

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Tibbo*, 2022 NSSC 321

Date: 20221028

Docket: *CRBW*, No. 504900

Registry: Bridgewater

Between:

His Majesty the King

v.

Linda Deloris Tibbo

Judge: The Honourable Justice Diane Rowe

Heard: October 17, 2022, in Bridgewater, Nova Scotia

Oral Decision: October 19, 2022

Counsel: Bryson McDonald, Crown Attorney
Michael Power, Defence Counsel

By the Court – Orally:

[1] In an oral decision, made July 5, 2022, I found that the Crown proved beyond a reasonable doubt that Ms. Linda Deloris Tibbo was guilty of defrauding Zinck’s Auto Salvage (Zinck’s) in excess of five thousand dollars, contrary to s. 380(1) of the *Criminal Code*, R.S.C 1985, c. C-46, and guilty of the second charge that, during the same time period, Ms. Tibbo committed theft of money of a value exceeding five thousand dollars, contrary to s. 334(a) of the *Criminal Code*. The total amount transferred from Zinck’s chequing account into Ms. Tibbo’s was \$98,156.00.

[2] The offences occurred over two and a half years, between May 27, 2017 and December 21, 2018.

Elements of the Offence

[3] In regard to the charge of fraud, contrary to s. 380(1) of the *Code*, the Crown was required to prove that the Accused, “...by deceit, falsehood, or other fraudulent means...” defrauded a person, of any property, money, or valuable security. This includes transactions involving cheques.

[4] The Crown proved that it was Ms. Tibbo who deposited cheques made out to herself, and withdrew money, at various locations over these two and a half years. Ms. Tibbo demonstrated omissions in reporting to her employer, Zinck's, which is a sole proprietorship. In doing so, she placed the owner, Mr. Ambrose Zinck, at a significant financial disadvantage. She "cleaned out the account." It was not until the account was exhausted that she made a pre-emptive contact with Mr. Zinck in an attempt to place blame on another person. The Crown demonstrated that the amounts taken were over five thousand dollars, not just in totality, but also in regard to a specific taking.

[5] As I referenced in the verdict, in *R v. Theroux*, [1993] 2 S.C.R. 5, at paragraph 24, the Supreme Court of Canada set out a framework for the elements of the *actus reus* and *mens rea* of the crime of fraud. The *actus reus* was established by the Crown, and on an analysis of the evidence before the Court, I found that the *mens rea* of fraud was established by proof of Ms. Tibbo's subjective knowledge of the prohibited act, and subjective knowledge that the prohibited act could have as a consequence the deprivation of another.

[6] In regard to the second charge of theft, the facts associated with the charge of fraud underpinned the finding for the conviction on this charge. Ms. Tibbo had fraudulently, and without colour of right, used the cheques in her control to take

money deposited in Zinck's company chequing account and deposit in her own.

The Crown also proved the *mens rea* element, that the taking was done with intent to deprive the owner of their property, the value of which exceeded five thousand dollars.

Reports Regarding Offender

[7] The victim, Zinck's Auto Salvage, and Mr. Ambrose Zinck, did not file a Victim Impact Statement. Mr. Zinck was present at the sentencing hearing, with his common law spouse, Ms. Judy Croft.

[8] A Pre-Sentence Report ("PSR") was prepared by the Nova Scotia Department of Correctional Services, dated October 6, 2022, in relation to Ms. Tibbo.

[9] There is no report concerning any counselling or psychiatric services provided to the Court, as Ms. Tibbo is not currently receiving any of these services.

Legal Principles on Sentencing

[10] The purposes of sentencing is set out in s. 718 of the *Criminal Code*:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect 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 and the harm done to victims or to the community that is caused by 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 acknowledgement of the harm done to victims or to the community.

