A-725-98

2001 FCA 186

Walter Paris (*Appellant*)

v.

Attorney General of Canada (*Respondent*)

INDEXED AS: PARIS v. CANADA (ATTORNEY GENERAL) (C.A.)

Court of Appeal, Décary, Létourneau and Noël JJ.A. —Montréal, May 17; Ottawa, June 5, 2001.

Parole — Sentence calculation — Parole forfeiture and consecutive sentences — Interpretation of Parole Act, ss. 17(1) (providing parole forfeited if parolee convicted of indictable offence while on parole), 21(1) (providing new sentence for offence committed while on parole added to unexpired portion of term at time parole granted, plus any remission credited to inmate) — No error in finding new sentence to be served consecutively to sentence then being served — Sentence received in 1975 served, has ceased to be effective and appellant's present detention resulting from subsequent convictions — Charter, s. 7 not applicable herein and, in any event, even if Act, s. 21(1) did violate appellant's right to liberty, principles of fundamental justice not breached by advance notice of consequences of conviction for crime committed whilst on parole or by imposition of harsher sentence for recidivism, breach of society's trust in offender.

Constitutional law — Charter of Rights — Life, Liberty and Security — Whether Parole Act, s. 21(1) authorizing unlawful detention — Parole forfeiture and consecutive sentences — Sentence calculation — No breach of fundamental justice resulting from application of Parole Act, s. 21(1) (repealed in 1977, before Charter came into force) as latter has ceased to be of consequence — Applying Charter when Act, s. 21(1) has no contemporary application would constitute impermissible retroactive application — Even if appellant's right to liberty still infringed by Act, s. 21(1), resulting violation would not breach principles of natural justice.

The appellant, an inmate in the Federal Training Centre at St-Vincent-de-Paul, Laval, Québec, has spent more than thirty years in detention. Many times he has been granted parole, and many times it has been revoked. In January 1975, the appellant was convicted of indictable offences, serious crimes committed while he was on parole, resulting in the forfeiture of his parole pursuant to section 17 of the *Parole Act* then in force. Consequently, under subsection 21(1) of the Act, the 1,393 days spent on parole and the three years of imprisonment imposed in January 1975 were added to the portion of his sentence that had not yet expired. The appellant was subsequently sentenced to many other terms of imprisonment.

The appellant argued unsuccessfully before the Trial Judge that the three-year sentence imposed on him in January 1975 for offences committed while he was on parole was to be served concurrently with, and not consecutively to, the previous sentence he was serving. According to his calculation, he ought to have been released in May 2001 rather than, according to the calculation of the Correctional Service, in May 2004. The appellant argued that the Trial Judge erred with respect to the application of subsections 17(1) and 21(1) of the Act and submitted that subsection 21(1) authorized an unlawful detention because it is in breach of section 7 of the *Canadian Charter of Rights and Freedoms*.

Held, the appeal should be dismissed.

The Trial Judge correctly interpreted subsections 17(1) and 21(1) and their relationship with subsection 649(1) of the *Criminal Code*. The latter provides that a sentence commences when it is imposed, except where a relevant enactment otherwise provides. And subsection 21(1) of the Act, in force in 1975, was an enactment that clearly derogated from and made an exception to subsection 649(1) of the *Criminal Code*, providing that the new sentence imposed for an offence committed while on parole was added to the *remanet* from the sentence, composed of the unexpired portion of the term at the time parole was granted, plus any remission credited to the inmate. Subsection 21(1) was clear and readily understood. The Trial Judge did not err in finding that the warrants for committal did not require that the three-year sentence be concurrent with the sentence being served and that the outcome of that sentence was governed by the terms of subsection 21(1).

The appellant invoked section 14 of the Act in force at the time in support of his Charter-based argument. This section created, by way of presumption, a legal fiction that all the sentences imposed upon an individual constituted a single period of imprisonment or a single sentence, the beginning and end of which are specified. It was on this basis that the appellant claimed, for all intents and purposes, that the next three and final years remaining in his period of imprisonment were those that were imposed on him consecutively in 1975 through the effect of subsection 21(1) of the Act. However, there was nothing in that provision that could indicate that the sentence imposed upon the appellant in January 1975 has not yet been served. On the contrary, section 14 did not affect the priority in which sentences are served, and upheld the principle that all sentences must be served one after the other. Therefore, the three-year sentence received in 1975 was served, has ceased to be effective and the appellant's present detention is the end result of his subsequent convictions.

