

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Saberi*, 2017 NSSC 34

Date: 20170210

Docket: Hfx No. 455505

Registry: Halifax

Between:

Navid Saberi

Appellant/Respondent
by Cross-Appeal

and

Her Majesty the Queen

Respondent/Appellant
by Cross-Appeal

Judge: The Honourable Justice Jamie Campbell

Heard: February 8, 2017, in Halifax, Nova Scotia

Counsel: Christopher Madill for Navid Saberi
Edward Murphy and Joshua Judah for the Crown

Introduction

[1] This is an appeal from a sentencing decision that imposed a fine for unlawfully allowing occupancy of a building without an occupancy permit. The Appellant Mr. Saberi argues that the judge should not have imposed the minimum fine under the *Building Code Act*¹ but should have applied the *Remission of Penalties Act*² to substantially reduce the amount of the fine. The Crown has cross-appealed and says that the judge should have imposed a fine greater than the minimum.

Summary

[2] The judge applied the purposes and principles of sentencing in imposing the minimum fine of \$90,500 and made no error in doing so. The sentence was not demonstrably unfit and the cross-appeal is dismissed.

[3] The judge made a discretionary decision to deny remission of the fine to the much lower amount of \$3,000. The judge exercised his discretion in a judicial and principled manner and the result was not unjust. The appeal is dismissed.

Facts

[4] Navid Saberi pled guilty to unlawfully allowing occupancy of a building without first getting an occupancy permit. That is an offence under s. 8(b) of the *Building Code Act*. The period of unauthorized occupancy was 181 days, from October 22, 2014 until April 22, 2015.

[5] Mr. Saberi bought land at 1069 Belmont On The Arm in Halifax on June 23, 2005. He intended to construct a home for his family. On July 25, 2008, a permit application was filed for the construction of a single-family dwelling. That permit expired. On April 8, 2011, a second building permit was issued.

[6] On January 30, 2014, a building inspector conducted a site visit and observed that the house was being occupied even though no occupancy permit had been issued. The building inspector sent a letter to Mr. Saberi stating that an occupancy permit had not been issued. Another letter was sent by registered mail on February 19, 2014, and it was received the next day. On March 25, 2014, an

¹R.S.N.S. 1989, c. 46.

²R.S.N.S. 1989, c. 397.

order to comply was issued to Mr. Saberi. It was posted at the property and sent by registered mail. Another site visit was conducted on May 2, 2014. The home was still occupied by the family.

[7] On May 26, 2014, an employee of HRM created a list of 10 items required before a permit could be granted. On September 23, 2014 one of Mr. Saberi's employees provided HRM with revised architectural plans that reflected what had been constructed on the property. On December 16, 2014 HRM provided a further list of items required to be completed before an occupancy permit could be issued. The occupancy permit was issued on April 22, 2015.

[8] Mr. Saberi pled guilty to the *Building Code Act* offence of unlawfully allowing occupancy of a building without first obtaining an occupancy permit. That was over the period from October 22, 2014 to April 22, 2015. The fine under the s. 19(1)(d) of the *Building Code Act* for a single offence is a minimum of \$500 to a maximum of \$25,000. Section 19(2) provides that a period of unauthorized occupation, committed or continued for more than one day is a separate offence for each day. The fine that would apply would then be from a minimum of \$90,500 to a maximum of \$4,555,000.

Provincial Court Sentencing

[9] The Honourable Judge Gregory Lenehan of the Provincial Court received written arguments on the sentencing. The offence continued over a period of 181 days. The minimum fine of \$500 per day would generate a fine of \$90,500. The Crown argued that the minimum fine should not apply but that an increased fine totaling \$234,000 should be imposed. Counsel for Mr. Saberi argued that the *Remission of Penalties Act* should be applied to reduce to minimum fine to a total of \$3,000.

[10] The judge set out the purpose of the occupancy permit under the *Building Code Act*. It is to ensure public health and safety. The purpose of an occupancy permit is to ensure that the building is safe to occupy and safe for those who visit it and who live near to it. The Saberi family moved in to the home when they were told by the contractor that it was ready for occupation. Once they were living in the house they were told that the building permit had not been issued and that fines could be issued against them.

[11] The property was always occupied as a family home. It was not a commercial enterprise and was not intended to generate income or produce

economic gain. Mr. Saberi was cooperative with the municipality in trying to obtain the occupancy permit. He pled guilty to the offence. Each day of occupation is a separate offence but it is relevant that the total fine here was a substantial amount. The judge was satisfied that the minimum fine of \$90,500 was appropriate to the level of Mr. Saberi's culpability.

