

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Melvin*, 2016 NSSC 130

Date: 20160511

Docket: CRH 447242 / CRH 447189

Registry: Halifax

Between:

Her Majesty the Queen

v.

James Bernard Melvin / James Bernard Melvin and Regan Taylor Henneberry

Restriction on Publication: Section 517 of the Criminal Code

Judge: The Honourable Justice Patrick Duncan

Heard: May 11, 2016, in Halifax, Nova Scotia

Written Decision: May 24, 2016

Counsel: Christine Driscoll, for Her Majesty the Queen
Patricia MacPhee, for Correctional Service Canada
Duane Eddy, for Nova Scotia Department of Justice (Correctional Services Division)
Patrick MacEwen and Sarah White, for James Melvin

Publication Ban:

Order directing matters not to be published for specified period

517 (1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

- (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
- (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

Failure to comply

(2) Every one who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

By the Court:

[1] This is an application brought by Mr. Melvin seeking remands to federal correctional facilities in relation to outstanding charges that are set out in two Indictments.

[2] The first is CRH 447242. It is a murder charge and he is currently detained in custody on that charge, pursuant to section 515(11) of the **Criminal Code**.

[3] The second is CRH 447189 which, among other things, includes a conspiracy to commit murder charge. His current status in relation to that matter is that he is detained in custody pursuant to section 516(1) of the **Criminal Code**.

[4] I have had the benefit of both oral and written submissions of counsel for the Public Prosecution Service of Nova Scotia, for the accused, for the Federal Correctional Services and for the Provincial Correctional Services. I have the affidavit evidence of Scott McLeod as well as his oral testimony today. He is with Correctional Service Canada (CSC). I have Mr. Eddy's affidavit with attachments, on behalf of the Province of Nova Scotia Correctional Services Division.

[5] In addition to this I have a fairly substantial amount of provincial Correctional Services' records in relation to Mr. Melvin and which I outlined at the outset of today's hearing.

[6] I have considered all of this information in reaching my conclusions today.

[7] The first issue is whether I have jurisdiction to grant the remedies being sought. That is, does this Court have jurisdiction to order a federal remand for an unconvicted person?

[8] All parties agree that under section 516(1) of the Criminal Code there is such a discretion in the court to consider remanding an unconvicted person to a "prison", which under section 2 of the **Criminal Code** includes a federal facility.

[9] As to section 515(11) the section only says that, or only directs that, the person be "detained in custody", but no specific location is indicated.

[10] My conclusion is that the court does have jurisdiction to remand to a federal institution under section 515(11) and my reasons are these. First: section 516 says:

A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison...

[11] In my view this language contemplates that a detention under 515(11) is captured by the language of section 516 and thus provides to the court a discretion to remand the person to a federal institution.

[12] My second reason is that section 515(11) is not restrictive. That is, there is no prohibition against remand to a federal institution or direction to any institution for that matter.

[13] Third: that it would be, as counsel has indicated, illogical that a court could remand an unconvicted person to a federal prison on lesser charges (the conspiracy charge) but not consider the same disposition in relation to the more serious charge (the murder charge).

[14] The second issue then is, on what basis should a court determine that it is appropriate to remand an unconvicted person to a federal institution as opposed to a provincial one?

[15] The test that has been suggested by the counsel for Correctional Service Canada is that it only be done in “exceptional circumstances”. I agree in the sense that it should be an exception, and one that is based upon evidence. The reasons are self-evident. Federal institutions, for reasons that have been set out by Mr. MacLeod in his affidavit, are structured to house prisoners that are serving sentences that by

law are lengthier and of a pre-determined duration and, presumably, sentences that are suitable to be served in institutions that may be outside of the province where the prisoner's offence was committed or where they were sentenced.

[16] On this latter point, a federal remand can result in being held in an institution that is in another part of the country. In fact, Mr. Melvin is in New Brunswick at this stage, and he could quite easily be transferred to any institution in Canada under a federal remand. I cannot direct where he is housed. That has the potential to interrupt or interfere with his ability to instruct counsel in Halifax, or to attend court from time to time as necessary through the course of these proceedings. For that reason alone it would generally be preferable that a person, an unconvicted person on remand, be held in an institution that is close to the place of trial and certainly within the same province.

