



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Burke*, 2018 NLCA 31

Date: May 28, 2018

Docket: 201601H0077

BETWEEN:

CECIL JOHN BURKE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201401G6728
(2016 NLTD(G) 83 and 2016 NLTD(G) 116)

Appeal Heard: December 11, 2017

Judgment Rendered: May 28, 2018

Reasons for Judgment by: Harrington J.A.

Concurred in by: White and Hoegg JJ.A.

Counsel for the Appellant: Self Represented

Counsel for the Respondent: Lloyd Strickland

Harrington J.A.:

[1] The appellant, Cecil John Burke, a real estate agent, appeals his convictions for fraud, forgery, and uttering forged documents relating to commission income obtained from bogus real estate purchase and sales agreements. Equity Financial (Equity), a lending company associated with the realty firm, ReMax, which employed Mr. Burke as one of its agents, provided a service to ReMax agents which enabled them to borrow against their anticipated commissions pending the closings of the real estate transactions which they had facilitated and which would yield a real estate commission upon closing. Upon Equity becoming concerned about outstanding advance loans made to Mr. Burke related to real estate transactions that were well past the originally scheduled closing date listed on the sales agreements by the appellant, ReMax conducted an internal review of its sales documentation as it related to the appellant and made inquiries regarding the numbers and amounts of cheques from Equity that had been paid to the appellant as commission advances before the closings of the transactions. There were at least nine real estate transactions that gave cause for concern, so Equity requested the Royal Newfoundland Constabulary to investigate. Eventually, charges of fraud, forgery and uttering a forged document were laid. The trial commenced on April 26, 2016.

[2] Mr. Burke chose to represent himself notwithstanding that Legal Aid counsel had been offered to him. He was convicted on the three counts in the indictment which resulted in concurrent sentences of twelve months incarceration followed by twenty-four months of probation. He was ordered to pay restitution of \$35,821.85 to Equity representing the outstanding monies he unlawfully obtained from the fraudulent sales agreements bearing forged signatures of purported vendors and purchasers named in the documents.

[3] For the reasons which follow, this Court affirms the convictions of the appellant and the sentence imposed by the trial judge, including the order for restitution.

THE TRIAL

[4] Mr. Burke pleaded not guilty. On the opening day of trial he advised the trial judge that he had dismissed his Legal Aid lawyer having decided that he would conduct his own defence. He also made an application for a

stay of proceedings arguing that his section 11(b) *Charter* rights were violated because the 45-month interval between committal and conviction at trial constituted unreasonable delay.

[5] The trial judge granted Mr. Burke sufficient time to pursue his section 11(b) *Charter* application. On hearing the application the trial judge concluded that the delay was not unreasonable and denied the appellant's application for a stay of proceedings.

[6] The trial proceeded on May 6, 2016.

[7] The Crown called thirty-nine witnesses at the trial, which took place over thirteen days. With respect to each of the transactions in issue, the court heard evidence from either the purported vendors or purchasers whose names were listed on the purported sales agreements. The witnesses confirmed in their testimony that the signatures of the named parties entered on the ReMax sales agreements were forged.

[8] Mr. Burke did not testify at trial nor did he call evidence. He argued that the Crown had failed to prove its case beyond a reasonable doubt. The trial judge was of a different view. He found that none of the purported vendors or purchasers had signed the purchase and sales agreements either as vendors or purchasers, and that all of the loan approval letters that were part of the documents assembled by Mr. Burke for delivery to Equity, in support of his requests for commission advances from Equity pending closing of the various sales agreements, were forgeries put forward for the purpose of obtaining the loans.

[9] The trial judge noted the complexity of the appellant's fraudulent scheme, and observed that in addition to the fictitious and forged purchase and sale agreements, Mr. Burke manipulated the sales agreements to establish new closing dates by amending the forged agreements and issuing new documents to Equity, in order to lead Equity to believe that the sales agreements were *bona fide* realty contracts. The trial judge convicted Mr. Burke on all three charges.

