
CANADA / JUDGMENT

R. v. Subhag

2012 BCCA 246

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 246 R. v. Subhag

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Subhag,

2012 BCCA 246

Date: 20120531

Docket: CA039628

Between:

Regina

Respondent

And

Ram Prakash Subhag

Appellant

Before:

The Honourable Mr. Justice Low

The Honourable Mr. Justice Groberman

The Honourable Madam Justice MacKenzie

On appeal from Provincial Court of British Columbia, November 14, 2011

(R. v. Subhag, Surrey Registry 17347-1, 185945-1)

Oral Reasons for Judgment

Counsel for the Appellant:

M.M. Ranspot

Counsel for the (Crown) Respondent:

E.A. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

May 29, 2012

Place and Date of Judgment:

Vancouver, British Columbia

May 31, 2012

- [1] A. MACKENZIE J.A.: This sentence appeal concerns identity theft involving almost \$250,000.
- [2] Ram Prakash Subhag applies for leave and if granted, appeals the effective sentence of two years imprisonment imposed by Judge Gulbransen of the Provincial Court of British Columbia on November 14, 2011. Mr. Subhag was sentenced after pleading guilty to three counts of theft and two counts of attempted theft, all perpetrated through various banking transactions involving the impersonation of two individuals. The stolen funds are the subject of restitution orders.
- [3] The judge arrived at the effective sentence as follows. For the two counts of attempted theft and two counts of theft charged under Information 173471, on which Mr. Subhag entered guilty pleas, the judge imposed concurrent sentences resulting in a two-year period of imprisonment. As the Information was sworn prior to the coming into force of the amendments under the Truth in Sentencing Act, S.C. 2009, c. 29, the sentences were reduced by four months as double-time credit for time served in pre-sentence custody, so that Mr. Subhag was required to serve an additional 20 months in jail. For the single count of theft charged under Information 185945 and on which Mr. Subhag entered a guilty plea, the judge imposed a sentence of two years. As this Information was sworn after the coming into force of the amendments under the Truth in Sentencing Act, Mr. Subhag was only given credit for the two months actually served before sentencing, so that he was required to serve an additional 22 months in jail.
- [4] The Truth in Sentencing Act amended s. 719 of the Criminal Code, R.S.C. 1985, c. C-46, to limit credit for pre-sentence custody to one day for each day in custody. Under s. 5 of the Act, the amendment applies to persons charged after February 22, 2010.
- [5] The Crown says the sentences on these offences are fit, with the exception that the sentence of 22 months on Information 185945 should be reduced to 20 months because of an oversight on the part of the Crown that resulted in a delay in laying charges such that the

appellant was denied the benefit of double-time credit for time served in pre-sentence custody. I would grant the appellant's uncontested application to adduce as fresh evidence the Crown's letter dated November 15, 2011 that explains the delay between the commission of the offences, which occurred between May 29, 2008 and June 4, 2008, and the laying of the charges in Information 185945 on December 17, 2010.

- [6] The appellant claims the sentence is excessive because the judge, unaware of the Crown's inadvertent delay in charge approval for Information 185945, attributed the delay to the appellant's sophistication in committing the offences, making them difficult to resolve. The appellant says instead that his commission of the offences was unsophisticated and that the appropriate range for an offence of this magnitude of "non-breach of trust" fraud is 12 to 21 months in prison. He submits a custodial sentence of 12 to 15 months is a fit sentence.
- [7] For the following reasons, I would grant the appellant's application for leave to appeal, but dismiss the appeal except to the extent of reducing the sentence on Information 185945 from 22 to 20 months imprisonment.

Background

- [8] The appellant pleaded guilty to four counts on Information 173471:

Count 6: December 7, 2007 - attempted theft of money;

Count 8: December 10, 2007 - theft of money;

Count 10: December 13, 2007 - theft of money; and

Count 12: December 18, 2007 - attempted theft of money.

All four counts involved money belonging to Mr. Gurcharan Grewal.

