CITATION: R. v. Berhe, 2016 ONSC 6474
COURT FILE NO.: 08/15
DATE: 20161017

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Respondent	*M. Sabat*, for the Respondent
– and –	
YOHANNES BERHE Appellant	*S. Wilson*, for the Appellant
	HEARD: September 21 and 22, 2016

S.A.Q. AKHTAR J.

[1] On appeal from the sentence imposed by Justice Ramez Khawly of the Ontario Court of Justice on 10 September 2015 and the sentence imposed by Justice Mary Hogan of the Ontario Court of Justice on 22 July 2015.

I. FACTUAL BACKGROUND AND OVERVIEW

[2] These appeals, heard together as a series of appeals brought by Yohannes Berhe, deal with the specific issue of the use of so-called "nominal fines" to reduce the amount of Victim Fine Surcharge (VFS) payable by a guilty party.

The Sentence Imposed by Khawly J.

[3] On 10 September 2015, the appellant pleaded guilty to the offence of Failing to Comply with a Recognizance, contrary to s. 145 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the *Code*). The substance of the plea was that on 3 May 2015, in violation of a court order, the appellant was found on property belonging to the Toronto Transit Commission. The presiding judge,

Khawly J., imposed a sentence of 15 days imprisonment, to be served in addition to 31 days already served in pre-sentence custody. In addition, the appellant was ordered to pay the VFS in the amount of $100, as required by s. 737(2)(i) of the *Code*.

[4] The appellant argues that the judge erred in this regard and instead should have imposed a nominal fine so that the VFS would be reduced to an amount that the appellant was capable of paying.

The Sentence Imposed by Hogan J.

[5] On 22 July 2015, the appellant pleaded guilty to the offences of Indecent Act and Failing to Comply with Probation, in front of Hogan J. He received a custodial sentence of 30 days imprisonment, to be served in addition to his pre-sentence custody of 111 days and placed on probation for a period of two years, with conditions of reporting and counselling. As a result of the charges, the appellant was also subject to the mandatory VFS, which in this case amounted to $200. After hearing submissions made on behalf of the appellant, requesting an extended time to pay, Hogan J. decided to impose a "nominal" fine of $5 on each count to reduce the VFS payment to $10 in total.

[6] The appellant appeals on the basis that in imposing custody, probation and a fine, Hogan J. committed a legal error by imposing a sentence not known to law. The respondent Crown concedes that the sentence is illegal and that the appeal must be allowed.

[7] The parties differ, however, in their views on the correct remedy. Ms. Wilson, for the appellant, submits that the probation condition should be removed to make the sentence a proper one. Mr. Sabat argues that the nominal fines imposed by Hogan J. were imposed only to circumvent the mandatory VFS provisions. That being the case, it is the fines that should be quashed.

The Sentencing Options Within S. 731 of the *Code*

[8] Section 731(1) of the *Code* sets out the options for sentencing an accused in the following manner:

> **731 (1)** Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,
>
> **(a)** if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
>
> **(b)** in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order. [Emphasis added.]

[9] It is clear from the wording of the subsection that a judge cannot impose all three options of custody, fine and probation: *R. v. Blacquiere* (1975), 24 C.C.C. (2d) 168 (Ont. C.A.).

The Victim Fine Surcharge

[10] Section 737 of the *Code* contains the VFS framework to be applied after conviction. It reads as follows:

> **737 (1)** An offender who is convicted, or discharged under section 730, of an offence under this Act or the *Controlled Drugs and Substances Act* shall pay a victim surcharge, in addition to any other punishment imposed on the offender.
>
> **Amount of surcharge**
>
> **(2)** Subject to subsection (3), the amount of the victim surcharge in respect of an offence is
>
> **(a)** 30 per cent of any fine that is imposed on the offender for the offence; or
>
> **(b)** if no fine is imposed on the offender for the offence,
>
> **(i)** $100 in the case of an offence punishable by summary conviction, and
> **(ii)** $200 in the case of an offence punishable by indictment.

[11] The funds generated by the VFS are collected in order to provide assistance to victims of offences. The funds are distributed to programmes, including those with the purpose of providing reparations for harm caused to victims or the community, promoting a sense of responsibility in offenders and acknowledgement of the harm committed to victims: *R. v. Michael*, 2014 ONCJ 360, 121 O.R. (3d) 244, at para. 8.

[12] Previously, s. 737(5) of the *Code* permitted a sentencing judge to waive imposition of the VFS on the grounds of undue hardship. Rightly or wrongly, Parliament felt judges were forgoing the VFS with such frequency that it was hardly ever imposed. On 24 October 2013, s. 737(5) of the *Code* was repealed, and the surcharge became mandatory with no exceptions.

