SUPREME COURT OF NOVA SCOTIA

Citation: *Pratt v. Nova Scotia (Attorney General)*, 2018 NSSC 243

Date: 20180919
Docket: Hfx No. 479943
Registry: Halifax

Between:

Maurice Pratt

Applicant

v.

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia
And the Superintendent of the Central Nova Scotia Correctional Facility

Respondents

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	September 17, 2018, in Halifax, Nova Scotia
Oral Decision:	September 19, 2018
Written Decision:	October 5, 2018
Counsel:	Maurice Pratt, on his own behalf Duane Eddy, for the Respondents

BY THE COURT (ORALLY):

[1] As I indicated on late Monday afternoon, I am giving my decision today. *Habeas corpus* matters, by their very nature, are time sensitive. For this reason, I believe it is important for all parties to be able to leave today knowing the outcome.

[2] At the present time it is not my intention to reduce these reasons to writing. There will, of course, be a written Order produced following this decision. In the event these reasons are to be published, I reserve my right to edit the text for grammar and readability but without in any way changing the analysis, reasoning or findings.

INTRODUCTION

[3] The applicant is housed at the Central Nova Scotia Correctional Facility (CNSCF, the Institution or the Burnside Jail) on North 3. North 3 is a general population unit. On or about September 2, 2018, North 3 was placed on a rotational schedule also referred to as a lockdown unit. This, owing to safety and security issues expressed by the administration. The rotational schedule permits inmates to be out of their cell 1 hour per day. In the Motion the applicant seeks a *writ* of *habeas corpus* against the institution. It was filed on September 5, 2018.

[4] I will very briefly summarize the positions of the parties. I am going to address the evidence and what I have taken from the evidence. It is not my intention to attempt to summarize or recite all the evidence or submissions. I will touch upon elements and portions of the most pertinent evidence and arguments. I have, however, weighed and considered all the evidence and submissions in arriving at my ruling.

[5] Mr. Pratt's Notice for *Habeas Corpus* is brief. In it he says it is impossible to leave detention because "23 hr. lock down". Nothing else is offered in the Notice other than the standard "boiler plate" of the Court issued form. In his direct evidence Mr. Pratt provided his rationale for proceeding with the *habeas corpus* application. He takes issue with a number of things inclusive of:

1. the Institution's use of a body scanner;
2. inmates have died at the institution;

3. he has not been provided with any reasons why CNSCF North 3 is on lockdown;
4. there are only "mere allegations" of threats;
5. the inmates' time (including his own) outside of their cells is severely restricted;
6. the facility is "poorly managed and abhorrently run";
7. he has been told he made a threat yet he has not been placed on a level;
8. inmates do not receive religious and other programs; and
9. he and the other inmates do not get out in the yard everyday.

[6] The respondent acknowledges that the inmate's residual liberty has been infringed. However, CNSCF says that given the circumstances, this infringement is justified. In this regard the respondent admits that the general inmate population at Burnside is permitted out of their cells for 11.5 hours per day. However, inmates on North 3, such as the applicant -- from September 2, 2018 up to the present – have been allowed out of their cells for periods of time well under this. They say this restriction is justified due to the threats to the safe and secure operation of the Burnside Jail.

BURDEN OF PROOF

[7] In this matter the lawyer for CNSCF has accepted that the placement of the applicant into lockdown does constitute a deprivation of his residual liberty. As a result of this acknowledgement, the burden of proof shifts to the Institution to prove that the deprivation is lawful and reasonable.

[8] At this point it will be helpful to consider the legal framework within which applications for *habeas corpus* must be decided.

CASE LAW

[9] The case of *Mission Institution v. Khela*, [2014] S.C.J. No. 24, a decision of the Supreme Court of Canada, is helpful and instructive. It states the following test for an application such as this at para .30:

> 30 To be successful, an application for habeas corpus must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must

> raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.

[10] In this case, as noted previously, counsel for the Institution acknowledges that the first branch of this test has been met. The applicant can demonstrate that there has been a residual deprivation of his liberty. For the purposes of this application the respondent also concedes that the applicant has raised a legitimate ground upon which to question the legality of the deprivation. In this regard, the respondent argues that whereas much of what Mr. Pratt complains about falls outside of the *habeas corpus* ambit, the lockdown aspect is germane.