[17] Further, provincial institutions are intended to be remand facilities and in fact house all but the most exceptional remanded prisoners. Clearly, as has been indicated in this case, an order to remand an unconvicted person to a federal institution is a rare occurrence and at this time Mr. Melvin, I am told, is the only prisoner in an Atlantic Federal Institution who is an unconvicted person.

[18] Turning to the specifics of this matter, on December 17, 2015 Provincial Court Judge Derrick remanded Mr. Melvin to a federal institution. I say at the outset that this is not a review of her decision, but the submissions that were made before her, and her comments were given to me for consideration as part of the overall circumstances in my consideration of this application. Judge Derrick did not have federal or provincial correctional services input at the time of the hearing as to the place of remand.

[19] The basis of Judge Derrick's decision was, first, that she took judicial notice that segregation of a prisoner, especially for a lengthy period of time, does impact negatively on a prisoner's mental health. She cited Justice Moir in *Gogan v. Nova Scotia (Attorney General)* 2015 NSSC 360, at paragraph 20, together with other authorities in support of this proposition.

[20] Second, she concluded that Mr. Melvin had been in a provincial institution locked up 23 hours per day, 7 days a week, since approximately July 17, 2015. Judge Derrick accepted submissions that there was no social contact available to him, no writing materials, no entertainment, his mattress was being taken away from 7:00 a.m. to 11:00 p.m. at night each day, and that he had threatened to take his own life.

[21] Third, Judge Derrick acknowledged that some of the issues that contributed to Mr. Melvin being placed in segregation were attributable to his own conduct, but she did not attempt or was unable to determine the cause(s). I will speak to that again in my own way in a moment.

[22] The evidence that I have before me today from the Provincial Correctional Services indicates quite clearly that three institutions have been utilized to this point in trying to deal with Mr. Melvin's challenges. The Northeast Nova Correctional Facility, Cape Breton Correctional Facility, and Central Nova Correctional Facility all have had significant difficulties in managing his remand period. In each case the issues seem to be the same - there are questions of ensuring his own safety, that is, from self-harm, and ensuring his safety from other inmates. There are issues of ensuring the safety of staff, and there have been issues of ensuring the safety of other inmates from harm caused by Mr. Melvin. All of these are founded to some degree on what has been characterized throughout the proceeding as his "incompatibles", which I am told is Mr. Melvin's incompatibility with other inmates and with staff in these institutions.

[23] The evidence that I have had presented to me includes the affidavit evidence of Paul Young, the Deputy Superintendent at Northeast Nova Correctional Facility. He says that Mr. Melvin was not able to be housed in general population and that

there were unresolvable issues with his management plan. They did put in a behavioural management plan that I have a copy of and have reviewed. Mr. Melvin was in Bravo 3 unit and by all accounts he was subject to considerable restrictions. For example, adjacent cells were empty and he was not to have any physical contact with other prisoners.

[24] Kirk Sheppard, Superintendent at Cape Breton Correctional Facility, said that he was segregated, Mr. Melvin that is, was segregated at first and then was moved into population. It lasted six days until Mr. Melvin was alleged by the superintendent to have carried out a vicious assault on another person. Mr. Sheppard says that there were many problems that Mr. Melvin presented that were not resolvable due to his incompatibilities and that safety overall could not be assured.

[25] In relation to the question of the assault, and I think this is what Judge Derrick was concerned about, it is difficult to understand the role that these incompatibilities played in the assault. I characterized it colloquially in discussion with counsel as a question of “who threw the first punch?”. Without getting into a deep examination of that issue it is difficult to say. Did he assault somebody because he was motivated to do it as a result of his own violent tendency, or because he was responding to what he perceived to be another person’s violent tendency? I think the most that could be drawn from this is that it is a problem that the correctional facility people have

identified and which by virtue of incompatibilities puts everyone's safety in jeopardy to some extent.

[26] The third person was Scott Keefe, the Deputy Superintendent of Central Nova Correctional Facility. He noted that Mr. Melvin had been segregated - essentially from the day of his arrival he was put in protective custody, and again the recited reason is due to the large number of incompatibles. He listed the number of restrictions that were imposed in relation to Mr. Melvin's movement in the Facility and the impact that it had on staff and the institutional operation, and trying to deal with these issues.

