
CANADA / JUDGMENT

Gustavson v. HMTQ

2005 BCSC 634

COURT

Supreme Court of British Columbia

DECIDED

31 March 2005

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2005 BCSC 634 Gustavson v. HMTQ

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Gustavson v. HMTQ

2005 BCSC 634

Date: 20050331

Docket: 22577

Registry: Vancouver

Between:

Orville John Gustavson

Petitioner

And:

Her Majesty the Queen

Respondent

and

Docket: X064166

X064857

Registry: New Westminster

Between:

Orville John Gustavson

Petitioner

And:

Her Majesty the Queen

Respondent

Before: The Honourable Mr. Justice Davies

Oral Reasons for Judgment

March 31, 2005

Appearing on his own behalf:

O.J. Gustavson

Counsel for the Respondent:

E.L. Burnet

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: I have before me a number of applications for habeas corpus that were remitted for reconsideration pursuant to the decision of our Court of Appeal in *R. v. Gustavson*, 2005 BCCA 32 in which the Court of Appeal determined that the procedure which was previously in place in this court concerning applications by in person applicants for habeas corpus breached the rules of natural justice and was therefore constitutionally defective.
- [2] As a consequence of the Court of Appeal's decision, this court has now instituted a new procedure by which both the applicant and Crown will appear before the court to determine whether habeas corpus may be granted and it is pursuant to that new procedure that Mr. Gustavson is now before the court for the rehearing of his habeas corpus applications.
- [3] Prior to Mr. Gustavson appearing before me today, he appeared before Madam Justice Gill on these applications by videoconference. At that time, Mr. Gustavson applied for the appointment of counsel and that application was denied by Madam Justice Gill.
- [4] There was, however, difficulty in the conduct of the videoconference application because Mr. Gustavson could not easily communicate with the court regarding documentary evidence and written submissions. Accordingly, the matter was adjourned to this hearing before me with both Crown counsel and Mr. Gustavson in court. But only after Mr. Gustavson was given the opportunity to provide to the court all of the information upon which he wished to rely in support of his applications.

- [5] Prior to, as well as during the hearing of these applications, Mr. Gustavson provided three folders of documents, which I have marked as Exhibits A, B and C, which he has relied upon to support the various grounds upon which he says that habeas corpus should be granted.
- [6] Exhibit A deals with British Columbia Supreme Court, Vancouver file number 22577, (which was dealt with in the Court of Appeal under designation numbers 031191 and 031174); Exhibit B deals with applications in British Columbia Supreme Court, New Westminster file number X064166, (which was the subject of Court of Appeal designations CA030521 and 030538); and, Exhibit C deals with British Columbia Supreme Court, New Westminster file number X064859, (which was the subject of Court of Appeal designation numbers CA030850 and CA031977).
- [7] In addition to those three folders of documents, I received from Mr. Gustavson and marked into evidence (as Exhibit D) a series of written communications including affidavits which cover some of the same material dealt with in Exhibits A, B and C, but which also deals in writing with three further alleged grounds of entitlement to habeas corpus that were not specifically addressed by Mr. Gustavson in his oral submissions.
- [8] Having reviewed all of the material and having heard the submissions of Mr. Gustavson, I have ascertained that there are in total six bases upon which he says that this court should exercise its habeas corpus jurisdiction to cause him to be released from incarceration.
- [9] Before proceeding to consideration of those specific bases upon which he seeks habeas corpus, I will set forth a brief history of Mr. Gustavson's incarceration. I will do so in general terms because the record itself is clear and has been covered by many prior judgments of this court and of the Court of Appeal.
- [10] Mr. Gustavson was initially sentenced in 1981 to a period of three years of incarceration. He was subsequently sentenced to a further consecutive seven-and-one-half years as a consequence of further offences that he committed and later by Mr. Justice McKay to a further consecutive period of incarceration of 15 years for still other offences committed. Thus, in total Mr. Gustavson received approximately 27 years in fixed term sentences for his various offences.
- [11] Subsequent to the imposition of the 15 year sentence by Mr. Justice McKay, the Attorney General for British Columbia brought dangerous offender proceedings against Mr. Gustavson in which Mr. Justice MacKenzie determined that Mr. Gustavson was a dangerous offender, and under the legislation in effect at that time ordered that Mr. Gustavson be incarcerated for an indeterminate period of time.
- [12] Mr. Gustavson has made numerous habeas corpus applications all of which have been denied. Many of those applications were also unsuccessfully appealed. Mr. Gustavson has also appeared before the parole board on a number of occasions but has always been denied parole. He is now 54 years old and has been incarcerated since he was 29.

