Damon William Knott (appellant) v. Her Majesty The Queen (respondent)

D.A.P. (appellant) v. Her Majesty The Queen (respondent)
(33911; 2012 SCC 42; 2012 CSC 42)

Indexed As: R. v. Knott (D.W.) et al.

Supreme Court of Canada
McLachlin, C.J.C., Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis, JJ.
July 31, 2012.

Summary:

Section 731(1) of the Criminal Code precluded probation for any accused sentenced to more than two years' imprisonment. The "sentence merger" provisions of s. 139(1) of the Corrections and Conditional Release Act provided that where an accused subject to a sentence that had not expired received an additional sentence, the accused was deemed to have been sentenced to one sentence which commenced at the beginning of the first sentence and ended when the last sentence expired. Two accused were sentenced to imprisonment not exceeding two years, followed by three years' probation. Before those sentences expired, both accused were sentenced, for other offences, to consecutive sentences. The accused argued that the "sentence merger" provisions of s. 139(1) applied to result in a total merged sentence exceeding two years, rendering the previously legal probation orders illegal.

In both cases, the British Columbia Provincial Court held that the probation orders remained legal. Both accused appealed. The appeals were heard together.

The British Columbia Court of Appeal, in a judgment reported (2010), 291 B.C.A.C. 236; 492 W.A.C. 236, dismissed the appeal. The court held that "regardless of any length of sentence imposed subsequent to a lawful probation order, the probation order is not nullified nor does it otherwise become unlawful by application of s. 139(1) of the CCRA". The accused appealed.

The Supreme Court of Canada dismissed the appeals.

Editor's Note: Certain names in the following case have been initialized or the case otherwise edited to prevent the disclosure of identities where required by law, publication ban, Maritime Law Book's editorial policy or otherwise.

Criminal Law - Topic 5726

Punishments (sentence) - Probation or probation order - Circumstances when permissible - Section 731(1) of the Criminal Code precluded probation for any accused sentenced to more than two years' imprisonment - The "sentence merger" provisions of s. 139(1) of the Corrections and Conditional Release Act provided that where an accused subject to a sentence that had not expired received an additional sentence, he was deemed to have been sentenced to one sentence which commenced at the beginning of the first sentence and ended when the last sentence expired - Two accused were sentenced to imprisonment not exceeding two years, followed by three years' probation - Before those sentences

expired, both accused were sentenced, for other offences, to consecutive sentences - The accused argued that the "sentence merger" provisions of s. 139(1) applied to result in a total merged sentence exceeding two years, rendering the previously legal probation orders illegal - The Supreme Court of Canada affirmed that both probation orders were valid when made and that no prior or subsequent sentence imposed on either of them had, or could have had, the effect of invalidating any of their probation orders, either prospectively or retrospectively - Section 139 was enacted for administrative purposes respecting parole and remission, and was of no assistance in determining the legality of a probation order - The court stated that "the ordinary meaning of s. 731(1)(b) is perfectly clear: A probation order may not be made where the *sentencing court* imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by *the sentencing court on that occasion* - not at *other* sentences imposed by *other* courts on *other* occasions for *other* matters." - See paragraphs 1 to 33.

Criminal Law - Topic 5726

Punishments (sentence) - Probation or probation order - Circumstances when permissible - Section 731(1) of the Criminal Code precluded probation for any accused sentenced to more than two years' imprisonment - At issue was whether a "fresh" probation order should be made, or an existing probation order should be varied or terminated, where an accused was subsequently sentenced to another sentence which, combined with the original sentence of two years or less being served, would result in a sentence exceeding two years - The Supreme Court of Canada held that s. 731(1) did not, in principle, preclude the imposition of a fresh probation order - However, probation orders were "subject to review for their fitness. ... a probation order that is manifestly inappropriate in itself or that renders unfit the sentence of which it is a part will be set aside on appeal. In considering whether a fresh probation order is appropriate, the sentencing court must thus take into account the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing ... In short, unexpired prior sentences remain an important consideration though not necessarily decisive, in determining whether a probation order is appropriate. A probation order that was appropriate when made may well be rendered inappropriate by a lengthy intervening term of imprisonment" - The court referenced the procedures for varying or terminating existing, otherwise valid, probation orders where a subsequent sentence was imposed - See paragraphs 58 to 70.

Criminal Law - Topic 5729

Punishments (sentence) - Probation and probation orders - Validity of - [See both **Criminal Law - Topic 5726**].

Cases Noticed:

R. v. Mathieu (P.), [2008] 1 S.C.R. 723; 373 N.R. 370; 2008 SCC 21, refd to. [para. 6].

R. v. Middleton (T.), [2009] 1 S.C.R. 674; 388 N.R. 89; 251 O.A.C. 349; 2009 SCC 21, refd to. [para. 6].

R. v. Proulx (J.K.D.), [2000] 1 S.C.R. 61; 249 N.R. 201; 142 Man.R.(2d) 161; 212 W.A.C. 161; 2000 SCC 65, refd to. [para. 10].

