NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Rizzetto*, 2002 NSCA 142

Date: 20021115
Docket: CAC No. 173010
Registry: Halifax

Between:

Carolyn Mary Dipenta Rizzetto

Appellant

v.

Her Majesty The Queen

Respondent

Judge(s):	Saunders, Freeman & Hamilton, JJ.A.
Appeal Heard:	November 13, 2002, in Halifax, Nova Scotia
Held:	Appeal against conviction dismissed. Leave to appeal sentence granted, but appeal against sentence dismissed as per reasons for judgment of Saunders, J. A.; Freeman and Hamilton, JJ.A. concurring.
Counsel:	Mr. Francis X. Moloney, for the Appellant Ms. Laurel Halfpenny-MacQuarrie, for the Respondent

Saunders, J. A.:

[1] At the conclusion of the appellant's submissions we recessed and upon our return I announced on behalf of the court that the appeal against conviction was dismissed, that leave to appeal sentence was granted but that the appeal against sentence was dismissed, with reasons to follow. These are my reasons.

[2] The appellant was tried and convicted by a jury on a charge that between 1978 and 1997 she defrauded the Nova Scotia Department of Community Services of a sum exceeding $5,000 contrary to s. 380(1)(a) of the ***Criminal Code***.

[3] She appeals her conviction alleging error on the part of the trial judge in his treatment of opinion evidence offered by a Crown witness, as well as on the basis that the jury's verdict was unreasonable. She seeks leave to appeal her sentence on the grounds that it was excessive both in comparison to punishment imposed in other cases and with respect to providing a suitable general and specific deterrent in this case.

[4] The theory of the Crown at trial was that over a period of almost twenty years the appellant received social service benefits totalling more than $137,000. In order to receive benefits she was required to make an initial application disclosing her personal assets and income, and subsequently participated in numerous reviews of her file at which time her personal circumstances were reassessed. On those occasions the evidence led by the Crown established that she failed to reveal income from her employment and her rental properties, or the receipt of a personal injury settlement, knowing full well what she was required to disclose. She also failed to make known to authorities her ownership of a number of properties, most of which were sold during the years she continued to be in receipt of social service benefits.

[5] In 1997 a new case worker assigned to review Ms. Rizzetto's file became suspicious that the appellant had not reported changes in her financial situation as required. An investigation was commenced which led to an Indictment charging Ms. Rizzetto with fraud. Following her conviction Justice LeBlanc sentenced her to two years, conditional sentence, followed by two years probation. In addition, LeBlanc, J., ordered the appellant to make restitution in the amount of $71,486.

[6] In appealing her conviction Ms. Rizzetto alleges error on the part of the trial judge in "allowing the trial to continue after a witness for the Crown, who was a lawyer, gave opinion evidence, that Ms. Rizzetto was guilty." I see no merit to this ground of appeal. One of the key Crown witnesses was Mr. Joseph Rizzetto, the appellant's son, who is a practicing lawyer and from whom she is estranged. During his cross-examination by Ms. Rizzetto's lawyer (not her counsel on appeal) at a time when tempers were obviously strained, Mr. Rizzetto in responding to a particular question answered:

> **A. Well, I will answer your question alright. We had the meeting, myself and my sisters, I had spoken to my mother's lawyer and I had had conversations with initially with (sic) the Social Services people and I knew my mother was guilty. I knew my mother had done a lot of these things that the Crown is saying that she did. I knew that a lot of the things my mother, that you are talking about here, when you are talk (sic) about some of them, I knew in my mind that those things were probably not that serious. I knew that those things, a lot of those things could be explained, but I knew there were a lot of things that couldn't be explained. So what I had hoped to do was try and put something together to settle whatever my mother owed Social Services people and to make her not have to come here, and make me not have to come here, and make my sister not have to come here and see my name in the paper everyday. So that is what I did. So it wasn't contingent on ... "**

At this point the Crown Attorney, Mr. Clarke, interrupted the witness and suggested to the trial judge that a suitable instruction ought to be given to the jury, reminding them that they were the exclusive triers of fact so that what the witness had just said would not be improperly construed.

[7] Crown counsel is to be commended for his intervention. I am satisfied LeBlanc, J. gave an appropriate and timely cautionary instruction to the jury. Defence counsel at trial did not express any concern about the judge's handling of the matter either then or following his charge to the jury. I am satisfied that Justice LeBlanc's directions to the jury were clear and unambiguous and that there was no risk that the jury's finding of guilt was based upon the "opinion evidence" offered by her son. LeBlanc, J. made it perfectly clear that the jury was not to rely on Mr. Rizzetto's opinion but was to consider all of the evidence and reach its own

conclusions as to whether the Crown had proven the essential elements of the charge beyond a reasonable doubt.

