
CANADA / JUDGMENT

R. v. Baghail

2020 BCSC 537

COURT

Supreme Court of British Columbia

DECIDED

4 March 2020

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2020 BCSC 537 R. v. Baghail

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Baghail,

2020 BCSC 537

Date: 20200304

Docket: 29427-1

Registry: Vancouver

Regina

v.

Mehrdad Baghail

Before: The Honourable Associate Chief Justice H. Holmes

On appeal from the Provincial Court of British Columbia,

North Vancouver Registry 64527-2-B,

Reasons for Sentence of October 3, 2019

Oral Reasons for Judgment

In Chambers

Counsel for Appellant:

A.A. Goldin

Counsel for Respondent:

J.L. Horneland

Place and Date of Hearing:

Vancouver, B.C.

March 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2020

- [1] THE COURT: This is a sentence appeal from a suspended sentence, with further probation for 18 months, imposed after Mr. Baghaili pleaded guilty to breaching a probation order by possessing tools on April 6, 2019 in violation of a condition of that order.
- [2] The probation order had been imposed by His Honour Judge Milne on November 1, 2018, along with a conditional discharge for an offence of possession of stolen property with a value greater than \$5,000, said to have taken place on October 26, 2016. The probation order's terms included that Mr. Baghaili was to have no access to any online vending service, including specifically Craigslist (condition 9), and that he must not possess tools outside his residence (condition 11). Those conditions were imposed because the possession of stolen property charge arose from buying and selling stolen tools by way of online vending.
- [3] In this appeal, Mr. Baghaili submits that the sentencing judge made material errors that formed part of the basis for the sentence she imposed and had an impact on the sentence, such that this Court is justified in intervening. He asks that the suspended sentence be set aside and replaced by a conditional discharge, again with probation.
- [4] The errors Mr. Baghaili asserts are three.
- [5] The first alleged error is that the judge drew an adverse inference concerning a receipt that Mr. Baghaili produced (during the sentencing proceedings) for the chainsaw in question, based on the judge's misapprehension that the receipt, dated November 2018, predated the theft of the chainsaw.
- [6] The judge was advised in the sentencing proceedings that the theft was reported in December of 2018. However, Mr. Baghaili submits that the chainsaw was not necessarily stolen at that time - it could have been stolen earlier, on the evidence placed before the judge. Mr. Baghaili submits that the judge drew an inference adverse to him from the fact that the receipt he produced for the purchase of the chainsaw predated what the judge improperly took to be the date of the theft.

- [7] The second alleged error is that the judge over-emphasized an apparent inconsistency in a statement Mr. Baghaili made during the sentencing hearing, to the effect that he had forgotten that the chainsaw was in his car (Transcript, October 3, 2019, p. 9, ll. 25-9).
- [8] The circumstances were that the owner from whom the chainsaw had been stolen noticed the chainsaw advertised on Craigslist, and contacted the police. The police then arranged a meet for an intended purchase, with, as it turned out, Mr. Baghaili, and met him in Squamish, where Mr. Baghaili and his wife and children arrived with the chainsaw in the back of the car. In her reasons, the sentencing judge noted that "the whole point of the meet with the RCMP who were undercover as purchasers, was to provide the chainsaw" (Reasons for Judgment, October 3, 2019, at para. 9).
- [9] Mr. Baghaili submits, in relation to this second alleged error, that the judge paid no heed to Mr. Baghaili's corrective or clarifying comments in the sentencing hearing that he meant, in his earlier comment, that he had forgotten that the chainsaw was not permitted to be in his car (see Transcript, p. 9, ll. 31-4).
- [10] The third alleged error is that the judge failed to adequately consider the mitigating factors that applied in Mr. Baghaili's circumstances.
- [11] There is no real dispute that there were a number of mitigating factors to be taken into account in sentencing, including that Mr. Baghaili had entered an early guilty plea and had readily admitted the breach. Indeed, he was cooperative from the start, once the police identified themselves as such at the Squamish meet. Mr. Baghaili's family circumstances also gave rise to mitigating circumstances, as did some of his own personal circumstances.
- [12] The Crown and the defence agree that the legal framework for this appeal is as described in *R. v. Agin*, 2018 BCCA 133:
- [52] In our view, the question is whether the error was material in that it had an impact on the sentence imposed and the sentence would have been different had there been no error. In other words, did the error impact the judge's analysis in imposing the sentence: *R. v. Eakins*, 2016 BCCA 194, at para. 21. This accords with the rationale, outlined at para. 43 of *Lacasse*, that requiring an impact aims to prevent appellate courts from intervening where an error cannot be said to have impacted the sentence, as to do so would undermine the deference owed to sentencing judges as well as public policy goals animating appellate review, including finality.
- [13] Addressing the first alleged error, I recognize that the trial judge did indeed allude to the date of the receipt predating the date of what she understood to be the date of the theft. However, there is no indication in the judge's reasons that she placed particular emphasis on what at one point in the hearing may have seemed to her like an incongruous sequence. Indeed, in coming back to that matter at one point in her brief reasons, she corrected herself to note, effectively, that the sequence of events was unclear. She also noted, in her reasons, that "[o]nly 28 days after the order of Judge Milne was imposed, Mr. Baghaili went to

