
CANADA / JUDGMENT

R. v. Mohebtash

2006 BCSC 944

COURT

Supreme Court of British Columbia

DECIDED

19 June 2006

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2006 BCSC 944 R. v. Mohebtash

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mohebtash,

2006 BCSC 944

Date: 20060619

Docket: 23408

Registry: Vancouver

Between:

Regina

And

Mohammad Mohebtash

Before: The Honourable Mr. Justice Goepel

Sentencing

(June 19, 2006)

Counsel for the Accused:

R. Kincaid

Counsel for Crown:

J. Oulton

Date and Place of Trial/Hearing:

Sentencing Submissions

December 12 - 16, 2005

May 18 and June 2, 2006

Vancouver, B.C.

INTRODUCTION

[1] Mr Mohebtash was charged with the following offences:

Count 1

At or near West Vancouver, in the Province of British Columbia, between the 3rd day of March, 2004, and the 19th day of March, 2004, he did use a document, a Power of Attorney, as if it were genuine, knowing the said document to be forged, contrary to Section 368(1)(a) of the Criminal Code of Canada.

Count 2

At or near West Vancouver, in the Province of British Columbia, between the 3rd day of March, 2004, and the 19th day of March, 2004, he did attempt to defraud the Canadian Imperial Bank of Commerce of money, of a value in excess of five thousand dollars (\$5,000.00), contrary to Section 380(1) and 463 of the Criminal Code of Canada.

[2] On February 3, 2006, I found Mr. Mohebtash guilty of both counts.

[3] On May 18, 2006, at the commencement of sentencing submissions, defence counsel argued that based on *Kienapple v. R.*, [1975] 1 S.C.R. 729, that a conviction should only be entered on count 1 of the indictment and that there should be a conditional stay of proceedings on count 2. I reserved judgment on that application. Counsel then made their submissions on sentencing. These are my reasons in regards to the *Kienapple* application and sentencing.

KIENAPPLE APPLICATION

[4] In *R. v. Prince*, [1986] 2 S.C.R. 480 it was held that the rule against multiple convictions applied only where there was both a factual and a legal nexus between the charges.

[5] In *R. v. Andrew* (1990), 78 C.R. (3d) 239 (B.C.C.A.) Lambert J.A. speaking for a five member bench set out a practical guide that should be followed in order to ascertain if *Kienapple* applies. He stated at pages 243-45:

The result of Chief Justice Dickson's corollary and the three examples he gave of cases where an element of an offence is not additional or distinct, is that there are four clear keys to when the Kienapple principle should be applied, other than the long-standing case of included offences, which is usually not regarded as an application of the Kienapple principle at all. I will set out the four key situations, following Chief Justice Dickson's words as closely as possible:

- 1) Where the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence (Prince, p. 499).
- 2) Where an element of one offence is a particularization of essentially the same element in the other offence (Prince, p. 500).
- 3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act (Prince, p. 501. But I have used "criminal act" instead of "delict").
- 4) Where Parliament has deemed a particular element to be satisfied on proof another element (Prince, p. 501).

In summary, in deciding whether the Kienapple principle is applicable in any case, this is the course that should be adopted:

A. Look at the facts, in the context of the offences, and ask whether only one wrongful act, in both its physical and mental elements, is involved.

B. Look at the offences, in the context of the facts, and ask whether there is an additional or distinguishing element in one offence that is not contained in the other. If there is, the Kienapple principle does not apply unless the additional and distinguishing element is covered by one of the four types of situations enumerated by Chief Justice Dickson as I have set them out above.

The two tests which I have described should be undertaken together. Each of the tests becomes an empty exercise unless the two tests complement each other. It is double test; not two consecutive tests.

- [6] Mr. Mohebtash was found guilty of both uttering a forged power of attorney and attempting to defraud the Canadian Imperial Bank of Commerce. The maximum sentence for uttering a false document is 10 years; for attempted fraud it is 7 years.
- [7] The circumstances giving rise to the offences are set out in my February 3, 2006 Reasons for Judgment. Mr. Mohebtash attended at the bank and presented the forged power of attorney. He was seeking to obtain a \$400,000 mortgage. In addition to the power of attorney, Mr. Mohebtash presented the bank with property tax and utility statements for the subject property. Subsequent to the initial meeting at the bank, he spoke further to the bank officer, Mr. Molyneaux. Additional documents were sent to Mr. Molyneaux, including a fax purportedly from the National Tejarad Bank of Iran, and documents confirming the alleged employment of the proposed mortgagors. At the second meeting on March 18, 2004, Mr.

Mohebtash signed documents concerning the mortgagors assets and liabilities.

