

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Connell, 2015 NSSC 11

Date: 2015-01-12

Docket: CRK No. 425409

Registry: Halifax

Between:

Her Majesty the Queen

v.

Robin Joy Connell

Judge: The Honourable Justice James L. Chipman

Heard: November 3-7, 2014, in Kentville, Nova Scotia

Oral Decision on

Sentence: January 12, 2015

Counsel: Alonzo Wright, for the Crown
David M. Lutz, Q.C., for Robin Joy Connell

Orally by the Court:

[1] On November 7, 2014, Robin Joy Connell was found guilty by a jury of her peers on one count of theft from her former employer, the Glooscap First Nation Gas Station, Variety Store and Gaming Room (“Glooscap”), of monies in excess of \$5,000, pursuant to s. 334(a) of the *Criminal Code*.

[2] Ms. Connell was the manager of Glooscap. One of her duties was to make deposits from the store safe to Glooscap’s bank account. Between April 1, 2012 and March 4, 2013, \$159,918.79 was stolen –this was agreed to in an Agreed Statement of Facts – from the safe at Glooscap. During this time, several cash deposits were made to Robin Connell’s bank account. The jury found Ms. Connell stole the money from her employer, Glooscap.

[3] In coming to this my sentencing decision, I am mindful of the oral and written submissions of the Crown, along with the oral submissions of the Defence, the pre-sentence report (“PSR”) and restitution report. I have also considered Ms. Connell’s comments of earlier today.

[4] At this time I would ask Ms. Connell to add anything she wishes to say before I issue my sentencing decision. (Ms. Connell: “I think Mr. Lutz has said everything.”) Alright, thank you Ms. Connell.

[5] At the end of the day, I am going to impose what the Crown and Defence have jointly recommended; that is, a custodial sentence of two years along with a restitution order in respect of \$119,918.79, which represents the amount in question \$159,918.79 less a \$40,000 insurance payout to Glooscap.

[6] By way of background, I want to say that sentencing is a complex process and it involves application of conflicting philosophical approaches, including deterrence, rehabilitation, retribution and denunciation. A balancing must occur, and that balancing includes factoring in the facts of the offence, the circumstances of the offender and the principles and purposes of sentencing. There are various types of sentences including incarceration, conditional sentence, fine, suspended sentences, probation, absolute or conditional discharge.

[7] I have borne in mind the purpose of sentencing, which has the general aim of the protection of individuals, institutions and values in Canadian society, and

Canadian courts see deterrence, reformation and retribution as a means of achieving the same.

[8] Section 718 of the *Criminal Code of Canada* provides the purpose of sentencing as follows:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a) to denounce unlawful conduct;
- b) to deter the offender and other persons from committing offences;
- c) to separate offenders from society, where necessary;
- d) to assist in rehabilitating offenders;
- e) to provide reparations for harm done to victims or to the community; and
- f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

I have borne these fundamental principles in mind in adopting the joint recommendation of the Crown and the Defence.

[9] Inherent in any employer-employee relationship is trust. In exchange for remuneration, employers such as Glooscap trust their employees to carry out their duties and responsibilities in a manner that is consistent with the employer's interests. When employees such as Ms. Connell steal from their employer, they exploit the trust placed in them. As Judge Dzenich stated in *R. v. Moffatt*, [2005] A.J. No. 1511 (P.C.) at para 152:

The thing about stealing from your employers or in a position of trust, is employers have to trust their employees. Our whole system in the west, in the marketplace, dictates that you have to trust the people that work for you, because otherwise it all falls apart. Without that, you would have security costs being astronomical. Because everyone who deals with money would have to have someone watching him. They'd have to have someone watching that person. If we can't trust our employees, the whole system breaks down.

[10] Ms. Connell held a position of management. This position entrusted her with unique duties and responsibilities which she used to facilitate this crime. By enacting s. 718.2(a)(iii) of the *Criminal Code*, Parliament has declared that where an accused abuses a position of trust in relation to the victim it is deemed to be an aggravating circumstance of the offence. This statutory provision reflects a long-standing common-law principle. This was affirmed by Chief Justice Howland, Martin and Houlden JJA concurring, in *R. v. MacEachern*, [1978] O.J. No. 987 (C.A.) at para 8:

As an assistant manager of a bank the respondent was in a position of trust. It has long been established that the most important principle in sentencing a person who holds a position of trust is that of general deterrence. The offences were serious and involved a large sum of money. They were concealed by the respondent until they were detected by the bank.

[11] Whereas a large corporation may be able to absorb a \$160,000 loss, the facts of this case clearly illustrate how such a loss has a potential to cripple a small business such as Glooscap. In *R. v. Vallee*, 2004 CarswellAlta 1024 (Prov. Ct.), a first-time offender defrauded her employer, a veterinarian, of just over \$94,000. In sentencing the accused to a period of 18 months incarceration, Judge Demetrich took special note of the impact such crimes have on small businesses at paras 35-38:

...Employers in businesses, especially small businesses, are very vulnerable. They have to be able to trust the employees who handle the money and keep the records. An employer cannot do everything.

In this case the employer was a veterinarian, and I am satisfied veterinarians, in terms of their professional skills, have enough to do looking after their professional duties, and they need other people who can look after the books and handle the money, and that is just one example of where small business has to be able to rely on employees.