[11] The Court thus moves to the final component of the analysis – can CNSCF demonstrate that the deprivation is lawful and reasonable?

[12] In *May v. Ferndale Institution*, 2005 SCC 82, the Supreme Court of Canada explained that for a deprivation of liberty to be lawful the decision must be within the jurisdiction of the decision maker. It was also clarified that lawfulness further requires the decision to be reasonable – which means it must fall within a range of outcomes which are defensible on the facts and the law.

[13] The caselaw establishes that the reasons and record of the decision must support its conclusion in fact and principle and the decision must be justified, transparent and intelligible.

[14] Reviewing the decision on a standard of reasonableness means that deference will be shown to the decision maker. The caselaw shows that on *habeas corpus* applications, decisions of prison administrators are owed considerable deference by the Courts. The Supreme Court of Canada stated the following in *Khela*:

> 75 … To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts….
>
> 76 … Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a Provincial Superior Court Judge.

[15] In this case the Crown led evidence through Deputy Superintendent Bradley Ross and Captain Christopher Deal. As a matter of law, I am directed by the

Courts above me, to conclude that Deputy Superintendent Ross and Captain Deal possess knowledge and related practical experience in matters of institutional safety and security. I am to regard their expertise and they are owed deference with respect to their areas of specialized knowledge. I ought not to interfere with the exercise of their discretion without showing reasonable deference to their determinations and conclusions. I should say at this juncture that I found both of the Crown witnesses to be reliable and credible. They gave their evidence in a straight-forward manner and were prepared to acknowledge problems at North 3.

[16] The Supreme Court of Nova Scotia in *Cain v. Correctional Service Canada*, 2013 NSSC 367, summarized the role of provincial Superior Courts, like this one, in reviewing decisions of prison administrators on *habeas corpus* matters. Justice Van den Eynden (as she was then) stated as follows, at para. 33:

> 33 In short, this Court's role is not to determine whether the administrative segregation and/or the security classification was the "proper decision" but rather whether the Respondent had the jurisdiction to make those decisions and whether such decisions were lawful and reasonable in the circumstances, taking into consideration the rights and procedural safeguards which Mr. Cain is to be afforded at law.

Other Courts have expressed similar sentiments including the New Brunswick Court of Queens Bench decision in *Samms v. LeBlanc*, 2004 NBQB 140, where the following comments from the decision of the Federal Court in *Cline v. Reynatt* were adopted:

> I would like to add that, except in clear and unequivocal cases of serious injustice coupled with mala fides or unfairness, judges, as a general rule, should avoid the temptation of using their *ex officio* wisdom in the solemn, dignified and calm atmosphere of the courtroom and substituting their own judgment for that of experienced prison administrators.

THE EVIDENCE

[17] I am going to briefly summarize the evidence. Counsel for CNSCF entered 3 exhibits and a 4th was entered by Mr. Pratt. All exhibits went in by consent and may be identified as follows:

1. Mr. Pratt's (aka Downey) Warrant of Remand with respect to 2 counts of assaulting a peace officer, alleged to have occurred on July 10, 2018 in Dartmouth;

2. Mr. Ross's 4-page Affidavit (with 3 exhibits attached) deposed September, 13, 2018;
3. Mr. Pratt's Notice of Appeal with respect to an assault he is alleged to have committed on staff at Burnside on July 16, 2018; and
4. Mr. Pratt's Warrant of Remand with respect to uttering threats to cause death or bodily harm dated April 23, 2018.