[12] The judge considered whether he should exercise his discretion under the *Remission of Penalties Act* to remit a portion of the fine. He noted that the Act allows a judge to reduce the penalty where the judge feels it is appropriate to do so. "That requires that there be some good reason and not just that the judge feels that a fine is too big. The judge's personal views cannot come into play. There has to be some logical, just reason to do so." The judge carefully considered the purpose of the minimum fine and noted directly that penalty schemes are determined by legislators and "it is not for the Court, on a whim, to decide that the penalty is too great."

[13] The judge was not satisfied that the fine should be greater than the statutory minimum and found nothing to justify a reduction in the fine under the *Remission of Penalties Act*. It would be a substantial penalty but undue financial hardship was not argued and based on the value of the home it would be unlikely to be the case in any event.

Standard of Review

[14] The judge in this case made two decisions. The first was to impose the minimum fine under the *Building Code Act*. The second decision was to refuse to grant a remission of the fine under the *Remission of Penalties Act*.

[15] The standard of review for the first decision is a deferential one. The question is whether the judge made an error in principle, failed to consider a relevant factor, over-emphasized some appropriate factors or imposed a sentence that is demonstrably unfit.³ The second decision was an exercise of discretion. The standard is similar though even somewhat more deferential. A court on appeal should intervene in a trial judge's exercise of discretion "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an

³R. v. *Murphy* 2015 NSCA 14.

injustice.”⁴ A discretionary decision can also be overturned if the trial judge gives no or insufficient weight to relevant considerations.⁵

The Minimum Fine

[16] The range of fines under the *Building Code Act* is broad. A fine can be from \$500 to \$25,000 for a single offence. The Act says that each day of unauthorized occupation is a separate offence. That can result in a spectacularly high fine. The judge ordered the minimum fine of \$500 payable with respect to 181 days.

[17] Offences under the *Building Code Act* are public welfare or regulatory offences. Deterrence is a paramount consideration in determining a fit sentence. The fine must be substantial enough to warn others that the offence will not be tolerated and must not appear to be a “mere licence fee for illegal activity.” The public has to know that basic rules will be enforced and must be followed. A fine has the effect of educating the public and can affect public attitudes about the offence to which it relates.

[18] The Crown argues that the imposition of the minimum fine of \$90,500 is problematic. The judge determined the economic value of the violation to be zero because prior to occupancy Mr. Saberi was living with his family, in one of the apartments owned by his company. The real economic value, as argued by the Crown should be based on the cost to Mr. Saberi of actually obtaining comparable accommodations at market rates.

[19] The Crown says that the trial judge’s reasoning gives an advantage to a person who has the resources to provide housing for himself in an apartment building that he owns. Even at that, there would be some cost to one of Mr. Saberi’s companies by having him and his family occupy an apartment.

[20] In parsing the judge’s words the Crown has emphasized the issue of economic gain more than the judge himself did. The judge did not enter into a precise calculation of the cost of rental accommodations for the family and the value of the home that was being constructed. He simply noted, quite properly, that this was not a case in which economic gain was the issue. The home was a family dwelling not occupied to produce a profit and not occupied directly for the purpose of saving money on rental accommodations.

⁴*Elsom v. Elsom*, [1989] 1 S.C.R. 1367.

⁵*Friends of the Oldman River Society v. Canada (Minister of Transportation)*, [1992] 1 S.C.R. 3, at pp. 76-77.

[21] The judge said that the family did not move into the house until they were told by the contractor that it was ready. He assumed that they would not have moved in and would just have remained in their apartment had they known that the permit had not been obtained when they moved in. “They found out afterwards that the occupancy permit was not there and they chose to continue to reside there.”

[22] The judge found that Mr. Saberi had complied with all requests by the municipality to provide documentation, plans, drawings, and approvals to allow the building inspectors to issue a permit. “It took a significant period of time despite the cooperation of Mr. Saberi and his employees.”

[23] While the judge was entirely aware of the importance of deterrence he took account of the degree of moral culpability that could be properly assigned to Mr. Saberi. His was not a defiant act. Mr. Saberi does not appear to have assumed that the fine would just be, in effect, an occupation fee that he could easily pay. He and his family moved in when they were told the home was ready. There was then some delay in getting the occupancy permit. The permit was not withheld because of serious concerns regarding the safety of the home. The level of moral culpability was relatively low. The judge also considered the total amount of the fine. The amount of \$90,500 is not insubstantial. The judge’s decision should not be read as a statement that in the absence of “economic gain” the minimum fine would be imposed. His decision is more nuanced than that. He considered a number of factors and concluded that a fine of \$90,500 was appropriate.