[13] The resulting inflexibility occasioned by the removal of judicial discretion was the subject of much criticism. It led to decisions by the Ontario Court of Justice, which declared the VFS in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*, by being "cruel and unusual treatment or punishment": see e.g. *Michael*. The matter was settled at the Summary Conviction Appeal level in *R. v. Larocque*, 2015 ONSC 5407, where Lacelle J. found the surcharge to survive s. 12 scrutiny. Moreover, in *R. v. Tinker*, 2015 ONSC 2284, 20 C.R. (7th) 174, Glass J. held that the VFS regime was constitutionally compliant with s. 7 of the *Charter*. Here, there is no challenge to the constitutionality of the VFS regime in this appeal.

[14] Although Lacelle J., in *Larocque*, found the VFS to constitute a fine within the definition of "punishment" for the purposes of s. 12 of the *Charter*, other decisions have found the VFS

more properly characterised as an ancillary order, rather than part of the sentence itself: *R. v. Fedele*, 2016 ONSC 2305, at para. 14; and *Tinker*, at para. 39.

[15] I agree with the views in *Fedele* and *Tinker*, to the extent that the VFS is an ancillary order akin to such orders as DNA orders and weapons prohibitions. Consideration of the surcharge is undertaken after the sentence has been determined and does not determine the actual sentence.

Principles of Sentencing

[16] On the other hand, there can be no doubting that a fine is part of the sentence handed down by the court to punish an offender after a finding of guilt. Fines are governed by reference to s. 718 of the *Code* which outlines the general principles a sentencing judge must consider before passing sentence: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 11.

[17] Sentencing is a highly individualised, customised task undertaken by a judge having regard to the principles contained in s. 718 of the *Code*. Sentencing is all about the offender and the offence: *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 2; and *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 33-36. The passing of sentence requires an evaluation of factors pertaining to the offender so that the objectives of s. 718 of the *Code* may be best achieved.

II. ARE NOMINAL FINES PERMISSIBLE?

[18] As noted, s. 737(2)(a) of the *Code* allows a variation to be applied to the VFS when a fine is ordered either wholly or as part of a sentence. Can a court impose a reduced or "nominal" fine in order to reduce the VFS? This question was left open by Lacelle J. in *Larocque*. The result of these appeals, however, requires an answer to this question. For the following reasons, I conclude the answer is "no."

[19] First, fines are part of a sentence customised to punish the offender in accordance with the sentencing principles contained in s. 718 of the *Code*. The use of "nominal" fines to reduce the VFS ignores these principles because they are not a sentence but a mechanism to manipulate the amount of an otherwise mandatory payment. In effect, the court creates a fine unrelated to the principles of sentencing. Such a practice, in my view, distorts the sentencing process as a whole.

[20] Secondly, a sentencing court has no place deliberately frustrating the will of the elected legislature of Canada. The VFS may well be deserving of many of its criticisms but, subject to a finding of constitutional impairment, the VFS is the law and must be followed. It is clear that Parliament's decision to remove judicial discretion concerning the VFS was a deliberate intervention to make payment mandatory. A court cannot take the sentencing mechanism of a fine, ignore its proper purpose, disregard the guiding principles and create a sentence which would not have been imposed, simply for the purpose of frustrating the will of Parliament.

[21] The courts have, on previous occasions, commented on the issue of judges creatively seeking to avoid Parliament's statutory amendments. For example, in *R. v. St. Amand* (1982), 67 C.C.C. (2d) 130 (Ont. C.A.), the offender pleaded guilty to three counts of armed robbery and an

additional count of using a firearm while committing those robberies. The latter offence carried with it a mandatory one-year custodial sentence consecutive to any sentence imposed for the robbery offences. In sentencing the offender, the sentencing judge imposed, in his words, "ridiculous" thirty day sentences for each of the robberies in addition to the consecutive one-year sentence (at p. 133). In his reasons, the sentencing judge made clear that the reduced robbery sentences were imposed to offset the one-year minimum. The Court of Appeal for Ontario reversed the sentence. In doing so, it commented, at p. 133, as follows:

> In proceeding in this manner, the trial judge, in my respectful opinion, was clearly frustrating the will of Parliament and completing negating the very purpose and object that Parliament had in mind in enacting [the mandatory minimum section] of the *Criminal Code*.