[8] The appellant's second ground of appeal challenges the reasonableness of the jury's verdict. The test to be applied by an appellate court in such circumstances was set out in *R. v. Yebes*, [1987] 2 S.C.R. 168 and subsequently confirmed by the Supreme Court in *R. v. Biniaris*, [2000] S.C.J. No. 16. After considering the entire record, the written and oral submissions of counsel and to the extent necessary having reviewed, analysed and within the limits of appellate disadvantage, weighed the evidence, I am satisfied that their verdict was one that a reasonable jury, properly instructed and acting judicially could have reached. The appellant, who testified in her own defence at trial, was contradicted in material respects by both the documentary evidence and important Crown witnesses including her own son and daughter. Credibility was clearly in issue, a subject exclusively within the province of the jury. Obviously the jury was not left with any reasonable doubt about Ms. Rizzetto's guilt after considering the appellant's testimony or any of the other evidence led at trial.

[9] The powers of a court of appeal on appeals against sentence are governed by s. 687 of the *Criminal Code*. Absent error or the application of wrong principles an appeal court should only intervene where the sentence constitutes a substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes. See for example *R. v. C.A.M.*, [1996] S.C.R. 500; and *R. v. Shropshire*, [1995] S.C.J. No. 52.

[10] It is apparent in reviewing Justice LeBlanc's carefully considered remarks that he took into account proper sentencing principles; he noted the pre-sentence report; he addressed the aggravating and mitigating features of the case; and he considered the relevant authorities and submissions of counsel together with the testimony of Ms. Cynthia Boutilier, a Crown witness who outlined the method of calculating the amount of overpayment owed by Ms. Rizzetto in ultimately determining that a conditional sentence was appropriate in the circumstances.

[11] Considerable deference is owed to the decisions of sentencing judges who serve on the front lines of our criminal justice system. They are uniquely qualified to administer punishment and enforce the community's standards by denouncing unlawful conduct, by ensuring the personal enjoyment, order and safety of its citizens and by dealing firmly but fairly with those persons convicted of crime.

Sentencing an individual has been described as an art; it is often difficult and never an exact science. It demands a careful consideration of the particular circumstances of the offence and the offender and requires a balancing of a variety of factors. I am satisfied that the sentence imposed by Justice LeBlanc is within the appropriate range and is not excessive. I would not disturb it.

[12] I would, however, choose to correct two technical errors made by the judge in his sentencing remarks. In sentencing Ms. Rizzetto to two years less a day to be served in the community he imposed several conditions including the requirement that she spend eighteen months confined to her residence coupled with an obligation to perform at least 200 hours of community work. Such a term is permissible pursuant to s. 742.3(2)(d). However, LeBlanc, J. went on to impose a period of probation of two years requiring the appellant to: ". . . perform an additional 100 hours of Community Service Work over a period of two years." This reference to "two years" is incorrect in that s. 732.1(3)(f) requires that such community service be performed "over a period not exceeding eighteen months." To the extent that this may not have been clarified in either the conditional sentence order or the probation order issued June 29, 2001 and August 8, 2001 respectively I wish to correct the record.

[13] Secondly, when considering the mitigating and aggravating features of the case LeBlanc, J. appears to have included among the aggravating factors "Ms. Rizzetto's resistance to the crown's application for a restitution order." (Transcript of sentence hearing, pages 149-150). If this is what LeBlanc, J. intended to say, I respectfully disagree. While a willingness to make restitution, like a genuine expression of remorse, may be taken into account as legitimate mitigating factors, a reticence or resistance to forced restitution, like a lack of remorse, ought not to trigger negative consequences. In other words, it cannot be taken to be an aggravating circumstance.

[14] In his oral submission before the court, counsel for the appellant questioned the restitution order compelling Ms. Rizzetto to pay to the Department of Community Services the amount of $71,486. While it would have been preferable had the trial judge elaborated upon his reasons for ordering restitution, I am satisfied that there was a proper foundation for an order of restitution in this case. While it is true he found as a fact that there was no possibility Ms. Rizzetto would earn sufficient income to pay such restitution, one may also reasonably infer that

he took into account the possibility that some of her real estate holdings might eventually be sold to satisfy the order.

[15] I find the very recent judgment of the British Columbia Court of Appeal in *R. v. Yates*, [2002] B.C.J. No. 2415, filed October 28, 2002 helpful in considering the circumstances of this case. I endorse the comments by Prowse, J.A. at ¶ 20 that while, ". . . the present or future ability of the accused to pay restitution are relevant considerations, . . . the weight to be given to those considerations will vary according to the specific circumstances of the offence and of the offender."

[16] In determining whether a restitution order is appropriate it is not simply the income of the offender that is to be considered. One must take into account their overall financial circumstances including any assets owned or controlled by the offender. Here there was evidence to support the conclusion that certain of the appellant's properties could be sold to satisfy the order. Given the egregious nature of this case where Ms. Rizzetto's deceit, dishonesty and fraudulent receipt of benefits from the province was found to be planned, deliberate and continuous over a period of twenty years, it seems to me that the imposition of a restitution order was a proper exercise of Justice LeBlanc's discretion and one which gave full effect to many of the principles of sentencing including denunciation, specific and general deterrence and rehabilitation.

DISPOSITION

[17] I would dismiss the appeal against conviction. I would grant leave to appeal sentence, but I would dismiss the appeal against sentence as well.

Saunders, J. A.

Concurred in:

Freeman, J. A.

Hamilton, J. A.