that the Crown can obtain a hearing date from the registry even if that date has not been agreed to by defence counsel. That practice is reflected in *R. v. Peterson*, [1985] B.C.J. No. 1960 (C.A.). In that case, the Crown sought to appeal fines that had been imposed on two offenders in November of 1984. However, it was not until early February of 1985 that the Crown took steps to discuss a hearing date with defence counsel. When defence counsel indicated that he was not available

through to the end of June, the Crown arranged to have the appeals heard in late October. In refusing leave to appeal, the Court criticized the Crown for failing to set the matter down for hearing on an earlier date. Apposite is the following from the judgment of Mr. Justice Craig:

> [12] The late Chief Justice Davey, when he was Chief Justice of British Columbia, instructed all Crown counsel that they were not to accommodate defence counsel on hearing dates; the important thing on Crown appeals was that they were to put them on as soon as possible, and his instructions were that counsel, while they were certainly justified in attempting to accommodate counsel, ultimately must in the event they could not fix an early hearing date, arrange with the registrar for the first available date, give defence counsel notice of that fact and let him worry about whether he was able to appear on that date or not, or to seek other counsel or to seek an adjournment. I think it is important, of course, that Crown counsel do try to accommodate defence counsel. Often times when a defence counsel is very busy it is impossible. That is perhaps what happened in this case. Regardless of what happened, I think it inappropriate to countenance the delay by granting leave to appeal, and I reiterate what Mr. Justice Hinkson said. I think, on the material put before me, that this was not a fit sentence. However that may be, I would refuse leave to appeal.

[18] In saying that the Crown can unilaterally obtain an early hearing, I am not suggesting that it invariably would be wrong for the Crown to agree to a short delay if the date set is not available to defence counsel. I had occasion to deal with such a situation in *R. v. Nguyen*, 2008 BCCA 252, 234 C.C.C. (3d) 67, a Crown appeal from a conditional sentence. The Crown acted expeditiously and obtained a hearing date approximately two months after the date of sentencing. It then served a notice of hearing personally on Mr. Nguyen. However, as the counsel Mr. Nguyen had retained for the appeal was not available on that date, the Crown agreed to a short adjournment. This Court allowed the appeal and imposed a custodial sentence. In rejecting Mr. Nguyen's submission that the passage of time militated against his being incarcerated, I said this:

> [51] In my view, counsel acted appropriately. The Crown obtained an early hearing date. Mr. Nguyen decided to retain Mr. Martland. It is understandable that Mr. Martland was not in a position to deal with the matter on short notice. To accommodate Mr. Martland, Ms. DeWitt-Van Oosten agreed to a brief, but reasonable, adjournment. In the end, the appeal was heard four months after Mr. Nguyen was sentenced.

> [52] The nature of the appellate process is that it takes time. However, this Court has always endeavoured to accommodate matters of some urgency. In sentence appeals of an urgent nature, a hearing date within two months of the filing of the notice of application for leave to appeal can usually be obtained. However, as occurred in this case, it is also not unusual for the initial date to be postponed to accommodate defence counsel. To not correct an unfit sentence when the Crown has brought its appeal on as quickly as possible would effectively negate the Crown's ability to appeal any non-incarceration sentence.

[19] I hasten to add that Mr. Coffin, who has acted throughout for Mr. Frisch, did nothing to delay the hearing of these appeals. It is clear that the Crown made no effort to have these appeals heard prior to November of 2012 and, even then, obtained what was, at best, a tentative hearing date. It was only after the appeals were not heard in Whitehorse that the Crown communicated with the registry with a view to obtaining a date in Vancouver. Although Mr. Coffin did agree to a hearing date in January of 2013, by the time that agreement was communicated to the registry, that date was no longer available. In the end, counsel settled on the February 8, 2013 date.

[20] Given that,

(a) the Crown made no effort to have these appeals heard in a timely way;

(b) Mr. Frisch and Mr. Pope completed the custodial portions of their respective sentences approximately six months before these appeals came on for hearing; and

(c) the Crown has not suggested that either of them has failed to abide by the terms of their respective probation orders;

we considered it inappropriate to entertain appeals seeking to have them reincarcerated.

[21] Accordingly, leave to appeal was refused.

“The Honourable Mr. Justice Frankel”

I agree:

“The Honourable Madam Justice D. Smith”

I agree:

“The Honourable Mr. Justice Hinkson”