- [13] The first issue that Mr. Gustavson raises as a basis for entitling him to relief by way of habeas corpus, is an attack upon the calculation of the sentences under which he has been held on a fixed term basis since the imposition of sentence by Mr. Justice McKay. Mr. Gustavson says that those sentences were improperly calculated and excessive so that the habeas corpus should lie.
- [14] The complete answer to that application is found in the decision of the Court of Appeal in *Gustavson v. Mission Institution*, 2002 BCCA 380 in which the court stated at ¶ 10 to 13:
- [10] In various documents filed on this appeal, the principal issues raised by Mr. Gustavson are the legality and excessiveness of the sentences and the calculation of earned remission and statutory release.
- [11] The issues raised by Mr. Gustavson concerning the legality and excessiveness of his sentences are, once again, attacks on the sentences that can only be challenged on appeal. This Court has decided that Mr. Gustavson's appeals from the sentences were abandoned on his instructions and will not be reinstated. It has also decided that Mr. Gustavson's applications for habeas corpus are collateral attacks on the sentences, which this Court has no jurisdiction to entertain. These matters cannot be reconsidered.
- [12] The issues of sentence calculation have no relevance to Mr. Gustavson's indeterminate sentence, which effectively overtook the fixed sentences once it was pronounced. Under the indeterminate sentence, Mr. Gustavson has the right to regular reviews by the National Parole Board. In its decision of December 2, 1999, the Board denied parole, having concluded that the risk that Mr. Gustavson would reoffend remained "undue" and he could not be managed in the community. We were advised by Crown counsel that his next parole review was scheduled for November 16, 2001. There is no evidence about its outcome.
- [13] Given the history of Mr. Gustavson's applications in this Court and his failure to disclose the indeterminate sentence on the habeas corpus application that is the subject of this appeal, we regard this appeal as frivolous, vexatious, an abuse of the Court and manifestly without merit.
- [15] Thus, the first ground upon which Mr. Gustavson seeks habeas corpus must be dismissed for the same reasons as those enunciated by the Court of Appeal. Issues raised concerning the legality of his sentences and excessiveness of the sentences are collateral attacks upon sentencing which cannot be heard in habeas corpus proceedings. Further, this issue is res judicata. The Court of Appeal has determined the issue against Mr. Gustavson and it cannot be re-argued.
- [16] The second basis upon which Mr. Gustavson seeks to obtain an order of habeas corpus is the allegation that the indeterminate sentence pronounced by Mr. Justice MacKenzie under the dangerous offender legislation was improperly obtained.

- [17] As I understand these submissions, they are basically twofold: Firstly, Mr. Gustavson, complains that he did not receive sufficient notice under the Criminal Code, R.S.C. 1985, c. C-46 of the intention to proceed with dangerous offender proceedings so that he had no opportunity to properly respond; and, secondly, he submits that the mandatory consent of the then Attorney General for the Province of British Columbia, Mr. Alan Williams, to have dangerous offender proceedings instituted was not, in fact, obtained, and that Crown counsel forged the signature of the Attorney General when the Crown realized there was a defect in the procedures once the matter went to appeal many years later.
- [18] I am satisfied that Mr. Gustavson's application for habeas corpus based upon alleged illegalities relating to the dangerous offender designation must also be dismissed. These allegations again constitute a collateral attack upon a valid order of this court that has been in place since 1983.
- [19] The third issue which Mr. Gustavson raises as a basis for granting habeas corpus concerns his complaints with respect to his never having been granted parole.
- [20] The decisions of our Court of Appeal in *May v. Ferndale*, 2003 BCCA 536 and in *Hickey v. Kent Institution*, 2003 BCCA 23 make it abundantly clear that this court should decline to hear an application for habeas corpus if no reasonable explanation for the failure to pursue judicial review in the Federal Court of matters relating to parole is offered by the petitioner.
- [21] Mr. Gustavson offered no explanation or evidence as to why these issues concerning parole were not dealt with by way of application in the Federal Court. Also, Mr. Gustavson has another parole hearing scheduled for June of 2005 and that that is where parole issues should be addressed. Accordingly, I decline to exercise this court's habeas corpus jurisdiction in respect of those matters.
- [22] As I have noted, the matters which were addressed by Mr. Gustavson in writing as identified by Exhibit D but not orally in his submissions raise three specific additional issues with which I will now deal.
- [23] Firstly, Mr. Gustavson raises the issue of the cost of his incarceration as something which should have resulted in the granting of parole in order to save taxpayers' monies. That is, in my view, a frivolous application. Mr. Gustavson was incarcerated as a dangerous offender and Corrections Canada has acted in accordance with its mandate. I see no substance whatsoever in the arguments raised by him with respect to the cost of his incarceration.
- [24] The next two issues addressed in writing but not orally relate to the allegations that Mr. Gustavson's incarceration has constituted cruel and unusual punishment in contravention of s. 12 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].

- [25] The first of those allegations relates to what Mr. Gustavson says has been intolerable noise in prison settings in which he has been kept in the past. In my view, that is a matter which is also governed by the decisions in Hickey, supra, and May, supra. Mr. Gustavson ought to have availed himself of grievance procedures and internal appeal procedures with respect to those situations. I decline to hear his habeas corpus application based upon those allegations given his failure to pursue internal and other remedies available to him.
- [26] Mr. Gustavson's second s. 12 Charter submission is an allegation that a sentence of indefinite incarceration is itself unconstitutional as cruel and unusual punishment. The complete answer to that argument is found in the decision in Steele v. Mountain Institution, [1990] 2 S.C.R. 1385, in which the Supreme Court of Canada upheld the constitutional validity of the dangerous offender legislation in relation to s. 12 of the Charter.
- [27] In summary, all of the applications for habeas corpus brought by Mr. Gustavson that were remitted for reconsideration to this court by the Court of Appeal are dismissed.
- [28] Mr. Gustavson, may I suggest that with respect to your continuing incarceration, you should work within the prison system and with the parole board in seeking release rather than attempting to re-argue issues by way of habeas corpus that have already been decided against you.

"B.M. Davies, J."

The Honourable Mr. Justice B.M. Davies

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