[22] Similar sentiments and rebukes can be found in the cases of *R. v. Aube*, 2009 SKCA 53, 324 Sask. R. 303, at para. 21; *R. v. Big Crow*, 2007 ABCA 401, 425 A.R. 32, at paras. 7-8; and *R. v. Leggo*, 2003 BCCA 392, 184 B.C.A.C. 150, at para. 9.

[23] The use of nominal fines and the VFS was considered in Québec in *R. v. Cloud*, 2014 QCCQ 464, 300 C.R.R. (2d) 349, rev'd 2016 QCCA 567, [2016] J.Q. No. 2819, where Healy J. found that although the law, as amended, could not be disobeyed, it could be interpreted in a manner which permitted the use of reduced fines to diminish the VFS. The Québec Court of Appeal disagreed and reversed the decision: *R. v. Cloud*, 2016 QCCA 567, [2016] J.Q. No. 2819. Writing for the court, Vauclair J.A. found the surcharge to be part of the sentence and that its rigidity might prove problematic. Notwithstanding these issues, he added, at para. 74:

> I readily admit that the legislative choice gives rise to difficulties that could be discussed in another context. When pronouncing the sentence, however, the judge cannot impose fines that do not and cannot have a consistent penological objective other than neutralizing the surcharge.

[24] I conclude, therefore, that the use of nominal fines to reduce the VFS is impermissible.

III. THE APPEALS

The Appeal Against the Sentence Imposed by Hogan J.

[25] The circumstances of the sentencing hearing held in front of Hogan J. are worth considering. Immediately prior to dealing with the VFS, Hogan J. had already imposed a custodial sentence with probationary terms. She then broached the topic of the VFS with counsel. Ms. Wilson indicated the appellant's lack of funds, with respect to the payment of the surcharge.

[26] The dialogue on the issue unfolded in the following way:

> THE COURT: And victim fine surcharge?
>
> MS. WILSON: No we were just saying, how much pre-trial custody....

THE COURT: Oh, I am sorry, yes, I—well—I am going to - it's I'll take your calculation which...

MR. MITCHELL: Fine.

THE COURT: ...unless you are objecting to it, 74 days of real time, 111 days of enhanced time at 1.5 to 1 credit. We also have the victim fine surcharge to deal w1th, and there are two counts. Anything to say with regard to that.

MS. WILSON: I would ask for time to pay given that his income is limited.

THE COURT: You don't ask that I fine in lieu of the....

MS. WILSON: The difficulty is given he is been ordered custody and probation as Your Honour permitted to.

THE COURT: Oh, you are familiar with the Cloud decision as — unless I has happened, morning, they which I understand, because yet, have been away unless something I asked another counsel that this said it's still out there.

MS. WILSON: In which case, I would ask Your Honour to alleviate in any way possible

THE COURT: Mr. Mitchell? way possible.

MR. MITCHELL: I — I wasn't prepared for that, 10 but it's our position that the — it — it — you can't have the fine and jail with respect to that.

THE COURT: There hasn't been a higher court decision yet on the Cloud, has there been?[1]

MR. MITCHELL: I am not....

MS. WILSON: I am not for sure.

THE COURT: There wasn't as of a while ago, but as I said, I've been — I was away for a few weeks, and so I haven't had time to catch up, but all

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[1] Despite being informed by both the Crown and Ms. Wilson that it was not legally possible to add a fine to the sentence already imposed, Hogan J. proceeded on the basis that she had the authority to do so based on Healy J.'s judgment in *Cloud*, which decided that it was possible to impose an intermittent sentence accompanied by a fine and probation. As we have seen, subsequent to the sentencing hearing in front of Hogan J., the Court of Appeal for Québec found Healy J. to be in error with respect to the VFS. However, in their view, the combined sentence imposed by Healy J. was not illegal.

right. I — you know this is a gentleman who clearly is not going to be able to pay it it would be $200 given that there were two counts. He is not in any....

YOHANNES BERHE: Can I say something? Last time 25 they gave me $1 fine.

THE COURT: Yeah, okay. He's not — he's not in a position to pay. As far as I know unless someone is going to tell me otherwise and you know, Cloud is still there, so I am going to fine him $5 on each, I will give him four months to pay.

[27] A number of things are apparent from the transcript of 22 July 2015. First, Ms. Wilson was not initially asking for the imposition of nominal fines to avoid the VFS but asking for a greater time to pay. Secondly, it was Hogan J. who raised the issue of imposing fines at a lower amount, to reduce the VFS.

