File No. 36410

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

BETWEEN:

MATTHEW JOHN ANTHONY-COOK

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA, ASSOCIATION DES AVOCATS DE LE DEFENSE DE MONTREAL and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

INTERVENER'S FACTUM
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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF POSITION

1. The appellant, Matthew Anthony-Cook, posits a tension between what he identifies as the two established tests governing a sentencing judge's decision to reject a joint sentencing submission. One test asks simply whether the submission would produce a fit sentence. The other asks whether acceptance of the submission would not be in the public interest. The Crown, on the other hand, says there is "no real difference", or only a "slight" difference, between the two tests (factum, para. 38).

2. The need for certainty in plea negotiations, and for efficiency in the administration of justice, require an elevated test that declines to interfere merely because the sentencing judge takes a different view of fit sentencing than the parties. And yet something more tangible and more concrete than the so-called "public interest" test is necessary if judges are to be able to appropriately balance respect for the plea bargaining process (by deferring to joint sentencing submissions), with the preservation of public confidence in the justice system (by rejecting submissions that are manifestly unjust).

3. This intervener, the British Columbia Civil Liberties Association, will propose a test for "jumping" (*i.e.*, imposing a harsher sentence than that agreed by the parties) that is substantially drawn from this Court's jurisprudence governing appellate review of sentencing, but which is tailored to the particular context of joint sentencing submissions. This factum will go on to highlight a crucial procedural consequence of a sentencing judge's decision in that regard: if the result of the decision is to more greatly deprive the offender of his liberty without giving that offender an opportunity to make full answer and defence, then the offender must be able to elect to withdraw the guilty plea.

PART II: STATEMENT OF POSITION

4. The BCCLA has a direct interest in sentencing law and post-conviction rights. This flows necessarily from the BCCLA's interest in protecting liberty, in its most essential sense: the right not to be subjected to imprisonment by the state, except in accordance with the principles of fundamental justice.

5. The BCCLA will make four points:[1]

A. Neither of the two extant tests should be accepted in their present form.

B. A sentencing judge should always "undercut" a joint submission that would, in the judge's view, produce an excessive sentence.

C. On the other hand, a sentencing judge must approach the submission differently when the concern is that it is too lenient. The correct approach asks whether the sentence is *clearly unreasonable* or *demonstrably unfit*, having regard to the particular context of plea bargaining involving a *quid pro quo*.

D. Depending upon the impact of increasing a sentence on an offender's liberty, the procedural consequence of doing so may be to trigger a right to withdraw the guilty plea.

PART III: STATEMENT OF ARGUMENT

A. *The Two Current Tests*

6. This Court has recognized that plea bargaining is "an integral element of the Canadian criminal process": *R. v. Burlingham*, [1995] 2 S.C.R. 206, para. 23. It is therefore essential that the sentencing judges who are presented with the thousands of joint submissions that occur in this country every year have clear and manageable standards by which to determine whether to accept those submissions. Those standards must, at the same time, ensure that the rights of offenders are protected, and the efficacy of the plea bargaining system is preserved.

7. The current tests, as presently framed and articulated, fail to meet these criteria. To get to the right approach, one must first dispense with the Crown's notion that the current tests are essentially the same. The entire premise of the "public interest" test is that sentencing judges ought to "have regard to the interest of certainty in resolution discussions when faced with a joint submission", and "give effect to the need for certainty", *per* the Martin Report[2] (at p. 328) and

[1] Cromwell J.'s order of January 29 restricts this intervention to the "standard" to be applied by a sentencing judge in this context. Given the close links between the substantive content of the judge's review and the process to be followed in that review (links acknowledged in both parties' facta on this issue), this factum will proceed on the assumption that the order enables submissions as to both *procedural* and *substantive* standards.