[27] Mr. MacEwen, counsel for Mr. Melvin, advised that Mr. Melvin during his incarceration in provincial institutions was segregated for something in excess of 90% of the time. That is undisputed.

[28] Mr. Melvin's remand has been and will be longer than many persons in correctional facilities. Interestingly, having regard to provisions for early release, he quite possibly could be on remand in an institution longer than some federal inmates serving sentences would be. For example an inmate who is paroled after a third of a two year sentence could be out after eight months. I do not see any way, short of the

charges being dropped or a guilty plea, that Mr. Melvin is going to be out of a correctional facility for at least another year, and probably longer.

[29] I do accept however that persons do spend long periods of time in protective custody at provincial institutions. It is not unusual and they sometimes do that as a remanded person or sometimes as a prisoner serving a sentence, so it does happen and it is managed in other circumstances.

[30] What in my view makes Mr. Melvin's situation unusual is that either he is unable to, or unwilling to, conduct himself in a manner that encourages more privileges than segregation provides in a provincial institution. The one attempt that clearly was made and failed was the Cape Breton attempt that I spoke to a few moments ago. Again it is difficult though to say that these issues are solely the responsibility of Mr. Melvin. I do not have the ability to make that determination and I do not have the ability to say that he is trying to manipulate the system by his conduct either.

[31] It is clear to me that provincial institutions have the ability to manage his incarceration, but it is also clear that in doing so it is likely that he is going to be held in strict segregation for an extended period of time in addition to that which he has already been incarcerated. Judge Derrick and Justice Moir expressed concerns that

segregation negatively impacts on a person's mental health when it is in place for an extended period of time. I agree with them.

[32] In fact, Mr. MacLeod in his evidence indicated that Correctional Service Canada does not use segregation except in extreme cases which, in my view, affirms the concerns that the courts have about the use of segregation for a lengthy period of incarceration.

[33] Turning to Mr. MacLeod's evidence - I accept his evidence that a federal institution is not intended to be a remand facility; it is not designed for that purpose and that the presence of an unconvicted person is disruptive, both to staffing efforts to manage housing and programming and disruptive for other inmates that are there to serve their defined sentence.

[34] I accept as well that a lack of a proper remand facility is particularly problematic because designated housing for unconvicted persons is a responsibility that Canada has adopted under the **International Convention on Civil and Political Rights**. Mr. MacLeod noted that the Convention requires that accused persons, other than in exceptional circumstances, be segregated from convicted persons, and subject to separate treatment appropriate to their status as an unconvicted person. This is an entirely logical and understandable principle, but one has to acknowledge

that there is language in the Convention that relieves the state of that obligation in “exceptional circumstances”.

[35] Overall, Correctional Service Canada concerns are that there is no proper remand facility to fulfill that type of an obligation in a federal institution. The obligation to securely, safely, and properly house Mr. Melvin can be met, from the federal perspective, in a provincial institution and the Province can and will do so. Therefore Mr. Melvin is not an exceptional case in the view of Correctional Service Canada. They add that if he was considered to be such a difficult prisoner to manage then a request should have come through from the Province to the federal correctional services to deal with this, and not through this process today.

[36] Mr. MacLeod and Correctional Service Canada indicate that the federal institutions are not able to offer markedly different conditions to Mr. Melvin than a provincial institution would if he was put in segregation. If Mr. Melvin does, in fact, exhibit the same behaviours that were exhibited in the provincial institutions then the Correctional Service Canada response is likely to be similar in the resulting segregation.

[37] Another general concern raised by Correctional Service Canada is the difficulty in conducting a proper threat assessment. They are generally not able to

do that. However, on the facts that are before me, Mr. Melvin presents a different circumstance in that he has been previously assessed for threat as a federal inmate - he is in their system, although I acknowledge that the information is perhaps dated and will need to be retrieved from Archives, but it is available to the federal authorities. I also have representations today from the Province that they will provide the records from their facilities to the federal authorities, on request, that would assist CSC in conducting any threat assessment. It is my view that this concern about being able to conduct a threat assessment is more of an administrative burden than a substantive one.