- [9] On Information 185945, the appellant pleaded guilty to one count of theft of money belonging to Raj Kumar, which offence was committed between May 29, 2008 and June 4, 2008.
- [10] At the hearing, the Crown sought a global sentence in the range of two years imprisonment, consisting of one year in total for the four counts on Information 173471 and one year consecutive for the single count on Information 185945, less time served in pre-sentence custody.
- [11] The appellant asked the Court to consider, based on factors including the amount of money at issue and what he characterized as a lack of sophistication in the commission of the offences, a conditional sentence of nine to 15 months.
- [12] The Crown has accurately summarized the circumstances of the offences for the four counts charged in Information 173471, occurring between December 7 and December 18, 2007:

6. The Appellant used false identification with his own photo, but in the name of Gurcharan Grewal, to impersonate Mr. Grewal and obtain bank cards and access to Mr. Grewal's Royal Bank accounts and line of credit. On December 7, 2007, the Appellant attempted to withdraw \$6,000 from Mr. Grewal's line of credit but the Royal Bank employee was suspicious of his identification and refused the transaction. On December 10, 2007, the Appellant attended a different Royal Bank branch and successfully obtained a bank draft for \$83,600 from Mr. Grewal's line of credit. The Appellant cashed that bank draft at a currency exchange location and obtained \$80,000 in U.S. currency. On December 13, 2007, the Appellant attended a third Royal Bank branch and obtained a bank draft for \$34,800 from Mr. Grewal's line of credit. He successfully cashed that bank draft at J&M Coin & Jewellery. On December 18, 2007, the Appellant attempted to obtain a bank draft for \$107,000 from Mr. Grewal's line of credit but left the bank while the teller sought assistance. The total loss to the Royal Bank for the thefts from Mr. Grewal's accounts was \$118,400. [T. Nov. 8, 2011, pp.2(36)-4(27)]
- [13] As to Information 185945, the circumstances are again concisely set out in the Crown's statement:
8. The Appellant again used false identification with his own photo, but this time in the name of Raj Kumar, to impersonate Raj Kumar and obtain bank cards and access to Mr. Kumar's Royal Bank accounts and line of credit. Between May 29 and June 4, 2008, the Appellant used various ATMs on 25 occasions to withdraw a total of \$15,000 from Mr. Kumar's bank accounts. During that time, the Appellant also made 6 point of sale purchases from Mr. Kumar's bank accounts, totalling \$24,856.98. The Appellant successfully obtained one bank draft for \$85,274.26 from Mr. Kumar's line of credit. The Appellant cashed that bank draft and obtained \$20,000 in U.S. currency and \$40,000 in Euros. The total loss to the Royal Bank for the thefts from Mr. Kumar's accounts was \$125,131.24. [T. Nov.8, 2011, pp.4(28)-5(12)]
- [14] The bank transactions were all captured on videotape, and the appellant was eventually identified by persons who knew him.
- [15] The appellant pleaded guilty to the counts identified above on January 28, 2011. The sentencing hearing occurred on November 8, 2011 with sentences imposed on November 14, 2011.
- [16] The appellant was 54 years of age at sentencing. He is divorced with no children, but has a common-law spouse. His usual employment is as a truck driver or mechanic. The appellant was drinking heavily when he committed the offences, but not at the time of sentencing. He had a truck driving job available to him if released from custody. He has a heart condition for which his medication costs \$400 - \$500 per month.
- [17] The sentencing judge accepted the appellant's explanation that he became involved with criminals who organized and orchestrated these offences, committing the theft of the identity documents and personal information needed to create the false identification used by the appellant. The appellant's only involvement in the making of false identification or obtaining of information related to the victims' bank accounts was to pick up some mail at

the post office sent to Mr. Kumar. The appellant told the judge he was paid \$50,000 of the amount stolen, which, with the exception of a \$10,000 gift to his sister, he used for living expenses.

- [18] While the judge found it unlikely that the appellant had access to the information about the victims' accounts, or the ability or opportunity to obtain the necessary personal information to allow false identification to be made, he was skeptical of the appellant's vague claim that the orchestrators of the scheme had threatened to harm him if he did not carry out the offences.
- [19] The appellant has a criminal record for the unrelated offences of assault causing bodily harm on December 14, 2000, for which he received a conditional sentence of four months, as well as the offences of failing to comply with a recognizance, assault and assault of a police officer on December 8, 2006, for which he received one day in jail and 15 months probation on each charge.
- [20] It is also significant that the appellant was on probation when he committed the 2007 offences giving rise to the current sentence appeal, although for a different offence.
- [21] As of the date of the sentencing hearing, the appellant had not paid any restitution. The judge observed that the only prospect of him doing so would be by paying periodic amounts once back in the workforce.