As to the allegation of injustices, excessive harshness and breach of the principles of fundamental justice which would result from the application of subsection 21(1), that subsection has now ceased to be of consequence and the appellant's present detention results from his many convictions subsequent to the repeal of the subsection (in 1977, before the Charter came into force) and for which the courts have imposed consecutive sentences. Applying the Charter when subsection 21(1) has no contemporary application would constitute a retroactive application that is not legally permissible.

Even if it were conceded that the appellant's right to liberty was still being infringed by the defunct subsection 21(1), the resulting violation would not be a breach of the principles of fundamental justice. First, it is not a breach of fundamental justice to inform in advance an inmate who wants to be paroled of the consequences he will face if his release is forfeited because he commits a crime while on parole. Second, the principles of natural justice are not necessarily opposed to a harsher sentence being imposed for recidivism and breach of the trust that the prison authorities and society have placed in an offender.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

An Act to amend the Parole Act, R.S.C. 1970 (1st Supp.), c. 31, s. 1.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 9, 12, 24(1).

Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 139.

Criminal Code, R.S.C. 1970, c. C-34, s. 649(1).

Criminal Code, R.S.C., 1985, c. C-46, s. 721(1).

Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53, s. 32.

Highway Safety Code, R.S.Q., c. C-24.2.

Parole Act, R.S.C. 1970, c. P-2, ss. 14, 17(1), 21(1).

Parole Act, S.C. 1958, c. 38, s. 20(1).

CASES JUDICIALLY CONSIDERED

APPLIED:

Kula v. Picard, [1983] 1 F.C. 95(T.D.); *Re Kerswill* (1975), 28 C.C.C. (2d) 362 (Ont. H.C.); *Re Guenette* (1975), 27 C.C.C. (2d) 279 (B.C.S.C.); *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; (1997), 143 D.L.R. (4th) 577; 42 C.R.R. (2d) 1; 37 Imm. L.R. (2d) 195; 208 N.R. 81.

DISTINGUISHED:

Marcotte v. Deputy Attorney General of Canada et al., [1976] 1 S.C.R. 108; (1974), 51 D.L.R. (3d) 259; 19 C.C.C. (2d) 257; 3 N.R. 613.

AUTHORS CITED

Cole, David P. and Allan Manson. *Release from Impri-sonment: The Law of Sentencing, Parole and Judicial Review*, Toronto: Carswell, 1990.

APPEAL from a Trial Division decision (*Paris v. Canada (Attorney General)* (1998), 165 F.T.R. 237 (F.C.T.D.)) rejecting the appellant's submissions as to the calculation of his sentence by the Correctional Service of Canada. Appeal dismissed.

APPEARANCES:

Pascal Lescarbeau for appellant.

Éric Lafrenière for respondent.

SOLICITORS OF RECORD:

Pascal Lescarbeau, Montréal, for appellant.

Deputy Attorney General of Canada for respondent.

The following is the English version of the reasons for judgment rendered by

[1] LÉTOURNEAU J.A.: This is an appeal from a decision by Mr. Justice Nadon of the Trial Division rejecting the submissions of the appellant, an inmate in the Federal Training Centre at St-Vincent-de-Paul, Laval, Quebec, regarding the calculation of his sentence by the Correctional Service of Canada (the Correctional Service). The decision of Nadon J. is reported at *Paris v. Canada (Attorney General)* (1998), 165 F.T.R. 237 (F.C.T.D.). The appellant argued unsuccessfully before the Trial Judge that the three-year term of imprisonment imposed on him in January 1975 for offences committed while he was on parole was to be served concurrently with, and not consecutively to, the previous sentence he was serving. The appellant argued in the

Court below that his effective release date should be July 19, 2001. According to the calculation made by the Correctional Service, the appellant's sentence would expire on May 6, 2004. In his appeal book, the appellant revised his calculations and concluded that he ought to have been released on May 6 of this year.

