

CANADA / JUDGMENT

R. v. Abdulahi-Sabet

2020 BCCA 213

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 213 R. v. Abdulahi-Sabet

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Abdulahi-Sabet,

2020 BCCA 213

Date: 20200703

Docket: CA46544

Between:

Regina

Respondent

And

Mehdi Abdulahi-Sabet

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated August 9, 2019 (R. v. Abdulahi-Sabet, 2019 BCSC 1538, Vancouver Dockets 27395-2, 27395-3, 27395-4).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

E. Purtzki

Counsel for the Respondent

(via videoconference):

J.M. Whiting

Place and Date of Hearing:

Vancouver, British Columbia

June 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 3, 2020

Summary:

The appellant was sentenced to eight months' imprisonment and ordered to pay \$35,607.09 in restitution after pleading guilty to fraud. He appeals the restitution order, arguing the judge failed to articulate a basis for the order and that the order is not proportionate to his degree of responsibility. Held: Leave to appeal granted; appeal allowed. On a functional review, the judge's reasons for making the restitution order are clear. However, the judge erred in principle by failing to take into account the appellant's junior role in the offence, which involved no breach of trust or personal profit, his impecuniosity, and the cumulative effect of the sentence in making the restitution order. The restitution order of \$35,607.09 added to the eight-month period of incarceration rendered the punishment excessive and, as a result, the restitution order should be reduced to \$10,000.

[1] DICKSON J.A.: In June of 2016, the appellant, Mehdi Abdulahi-Sabet, attended several dealerships in the Lower Mainland with his friend, Tony Moeinian, and acquired new vehicles and a boat by providing false information to obtain financing. The total value of the property they acquired was \$715,756.67. Although it was all recovered, the property depreciated in value when the vendors resold it. The financial institutions that provided the financing for the fraudulent acquisitions sustained a cumulative loss of \$142,933.26.

[2] Mr. Moeinian was the mastermind and leader of the operation. Mr. Abdulahi-Sabet was a junior partner who acted on Mr. Moeinian's directions. In each case, Mr. Abdulahi-Sabet applied for vehicle financing using false information and false documentation, such as false employment verification, false pay stubs and false information relating to property ownership. In many cases, Mr. Moeinian directed Mr. Abdulahi-Sabet on how to complete

the applications, did the majority of the talking during negotiations and drove the vehicles off the lot.

- [3] Mr. Abdulahi-Sabet and Mr. Moeinian were initially charged together on the same indictment. However, on September 18, 2018, Mr. Moeinian pleaded guilty in a separate proceeding to four counts of fraud, one of which was participating with Mr. Abdulahi-Sabet in the fraudulent transactions in June 2016. He was sentenced to a global sentence of four-and-a-half years' imprisonment for all four offences based on a joint submission. For the transactions in which Mr. Abdulahi-Sabet participated, Mr. Moeinian was sentenced to two years' imprisonment, a restitution order of \$35,607.09 in favour of one of the victims, the Toronto-Dominion Bank, and a victim fine surcharge of \$200.
- [4] On August 9, 2019, Mr. Abdulahi-Sabet pleaded guilty to a single count of fraud in respect of the acts he committed with Mr. Moeinian. Crown counsel sought a sentence of 20 months' imprisonment, a restitution order of \$142,933.26 and a DNA order. He advised the sentencing judge that the \$35,607.09 restitution order made in Mr. Moeinian's case corresponded to the loss of the Toronto-Dominion Bank and could not explain why Mr. Moeinian was not ordered to pay restitution in connection with the other victims' losses. Crown counsel conceded that a restitution order was discretionary and that Mr. Abdulahi-Sabet's ability to pay was a relevant factor to be taken into account.
- [5] For his part, defence counsel stressed Mr. Abdulahi-Sabet's junior role in the fraudulent transactions, his blameless past and his compromised personal and financial circumstances. He sought a 90-day intermittent period of imprisonment. As to restitution, he asked that "in the interest of parity" if Mr. Abdulahi-Sabet was to receive a restitution order it not be "any higher than the ringleader" and that he be granted a significant time to pay restitution. He also stated "we are asking the court to find that a restitution order certainly is appropriate, but one much more in line with what the number one person in this organization, Mr. Moeinian, received".
- [6] Following a brief adjournment, the sentencing judge imposed sentence. She reviewed the circumstances of the offences and the offender, including Mr. Abdulahi-Sabet's poor health, inability to work and limited financial capacity, the parties' positions and the mitigating and aggravating factors. She acknowledged his junior role in the offence, lack of criminal record, remorseful attitude and deep concern for the impact of his imprisonment on his young family, stating "[a]ny sentence of incarceration will thus be a severe punishment". However, she also noted that the offence was premeditated and, that although it did not involve a breach of trust, the one count of fraud consisted of multiple transactions completed over the course of a month with several victims. Mr. Abdulahi-Sabet was a junior partner, but an integral part of the fraud. All things considered, the sentencing judge found that a 90-day intermittent sentence "would not be sufficient to effect the principles of denunciation and deterrence".
- [7] The judge concluded her reasons as follows:

