
CANADA / JUDGMENT

R. v. Kassa

2014 BCCA 457

COURT

British Columbia Court of Appeal

DECIDED

18 November 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCCA R. v. Kassa

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kassa,

2014 BCCA 457

Date: 20141118

Docket: CA042043

Between:

Regina

Respondent

And

Yonatan Abraham Kassa

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 517(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of the evidence taken, the information given, or the representations made and the reasons, if any, given or to be given by the justice presiding over the application for judicial interim release (bail).

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Madam Justice A. MacKenzie

On appeal from: Supreme Court of British Columbia dated

March 4, 2014 (R. v. Kassa, 2014 BCSC 575,

New Westminster Registry No. X075633-4)

Oral Reasons for Judgment

Counsel for the Appellant:

G.J. Barriere

Counsel for the Respondent:

E. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

November 17, 2014

Place and Date of Judgment:

Vancouver, British Columbia

November 18, 2014

Summary:

The appellant breached a CSO when he committed the predicate offences. Pre-Summers, he was given 1:1 credit in his sentence for the time he chose to remain in custody after being arrested on these offences, less the time served in custody on the breached CSO. He now sought enhanced credit.

Appeal allowed: The appellant had suffered the consequence of his breaching the CSO: he had to serve the remainder of the CSO in custody, and the judge considered the breach as an aggravating factor in sentencing him on the new offences. His choice not to seek bail on arrest was not shown to be a 'manipulation' of the system. There was no other reason to deny him enhanced credit on the new offences under s. 719(3.1).

[1] NEWBURY J.A.: This is yet another sentence appeal based on rather technical issues arising from the Supreme Court of Canada's decision in R. v. Summers, 2014 SCC 26.

[2] In this case the predicate offences - breaking and entering a dwelling with intent to commit an indictable offence; using an imitation firearm while committing an indictable offence; and theft of property over \$5,000 - were committed on August 22, 2011. The appellant was immediately arrested and at his appearance before a Provincial Court judge on October 4th, his counsel said he had instructions to "consent to a detention order so he can get this on quicker".

- [3] Counsel also advised the Court that Mr. Kassa was "currently serving a sentence on a conditional sentence order". One of the terms of the conditional sentence order had been that the appellant not be in possession of a weapon or an imitation weapon, but that fact was not noted by counsel or by the Court. We are told that formal steps were taken to have the CSO terminated under s. 742.6(9) of the Code.
- [4] The appellant remained in custody from August 2011 through his guilty plea until sentencing in March 2014 - about 30 months and 10 days after his arrest.
- [5] In the course of argument on sentencing, counsel mentioned the CSO. In fact, defence counsel acknowledged that the fact Mr. Kassa had been serving a CSO at the time of the offences would be an "aggravating factor" in the judge's sentencing decision.
- [6] In his reasons for sentencing, Mr. Justice Crawford mentioned the fact Mr. Kassa had been serving a CSO. At paras. 16 and 17 of his reasons he stated:

Counsel touched on the record Mr. Kassa has compiled in the criminal law system beginning in March of 2006 with an offence of trafficking in a controlled substance for which he got a six month conditional sentence. That was disposed of in January 2007. Before then he breached an undertaking and that was disposed of in January of 2007 as well. He has a failing to appear in 2008, possession for the purpose of trafficking with four months jail; a break and entry in January of 2010, a trespassing at night in July of 2010, and then this period of time in the middle of 2011. But the January 2010 break and enter finds Mr. Kassa before a judge who gives him a conditional sentence of one year. In other words, he can spend his time in the community on terms. Then there is a driving while prohibited in August of 2011.

The break and entry that concerns me today is on the 22nd of August, 2011. The July 2010 trespassing at night was dealt with in September of 2011 with a day in jail. These all result in Mr. Kassa having spent the better part of the last two years in remand.

[Emphasis added.]

He did not, however, refer to the fact that the offences had occurred while the appellant was on a CSO, as one of the "aggravating" factors informing the sentence. Then, at the end of his reasons, the judge stated:

- [28] I note too there have been some 23 and a half months in remand which comes into the picture and will come in as a credit.
- [29] Mr. Kassa, with respect to Count 1 regarding the break and entry, I sentence you to four years. On Count 4 regarding the imitation gun, that is a statutory sentence of one year. On Count 9 as to the theft, there will be one year concurrent with the sentences on Count 1 and Count 4. The net effect of that if I have it correctly is that 60 months less 23 and a half months that will leave 36 and a half months that I sentence you to incarceration, less of course what happens with good behaviour and parole.

[Emphasis added.]