GROUND OF APPEAL

[10] The appellant appeals his convictions and the restitution order portion of his sentence. On appeal, Mr. Burke's focus was on the unfairness of his trial given his decision to represent himself and his desire to have the

restitution order vacated. Nevertheless, the following four issues are identified in his factum and have been addressed by the Crown in its factum:

1. unreasonable delay;
2. self-representation in error;
3. that his section 8 *Charter* right had been breached; and
4. the restitution order should be set aside.

Mr. Burke represented himself on appeal.

Unreasonable Delay

[11] The trial judge dismissed the section 11(b) *Charter* application two months prior to the Supreme Court of Canada decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. His analysis was properly conducted under the principles in *R. v. Morin*, [1992] 1 S.C.R. 771 which were in place at the time and has not been shown by Mr. Burke to have been in error.

[12] The trial judge ruled that the appellant had waived his *Charter* rights during a period of time when proceedings were before the Provincial Court and that the post-committal delays were largely incurred because the appellant twice dismissed his counsel just prior to trial. He found the Crown responsible for “a very small part of the delay” and even then noted that defence counsel had consented to the Crown’s requests.

[13] The appellant was charged in July 2012 and sentenced on July 21, 2016. The total delay inclusive of sentencing was 48 months and 12 days.

[14] The Crown submits that under the *Jordan* analysis, the presumptive ceiling in this case is 30 months, and acknowledges that the time taken to conclude the proceedings breached the presumptive ceiling. However, the Crown points to significant causes of delay for which Mr. Burke is responsible under the new *Jordan* framework. Mr. Burke claimed to have had six different lawyers from the Legal Aid office representing him at various times. However, the first two lawyers assigned from the Legal Aid office had to withdraw upon discovery of conflicts. A third lawyer withdrew to accept alternate employment. The fourth, fifth and sixth lawyers assigned by Legal Aid were dismissed by the appellant for reasons not associated with availability of Legal Aid counsel.

[15] The delays incurred because of withdrawal of defence counsel totalled six and one half months. However, at least three Legal Aid counsel were subsequently made available to the appellant, each of whom was dismissed by the appellant. The delay due to Mr. Burke's dismissal of counsel was 14 months between the first scheduled trial date in February 2015 and the actual trial date of April 26, 2016. There were further deductions of six and a half months which put the delay below the presumptive ceiling of 30 months.

[16] The factual findings by the trial judge respecting Mr. Burke's section 11(b) *Charter* argument were not shown on appeal to have been in error. Neither was the judge shown to have erred in his application of the relevant section 11(b) law. Accordingly, this ground of appeal is without merit.

Self-Representation

[17] Mr. Burke argued that he should be granted a new trial on the basis of his having represented himself at trial. He submits that he made a mistake in choosing to do so. He did not point to any unfairness visited on him as a result of his choice to represent himself.

[18] The trial record demonstrates that Mr. Burke, a real estate agent for many years, had a full appreciation of the nature of the charges against him. The trial judge was responsive in answering Mr. Burke's questions and helpful to him with his arguments at trial. At the close of the Crown's case, the trial judge granted the appellant an adjournment to discuss matters with a lawyer. On recommencement, the appellant indicated that he would not be testifying but wished to tender the provisions of the *Real Estate Trading Act*. The trial judge accepted the *Act* but advised Mr. Burke that it was not evidence.

[19] This ground of appeal has no merit. It appears to be based, not on errors at trial or miscarriages of justice that could have resulted from self-representation, but simply on the notion that Mr. Burke should have a second chance at defending his charges – this time with a lawyer.

[20] Mr. Burke also contends that the Crown's case was circumstantial and that it did not meet the standard of proof beyond a reasonable doubt. He did not offer an explanation as to how this was so. I am unable to accede to his submission in this regard.

