R. v. Critton (P.D.), [2002] O.T.C. 451 (SC)

Judge: Hill, J.

Court: Superior Court of Justice of Ontario (Canada)

Case Date: June 12, 2002

Jurisdiction: Ontario

Citations: [2002] O.T.C. 451 (SC)

Key Phrases Credit against a federal sentence for presentence state custody. Criminal record. General deterrence. Kidnapping for ransom. Extortion attempts. Aircraft hijacking.

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Her Majesty The Queen v. Patrick Dolan Critton (Court File No. CRIM(P)6030/02)

Indexed As: R. v. Critton (P.D.)

Court of Ontario

Superior Court of Justice

Hill, J.

June 12, 2002.

Summary:

This headnote contains no summary.

Criminal Law - Topic 5840

Sentencing - Considerations on imposing sentence - Prospective deportation of convict - See paragraphs 77 to 86.

Criminal Law - Topic 5846.3

Sentencing - Considerations on imposing sentence - Vigilantism - See paragraphs 68 to 76.

Criminal Law - Topic 5848.2

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Criminal Law - Topic 5849.15

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Criminal Law - Topic 5904

Sentencing - Sentence - Particular offences - Kidnapping and abduction - See paragraphs 1 to 126.

Criminal Law - Topic 5911

Sentencing - Sentence - Particular offences - Extortion - See paragraphs 1 to 126.

Cases Noticed:

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United States of America v. Allard and Charette, [1991] 1 S.C.R. 861; 122 N.R. 352; 40 Q.A.C. 274, refd to. [para. 56].

R. v. Edwards (S.) (2001), 147 O.A.C. 363; 155 C.C.C.(3d) 473 (C.A.), refd to. [para. 61].

Sillery v. R. (1994), 180 C.L.R. 353 (Aust. H.C.), refd to. [para. 66].

United States v. Ali, [1998] CADC-QL 13 No. 96-3127, refd to. [para. 67].

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Jackson v. Brennan (1991), 924 F.2d 725 (7th Cir.), refd to. [para. 67].

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R. v. Pangman - see R. v. Vermette (I.M.).

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Counsel:

M. Saltmarsh, for the Crown;

I. Andre, for the defence.

This matter was heard on May 3, June 3 and 4, 2002, before Hill, J., of the Ontario Superior Court, who released the following reasons for sentence on June 12, 2002.

Please note: The following judgment has not been edited.

INTRODUCTION

[1] Hill, J. : At Christmas time of 1971, Patrick Critton hijacked an aircraft to Cuba. Three decades later he was arrested. The question now for the court is the fit and just sentence.

[2] The accused pleaded guilty to charges that he:

... on or about the 26 th day of December, 1971, at the Town of Mississauga, in the said County, unlawfully did kidnap Captain D.E. Glendinning, First Officer H. Reid, Virginia Harnadek, Ruth Snell, Helga Wetirings and Jean Keldson with intent to cause them to be unlawfully transported out of Canada against their will, contrary to section 247(1)(b) of the Criminal Code of Canada. [count #1]

. . . . .

... on or about the 26 th day of December, 1971, at the Town of Mississauga, in the said County, unlawfully did, without reasonable justification or excuse and with intent to gain passage from Canada to Cuba, did induce Captain D.E. Glendinning by threats and menaces to fly him from Canada to Cuba, contrary to section 305 of the Criminal Code of Canada. [count #3]

OVERVIEW OF THE CRIMES

[3] On Sunday, December 26 th , 1971 at about 6:40 p.m., Air Canada Flight #932 left Thunder Bay on route to Toronto International Airport in Mississauga, Ontario. On board, there were eighty-three passengers and six crew members.

[4] Fifteen minutes prior to the scheduled landing at the Toronto Airport, the accused exited a washroom in the forward area of the airplane behind the cockpit and handed flight attendant Jeanne Keldson a note reading:

Think. We have fragmentation grenades and a 38 calibre revolver. Take me to the captain in the cockpit. We are going to Havana, Cuba. This is no joke.

[5] Ms. Keldson immediately took the note to Captain Glendinning. Mr. Critton came to the cockpit and advised that no one would be harmed if the crew followed his instructions. The accused directed that the flight should continue as scheduled to the Toronto Airport where the passengers would be permitted to deplane and the aircraft was to be refueled for a flight to Cuba. The accused stated that the crew was to remain on board and no one would be allowed entry to the plane.

[6] Mr. Critton stated he had a gun. A small pistol was observed in his right hand. With his left hand, the accused pulled a grenade from a pocket stating he had "other explosives" in a small airline bag he was carrying.

[7] Flight #932 landed at the Toronto Airport where the passengers deplaned. Mr. Critton showed concern that the passengers not become aware of what was occurring. It appears they did not. The accused emerged from the cockpit and ordered members of the flight crew to pull all the window shades down. All flight attendants were then ordered into the forward galley of the airplane. Mr. Critton then directed the windows in the galley door be covered.

[8] The accused spoke slowly and quietly to the flight attendants. He gave his name as "Pat". Mr. Critton appeared anxious to be underway asking questions concerning alternate exits and hatches. The accused assured the crew no one would be hurt "if the people on the ground were smart".

[9] Mr. Critton related his knowledge of details of other hijackings involving American Airlines saying he had selected a Canadian airline because "we were very cool people" unlike the FBI which he was very much against.

[10] At a point, Mr. Critton explained how the grenade in his possession worked. He explained he had been a soldier in Vietnam and had much experience with such items. Mr. Critton discussed Vietnam with one of the attendants. In fact, the accused had not been to Vietnam.

[11] The accused related that he was born in Harlem, New York adding that while he had had a tough life he received a good education. A discussion ensued about birth or zodiac signs of those present.

[12] Throughout the conversation at the airport, the accused called to the pilots in the cockpit inquiring when they would be taking off. When the captain asked Mr. Critton whether he wished to speak to anyone, the accused responded negatively. The accused refused the captain's request to allow some of the crew to leave the plane.

[13] When the captain asked Mr. Critton if he was seeking money, he became agitated saying he was not looking for money. Mr. Critton then said to one of the flight attendants:

What do they think I am? Isn't that just like them to think that money will fix everything?

[14] The accused was pleased to hear from the captain that the flight to Cuba would be non-stop without going through Miami.

[15] Prior to take off, the accused ordered the flight attendants to sit on the galley floor as opposed to their seats. Mr. Critton scrutinized the aft area of the plane checking that no one had come on board through a rear exit.

[16] During the taxiing phase, Mr. Critton produced pictures of his two-year-old son speaking fondly of the child. He showed photos of his wife. The accused mentioned relatives killed in Vietnam and spoke of a bank robbery although there was no indication he had been involved in the robbery. In apparent reference to the police and ground crews, the accused stated he hoped there were "no heroes out there". At about 8:44 p.m., the flight to Havana, identified as Flight #67, left the Toronto Airport.

[17] While Mr. Critton at no time described the hijacking as a mission, he described himself as "a man with a job to do".

[18] After takeoff, Mr. Critton asked the flight attendants their names. He said they could call him Pat. He showed his passport with the name "Patrick Critton". The accused appeared more relaxed once the aircraft was again in the air. Mr. Critton spoke to the crew about their

respective nationalities. The accused spoke about the Quebec crisis. He remarked that Canada was a very attractive country. Mr. Critton allowed the crew to have coffee during the flight.

[19] A discussion ensued concerning the black race, capitalism and bureaucracy. The accused did not express pro-black radical ideas although he was clearly anti-government and anti-corporation. He wanted to wipe out racism and poverty amongst black and white peoples. Mr. Critton explained his problems finding a job despite having a college education. He related that for a two-year period he had been a high school history teacher. The accused spoke of the problems of the black man in society. Mr. Critton stated he was not bitter that he and his people were not employed.

[20] Several times in the conversation, the accused said, "I am human, I get lonely, I cry, and I need like anyone else". He spoke of his childhood. He spoke of love and being needed. In speaking of his mother, Mr. Critton said she would feel better when she heard he was safe in Cuba. The accused put down his grenade and gun and spoke about drugs in Vietnam. He stated his sister had a drub problem saying he would rather see someone rob a bank than push drugs.