[emphasis added]

[11] The Court, when considering these objectives of s. 718 of the *Code* upon sentencing an offender, does so in recognition that it cites protection of the public as a primary aim, and that sanctions should contribute toward respect for the law and a just, peaceful, and safe society. Deterrence, separation of offenders from society where necessary, rehabilitation, and the promotion of a sense of responsibility in offenders are each enumerated as possible objectives when imposing a sanction on criminal conduct, as a denunciation of the crime and reparations for the harms done. Further, when imposing a sentence, it must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[12] I also note that s. 718.2(a)(iii) of the Code highlights that in considering aggravating and mitigating factors in imposing sentence that the Court consider

evidence that the offender abused a position of trust or authority in relation to the victim.

[13] I have submissions on sentence from both the Crown and Ms. Tibbo's counsel.

[14] The Crown submits that, on a review of the caselaw and evidence, Ms. Tibbo should receive a sentence of 10 months imprisonment, with a 12 month period of probation.

[15] Ms. Tibbo concedes that her initial written submission concerning a conditional sentence is a sanction that is not available under the *Criminal Code* for these offences. Ms. Tibbo submitted at the hearing that the Court consider a sentence of 90 days, to be served intermittently, followed by a probation order of 21 months.

Aggravating Factors

[16] The evidence at trial demonstrated that Ms. Tibbo wrote cheques to herself on Zinck's account over a two and a half year period. The acts were not isolated or limited to a few occasions. None of the money has been repaid or recovered.

[17] The financial impact on the victim was quite substantial, with the amount taken in excess of \$98, 000.00. The sole proprietor, Mr. Zinck, received the bulk of his income from his business.

[18] Ms. Tibbo's actions resulted in an overdraft of his business account, which depleted his finances.

[19] Ms. Tibbo also was aware that Mr. Zinck, the principal of the company, had limited literacy and numeracy skills. He places utmost trust in Ms. Tibbo, who received his bank statements for the account from him unopened, and unreviewed, and he gave her a chequebook to the account.

[20] In reviewing the PSR, it was apparent that Ms. Tibbo did not demonstrate an acceptance of responsibility for her actions during her interview. The PSR indicates that, as she reported to the writer that "I am guilty of cashing the cheques, but I did not take that man's money." Depositing cheques from Zinck's into her own personal account for an improper purpose is at the very heart of the offences. While she indicated to the PSR writer she had expressed an apology to the victim, I do not find she has any appreciation for the crime she committed, while acting contrary to the victim's interests and financial security.

Mitigating Factors

[21] In regard to mitigating factors, the Court was directed to the statements of Ms. Cammy Tibbo, the Offender's sister. Ms. Cammy Tibbo confirmed Ms. Deloris Tibbo's statements in the PSR that she, and her sister, had grown up in a violent and abusive home while in Newfoundland and in Nova Scotia.

[22] Ms. Cammy Tibbo states that Ms. Tibbo had "never been in trouble" before. This was not the case, and counsel for Ms. Tibbo clarified their written submission and Ms. Cammy Tibbo's statement by disclosing that Ms. Deloris Tibbo had a prior conviction. However, as this was an offence from decades ago, committed over 20 years ago, with Ms. Tibbo not being in conflict with the law on other matters since then, the Court will not consider this an aggravating factor. It is noted though that a lack of prior criminal record is not a mitigating factor in similar cases.

[23] Ms. Cammy Tibbo indicated she felt her sister may benefit from mental health services, and that she was of the personal opinion that her sister had a gambling issue, which Ms. Deloris Tibbo may be in denial about.

[24] Ms. Deloris Tibbo did acknowledge she had used alcohol to cope with stress, particularly in the context of this charge, and alluded to suicidal thoughts at the time.

[25] Ms. Deloris Tibbo is 51 years old. Despite a challenging childhood and young adulthood, she achieved certification to be a Continuing Care Assistant, and is employed currently with an online sports betting company performing administrative tasks. She referred to a continuing relationship with her spouse, and positive relationships with her two children, who are young adults.

[26] Ms. Tibbo was on a promise to appear, and has complied with this, and not reoffended since her indictment on the charges.

[27] Ms. Tibbo, in the course of her sentencing hearing, indicated she is now providing “room and board” to an elderly friend, Mr. Charles Hill. She stated she is doing so without payment from Mr. Hill.

