
CANADA / JUDGMENT

R. v. Zeek

2004 BCCA 42

COURT

British Columbia Court of Appeal

DECIDED

27 January 2004

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Zeek,

2004 BCCA 42

Date: 20040127

Docket: CA030365

Between:

Regina

Respondent

And

Martin John Zeek

Appellant

Before:

The Honourable Madam Justice Southin

The Honourable Madam Justice Rowles

The Honourable Madam Justice Prowse

J. R. Ray

Counsel for the Appellant

U. Botz

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

January 7, 2004

Place and Date of Judgment:

Vancouver, British Columbia

January 27, 2004

Written Reasons by:

The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Madam Justice Southin

The Honourable Madam Justice Prowse

Reasons for Judgment of the Honourable Madam Justice Rowles:

- [1] This is an application for leave to appeal sentence and if leave be granted, to substitute a conditional sentence of somewhat greater length than the term of imprisonment the trial judge imposed.
- [2] Mr. Martin John Zeek was convicted of two offences under the Criminal Code, public mischief contrary to s. 140(1)(c) and fraud contrary to s. 380(1)(a). He was sentenced to 12 months imprisonment, to be followed by 12 months probation. As I would grant leave to appeal in this case, I will refer to Mr. Zeek as the appellant.
- [3] The main ground of appeal is that the trial judge erred in principle by taking into account the appellant's post charge conduct, including the conduct of his defence at trial, when rejecting the imposition of a conditional sentence.
- [4] The two offences with which the appellant was charged arose out of the same set of circumstances. On 27 January 2000, the appellant falsely reported to the R.C.M.P. and to a motor vehicle insurer that his 48 foot 1994 utility refrigeration trailer worth approximately \$45,000 had been stolen from the location where he had parked it just off Highway 7 near the Albion Ferry in Maple Ridge, British Columbia. In fact, the appellant did not own such a trailer at the time.
- [5] The R.C.M.P. began an investigation as a result of the appellant's report. Some three months later, on 26 April 2000, after an insurance adjuster had pressed for further information to substantiate the theft, the appellant, through his wife, then claimed that a friend had taken the trailer and the appellant abandoned the claim.

- [6] Two years later, in March 2002, and one month before his trial, the appellant and his wife persuaded the secretary of a company from which he had earlier purchased a different trailer to write a misleading letter for the purpose of perpetrating what the trial judge described as "a further clumsy fraud upon a fraud attempting to create a defence for presentation at this trial." False evidence was presented by the appellant at trial which was supported by the appellant's wife and a friend.
- [7] At the sentencing hearing, the Crown sought a one year term of imprisonment. The defence did not take issue with the length of the sentence but submitted that the sentence ought to be served in the community.
- [8] At the sentencing hearing, the contentious question was whether all the conditions for making a conditional sentence order had been met, as set out in s. 742.1 of the Criminal Code:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

- [9] Section 718, which is referred to in s. 742.1(b), sets out the purpose and principles of sentencing:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

- [10] The portion of s. 718.2 that is relevant to this appeal is subsection (d), which provides:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

* * *

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; ...

[11] It was Crown counsel's submission that a sentence of 12 months would be appropriate for fraud of the kind the appellant had committed and, as noted above, defence counsel did not take serious issue with that submission. However, it was the Crown's position that a conditional sentence order ought not to be made because it would not satisfy two of the fundamental purposes of sentencing set out in s. 718 of the Criminal Code, that is, denunciation and general deterrence.

[12] A mitigating factor put forward by the defence was that the appellant had voluntarily abandoned the fraud. In that regard, defence counsel made these submissions:

The positive thing that can be said about the accused's participation in this crime is that he voluntarily abandoned the insurance claim before he received any benefit from the crime that he was found to be convicted of. He has not been driven by the commission of crime in the past to economic considerations, and, in my respectful submission, he does not have a history of gaining economic benefit from criminal conduct.

I wasn't counsel at trial, but, by reviewing Your Ladyship's reasons for judgment, it certainly seemed to be an attempted commission of fraud that was foolish to the extreme, and certainly it was found to be criminal. The good thing that can be said is that he abandoned it.

[13] In determining whether a conditional sentence order ought to be made, the learned trial judge initially focused on the conditions set out in s. 742.1. She accepted the submission that a sentence in the order of 12 months was appropriate and said she was satisfied that Mr. Zeek would not endanger the safety of the community if he were to serve his sentence in the community. The trial judge then stated that "[t]he only real issue is whether two particular principles of sentencing can be met by a conditional sentence, and those are the denunciation of the unlawful conduct and the general deterrence of others." In addressing that issue, the trial judge said:

[14] Dealing with the need for denunciation of the unlawful conduct, I note that this fraudulent scheme, while perhaps a fumbling confused effort, was nonetheless a determined one. The accused went to some trouble to place insurance on a vehicle which was no longer in his possession, manipulating insurance documents to create the impression the vehicle remained both his property and in his possession. Reports, as I have mentioned, were filed with both the police and with the insurer's adjuster. A poster was prepared to give the impression the vehicle had been stolen.