[18] Of the exhibits, I find exhibit number 2 to be most germane to the *habeas corpus* application as it provides the rationale for the Deputy Superintendent placing North 3 on lockdown. In this regard para. 6 sets out in detail these reasons for the rotational schedule:

> 6. On or about September 2, 2018, North 3 was placed on a rotational schedule (also referred to as a "lockdown unit") for the following reasons:
>
> Several staff have submitted reports stating threats of harm and death were being shouted at them from inmate cells. Officers were not able to identify who the inmates were due to them being in their cells. Also, information has been gathered that officers may be at risk of assault in North 3.
>
> On August 30, 2018, an officer received information that officers were going to be assaulted for removing water bags from the unit.
>
> On September 1, 2018 information was given that another inmate was assaulted in North 3 for refusing to assault a correctional officer. Additional information was given that an officer was going to be assaulted outside of the facility if the opportunity is available.
>
> On September 1, 2018 information was given that on September 9th (end of peaceful protest) there would be refusal of inmates to lock in their cells and they were going to "tie off" doors and prevent staff from entering the dayroom.
>
> On September 1, a report was submitted from CNSCF that an inmate had commented that the peaceful protest being held would be over September 9, 2018. The staff then states they heard another inmate yell, "yeah, and then someone is going to die".
>
> On September 9, 2018, an inmate was heard yelling at an officer "I am going to kill you" and "I am going to grab your skinny neck". Several minutes later an inmate was heard yelling, "I'm going to snap your neck".
>
> Below is a timeline that was a result of the threats made by inmates on North 3:
>
> September 2, 2018 North 3 Unit was locked due to safety and security issues in the facility. The unit was placed on a 4-cell rotation allowing 1 hour out per day

> for the inmates housed in this unit. 30 minutes of airing court was offered to inmates in this dayroom.
>
> September 4, 2018 North 3 Unit was locked due to safety and security issues in the facility. The inmates in North 3 were on an 8-man rotation allowing inmates to be out of confinement for 2 hours per day. 30 minutes of airing court was offered to inmates in this dayroom.
>
> September 7,2018 North 3 Unit was locked due to safety and security issues in the facility. The inmates in North 3 were on a 10-man rotation allowing inmates to be out of confinement for 2 hours per day. 30 minutes of airing court was offered to inmates in this dayroom.
>
> September 9, 2018 North 3 unit was locked in due to officer work refusals. The work refusals stated that the staff did not feel safe to be in the dayroom with inmates out of their cells.
>
> September 10, 2018 the Occupational Health and Safety committee for CNSCF met and made recommendation based on the work refusals. Heightened security was added to allow a plan to get inmates out of their cells in a gradual manner based on behaviour.

[19] I find this affidavit provides a detailed, clear account of the background and the decision-making framework around the placement of North 3 in lockdown. I would add that the evidence of Deputy Superintendent Ross and Captain Deal provided further rationale and specifically addressed the September 9 and 10, 2018 situation at North 3 which resulted in inmates being locked in their cells for more than 24 hours and perhaps in excess of 36 hours.

[20] In particular, I accept that there were occupational health and safety concerns expressed at the Joint Occupational Health and Safety (JOSH) Committee by correctional officers who refused to come to work. As background, Deputy Superintendent Ross said the guards expressed concerns as their were death threats and it was believed a riot was planned by the North 3 inmates.

[21] Captain Deal also addressed the work refusal, which he said he investigated. There was a emergency meeting of JOSH Committee members as there had been 10 to 12 work refusals. He testified that concerns were expressed about death threats, threats of harm and hostage taking. In the result, the North 3 inmates were confined to their cells on September 9 and 10, 2018 for more than 24 hours and possibly in excess of 36 hours. On account of the JOSH Committee's recommendations the situation has since improved and the North 3 rotational schedule has progressively allowed for more time out of cells such that it is anticipated 12 hours per 24 hour period may be achieved.

KHELA FACTORS

[22] I want to turn now to an application of the factors from the *Khela* decision to the circumstances of this case. Those factors again, in summary were:

1. Did CNSCF have the jurisdiction to make the decision they did?
2. Was the decision one which was reasonably open to the respondent to make?
3. Was procedural fairness afforded to the applicant, Mr. Pratt?

[23] Having reviewed all these materials and having considered the positions of the parties I am satisfied that the Institution had the jurisdiction to take the steps they did.

[24] The more critical part of the analysis is to determine whether the decision was lawful and reasonable in all the circumstances.