[2] As grounds of appeal, the appellant submits, first, that the Trial Judge erred with respect to the application of subsections 17(1) and, more particularly, 21(1) of the *Parole Act*, R.S.C. 1970, c. P-2 (the Act) and with respect to the appropriate interpretation of the warrants of committal issued on January 9, 1975. Those subsections in force in January 1975 provided:

> **17.** (1) Where a person who is, or at any time was, a paroled inmate is convicted of an indictable offence, punishable by imprisonment for a term of two years or more, committed after the grant of parole to him and before his discharge therefrom or the expiry of his sentence, his parole is thereby forfeited and such forfeiture shall be deemed to have taken place on the day on which the offence was committed.
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> …
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> **21.** (1) When any parole is forfeited by conviction for an indictable offence, the parole inmate shall undergo a term of imprisonment, commencing when the sentence for the indictable offence is imposed, equal to the aggregate of
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> (*a*) the portion of the term to which he was sentenced that remained unexpired at the time his parole was granted, including any period of remission, including earned remission, then standing to his credit, and
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> (*b*) the term, if any, to which he is sentenced upon conviction for the indictable offence,
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> minus
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> (*c*) any time he spent in custody after conviction for the indictable offence, and before the sentence was imposed.

[3] Secondly, he argues that subsection 21(1) of the Act authorizes an unlawful detention because it is in breach of section 7 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter). However, at the hearing he waived reliance on sections 9 and 12, which he had cited in his memorandum of fact and law. I hasten to explain that he is not trying to obtain a declaration that section 21 is constitutionally invalid, as it has since been repealed. But, because he is still suffering its effects, he argues that his Charter-protected constitutional rights, and in particular his right to liberty, are infringed and compromised by the Correctional Service's decision to extend his detention beyond July 19, 2001. Hence, his application for a remedy based on subsection 24(1) of the Charter for an order requiring the Correctional Service to change the date of termination of his remand warrant so that it states that this imprisonment ceased to be authorized effective May 6, 2001.

The Facts

[4] On March 6, 1959, the appellant was convicted of manslaughter and sentenced to a 25-year term of imprisonment that was to expire on March 5, 1984. He subsequently benefited from an amnesty of 750 days that brought forward the date of expiration of his sentence to February 14, 1982. In June 1965 he was released on parole, which was revoked on December 21, 1966. The revocation resulted in deferring the end of his sentence to April 15, 1983, since, at that time, under subsection 20(1) of the Act [S.C. 1958, c. 38], the time spent on parole was not deducted from the duration of the term of imprisonment if the parole was revoked. In other words, an inmate in such circumstances was deemed not to have served his sentence of detention during his parole period that was subsequently revoked.

[5] The appellant was again released by the National Parole Board on February 22, 1971. Parole was again revoked on December 17, 1974, and on January 9, 1975, the appellant was convicted of indictable offences committed while he was on parole. The crimes he was convicted of were serious: conspiracy to commit armed robbery and armed robbery against an individual, conspiracy to traffic in narcotics and sale of narcotics. Those convictions and the sentences that resulted are the basis of this dispute, since the criminal court judge imposed a sentence of three years' imprisonment on each count, to be served concurrently, but, in the opinion of the respondent (which is not shared by the appellant), without specifying their status in relation to the sentence already being served.

[6] The appellant's conviction in 1975 for serious crimes committed while he was on parole led to the forfeiture of the parole, in accordance with section 17 of the Act then in force, with the following result: under subsection 21(1) of the Act, the 1,393 days spent on parole and the three years of imprisonment imposed on January 9, 1975 were added to the portion of the appellant's sentence that had not yet expired. His release date was then deferred to February 6, 1990.

[7] In April 1983, the appellant was given an eight-year sentence to be served consecutively to the sentence he was already serving. His new release date then became February 6, 1998. The following month, the court sentenced him again to one year consecutive to the sentence being served, and his release was deferred to February 6, 1999.

[8] Between June 27 and July 3, 1990, the appellant was released for five days. During the period October 31, 1990 to April 29, 1991, he was sentenced to seven prison terms for offences under the *Highway Safety Code* [R.S.Q., c. C-24.2]. These sentences resulted in a 56-day imprisonment to be served consecutively to the current sentence. This had the effect of deferring his release to April 8, 1999. Three new series of sentences postponed the release date to May 6, 2004:

(a) a sentence of five years consecutive to the current one, received March 11, 1992;

(b) a sentence of 19 days consecutive imposed July 23, 1992; and

(c) a sentence of 10 days consecutive handed down on January 12, 1993.

[9] As I mentioned previously, the appellant is attacking the interpretation of the warrants of committal issued in January 1975 and the Correctional Service's decision to consider the three-year sentence imposed at that time as a sentence to be served consecutively.