Credit for Pre-Sentence Custody

- [22] As discussed above, the Crown takes responsibility for the delay in charging that deprived the appellant of the double-time credit for time served that he would have enjoyed had he been charged prior to the coming into force of the amendments under the Truth in Sentencing Act.
- [23] The day after the sentencing hearing, the Crown (not counsel before us) wrote to counsel for the appellant to explain that although the Crown had received the relevant police report on April 1, 2009, it was not reviewed until early October 2010 due to oversight. This delay resulted in charges being sworn on December 17, 2010, after the effective date of February 22, 2010 for the relevant amendments to the sentencing provisions of the Criminal Code.
- [24] Thus, conceding its delay that deprived the appellant of two extra months reduction for "dead time", the Crown submits the 22 month sentence on Information 185945 should be reduced to 20 months. In the unique circumstances of this case, and given the Crown's position that the sentence should be reduced, I am prepared to allow the appeal to that limited extent.

Fitness of the Sentence Imposed

[25] Appellate courts must show considerable deference when reviewing the fitness of a sentence. A court may intervene on appeal only where the sentence is "demonstrably unfit," reflects an error in principle, or fails to consider or over-emphasizes a relevant factor: *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 at para. 46.

The sophistication of the offences

[26] The appellant submits the judge unknowingly erred in attributing a higher than justified degree of sophistication to the offences based, in part, on the 30-month time period between the commission of the offences in Information 185945 and the swearing of that Information.

[27] At the sentencing, the appellant conceded the offences were aggravated by having been planned but contended the offences were mitigated by the appellant's lack of sophistication in committing them. In so arguing, the appellant relied upon the fact that he would inevitably be caught on videotape while carrying out the bank transactions.

[28] The judge obviously did not accept the appellant's submission that the offences were unsophisticated. Instead, he found that, "Mr. Subhag was able to commit these offences because he and others were part of a fairly sophisticated identity theft scheme" (para. 18).

[29] The judge emphasized that identity theft constitutes "a very serious threat to the public", given the highly impersonal nature of modern banking transactions and the vulnerability of electronic security systems to identity theft (para. 19). These concerns echo the comments of this Court in *R. v. McNeil*, 2006 BCCA 375, 229 B.C.A.C. 297 at paras. 8, 11 and 12; *R. v. Ireland*, 2007 BCCA 387, 244 B.C.A.C. 317 at para. 10, and *R. v. Mahoney*, 2011 BCCA 132, 302 B.C.A.C. 69 at para. 24.

[30] The judge further highlighted the substantial difficulties involved in investigating cases of identity theft. Although not referenced in the reasons for judgment, he had before him the victim impact statement from the bank that suffered the losses occasioned by the fraudulent transactions, the contents of which discuss the challenges of detecting identity theft and the serious consequences of such conduct for both the institution and its clients. The judge's reasons indicate that he considered the time elapsed between the commission of the offences and the swearing of the Informations in the present case to be illustrative of the investigational challenges extant with respect to cases of identity theft. He said at para. 10:

...it is clear that it took some significant time before the police actually gathered sufficient evidence so that charges could be sworn against him: For example, the charge arising from 2007 was not sworn until March 11, 2009, and the Information charging the 2008 offences was sworn on December 17, 2010.

And then at para. 20:

Another point to make I think is it is very difficult to solve or arrest the guilty parties in cases like this: It is quite quickly that one discovers that some theft has taken place from an account, but getting from there to find out who did it and who is this person, where is this person, what are the circumstances in which they got access to this account are quite difficult. That is illustrated by the time it took the police in this particular case to find the culprit. ...

[Emphasis added.]

[31] However, it is clear from the judge's reasons that he did not rely solely on the elapsed time, in part caused by the Crown's oversight of which he was unaware, in rejecting the appellant's submission that the offences were unsophisticated. He was largely motivated in his reasoning by the nature of the offence of identity theft itself and the serious societal impact of such offence, as is evident from the remainder of his para. 20:

...As well, as I think is obvious in this case, it is often very difficult to find all the parties involved and successfully prosecute them because of the nature of the anonymity of the withdrawal process, the difficulty in connecting perhaps the person who actually did the physical withdrawals to other persons who put him up to it or assisted him. Those are all reasons why identity theft and related crimes, that is crimes committed through stealing people's identity, are quite a serious threat to the public order.

[32] I consider that the references to the elapsed time between the commission of the offences and the swearing of the Informations played only a very minor role in the judge's reasoning with respect to the sophistication of the offences, and were included more as a manifestation or example of his concerns regarding this type of offence. I agree with the respondent that the Crown's delay in charging, of which the judge was unaware, does not negate the concerns of the sentencing judge about the seriousness of identity theft offences and the challenges of bringing the perpetrators to justice.

[33] The appellant is hard-pressed, in any event, to maintain that his offences, requiring the planning and attention they did, were unsophisticated. The amount obtained by way of the fraudulent transactions, almost \$250,000, offers further support for this conclusion.