[21] When asked, the accused said someone would be expecting him in Cuba although that person would not be at the airport. Mr. Critton expressed his opinion that the Cuban police would put him in jail for ten to fourteen days during their investigation before releasing him. He expected the Cuban authorities to be sympathetic. Mr. Critton said he had to get to Cuba because he was a wanted man. He said he had killed and hijacked before and could never come back without facing twenty-five years in prison. Mr. Critton stated he had been in Cuba in May of 1968 and knew the Havana airport. The accused, in actual fact, had not previously been to Cuba.

[22] At some point in the flight, the accused fell asleep. The flight crew elected not to attempt to subdue him because of the weapons he possessed.

[23] As the airplane approached Cuba, the accused requested binoculars. None were on board. When the flight landed, Cuban officials boarded the aircraft and Mr. Critton was taken into custody without incident. The accused surrendered his handgun and grenade. There were two other hijacked aircraft already at the Havana airport.

[24] According to Ms. Keldson, the accused at no time pointed his gun at anyone's head or stomach. In her view, "He did not want to frighten us". He never threatened to kill the flight attendants. The accused remained throughout in control of his emotions.

THE INVESTIGATION AND ARREST

[25] The aircraft refueled in Havana and returned to Canada arriving at about 6:00 a.m. on December 27 th .

[26] Members of the then Mississauga Police Force entered the plane and seized various items identified to them by crew members as things Mr. Critton had touched. Subsequent fingerprinting investigation revealed the hijacker to be Patrick Dolan Critton.

[27] A warrant of arrest issued for the accused's apprehension. In 1972, Canada requested the accused's extradition from Cuba. The request was refused.

[28] Using the internet in 2001 as a measure to investigate the 1971 hijacking incident as a re-opened cold case, Peel Regional Police Service investigators located a reference to a Patrick Critton in The Journal newspaper of Mount Vernon, New York. Police in New York initially assisted with the ruse of attending Mr. Critton's neighbourhood in furtherance of a missing child investigation. When the accused touched the photo of the alleged missing child, his fingerprints remained which were cross-matched to those seized in 1971.

[29] The accused was arrested in New York on September 8 th , 2001 by the FBI and New York City Police on a provisional arrest warrant. The accused was surprised by the attendance of Canadian investigators. He did not believe his arrest related to the December, 1971 hijacking.

[30] Mr. Critton provided inculpatory statements to the FBI and to the Peel Police. The accused indicated the grenade he had on December 26 th , 1971 was a dummy.

[31] Mr. Critton waived extradition proceedings and was returned to Canada on November 6 th , 2001. The accused waived a judicial interim release hearing and his preliminary inquiry. The offender has been ordered to be deported from Canada.

[32] While in custody at the Maplehurst Correctional Institute, the accused has engaged in teaching school subjects to other inmates.

BACKGROUND OF ACCUSED

[33] At the time of the offences, Mr. Critton was twenty-four years of age.

[34] The accused was born in the Lincoln Heights Project in Harlem, New York on July 14 th , 1947. Patrick Critton was one of five children. Mr. Critton grew up in an overtly racist world. He was called a "nigger" with frequency. Harlem was a major African-American political centre during the 1960's.

[35] The accused was a good student in public school and high school. The community was poor and violent. Patrick Critton's father died of a drug overdose in 1964. A younger brother was shot and killed in an unsolved homicide. There were shootings and bombings in the neighbourhood. In the late 1960's, there emerged a vigorous anti-Vietnam War agenda and a robust civil rights movement.

[36] In 1968, Martin Luther King Jr., a champion of civil rights, and Robert Kennedy, Attorney General and a presidential aspirant, were both murdered. Black radicalism was an integral part of the social activism of the day including the Black Panthers, the Black Liberation Army, the Republic of New Africa, and the Urban League.

[37] In 1969, the accused graduated from Lehman College in New York with a B.A. Mr. Critton became a member of the Republic of New Africa (RNA), a group advocating formation of an independent black republic in five southern states. The accused was, needless to say, fervently anti-racist. In 1971, the accused's first son was born.

[38] In the 1969-1971 period, the accused became progressively more involved in RNA activities to the point where he ran three independent cells of RNA members. Each had safe houses with food, weapons, ammunition and medical supplies. One was in essence a bomb factory. The houses were used for para-military training, sanctuary and storage of supplies. The RNA considered itself at war. There were white radical groups intent on not only defeating equality and anti-segregation laws but also eliminating black communities.

[39] Over time, the RNA adopted "the ends justify the means" approach of the extremely militant Black Panther movement. Banks were robbed using heavy fire-power to secure funding for the cause. The accused admitted undertaking various actions in furtherance of the cause including participation in the armed robbery of three banks in New York City. In a July 29 th , 1971 robbery of the Banker's Trust, the accused was to act as the wheelman. He fled on foot before a shootout with the police began. One robber was killed and a second injured. After laying low for a time in a RNA safe house, and believing he was the target of an active manhunt, the accused decided to leave the United States for Canada, a country widely considered to be racially tolerant and sympathetic to the anti-war movement.

[40] The accused travelled by bus from New York City to Buffalo and entered Canada. Mr. Critton took a bus headed from Toronto to some point in western Canada but, on Christmas day, 1971, on account of weather conditions, was unable to continue past Thunder Bay. He became totally depressed and demoralized and even considered returning to the United States. Mr. Critton bought a plane ticket from Thunder Bay to Toronto thinking he could force the airline to transport him to Cuba.

[41] After Cuban authorities removed him from the Air Canada flight in Havana, the accused was placed in solitary confinement at a facility known as G-2 which appears to be a state security holding facility and part of La Cabana Prison. He was interrogated but not charged with committing any crime.

[42] The accused then spent about eight months in a facility which became known as "Hijackers Hotel" - a converted mansion or hotel housing non-Cuban citizens who had come to the country by hijacking aircraft. Occupants were subject to some government restrictions. Then, for a period of about two years, Mr. Critton lived in communities with wooden shacks and mosquito netting, cutting sugar cane in the fields and working on construction projects.

[43] The accused approached government officials, seeking authority to leave Cuba for Algiers. At some point in 1974, the accused departed for Tanzania, Africa. The Black Panthers' embassy in Algiers had been closed and there was a cooperative socialist regime in Tanzania with a sizable population of African-American expatriates.

[44] The accused secured employment as a teacher. He remarried in 1983. Over the twenty-year period spent in Tanzania, he became a teacher, head of a school history department, and a school headmaster. Two more sons were born. Mr. Critton enrolled in a masters degree programme at the University of Dar es Salaam. He became extensively involved in community and church activities.

[45] Using his own name and his American social security number, the accused applied for, and received, a valid United States passport in 1991. He remained apprehensive about returning to the United States, unsure of his legal jeopardy. He again applied for a U.S. passport in 1994 and, persuaded by his wife to return to the United States, he did so in 1994 leaving behind his sons and his wife.

[46] In the 1994 to 1996 period, the accused taught in public schools in Harlem and Mount Vernon, New York. He also worked as a counselor at a juvenile correctional detention centre.

[47] In 1996, Mr. Critton became involved with a United Way funded project, the Westchester County Community Opportunity Program Inc. (WestCOP), in Mount Vernon. The WestCOP Community School initiative engaged parents and teachers in a cooperative effort after school to provide tutoring, extra classes, and extra-curricular activities in a community with the highest incidence of drug abuse, teen pregnancy, AIDs, firearms offences and crime amongst young persons in New York. The accused became director of the programme designed to intervene in the lives of children most at risk. As well, Mr. Critton acted as an instructor in the Summer Youth Employment Program.

[48] Mr. Critton undertook steps to upgrade his own skills including continuing education at Pace University and Cornell University. In 1997, his sons arrived from Tanzania. He was a single parent from 1997 to the time of his arrest.

AIRCRAFT HIJACKINGS

[49] The court was informed that the 1971 hijacking by Patrick Critton was the only successful act of air piracy of a flight originating in Canada to an international destination.

