PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Korem,* 2017 NSPC 70

Date: 2017-08-16
Docket: 2678714
Registry: Sydney

Between:

Her Majesty the Queen

v.

Nahman Korem

Judge:	The Honourable Judge A. Peter Ross
Heard:	February 9 and 10, March 8 and April 5, 2017, in Sydney, Nova Scotia
Sentencing:	August 16, 2017
Charge:	s. 334(a) and(b) Criminal Code of Canada
Counsel:	Kathryn Pentz, Q.C., for the Crown Vincent Gillis, Q.C., for the Accused

[1] On July 25, 2017 I found Mr. Korem guilty on a single count of theft of property under five thousand dollars in value, contrary to s.334(b) of the Criminal Code. I filed written reasons for decision, which also inform this sentencing.

[2] A sentence hearing was held on August 8th, 2017. I received as additional evidence a decision of the Supreme Court Family Division released June 29, 2017 following a hearing held on June 12, 2017. It is the latest chapter in a lengthy history of family law disputes between the accused and the victim (Iris Kedmi). Among other things, this decision imputes income to the accused and orders that he pay monthly child support for their daughter Danielle. It refers to an affidavit filed by the accused for that hearing, and an affidavit filed by his current partner, Dr. Doyle.

[3] I also received more *vive voce* evidence from the victim and accused. Ms. Kedmi has filed a victim impact statement and a request for restitution. The accused filed a note from his physician concerning his inability to do strenuous work.

[4] Crown and Defence both agree that the accused should be put on probation. Defence argues that this should be accompanied by a conditional discharge, to which the Crown is opposed. The other point of contention is the amount which the

accused should be ordered to pay to the victim as restitution. Some of the stolen items were recovered by Ms. Kedmi by civil process. Restitution is claimed only for the infused oils and the golf clubs, but the quantum is disputed.

The discharge application

[5] Defence asserts two bases for a discharge. First, the accused says that a conviction will jeopardize his ability to return to Canada should he travel abroad, and may even lead to removal from the country. Second, he says that a criminal record will diminish his ability to obtain paid employment.

Impact on residency

[6] The accused is an Israeli citizen with "permanent residency" status in Canada. Children from his first marriage, a grandchild and his sister all live in Israel. He was last in Israel in 2004 but hopes to travel there in future. He expresses concern that with a criminal record for the instant offence he may not be permitted re-entry to Canada, and indeed is concerned that if defined as "inadmissible" he may even be deported.

[7] This concern seems to be based on his reading s.36(1) of the Immigration and Refugee Protection Act which declares a permanent resident inadmissible on grounds of "serious criminality". However, only subsection (a) speaks about convictions for offences committed in Canada, and it includes only offences punishable by a maximum term of imprisonment of at least 10 years. The accused was originally charged with theft over five thousand dollars, and the proceeding was by Indictment. However I have found him guilty of theft under, which is punishable by a maximum term of imprisonment of two years (when by Indictment). His concern thus seems to be unfounded.

[8] Defence submits that any record may be an impediment to travel to the USA. Even if this is so, there is no apparent need for the accused to travel there, and he has expressed no wish to do so.

[9] In R. v. J.H. [2012] OJ. No. 5803 at par.[34] the court writes:

> While never dispositive, an offender's immigration status is another "legitimate factor ... to be taken into account at a sentence hearing". *R. v. Abouadabedellah* (1996), 109 C.C.C. (3d) 477 (Que. C.A.) affords one example of an appellate court granting an absolute discharge to avoid the risk of disproportionate immigration consequences. The Ontario case of *R. v. El-Hamdi*, 2009 ONCA 129 is another. Neither *R. v. Abouadabedellah* nor *R. v. El-Hamdi* involves an offence of sexual assault. Both, however, illustrate a more general proposition set out by the Court of Appeal in *R. v. Hamilton*, 186 C.C.C. (3d) 129, at para. 156:

> The sentencing process cannot be used to circumvent the provisions and policies of the *Immigration and Refugee Act*. ... [H]owever, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender.

(See, also: *R. v. Lacroix* (2003), 172 O.A.C. 147, *R. v. Kanthasamy* (2005), 195 C.C.C. (3d) 182 (B.C.C.A.), *R. v. Mai* (2005), 204 C.C.C. (3d) 114 (B.C.C.A.), *R. v. Hennessey* (2007), 228 O.A.C. 29, and *R. v. B.R.C.*, 2010 ONCA 561.)

[10] *Hennessey, Lacroix* (referred to above) and other decisions I have encountered in my brief canvass of the case law deal primarily with accused who clearly faced deportation, or will lose their right to appeal a deportation order if sentenced to more than two years in jail. Mr. Korem has not shown that he faces deportation or denial of re-entry. I am not going to consider as a "factor" something which has not been plausibly and convincingly demonstrated.

Impact on possible employment

[11] I have learned that the accused has been solely occupied with building and running his business since he came to Canada. I have some idea of the financial trouble the business encountered subsequently. The assets of Crown Jewel Resort

are now owned by his present common law wife, who purchased them from a court-appointed receiver. She and the accused are attempting to run some commercial ventures from the premises in Big Baddeck. The accused lives and works there full-time. He says he does not draw a salary, but relies on his partner for support. As noted, the Family Division imputed earnings to him and ordered payment of child maintenance.

