

Case Name:
R. v. Moran

Between
**Her Majesty the Queen, Respondent, and
Patricia Moran, Appellant**

[2019] O.J. No. 1397

2019 ONCA 217

Docket: C64539

Ontario Court of Appeal

D. Watt, C.W. Hourigan and G. Huscroft JJ.A.

Heard: March 12, 2019.
Judgment: March 20, 2019.

(24 paras.)

Criminal law -- Sentencing -- Criminal Code offences -- Fraudulent transactions relating to contract and trade -- Fraud over \$5,000 -- Particular sanctions -- Imprisonment -- Sentencing considerations -- Deterrence -- Denunciation -- Offence committed while accused on interim judicial release or probation -- Deportation -- Appeal by accused from sentence of three months' imprisonment and \$6,339 restitution for fraud over \$5,000 dismissed -- Appellant, 35, received Ontario Works Assistance Benefits of over \$6,000 over eight months while attending university -- Appellant failed to disclose employment income -- She was a foreign national in Canada and ordered deported as a result of her conviction -- Sentence imposed was fit -- Collateral immigration consequences provided no warrant for the imposition of a sentence which was not true to the governing objectives and principles of sentencing, including the fundamental principle of proportionality.

Appeal by the accused from sentence of three months' imprisonment and \$6,339 restitution for fraud over \$5,000. The appellant, 35, received Ontario Works Assistance Benefits of over \$6,000 over a period of eight months while she was a student at an Ontario university. She did not disclose that she had money in bank accounts or that she had received employment income. The appellant

was on probation at the time for theft and possession of property obtained by crime. The appellant argued that a fit sentence was a conditional discharge. She was a foreign national in Canada on a student visa. As a result of her conviction, she was ordered deported. She argued the trial judge assigned inadequate weight to the appellant's precarious immigration status in determining the sentence he imposed.

HELD: Appeal dismissed. The sentence imposed was fit. In cases involving fraud in connection with funds earmarked for social assistance for the disadvantaged, the predominant sentencing objectives were denunciation and deterrence. The application of the controlling sentencing objectives, principles and aggravating and mitigating factors warranted a term of imprisonment in the mid-reformatory range. The sentencing judge considered the collateral immigration consequences to the appellant, but they provided no warrant for the imposition of a sentence which was not true to the governing objectives and principles of sentencing, including the fundamental principle of proportionality. Sentence: Three months' imprisonment; \$6,339 restitution.

Appeal From:

On appeal from the conviction entered on June 23, 2017 and the sentence imposed on October 6, 2017 by Justice John D. Evans of the Ontario Court of Justice.

Counsel:

Patricia Moran, acting in person.

Michael Fawcett, for the Attorney General for Ontario.

Gerald Chan, duty counsel.

REASONS FOR DECISION

The following judgment was delivered by

1 THE COURT:-- After a trial before a judge of the Ontario Court of Justice, the appellant was convicted of a single count of fraud under \$5,000 on which the Crown proceeded by indictment. She was sentenced to a term of imprisonment of three months and ordered to pay restitution of \$6,339.20 to the District of Muskoka, the victim of the fraud.

2 With the assistance of duty counsel, she appeals both conviction and sentence.

The Conviction Appeal

3 The conviction appeal was not pressed either by duty counsel or by the appellant. Our review of the record satisfies us that the conviction was fully warranted on the evidence adduced at trial. It is neither unreasonable nor tainted by any error that would warrant our intervention.

4 The appeal from conviction is dismissed.

The Sentence Appeal

5 Both duty counsel and the appellant made submissions on the appeal from sentence. We also received fresh evidence about the appellant's immigration status and her medical condition.

6 Duty counsel and the appellant contended, as had trial counsel for the appellant, that a fit sentence is a conditional discharge, not entry of a conviction followed by a suspended sentence or a term of incarceration.

The Circumstances of the Offence

7 The offence of which the appellant was convicted involved the receipt of Ontario Works Assistance Benefits of over \$6,000 over a period of 8 months while she was a student at an Ontario university.

8 During the application process it was made clear to the appellant that she was to disclose *any* income she received from any source, employment or otherwise. This she failed to do. She did not disclose that she had money in bank accounts or that she had received funds from a job she held in the hospitality industry. In this way, she dishonestly deprived the Department of Social Services of the District of Muskoka of the funds alleged. Her conduct was knowing and deliberate.

9 During the period of the fraud committed in this case, the appellant was bound by the terms of a probation order imposed as part of a conditional discharge she received on findings of guilt of theft and possession of property obtained by crime of a value of less than \$5,000.