[50] In 1961, the first hijacking of an American commercial aircraft took place. Later in the year, with the encouragement of President Kennedy, Congress enacted a federal crime proscribing aircraft hijacking - a crime punishable by death. From 1961 to 1967, the United States averaged one hijacking per year. Then in 1968, there were 18 acts of air piracy. The following year, there were 40 attempted skyjackings, 33 of which were successful: United States v. Davis , 482 F.2d 893 (9 th Cir.1973) at para. 16.

[51] By 1968, United States' authorities were developing hijacker profiles and installing magnetometers in some larger airports. He a 1970 presidential initiative, A Program to Deal with Airplane Hijacking, the U.S. Department of Transportation was directed to develop approaches for the use of surveillance and detection techniques at all American airports. What followed were government attempts to use informal means to obtain cooperation from air carriers. Armed sky marshals rode some flights. Aircraft cockpit doors were locked in-flight with the only key inside.

[52] In September of 1971, the FAA concluded that voluntary cooperation was not succeeding. A recommendation was made for a new rule requiring all air carriers to submit a screening program to the FAA for approval. The proposed rule was enacted February 1 st , 1972. By July

of 1972, there was widespread prescreening of all passengers including magnetometer use. At some point in 1973, all United States' airports with commercial travel had established pre-travel screening procedures.

[53] The most frequent destination of flights hijacked in the western hemisphere by terrorists, radicals, criminals, and others was Cuba. Hijackers who were members of U.S. black radical groups such as the Black Panthers and related splinter groups were, for a time, viewed by Cuba as victims of FBI conspiracies and as political refugees from a capitalist society criticized for its racial discrimination. Black Panthers Huey Newton and Eldridge Cleaver became inhabitants of Cuba. Cuba was frequently used as a stopping-off point for American black radicals on their way to Africa.

[54] Not until July 24 th , 1972 (S.C. 1972, c. 13, s. 6 (Criminal Law Amendment Act, 1972), was the predecessor provision to the current s. 76 of the Criminal Code enacted and proclaimed by Parliament as a domestic response ratifying the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention 1970) signed by Canada December 16 th , 1970. The statutory initiative was also influenced by Canada being a signatory to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation September 23 rd , 1971 in Montreal.

[55] The preamble to the Hague Convention 1970 reads:

CONSIDERING that unlawful acts of seizure of exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

[56] The multi-national conventions together with consequential domestic legislation by countries throughout the world reflected a determination to combat hijacking on an international scale. Where the crime of hijacking was not listed in a bilateral treaty between nations, extradition was not possible: United States v. Allard & Charette , [1991] 1 S.C.R. 861 at 863-4 per La Forest J.

[57] Canada's decision to deal with aircraft hijacking came at a time when acts of air privacy had reached almost epidemic proportions (Commons Debates , May 2 nd , 1972 at page 1818, and, May 16 th , 1972 at pages 2329-2330). Canadian airports had little pre-flight screening capability (Commons Debates , April 27, 1972, page 1702). Parliament was especially concerned with hijacking motivated as a political action (Commons Debates , April 27, 1972 at page 1704, and, May 16 th , 1972 at page 2330) and as an action designed "to bring about extortion by way of ransom" (Commons Debates , April 27, 1972 at page 1772).

[58] Canada's hijacking crime carried a maximum term of life in prison. In the Unites States, section 1472(1) of 49 U.S.C. prescribed death as the maximum punishment for aircraft hijacking and 20 years' imprisonment as the mandatory minimum.

[59] The Los Angeles Times of August 4 th , 1983 (online at http://www.rose-hulman.edu/~delacova/hijackers/flying-high.htm) reported that since 1961, from 71 different U.S. airports, there had been 225 attempted hijackings of American airliners, 115 of them successful with the peak period in 1968 to 1972 when 117 hijacking attempts were undertaken, 69 of them successful. This accords with the data described by Professor R.T. Holden of Indiana University in his article, The Contagiousness of Hijacking (1986), 91 American Journal of Sociology 874:

From late 1958 through 1969, aircraft hijacking was predominantly a phenomenon of the Western Hemisphere, centered on Cuba, and many of the hijackings of U.S. planes to Cuba are best understood in that larger context. Of the 177 worldwide hijacking attempts between 1958 and 1969, 80% originated in the Western Hemisphere and 77% either originated in Cuba or were efforts to divert planes to Cuba. (page 880)

. . . . .

... the hijacking rate in the United States increased dramatically in 1968 and remained high through 1972. A similar increase occurred in hijacking attempts outside the United States. There were two peaks in the rate of U.S. hijacking activity during that period, one early in 1969 and one in 1972 ... The first peak consisted primarily of hijackings by individuals seeking transportation to Cuba, whereas the second consisted primarily of extortion attempts. (page 881)

By the end of 1971 there were far more hijackings for extortion than for transportation. Of 111 total transportation hijacking attempts between 1968 and 1972, 90 were attempts to reach Cuba ... (page 882)

. . . . .

Another 23 of those who hijacked planes to Cuba were black Americans, who committed the hijackings during a period of militant civil rights activity in which leftist ideology was prominent. (page 882-3)

. . . . .

Although far more hijackings occurred in the United States than in any other country, hijacking was a worldwide phenomenon. ... the peak years for transportation hijacking outside the United States were 1969 and 1970. Between 1968 and 1972 there were almost as many hijackings to Cuba from outside the United States as there were from within it. (page 883)

. . . . .

The next extortion hijacking in the United States, in September 1971, was an attempt to gain the release of several Black Panthers from prison. That incident happened during the same period as several hijackings of Jordanian planes by Palestinians.

The most famous of all U.S. hijackings took place on November 24, 1971. A man who boarded a flight in Portland, Oregon, under the name of D.B. Cooper hijacked the plane, demanding a ransom of $200,000 and two parachutes. His demands were met and he later bailed out with the money. The idea of a parachute escape may not have originated with Cooper, however; a hijacker who held a Canadian plane for ransom just 12 days earlier had attempted unsuccessfully to bail out (Phillips 1973). (page 885)

. . . . .

The hijacking rate in the United States began to decline in late 1972 and never again reached the high level of the period 1968-72. In the 10-year period 1973-82, there was an average of only 9.3 hijacking attempts in the United States per year, compared with 29 attempts per year for 1968-72. Foreign hijackings also decreased after 1972, though not as sharply as U.S. hijackings. (page 885)

POSITIONS OF THE PARTIES

[60] There is agreement between the prosecution and the defence that reform, rehabilitation and specific deterrence are of no concern with respect to Patrick Critton. The offender's crime-free existence for the past three decades, together with his contributions to the teaching

profession and the advancement of under-privileged and at-risk children in New York and Tanzanian communities, legitimately eliminates these sentencing principles as factors contributing to punishment.

[61] Insofar as the accused's self-admitted involvement in serious criminal activity as a black radical at a time when equality and desegregation for American blacks were far more illusory than real, Mr. Saltmarsh, with his customary fairness, and having regard to the principles espoused in Regina v. Edwards (2001), 155 C.C.C. (3d) 473 (Ont. C.A.), seeks to rely on this conduct only as narrative backdrop to explain Mr. Critton's apparent fugitive status during the few hours he spent in Canada in December, 1971.

[62] The Crown stresses the gravity of kidnapping in a hijacking context and the intimidation of the flight crew confronted by an armed air pirate. The prosecution emphasizes general deterrence as the principal factor to be weighed here given the global concern over hijacking crimes. As well, in submitting that a term of imprisonment of 10 to 12 years beyond the credit for pre-sentence custody would be a fit disposition, Mr. Saltmarsh points to the need for a denunciatory sentence from the court to properly serve the proportionality interests of sentencing.

[63] Mr. Andre, while recognizing the gravity of the crimes here, in terms of the threat to aircraft travel and the international dimension of the case, submits that the range of sentence after credit for pre-sentence custody is 3 to 6 years further incarceration. The defence places particular emphasis on Mr. Critton's rehabilitation, the significance of the outstanding deportation order, and the delay between the criminality and the imposition of sentence.