[34] I do not think there is any merit to this ground of appeal.

Length of sentence

[35] The appellant asks this Court to substitute a global custodial sentence of 12 to 15 months for the two-year sentence imposed by the judge. His counsel referred us to cases from this and other jurisdictions where identity theft was used as a means to steal money or commit fraud that support a sentence range of 12 to 21 months in prison or the imposition of a conditional sentence, with or without probation.

- [36] The Crown has provided authorities from this Court dealing with multiple thefts or frauds committed by way of identity theft that support a sentence range of 1 to 4 years in jail: see in particular *R. v. Lambert*, 2007 BCCA 473, 246 B.C.A.C. 246 at para. 13, citing *R. v. Goertzen*, 2004 BCCA 639, 207 B.C.A.C. 165 at para. 15. The range of available sentences is not rigid, but is borne of the sentencing judge's exercise of discretion in the weighing of the relevant objectives and principles of sentencing under ss. 718, 718.1 and 718.2 of the Criminal Code.
- [37] The judge properly recognized the importance of deterrence and denunciation in this case. He said:
- [30] Deference, both general and specific, are pressing needs here. This brazen theft, which was part of a moderately sophisticated but very successful scheme has to be denounced and similar schemes or people who do similar things have to be deterred. As I said, this kind of crime is a serious threat to the privacy, particularly the financial security of individuals, and by the use of identity theft, I mean, I am talking about, and as well as a significant threat to the proper function of the banking system: This is, the banks have to further look at how do you protect your customers from this kind of thing? I also point out again that this kind of crime can be committed almost anonymously. It is very difficult to detect and to solve, so that is a crime that other people might be motivated to commit because it is hard to solve. All of those reasons in my view suggest that a strong deterrent, denunciatory message must be given out.
- [31] I would say circumstances where someone uses a false identity obtained in the way it was obtained in this case to loot somebody's bank account displayed someone with a very high moral culpability. It is a very callous attitude towards the finances of another person. I would also say that this kind of serious invasion of person's private affairs is quite analogous to what might happen when a home is broken into. It is a violation of a very private part of a person's life. One can imagine the effect on the victims here. But it is a serious invasion of privacy that has to be deterred and denounced.
- [38] In addition to finding that it would endanger the public to release the appellant on a conditional sentence as requested, the judge rejected this option as being inconsistent with the principles of deterrence and denunciation. He concluded that a fit sentence would be concurrent two-year custodial sentences, less time served.
- [39] I would note that the appellant is not challenging the judge's rejection of a conditional sentence but is rather asking this Court to decrease the duration of the custodial sentence ordered.
- [40] There is no question the courts must respond severely to address crimes of identity theft. In committing these offences, perpetrators prey on innocent victims who rely on the convenience of multi-branch banking, ATMs and online banking as a routine aspect of daily life. An individual's sense of personal security is profoundly threatened by such crimes, and the public's confidence in our banking institutions, credit and debit cards, and ubiquitous documents such as drivers' licences is put at risk. As noted above, this Court has emphasized

the seriousness of identity theft crimes in cases such as McNeil, Ireland, and Mahoney.

- [41] In the circumstances of the case at bar, rehabilitation is not a significant consideration for sentencing. The fact that the offences involved a very large sum of money and a pattern of transactions perpetrated by an offender in his mid-50s who was on probation at the time with two convictions for breach of recognizance, and who committed these offences in association with people he characterized as dangerous criminals, does not indicate leniency.
- [42] In my view, the sentencing judge properly and carefully exercised his discretion, in light of all the relevant factors, emphasizing the paramount sentencing objectives of deterrence and denunciation. He considered the substantial amount of money involved, the critical role of the appellant in the scheme, the degree of planning and difficulty in investigating these crimes, the aggravating features of the appellant's probationary status and record, and the expense and devastation to the victims.
- [43] The judge's language reflects that he considered the case law and was aware that identity theft poses an enormous threat not only to our system of banking in the modern age, but also to our individual identities and privacy.
- [44] In light of the above, in my opinion, the effective sentence of two years was fit.

Conclusion

- [45] I would grant leave to appeal, but dismiss the appeal except to the extent of reducing the sentence on Information 185945 from 22 to 20 months imprisonment.
- [46] I would grant leave to appeal.
- [47] LOW J.A.: I agree.
- [48] GROBERMAN J.A.: I agree.
- [49] LOW J.A.: Leave to appeal sentence is granted and the appeal is allowed to the limited extent of reducing the sentence from 22 months to 20 months as stated by my colleague.

"The Honourable Madam Justice A. MacKenzie"

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