R. v. Shoker (H.S.), [2006] 2 S.C.R. 399; 353 N.R. 160; 230 B.C.A.C. 1; 280 W.A.C. 1; 2006 SCC 44, refd to. [para. 10].
R. v. Pickell (D.K.), [2007] O.T.C. Uned. E76; 2007 CanLII 25672 (Sup. Ct.), refd to. [para. 25].
R. v. Amyotte (G.B.) (2005), 207 B.C.A.C. 12; 341 W.A.C. 12; 192 C.C.C.(3d) 412; 2005 BCCA 12, refd to. [para. 25].
R. v. Pawlak (A.E.) (2005), 217 B.C.A.C. 146; 358 W.A.C. 146; 2005 BCCA 500, refd to. [para. 25].
R. v. McKinnon (T.W.) (2008), 261 B.C.A.C. 314; 440 W.A.C. 314; 237 C.C.C.(3d) 345; 2008 BCCA 416, refd to. [para. 25].
R. v. Miller (1987), 22 O.A.C. 103; 36 C.C.C.(3d) 100 (C.A.), refd to. [para. 25].
R. v. Lucas (M.) (2009), 293 Nfld. & P.E.I.R. 90; 906 A.P.R. 90; 2009 NLCA 56, refd to. [para. 25].
R. v. Pauls (M.A.), [2008] B.C.A.C. Uned. 99; 2008 BCCA 322, refd to. [para. 26].
R. v. Kohl (K.), [2009] O.A.C. Uned. 163; 244 C.C.C.(3d) 124; 2009 ONCA 254, refd to. [para. 26].
R. v. Hendrix (G.M.) (1999), 176 Nfld. & P.E.I.R. 293; 540 A.P.R. 293; 137 C.C.C.(3d) 445 (Nfld. C.A.), refd to. [para. 27].
R. v. Renouf (G.E.) (2001), 206 Nfld. & P.E.I.R. 67; 618 A.P.R. 67; 160 C.C.C.(3d) 173; 2001 NFCA 56, refd to. [para. 27].
R. v. Weir (P.), [2004] B.C.A.C. Uned. 186; 2004 BCCA 529, refd to. [para. 27].
R. v. Currie (1982), 65 C.C.C.(2d) 415 (Ont. C.A.), refd to. [para. 27].
R. v. Young (1980), 27 C.R.(3d) 85 (B.C.C.A.), refd to. [para. 51].
R. v. Hennigar (1983), 58 N.S.R.(2d) 110; 123 A.P.R. 110 (C.A.), refd to. [para. 51].
R. v. McPhee (E.A.) (1993), 128 N.S.R.(2d) 79; 359 A.P.R. 79 (C.A.), refd to. [para. 51].
R. v. Amaralik (1984), 57 A.R. 59; 16 C.C.C.(3d) 22 (N.W.T.C.A.), refd to. [para. 51].
R. v. Hackett (1986), 30 C.C.C.(3d) 159 (B.C.C.A.), refd to. [para. 51].
R. v. Gill (B.S.) (1994), 162 A.R. 163; 83 W.A.C. 163 (C.A.), refd to. [para. 51].
R. v. H.J.P. (1995), 133 Nfld. & P.E.I.R. 20; 413 A.P.R. 20 (Nfld. C.A.), refd to. [para. 51].
R. v. Shropshire (M.T.), [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37, refd to. [para. 61].
R. v. Nasogaluak (L.M.), [2010] 1 S.C.R. 206; 398 N.R. 107; 474 A.R. 88; 479 W.A.C. 88; 2010 SCC 6, refd to. [para. 62].

Statutes Noticed:

Criminal Code, R.S.C. 1985, c. C-46, sect. 731(1) [para. 31]; sect. 732.2(1)(b) [para. 13].

Counsel:

Anna King, for the appellant, Damon William Knott;
Eric Purtzki, for the appellant, D.A.P.;
Michael J. Brundrett, for the respondent.

Solicitors of Record:

Anna King, Vancouver, B.C., for the appellant, Damon William Knott;
Eric Purtzki, Vancouver, B.C., for the appellant, D.A.P.;

Attorney General of British Columbia, Vancouver, B.C., for the respondent.

These appeals were heard on December 14, 2011, before McLachlin, C.J.C., Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis, JJ., of the Supreme Court of Canada.

On July 31, 2012, Fish, J., delivered the following judgment in both official languages for the Court.

Appeals dismissed.

Editor: Steven C. McMinniman

Criminal Law - Topic 5729

Punishments (sentence) - Probation and probation orders - Validity of - Section 731(1) of the Criminal Code precluded probation for any accused sentenced to more than two years' imprisonment - The "sentence merger" provisions of s. 139(1) of the Corrections and Conditional Release Act provided that where an accused subject to a sentence that had not expired received an additional sentence, he was deemed to have been sentenced to one sentence which commenced at the beginning of the first sentence and ended when the last sentence expired - Two accused were sentenced to imprisonment not exceeding two years, followed by three years' probation - Before those sentences expired, both accused were sentenced, for other offences, to consecutive sentences - The accused argued that the "sentence merger" provisions of s. 139(1) applied to result in a total merged sentence exceeding two years, rendering the previously legal probation orders illegal - The Supreme Court of Canada affirmed that both probation orders were valid when made and that no prior or subsequent sentence imposed on either of them had, or could have had, the effect of invalidating any of their probation orders, either prospectively or retrospectively - Section 139 was enacted for administrative purposes respecting parole and remission, and was of no assistance in determining the legality of a probation order - The court stated that "the ordinary meaning of s. 731(1)(b) is perfectly clear: A probation order may not be made where the *sentencing court* imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by *the sentencing court on that occasion* - not at *other* sentences imposed by *other* courts on *other* occasions for *other* matters." - See paragraphs 1 to 33.

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for their fitness. ... a probation order that is manifestly inappropriate in itself or that renders unfit the sentence of which it is a part will be set aside on appeal. In considering whether a fresh probation order is appropriate, the sentencing court must thus take into account the particular circumstances of the offence, the character and needs of the offender, and the purpose and relevant principles of sentencing ... In short, unexpired prior sentences remain an important consideration though not necessarily decisive, in determining whether a probation order is appropriate. A probation order that was appropriate when made may well be rendered inappropriate by a lengthy intervening term of imprisonment" - The court referenced the procedures for varying or terminating existing, otherwise valid, probation orders where a subsequent sentence was imposed - See paragraphs 58 to 70.