[2] Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Chair G.A. Martin) (Toronto, Queen's Printer, 1993)

the appellate cases that have accepted its rationale directly.[3] The Martin Report's focus on "certainty" is directly at odds with an approach that obliges sentencing judges to arrive at their own view of a fit sentence in every case. The Newfoundland and Labrador Court of Appeal has been particularly emphatic about this differentiation:

> The applicable test for determining whether a joint submission should be accepted therefore requires the sentencing judge to focus, not on general sentencing questions such as fitness, proportionality and range of sentence but on the much more discrete inquiries of whether the imposition of the recommended sentence will, in the circumstances of the case, bring the administration of justice into disrepute and whether the sentence is contrary to the public interest. This is different from simply considering whether the sentence is "fit" or falls within the range of sentences for offences of the type in question. [*R. v. Oxford*, 2010 NLCA 45, para. 63; emphasis added]

8. Given a choice between the approaches, there are three reasons why the fitness-based test for which the Crown contends should be rejected. First, avoidance of a purely fitness-based inquiry represents the preponderance of appellate opinion across this country,[4] and it appears to be working. The Crown has brought forward no reports or analyses that demonstrate any mischief flowing from the approach that nearly all Canadian jurisdictions have adopted.

9. Second, the narrow inquiry proposed by the Crown gives no weight to the joint submission, and thus threatens to bring about the result of which Clayton Ruby has warned in his treatise *Sentencing* (8th ed., 2012), as follows:

> [T]he acceptance of joint submissions has become a practical necessity in our busy criminal courts. A pattern of failure to accept

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[3] Perhaps the most explicit cases in this regard are *R. v. G.W.C.*, 2000 ABCA 333, para. 17 ("The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere"); *R. v. Cerasuolo* (2001), 140 O.A.C. 114, para. 8 ("a high threshold […] intended to foster confidence in an accused"); and *R. v. DeSousa*, 2012 ONCA 254, para. 21 ("certainty serves not only the interests of the accused, but those of the Crown as representative of the public interest. To the extent that judges reject joint submissions, certainty suffers") (emphases added).

[4] Ontario, Alberta and Newfoundland's leading cases are cited above; other leading cases, jurisdiction-by-jurisdiction, are *R. v. Webster*, 2001 SKCA 371, para. 7 (Saskatchewan); *R. v. Pashe* (1995), 100 Man. R. (2d) 61 (C.A.), para. 11, and *R. v. Sinclair*, 2004 MBCA 48 (Manitoba); *R. v. Douglas* (2002), 162 C.C.C. (3d) 37 (Que. C.A.), para. 51 (Quebec); *R. v. Steeves*, 2010 NBCA 57, para. 31 (New Brunswick); *R. v. Hatt*, 2002 PESCAD 4, para. 18 (P.E.I.); *R. v. MacIvor*, 2003 NSCA 60, and *R. v. Marriott*, 2014 NSCA 28, para. 102 (Nova Scotia). While some of these cases incorporate fitness as an *element* of the inquiry, none merge it completely with the public interest. Only B.C.'s leading case seems to make fitness the ultimate issue: *R. v. Bezdan*, 2001 BCCA 215, para. 15.

> joint submissions would slow the process immeasurably and undermine a system that depends upon predictability of sentence following joint submissions by counsel. [3.57]

10. Third, the Crown's approach seems to overlook the fact that sentencing involves an analysis that goes beyond examination of the gravity of the offence and the responsibility of the offender (see, for instance, para. 4 of the Crown's factum). The Crown's analysis captures the moral, or normative, aspect of sentencing; but there is also a utilitarian aspect that gives value to the diminished burden on witnesses and public resources that plea bargaining brings about. As Lamer C.J. observed in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, "in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment" (para. 82).

11. The approach proposed in the Martin Report ought therefore to be preferred. But at the same time, it has become apparent that it is not enough to *only* describe this approach in terms of the public interest and the administration of justice. Language of that kind, and a broad commitment to respecting joint submissions, cannot be all that sentencing judges are left to go on. It is too easy to say, as the Crown does at para. 38, that a joint sentencing submission that would produce an unfit sentence is "surely 'contrary to the public interest'".[5] Too many cases appear to blend the tests. There is a risk that "unreasonable", "contrary to the public interest", "unfit", and "would bring the administration of justice into disrepute" all become treated as alternative formulations of the same test – and they are not. A more structured analysis is required to avoid this risk.