- [8] The charge of uttering requires proof that a person used, dealt with or acted on the forged document. The mens rea is satisfied by proof that the person, knowing that it was forged, used it or caused anyone else to act upon it as genuine.
- [9] The actus rea and mens rea for fraud were set out in *R. v. Zlatic*, [1993] 2 S.C.R. 29 at ¶13. The actus rea for fraud is established by proof of:
1. The prohibited act, be it an act of deceit, falsehood or some other fraudulent means; and
 2. Deprivation caused by the prohibited act, which may consist an actual loss or the placing of the victim's pecuniary interests at risk.

The mens rea is established by proof of:

1. Subjective knowledge of the prohibited act; and
 2. Subjective knowledge that the prohibited act could have, as a consequence, the deprivation of another.
- [10] In this case, attempted fraud is the lesser offence. Attempted fraud does not require the use of a forged document or anything considered false within the meaning of the Criminal Code. The element of deprivation is a distinct and additional element required to prove fraud. People may be guilty of uttering a forgery without attempting to deprive anyone of a pecuniary interest. As noted in *Prince*, if the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. In this case, there are additional elements in the lesser offence, being the requirement of a subjective knowledge of deceit that would put the victim's pecuniary interests at risk. Accordingly, applying the principles as explained in *Andrew*, it is my view that the Kienapple principle does not apply. Convictions will be entered on both counts.

SENTENCE

- [11] The circumstances of the offence are set out in detail in my February 3,, 2006 Reasons for Judgment. They have been briefly summarized above.
- [12] The circumstances of the offender are as follows. Mr. Mohebtash is 59 years-old. He is a native of Iran. He came to Canada with his wife and three children in October 1988 as a Convention refugee. He became a permanent resident in 1996. He has recently applied for Canadian citizenship.
- [13] He was divorced in 1993. His wife subsequently returned to Iran. He maintains contact with his three adult children. He has not disclosed these charges to them.

- [14] Mr. Mohebtash was educated in Iran where he obtained a university degree in mechanical engineering. He worked as a mechanical engineer in Iran from 1975 to 1988.
- [15] In Canada his engineering skills and work experience were not recognized and he was unable to secure employment in the mechanical engineering field. He has had limited employment since coming to Canada. Much of that employment was in unskilled jobs such as pizza and newspaper delivery, maintenance worker and grocery clerk. He filed for bankruptcy in 2001 after he was unable to finance the repair of his "leaky" condo.
- [16] He has not been gainfully employed since 2001. He has numerous present physical difficulties which affect his ability to work, including thyroid problems, back pain and arthritis. Since November 2003, he has received a disability pension which presently pays him \$856 per month.
- [17] Mr. Mohebtash was convicted in 2001 of possession of tobacco for an unlawful purpose pursuant to the provisions of the Tobacco Tax Act, R.S.B.C. 1996 c. 452 and fined \$8,535.
- [18] The crown seeks a sentence of nine to twelve months incarceration. It cites the following authorities: R. v. Coxall, 2006 BCPC 18; R. v. Reid, 2004 YKCA 4; R. v. Pierce (1997), 5 C.R. (5th) 171 (Ont. C.A.); R. v. Khan, 2002 BCCA 703; R. v. Stokic, 1999 BCCA 357; and R. v. Asgari, [1997] B.C.J. No. 3149 (QL) (S.C.).
- [19] Coxall, Reid and Pierce are all breach of trust cases involving trusted employees. In Coxall an accountant stole \$160,000 from his employer. He pled guilty. He was sentenced to one year in jail.
- [20] In Reid the head cashier of a small grocery chain over three years stole \$212,000 from her employer. She pled guilty. At trial she received an 18 month conditional sentence. On appeal the Court indicated that an appropriate sentence at trial would have been two to three years. They imposed a sentence of 14 months to take into account intervening circumstances.
- [21] In Pierce a well-educated woman was convicted of defrauding her employer of approximately \$270,000. She was sentenced to 21 months in prison. On appeal the sentence was reduced to 12 months.
- [22] Khan involved a large scale fraud in excess of \$2.2 million. The accused pled guilty. Sentences of three years and two years less a day were imposed and upheld on appeal.
- [23] Stokic involved a long running fraud on the Medical Services Plan and the Insurance Corporation of British Columbia. There was a guilty plea. The accused was sentenced to 22 months which was upheld on appeal.
- [24] In Asgari the accused was found guilty of three counts of fraud, two counts of passing forged cheques, and one count of theft all arising from a cheque kiting scheme. The bank lost \$82,000. The accused was sentenced to 12 months plus 12 months probation.
- [25] Neither counsel cited cases involving uttering a forged document or attempted fraud.