Law and Analysis

[28] Counsel for Ms. Tibbo directed the Court to a series of decisions involving charges of fraud and theft in which an order for a conditional sentence was available. Read broadly, these cases, and those presented by the Crown, serve to underscore that factors the Court considers in the context of these offences include, but are not limited to:

(a) the truthfulness of the accused in connection with the offence or in regard to the legal proceedings;

(b) the overall value of the amounts taken;

(c) the likelihood of rehabilitation, in the offender's particular circumstances;

(d) the impact on the victim or the community of the theft; and

(e) remorse expressed.

[29] Judge Derrick, (as she then was) canvassed the law in her decision in *R v. Lee*, 2011 NSPC 81. The decision is instructive. In that matter, Ms. Lee was convicted of theft over five thousand dollars, and fraud. She was found to have stolen \$66, 939.00 in deposits taken over a one year period, with none of the funds recovered. Ms. Lee also cleared the balances of some customers and misappropriated insurance payouts to her own account and to others related to her.

[30] She was not remorseful and did not accept responsibility for her actions. Ms. Lee committed perjury in the course of her trial and sentencing, claiming to have cancer which was an aggravating factor in sentencing.

[31] Ms. Lee received a 10 month sentence of incarceration, as Judge Derrick found that a conditional sentence (as was then statutorily available under the *Criminal Code*) would not be restorative or rehabilitative.

[32] Further, in reviewing Judge Derrick's decision in *R v. Naugler* 2011 NSPC 68, Ms. Naugler was sentenced to 8 months incarceration followed by 12 month probation for two counts of fraud over five thousand dollars. In that matter, Ms. Naugler had used her position as a bookkeeper to issue herself an additional paycheque on 34 occasions over a three year period, with a total fraud in the amount of \$136, 456.00. The principles of denunciation and deterrence were considered by Judge Derrick in this decision as significant sentencing objectives.

[33] My decision in *R v. Slauenwhite* 2022 NSSC 92 is distinguished from this case. The matter came before the Court for sentencing upon a plea of guilty by the offender and on an agreed statement of facts, with a joint recommendation of counsel for sentence regarding the offences. On the facts presented to the Court, Ms. Slauenwhite had retained amounts of cash intended for deposit in her employer's bank account, with each amount of taking under five thousand dollars over approximately 18 months. Her employer was an established business, specializing in tires. An internal audit conducted by the company discovered the losses, when the discrepancies became obvious.

[34] The recent sentencing decision of Judge Scovil in the *R v. Kitch* 2022 NSPC 4 matter was also considered. In that matter, Ms. Kitch, while in a position of trust with the IWK Children's Hospital was sentenced to 5 months in jail, with a probation order.

[35] In this case, Ms. Tibbo wrote a series of cheques on her employer's account over the course of two and a half years. The total amount taken was in excess of \$98,000.00, and there was proof of her depositing into her own account in excess of eight thousand dollars in one of the transactions.

[36] On a review of the cases, specifically *R v. Lee* supra, *R v. Kitch*, supra, and *R v. Wilson* 2008 NSPC 68, it is apparent that denunciation and deterrence are at the front of the Court's consideration when fraud and theft are committed by a person in the course of their employment when placed in a position of heightened trust. Mr. Zinck's business operates as a sole proprietorship. He has limited education, and his spouse wholly trusted Ms. Tibbo with the accounting and deposits for the business, as they were then close and personal friends.

[37] As Mr. Zinck is a sole proprietor, there were no substantial administrative oversights or controls in place at the business other than Ms. Tibbo herself. Mr. Zinck has operated his business for decades, and the loss of such an amount of

money at his stage of life will be very difficult to accumulate again. Zinck's Auto, and Mr. Zinck himself, was in a vulnerable position, with a high degree of dependence on Ms. Tibbo.

[38] The overall circumstances of the crime had a serious impact on the victim, compounded by the significant breach of trust while committing the crime during a lengthy period of time.