Section 8 of the *Charter*

[21] Mr. Burke's third ground of appeal relates to his assertion that his section 8 *Charter* right to be secure from unreasonable search and seizure was violated due to an investigation carried out by a member of the Financial Services Division of Government Services in which documentation related to the bogus transactions was obtained without a warrant.

[22] In this regard, the documents obtained by the Financial Services Division were documents of Equity Financial and ReMax, which their employees had voluntarily turned over to the Division and the police for investigation. There was no need for a warrant in these circumstances, and in any event Mr. Burke had no privacy interest in the documents.

[23] Mr. Burke did not make an application alleging a breach of section 8 of the *Charter* either prior to or during his trial. When an issue may be raised for the first time on appeal was addressed by this Court in *R. v. Parsons*, 2017 NLCA 64:

12 Leave of the Court is required where an appellant raises a new issue on appeal (*R. v. Aisthorpe*, 2006 NLCA 40, 257 Nfld. & P.E.I.R. 1 at paragraph 36). Exercise of the discretion to grant leave "will be guided by balancing the interests of justice as they affect all the parties" (*Aisthorpe* at paragraph 37). In *Aisthorpe*, at paragraph 37, Rowe J.A., for the Court, quoted from the decision in *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (B.C.C.A.):

"An accused must put forward his defences at trial. If he decides at that time, as a matter of tactics or for some other reason, not to put forward a defence that is available, he must abide by that decision. He cannot expect that if he loses on the defence that he has put forward, he can then raise another defence on appeal and seek a new trial to lead the evidence on that defence. . . ."

[24] Particularly relevant in this case is the summary of the law provided by Dymond J. in *R. v. Stacey* (1999), 181 Nfld. & P.E.I.R. 200 (Nfld. T.D.), and cited with approval by this Court in *Aisthorpe* at paragraphs 8 to 10:

[8] The issue as to whether a *Charter* right can be raised for the first time on this appeal is the issue for the court to decide in this case.

[9] The court does have a discretion to allow a *Charter* issue to be raised if the issue is one which has a factual basis to make the particular decision or if it is dealing with law alone.

[10] If, however, the issue raised in relation to the *Charter* right has to have a factual grounding, then the appeal court should not deal with an appeal raising an issue of a *Charter* right for the first time. This would mean sending the matter back for a new trial and starting over again if the appeal was successful.

[25] As was stated previously, Mr. Burke did not raise the issue of a section 8 *Charter* breach prior to or at trial, nor did he call evidence on the issue. There is therefore no factual basis on which to deal with it. Mr. Burke has not satisfied the test, as outlined above, for when an issue may be raised for the first time on appeal.

The Restitution Order

[26] The standard of review on sentence appeals was summarized by Lebel J. in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 at para. 46:

Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was “demonstrably unfit” or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently...

This standard of review was held to apply to appeals respecting restitution orders upon sentencing in *R. v. Castro*, 2010 ONCA 718, 102 O.R. (3d) 609.

[27] Mr. Burke’s argument respecting the restitution order was the main focus of his appeal. While at trial his position was that the real estate transactions he solicited were legitimate, on appeal he admitted his guilt and seeks to have the restitution order imposed by the trial judge vacated.

[28] During the sentencing hearing, Mr. Burke declared his intent to repay to Equity the commission advances he had illegally obtained. However, no repayment has been made to Equity or ReMax.

[29] The trial judge characterized Mr. Burke’s trial conduct and attitude as “egregious”. In sentencing the appellant, the trial judge said the following at paragraphs 23 to 26 of his reasons:

[23] This was a serious and deliberate breach of trust within an industry that relies heavily on trust and ethical conduct. The trust of former clients was betrayed by using their style signatures and private information about their homes to create the illusion of legitimate agreements with legitimate signatures. The trust of co-workers was betrayed by passing off these false documents. The trust of Mr. Burke's broker was betrayed by having its representative co-sign repayment for fraudulent loans. The trust of competing real-estate agents was betrayed by forging signatures in the witness space adjacent to their clients' forged signatures on several agreements.