- [15] While he eventually did withdraw his claim for recovery of the insurance, as I have said earlier and I will say again, the real mischief here lay in the accused's determined pursuit, following the laying of charges, to mislead the court and to attempt to create the impression a trailer unit had indeed gone missing for a period and that the confusion created by the insurance documents was entirely the result of various errors made by himself and his commonlaw wife.
- [16] As I have mentioned, I found that there were no mistakes, but rather a series of calculated deliberate steps taken to attempt this clumsy insurance fraud. The accused not only took steps to perjure himself to create false evidence, but he summoned perjured evidence from both his friend, Mr. Betcker, and from his commonlaw wife, Ms. Vukelich, to support his version of the events. He also called the evidence of a Ms. BriscellBarrett to support the allegation that the 1988 utility reefer van had been stored on her property. I do not specifically find that she lied. Rather, I find that, while a van may well have been stored on that property, it was not the 1988 van alleged by the accused.
- [17] Even more aggravating, and I have mentioned this before, was the fact that shortly before trial the accused and his wife approached the Natrel firm, that is, the firm which had sold him the 1988 unit, and succeeded in having that firm create a letter presumably to support a finding by the court that there had been a mixup in the VIN numbers referable to the two utility trailers in question. As I noted at trial, the letter was prepared by Natrel at the request of the accused and Vukelich and presumably, I can only infer this, in an effort to further mislead the court. Fortunately the letter was never relied on at trial. Thus, in this case, I have the original attempted fraud of the accused compounded by a continuous effort up to and throughout trial to mislead the court.

[Underlining added.]

- [14] As to whether there were any mitigating factors to consider, the trial judge said this:
- [18] This is not a case in which the accused has ever offered any explanation or any apology for his behaviour. There never has been any expression of remorse nor any acknowledgement of his complicity. While the case authorities are clear that the absence of remorse cannot be an aggravating factor, the accused's failure to express any remorse and, indeed, his course of action throughout these criminal proceedings, can be taken into account in considering whether there are any mitigating factors to be advanced on his behalf. In my view, in all of the circumstances, the fact that the accused wisely decided not to pursue this fraud scheme is but a small mitigating factor.

[Underlining added.]

- [15] In declining to impose a conditional sentence, the trial judge also took into account the appellant's criminal record, about which she said:

- [19] One other matter bears mentioning, which is the accused's criminal record. While it is dated, it is still noteworthy that the accused has four convictions: In January 1982, he was convicted for breaking and entry with intent and possession of house breaking instruments and fined \$500 and \$250, respectively, with default periods of 30 and 15 days. In November 1984, he was convicted of making false pretences for a value over \$200 and given a suspended sentence and probation for nine months. In December 1988, he was convicted with personation with intent, this time fined \$850 and given probation for one year. In March 1999, he was convicted of obstruction of a peace officer and fined \$220 and put on probation for 12 months.
- [20] While there was no particular description of the circumstances involved in the first three offences, Mr. Chamberlain advised that in none of these cases and indeed in the case of the fourth conviction, was there any motive for economic gain on the part of the accused. He advised, however, that the obstruction charge related to the provision of a false name to the police. While these offences, at least the 1984 and 1988 offences, are dated, I am satisfied that the convictions reflect a history of dishonesty on the part of the accused and moral turpitude on his part. It is significant that three of the four convictions are in that vein.
- [16] It is the appellant's submission that paragraphs 16 and 17 of the reasons clearly show that the trial judge considered the conduct of the defence as an aggravating factor and a basis for rejecting the imposition of a conditional sentence order. To support his submissions of legal error, appellant's counsel referred us to *R. v. Sawchyn* (1981), 60 C.C.C. (2d) 200 (Alta. C.A.) (leave to appeal refused, [1981] 2 S.C.R. xi) and *R. v. Vickers* (1998), 105 B.C.A.C. 42, [1998] B.C.J. No. 549 (Q.L.) (C.A.).
- [17] Respondent's counsel submits that the appellant is reading more into the judge's references to the appellant's post charge conduct than is supportable and points to paragraph 18 of the reasons to show that the trial judge was simply discounting the defence submission on mitigation. The respondent relies on *R. v. Vickers*, supra, to support the proposition that conduct of the defence at trial may be considered in relation to a mitigation argument.
- [18] The respondent argues that the trial judge's references to the appellant's conduct in paragraphs 15 to 17 of her reasons, including the various actions taken by the appellant after being charged, are simply directed to defence counsel's suggestion that the appellant's abandonment of the insurance fraud should be considered a mitigating factor. The respondent submits that paragraph 18 of the reasons makes clear that the trial judge had concluded that the abandonment of the fraud, given the appellant's conduct throughout and his obvious lack of remorse, could not be given as much weight in mitigation as it might have otherwise.
- [19] With deference, I am unable to agree with the respondent's argument. The question on appeal is whether the trial judge gave improper consideration to the appellant's post charge conduct when she concluded that the principles of denunciation and general deterrence could not be met by a conditional sentence. In my view, an examination of the trial judge's