The Circumstances of the Offender

10 The appellant was 35 years old at the time of the offence and a full-time university student. She is now 39. She has received her undergraduate degree. She has overcome significant medical challenges and a prior abusive relationship. Her health challenges remain. She continues to pursue assistance from several available services principally in connection with her health issues.

11 The appellant was born in Ireland. She is not a Canadian citizen or a permanent resident. She is a foreign national who is in Canada on a student visa.

12 As a foreign national convicted in Canada of an indictable offence, the appellant is inadmissible to Canada on grounds of criminality under s. 36(2)(a) of the *Immigration and Refugee Protection Act*. The consequences of inadmissibility for a foreign national are that she is deportable

from Canada and is ineligible to become a permanent resident or to apply to enter or remain in Canada unless given an exemption by the Department of Immigration, Refugees and Citizenship Canada.

13 A deportation order was issued against the appellant in October, 2017 as a result of the conviction with which we are concerned.

The Positions of the Parties at Trial

14 At trial, Crown counsel sought a sentence of imprisonment of 5-8 months, a free-standing restitution order in the amount of \$6,339.20, and various ancillary orders.

15 Experienced defence counsel sought a conditional discharge, but acknowledged that such a disposition would seem unlikely in light of the paramount principles of sentencing applicable to frauds of this nature and the aggravating circumstance that this offence was committed while the appellant was bound by a probation order included in a conditional discharge for a cognate offence.

The Arguments on Appeal

16 In this court duty counsel and the appellant focused their submissions on the collateral consequences of a conviction on the appellant's immigration status. She wants to stay in Canada to pursue her volunteer activities and address her health concerns so that she may obtain gainful employment appropriate for her education achievements. With a conditional discharge, the absence of a conviction will not render her inadmissible to Canada. And a conditional discharge is not contrary to the public interest.

17 The respondent acknowledges that this is a sympathetic case but points out that the sentence imposed is at the very low end of the range of sentence appropriate for this type of offence committed by a recidivist bound by a probation order imposed for a similar crime.

Discussion

18 It is well established that, absent an error in principle, a failure to consider a relevant factor or the erroneous consideration of aggravating or mitigating factors that had an impact on the sentencing decision, we are disentitled to interfere with the sentence imposed at trial: *R. v. Lacasse*, 2018 SCC 64, at para. 44. Similarly, we cannot intervene simply because we would have weighed relevant aggravating or mitigating factors differently: *Lacasse*, at para. 49; *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, at para. 35. Further, a sentencing judge's decision about the applicable range of sentence or where within that range a sentence should be located is equally impervious to appellate intervention unless the sentence imposed is demonstrably unfit: *Lacasse*, at para. 51.

19 In this case, the error in principle alleged is that the trial judge assigned inadequate weight to the appellant's precarious immigration status in determining the sentence he imposed. The appellant

acknowledges that the sentencing judge did consider the immigration consequences in his sentencing decision. But a more considered assessment of those consequences was required.

20 We are unable to accept this submission. The sentence imposed was fit.

21 In cases such as this involving fraud in connection with funds earmarked for social assistance for the disadvantaged, the predominant sentencing objectives are denunciation and deterrence. It is all the more so where the offender is a recidivist who within months of findings of guilt for cognate offences re-offends while bound by the terms of a probation order. The offending conduct in this case was deliberate and extended over a period of eight months. Setting to one side the influence of the collateral immigration consequences, the application of the controlling sentencing objectives, principles and aggravating and mitigating factors warranted a term of imprisonment in the mid-reformatory range.

22 The sentencing judge considered but rejected a conditional discharge as the appropriate sentencing disposition. He did so on the basis that it was not in the public interest to make such an order in respect of an offender who, within months of being sentenced for similar crimes and while bound by a probation order, proceeded over the next several months to practise deceit to obtain social assistance to which she was not entitled.

23 The sentencing judge considered the collateral immigration consequences to the appellant when deciding on the sentence he would impose. That another judge in equivalent circumstances might have reached a different conclusion does not mean that this judge erred. Immigration consequences of a sentence for a particular offender are a relevant factor for a sentencing judge to consider. But they provide no warrant for the imposition of a sentence which is not true to the governing objectives and principles of sentencing including the fundamental principle of proportionality: *R. v. Pham*, [2013] 1 S.C.R. 739, at paras. 14-16. The sentence imposed here was well within the range of appropriate sentencing dispositions, indeed at the very low end of that range. By no means can it be said that this sentence is demonstrably unfit.

24 For these reasons, although we would grant leave to appeal sentence, the appeal from sentence is dismissed.

D. WATT J.A.

C.W. HOURIGAN J.A.

G. HUSCROFT J.A.

---- End of Request ----

Download Request: Current Document: 1

Time Of Request: Tuesday, April 23, 2019 17:23:23