[38] Having an unconvicted prisoner in a federal facility presents an administrative burden which clearly has been managed in the past (although on rare occasions), but Mr. MacLeod did acknowledge that Mr. Melvin would not be the first unconvicted person to be remanded into federal custody and so, again, to the extent that his remand into a federal institution would create administrative burdens, I am not satisfied that that should be sufficient to outweigh evidence that shows exceptional circumstances that otherwise speak to a federal remand being the appropriate disposition.

[39] Programming in a federal institution: again I acknowledge that is a challenge for the federal institution because they are trying to provide employment and housing

to sentenced prisoners and it would be difficult if not impossible to consider Mr. Melvin for the same privileges. There is a competition for space with those who are serving sentences I am told, and I accept that tensions can be generated by the competition that can be created by an unconvicted person looking for programing that is typically only available to persons that are serving a sentence. I am told that in particular, and again I accept Mr. MacLeod's evidence, that this can be particularly problematic in maximum security institutions which is where Mr. Melvin is at this time.

[40] Like provincial institutions, managing compatibles is always a challenge for any facility. Mr. Melvin is at the Renous maximum security institution, the Atlantic Institution right now. He has certain privileges - an hour of recreation a day, shower every second day. The area of the facility that he is in now, I am told, is not intended for long term detention and generally is used for transfers of prisoners or for those who are awaiting placement or on a conditional release suspension. There is an issue that would have to be considered and resolved by the federal institution, which is whether he can be considered for a move to general population, notwithstanding the concerns arising from the **International Convention on Civil and Political Rights**.

[41] The bottom line for me today is this: the evidence emanating from the provincial correctional facilities is clear. There are a high number of incompatibles

between Mr. Melvin and other inmates and with staff. Mr. MacLeod's outline of the privileges and benefits that are available to a person in a federal institution, even one in segregation which would be the worst case scenario, would, based on the evidence I have, at least seem to be, and I say this acknowledging that federal segregation is going to be very restrictive if that is the result, but it still seems to me to offer much more to a person in Mr. Melvin's position than what the province can offer him or to any segregated person for that matter. In this case what is overshadowing the provincial attempts is Mr. Melvin's accentuated issues with incompatibilities and the attempts to deal with him in different institutions of differing characteristics and still unsuccessfully.

[42] It seems, at least on the limited information I have available at this point, that Mr. Melvin is managing in the federal institution in a more constructive manner. I do not have any evidence that the same issues with respect to his safety or the safety of other inmates is present in the federal facility in the manner in which the provincial correctional records demonstrate. Mr. Melvin has a strong incentive to cooperate with the Correctional Service Canada to manage his own safety if he is in the federal institution - if not he may find himself in a much less appealing circumstances than he is already in.

[43] For example, it could result and it is always open to remand him back into a provincial institution if that seems to become a more appropriate result of all of this. Or, alternatively, as I have indicated previously, a federal remand does not dictate where he is housed and if Mr. Melvin's issues, whether of his own making or of the making of other inmates or even with staff, require it then he is capable of being transferred anywhere in the country, presumably to an institution where there are no or very few incompatibles - just because of geography where he might not be known to people in another institution. All of that is speculative on my part but it is simply to state the obvious, which is that federal services do have a wider range of facilities available to house a person who is otherwise having difficulties in a provincial institution in ensuring that their own safety and the safety of others around them is secured.

[44] I will add this - if in fact it comes to a situation where Mr. Melvin is looking for a return to a provincial institution on remand for anything other than to temporarily appear in court or other appropriate reasons, in my view there should be no yo-yo-ing back and forth between the federal and provincial institutions. I am going to have my comments transcribed so that they are available in the court's file so that if I am not the next judge that has to deal with this it will be available to any further judge who is in a position of having to issue a remand. There is an opportunity

here today to resolve this and let's hope that it works in everybody's best interest at the end of the day.

[45] Therefore I am satisfied overall that this is a case of "exceptional circumstances"; that the evidence has satisfied me that it is an appropriate circumstance for a federal remand and I am prepared to grant the federal remand at this time in both matters.

Duncan, J.