SENTENCING FACTORS

[64] Prior to engaging in the conventional sentencing analysis applying the principles set out in ss. 718, 718.1 and 718.2 of the Criminal Code , some assessment is necessary of the role of the following four factors in assessing the appropriate disposition:

(1) the relevance of the hijacking of the Air Canada aircraft

(2) the delay or gap in time between the crimes and the sentencing hearing

(3) the offender's imminent deportation

(4) pre-sentence custody.

The Hijacking Context

[65] The accused's pleas of guilt justify conviction for the offences of kidnapping and extortion. In 1971, there was no domestically prohibited crime of hijacking. Nevertheless, Mr. Critton's act of air piracy is very much the context of the crimes for which he is to be sentenced. It cannot be ignored.

[66] The accused's pleas of guilt, as a matter of law, acknowledge the blameworthy states of mind for the crimes charged. This, however, says nothing about the accused's motive - a significant factor in the sentencing calculus. In Sillery v. The Queen (1994), 180 C.L.R. 353 (H.C. Aust.) at 357, Chief Justice Gibbs observed:

It is true that hijacking is generally a most serious crime, which ought to be punished by severe penalties, as Art. 2 of the Convention recognizes. However, even in the case of such a crime there may exist wide differences in the degree of culpability of particular offenders, so that in principle there is every reason for allowing a discretion to the judge of trial to impose an appropriate sentence not exceeding the statutory maximum. One may compare, for example, the case of an unarmed drunken man who seeks to take control of an aircraft by the use of his fists with that of a terrorist armed with a bomb.

[67] Review of even a small sampling of the limited jurisprudence dealing with aircraft hijackings, inevitably including kidnapping and extortion, reflects a broad spectrum of motivation on the part of criminal defendants:

(1) political terrorism: United States v. Ali , [1998] CADC-QL 13 No. 96-3127; Re Haas, The Times , Nov. 17, 1998 (Story #957382756); United States v. Busic et al. , 592 F.2d 13 (2 nd Cir. 1978)

(2) ransom/money extortions: Allbee v. Maas , [1992] CA9-QL 267; United States v. Compton , 5 F.3d 358 (9 th Cir.1993); Jackson v. Brennan , 924 F.2d 725 (7 th Cir.1991); United States v. McNally , 485 F.2d 398 (8 th Cir.1973); United States v. Trapnell , 495 F.2d 22 (2 nd Cir.1974)

(3) prison escapes: United States v. Clark , [2001] CA11-QL 515 No. 00-16295; Regina v. Kendall , [1992] E.W.J. No. 3000 (C.C.A.) (Q.L.); United States v. Hack , 782 F.2d 862 (10 th Cir.1986)

(4) racial turmoil: United States v. Johnson , 823 F.2d 840 (5 th Cir. 1987); Robinson v. United States , [1991] CA9-QL 3134 No. 90-55884

(5) Vietnam War protest: United States v. Sibley , 595 F.2d 1162 (9 th Cir. 1979)

(6) mental illness: United States v. Bohle , 475 F.2d 872 (2 nd Cir. 1973)

(7) flight from political persecution: Regina v. Abdul-Hussain , [1998] E.W.J. No. 4183 (C.C.A.) (Q.L.); Regina v. Membar (as summarized in The Times , Feb. 10, 2000, Story No. 950009990); Regina v. Safi et al. (as summarized in The Times , Jan. 19, 2002, Story No. 938393641)

(8) release of an imprisoned comrade: United States v. Trapnell, supra.

Other hijackers included individuals such as Cuban nationals returning home or persons fleeing the commission of another crime such as a bank robbery.

Significance of Delay Between Crime and Sentencing

[68] There is serious disagreement between the parties as to the legal significance of the 31 1/2-year delay between the crimes and the sentencing hearing. The prosecution's emphasis upon general deterrence and denunciation and its recommended range of sentence afford little credit for the intervening decades. The defence strongly argues that the sentencing result today should be materially different from what an appropriate disposition would have been in the early 1970's.

[69] There are often competing tensions at play when considering the effect of lengthy delay between commission of the offence(s) and the point of sentencing accountability. Evasion of responsibility and apprehension through flight from the jurisdiction or placing a victim in a non-reporting posture through the criminal conduct itself tend to militate against favourable recognition of the period of delay. On the other hand, even in an instance of a unilaterally seized opportunity for rehabilitation and reform, absence of further criminal misconduct and real indicators of lack of risk to the community at the point of the sentencing proceeding speak directly to the issue of protection of the public. Leaving to the side delay steeped in systemic or process matters, some review of the authorities is useful.

[70] The antiquity of an offence is not inevitably a mitigating factor especially where delay in reporting the offence results from threats made by the offender or other conduct suppressing the complaint: Regina v. R.(A.) (1994), 88 C.C.C. (3d) 184 (Man. C.A.) at 190-1 per Twaddle J.A.

[71] In Regina v. Spence; Regina v. F.(D.L.) (1992), 78 C.C.C. (3d) 451 (Alta. C.A.) at 454-5, cases of a 25-year-gap between offence and sentencing, the court stated:

The lapse of time does not in any way render inapplicable the principles of general deterrence and denunciation. The first of these requires a sentence which will intimidate those other than the offender who might be tempted to follow his example. The second requires a sentence by the imposition of which the court will reflect society's view of the wrongness of the conduct, and persuade those who might be confused about what is right and wrong. These two principles may overlap in their effect on the choice of sentence.

The need for the sentence to reflect the community's desire to denounce offences of the kind with which we are concerned is not diminished by the passage of time. Conversely, if the court were to impose a lenient sentence because of the passage of time, some members of the community might regard the sentence as judicial condonation of the conduct in question. That would tend to lessen respect for the administration of justice.

[72] Again, in Regina v. Keegstra , [1996] A.J. No. 833 (C.A.) at para. 20, the Alberta Court of Appeal repeated its view that "pre-charge delay [is not] a significant factor in a disposition where the paramount sentencing factors are ... general deterrence and denunciation". In The Queen v. W.(L.F.) (2000), 140 C.C.C. (3d) 539 (S.C.C.), with a delay of 25 years, Lamer C.J.C. stated at 545 and 550:

Over a quarter of a century had passed since the offences occurred without any related criminal activity by the respondent, who had led a productive life. Incarceration was, therefore, not needed for specific deterrence of the offender despite the absence of expressed remorse.

. . . . .

Mercer J. also pointed out an important mitigating factor, namely, that over a quarter of a century had passed since the offences occurred without any related criminal activity, and that the respondent had led a productive life.

[73] Similarly, in Regina v. Thompson (1989), 50 C.C.C. (3d) 126 (Alta. C.A.), where there was a 10-year period between the cocaine trafficking and sentencing, Côté J.A. observed at pages 129 and 131:

It would be easy to fall into looking at this situation only after the fact. If one did that, one would say that the man who committed the crime no longer exists and that nothing would be gained now by giving a longer sentence: Ruby, pp. 159-60. Indeed, on that reasoning, there might be little point to ordering any jail at all in this striking case.

. . . . .

Here two sentencing principles appear to conflict: later rehabilitation as mitigation, versus not rewarding a criminal for his own wrong. Both principles are valid, and in my view they are largely reconcilable here.

[74] In Regina v. Cossette-Trudel and Cossette-Trudel (1979), 52 C.C.C. (2d) 352 (Que.Ct.Sess.Peace), where the accused extorted their absence from Canada staying abroad for over eight years in Cuba and France, Mayrand C.J.S.P. stated at 359:

One must avoid allowing threats and extortion, for the purpose of gaining time, obtaining delay and retarding the date when punishment falls due, to become profitable.

One must avoid making the conduct followed by the accused profitable, for that could lead other criminals, in similar situations, to try the same experiment.

It would be against the public interest that the accused should derive a profit from a lapse of time obtained by threatening and blackmail, and as their flight was an integral part of the crime, it would be aberrant that they should capitalize twice on the same criminal gesture, to escape prison.

Their flight, obtained by extortion, saved them from prison terms in 1970. There could be no question that this same flight, which lasted eight years, should again avert incarceration for them in 1979.

[75] In Regina v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), with a three-decade separation in time between the crime and case disposition, Doherty J.A. noted at 223:

Considering the passage of time between the offence and the conviction, the appellant's relative youth when the offence occurred, and the exemplary life he has led over the last 30 years, I do not regard further incarceration at this point as necessary or appropriate.

