

CANADA / JUDGMENT

Gustavson v. Warden, Mission Institution

2002 BCCA 380

COURT

British Columbia Court of Appeal

DECIDED

18 June 2002

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2002 BCCA 380 Citation: Gustavson v. Mission Institution Date: 20020618 2002 BCCA 380 Docket: CA029266 COURT OF APPEAL FOR BRITISH COLUMBIA BETWEEN: ORVILLE JOHN GUSTAVSON PETITIONER AND: THE WARDEN, MISSION INSTITUTION, AND THE DEPUTY COMMISSIONER, PACIFIC REGION, AND THE CORRECTIONAL SERVICE OF CANADA RESPONDENTS Before: The Honourable Madam Justice Prowse The Honourable Madam Justice Levine The Honourable Mr. Justice Hollinrake O.J. Gustavson Appearing In-Person W. Bansley Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia June 11, 2002 Place and Date of Judgment: Vancouver, British Columbia June 18, 2002 Written Reasons of the Court Reasons for Judgment of the Court:

- [1] The appellant, John Orville Gustavson, appealed from the dismissal by Singh J. on October 30, 2001 of Mr. Gustavson's application for habeas corpus. The respondent, the Attorney General of Canada, applied for dismissal of Mr. Gustavson's appeal on the grounds that it is frivolous, vexatious, an abuse of process of the court and manifestly devoid of merit. On June 11, 2002, we allowed the Crown's application and advised the parties that we would file written reasons. These are those reasons.
- [2] Mr. Gustavson is no stranger to the Court of Appeal. This Court has twice previously dismissed his appeals from the dismissal of his applications for habeas corpus: see *R. v. Gustavson*, [1999] B.C.J. No. 2211 and [2000] B.C.J. No. 2455.
- [3] The background of these matters may be briefly summarized:
- [4] In 1981 and 1982, Mr. Gustavson received consecutive sentences totalling more than 25 years in prison after convictions for rape, assault and numerous property offences. In 1983, after dangerous offender proceedings following convictions for indecent assault, attempted rape and rape, Mr. Gustavson was sentenced to detention in a penitentiary for an indeterminate term. Mr. Gustavson has been in federal penitentiaries ever since. His parole reviews have not resulted in any form of release.

- [5] Mr. Gustavson appealed his sentences, but the appeals were abandoned in 1983. In the mid-1990's, Mr. Gustavson claimed that he had not instructed his counsel to abandon his appeals. He filed various applications in this Court and in 1997, applied for habeas corpus in the B.C. Supreme Court. His application for habeas corpus was dismissed by Dohm A.C.J. on the grounds that the Court lacked jurisdiction because Mr. Gustavson was then in prison in Manitoba.
- [6] Mr. Gustavson appealed the dismissal of the habeas corpus application after the time provided for filing. He applied for an extension of time. That application was refused in the first case cited above. In reasons concurred in by McEachern C.J.B.C. and Finch J.A. (as they then were), Mackenzie J.A. said (at paras. 6, 8 and 9): The heart of the matter is an application to reinstate the original appeals on the grounds that they were abandoned without instructions. . . . While there is no doubt that this Court has the jurisdiction to reinstate appeals dismissed other than on the merits in appropriate circumstances, in my opinion, the evidence is overwhelming that the dismissal of the applicant's appeals as abandoned was done on his written instructions. Accordingly, there are no grounds to reinstate these appeals and I would dismiss the applications in their entirety. This Court has no jurisdiction to grant relief pursuant to a writ of habeas corpus in the circumstances of this case which is essentially a collateral attack on convictions and sentence imposed by a Superior Court. See. *R. v. Sarson* [1996] 2 S.C.R. 223. I would refuse leave to extend the time to appeal the dismissal of the habeas corpus petition.
- [7] Mr. Gustavson brought another application for habeas corpus, which was dismissed by Dohm A.C.J. in July 2000 on the ground that it was in substance the same as the previous application which had been dealt with by the Court of Appeal. Mr. Gustavson's appeal was dismissed in the second case cited above, on the grounds that it was bound to fail. Lambert J.A., in reasons concurred in by Finch and Hall J.J.A., found that the issues had been decided by the Court in its 1999 decision; the appeal was a collateral attack being made by habeas corpus on convictions and sentences imposed by a superior court; and the appeal was without merit. Lambert J.A. concluded (at para. 15): On the basis of the matters I have discussed, I conclude that this appeal has no prospect of success and is bound to fail. Having regard to the background that I have discussed, I regard the appeal as frivolous and vexatious and an abuse of the process of the Court.
- [8] The appeal was struck out and dismissed.
- [9] The present appeal is brought from Mr. Gustavson's third habeas corpus application, dismissed on October 30, 2001. The grounds for his application were, essentially, that he was being detained illegally because of an error in the calculation of his sentences. In the material he filed on the application, Mr. Gustavson referred to and attached the Warrants of Committal for the fixed sentences imposed in 1981 and 1982, but said nothing in his affidavits about and did not attach the Warrant of Committal for the indeterminate sentence imposed in 1983.

- [10] In the 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.
- [14] We order that Mr. Gustavson's appeal be struck out and dismissed. "The Honourable Madam Justice Prowse" "The Honourable Madam Justice Levine" "The Honourable Mr. Justice Hollinrake"

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