[12] The accused claims that having recently been ordered to pay child support he now has to seek a paying job. The financial obligations of the accused are not relevant to the discharge application so much as his prospects for paid employment, and any detrimental effect of a criminal record.

[13] In the recent Family Division proceeding he filed an affidavit citing the reasons he could not find a job. I assume he was arguing against a possible order to pay child support. He cited a lack of recognized credentials, his age (63), the fact he has to live in Baddeck and has no resources to relocate, limited access to a motor vehicle (his girlfriend's), and the defamation of his name and reputation by Ms Kedmi on internet sites. To these he would now add the prospect of a criminal record. The Family Division decision says (par.108) that he applied for only one job since separating from Ms. Kedmi, but was unsuccessful.

[14] At the sentence hearing the accused cited examples of jobs requiring a criminal record check. However he was unsuited or unqualified for many of these, on other grounds. While it is undoubtedly true that many jobs are closed to people with a criminal record, there is no cogent evidence before me that entry of a criminal record for this accused would have any actual effect on his prospects, which are already diminished by the very factors he cited in his affidavit.

[15] The accused claims that if he receives a conviction and record, the only jobs which will remain open to him are those involving physical exertion of some sort. He tendered a very brief note from his family doctor which says only that "for health reasons, (Nahman Korem) advised to avoid vigorous work and lifting." The accused says the reason is a hernia. He says he told the Family Division about it but did not have confirmation for it. That decision, following a hearing just two months ago, makes no mention of such a disability. The doctor's note gives no specific reason for the advice to "avoid vigorous work and lifting", a descriptor which is itself rather vague and hence unhelpful in defining what jobs he may or may not be able to perform.

[16] I recognize that there is no hard and fast test as to how employment prospects bear on a discharge application. That said, I am not persuaded that entry of a conviction will have negative repercussions on Mr. Korem's employment

prospects. It seems at least as likely that he will continue with his present engagements, with or without a criminal record.

The public interest

[17] The test for granting a discharge is twofold. It must serve the interests of the accused and must not be contrary to the public interest. As noted above, it is not clear that a discharge will make any material difference in Mr. Korem's residency status or his prospects for employment. Beyond this, I have reason to think that it would be contrary to the public interest to grant this application for a discharge.

[18] While I do not have a complete picture of the family breakup and civil proceedings which ensued, it is apparent that the parties have had a long and bitter dispute. The actions of the accused in May of 2013 were opportunistic and mean-spirited. It led to issuance of a Contempt Order. It may have been retribution for what the accused perceived as deliberate flouting of earlier Family Division orders by the victim (see par. 23 of his affidavit, above), but this does not excuse the vindictive nature of his actions. In my trial decision of July 25, 2017 I concluded that the accused was disingenuous about his motives for removing the contents of the home when he did. Taking account of the circumstances of the offence and the

surrounding context it is my view that granting a discharge would be contrary to the public interest.

[19] Counsel have cited a number of cases in support of their respective positions. This is not an area of law amenable to strict application of *stare decisis*; each case brings individual circumstances into play. However I will note differences with two cases cited by the Defence. In R. v. Butler the sentencing judge was satisfied that the accused required access to the United States in order to maintain meaningful access to her children, in particular her son. In R. v. Jamael the court appears to have been satisfied that the offence had made a detrimental and measurable impact on the accused's towing operation in that he'd lost business from the local RCMP and Regional Police. Mr Jamael also pled guilty, was relatively young, and the offences were described as being "out of character".

Restitution

[20] On the issue of restitution, I am asked to rely on the testimony of the victim, and nothing more, to support the claim. I noted credibility concerns in my decision at trial and remain wary of bald assertions such as those made by the victim here. Of the stolen items, it appears the golf clubs and the infused oils were the only items of monetary value not recovered. The amount attributed to the golf clubs,

$500, seems reasonable. These are well-known articles of merchandise. This cannot be said of the oils. These are products which the victim herself creates, from raw materials which she buys for $20 per litre. She apparently infuses the raw oils (coconut, olive) with natural products which she gathers in the local area, then repackages and sells it in smaller jars. The accused acknowledged that she has such a business, and I do not question it, but I have no sales data, no business statements, no receipts, no supporting evidence of any kind to corroborate the selling price which Ms. Kedmi has put forward. Neither can I be sure that she would in fact have sold all of the product.

[21] As to the cost of retrieving the goods, Defence correctly points out that the victim incurred this expense – whatever it might be – for all the furnishings and other items taken from the home. The accused has been found guilty of theft of only a small portion of these. The cost cannot be attributed to the stolen property alone, and I decline to order restitution here. It is more properly the subject of the civil proceedings in any event.

[22] I am, somewhat arbitrarily, fixing a value of $1500 for the oils and accepting the figure of $500 for the golf clubs.

Sentence

[23] Pursuant to s.731(1) (a) I am releasing the accused on probation for 12 months on the following terms: to keep the peace and be of good behavior, no contact with Iris Kedmi except in accordance with an Order of the Supreme Court Family Division, payment of restitution to Iris Kedmi of $1,000 on or before January 31, 2018 and a further $1,000 on or before August 1, 2018, such payments to be made through the court.

Dated at Sydney, N.S. this 16th day of August, 2017.

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A. Peter Ross, JPC