WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. R. S., 2015 ONCA 291
DATE: 20150430
DOCKET: C57304

Feldman, Epstein, and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

R.S.

Respondent

Gregory J. Tweney and Michael Perlin, for the appellant

Michael Dineen and Victoria Rivers, for the respondent

Roy Lee, for the intervener the Attorney General of Canada

Heard: October 7, 2014

On appeal from the sentence imposed on June 12, 2013, by Justice Alison Harvison Young of the Superior Court of Justice, sitting without a jury, with reasons reported at 2013 ONSC 4088.

Benotto J.A.:

[1] This is a Crown appeal against sentence. The respondent was convicted of two counts of sexual assault and two counts of sexual interference following a trial by judge alone. He was sentenced to 7 years in custody with 2:1 credit for time already served.

[2] The respondent committed the offences before the *Truth in Sentencing Act*, S.C. 2009, c. 29 ("Act"), came into force. He was charged after it came into force. The Act imposed an upper limit on the credit an offender can receive from a sentencing judge for time spent in pre-sentence custody. The sentencing judge determined that the Act is of no force and effect to the extent that it violates the respondent's s. 11(i) *Charter* right not to receive a greater punishment than that which was in place at the time the offence was committed. The Crown appeals this determination by the sentencing judge.

BACKGROUND FACTS

[3] The respondent falls into a group of offenders who committed an offence before, but were charged and sentenced after the Act came into force.

[4] Here, the offences, as particularized on the indictment, were committed from January 2008 until September 2009. The Act came into force on February 22, 2010. The respondent was charged and brought into custody on December 15, 2010. The convictions were entered on December 19, 2012, and the sentencing reasons were delivered on June 12, 2013.

The Earlier Pre-Sentence Custody Regime

[5] When the appellant committed the offences in 2008 and 2009, s. 719(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 provided:

> (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.

[6] Under this provision, sentencing judges had broad discretion to award credit for pre-sentence custody. There were "no restrictions on the reasons for giving credit, nor the rate at which credit was granted": *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 20. The Supreme Court approved credit of two days for every day in custody, noting that there was no "rigid formula": *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 45. Different ratios could be applied depending on the conditions of the offender's pre-sentencing detention: *Wust*, at para. 45. Sometimes credit at a ratio of 3:1 or even 4:1 would be awarded if the offender's pre-sentence detention was very harsh: *Summers*, at paras. 3, 31.

[7] Credit for time served – that is, credit at a rate of at least 1:1 – was usually granted because "[i]ncarceration at any stage of the criminal process is a denial of an accused's liberty": *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 721. As noted by Karakatsanis J., writing for the court in *Summers*, at para. 21:

> [I]t would be unfair if a day spent in custody, prior to sentencing, were not counted towards an offender's ultimate sentence. Otherwise, an offender who spent time in pre-sentence custody would serve longer in jail than an identical offender who committed an identical offence, but was granted bail.

[8] Credit at higher ratios was justified by the rationale discussed in *Summers*, to ensure that the offender does not spend more time behind bars than if he had been released on bail. As explained by Karakatsanis J. at paras. 25-27:

> In practice, the "vast majority of those serving reformatory sentences are released on 'remission' ... at approximately the two-thirds point in their sentence"....
>
> Because a sentence begins when it is imposed (s. 719(1)) and the statutory rules for parole eligibility and early release do not take into account time spent in custody before sentencing, pre-sentence detention almost always needs to be credited at a rate higher than 1:1 in order to ensure that it does not prejudice the offender.
>
> A ratio of 1.5:1 ensures that an offender who is released after serving two thirds of his sentence serves the same amount of time in jail, whether or not he is subject to pre-sentence detention.

The Act and the New Regime

[9] The Act amended s. 719 of the *Criminal Code* to impose an upper limit, a so-called "hard cap", on the ratio at which credit for pre-sentence custody could be granted. The maximum ratio is now 1.5:1. The relevant subsections of s. 719 now read:

> (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 <u>but the court shall limit any credit for that time to a maximum of one day for each day spent in custody</u>.
>
> (3.1) <u>Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody</u>

> 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). [Emphasis added.]