[10] I have taken the trouble to outline the uncomplimentary and worrisome background of the appellant, who has spent more than thirty years in prison and who is, in the opinion of the National Parole Board, "excessively institutionalized", in order to explain the basis for the Correctional Service's decision regarding the date on which the appellant should be released and to enable the appellant's submissions to be understood. The least that can be said is that the appellant has failed to fulfill the hopes placed in him by the parole system. Disappointments have accumulated in quick succession, to the detriment of the protection of society. As the respondent's counsel commented at the hearing, the appellant, through his own delinquent conduct, has consistently flouted his right to liberty he is now avidly demanding with his protests against injustice. I will now analyze the appellant's submissions, beginning with the allegation that the Trial Judge erred in interpreting subsections 17(1) and 21(1) of the Act and the warrants of committal issued in January 1975.

<u>Did the Trial Judge err in interpreting subsections 17(1) and 21(1) of the Act and the warrants of committal?</u>

[11] I do not intend to expend a lot of energy on this question since, in my humble opinion and in view of the relevant case law, the Trial Judge correctly interpreted subsections 17(1) and 21(1) and their relationship with subsection 649(1) of the *Criminal Code* [R.S.C. 1970, c. C-34].

[12] Indeed, under subsection 649(1) (now subsection 721(1) [R.S.C., 1985, c. C-46]), "A sentence commences when it is imposed, <u>except where a relevant enactment otherwise provides</u>" (emphasis added). Subsection 21(1) of the Act, as it was in force in 1975, was an enactment that clearly derogated from and made an exception to subsection 649(1) of the *Criminal Code*. As the Trial Judge notes, this was the conclusion reached by Marceau J. (then in the Trial Division) in *Kula v. Picard*, [1983] 1 F.C. 95(T.D.), at page 98. His interpretation was consistent with the Ontario High Court of Justice and the British Columbia Supreme Court: *Re Kerswill* (1975), 28 C.C.C. (2d) 362 (Ont. H.C.); *Re Guenette* (1975), 27 C.C.C. (2d) 279 (B.C.S.C.). Clearly, subsection 21(1) provided at that time that the new sentence received for an offence committed while on parole was added to the *remanet* from the sentence, composed of the unexpired portion of the term at the time parole was granted, plus any remission credited to the inmate. In other words, paragraphs (*a*) and (*b*) of subsection 21(1) of the Act were added together, and from that aggregate, the time spent in custody after conviction but while awaiting sentencing was subtracted, as provided by paragraph (*c*).

[13] The appellant, relying on *Marcotte v. Deputy Attorney General of Canada et al.*, [1976] 1 S.C.R. 108, submits that subsection 21(1) was ambiguous and that this ambiguity should operate in his favour. I do not agree with this submission. Subsection 21(1) was clear and readily understood. It may have resulted in great severity, as the

appellant submits in one of his arguments, but the severity, if any, of the clear result of subsection 21(1) did not give rise to any ambiguity in that subsection. Otherwise, we end up with a genuine contradiction: an ambiguous subsection producing a clear-cut and undeniable result that is the source of the ambiguity!

[14] In my opinion, there is no merit, either, in the appellant's submission that the Correctional Service and the Trial Judge misinterpreted the warrants of committal issued against him on January 9, 1975.

[15] The first warrant of committal states that the sentences are mutually concurrent on each of the two counts, while the second warrant of committal provides that the sentences referred to therein are concurrent on each of the two counts, but also concurrent with those in the first warrant of committal. At no time do these warrants indicate that the total of three years' imprisonment resulting from these warrants must be served concurrently with the sentence already under way, which, in any case, would have conflicted with subsection 21(1) of the Act. In my view, the Trial Judge did not err in finding that the warrants of committal did not require that the three-year sentence be concurrent with the sentence being served and that the outcome of that sentence was governed by the terms of subsection 21(1).

[16] Lastly, this leads me to the appellant's problematic submissions based on the Charter and to the respondent's submission that the Charter does not apply in this case to the concurrent sentences given to the appellant in January 1975.

<u>Does the Charter apply in this case?</u>

[17] It must be pointed out that the appellant's three-year prison sentence, served consecutively to the sentence in progress, was to expire on February 6, 1990, pursuant to subsection 21(1), as I indicated in the background material on the appellant's difficulties with the justice system. Subsection 21(1) therefore ceased to have effect as of that date and the appellant would have been released had it not been for his many convictions subsequent to those of January 1975, including the April 1983 conviction that had earned him an eight-year prison sentence.