a pawn shop and bought a chain saw" (para. 2).

- [14] The judge's reasons as a whole make clear that the sequence of, specifically, the theft and the receipt was not material to the judge's decision. The matter of the receipt came up only in submissions by Mr. Baghail's counsel (who is not counsel in this appeal) when addressing how it came to pass that Mr. Baghail came into possession of the chainsaw. Counsel was emphasizing that this was different from the manner in which Mr. Baghail had come into possession of the property that was the subject of the original possession of stolen property charge.
- [15] The material point concerning the timing of events, which did form part of the basis for the judge's sentence, was that Mr. Baghail had acquired the chainsaw in violation of the probation order very shortly after having been granted a conditional discharge and placed on probation terms. He also then attempted to sell the chainsaw in violation of the probation order, and did so by using Craigslist, in violation of yet another term.
- [16] I agree with Crown counsel that the accuracy of the judge's passing comments about the timing of the receipt and the theft amounts to a red herring.
- [17] As to the second alleged error, I find no indication of overemphasis on the first explanation Mr. Baghail gave for the chainsaw being in his car at the time of the meeting in Squamish. What was clear was that he was admitting his offence during the sentencing proceedings, and apologizing for it, his emphasis being on having forgotten. Whether it was that he had forgotten that the chainsaw was in his car, or, rather, that he had forgotten that the probation order did not allow him to place the chainsaw in the car, was not material in the circumstances. The distinction could not have played a part in the judge's reasoning.
- [18] As to the third alleged error, it is true that the trial judge at no time expressly used the term "mitigating factor" (or indeed "aggravating factor"), but neither did Crown or defence counsel. Crown and defence counsel made their submissions addressing the standard topics addressed in sentencing proceedings, including mitigating and aggravating factors, even though they did not use those terms. The sentencing judge is a very experienced trial judge, and would have been well aware that the submissions were addressing factors she was being asked to consider as either aggravating or mitigating.
- [19] It is not necessary for a sentencing judge to spell out explicitly everything she has taken into account. The submissions were made very shortly before the judge issued her reasons, and there is no reason to believe that she would not have had them clearly in mind, along with the other legal principles relating to sentencing.

- [20] Even if I were persuaded that one or more of the alleged errors had taken place, I would not intervene to substitute for the suspended sentence another conditional discharge, as Mr. Baghail asks. Mr. Baghail was granted a conditional discharge very shortly before the present offence, when he was placed on the terms of probation he then breached. The circumstances of his breach had some features similar to those of the original offence for which he had been granted a conditional discharge.
- [21] The sentencing judge evidently acceded to the Crown's submission that specific deterrence was required in Mr. Baghail's circumstances, and that it required a sentence different from the conditional discharge Mr. Baghail had been granted not long before he committed the breach offence.
- [22] The sentencing judge was clearly of the view that a conditional discharge would have been contrary to the public interest, and I agree.
- [23] For these reasons, the appeal is dismissed.

"The Honourable Associate Chief Justice H. Holmes"

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