[10] Section 5 of the Act, which is the focus of this appeal, is a transitional provision that reads:

> Subsections 719(3) to (3.4) of the [*Criminal Code*] ... apply only to persons charged after the day on which those subsections come into force. [Emphasis added.]

[11] In *R. v. Clarke*, 2013 ONCA 7, 115 O.R. (3d) 75, aff'd 2014 SCC 28, [2014] 1 S.C.R. 612, it was held that s. 5 of the Act works to apply the new credit regime retrospectively to offences *committed prior* to February 22, 2010, so long as the offender was *charged after* that date.

Effect on the Respondent

[12] The effect of a retrospective application of the new regime on the respondent would be significant. He spent about 30 months in custody before sentencing. Under the previous regime, he would have been given credit for 60 months if, as the sentencing judge found, the typical 2:1 basis was appropriate. Pursuant to the new provisions, he would receive a maximum credit of approximately 45 months on a 1.5:1 basis.

REASONS FOR SENTENCE

[13] The sentencing judge held that the amendments to s. 719 were of no force and effect against the respondent, as their retrospective application violated

his s. 11(i) *Charter* rights. This section provides that a when punishment for an offence is varied between the time of commission and the time of sentencing, the offender has the benefit of the lesser punishment. The sentencing judge noted that this issue arose as a matter of first instance because, prior to the decision of this court in *Clarke*, "the practice on the part of both Crown and defence counsel in this court had generally been to ... invite sentencing courts to apply former provisions whenever the offences had been committed before the [Act] came into force".

[14] The sentencing judge found that pre-sentence custody is recognized in the case law as being "punishment" notwithstanding that those who are subject to it are, until conviction, innocent. The sentencing judge said that incarceration is, "by its nature ... quintessentially punitive". (See also *R. v. Rodgers*, 2006 SCC 15.)

[15] She also found that s. 5 of the Act "varied" this punishment because it removed any chance of credit at a rate of 2:1 which had been the usual practice.

[16] The new provisions violated the respondent's s. 11(i) right to the benefit of the lesser punishment available between the time of commission of the offences and the time of sentencing. As a result, the sentencing judge considered the appropriate amount of credit for pre-sentence custody under the previous provisions. She was satisfied that this was not a case in which a court would

have departed from the usual practice of granting 2:1 credit. The respondent was credited with 60 months, leaving two years of the sentence to be served.

GROUNDS OF APPEAL

[17] The appellant submits that the sentencing judge erred in finding that s. 5 of the Act offends s. 11(i) of the *Charter* as that provision does not constitute "punishment" that has been "varied".

[18] The appellant also submits that if s. 11(i) has been violated, the violation is justified under s. 1 of the *Charter*. This argument was not made before the sentencing judge.

[19] The intervener, the Attorney General of Canada, submits that international jurisprudence on provisions corresponding to s. 11(i) in the human rights protection instruments of those jurisdictions supports the appellant's position.

ANALYSIS

[20] Section 11(i) of the *Charter* provides:

> Any person charged with an offence has the right
>
> …
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[21] Section 11(i) is concerned with two moments in time: the time of commission of the offence and the time of sentencing. If the punishment for the

offence has changed between those two moments, the accused is entitled to the benefit of the lesser punishment.

Did the sentencing judge err in finding that pre-sentence custody is "punishment" under s. 11(i)?

[22] The appellant's first submission is that limiting the respondent's credit for pre-sentence custody to 1.5:1 did not engage s. 11(i) of the *Charter* because the imposition of the hard cap was not "punishment" within the meaning of s. 11(i). In *Wust*, at para. 41, Arbour J. wrote for the court:

> To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody so carefully delineated by Laskin J.A., in *Rezaie*, *supra*, and by Gary Trotter in his text, *The Law of Bail in Canada* (2nd ed. 1999), at p. 37:
>
> > Remand prisoners, as they are sometimes called, often spend their time awaiting trial in detention centres or local jails that are ill-suited to lengthy stays. As the Ouimet Report stressed, such institutions may restrict liberty more than many institutions which house the convicted. Due to overcrowding, inmate turnover and the problems of effectively implementing programs and recreation activities, serving time in such institutions can be quite onerous.
>
> Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's

> conviction, by the operation of s. 719(3). [Emphasis in original.]