[18] It is important to note that the eight-year sentence, as well as all the others that followed, were served consecutively to all those in progress by specific order of the court and not by the operation of subsection 21(1), which had been repealed. The appellant had a significant criminal record and the offences had been committed while on parole, so each criminal court in turn rightly viewed these, as Parliament had in subsection 21(1), as an aggravating circumstance justifying the consecutiveness of the sentences. In short, all the consecutive sentences imposed after January 1975 were consecutive by virtue of court orders, and these orders were never appealed and are not challenged on this appeal. How, in such circumstances, can the appellant therefore allege that his detention is illegal under section 7 of the Charter?

[19] The appellant's submission is based on the former section 14 of the Act, now section 139 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. Initially, section 14 read:

> **14.** Where, either before, on or after the 26th day of August 1969,
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> (*a*) a person is sentenced to two or more terms of imprisonment, or
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> (*b*) an inmate who is in confinement is sentenced to an additional term or terms of imprisonment,
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> he shall, for all purposes of this Act, the *Penitentiary Act* and the *Prisons and Reformatories Act*, be deemed to have been sentenced, on the day on which he is so sentenced in the circumstances described in paragraph (*a*), or on the day on which he was sentenced to the term of imprisonment he is then serving in the circumstances described in paragraph (*b*), to a single term of imprisonment commencing on that day and ending on the last day that he would be subject to confinement under the longest of such sentences or under all of such sentences that are to be served one after the other, whichever is the later day. [Emphasis added.]

In 1970, through *An Act to amend the Parole Act*, R.S.C. 1970 (1st Supp.), c. 31, section 1, section 14 was repealed and replaced by a provision that introduced the concept of a single sentence consisting of one period of imprisonment, the beginning and end of which were determined:

> **14.** (1) Where, either before, on or after the 25th day of March 1970,
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> (*a*) a person is sentenced to two or more terms of imprisonment, or
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> (*b*) an inmate who is in confinement is sentenced to an additional term or terms of imprisonment,
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> the terms of imprisonment to which he has been sentenced, including in a case described in paragraph (*b*) any term or terms that resulted in his being in confinement, shall, for all purposes of this Act, the *Penitentiary Act* and the *Prisons and Reformatories Act*, be deemed to constitute one sentence consisting of a term of imprisonment commencing on the earliest day on which any of those sentences of imprisonment commences and ending on the expiration of the last to expire of such terms of imprisonment.
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> (2) This section does not affect the time at which any sentences that are deemed by subsection (1) to constitute one sentence commence pursuant to sub-section 649(1) of the *Criminal Code*. [Emphasis added.]

[20] It can be seen from a reading of this tortuous section that it creates, by way of presumption, a legal fiction according to which all the sentences received by an individual constitute, under either version, a single period of imprisonment or a single sentence, the beginning and end of which are specified. It is on this basis that the appellant claims, for all intents and purposes, that the next three and final years remaining in his period of imprisonment are those that were imposed on him consecutively in 1975 through the effect of subsection 21(1) of the Act. It is to be noted that the appellant has at no time disputed the validity and legality of the convictions and

sentences handed down in 1975. Nor could he do so by citing the Charter since they were specific and isolated acts that occurred before the Charter came into force: *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at page 383.

[21] Couched in more legal language, the appellant's submission postulates two things. First, through section 14, the decision rendered by the criminal court in 1975 is still producing effects. Second, as a result of section 14, the effect of subsection 21(1) of the Act continues to this day and will do so until he is definitively released. With respect, I believe the appellant's submission is based on a misunderstanding of section 14, its purpose and its effects.

[22] The goal of the presumption in section 14, whether in its original or amended version, was, in the context of the three statutes referred to therein, to harmonize and simplify the complex calculation of sentences by creating a merger of the prison terms or sentences and specifying when they began and ended. Cole and Manson describe the purpose sought by Parliament at pages 367-368 of their volume *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* (Toronto: Carswell, 1990):