I am satisfied, for example, small law firms are in the same situation, and many other businesses, that you need to be able to trust your employees to keep the books right and handle the money in the way that is right.

The reasoning is then that it is important to the community, and it is important to have that general deterrence message there so that though obviously not all employees and would-be employees are going to be deterred by the sentence I shall pass soon, one expects and one hopes, and it is likely that the sentence I impose on this accused today will make others who would be tempted to do what she did, think twice, and to deter at least some of them, so that there are at least some other employers who are not going to be in the unhappy position that the victim of this accused's crime is in, where many years of his savings have been taken from him by criminal activity, and he is in the position where he is not likely to recover them soon, and that it has caused a significant disruption to his life and deprivation to his own family.

[12] Ms. Connell stole over \$5,000 from her employer; from the Agreed Statement of Facts we know the amount was almost \$160,000. Undeniably, cases exist in which much higher dollar amounts have been taken from victims; nevertheless, it is important that this not be used to diminish the significance of the amount here. For the majority of Canadians \$160,000 is a very large amount of money and would represent years of post-tax earnings. In *Vallee, supra*, at para 15, the Judge noted::

Another aggravating factor here is that the amount of money stolen was very large, specifically, \$94,206.85. This court judicially recognizes that that amount of money, slightly over \$94,000.00, would represent years of saving for many families. It would take many families quite a number of years to be able to save up that much money and have it sitting in an account.

[13] Given that *Vallee* concerned a theft dating from 1999 to 2003, the \$94,000 from that period of time may be likened to the \$160,000 between 2012 and 2013. Ms. Connell stole the money from Glooscap in a period of just under one year through several separate thefts. It is difficult to find a more enduring and sustained pattern of theft than the facts of this case. Certainly, her actions cannot be characterized as an isolated incident which may be explained by a temporary lack of discretion or a lapse in judgment. Indeed, Ms. Connell's actions are similar to what our Court of Appeal considered in *R v. Tucker*, [1988] N.S.J. No. 33 (C.A). Justice MacDonald, Jones and Matthews JJA concurring, noted at the conclusion of his decision:

This is not a case involving one or two transactions but rather is one of a continued premeditated fraud perpetrated by a knowledgeable businessman and carried out over a lengthy period of time. General deterrence must be the paramount consideration because it is of the utmost importance for the public generally and the business community in particular to understand that those who practice fraud in commercial matters will be severely punished.

[14] Ms. Connell is obviously not a businessman but a businesswoman who carried out her crime over a period of 11 months. Accordingly I find the above quotation particularly apt to the circumstances here.

[15] Further aggravating is the fact that the fraudulent activity of Ms. Connell only stopped when her acts were about to be discovered in an audit. It would appear that what motivated Ms. Connell was greed and the desire to increase her lifestyle through illegal means.

[16] I have reviewed the PSR in detail. It comprises eight pages and offers a very detailed review of Ms. Connell, her history and circumstances. While many components of the PSR are commendable, I think some deserve highlighting in the context of this joint recommendation and my decision of two years in custody. The PSR discloses that Ms. Connell is not an aboriginal person. She has no addiction issues in relation to gambling or narcotics. Furthermore, it discloses she does not have a criminal record. There is some indication in the PSR that she has led a pro-social life.

[17] The absence of a criminal record in a fraud such as we have here is less significant than in other criminal cases for two reasons:

- 1) good reputations are a necessary precondition to holding positions of management at a business like Glooscap; and
- 2) the offences were comprised of numerous planned and criminal acts committed over a significant period of time.

[18] I have reviewed the principles of sentencing in general and I now want to talk about the range of sentences. For every different set of circumstances, we have a different decision with varying sentences. In this case, I have stated the features which must be borne into consideration. In my view the appropriate disposition for Ms. Connell is 24 months incarceration. Again, I have reviewed all

of the submissions in coming to this conclusion, inclusive of the numerous cases forwarded by the Crown. I have reviewed those cases and found the decision of Justice Beveridge in *R. v. Upton*, [2008] N.S.J. No. 527 (S.C.) to be applicable. Justice Beveridge, when he was at the trial Court, assessed a situation where there was a fraud in the order of \$45,000 and imposed a sentence of three years' incarceration. His Lordship said as follows at paras 88 and 103:

Taking into account the complete absence of any mitigating factors and the presence of many aggravating ones including but not limited to the fact that these offences involved a complex and relatively prolonged scheme...

...

Here I have no explanation as to why you chose to pursue such a planned, premeditated, complicated scheme to defraud vulnerable victims. It is easy today to call it a simple scheme, but think of the planning and the premeditation, the steps that had to be gone through to achieve this.

[19] Of all the cases, I find this to be on point for what occurred here, albeit recognizing that it tends to support the outside range. By contrast we have other cases that impose non-custodial or custodial sentences of less than two years. Nevertheless, at the end of the day, for all of the reasons set forth, I find the joint recommendation to be appropriate.

[20] Ms. Connell, in imposing my decision, I wish you every opportunity in the time ahead and I commend you to do some soul-searching and to ultimately get your life back on track. With that sentiment expressed, I thank the parties for their submissions.

Chipman, J.