SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Mira Vista Apartments Ltd., 2010 NSSC 302

Date: 20100728
Docket: Hfx No. 326459
Registry: Halifax

Between:

Mira Vista Apartments Limited

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	June 23, 2010, in Halifax, Nova Scotia
Written Decision:	July 28, 2010
Counsel:	Elizabeth Buckle, for the Appellant Joshua Judah, for the Respondent

By the Court:

[1] This is an appeal by Mira Vista Apartments Ltd. pursuant to s. 822(1) of the *Criminal Code of Canada* against the quantum of sentence imposed by his Honour Judge William B. Digby, a judge of the Provincial Court of Nova Scotia on February 22, 2010.

[2] The appellant was fined $75,000 as a result of a guilty plea to the charge that it, between November 18 and December 18, 2008 constructed a building without a permit contrary to s. 80(a) of the *Building Code Act*, R.S.N.S. 1989, c. 46, as. am.

[3] The appellant appeals on the following grounds:

a) The sentence imposed was harsh and excessive, given the circumstances of the offence and the offender, and given the range of sentences previously imposed in similar circumstances;

b) the learned sentencing judge erred in that he placed undue emphasis on certain aggravating factors and failed to give proper weight to relevant mitigating factors; and

c) such further and other grounds as counsel may advise and this honourable court may allow.

[4] In its notice of summary conviction appeal, the appellant says the court should vary the sentence by reducing the quantum of fine to $31,000, with time to pay.

The Decision:

[5] The essence of Judge Digby's decision, in part, is as follows:

> This is a situation where Mira Vista Apartments Limited decided and I think the crown has stated it correctly made a business decision to proceed without a building permit and construct a building. The court can well understand there must have been tremendous pressures on Mira Vista Apartments Limited to bring the project to fruition. There's always the danger, of course, that the money and financing runs out before the stream of costs incurred in. There's the element of

> deterrence, not only for Mira Vista but others who are prepared to undertake building projects they must understand that building permits are required...
>
> The crown has asked for a fine of $100,000, or sorry, $90,000 based on the fact that it is a 90 unit building. Ms. Buckle on behalf of Mira Vista has made reference to the principal proportionality. Proportionality has to do with sentence imposed on others but this is not a single family residence or a garage that somebody's constructing in their backyard. Any fine, I think, has to be proportionate to the value of the building being put up and the cost savings that are incurred by the company or individual constructing the building.
>
> With the greatest of respect to the defence submission I think the prosecution has more clearly delineated the principles of sentencing and setting forth the amount suggested as a fine. The fine has to be such that it's not a good business decision to proceed without a building permit. I am going to reduce the fine somewhat in this case because in fact all the safety considerations have been met which is the primary reason for building codes although there are others.
>
> I also acknowledge that if the building opens a month earlier the rents aren't all profit there are costs involved in that although some of the financing costs are running because the land has been paid for and is part of the costs of constructing the building.
>
> Taking all of this into consideration the fine will be $75,000.

Background Facts:

[6] Mira Vista Apartments Ltd. intended to erect a building on Regency Park Drive in Halifax. Apparently there was a development agreement in effect. In March 2007 the appellant's architect met with city officials to discuss proposed site changes to this lot. A modified site plan was provided, with proposed changes, including modifications to the location of the driveway, a change from a shared driveway to separate driveways, and changes to the location of the parking garage. Municipal officials dealing with this matter sent a letter on April 17, 2007 listing items that required attention, but made no reference to these modifications. As a result, according to the appellant, it anticipated no major difficulties with obtaining a building permit. HRM submits that between April 17, 2007 and October 27, 2008 Mira Vista did not provide any additional information to HRM. Further, sometime between these dates, the appellant began site preparation, bringing in fill

and getting the site pad ready for construction, even though a permit had not been issued.

[7] An application was made on October 27, 2008 for a building permit to construct a 90 unit building. In November 2008 the parties exchanged correspondence regarding a number of deficiencies that required correction and about a dispute about the method of calculation of the value of the building. On November 20 2008 Mira Vista officials sent a letter to HRM stating that they would not pay the permit fee. In November 2008 correspondence, according to the appellant, there was no indication that HRM required the driveway or parking garage to be moved.

[8] In late November 2008 the appellant was first advised of the difficulty with the location of the driveway but, in any event, made the required modifications to the plans and on January 27, 2009 a building permit was issued. However, the appellant is charged with building without a permit for the period between November 18th and December 18th, 2008.

[9] The appellant cites various costs it incurred in moving the garage door and driveway.

[10] Site visits by HRM officials were made on November 27th , December 2nd, December 9th and December 29th, 2008, during which time Mira Vista was observed continuing with its construction.

[11] After the first site visit of November 27, 2008 a “stop work order” was issued.

[12] On December 30, 2008 Mira Vista was arraigned in Halifax Provincial Court in relation to the charges that are the subject of this appeal and, after several delays, on the trial date of October 6, 2009 Mira Vista changed its plea to guilty on the first count of the information sentence was imposed on February 22, 2010.