- [23] After taking into account time spent in custody, I impose a period of incarceration of eight months. In doing so, I am mindful of the principles of parity and proportionality that feature here, as well as the unique circumstances of this case. Of note is your guilty plea, your remorse, and that all of the property has been recovered, albeit at a loss.
- [24] There is to be restitution in the amount of \$35,607.09 with a period of time to pay of seven years.
- [25] There will be an order that a sample of your DNA be taken pursuant to the provisions set out in s. 487.051(3) of the Criminal Code. You [will] be required to provide a sample of bodily substance that is reasonably required for the purposes of forensic analysis of DNA.
- [8] On appeal, Mr. Abdulahi-Sabet contends that the sentencing judge erred in principle in imposing the restitution order. In his submission, she failed to explain the basis for the order and failed to account for the differing role played by Mr. Abdulahi-Sabet to ensure that restitution was proportionate to his degree of responsibility, which errors had an impact on the amount of restitution she imposed. He asks that we reduce that amount to \$10,000 with seven years to pay, which he says would be fit bearing in mind his lesser role, his limited financial means and the severely punitive nature of the custodial sentence.
- [9] Crown counsel responds that the sentencing judge did not err in principle and says the sentence is not demonstrably unfit in the circumstances. In his submission, while she did not state expressly why she made the restitution order in the terms that she did, her reasons are apparent from the record and clearly reflect a proper basis for the order she imposed. In particular, he says, the sentencing judge considered the scale of the fraudulent acts and losses incurred, Mr. Abdulahi-Sabet's role in the fraud, his financial challenges and defence counsel's submission that a restitution order "in line with" the Moeinian restitution order was appropriate. According to Crown counsel, the judge crafted a restitution order that was consistent with defence counsel's recommendation, accounted for Mr. Abdulahi-Sabet's junior role by imposing a shorter period of imprisonment than Mr. Moeinian received and imposed a sentence that is proportionate, fit overall and entitled to appellate deference.
- [10] Sentencing is a highly individualized process. Sentencing judges are in the best position to determine a just and appropriate sentence, having regard to all the circumstances, and this court must give them wide latitude on review: *R. v. Lacasse*, 2015 SCC 64 at para. 39; *R. v. Forner*, 2020 BCCA 103 at para. 18. Appellate intervention will only be warranted if a sentence is i) demonstrably unfit or ii) based on error of law, error in principle, failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor that has an impact on the sentence: *R. v. Friesen*, 2020 SCC 9 at para. 26. As with other aspects of a sentence, this deferential standard applies to a decision to order restitution: *R. v. Nanos*, 2013 BCCA 339 at para. 13.
- [11] If a sentencing judge made an error warranting appellate intervention, this court must then consider the fitness of the sentence by conducting its own sentencing analysis: *Forner* at para. 18. The fitness inquiry focuses on giving effect to the fundamental principle of

proportionality, namely, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. If a sentence departs markedly and unreasonably from this principle, which requires reconciling parity of sentences and individualization, it is a demonstrably unfit sentence: *Lacasse* at para. 53. When determining a fit sentence, its custodial component must be considered together with any order for restitution: *R. v. Widdifield*, 2018 BCCA 62 at para. 49.