[76] Summarizing those principles rationally emerging from the jurisprudential debate, I conclude that:

(1) the effect of delay on sentencing as a case-specific inquiry

(2) deliberate acts to evade detection by the authorities, whether flight or contribution to delayed complaint tend to weigh against assigning mitigating impact to the fact of delay

(3) reform and rehabilitation during the intervening period tend to eliminate the prospect of recidivism and to nullify the need for specific deterrence to be reflected in the court's disposition

(4) certain very serious crimes require sentences with measures of general deterrence and denunciation regardless of the offender's lengthy crime-free existence subsequent to the crime(s)

(5) objectively speaking, taking into account delay, the court's disposition should not be seen as a reward or benefit eliminating or depreciating the concept of proportionate punishment.

Deportation

[77] The appellant raises his certain deportation as relevant to the imposition of punishment - if not a mitigating factor at least a consideration capable of tempering the severity of the sentence to be imposed. The jurisprudence is not entirely uniform as to the legal significance of an accused's pending deportation.

[78] In Regina v. Johnston and Tremayne , [1970] 4 C.C.C. 64 (Ont. C.A.) at page 68, Gale C.J.O. listed a number of features of the personal circumstances of the accused, concluding with this observation:

Both appellants will be deported when they are released from the penitentiary.

All of these circumstances I have just outlined, which were unknown to the learned trial Judge, mitigate, of course, against severe sentences.

[79] In Regina v. Sullivan (1972), 9 C.C.C. (2d) 70 (Ont. C.A.), an armed robbery case, Evans J.A. stated at page 70:

In the present case, however, there are, in our view, two circumstances which we consider to be in mitigation. One is that the appellant has no prior criminal record, and second is the fact that undoubtedly upon the expiration of his sentence he will be deported from Canada.

[80] At para. 1 of Regina v. Brathwaite , [1996] O.J. No. 1650 (C.A.) (Q.L.), Morden A.C.J.O. stated:

Further the trial judge erred on the facts of this case, in treating deportation as a mitigating factor and in ... [holding] that the factor of general deterrence was inapplicable.

[81] In the subsequent decision of Regina v. Robinson , [1997] O.J. No. 650 (C.A.) (Q.L.) at para. 4, the court stated:

Having regard to the youth of the appellant, the absence of a criminal record, his good school record, the undoubted sincere efforts that he is making towards his rehabilitation, his genuine remorse and, particularly, the deportation order which has recently been made against him, we think that a fit sentence would be 8 years imprisonment.

[82] In Regina v. Antonecchia (1959), 31 C.R. 320 (Que.C.A.) at 323, Montgomery J.A. held that the court could not be swayed by the probability that the offender would be deported. A different court saw the likelihood of deportation as having only a "slight" effect in the imposition of sentence: Regina v. Bratsensis (1974), 31 C.R.N.S. 71 (N.S.C.A.) at 72-3 per MacKeigan C.J.N.S. It may be that the more serious the offender's prior criminal record, the less likely any weight will be assigned to the deportation factor: Regina v. F.(R.) (1994), B.C.A.C. 164 (C.A.) at 170 per Donald J.A. In another apparent retreat from weighing the fact of deportation into the sentencing calculus, Finlayson J.A. stated at page 147 of Regina v. Smith (1997), 105 O.A.C. 141 (C.A.):

For myself, I consider the fact of deportation to be irrelevant. The appellant committed serious crimes in this jurisdiction and he should be sentenced appropriately for them regardless of his immigration status.

Rosenberg J.A. (Moldaver J.A. concurring) stated at para. 34:

Accordingly, I agree that the appeal from conviction should be dismissed. I also agree that there is no basis for this court's intervention with respect to the sentence and I would dismiss the sentence appeal as well.

[83] At para. 1 of Regina v. Ikegwuonu , [1998] O.J. No. 1520 (C.A.) (Q.L.), Morden A.C.J.O. stated "The trial judge erred in taking the appellant's immigration status into account". Given that this was an appeal by the accused, I do not read the court's observation as directly relevant to deportation.

[84] In Regina v. Lasala , [1999] O.J. No. 1322 (C.A.) (Q.L.) at para. 2, the court stated:

Counsel raised the question of deportation in the argument respecting sentence. Deportation is not relevant to our consideration.

[85] Lastly, in Regina v. Lawani (1999), 123 O.A.C. 136 (C.A.) at 137, the court approved deportation as a relevant consideration:

The appellant submits that the trial judge erred in not resorting to the conditional discharge provisions of the Criminal Code . In a concurrent submission, the appellant submits that the trial judge did not take the appellant's immigration status into appropriate account when he sentenced the appellant

In our opinion, the trial judge considered all of the appropriate factors, including the appellant's immigration status, that is the prospect of him being deported as a result of these criminal convictions.

[86] I prefer the view that the accused's deportation is a factor which can, in some circumstances, serve to mitigate the severity of the sanction imposed by the court. Leaving aside instances of accused who are illegally in the country, in cases such as that of Patrick Critton, deportation is relevant to the sentencing function in at least three respects:

(1) the risk of incomplete rehabilitation on release from custody is not a risk imposed upon the Canadian people

(2) frequently, the offender subject to deportation serves "harder time" in Canada because he or she is incarcerated a significant distance from family who are resident in a foreign country

(3) Canadians are spared the expense of continued incarceration of the accused where the offender is deported (annualized cost of maintaining a federal prisoner - $51,202.00 in 1998 (Prison Population and Costs, 1997/98 , Statistics Canada (online at http://www.statcan.ca/english/indepth/85-002/feature/jurl1999004006sda.htm); $67,160.00 in 1999-2000 (Prisoners' Justice Updates - Current News, Facts & Stats (online at http://www.vcn.bc.ca/august10/news.html)).

Pre-Sentence Custody

[87] Section 719(3) of the Code entitles the sentencing court to take into account any time spent in custody by the accused as a result of the offence. I agree with the approach of counsel for the offender and the Crown that Mr. Critton should, as a reasonable starting point, receive credit for pre-sentence custody in a 2:1 ratio. This is reasonable and consistent with the views expressed in Wust v. The Queen (2000), 143 C.C.C. (3d) 129 (S.C.C.) at 148 per Arbour J. and in Regina v. Rezaie (1997), 112 C.C.C. (3d) 97 (Ont. C.A.) at 104 per Laskin J.A.

[88] Having said this, a number of sub-issues arise on the facts of this case including:

(1) what constitutes pre-sentence custody "as a result of the offence"?

(2) is all the pre-sentence custody which is properly under consideration to be treated on the same 2:1 basis?

[89] On the first point, the defence submitted that the following time periods deserved consideration as pre-sentence custody or its equivalent:

(1) the 10 months of solitary confinement detention in Cuba

(2) the 23 years away from North America spent by the offender in Cuba and Tanzania after release from la Cabana Prison

(3) time spent in United States custody (September 8 th to November 5 th , 2001)

(4) time spent in custody in Canada at the Maplehurst Correctional Institute (November 6 th , 2001 to the present).

[90] Mr. Saltmarsh accepts of course the legitimacy of the pre-disposition Canadian custody. The prosecution also recognizes the incarceration in the United States awaiting extradition as falling within the scope of s. 719(3) of the Code . This is consistent with authority: Regina v. Valois (2000), 135 B.C.A.C. 45 (C.A.) at para. 11-12 per Hollinrake J.A.

[91] The defence argued that the detention in solitary confinement in Cuba was at least an indirect consequence of the kidnapping and extortion. It is said that the circumstances of Mr. Critton's unannounced arrival in Havana as the termination point of the kidnapping led the Cuban authorities to order his detention until they determined whether he was truly a hijacker, a spy, or other inadmissible person.

[92] On the other hand, the prosecution submitted that there were no charges of any type in Cuba and it is altogether unclear whether there was even an arrest. It was argued that the custody at La Cabana Prison was really as a result of the offender choosing Cuba as a destination to preserve his fugitive status from the United States.