[23] *Wust* concerned the definition of "punishment" in a mandatory minimum provision of the *Criminal Code*, namely s. 344(a). By analogy, the rationale applies here.

[24] The appellant submits that *R. v. Mathieu*, 2008 SCC 21, [2008] 1 S.C.R. rejected this finding from *Wust*. However, in *Mathieu* the Supreme Court held that pre-sentence custody is not part of the sentence, but is only one factor taken into account by the judge in determining the sentence. As noted by the sentencing judge, this does not address whether pre-sentence custody is deemed part of the punishment under s. 11(i). In *Wust,* at para. *36,* Arbour J. pointed to the "helpful" distinction made by this court in *R. v. McDonald* (1998), 40 O.R. (3d) 641 (C.A.), that "'sentencing' is a judicial determination of a legal sanction, in contrast to 'punishment' which is the actual infliction of the legal sanction".

[25] The appellant also submits that there is a new definition of punishment as a result of *Whaling v. Canada (Attorney General),* 2014 SCC 20, [2014] 1. S.C.R. 392. The sentencing judge did not have the benefit of *Whaling.*

[26] In *Whaling*, the Supreme Court considered the meaning of the term "punished" in s. 11(h) of the Charter, which includes the right not to be punished twice for the same offence. That case dealt with Parliament's repeal of

accelerated parole review for first-time non-violent offenders. The repeal applied retrospectively to otherwise-eligible offenders who had been sentenced prior to the repeal coming into force. The Supreme Court found that this retrospective application violated the respondents' s. 11(h) right not to be "punished ... again" and was not justified under s. 1 of the Charter.

[27] Wagner J., writing for the court, stated at para. 60:

> I will not articulate a formula that would apply to every case, because such a formula is not needed to resolve this appeal and the effect of every retrospective change will be context-specific. That said, the dominant consideration in each case will in my view be the extent to which an offender's settled expectation of liberty has been thwarted by retrospective legislative action. It is the retrospective frustration of an expectation of liberty that constitutes punishment. [Emphasis added.]

[28] The appellant argues that decreasing the credit for pre-sentence custody does not infringe s. 11(i), because at the time of committing the offence, the offender can have no "settled expectation" of any particular credit for time served.

[29] In *Whaling*, the Supreme Court did not limit punishment under s. 11(h) to state actions that thwart a "settled expectation of liberty". In Wagner J.'s words, set out above, this was "the dominant consideration". But it is also clear in *Whaling* that the court thought that there were other considerations. At para. 74, Wagner J. wrote:

> [E]very retrospective change must be analyzed in detail before conclusions can be drawn as to its possible

> punitive effect. The greater the impact on the offender's settled expectation of liberty, or the greater the likelihood of additional incarceration, the more likely it is that a given retrospective change will violate s. 11(h). [Emphasis added.]

[30] On the plain words of *Whaling*, "the greater the likelihood of additional incarceration," the more likely a retrospective change will constitute punishment. The respondent would be subject to about 15 months of additional incarceration if the new regime applied to him.

[31] In *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 311 C.C.C. (3d) 159, leave to appeal refused, [2014] S.C.C.A. No. 298, the British Columbia Court of Appeal had occasion to address s. 11(i) post-*Whaling*. The Court considered whether the retrospective repeal of accelerated parole review also violated s. 11(i). I agree with the following analysis of MacKenzie J.A. at para 23:

> I see the objectively ascertainable effect of "extended incarceration" as constituting the relevant punishment... On this analysis, where the effect of changes to the parole system appreciably increases the amount of time an offender would be incarcerated, in comparison to what he or she would have been expected to serve under the prior regime, it will constitute punishment. What matters is whether the changes "substantially increase the risk of additional incarceration", thereby frustrating an objective expectation of liberty, not whether the offender's subjective expectations have been dashed. [Emphasis in original.]