[24] There was no effort of repayment and, in fact, a negative attitude expressed toward repayment. In an email sent to the victim of the fraud, after the complaint was made to police, Mr. Burke stated that in a worst case scenario he would be ordered to repay money over the next 7 – 10 years. That email implies that Mr. Burke was in no rush to make any payments on the debt. During sentencing submissions Mr. Burke declared his intent to repay Equity. That declaration, because it was made so late in the proceeding, is not a mitigating factor. Nothing was repaid over the past five years even though the repayment obligation was never in dispute.

[25] The absence of a criminal record and the absence of any other negative factors in Mr. Burke's personal history are mitigating factors. Mr. Burke has a positive history based on the limited information available. He is a university graduate, he is married, and he has been gainfully employed most of his adult life.

[26] Considering these mitigating and aggravating factors, in the context of comparable sentencing authorities, I have determined that a 12-month custodial sentence followed by two years' probation is appropriate here. The remaining issue is whether Mr. Burke should serve the custodial sentence in the community or inside a penitentiary.

[30] In addition to an incarcerating sentence of twelve months, the trial judge ordered Mr. Burke to pay restitution in the amount of \$35,821.85 to Equity, being monies Mr. Burke owes Equity as a result of his frauds. The order was made pursuant to section 738(1)(a) of the *Criminal Code*, which reads:

(1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:

(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not

exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable; ...

[31] The constitutionality of stand-alone restitution orders was upheld by the Supreme Court of Canada in *R. v. Zelensky*, [1978] 2 S.C.R. 940. The Court also confirmed that such orders are discretionary, and made clear that an offender's means to pay a restitution order is an important factor in considering whether to impose one.

[32] This Court considered the appropriateness of restitution orders imposed in addition to incarcerating sentences in *R. v. Spellacy* (1995), 131 Nfld. & P.E.I.R. 127 (Nfld. C.A.), leave to appeal to S.C.C. refused, 145 Nfld. & P.E.I.R. 90 (note) and *R. v. Bradbury*, 2004 NLCA 82, 243 Nfld. & P.E.I.R. 1. In *Spellacy*, the Court reduced a \$1,086,477 restitution order to \$200,000 on the basis that payment of the original amount was not realistic in the circumstances. In *Bradbury*, the Court reduced the restitution order imposed by the trial judge from \$66,070 to \$10,000 on the basis that the offender had no realistic ability to pay it. The offender had adduced evidence showing that after she served her incarcerating sentence, she had secured minimum wage employment in a retail store where the most she would gross per annum was \$20,000 and that only if she were to work 50 hours per week. Her husband's salary was \$35,000 per annum and their home was subject to a mortgage of \$55,000.

[33] In *Castro*, the Ontario Court of Appeal described relevant factors regarding the making of restitution orders when a breach of trust is involved:

[27] Reviewing courts have, however, consistently held that no single factor is itself determinative of whether a compensation order should be granted and that the weight to be given to individual considerations will depend on the circumstances of each case. Those circumstances include two considerations I wish to emphasize: the nature of the offence and, when money has been taken, what has happened to the money.

[28] Insofar as the nature of the offence is concerned, in cases involving breach of trust, the paramount consideration is the claims of the victims: *Fitzgibbon*, at pp. 1014-15. Ability to pay is not the predominant factor. Indeed, where the circumstances of the offence are particularly egregious, such as where a breach of trust is involved, a restitution order may be made even where there does not appear to be any likelihood of repayment: *R. v. Yates*, 2002 BCCA 583, 169 C.C.C. (3d) 506, at paras. 12 and 17.

...