- [12] Pursuant to s. 738(1) of the Criminal Code, where an offender is convicted or discharged of an offence, in addition to any other measure imposed, the court may make a discretionary restitution order. Such orders are a part of the punishment and should be made with caution and restraint. They should also be made bearing in mind the principle of totality, not as a "mechanical afterthought". As Justice Weiler explained in *R. v. Castro*, 2010 ONCA 718 "[c]are must be taken not to simply add a restitution order to a sentence of imprisonment which, in itself, is a fit punishment for the crime, as this can amount to excessive punishment and offend the totality principle": at para. 23; see also *R. v. Robertson*, 2020 ONCA 367 at paras. 6-7; *R. v. Fast-Carlson*, 2015 SKCA 86 at para. 11.
- [13] A restitution order survives any bankruptcy, is there for life and should not undermine an offender's prospects for rehabilitation. For this reason, an offender's past and future ability to make restitution is an important factor to be weighed and considered, not merely noted, by a sentencing judge: *Robertson* at para. 8; *Fast-Carlson* at paras. 17-19. The shorter a custodial sentence, the more likely it will be that a manageable restitution order will be appropriate. However, as the period of imprisonment becomes longer, a restitution order may become increasingly futile or result in an excessive sentence: *Nanos* at para. 14; *Fast-Carlson* at para. 11.
- [14] Nevertheless, where the offence in question involves a breach of trust or is theft-related and stolen money is unaccounted for, the fact that an offender has limited ability to pay restitution will be given little weight. A breach of trust is a significantly aggravating factor and offenders should be deprived of ill-gotten gains: *Nanos* at para. 17; *Fast-Carlson* at paras. 20-21. Accordingly, the determination of what happened to the money is an important consideration in deciding whether and in what amount a restitution order should be made: *R. v. Solleveld*, 2014 ONCA 418 at para. 44.
- [15] Where there is no breach of trust and an offender does not profit from the offence, an inability to pay restitution will weigh more heavily. In such circumstances, a restitution order need not be for the full amount and it may be appropriate to order differing amounts for different participants in the offence: *Fast-Carlson* at paras. 21-26. Although apportionment or allocation of responsibility for restitution is generally not appropriate in common enterprise crimes, in some cases one participant may have played a significantly different role than another and may be significantly less culpable. In such cases, those differences should be accounted for in the sentence and may be reflected in differing quantum of restitution imposed: see, for example, *Fast-Carlson*, *Solleveld* and *R. v. Ali* (K.N.M.), 98 B.C.A.C. 239.

- [16] In *Nanos*, Justice Bennett provided a comprehensive review of the principles that guide the imposition of restitution orders:
- [14] As a restitution order is part of the sentence, it should not be a "mechanical afterthought" imposed after the sentence is fixed, as it may result in a sentence that is excessive (*R. v. Castro*, 2010 ONCA 718 at para. 23; *R. v. Eizenga*, 2011 ONCA 113 at para. 93, citing *R. v. Siemans* (1999), 136 C.C.C. (3d) at para. 10 (Man. C.A.)).
- [15] In *Castro*, at paras. 24-25, the Ontario Court of Appeal recently affirmed the non-exhaustive list of considerations derived by Mr. Justice Labrosse in *R. v. Devgan* (1999), 136 C.C.C. (3d) 238 at para. 26 (Ont. C.A.):

In [*R. v. Zelensky*, [1978] 2 S.C.R. 940,] Laskin C.J. identified certain objectives and factors that relate to the application of s. 725(1) [now s. 738.1]. These considerations have been expanded upon in subsequent cases. Below, I have consolidated these objectives and factors, all of which are relevant to the issue of what constitutes a proper exercise of discretion for the purpose of s. 725(1) [s. 738.1].