[32] Accordingly, the sentencing judge did not err in finding that pre-sentence custody is “punishment” under s. 11(i).

Did the sentencing judge err in finding that punishment had been “varied”?

[33] The appellant submits that the sentencing judge erred in finding that s. 5 of the Act “varied” the punishment for the offence between the time of commission and the time of sentencing. The appellant argues that to engage s. 11(i), the punishment “varied” must have been one set out by legislation, not by judges. The appellant relies on *R. v. R.D.* (1996), 48 C.R. (4th) 90 (Sask. C.A.), where the court stated, at p. 94:

> We are all of the opinion that the learned trial judge erred in his interpretation and application of s. 11(i) of the *Charter*.... Under this provision “punishment” must be construed to mean the punishment fixed by Parliament rather than any range of sentences that may emerge in court decisions within the controlling statutory provisions. This is not a case where Parliament has introduced significant legislative changes with respect to penalty...

[34] As the sentencing judge noted, Parliament has introduced a significant legislative change that affects the penalty to be imposed on the respondent. This statutory limitation on the discretion of a sentencing judge, applied retrospectively under s. 5 of the Act, engages s. 11(i) of the Charter.

[35] By denying him the benefit of the earlier pre-sentence custody credit regime, which was extant at the time he committed the offences, s. 5 of the Act violates the respondent's s. 11(i) rights.

[36] Therefore the sentencing judge did not err in finding that punishment had been "varied".

Is the s. 11(i) violation justified under s.1 of the Charter?

[37] For the first time on appeal, the appellant seeks to justify the s. 11(i) violation under s. 1 of the *Charter*. As a general rule, s. 1 should not be raised for the first time on appeal. The Supreme Court has consistently "cautioned against deciding constitutional cases without an adequate evidentiary record": *Christie v. British Columbia (Attorney General)*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 28. That said, the appellant has failed to establish that the violation is justified.

[38] The test under s. 1 is well-established. The impugned law must have a pressing and substantial objective and the means chosen must be rationally connected to the objective, minimally impair the *Charter* right, and be proportionate: *R. v. Oakes*, [1986] 1 S.C.R. 103.

Pressing and substantial objective

[39] In applying the *Oakes* test in this case, the focus is not on the government's broader objectives for restricting credit for pre-sentence custody.

Rather, only the specific objectives of the transitional provision in s. 5 of the Act should be considered: *Liang*, at para. 48. In other words, the question is not whether limiting credit for pre-sentence custody generally is justified; rather, the question is whether it is justified to limit credit for the group of offenders like the respondent, who are otherwise entitled under the *Charter* to lesser punishment.

[40] For the purposes of this appeal, I will assume, without deciding, that the appellant is correct in asserting that s. 5 of the Act has the following two pressing and substantial objectives:

> 1) enhancing parity by ensuring uniform assessment of time spent in remand based on the date individuals are charged with an offence; and
>
> 2) creating certainty as to the scope of the amendments by clearly defining the category of offenders to whom the new rules apply.

[41] These two objectives are furthered by uniformly applying the new credit rules to everyone charged after February 22, 2010.

[42] However, the appellant also submits that s. 5 of the Act has two further pressing and substantial objectives:

> 3) expediting the transition between the two credit regimes, and therefore furthering the objectives of the new regime; and
>
> 4) promoting the overall objectives of the Act, since a transition provision based on offence date (as opposed to the date of the charge) would undermine the Act's objectives by permitting an unknown number of cases to be dealt with under the old regime.