reasons shows that she did consider the appellant's post charge conduct when deciding whether to make a conditional sentence order and treated that conduct as an aggravating factor when concluding that a conditional sentence would be inappropriate.

- [20] In paragraph 13 of her reasons, the trial judge specifically identified what was in issue on the sentencing hearing:
- [13] Regarding the issue of the appropriateness of a conditional sentence, I accept the submission of both Crown and defence counsel that the appropriate range of sentence is in the order of 12 months. So the first condition is satisfied. Further, I am satisfied that Mr. Zeek would not endanger the safety of the community if he were to serve this sentence in the community. The only real issue is whether two particular principles of sentencing can be met by a conditional sentence, and those are the denunciation of the unlawful conduct and the general deterrence of others.

[Underlining added.]

- [21] It is plain from her reasons that the trial judge concluded that the principles of denunciation and general deterrence could not be met by a conditional sentence. The trial judge referred explicitly to the appellant's post charge conduct in paragraphs 15 to 17 of her reasons and, in the concluding sentence of paragraph 17, she said: "Thus, in this case, I have the original attempted fraud of the accused compounded by a continuous effort up to and throughout trial to mislead the court." When the trial judge's reasons are couched as they are and focus to such an extent on the appellant's post charge conduct, it is difficult to escape the conclusion that the trial judge treated the post charge misconduct as an aggravating factor in sentencing.
- [22] It is well settled that the misconduct of an accused at trial cannot be treated as an aggravating factor attracting an additional sentence. That follows from the basic proposition that an accused person should not be sentenced for a crime with which he has not been charged and convicted.
- [23] In this case, there can be no complaint about the trial judge having taken into account the appellant's post charge misconduct when considering whether she should give effect to the mitigating factor advanced by the appellant that he had abandoned the fraud. However, it seems to me that some care had to be taken in how the appellant's demonstrated lack of remorse was treated.
- [24] It is generally regarded as an error in principle to consider lack of demonstration of remorse as an aggravating circumstance in sentencing. The part remorse plays in sentencing was explained by Taylor J.A. in *R. v. Anderson* (1992), 74 C.C.C. (3d) 523 (B.C.C.A.) at 53536:

The factor of "remorse" is often important. In so far as it might be suggested that the court should regard those who come before it in a submissive or contrite manner as deserving of more lenient treatment than those who accept their predicament with whatever fortitude they are able to summon, there would be little in this factor which could assist the sentencing judge. But to the

extent that an accused person is able to demonstrate that he or she has, since the commission of the crime, come to realize the gravity of the conduct, and as a result has achieved a change in attitude or imposed some selfdiscipline which significantly reduces the likelihood of further offending, the existence of remorse in this sense obviously has much importance.

The capacity of human beings who have erred to recognize the magnitude of their wrongdoing, and to redeem themselves, offers the only possibility that those who have committed crimes may again become contributing members of the community, rather than its burden for the rest of their lives.

[Underlining added.]

[25] In *R. v. Sawchyn*, *supra*, Laycraft J.A. made the following observations, at 20810, which are apposite here:

Evidence of remorse, as for instance by a plea of guilty, will often justify reduction of a sentence below the level which would otherwise be appropriate for the offence committed. In my view, however, evidence of misconduct by an accused in the course of his defence cannot justify an increase in sentence beyond that which is appropriate for the offence for which he has been convicted.

* * *

Misconduct by an accused in the course of his defence may indirectly affect his sentence by negating the existence of remorse. A plea for leniency leading to a sentence lower than otherwise appropriate may fail because the misconduct will prove that the accused had no contrition for the offence committed and that the process of rehabilitation has not commenced.

* * *

It remains a valid principle that remorse, or indeed any other mitigating factor, justifies leniency; an accused who shows no remorse will, all other factors being equal, receive a higher sentence than an accused who does not [sic]. It is also a valid principle that an accused is not to receive a sentence higher than appropriate for the offence of which he has been convicted because of misconduct in his defence. In my view, the two principles are not inconsistent. It is simply a fact that it will be much more difficult to perceive the existence of remorse where there has been misconduct in the defence. Where that occurs, and there is no other indication of remorse, an accused may lose the benefit of leniency arising from factors in mitigation. At the same time the Court must ensure that the resultant sentence is not higher than that which is appropriate for the offence involved.