1. An order for compensation should be made with restraint and caution;
2. The concept of compensation is essential to the sentencing process:
 - (i) it emphasizes the sanction imposed upon the offender;
 - (ii) it makes the accused responsible for making restitution to the victim;
 - (iii) it prevents the accused from profiting from crime; and
 - (iv) it provides a convenient, rapid and inexpensive means of recovery for the victim;
3. A sentencing judge should consider:
 - (i) the purpose of the aggrieved person in invoking s. 725(1);
 - (ii) whether civil proceedings have been initiated and are being pursued; and
 - (iii) the means of the offender.
4. A compensation order should not be used as a substitute for civil proceedings. Parliament did not intend that compensation orders would displace the civil remedies necessary to ensure full compensation to victims.
5. A compensation order is not the appropriate mechanism to unravel involved commercial transactions;
6. A compensation order should not be granted when it would require the criminal court to interpret written documents to determine the amount of money sought through the order. The loss should be capable of ready calculation.

7. A compensation order should not be granted if the effect of provincial legislation would have to be considered in order to determine what order should be made;
 8. Any serious contest on legal or factual issues should signal a denial of recourse to an order;
 9. Double recovery can be prevented by the jurisdiction of the civil courts to require proper accounting of all sums recovered; and
 10. A compensation order may be appropriate where a related civil judgment has been rendered unenforceable as a result of bankruptcy.
- [25] As support for these factors, Labrosse J.A. cited Zelensky at pp. 960-64; R. v. Fitzgibbon, [1990] 1 S.C.R. 1005, at pp. 1012-14; London Life Insurance Co. v. Zavitz, (1992), 12 C.R. (4th) 267 (B.C.C.A.), at p. 270; R. v. Scherer, (1984), 16 C.C.C. (3d) 30 (Ont. C.A.), at pp. 37-38; R. v. Salituro, (1990), 56 C.C.C. (3d) 350 (Ont. C.A.), at pp. 372-73; R. v. Horne, (1996), 34 O.R. (3d) 142 (Gen. Div.), at pp. 148-49; and R. v. Carter (1990), 9 C.C.L.S. 69 (Ont. C.J. (Gen. Div.)), at pp. 75-76.
- [16] These factors are completely consistent with the law in this province: R. v. Yates, 2002 BCCA 583.
- [17] The case law is uniform on the consideration of restitution orders when the offences involve a breach of trust or other theft-related cases when the stolen money is unaccounted for or not accounted for adequately. In such a case, the fact that an offender has little or even no ability to pay the restitution order will be given little weight, as one of the principles behind the legislation is that an accused should be deprived of "the fruits of his crime". The Law Reform Commission of Canada Working Paper 5, Restitution and Compensation (Ottawa: Information Canada, 1974), cited with approval in Zelensky at 952-953; Castro at para. 34; see also R. v. Fitzgibbon, [1990] 1 S.C.R. 1005 at 1014; Yates.
- [18] In Castro, Madam Justice Weiler considered the phrase in Zelensky that a restitution order should be imposed with "restraint and caution". This phrase has sometimes been employed to argue that this limit applies to all restitution orders. I agree with the following analysis of Weiler J.A.:
- [43] The comment that a restitution order should be made with restraint and caution is sometimes taken out of context as a free-standing brake on the making of a compensation order. The comment by Laskin C.J. in Zelensky regarding restraint and caution was made in the context of a broader statement that the purpose of a compensation order should not be to enforce a civil obligation, particularly where the amount taken is unclear; rather, the purpose of a compensation order is as part of the sentence. See Zelensky at pp. 961-962. The fact that a restitution order provides a convenient, rapid and inexpensive means of recovery for the victim, especially a vulnerable victim, is one of the considerations in favour of the making of such an order.
- [17] With these principles in mind, I turn to the restitution order imposed in this case.