Jurisdiction

[13] An appeal from a sentence in a summary conviction proceeding is governed by the same principles as an appeal in an indictable matter. Section 822(1) of the

Criminal Code adopts by reference the provisions of 687(1), which provides as follows:

> 687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

Standard of Review:

[14] In *R. v. C.A.M.*, [1996] S.C.J. No. 28 at para. 90, the Supreme Court of Canada stated the general principles for appellate review of sentencing:

> 90 Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit...

[15] The appellant also refers to *R. v. Shropshire,* [1995] S.C.J. No. 52, where Iacobucci J., for a unanimous court said:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[16] Further in *R. v. C.A.M., supra*, Lamer C.J., at para. 91, instructs that even where there was no trial, the standard of review remains the same:

> ... But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly

> assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community...

[17] The appellant submits that by virtue of the provisions of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, s. 7(1), as am., the sentencing principles outlined in ss. 718, 718.1, 718.2 and 718.21 of the *Criminal Code* are also applicable to sentencing in cases such as the one before this court.

[18] The appellant submits that for a public welfare or regulatory offence, such as one here under the *Building Code Act*, deterrence is the paramount consideration in determining a fit sentence. The appellant's position is that the focus on deterrence should not preclude consideration of the other principles of sentencing. The appellant suggests that this requires consideration of all principles and all relevant factors. The appellant submits that the sentence is unfit, given the circumstances of the offence and the offender, and given the range of sentences previously imposed in other circumstances.

[19] The appellant argues that the learned sentencing judge relied on general deterrence to impose a fine of $75,000, well above the minimum sentence required by law, and, by doing so, failed to consider the relevant mitigating factors and failed to properly apply the principles of proportionality, parity and restraint.

[20] With respect, I am not convinced that the trial judge failed to consider mitigating factors, nor that he failed to properly apply the principles of proportionality, parity and restraint.

[21] Written submissions were made by counsel for the appellant, to the trial judge, dated February 16, 2010 which are part of the appeal record. Written submissions were received from the Crown dated February 11, 2010. Both parties made oral submissions which are included in the appeal record.

[22] Counsel for the appellant, in her extensive brief to the trial judge, dealt with various issues, including the circumstances of the offender and the cost to Mira

Vista of making the changes to the driveway and garage door. Appellant's counsel, at p. 17 of her reply submissions, addresses the application of the principles of sentencing, in particular, specific deterrence, general deterrence, proportionality and fitness of the sentence.

[23] The sentencing judge referenced both the appellant's and the respondent's submissions. and made it clear that he was of the view that "the prosecution has more clearly delineated the principles of sentencing in setting forth the amounts suggested as a fine". The learned trial judge clearly demonstrated that he was mindful of the positions of both parties. He was persuaded by the submissions of HRM.

[24] In its written submissions on appeal, HRM argues that the fine imposed on Mira Vista is within the range of sentences previously imposed for similar offences. Counsel for HRM have reviewed each of the cases listed in the appellant's book of authorities and provided argument that the fine imposed against Mira Vista is within the range of sentence, if not proportionally much lower. I am satisfied that the fine imposed is within the range for similar offences.

[25] While it was not before the trial judge, the appellant has referred to *R. v. Bylos Development Group Inc., W.M. Fares Group Design, Nahas and Andrew Metlege*,. Unreported, October 30, 2007, (NSPC). The appellant submits that the offender in *Bylos Development Group Inc et al., supra*, was similar to the appellant in this case and that the case dealt with similar offences. Counsel suggests that this would go to the issue of parity and that based on *Bylos Development Group Inc et al., supra*, the fine in this case was excessive.

[26] Counsel for HRM argues that the decisions are not similar for the following reasons:

a) When charges were laid in the *Bylos Development Group Inc et al., supra*, case, the offender had already complied with the law. HRM submits that Mira Vista continued to violate the law past the charge date, the arraignment date and to within a week of the trial date.

b) The offender in *Bylos Development Group Inc. et al., supra,* was close to getting a building permit while Mira Vista had significant issues that require resolution before the permit could be issued.

c) At sentencing, Mira Vista's submissions indicated that they had started construction before they applied for a building permit.

d) The offender in *Bylos Development Group Inc et al., supra*, entered a guilty plea at the earliest opportunity, while Mira Vista changed its plea 11 months after the charge was laid and after the matter was set for trial twice.

e) By starting early, the offender in *Bylos Development Group Inc. et al., supra*, gained a 17 day advantage. Mira Vista had a 69 day advantage.

[27] I also note from the decision that the fine in *Bylos Development Group Inc. et al., supra*, was as a result of joint recommendation. For all of these reasons I am not satisfied that the *Bylos Development Group Inc. et al., supra*, decision is as relevant as the appellant's counsel suggests.

[28] I have no hesitation in finding that the fine imposed by the trial judge was appropriate given the actions of Mira Vista Apartments Ltd. I am not satisfied that the trial judge committed any error in principle, nor did he fail to consider relevant factors. He had before him written and oral submissions from experienced counsel on behalf of Mira Vista Apartments Ltd. and HRM. I am satisfied he did not over emphasize the issue of deterrence and, as I have said, the fine imposed by the trial judge is not demonstrably unfit. Mira Vista, even after they were charged and arraigned, continued construction, all in the face of a stop work order. I dismiss the appeal of Mira Vista Apartments Ltd. as against sentence.

Pickup, J.