12. In considering the shape of that structure, a single idea ought to be definitive: that our system of justice can tolerate a degree of under-enforcement of the criminal law, *particularly with the Crown's consent*;[6] but it should be scrupulous in ensuring that the criminal law is not over-enforced, *even with the offender's consent*. This is reflected in what follows.

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[5] The Crown cites *R. v. Douglas* as authority in this regard. In fact, what Fish J.A. said in the words immediately prior to those quoted by the Crown is that an *unreasonable* joint submission would be "surely 'contrary to the public interest'" (para. 51). The difference matters: Fish J.A.'s judgment otherwise makes apparent that he was prepared to show deference to joint submissions.

[6] The theoretical and historical force of this point is conveyed powerfully by Benjamin L. Berger in "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61 U. Toronto L.J. 579.

B. *The Proposed Approach, Part I: One Test for "Undercutting"*

13. The sentencing judge is the ultimate guardian of the constitutionally-protected liberty interests of the accused. Nothing should impede a judge from going *below* the parties' joint sentencing submission if the judge thinks it is necessary to achieve a proportionate sentence.

14. This flows from the constitutional mandate of every sentencing judge. The court's constitutional obligation exists independently of defence counsel's position or concessions. In the "fair trial" context, for instance, this Court has recognized a trial judge's duty to safeguard the accused's rights: *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419, p. 461. The trial judge's duty to provide a proper jury instruction extends to circumstances where defence counsel have failed to object to the judge's charge: *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Arcangioli*, [1994] 1 S.C.R. 129. At bottom, the judge's duty to protect the accused's s. 7 rights is engaged even where defence counsel has failed to do so – and, all the more so, where the offender is unrepresented.

15. That duty applies with equal force to sentencing. The offender has a fundamental and constitutional right to a proportionate sentence: *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, para. 24 (referring to the "principle of fundamental justice that sentences be proportionate"). Even if defence counsel has conceded, in conjunction with the Crown, that a certain sentence is appropriate, the sentencing judge's constitutional duty is to ensure that nothing greater than a proportionate sentence is imposed.

C. *The Proposed Approach, Part II: Another Test for "Jumping"*

16. By contrast, when the sentencing judge is considering *increasing* the length or severity of the sentence, the analysis changes. In this context, guidance may be found in the cases controlling appellate review of sentencing. Those cases establish that the court ought only to interfere where the sentence is "clearly unreasonable": *R. v. Shropshire*, [1995] 4 S.C.R. 227, p. 249. The question is not whether the sentence is unfit, but whether it is "demonstrably unfit", having regard to the principle of proportionality: *M.(C.A.)*, para. 90; *R. v. Lacasse*, 2015 SCC 64, para. 52. By adopting and adapting this well-established, highly deferential standard, the public interest in certainty in plea bargaining is appropriately balanced against the public interest in

ensuring the administration of justice is not brought into disrepute by sentences that are inordinately lenient.

17. The analogy between appellate review and joint sentencing submissions is apposite in two ways. First, in both contexts there is a significant differential in knowledge. In the appellate context, that differential in knowledge is as between the trier of fact and the appellate court: *Shropshire*, para. 46; quoted in *Lacasse*, para. 40. In the context of joint sentencing submissions, the knowledge differential is as between the counsel who made the agreement, and the judge hearing the submission. Cromwell J.A. (as he then was) described this problem in *MacIvor*:

> Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that <u>even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation</u>. [para. 32; emphasis added]

Likewise, in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, Charron J. pointed out that:

> Counsel certainly have an ethical obligation not to mislead the court about those circumstances, but the fact remains that the judge is presented with the *end product* of the plea negotiations, not with the entire set of circumstances or considerations that went into the mix. [para. 53; italics in original]

18. The players are different in the two contexts, but the effect ought to be the same: because the knowledge differential may impede the reviewing judge's assessment of the case, a high degree of deference is warranted, as a means of ensuring just outcomes. Conversely, failure to show sufficient deference to the parties' agreement may accidentally produce *unfit* sentences, in the name of achieving fitness. This case may illustrate the problem: if this Court agrees with the appellant's argument that the probation order in this case was unreasonable, then an injustice may well have been done simply for want of insight into the appellant's mental health and addiction issues.