[93] In Regina v. Schumacher , [1997] O.J. No. 4697 (S.C.J.) (Q.L.) at para. 78, Watt J. held that time spent in jail "as a result of the offence" would not include incarceration in the United States serving a sentence as a result of conviction and sentencing in that jurisdiction.

[94] In United States v. Johnson, supra , the accused, a 29-year old black man citing racial turmoil of the day and personal problems, hijacked an airplane from New Orleans to Havana. When the plane landed, the accused was taken away by Cuban authorities. He spent four years in a Cuban prison and fourteen further years in Cuba before returning to the United States to face kidnapping and hijacking charges. Sentenced to twenty-five years in prison for kidnapping, johnson appealed his sentence arguing in part a lack of consideration of his foreign incarceration by the sentencing court. At para. 8, noting the restricted scope of appellate review in sentencing matters, the court stated:

As to the length of the term, Johnson claims that in light of the punishment he claims to have suffered in Cuba, and his alleged rehabilitation since the time of the offense, it amounted to an abuse of discretion. However, the maximum sentence for kidnapping is life, so the twenty-five years imposed is well within the statutory limit. Our task is not to pass on pleas for leniency, and we will not disturb a trial court's broad discretion in determining the appropriateness of a sentence "absent a finding of arbitrary or capricious action resulting in a gross abuse of discretion." United States v. Adi , 759 F.2d 404, 411 (5 th Cir. 1985).

[95] In Jackson v. Brennan , 924 F.2d 725 (7 th Cir. 1991), the court was asked to review the sentence of an offender who, in 1972, hijacked an aircraft to Cuba after it left Memphis, Tennessee. On arrival in Cuba, Jackson was immediately incarcerated and after a trial of sorts was imprisoned for eight years. Some time later, he was released to the United States by Cuban authorities. On a plea of guilty to aircraft piracy, he was sentenced to twenty-five years' incarceration. In computing how much of the sentence Jackson would actually serve, the United States Bureau of Prisons and the United States Parole Commission refused to credit Jackson with any time spent in Cuban custody. The appellant's argument proved unsuccessful for the reasons expressed at para. 9 to 14, 18, 19 and 21 of the court's decision:

In his [s] 2241 petition, Jackson argues that his custody is in violation of federal statute. See 28 U.S.C. [s] 2241(c)(3). The federal statute he cites is 18 U.S.C. [s] 3568, which provided as follows:

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

Jackson argues that [s] 3568 ... obligates the federal prison system to credit against his sentence the time he spent in Cuban custody for the same hijacking episode. (Were Jackson to receive this credit, it appears that the would already be eligible for release.)

Jackson's interpretation of [s] 3568 finds no support in the statute itself, its legislative history, or the case law. We begin, of course, with the plain language of the statute. See United States v. One Parcel of Real Estate , 903 F.2d 490, 492 (7th Cir. 1990) (citing Reiter v. Sonotone Corp. , 442 U.S. 330, 337, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)). Jackson's Cuban custody cannot possibly be characterized as "in connection with the offense ... for which sentence was imposed" (emphasis added), for [s] 3568 explicitly limits the term "offense" to violations of federal law triable in the federal courts. Jackson's Cuban incarceration was due to a violation of Cuban law. To construe a violation of foreign law as a creditable "offense" under [s] 3568 would do violence to the plain meaning of the terms of the statute.

. . . . .

This legislative history merely reinforces what the statute itself makes sufficiently clear: credit must be given only when the pre-sentence custody is federal custody or non-federal custody that was caused or sustained by the federal government. Cf. Siegel v. United States , 436 F.2d

92, 95 (2d Cir. 1970) (interpreting the 1966 amendments to [s] 3568 to the same effect); Gilbert v. United States , 299 F. Supp. 689, 695 (S.D.N.Y. 1969) (rejecting argument that insertion of "or acts" into 1966 amendments requires credit for state custody for factually connected crime).

The case law is uniformly against Jackson's position as well. Although it appears that no reported decisions have addressed the treatment of pre-sentence foreign custody under [s] 3568, a substantial number of cases have addressed the analogous issue of the treatment of pre-sentence state custody under [s] 3568. In every one of these cases, the courts have held that [s] 3568 does not require credit against a federal sentence for presentence state custody (unless, as mentioned above, the state custody was at the behest of the federal government), even when the identical criminal "acts" formed the basis for both the federal and state prosecutions. See, e.g., Shaw v. Smith , 680 F.2d 1104, 1106 (5th Cir. 1982); Goode v. McCune , 543 F.2d 751, 753 (10th Cir. 1976) (per curiam); Culotta v. Pickett , 506 F.2d 1061, 1062-64 (7th Cir. 1974). Declining Jackson's invitation to reject this entire body of precedent as "erroneous interpretations of [s] 3568," we find the analogy persuasive. In other words, as with state custody, [s] 3568 does not require that the federal prison system give Jackson credit for his pre-sentence Cuban custody, because that custody was pursuant to the laws of, and under the complete control of, a sovereign other than the federal government.

. . . . .

Both the Cuban and the United States governments (at different times, of course) have imprisoned Petitioner Jackson for the same hijacking. Jackson claims that federal law requires the U.S. government to give him credit for the time he spent in Cuban custody. To paraphrase the court in Goode , however, Jackson owed a debt to two separate sovereigns, each of which had a right to exact payment independently of the other. See 543 F.2d at 753.

[96] I am in agreement with the submission of Crown counsel that the offender's incarceration in Cuba is not strictly, within the meaning of s. 719(3), "time spent in custody by the person as a result of the offence" or offences. The detention in Cuba was essentially immigration processing not criminal investigation or sanction relating to the hijacking-related offences. That said, however, it is unclear that the accused's detention was as a result of violating Cuba's sovereignty and accordingly there is an indirect connection sufficient to permit consideration of the Cuban incarceration as "relevant information" placed before the court (s. 726.1 of the Code) which may be considered in a fashion akin to the s. 719(3) regime.

[97] As to the additional three years spent in Cuba and twenty years in Tanzania, Mr. Andre places particular reliance on the decision in Regina v. Cossette-Trudel and Cossette-Trudel, supra . In that case, the accused, FLQ cell members, extorted Canada to permit them to leave the country in December of 1970 for Cuba in exchange for the life of British Trade Commissioner, James Cross. After years in Cuba and France, the accused voluntarily surrendered to Canadian authorities in December of 1978 and subsequently pleaded guilty to kidnapping and unlawfully confining Mr. Cross. The couple were found guilty of extortion. In the trial court's reasons for sentence, the issue of pre-sentence credit for time out of Canada was addressed at page 363 as the court cut down a starting-point penitentiary term to the maximum reformatory term:

Even while conceding that absence from Quebec could not completely replace the punishment merited, it must be admitted that this absence constituted in itself a certain punishment.

For eight years the accused knew hardship, but their ills largely went beyond deprivations of a material order.

They have lived in insecurity, anguish, regret for their deed, apprehension as to their future and that of their children.

As Jacques Cossette-Trudel confided to his probation officer, he admitted having lost 10 years of his life, and lived asking himself how many more years he was going to lose.

They have been homesick. They have experienced uprooting, enforced idleness in Cuba, the strain of facing the unknown, and the impossibility of taking their lives in hand and building a stable, serious future.

The Court is prepared to accept the suggestion of counsel for the defence, who evaluates the combination of unhappinesses and difficulties which the accused have undergone since 1970 as the equivalent of at least four years' imprisonment.

[98] The written sentencing submissions filed on behalf of Mr. Critton pick up on this approach:

Activities of Critton over 2 1/2 years after being released from G-2, in Cuba and his work as an educator and counselor in Tanzania from 1974 to 1994. In the Cossette-Trudel case, the defendants were given credit of 8 years imprisonment for the 4 years of loneliness and "enforced idleness" in Cuba and in France. Patrick Critton, whose experiences were more

challenging, meaningful and reflective of an unmitigated rehabilitation, is deserving of similar consideration. If the defendants in Cossette-Trudel got consideration of 4 years for their 8 year sojourn in Cuba and France, Patrick Critton is deserving of consideration of at least eight years imprisonment for the 23 years he spent in Cuba and Tanzania.