- [26] Crown counsel emphasises the principle of general deterrence. She cites the comments of Locke J., the trial judge in *Pierce* quoted at ¶ 17 of the appeal decision:

This country, from coast to coast and especially the heavy populated urban areas of Southern Ontario, abounds with fraudsmen who would regard a low or a non-custodial sentence in these circumstances as an irresistible temptation to take the risk of spending a few short months in jail (a Canadian jail) in return for attempting the crime of fraud or theft where the prize exceeds \$150,000. To some, such a prospect would be almost irresistible. Great care must be taken in the matter of sentence for a criminal offence such as fraud at this level of seriousness, to avoid the prospect that by over-emphasizing the principle of rehabilitation, the crime, to many, would be worth the risk of being caught.

- [27] Crown counsel submits that the failure of the accused's scheme does not reduce its seriousness. She notes that this was not an impulsive act, but one that took both planning and preparation. The scheme failed because of the alertness of the bank security staff, not because of the acts of the accused.
- [28] Aggravating factors include the amount involved, planning and the potential financial consequences to both the bank and the innocent homeowner. If the fraud had succeeded it may have taken some effort to rectify its impact, particularly given that one of the mortgagors is more than 90 years old and resides in Iran.
- [29] There is before me a victim impact statement from Ms. Vafaeinejad. She is the co-owner of the subject property. As noted in my reasons for judgment there was a pre-existing relationship between Ms. Vafaeinejad, her husband and Mr. Mohebtash. She says she has suffered emotionally as a result of this crime. She says she now finds it hard to trust anyone.
- [30] The defence seeks a conditional sentence of nine to twelve months. Defence counsel properly notes that several of the cases cited by the crown involved persons in position of trust who had defrauded employers with serious implications for the victims. He submits that this case is considerably different. He says this was an unsophisticated fraud which had little chance of success. He submits that Mr. Mohebtash's relatively clean record and his present medical disabilities support a conditional sentence.
- [31] The principles of sentencing are set out in ss. 718.1-718.2 of the Criminal Code. Deterrence, denunciation and rehabilitation are all important sentencing principles. Pursuant to s. 718.1 the sentence must be proportionate to the gravity of the offence and to the degree of the responsibility of the offender. The sentence must take into account the nature of the offence, the character of the offender, and the circumstances surrounding the commission of the offence: *R. v. Shropshire*, [1995] 4 S.C.R. 227 at 238. While past cases can provide guidance, every particular sentence depends on the specific circumstances of the offence and offender.

[32] These offences are eligible for a conditional sentence as they meet the requirements that the sentence be less than two years and that the offender not pose a danger to the public. The issue is whether a conditional would be consistent with the principles of sentencing.

[33] Here the concern is that a conditional sentence will not adequately address general deterrence. Although Pierce concerned a breach of trust situation, the comments of Finlayson J.A. are also applicable in these circumstances. He said at ¶ 41:

What the authorities make clear is that the purpose of incarcerating these offenders is not to protect the community from any danger posed by the particular offender, but to protect the community from the danger posed by those who may be inclined to engage in similar conduct. In the context of crimes of dishonesty, and particularly those involving a breach of trust, for the purposes of resolving the issue of whether "serving the sentence in the community would . . . endanger the safety of the community", the risk of endangering the safety of the community must not only be measured by an assessment of the danger which the particular offender may pose if permitted to serve the sentence in the community. The risk must also be measured by an assessment of the danger which others may pose if the offender is permitted to serve the sentence in the community. The point was succinctly stated by Lamer J. sitting as a member of the Quebec Superior Court in *R. v. Viger* (unreported) as cited in *R. v. Cossette-Trudel* (1979), 52 C.C.C. (2d) 352 at p. 360, 11 C.R. (3d) 1 (Q.S.P.):

There will also be a danger to the community if the sentence imposed is not of a nature to deter others from conduct analogous to that . . . of the accused. [emphasis in original]

[34] Frauds of this nature, like breach of trust cases, can be devastating for innocent persons such as Ms. Vafaeinejad. The fact that the scheme failed is not reason enough for a conditional sentence. This was a planned and deliberate scheme to defraud the Canadian Imperial Bank of Commerce of \$400,000. The maximum sentence for uttering is ten years. The maximum for attempted fraud is seven years. Although Mr. Mohebtash's limited criminal record and health are mitigating factors, they are more than offset by the circumstances of the offence. In the circumstances of this case general deterrence must take precedence over other sentencing considerations. Those who embark on schemes to defraud large sums of money must know they face significant consequences, regardless of whether their scheme succeeds. Mr. Mohebtash will you please stand.

[35] Given all of the above considerations, I sentence you to eight months imprisonment for uttering a forged document and eight months for attempted fraud. The sentences will be served concurrently.

"R.B.T. Goepel, J."

The Honourable Mr. Justice R.B.T. Goepel

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