[43] But in any s. 11(i) case, the government could argue that the old punishment regime is inadequate, and the new punishment regime must be applied retroactively, otherwise the new regime's objectives will be impeded. The British Columbia Court of Appeal observed in *Liang*, at para. 59, that "the fact the offender will receive a lesser punishment, and perhaps one that does not meet the objectives of the present sentencing regime, is exactly what s. 11(i) contemplates." The court continued, at para. 60:

> The effect of applying s. 11(i) of the *Charter* in this case is that, as with any other change to sentencing that results in an increase in punishment, it will not apply to those who committed an offence before the change. The mere assertion that a previous regime has been suboptimal, and the new regime preferable, does not negate the application of the *Charter*. In other words, the Crown is correct in submitting that this decision will delay the full replacement of the old regime with the new. However, as the Court found in *Whaling*, that in itself is not sufficient to meet its obligation under the *Charter*.

Rational connection

[44] I accept the appellant's submission that s. 5 of the Act is rationally connected to its objectives. The transition rule ensures the uniform application of the new regime to offenders based on the date they enter remand. Furthermore, the transition rule increases certainty, as it clearly delineates to whom the new credit rules apply.

Minimal Impairment

[45] In *R. v. Safarzadeh-Markhali*, 2014 ONCA 627, 122 O.R. (3d) 97, leave to appeal granted, [2014] S.C.C.A. No. 489, this court struck down another aspect of the Act. At paras. 116-17, Strathy J.A. (as he then was) observed that, while "the standard for minimal impairment is deferential" and "the courts must accord a measure of deference to the legislature on 'complex social issues'", pre-sentence custody is not "a particularly complex social issue".

[46] With respect to minimal impairment, in *Whaling*, Wagner J. wrote, at para. 80:

> In my view, having the repeal apply only prospectively was an alternative means available to Parliament that would have enabled it to attain the objectives of reforming parole administration and maintaining confidence in the justice system without violating the s. 11(h) rights of offenders who had already been sentenced. Regarding the Crown's argument that retrospective application is necessary to maintain confidence in the justice system, I would point out that the enactment of *Charter*-infringing legislation does great damage to that confidence. The Crown has produced no evidence to show why the alternative of a prospective repeal, which would have been compatible with the respondents' constitutional rights, would have significantly undermined its objectives.

[47] This rationale, coupled with the fact that there is no evidence with respect to minimal impairment, answers the appellant's submission. The appellant has not established that the violation is justified under section 1.

Proportionality

[48] Given my conclusion on minimal impairment, there is no need to address the final proportionality branch of the *Oakes* analysis. Nevertheless, I make the following comments.

[49] The appellant submits that any violation of s. 11(i) is minor. The Act extinguishes no vested right to a sentence reduction, since under the old regime, there was no automatic right to any credit, or to credit at a particular ratio. In any event, there is an increasingly small group of offenders in the respondent's position: offenders who committed their offences before February 22, 2010, but were charged afterwards.

[50] In my view, however, the deleterious effects of the impugned provision outweigh its salutary effects. The deleterious effects are significant: offenders are punished more than they would otherwise be punished, in violation of their *Charter* rights. For example, applying the new credit rules to the respondent would result in approximately 15 months' additional incarceration. By contrast, the salutary effects are largely administrative in nature. Furthermore, while the government observes that an increasingly small group of offenders are in the respondent's position, that argument cuts both ways. If only a small group of offenders are in the respondent's position, there would appear to be little harm in allowing them the benefit of the old credit regime.

[51] In my view, the appellant's attempted s. 1 justification should fail.

International jurisprudence is of little value in resolving the appeal

[52] I accept the respondent's submission that the international jurisprudence on statutory provisions akin to s. 11(i), while of academic interest, is of little concrete value here. Not only were those courts interpreting different statutory provisions in different criminal justice systems, but Canada has its own jurisprudence on s. 11(i) and related *Charter* rights. I see no need to address the substance of the international jurisprudence here.

DISPOSITION

[53] For these reasons, I would dismiss the appeal.

Released: "K.F." April 30, 2015

"M.L. Benotto J.A."
"I agree K. Feldman J.A."
"I agree Gloria Epstein J.A."