[24] The judge’s decision was not demonstrably unfit. He did not err in principle nor did he fail to consider a relevant factor or over-emphasize any appropriate factor. His decision weighed considerations of deterrence and individual moral culpability having regard to the relevant circumstances of the case. He made no error.

[25] The cross appeal brought by the Crown is dismissed.

Remission of Penalties Act

[26] The judge’s second decision was to exercise his discretion to not remit a portion of the fine.

[27] The *Remission of Penalties Act* does not widen the scope of a judge’s discretion in sentencing. Sentencing principles are applied to determine the amount of the fine to be imposed within the range of sentencing established by legislation.

The minimum sentence set by legislation is not merely a helpful suggestion. It is the law.

[28] The *Remission of Penalties Act* offers some relief. It provides that where a pecuniary penalty is imposed the judge in the proceedings may at any time after the commencement of the proceedings, remit in whole or in part any sum of money imposed as a penalty. The Act allows for remission of the fine, after it has been imposed.

[29] The application of the Act could not involve merely the application of the purposes and principles of sentencing that are considered in determining the fit sentence within the range set by statute. Those principles would include proportionality, parity and restraint. If those principles were applied to override the minimum fine set by legislation the minimum fine would be of no real consequence. The penalties set by legislation are generally and almost always applicable. The *Remission of Penalties Act* provides virtually no guidance as to when it should be applied. It involves the exercise of judicial discretion. The issue then is how that discretion ought to be exercised.

[30] Discretion and whim are not the same thing. A judge's discretion must be applied judicially, so that it is based on principle. Otherwise discretion can be used to disguise the purely arbitrary exercise of authority.⁶ It can follow ingrained, unacknowledged personal prejudices. The principled exercise of discretion in this case is authorized by the statute, and is a restrained application of legal norms and principles. The exercise of discretion is restrained by the need for certainty and predictability, and respect for the standards imposed by legislation. Discretion can be exercised to bring the outcome of the case within broader legal norms.

[31] There is a value to the predictability provided by a range of sentences. That predictability should be disturbed only when the application of the minimum penalty offends broader established legal norms. That is a higher standard than an individual judge's sense of what a fair fine might be. It has to be more than the application of the principles that apply to setting the proper sentence within the range mandated by the statute. There is no master list of legal norms and principles and no checklist that can be applied to determine whether there should be remission for a fine in each set of circumstances.

⁶R. v. *Lewandowski* 2010 NSPC 37, para. 17.

[32] Fines affect each person differently depending on his or her income, savings or current expenses. To some a minimum fine is hardly an inconvenience while to others it is a substantial hardship. To a few it can be a crushing financial blow. A minimum fine may affect a person in a way that is grossly disproportionate to his or her offending conduct having regard to his or her financial means. That impact may be so pronounced that it is manifestly unfair. In that situation predictability of outcome and respect for the authority of the legislative body may give way to the principle or legal norm that the law should not act against a person in way that is grossly disproportionate and manifestly unfair.

[33] There may be situations where the technical nature of breach of a provincial statute or municipal by-law would offend the broad legal principle of proportionality. In almost all cases legislation contemplates a range within which the minimum would not offend that principle. There may be circumstances where the imposition of a minimum fine is for a technical minor infraction involving no moral culpability at all. In that situation it may be that the imposition of the minimum fine would not have any educative effect and would not serve as a deterrent. On the contrary the minimum fine would diminish respect for the law itself. Predictability may in that case also give way to the principle that the law, in its strict application, should not mock itself.

[34] The judge in this case considered whether he should remit the fine. He said that there must be some good reason for the remission beyond the individual judge's feeling that the fine is too high. There must be a "logical, just reason" to remit the fine. The judge was under no obligation at that point to exercise his discretion to remit the minimum fine based on how it related to fines imposed in other regulatory matters. The legislature has set the minimum fine and there is no challenge to its constitutionality. He was not obligated to remit the fine based on the application of the principles of sentencing that apply in determining the sentence to be imposed within the range set by statute. To do that would render the minimum meaningless. The judge was under an obligation to exercise his discretion in a principled and judicial way. He did exactly that.

[35] The imposition of the minimum fine against Mr. Saberi did not have an effect on him that was so disproportionate and manifestly unfair that it would be inequitable for the court to tolerate it. The fine was not ruinous. His actions did not amount to a merely technical breach for which the imposition of the minimum fine would be so out of proportion as to bring the law itself into disrepute. The case did

not offend other norms and principles that would justify a departure from the minimum set by statute.

[36] The appeal brought by Mr. Saberi is dismissed.

Campbell, J.