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COURT OF APPEAL FOR ONTARIO

RE:	HER MAJESTY THE QUEEN (Respondent) – and – JOHN LERNO (Appellant)
BEFORE:	MOLDAVER, GILLESE and BLAIR JJ.A.
COUNSEL:	Sarah Egan For the appellant Lorna Bolton For the respondent
HEARD:	June 4, 2004
RELEASED ORALLY:	June 4, 2004

On appeal from sentence imposed by Justice Lenz of the Ontario Court of Justice dated April 9, 2003.

E N D O R S E M E N T

[1] The appellant received a total sentence of fifty-four months (in addition to ten months calculated on a two-for-one basis for time spent in pre-trial custody) for a series of offences including various driving offences, failing to appear, false pretences and most significantly, kidnapping, robbery and extortion in relation to an 84 year-old woman.

[2] The appellant challenges the total sentence. He submits that the trial judge erred in the manner in which he calculated the amount of time spent by the appellant in pre-trial custody for which he was entitled to credit. That ground has, at its root, the application of this court's decision in *R. v. Atkinson* (2003), 174 C.C.C. (3d) 144, which, on the facts of this case, resulted in the appellant serving approximately thirteen and a half months of a conditional sentence in custody following his arrest and detention for having allegedly breached the terms of his conditional sentence order. That arrest and detention came several days after his arrest and detention on the substantive charges that form the subject of this appeal. The oddity of this case is that during the thirteen and a half month time frame, no breach hearing was held. Indeed, no such hearing has ever been held.

[3] Based on *Atkinson*, the trial judge, with the approval of the defence counsel [not Ms. Egan], refused to consider the thirteen and a half month period as pre-trial custody that could be taken to account on the substantive charges. Rather, he treated it as time during which the appellant was serving out the remainder of his conditional sentence.

[4] On appeal, the appellant takes exception to that approach. He submits that the principles of *Atkinson* should not apply in the circumstances and that he should be credited on the substantive offences for an additional thirteen and a half months of pre-trial custody. Calculated on a two-for-one basis, that would amount to slightly more than two years' additional credit.

[5] For reasons that follow, we need not finally decide whether the principles in *Atkinson* should be ameliorated in the interests of fairness when through no fault of an accused, the breach hearing is not pursued with diligence and completed in a timely fashion. No such fairness issues arise here. The breach hearing was delayed at the instance of the appellant. Had it proceeded, we have no doubt that the breach would have been established. As well, given the horrendous nature of the crimes underlying the breach and the appellant's lengthy and serious criminal record, we are certain that the balance of the conditional sentence would have been converted into a custodial sentence.

[6] Viewed that way, the manner in which the conditional sentence was treated for purposes of calculating the amount of pre-trial custody available on the substantive offences occasioned virtually no prejudice to the appellant. At most, with statutory remission, he would have had an additional three or four months of pre-trial custody available to him. Doubled, that would amount to six or eight months. In the overall scheme of things, we do not believe that that additional amount of pre-trial custody would or should have had an impact on the sentence imposed by the trial judge. See *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.). Indeed, having regard to the gravity and seriousness of the appellant's crimes, particularly those involving the kidnapping, extortion and robbery of an 84 year-old woman, his substantial criminal record and his inability to come to grips with the problems underlying his criminality, we think the total sentence imposed by the trial judge was lenient.

[7] Although the appellant abandoned the other grounds of appeal, we think it appropriate to comment on one of them. In arriving at the sentence under review, the trial judge stated that the circumstances called "for a sentence which reflects retribution; the ability of the court to seek cold and calculated vengeance upon the accused for the benefit of society and the benefit of the victim".

[8] With respect, it would appear that the trial judge confused the notion of retribution - a term used by Lamer C.J. in *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 S.C.C. to

reflect that criminal punishment should be imposed to sanction the moral culpability of the offender - and vengeance. Vengence, of course, has no place in sentencing.

[9] Nonetheless, the trial judge's error occasioned no prejudice to the appellant. Specifically, it did not render the total sentence unfit. Rather, as already indicated, in our view, if anything, the total sentence was lenient.

[10] Accordingly, we would grant leave to appeal but dismiss the appeal from sentence.