19. The second point of similarity to the appellate review context arises from the courts' need to avoid a proliferation of time-consuming review proceedings. Just as appeals must not become

re-trials or re-hearings,[7] so too must review of joint sentencing submissions not routinely become wide-ranging explorations of the many facts and considerations germane to sentencing – which extend well beyond the specific facts of the offence charged, to include such matters as the offender's personal and criminal history, his or her likelihood of rehabilitation and reintegration, and the impact of the offence upon victims and society. A high degree of deference, akin to the appellate context, serves the powerful practical imperative of allowing the criminal courts to dispose efficiently of the many matters on their daily docket.

20. The Crown's central point against a deferential approach is that s. 718.1 directs that a sentence be proportionate, and that the judge, as ultimate arbiter of sentencing, is therefore obliged to ensure proportionality (factum, paras. 24-25). While it is true that *ultimate* responsibility rests with the judge, this argument overlooks the significant role that the Crown can play *in this context* in helping to determine a proportionate sentence, in collaboration with defence counsel. As this Court said in *R. v. Power*, [1994] 1 S.C.R. 601, with specific reference to plea bargaining (among other things), "courts should be careful before they attempt to 'second-guess' the prosecutor's motives when he or she makes a decision" (p. 616).

21. At the end of the day, when the offender has a liberty interest on the line, *and* the Crown does not desire or think appropriate any greater deprivation of that interest, there seems to be no reason why the court should not show deference to that exercise of discretion on the part of the Crown, as a *quasi*-judicial officer. In this context, as much as any other, the Crown is not merely a litigant but a "Minister of Justice": *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, para. 65.

22. In applying the deferential standard to the particular context of joint sentencing submissions, three further points are of importance. The first is the point made by Steele J.A. in *Sinclair*, that "[t]he clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge" (para. 13). While, with respect, it may not be correct to suggest that degrees of "weight" will vary depending on the "clarity" of the *quid pro quo*, Steele J.A.'s focus on the significance of the *quid pro quo* is nevertheless correct. It is the element of a *quid pro quo* in the process leading to a joint submission – which could take many

[7] For this reason, should a sentencing judge ultimately choose to reject a joint submission, and the sentence is entered, appellate review of *that* sentence must still proceed in the ordinary fashion, on the "demonstrably unfit" standard. While it may seem counter-intuitive that deference can be double-stacked in this sense, that is the inevitable consequence of an approach that is sufficiently respectful of the plea bargaining process.

forms, including a reduction of charges, an agreement to provide evidence, or simple expedition of the process in circumstances where the offender would otherwise spend months in pre-trial detention – that brings about the conditions justifying the heightened level of deference.

23. The second point flows from the first. To enable the sentencing judge to know that deference is justified, counsel should remember the admonition of Kroft J.A. (dissenting) in *R. v. Sherlock* (1998), 131 Man. R. (2d) 143 (C.A.), that:

> [I]t is important to trial judges and courts of appeal that the nature of the bargain be clearly presented on the record. Without that assistance, no court can adequately assess the extent to which it should be constrained by the joint recommendation of counsel. [para. 32]

24. The third and final point to be made here is that sentencing ranges should not be a controlling metric for the determination of whether a sentence is demonstrably unfit. This Court held that very thing recently, in *Lacasse* (see para. 58). The *Lacasse* reasoning applies with even greater force in the context of a plea bargain wrapped around a *quid pro quo*. The *quid pro quo* is an additional, utilitarian sentencing factor that contributes to making the facts of each case unique, and thus unsuitable to rigid confinement to a pre-defined range.

25. The result of all this is an approach that holds that where, having followed an appropriate process of inquiry (discussed further below), a sentencing judge is satisfied that a joint sentencing submission would produce a *clearly unreasonable* or *demonstrably unfit* sentence, in the sense that it shows manifestly undue lenience having regard both to proportionality and to the *quid pro quo* underpinning the guilty plea, it may *then* be said that the proposed sentence would be contrary to the public interest and would do harm to the administration of justice. Such a submission should be refused; the sentencing judge may then adjust the sentence to correspond to what proportionality minimally requires. But, short of the high threshold described here, the submission should be accepted.