- [18] First, I agree with Crown counsel that the absence of articulated reasons for the imposition of the restitution order, standing alone, does not amount to a material error justifying a variation of sentence, particularly in light of the defence submission that a restitution order close to or consistent with the amount imposed on the co-offender would be appropriate. Adopting a functional approach to review of the reasons in the context of the record and submissions of counsel, in my view the parties and this court are able to understand the decision-making process of the sentencing judge: see *R. v. Dick*, 2018 BCCA 343 at paras. 22-25. Although it would have been preferable for her to explain that she was ordering restitution "in line with" the \$35,607.09 Moeinian restitution order, as defence counsel recommended, she clearly made the order in exactly the same amount taking into account his recommendation and the factors outlined in the body of her reasons, including the circumstances of the offence, Mr. Abdulahi-Sabet's role in its commission and his personal and financial circumstances.
- [19] However, in my view, the sentencing judge erred in principle by failing to give adequate weight to Mr. Abdulahi-Sabet's junior role in the offence, which involved no breach of trust or personal profit, and his impecuniosity when she ordered restitution in the same amount as that ordered for the ringleader. Although defence counsel acknowledged that restitution was appropriate and, if ordered, should be "in line with" what Mr. Moeinian received, this submission was made in the context of seeking a 90-day intermittent period of imprisonment, and thus a significantly less punitive sentence overall. It should be understood from that perspective.
- [20] In my view, a sentence of 8 months' imprisonment is in itself proportionate and fit in light of the gravity of the offence and the degree of Mr. Abdulahi-Sabet's responsibility. As the sentencing judge recognized, in his particular circumstances that period of imprisonment alone amounted to a "severe punishment". Her assessment in this regard was accurate.
- [21] Mr. Abdulahi-Sabet was the 47-year-old father of two young sons when he was sentenced. He and his wife live with their children in a basement suite. He has a university education but was injured at work, has received disability benefits since 2010 and struggles with depression and anxiety. He has no prior criminal record, is remorseful and entered a guilty plea. Nothing suggests that his personal or financial circumstances are foreseeably likely to change.
- [22] For a person in Mr. Abdulahi-Sabet's modest financial circumstances, the addition of a \$35,607.09 restitution order to an 8-month custodial sentence significantly increased the severity of the punishment. The sentencing judge did not consider the sentence's cumulative effect and whether a restitution order "in line" with that imposed on the co-offender would result in an overall disproportionate sentence, given the findings she made about Mr. Abdulahi-Sabet's moral blameworthiness and other mitigating factors in his case. As noted, the restitution order lasts for life, may haunt Mr. Abdulahi-Sabet indefinitely and could undermine his rehabilitation. All things considered, a restitution order of this magnitude in addition to an already severe period of incarceration rendered the punishment excessive

and the overall sentence unfit.

[23] For all these reasons, I agree with defence counsel that a \$10,000 restitution order is appropriate. I would grant leave to appeal, allow the appeal, vary the restitution order by reducing the amount ordered to \$10,000 with seven years to pay and leave the remainder of the order intact. In addition, Mr. Abdulahi-Sabet required an extension of time to pursue his appeal. The Crown having indicated its consent, I would also grant an extension of time in the amount requested by the appellant.

[24] HARRIS J.A.: I agree.

[25] DEWITT-VAN OOSTEN J.A.: I agree.

[26] HARRIS J.A.: An extension of time to apply for leave is granted. Leave to appeal is granted. The appeal is allowed and the restitution order is varied on the terms that were set out in the reasons for judgment of Justice Dickson. Thank you.

"The Honourable Madam Justice Dickson"

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