[28] By following the course of action that she did, the judge committed two errors. The first, for which there is no dispute by the parties, was the passing of a sentence that contravened s. 731(1)(b) of the *Code*. By sentencing the appellant to imprisonment, fines and probation, Hogan J. imposed a sentence unknown in law. The second error was the creation of fines which had nothing to do with sentencing the appellant for the offences to which he had pleaded guilty but instead amounted to an undisguised attempt to bypass the VFS scheme contained in the *Code*.

[29] Although there is no disagreement that the judge erred in her sentence, I dismiss Ms. Wilson's request to strike out the probation conditions – and thereby leave in place the fines – for the following reasons.

[30] First, as previously explained, it is impermissible for a judge to fashion a sentence for the sole purpose of circumventing the VFS. That is clearly what happened in this case. In my view, this reason alone warrants the removal of the fines.

[31] Secondly, it is abundantly clear from the transcripts of proceedings that the fines imposed by Hogan J. were simply an afterthought created after the appropriate sentence had been considered and passed. By the time she addressed the VFS issue, Hogan J. had determined the appellant's guilt in the offences to be worthy of custody and, further, the appellant's rehabilitation to warrant a period of probation. Had the issue of the appellant's supposed lack of funds not arisen, that would have been the end of the sentencing hearing. The sentence, as it stood at that point, was a fit one.

[32] Ms. Wilson now submits that probation was inappropriate given the Probation Service's view that it would prove of little benefit to the appellant, due to his previous history. This submission carries little weight, as there was no objection to Hogan J.'s order at the time it was made. On the contrary, the appellant was more than willing to accept a probationary period, telling the court, "I'd like to go on probation, no problem, to program, they recommend me, because they keep telling me the psychiatrist say we cannot accept this time now, I am gonna get

accepted by CAMH to go there." Whilst the recommendations of the Probation Service are to be considered, the final call belongs to the sentencing judge. Here, Hogan J., aware of the comments made by the Probation Service, made that call. Her decision is entitled to deference.

[33] Finally, the appellant did not ask for the fines to be imposed. The subject of fines arose at the end of the proceedings and, as noted, had nothing to do with sentencing the appellant for the offence. Ms. Wilson sought an extended period of time to permit the appellant to pay the surcharge. In response, Hogan J. suggested fines as a means of reducing the statutory rates mandated by the VFS. Once that suggestion was made,

[34] Ms. Wilson acquiesced on behalf of her client to, in her words, "alleviate in any way possible."

[35] As noted below, a judge may only interfere with a sentence on the basis of an error in principle or if the sentence is demonstrably unfit. I find neither of these descriptions to apply to the sentence handed down by Hogan J.

[36] In summary, I find that Hogan J.'s original sentence of custody and probation was fit, and I decline to vary it. The addition of fines imposed for the purpose of reducing the VFS was impermissible and, in addition, led to an illegal sentence.

[37] For these reasons, the appeal is allowed, and the fines imposed by Hogan J. are quashed. The standard VFS rates are applicable. At the conclusion of the hearing, both parties agreed that I could impose a time period for payment. Accordingly, the appellant is permitted a further six months to make payment.

The Appeal Against the Sentence Imposed by Khawly J.

[38] The appellant argues that Khawly J. erred in not imposing a nominal fine due to his inability to pay the VFS. I disagree.

[39] An appellate court reviewing sentence owes great deference to the sentencing judge. It may only allow an appeal against sentence if there is an error in principle, a failure to consider a relevant factor or if the sentence is demonstrably unfit: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90; *L.M.*, at paras. 14-15; and *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46. Indeed, the Supreme Court of Canada's statement in *Shropshire*, at para. 46, is worth noting here, and it is as follows:

> ... An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[40] In *Lacasse*, at paras. 10-11, the Supreme Court of Canada reiterated that even if an error in principle was found to have been made, an appellate court could only interfere if that error had an impact on sentencing.

[41] For the reasons set out previously, I have found that the practice of imposing nominal fines to reduce the VFS is not permissible. Accordingly, this option was not available to Khawly J. when sentencing the appellant.

[42] Even if a nominal fine could have been imposed, this court would not interfere with Khawly J.'s judgment. The appellant has not demonstrated any error in principle or that the sentence was unfit. The issue of the VFS was not even raised in submissions made before Khawly J.

[43] Accordingly, the appeal is dismissed.

S.A.Q. Akhtar J.

Released: 17 October 2016

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SUPERIOR COURT OF JUSTICE

BETWEEN:

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Respondent

– and –

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Appellant

REASONS FOR JUDGMENT

S.A.Q. Akhtar J.