- [7] There is no argument that the 23½ months' credit represents approximately 30 months and 10 days less the 6½ months or so that remained of the CSO and was served in custody. In other words, the six months attributable to the "2010 break and enter" was not credited by the sentencing judge. Credit was given on a 1:1 basis for the remaining 23½ months.
- [8] Counsel do disagree, however, on whether the judge took into account the breach of CSO as an aggravating factor in his sentencing decision. The Crown takes the position that since the judge was required to consider all aggravating and mitigating factors, he was required also to articulate them. Since the judge did not do so here, the Crown submits that we must assume the breach of CSO was not considered, with the result that the appellant's conduct militates against the granting of enhanced credit.
- [9] I disagree with the Crown's argument. It would be requiring too much of busy sentencing judges to enunciate every reason or factor behind their sentencing decisions. The Court is presumed to know the law, and here, where even the defence conceded an aggravating factor, we may safely assume the judge took the breach into account. I see nothing in *R. v. C.A.M.*, [1996] 1 SCR 500 that is to the contrary.
- [10] I turn then to s. 719(3) and 719(3.1) of the Code, which I reproduce for convenience below:
- (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

I also reproduce para. 71 of *Summers*, where the Court said this:

The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely. Of course, a lower rate may be appropriate when detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole. When the statutory exceptions within s. 719(3.1) are engaged, credit may only be given at a rate of 1 to 1. Moreover, s. 719 is engaged only where the pre-sentence detention is a result of the offence for which the offender is being sentenced.

[Emphasis added.]

- [11] It is not contended that Mr. Kassa was detained under s. 524(4) or (8): they refer only to contraventions or anticipated contraventions of summons, appearance notices, promises to appear, undertakings or recognizances and not to terms of CSOs. As we have seen, the appellant consented to remain in custody, purportedly to get an early trial date, and the detention order was made simply on that basis and without any other reason being given by the judge.
- [12] The Crown argues that the only reason Mr. Kassa was in custody was because he committed the predicate offences - thus his "bad conduct" was "related to" his detention. The Crown adds that an accused should not be able to "avoid the implications of his bad conduct simply by consenting to his custodial status", citing *R. v. Chambers* 2014 YKCA 13. In that case, Chief Justice Bauman stated for the Court:

Adopting a common-sense approach to s. 524(8) and what happened in this case, it is very difficult to reach any conclusion but that Mr. Chambers was "detained in custody" during this period under s. 524(8). If he was not, by what authority was he detained? With respect, to suggest that by the simple expedient of consenting to remand, an accused can take himself or herself beyond the reach of s. 719(3.1) invites the kind of manipulation by accused persons that the TISA amendments are generally directed against.

To proceed from "common sense" to a more legalistic approach, it is noted that the impugned provision applies where "the person was detained in custody under ss. 524...(8)". There is no requirement for an express order of detention after a show cause hearing initiated by an accused person.

[Emphasis added.]

- [13] However, neither *Chambers* nor *R v Ahmadzai*, 2013 BCCA 80, a pre-Summers case, is of direct assistance here, in my respectful view. As we have seen, Mr. Kassa suffered the consequence of breaching his CSO: he served the balance of that sentence in custody and the breach was considered in his sentencing. Having had these consequences, he should in my view not be penalized again by losing the right to qualify for what is now the "general" or "default" position of entitlement to enhanced credit under s. 719(3.1).
- [14] As for the notion that an accused person should not be able to "manipulate" the process by not seeking bail and serving a long period in custody prior to trial, it may be that Mr. Kassa expected that he would get a quicker trial, as his lawyer told the Court, or that he expected that he would be denied bail if he sought it - an expectation that was realistic in the circumstances. I am not persuaded that he has been shown to have abused or 'manipulated' the system in declining to apply for bail.

- [15] In terms of the Court's discretion, I agree that the breach of a court order while on bail is a serious matter that militates against the granting of enhanced credit. However, as noted, the court order in this case was a CSO for which Mr. Kassa suffered the independent and serious consequences of (a further) six months in jail when the CSO was terminated. In the circumstances, I conclude that the appeal must be allowed.
- [16] I would extend the time for applying to appeal, grant leave, allow the appeal and substitute a sentence of 24 months and 22 days for the sentence imposed by the sentencing judge.
- [17] DONALD J.A.: I agree.
- [18] A. MACKENZIE J.A.: I agree.
- [19] DONALD J.A.: Time is extended. Leave is granted and the appeal is allowed by substituting a sentence of 24 months and 22 days for the sentence imposed by the sentencing judge.

"The Honourable Madam Justice Newbury"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/14/04/2014BCCA0457.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-kassa-2014>

Prepared on 28 October 2026 · Esheria