[99] With the greatest deference to the sentencing court in the Cossette-Trudel case, I find the logic of the "tough times while abroad" argument entirely unpersuasive in fashioning credit akin to pre-sentence custody. Patrick Critton undertook a deliberate course of action resulting in his absence from North America. This self-imposed exile was a conscious act of volition. As well, I note that in Regina v. Thompson, supra at 130, Côté J.A. observed:

I have found few decided Canadian cases about evading sentencing. In R. v. Cossette-Trudel and Cossette-Trudel (1979), 52 C.C.C. (2d) 352, 11 C.R. (3d) 1 (Que. Ct. Sess.), a judge of the sessions of the peace in Quebec imposed a sentence of two years less a day for the famous kidnapping of a British consular official. The sentence was lower than usual because the two accused had successfully negotiated a deal to exile themselves to Cuba and then to France. They reported great hardships, and then voluntarily came back. They were a married couple with small children. There were very unusual political and social overtones in that case not present here. In any event, I am not persuaded that that decision is correct.

[100] In any event, during the accused's exercise of his allocution right under s. 726 of the Code , he specifically stated he had had a good and rewarding life with his family and in his work during the two decades he spent in Tanzania.

[101] As to the accused's incarceration in Cuba, I am disposed to limit the credit to a 1:1 ration to reflect the limited and indirect extent to which the imprisonment relates to the commission of the offences before the court.

[102] There is no rigid mathematical formula for crediting pre-sentence custody: Wust v. The Queen , supra at 148. Enhanced credit beyond the ordinary rule-of-thumb 2:1 ratio may amount to a justifiable exercise of discretion depending on the circumstances of the pre-sentence custody: Regina v. Pangman (2001), 154 C.C.C. (3d) 193 (Man. C.A.) at 211-2 per Steel J.A.; Regina v. Jabbour , [2001] O.J. No. 3820 (S.C.J.) (Q.L.) at para. 50, 58-66 per Watt J. Where the sentencing court has evidence before it abnormally harsh conditions of detention, account should be taken of such circumstances. For example, in Regina v. Rowan , [1976] O.J.

560 (C.A.) (Q.L.) at para. 6, Jessup J.A. measured the appropriate term of imprisonment against time already spent in Toronto's Don Jail recognizing that "imprisonment in that jail for any but a brief period is a severe punishment".

[103] In Regina v. Albert , Ont.S.C.J., Dec. 17, 2001 (unreported - Brampton File No. 5708/01, based on evidence called in the sentencing hearing, the accused was credited with 19 1/2 months of pre-sentence custody, a ratio of 2.5:1 for actual custody spent in the Maplehurst facility, on account of oppressive carceral conditions.

[104] Mr. Critton's filed affidavit speaks to the conditions at the Maplehurst Correctional Institute during the 162-day provincial civil service strike which lasted from March 14 th to May 6 th , 2002 including:

(1) prescription medicine or medication for emergencies unavailable at night

(2) chapel and church services halted

(3) not taken to court for preliminary inquiry

(4) not taken to court April 29 th , 2002 to plead guilty during unlawful confinement to cell

(5) inability to consult with counsel April 10 th to sign documents

(6) reduced telephone access

(7) cancelled visits and outdoor recreation time

(8) delayed mail delivery.

Outside the period of the labour dispute, incarceration at Maplehurst included the following events:

(1) 6 days of confinement to cells without showers

(2) frequent cell and strip searches during which the accused's letters, photographs, cosmetic and food purchases were destroyed.

[105] None of the factual allegations raised by the offender have been disputed by the Crown. Some of these circumstances represent flagrant abuse of government power, contempt of court, and violation of civil rights especially during the currency of the civil service strike.

[106] In summary, the allowance for pre-sentence custody is:

location	date	actual time	time credited (mon.)	ratio
Cuba	Dec. 27, 1971 to early March 1972	10 wk.	2.5	1:1
United States	Sept. 8 to Nov. 5, 2001	2 mon.	4	2:1
Canada	Nov. 6, 2001 to March 12, 2002; May 7 to June 12, 2002	164 days	11	2:1
	March 13 to May 6, 2002	55 days	7.3	4:1
TOTAL			24.8 months	

ANALYSIS

[107] In 1971, Patrick Critton spent Christmas Day and the day after in Canada believing he was a fugitive sought by police in the United States. On the run and separated from his family, his travel further away from the New York area impeded by winter weather conditions, the accused became depressed. Deciding his future as an African American might be better made in Africa, Mr. Critton decided to hijack a Canadian aircraft to Cuba as a stopping-off point. Many African American black radicals had taken such a step. Importing the almost commonplace crime of aircraft piracy in this country, the offender committed offences against Canada and its citizens as part of his travel plans.

[108] Crown counsel quite correctly identified a number of features of the crimes underlining the gravity of the criminality including:

(1) the hijacking context to the kidnapping and extortion

(2) the offender was armed

(3) the flight crew was intimidated by the presence of weapons and Critton's statements as to his prior criminal actions

(4) the offences led to the involvement of a second government.

[109] Mr. Saltmarsh further emphasized quite properly in my view, that, at age twenty-four with a college education, Patrick Critton was a mature individual who knew better than to abuse his limited privilege of being on Canadian soil.

[110] In the balance, in mitigation, Mr. Andre sought to ameliorate the seriousness of the crimes with reference to the following factors:

(1) separated from his family and in a foreign country on Christmas Day of 1971, the accused became depressed and homesick - the plan to hijack an aircraft arose only hours before the crimes were committed.

(2) the accused took steps to ensure the 83 passengers were not alarmed and were allowed to deplane in Toronto without knowledge of his plan to take the aircraft to Cuba

(3) while the offender was armed, carrying a degree of intimidating impact, he did not otherwise harm, threaten or menace the crew making sincere efforts not to frighten them

(4) not only was no ransom demanded, an apparent invitation to discuss ransom was refused

(5) the kidnapping lasted 5 or 6 hours only

(6) the offender's crimes were unsophisticated - there was no airport security in Thunder Bay to evade, no attempt to hide the accused's real identity, and he fell asleep during the flight to Cuba.

[111] As well, the defence points to the offender's post-arrest circumstances submitting that the accused is remorseful and fully accepting of responsibility for his actions:

(1) inculpatory statements were given to American and Canadian police officers

(2) extradition was waived

(3) there was a consent detention order

(4) the preliminary inquiry was waived

(5) the offender has volunteered his time to assist fellow prisoners and to teach school subjects to other inmates at the Maplehurst Correctional Facility

(6) the accused pleaded guilty

(7) the offender, a single parent, has been separated for about 10 months from his sons residing in the United States

(8) Mr. Critton has been ordered deported.

[112] From the testimony of Patrick Critton's brother and son and the extensive character evidence filed, the defence further submitted in mitigation of sentence a number of personal circumstances of the offender:

(1) the accused has no prior criminal record

(2) for two decades in Tanzania and nearly 8 years in New York, the offender has been a teacher and a community activist helping impoverished, under-privileged and at-risk children

(3) the accused is a single parent with stable family support in the United States.

[113] Kidnapping is a grave offence and sentencing by the court "must appropriately reflect society's abhorrence of it": Regina v. Grossman , [1997] O.J. No. 605 (C.A.) (Q.L.) at para. 6 per curiam . The crime is "one of the most serious offences known to Canadian law": Regina v. Kear (1989), 51 C.C.C. (3d) 475 (Ont. C.A.) at page 576 per Brooke J.A. In Regina v. Sookram , [1982] A.J. No. 580 (C.A.) (Q.L.) at para. 15, Laycraft C.J.A. noted:

Professor Nadin-Davis, in his most helpful text book Sentencing in Canada , (at 274-277) suggests that there are three categories of kidnapping and that different considerations affect the appropriate sentence in each. One category involves abduction for some other ulterior purpose, such as rape. Another category involves abduction in the course of escape from the commission of another crime. The third category is the archetypal kidnapping for ransom of which this is an example. Some cases will always be found to fall outside this grouping such as R. v. Gillen (1978), 8 C.R. (3d) S-5 (B.C.C.A.), where a woman made an elaborate plan to steal a baby to have as her own child. The analysis contains a helpful review of the authorities.