D. *Withdrawal of Guilty Pleas*

26. With respect to the appropriate procedure to be followed by the sentencing judge, the parties appear to be substantially *ad idem* (compare the appellant's para. 70 with the Crown's

para. 20). Those procedural steps ensure that, when the sentencing judge applies the deferential standard described above, it will be with the benefit of notice and an opportunity to counsel to make further submissions and, if necessary, adduce evidence. Perhaps the sole point of divide between the parties arises from the appellant's submission that "[i]n certain circumstances, the accused should be permitted to apply to withdraw a guilty plea" (para. 70(c)). The appellant notes, however, that *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 (Ont. C.A.) may be an obstacle to withdrawal.

27. As a starting point, it over-reads *Rubenstein* to find in it authority for the broad proposition that a guilty plea may not be withdrawn when the sentencing judge rejects a joint submission. In that case, as Zuber J.A. explained, the sentencing judge found that the request for withdrawal was intended to "result in judge shopping", based on facts specific to the case before him (para. 7). It stands to reason that if a judge for some reason believes the same joint submission will simply be re-submitted to a different judge on a different day, the judge may refuse the withdrawal of the plea. But this is a mischief that Crown counsel, whose participation would be essential to any attempt at a repeat submission, can ensure does not take place.

28. This Court held in *The Queen v. Bamsey*, [1960] S.C.R. 294, that a guilty plea may be withdrawn if there are "valid grounds […] to do so" (p. 298). In *Adgey v. R.*, [1975] 2 S.C.R. 426, Dickson J. (for the majority) observed that it "would be unwise to attempt to define all that which might be embraced within the phrase 'valid grounds'" (p. 431). Then, crucially, in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307, the Court held that "even if the requirements for validity [of the plea] are met, a guilty plea may be withdrawn <u>in the event that the accused's constitutional rights were infringed</u>" (para. 86; emphasis added) – or, it should be added, "<u>would be</u> infringed".

29. When an accused makes a plea bargain involving a *quid pro quo*, that accused gives up the right to make full answer and defence. The accused, who is now an offender, does so on the premise of representations that have been made by one branch of government – the Crown – with the obvious expectation that a certain result will obtain. Having surrendered a s. 7-protected right on that premise, it is unconstitutional for another branch of government – the judiciary – to direct a greater deprivation of the offender's liberty without conferring a fresh right of full

answer and defence.[8] And that is so regardless of the fact that the offender ought to be aware of the *risk* that a judge *might possibly* take a different view of the matter. The requirements of fundamental justice cannot be satisfied by a throw of the dice.

30. In applying the criminal law, judges, no less than prosecutors, are obliged to comply with s. 7: *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Robinson*, [1996] 1 S.C.R. 683. This compels the conclusion that if, notwithstanding the deferential approach outlined above, a sentencing judge nevertheless chooses to impose a sentence that would more greatly infringe the offender's liberty, the offender must be extended an opportunity to withdraw the guilty plea and make full answer and defence to the charge. It is easy to imagine circumstances in which that opportunity is declined – the offender may have nothing to say in answer to the charge, and may wish simply to receive his sentence (and, possibly, get on with an appeal therefrom) – but it is an opportunity that must be given.

PART IV: COSTS

31. The BCCLA does not seek costs and asks that costs not be awarded against it.

PART V: REQUEST FOR ORAL ARGUMENT

32. The BCCLA requests the Court's permission to make 10 minutes of oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14th day of March, 2016.

Ryan D. W. Dalziel

Emily C. Lapper

[8] The Supreme Court of Michigan arrived at the same conclusion on the basis that the issue goes to the validity of the underlying plea: *People v. Killebrew*, 330 N.W. 2d 834 (Mich. 1982).

PART VI: TABLE OF AUTHORITIES

PART VII: LEGISLATION IN ISSUE

Canadian Charter of Rights and Freedoms / Charte Canadienne des Droits et Libertés

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

***Criminal Code*, R.S.C., 1985, c. C-46 / *Code criminal*, L.R.C. (1985), ch. C-46**

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.