> **(b) The "Merger" Provisions of the *Parole Act***
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> Prior to the enactment of the *Criminal Law Amendment Act, 1968-69*, the service of terms of imprisonment did not involve any concept of merger. Sentences were treated as discrete units of time. This situation generated substantial confusion with respect to parole and remission. As demonstrated in the case of *Re McCaud* statutory remission entitlements accrued individually for each sentence, each sentence produced its own independent parole eligibility date, and the consequences of parole revocation when a prisoner was released on parole in respect of a number of sentences were different, depending on the various expiry dates. In an effort to respond to these problems, and to "abrogate" the decision in *McCaud*, the 1968-69 statute established the concept of merger. Essentially, its purpose was to combine all sentences of imprisonment which a prisoner was serving, whether concurrently or consecutively, to create one total term of imprisonment to which the parole, mandatory supervision and remission regimes could apply … .
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> …
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> The original version of the merger provisions was contained in section 14 of the *Parole Act* … .
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> …
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> Although this section has been modified on several occasions since it was first introduced, the principle remains the same.

In fact, the initial version of section 14 stated that the period of imprisonment ended on the latter of the following two hypothetical dates:

(a) when the longest sentence expired, or

(b) if they were consecutive sentences, when the last of these sentences came to an end.

The same principle was repeated in the amended version.

[23] I see nothing in this provision, whose ultimate purpose remained unchanged, that indicates or could indicate that the sentence received by the appellant in January 1975 has not yet been served. On the contrary, section 14 does not affect the priority in which sentences are served, and the final lines of the section, whose original version dealt with the hypothesis of consecutive sentences, recognize and uphold the principle that all sentences must be served one after the other. The second version of section 14 is even more explicit. It specifically states in the second subsection that the merger of the sentences into one does not affect when a sentence begins under subsection 649(1) of the *Criminal Code*. Under that subsection, a sentence commences when it is imposed, except where a relevant enactment otherwise provides:

> **649.** (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

Subsection 21(1) provided that the sentence the appellant received in 1975 was consecutive to the sentence in progress. Therefore that sentence began on April 15, 1983, when the appellant's sentence was to end following the first revocation of his parole on December 21, 1966. I am of the view that the three-year term of imprisonment received by the appellant in 1975 was served, that it has ceased to be effective and that the appellant's present detention is the end result of his subsequent convictions.

[24] The second part of the appellant's submission deals with the ongoing effect of subsection 21(1), which he alleges is unfair, unduly harsh and contrary to the principles of fundamental justice, and leads to absurd results. As an example of absurdity, the appellant cites the hypothetical case of an inmate who has committed the same offence inside the prison walls as an individual who has been paroled. Because of the effect of the legislation, the individual on parole would automatically receive a sentence consecutive to the one being served, while the fate of the inmate would lie with the court, which has the discretionary power to sentence consecutively or otherwise.

[25] The alleged injustices, excessive harshness and breach of the principles of fundamental justice would result from the fact that under subsection 21(1), the appellant served three years of prison consecutively rather than concurrently, that all the time he was on parole had to be served in prison and that he lost all of his earned remission.

[26] I am satisfied, as I was with respect to the January 1975 sentence, that subsection 21(1) has now ceased to be of consequence and that the appellant's present detention results from his many convictions subsequent to the repeal of the subsection, for which the courts have imposed consecutive sentences. In other words, I do not believe the appellant's sentence is still affected by subsection 21(1), which was repealed in 1977 before the Charter came into force (*Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, section 32). Applying the Charter in such circumstances, when subsection 21(1) has no contemporary application, would, in my opinion and to

quote Iacobucci J. in *Benner*, *supra*, constitute a retroactive application that is not legally permissible.

[27] However, even if I were to concede that the appellant's right to liberty was still being infringed by the defunct subsection 21(1), I do not believe the resulting violation would be a breach of the principles of fundamental justice.

[28] In the first place, it is not a breach of the rules of fundamental justice to inform in advance an inmate who wants to be paroled of the consequences he will face if his release is forfeited because he commits a crime while on parole.

[29] Secondly, from the perspective of making a paroled inmate accountable and protecting the society in which he lives, the principles of fundamental justice are not necessarily opposed to a harsher sentence being imposed for recidivism and breach of the trust that the prison authorities and society placed in the offender. It all depends on the measure that is used, and I am unable to conclude that the one that prevailed at the time in question breached the then-current or even the present principles of fundamental justice. On that point, we must refrain from evaluating and judging a legislative norm such as subsection 21(1) based on today's customs and knowledge, given that the norm was enacted over thirty years ago in accordance with the needs, customs and knowledge of that day.

[30] For these reasons, I would dismiss the appeal with costs.

DÉCARY J.A.: I concur.

NOËL J.A.: I concur.