[39] Denunciation and deterrence are objectives of sentencing in determining an appropriate sentencing decision in the matter. Zinck's Auto Salvage, headed by Mr. Zinck, is representative of many small or sole proprietor businesses in Lunenburg and Queens Counties. They may not be administratively sophisticated businesses, and are headed by people with a strong work ethic and, often, personal abilities that are the basis of their enterprise. It can be a challenging economic environment to run a successful business, requiring risk and hard work. The Court is mindful that the sentence reflect the seriousness of the crime against this business, and by extension, the proprietor, in having the trust extended to an employee breached in such a significant manner.

[40] On another note, and pursuant to the principles set out by the Supreme Court of Canada in *R v. Kienapple* [1975] 1 S.C.R 729, the Court noted that elements of

the offence of theft and for fraud are proven from the same facts. This was raised with counsel at the sentencing hearing, as there were not written submissions on this point.

[41] Counsel for the Defence submitted that, as the count of theft carried a maximum term of imprisonment of 10 years, that the Court should consider staying the charge of fraud, as it carries the higher penalty.

[42] The Crown did not oppose the Defence position on staying the count for fraud. The impact of this was canvassed in regard to any potential order for probation the Court may make in sentencing.

[43] Further, I requested and received some financial information concerning Ms. Tibbo's employment income and expenses as it relates to the issue of the victim surcharge.

[44] Defence submitted that Ms. Tibbo is in a limited financial position. The PSR indicated that Ms. Tibbo received employment income from an online gambling company for administrative tasks, totalling about \$1,600.00 per month. The income tax summary for 2021 provided to the Court disclosed she was then receiving taxable income averaging about three thousand dollars per month. While I note the discrepancy in monthly income concerning this information, I also have

received her handwritten account of expenses, which includes obligation to pay an amount for a consumer proposal to address indebtedness. In accepting that her information concerning her current income is accurate, it appears she would have limited income available to satisfy a victim surcharge fee at this time.

[45] The issuance of a Restitution Order in the full amount taken by Ms. Tibbo was requested by the Crown, with a reduction sought by Ms. Tibbo. I did raise this element of the written submission with Ms. Tibbo at the hearing. On a review of the information, and the law relied upon by Ms. Tibbo, the Court will not make a reduction in the restitution amount in the circumstances of this matter.

Sentence

[46] Ms. Tibbo, please stand.

[47] On the first count of defrauding Zinck's Auto Salvage ("Zinck's) in excess of five thousand dollars, contrary to s. 380(1) of the *Criminal Code*, this count is stayed on the basis of principles set out in *R v. Kienapple* [1975] 1 S. C. R. 729.

[48] On the second count, theft of money of a value exceeding five thousand dollars, contrary to s. 334(a) of the *Criminal Code*, I sentence you to a term of

imprisonment for six months, with a period of probation ordered for 12 months upon release.

[49] In regard to the content of the Probation Order, conditions include that you shall keep the peace and be of good behaviour, attend Court when required to do so, and notify your probation officer of any change of contact information or employment.

[50] Ms. Tibbo is also ordered, as a term of the Probation Order, not to attend Zinck's Auto Salvage.

[51] Further, she is not to communicate with Mr. Ambrose Zinck or Ms. Judy Croft, or be present at their place of residence or employment.

[52] Further, she is not to seek, obtain or continue any employment, or become a volunteer in any capacity that involves having responsibility or authority to administer real property, money, or any other valuable security possessed by another person during the term of her probation.

[53] Ms. Tibbo is also ordered to attend assessment and counselling as it relates to mental health including in regard to gambling addiction, and to attend any assessment and counselling as may be directed by her probation officer.

[54] In conclusion, I am going to make an order for restitution in the amount of \$98, 156.00. Counsel did not make submissions in regard to payment of this amount over time. The amount is significant and Ms. Tibbo's circumstances may change over time, as may her ability to pay toward restitution. I will waive the victim surcharge fee.

[55] That concludes the decision on this matter.

Diane Rowe, J.