

TOP FIVE 2015

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v NUR, **2015 SCC 15, [2015] 1 SCR 773.**

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15272/index.do>

Facts

A young man entered a community centre in the Jane and Finch neighbourhood of Toronto. That area had high levels of crime and gun violence was a serious concern. The man told a staff member at the centre that he was afraid because there was someone waiting outside to "get him". After the staff member confirmed that someone was outside, a supervisor called the police and put the centre on lockdown.

When the police arrived, they saw four men outside one of the entrances of the centre. The men scattered, and the police chased them. One of the four men, Hussein Nur, was holding his left hand against his body and appeared to be concealing something. As the officer pursuing him drew near, he saw Mr. Nur throw something to the ground moments before he caught and arrested him. When he revisited the site where he saw Mr. Nur throw the object, he discovered a loaded handgun under a parked car.

Mr. Nur was not found to be involved with the aforementioned threatening behaviour, and it was not clear when, for how long, or how he came to possess the loaded handgun. He was charged under s. 95(1) of the *Criminal Code* with possession of a loaded prohibited firearm.

Criminal Code of Canada

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

- (a) an authorization or a license under which the person may possess the firearm in that place; and
- (b) the registration certificate for the firearm.

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of
 - (i) in the case of a first offence, three years, and
 - (ii) in the case of a second or subsequent offence, five years; or



Canadian Charter of Rights and Freedoms

s. 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

s. 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

s. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Procedural History

At trial, the Crown had the option to proceed with the charge against Mr. Nur as a summary or an indictable offence. As a summary offence, the charge carries a maximum sentence of one year, but as an indictable offence it carries a minimum sentence of three years.

The Crown elected to proceed by indictment. Mr. Nur pled guilty, but argued that the three-year minimum sentence violated s. 12 of the *Canadian Charter of Rights and Freedoms*, because it was disproportionate to the offence and therefore a form of cruel and unusual punishment.

The judge held that the three-year mandatory minimum sentence did not offend s. 12 of the *Charter*. However, the judge also ruled that the two-year difference between the sentencing requirements for summary and indictable offences was contrary to s. 7 of the *Charter* because it was arbitrary and was not justified under s. 1.

Nevertheless, the trial judge held that Mr. Nur had not personally been affected by that gap because the Crown would not have proceeded summarily against him in any event. They dismissed the s. 7 claim. Mr. Nur was sentenced to one day in prison because he had already served twenty-six months in custody, which was credited as double time.

Mr. Nur appealed to the Ontario Court of Appeal (ONCA), which allowed the appeal. The ONCA acknowledged mitigating factors, but ultimately upheld the trial judge's decision with respect to Mr. Nur's sentence. That Court also found that the mandatory minimum sentencing regime violated s. 12 of the *Charter*. The Crown appealed to the Supreme Court of Canada (SCC).

Issues

1. Do the mandatory minimum terms of imprisonment in s. 95(2)(a)(i) and (ii) of the *Criminal Code* infringe s. 12 of the *Charter*?
2. Do the mandatory minimum terms of imprisonment in s. 95(2)(a)(i) and (ii) of the *Criminal Code* infringe s. 7 of the *Charter*?
3. If so, can either of these be saved under s. 1 of the *Charter*?



Decision

The SCC declared ss. 95(2)(a)(i) and (ii) of the *Criminal Code* to be of no force or effect as they violated s. 12 of the *Charter*. However, they upheld the sentences imposed by the trial judge, and dismissed the appeals.

Ratio

A law must be *Charter*-compliant in all reasonably foreseeable situations. A mandatory minimum sentence infringes upon the guarantee against “cruel and unusual punishment” in any situation where it is reasonably hypothetical that the law could produce such a punishment.

Reasons

To determine whether a mandatory minimum sentencing provision violates s. 12 of the *Charter*, the majority identified two questions to address. The first is whether the sentence is grossly disproportionate to the specific crime committed by the individual before them. In other words, if the penalty imposed on Mr. Nur was more severe than this crime should warrant, it would be cruel and unusual punishment. The second is whether it could be reasonably foreseeable that applying the law could impose cruel and unusual punishment upon other offenders being sentenced.

Recalling that Mr. Nur was sentenced to a single day in prison in, addition to the time served in custody, he was not

arguing that his own sentence was grossly disproportionate at this point. For the SCC, therefore, the question here was whether mandatory minimum terms of imprisonment could be grossly disproportionate when applied to others in different circumstances. The majority found that they could indeed. They presented a hypothetical scenario where a licensed, unloaded gun and ammunition are mistakenly stored in an improper place. In this scenario, the three-year minimum sentence would still apply, but it would be disproportionate to the offence, as there is very little blameworthiness and no real harm or risk to the public arising from the behaviour.

S. 95(2)(a)(i) of the *Criminal Code* can be similarly discounted as being grossly disproportionate for less serious offenders. There are reasonably foreseeable scenarios in which the punishment prescribed is unnecessarily severe compared to the goals of protecting the public, expressing moral condemnation, and deterring similar behaviours in other potential offenders.

Because the majority decided that the provisions of the *Criminal Code* failed under s. 12 in this case, they did not need to determine whether they also failed under s. 7.

The Court applied the *Oakes* test in deciding whether this infringement was justifiable under s. 1, which determines reasonableness through three factors: a law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally



impairing of the right in question; and
(3) there is proportionality between the deleterious and salutary effects of the law.

A rational connection between deterrence and mandatory minimum sentences was established, but the law failed on the second and third requirements. The Court held that the law was not minimally impairing, as lawmakers could have written a law that provided less severe sentences for less serious violations of the provision, and that it was not proportionate because its potential negative impact on *Charter* rights outweighs its potential benefit to the public.

Dissenting Opinion

The SCC was not unanimous in this decision. Justice Moldaver, writing on behalf of the dissent, challenged the high threshold set for reasonable foreseeability. He wrote that these scenarios, while technically possible, are highly unlikely to ever actually arise. Further, the minority found that the difference between “true” crimes and the less-serious infractions in the hypothetical scenarios is already addressed by Parliament through the crafting of s. 95 as a hybrid offence – this means that the Crown would always have the option of proceeding summarily with less serious or unintentional offences, but by indictment in more serious cases.

DISCUSSION

1. Why do you think the Crown has the option of proceeding summarily or by indictment in some kinds of criminal charges?
2. Why do you think there are mandatory minimum sentences for some offences? What might be some positive or negative impacts of having them in place?
3. Does three years in prison seem like a fair sentence considering Mr. Nur's offence?
4. The dissenting opinion from the SCC argued that it may have been unnecessary to strike down the law because the Crown always has the option of proceeding summarily against people who commit less serious offences. Might there be any problems with leaving the law as it stands nonetheless?
5. Do you agree with the SCC's finding that s. 95(2)'s negative impacts on *Charter* rights outweigh its benefits for law enforcement and the good of Canadian society? Explain.



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