[30] In imposing a sentence where the offender has used his or her position to commit a breach of trust, the primary considerations are the protection of the public, general deterrence and the repudiation of the conduct of which the offender was found guilty. Relevant factors include the length of time over which the conduct took place, whether the offence was a sophisticated and well-planned scheme, the amount involved and, most importantly, the impact of the offender's conduct on the victims. The *secondary* considerations are specific deterrence, rehabilitation and any mitigating circumstances such as a plea of guilty or co-operation with the authorities (in tracing the funds): *Scherer*, per Martin J.A., at para. 34.

(Emphasis added.)

[34] This Court also considered the imposition of restitution orders in *R. v. Strowbridge*, 2014 NLCA 4, 346 Nfld. & P.E.I.R. 203. The restitution orders in *Strowbridge*, upheld by this Court, were made pursuant to a three-year probation order to come into effect after the offender finished serving his incarcerating sentence, and were for small amounts of money owing to victims whose circumstances did not appear to be any better than those of the offender. The offender had also expressed willingness to find employment and repay the victims.

[35] I would also note that section 739.1 of the *Code*, enacted in 2015, after Mr. Burke committed the frauds but before he was convicted and sentenced, provides that an “offender’s financial means or ability to pay” does not prevent the court from making an order under section 738.

[36] In summary, considerable jurisprudence supports the imposition of restitution orders as part of a sentence where the circumstances of the offence and the behavior of the accused demonstrate willful misconduct through fraud and serious breach of trust.

[37] In this case, the restitution order is \$35,821.85. While this is a significant amount of money, it is not immediately apparent that it is a crushing amount for Mr. Burke, as was the case for the offenders in both *Spellacy* and *Bradbury*. As well, payment of restitution in Mr. Burke’s case is not time-sensitive like it was in *Strowbridge*, and Mr. Burke is not in jeopardy of breaching his probation order if he does not pay. In this regard, the restitution order, made under section 738 of the *Code*, is only enforceable under section 741 of the *Code*, which requires Equity to seek to enforce payment of it through the civil courts, with all that that entails.

[38] The sentencing judge described Mr. Burke's offences as a "serious and deliberate breach of trust within an industry that relies heavily on trust and ethical conduct" (*R. v. Burke*, 2016 NLTD(G) 135 at para. 23). At paragraph 35, he considered Mr. Burke's financial circumstances saying:

There is the reality that Mr. Burke's current financial situation — no recent employment and jail time pending — means that he has no immediate ability to make restitution. However, at his sentencing hearing Mr. Burke stated an intention to find some form of employment and repay this debt. This repayment can occur once the custodial sentence is served. Accordingly, I order Mr. Burke to pay restitution of \$35,821.85 to Equity. I make this order under section 738 of the *Criminal Code* and it may be enforced under section 741 of the *Criminal Code* as if the order was a judgment obtained in civil proceedings.

[39] At trial, Mr. Burke did not demonstrate remorse. At sentencing he changed his attitude by advising the trial judge that he intended to find a job and begin repaying the money he had defrauded from Equity. On appeal he expressed a desire to pay restitution but submitted that he does not have the ability to repay the amount of \$35,821.85 and that his wife and child are unwell. Mr. Burke did not adduce evidence respecting his ability to pay restitution, other than to say that he had been and remained unemployed for some time. This is in contrast to the offender in *Bradbury* who put considerable evidence of her financial status before the court.

[40] In the result, it cannot be said that the sentencing judge erred in exercising his discretion to order restitution. He considered the submissions including the fact that Mr. Burke had not been recently employed and that he was facing jail time, and imposed a restitution order in respect of which there was no evidence that it was of a crushing amount. Again, enforcement of the order requires Equity to take steps to do so under section 741 of the *Code*.

[41] In these circumstances, I would not interfere with the trial judge's discretion to order restitution.

[42] I would dismiss the appeal.

M. F. Harrington J.A.

I concur: _____

C. W. White J.A.

I concur: _____

L. R. Hoegg J.A