[26] In this case, I am of the view that the learned trial judge erred by treating the appellant's post charge misconduct as an aggravating factor in sentencing. That leaves open the question, which I will come back to shortly, of whether the sentence imposed was unfit.

- [27] The second ground of appeal is that the trial judge erred by concluding that the appellant's employment precluded the imposition of a conditional sentence with terms that would serve to meet the sentencing principles of general deterrence and denunciation. In regard to conditions that might be imposed, the trial judge said:
- [21] Finally, I note that the conditional sentence order which has been sought, was an open one, the only specific condition sought by the defence being the addition of one or two years of probation in which the accused would cooperate in seeking out whatever counselling, financial or otherwise, might be deemed appropriate by the court. While there were no submissions to this effect, I take it that nothing close to house arrest or strict curfew conditions were being sought since the accused is a trucker and, by definition, is therefore absent from home on trips to other provinces on a regular basis. In these circumstances, of course, it would be difficult if not impossible to craft a form of conditional sentencing order with the strict terms and conditions ordinarily included which would satisfy the element of denunciation which the nature of these crimes call for.
- [28] In the portion of her reasons just quoted, it appears to me that the trial judge was considering the submissions which had been made to her by defence counsel in relation to the question of whether a conditional sentence could meet the principles of denunciation and general deterrence. I say that because it was obviously open to the trial judge to impose a term of imprisonment, regardless of whether it interfered with the appellant's employment, just as it was open to her to make a conditional sentence order, regardless of whether the terms interfered with the appellant's employment.
- [29] In his written submission on the appeal, the appellant states that the trial judge did not have correct information before her and that "defence counsel misstated the Appellant's true employment arrangements". In order to demonstrate that terms could be imposed which would come close to "house arrest", and that would meet the requirements of denunciation and general deterrence, the appellant now seeks to introduce fresh evidence about arrangements that could be made concerning his employment.
- [30] I would not admit the fresh evidence. The Supreme Court's decision in *R. v. Lévesque*, [2000] 2 S.C.R. 487, 148 C.C.C. (3d) 193, makes clear that the principles that apply with respect to the introduction of fresh evidence on a conviction appeal apply as well to sentencing proceedings. In this case, the appellant cannot meet the requirement for due diligence because information about alternative arrangements for his employment would have been available at the time of sentence. I am also not persuaded that the fresh evidence, if admitted, could reasonably be expected to have affected the result.
- [31] I would not accede to the second ground of appeal.
- [32] I turn now to the question of whether this Court ought to vary the sentence in this case. The standard of review on sentence appeals is summarized in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, ¶ 90:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.

[Emphasis of Lamer C.J.C.]

[33] In view of the error in principle which is the subject of the first ground of appeal, this Court is required to determine whether the sentence, taking into account the correct principles, is unfit. Section 687 of the Criminal Code sets out the powers of the court of appeal on an appeal against sentence:

687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

[34] As noted above, s. 742.1 sets out the conditions that must be satisfied before an order may be made that an accused serve a sentence in the community. Section 742.1(b) provides that the court must be satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[35] In this case, I am of the view that the principles of denunciation, general deterrence and specific deterrence could not be met by a conditional sentence order and therefore I do not regard the sentence of 12 months incarceration as unfit. As the trial judge found, this was a fraud of a deliberate and determined nature. The appellant embarked on the scheme by placing insurance on a vehicle which was no longer in his possession, and he manipulated insurance documents to create the impression the vehicle remained both his property and in his possession. He filed theft reports with both the police and the insurer and had a poster prepared to give the impression the vehicle had been stolen.

[36] The fraudulent scheme may not have been a sophisticated one but the appellant persisted in it until he was pressed by the insurance adjuster some three months after the initial false report. Anything that might be said in mitigation as a result of his abandoning the claim and not deriving any benefit from the attempted fraud is defeated by his subsequent conduct.

[37] This is not a case where there are mitigating factors to be taken into account. As the trial judge noted, the appellant's record includes offences for dishonesty and dishonesty is the very essence of the offences of which he was convicted. Assuredly there was no demonstration of remorse or any other indication that the appellant was a good candidate for rehabilitation.

[38] In the circumstances, I am not persuaded that a one year term of imprisonment was unfit.

[39] I would grant leave but dismiss the appeal.

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Madam Justice Southin"

I agree:

"The Honourable Madam Justice Prowse"

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