[114] Kidnapping for ransom is a particularly despicable specie of the crime warranting sentences of imprisonment of 10 to 20 years: Regina v. Raber , [1983] A.J. No. 312 (C.A.) (Q.L.) at para 4 per Kerans J.A.:

The decision of this Court in R. v. Sookram was intended to offer a guideline for a starting point for cases involving organized kidnapping for ransom. Laycraft, J.A. there said:

Kidnapping for ransom is, of course, one of the most serious offences in the Criminal Code ; Parliament has prescribed a maximum sentence of life imprisonment. It will invariably call for a lengthy term of imprisonment. In the words used by Lieberman J.A. in dismissing the

appeals of the co-accused in this case: 'Kidnapping ranks, in the litany of crimes, as one of the most heinous, depraved, and reprehensible, and attracts a severe sentence' ... The normal range for kidnapping for ransom is from 10 to 20 years imprisonment.

[115] The courts have consistently stressed the need to give general deterrence the greatest weight when sentencing in a kidnapping case: Regina v. Mulvahill and Snelgrove (1993), 21 B.C.A.C. 296 (C.A.) at para. 27 per curiam ; Regina v. Mills (1998), 129 C.C.C. (3d) 313 (B.C.C.A.) at 320. In the latter case, at 319, McEachern C.J.B.C. stated:

The classic form of kidnapping, that which attracts penalties in the 10 years to life range, usually involves a carefully planned scheme for ransom with a period of confinement much longer than several hours and where the victim is bound, gagged, and sometimes blindfolded.

[116] Severe sentences have been meted out in ransom kidnapping cases. For example, 14-year prison terms were imposed in Regina v. Raber, supra ; Regina v. Sookram, supra; Regina v. Li, Chen and Liu (2002), 162 C.C.C. (3d) 360 (Ont. C.A.); Regina v. Hui (1995), 61 B.C.A.C. 234 (C.A.). In Regina v. Mulvahill and Snelgrove, supra , 18-year and 10-year terms respectively were imposed.

[117] The commission of other offences while the hostage or hostages are held can serve to aggravate the seriousness of the kidnapping. In Regina v. Davis , (1999), 117 O.A.C. 81 (C.A.), where sexual assault and a weapon and robbery accompanied the kidnapping, the court upheld a term of 15 years' imprisonment. In Regina v. Dunseath , [1993] A.J. No. 927 (C.A.) (Q.L.), kidnapping accompanied by sexual assault warranted a 17-year sentence of imprisonment.

[118] Extortion, the second offence to which the accused pleaded guilty, itself a serious offence, need not attract a consecutive sentence, particularly where the crimes amount to a single transaction: Regina v. Mulvahill and Snelgrove, supra , at para 38, 46. In Regina v. Grossman, supra , at para. 6, the court stated:

It is clear that the counselling to commit kidnapping and the counselling to commit extortion took place on separate occasions and involved different potential victims. Accordingly, the sentences were appropriately consecutive.

[119] The Crown's emphasis on general deterrence is by no means misplaced. Mr. Saltmarsh is right to be concerned that Canada not become, or globally be seen as, soft on kidnapping in a hijacking context.

[120] In Regina v. Stanford (1975), 27 C.C.C. (2d) 520 (Que. C.A.), the only Canadian authority directly dealing with the hijacking of a domestic aircraft, the court upheld a 20-year sentence noting there "was a factor of exemplarity". While the decision is nearly bereft of facts, it appears Stanford, while armed with an offensive weapon, seized control of a Quebecair aircraft at the airport in Montreal on December 14 th , 1972. An insanity defence at trial was rejected by the jury. It is unclear whether the psychiatric evidence at trial relevant to sentencing predicted future dangerousness. Because the hijacking occurred in the world-wide peak period for airplane hijackings, general deterrence was a preeminent concern.

[121] There have been no aircraft hijackings in Canada for decades - and the frequency of such offences has fallen dramatically on a global basis, in particular in the western hemisphere. The life imprisonment maximum in Canada and more severe penalties elsewhere, improvements in airport security, and an international community committed to eliminating incidents of hijacking have all contributed to the significant decline in air piracy offences. As well, according to students of the hijacking phenomenon such as Professor Holden in his thesis, The Contagiousness of Aircraft Hijacking, supra , the contagion effects of hijacking events explains to a degree a correlation between hijackings when they were a rampant occurrence:

Thus, the only types of transportation hijacking that had a significant effect on subsequent transportation attempts in the United States were successful transportation hijackings that originated in the United States. (page 894)

. . . . .

Thus, the only significant effect on U.S. extortion attempts that remained was that of successful U.S. extortions. For that single-input model, the unexplained rate of extortion attempts was only .002, so the contagion effect of previous successful extortion hijackings explained about 85% of the .014 attempts per day. (page 898)

. . . . .

It was confirmed that transportation hijackings generated only transportation hijackings and extortion hijackings only generated extortion hijackings by the finding of contagion effects for certain hijacking attempts of the same type but none for hijackings of the opposite type. Although there were apparent inhibiting effects of the opposite type of hijacking when the effects of each input series were estimated separately, those effects were due to the lack of temporal overlap of transportation and extortion attempts and vanished when the full models (which controlled for the effect of the history of the same type of hijacking) were estimated.

This result perhaps offers support to the view of hijacking as goal-directed behavior. The majority of the transportation hijackings in the United States were to Cuba, and those hijackers were predominantly Latinos (often Cuban exiles) or black Americans. For them, hijacking was a means of returning home or traveling to a presumably friendlier political climate. Although there were exceptions, extortion hijackers were predominantly white and appear to have been using hijacking to achieve the more commonplace goal of getting rich. The analysis suggest that hijackings of a particular type tended primarily to influence individuals with the appropriate type of motivation. (page 899)

. . . . .

One of the most important hypotheses theoretically was the third, which predicted that successful hijackings had a greater stimulating effect than unsuccessful hijackings. I found no effects on the U.S. hijacking rate for foreign hijackings or for U.S. hijackings of the opposite type, regardless of their outcomes. Significant contagion effects, however, were found for successful U.S. hijackings of the same type (either transportation or extortion) but not for unsuccessful hijackings. Thus, the hypothesis was supported, provided it is interpreted to refer only to hijackings of the same type and those from the United States. (page 900)

. . . . .

A caveat must be added about the meaning of a "successful" hijacking. Instead of finding a better life in Cuba, hijackers who reached that destination were usually imprisoned (Phillips 1973); thus, a successful transportation hijacking was not necessarily a successful solution to the hijacker's problems. (page 900)

. . . . .

The difference between the effects of clearly unsuccessful hijackings and apparently successful (but, in reality, unsuccessful) hijackings suggest that viewer's perceptions of the outcomes were based primarily on the initial image presented instead of on the eventual outcome of the hijacking. (page 900)

[122] In these circumstances, the need to serve the general deterrence principle with exemplary sanctions to prevent others from mimicking a phenomenon all but unknown for three decades is far from clear and urgent.

[123] Hijacking escapades involving extortion and the kidnapping of innocent air travellers and flight crews by terrorists, political extremists or ransom seekers will generally merit sentences of 12 years' incarceration to life imprisonment. In this case, the prosecution seeks a sentence in this range. This overshoots punishment proportionate to the crimes committed by Patrick Critton considering his motivation, plea of guilt, lack of a prior criminal record, certain deportation, and nearly three decades of dedication to helping children. In the unusual circumstances here, the principles of general deterrence and denunciation can be honoured with a global sentence of five years' imprisonment.

CONCLUSION

[124] Taking into account credit for 2 years of pre-sentence custody, the accused is sentenced to concurrent terms of 3 years' imprisonment on the charges of kidnapping and extortion.

[125] Mr. Critton, as a "foreign offender" under the Transfer of Offenders Act , R.S.C. 1985, c. T-15, has the opportunity under the Act to request from the Canadian Minister of the Solicitor General and the United States a transfer to that country to serve his term of imprisonment there.

[126] In any event, the court recommends early parole for deportation.

Sentenced accordingly.

Editor: Elizabeth M.A. Turgeon

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