LAWFUL AND REASONABLE

[25] I refer to para. 74 of the *Khela* decision which said as follows:

> 74 As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion,… Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

I have previously reviewed the evidence as I accepted it from the affidavit and the *viva voce* evidence.

[26] In *Gogan v. Canada (Attorney General)*, 2018 NSSC 18, 2 applications for habeas corpus were filed by two federal prisoners housed in a lockdown unit within the CNSCF. The federal prisoners challenged the lawfulness of their detention within the lockdown unit. The applicants raised questions regarding the severity of solitary confinement, the absence of an individual assessment and the Institution's stated reasons. In *Gogan* the decision to place federal prisoners into a lockdown unit on admission and based solely on their federal status was found to be arbitrary. Consequently, the placement of federal prisoners in *Gogan*, did not fall within a range of possible outcomes that was defensible on the facts and the law.

[27] In my view this case is distinguishable from *Gogan*. In this case the Deputy Superintendent reviewed the incidents and threats to the safe and secure operation of the facility. Mr. Ross determined that the incidents and threats documented on North 3 created unreasonable risks to staff and the inmates living on that unit. The particulars regarding the safety and security concerns held by the Deputy Superintendent are outlined in Mr. Ross's affidavit at para. 6 and amplified in *viva voce* evidence of both Mr. Ross and Mr. Deal.

[28] In the result I conclude the actions of the Institution were lawful and reasonable in the circumstances. Having concluded that the placement into lockdown was made for reasons grounded in safety and security considerations which I find to be valid, I conclude the decision was both lawful and reasonable.

[29] My role is not to determine what decision I would have made in the circumstances. In making the decision, the administration must take into account many factors, including most prominently the safety and security of persons, both of the inmates and the staff.

[30] The situation on North 3 was a dangerous one which could have escalated. The reasoning of the decision maker was clear and understandable. The pathway and steps they took are evidence to the Court.

DUTY OF FAIRNESS

[31] The final part of the test asks me to consider whether Burnside has complied with its procedural duties and requirement of fairness. I have concluded they did meet their procedural duties under the governing statute and regulations.

[32] I would like to again reference again the decision in *Cain v. Correctional Service Canada* that I quoted from earlier. In the *Cain* case the issue of procedural irregularities had been raised very strongly and those issues were at the center of the dispute in that application. The Court had the following to say:

> 47 Mr. Cain has raised procedural and due process concerns. Although the process followed by the Respondent might not be perfect, I find that overall on balance, Mr. Cain's segregation placement was handled in a manner that, in the circumstances of this case, was generally compliant with the Respondent's obligation at law, including ensuring due process and procedural fairness was appropriately afforded to Mr. Cain.

I find that I can adopt this analysis and rationale in the present case as well.

CONCLUSION

[33] I have concluded that the actions of the administration do fall within the range of reasonable and justifiable outcomes. Substantively and procedurally, the decision is lawful and reasonable. In conclusion it occurs to me that having listened to the evidence in this *habeas corpus* application there are clearly problems in North 3. The situation was brewing in the lead up to the September 2, 2018 lockdown and regrettably the lockdown continues. Rather than 11.5 or 12 hours per day outside of their cells, Mr. Pratt and the others on North 3 have endured days of restricted time. On September 9 and 10, 2018 the situation became extreme and the inmates were in lockdown in excess of 24 and perhaps 36 hours. This is obviously unfortunate and affects the prison population and these effects have been written about in learned journals and texts and Mr. Pratt has spoken of his own personal situation. In the time since the filing of this *habeas corpus* application there has been progress and in this regard a process has been started to return North 3 to the 11.5 (or perhaps 12 hours) unlocked schedule that existed prior to September 2, 2018. By way of wrapping up I can only express the Court's sincere hope that the rotational schedule will return to normal, which for all concerned will be a positive move.

[34] For all of these reasons I will dismiss the *habeas corpus* application. I thank all for their attendance and counsel for the Institution for his efficiency in advancing the matter to hearing. I would also like to thank you, Mr. Pratt, for the way in which you presented your application. There will be no costs awarded.

Chipman, J.