ONTARIO COURT OF JUSTICE

DATE: 2017 04 19
COURT FILE No.: Ottawa 12-5958, 12-5983

B E T W E E N :

MISSISSIPPI VALLEY CONSERVATION AUTHROITY

Appellant

— AND —

RODOLFO MION

-AND-

1634088 ONTARIO INC.

Respondents

Before Justice Diane M. Lahaie
Decision released on April 19, 2017

Mr. H. Brodmann .....for the Appellant
Mr. T. Green ..... for the Respondents, Rodolfo Mion and 1634088 Ontario Inc.

LAHAIE J.:

Overview

[1] This sentence appeal is brought by the Mississippi Valley Conservation Authority (hereinafter referred to as "MVCA") following a decision of Justice of the Peace L. Girault of the Ontario Court of Justice arising from charges under the *Conservation Authorities* Act, R.S.C. 1990, c. 27.

The Charges, the Decision and the Sentence

[2] The Respondents were charged with the three following counts:

Count 1: Undertake a development, being site grading and the placing and removal of material in an area which is described in Ont. Reg. 153/06 as prohibited without the written permission of the Conservation Authority contrary to s. 28(1)c) of the Conservation Authorities Act, R.S.O. 1990, Chapter 27, as amended contrary to section 28(16) of the Act.

Count 2: changing and interfering in any way with a wetland which is described in Ont. Reg. 153/06 as prohibited without the written permission of the Conservation Authority contrary to section 28(1)(b) of the Conservation Authorities Act, R.S.O. 1990, Chapter 27, as amended contrary to section 28(16) of the Act.

Count 3: interfering in any way with the existing channel of a watercourse which is described in Ont. Reg. 153/06 as prohibited without the written permission of the Conservation Authority contrary to section 28(1)(b) of the Conservation Authorities Act, R.S.O. 1990, Chapter 27, as amended contrary to section 28(16) of the Act.

[3] After trial, the Respondents were convicted on counts 1 and 2 and acquitted on count 3. A fine in the amount of $7,500 was imposed on 1634088 Ontario Inc. on count 1 with a suspended sentence on count 2. Rodolfo Mion received a suspended sentence on both counts. There were other defendants involved in this matter, who were also convicted and sentenced however; these defendants are not respondents on this appeal.

[4] The Appellant, the MCVA, argues that the failure of Justice of the Peace Girault to impose a sentence requiring the Respondents to rehabilitate the wetland is an error in principle and that the sentence imposed, of a fine only, is unreasonable in the circumstances.

[5] During the sentencing submissions, the Appellant requested a remediation order with four conditions:

(1) Remove the sand spread out in the southwesterly corner;

(2) Replace the stripped organic material that had been stockpiled on the property;

(3) Replant the identified wetland area with native vegetation species; and

(4) The developed areas beyond the wetland area, but within the 120 meter regulated limit, should be replanted with native vegetation species.

[6] The Appellant also requested an order that the Respondent obtain, at his own expense, a report from a qualified environmental consultant to develop the remediation plan, as well as prior approval of the plan by the MVCA.

[7] In her Reasons for Sentence, the Justice of the Peace identified a number of issues with the requested remediation order. First, the trial Justice disputed that she had jurisdiction to order environmental reports. Second, she determined that there was no evidence that sand was brought onto the property, meaning that this condition was moot. Third, on the issue of replacing organic material, she accepted the evidence of Mr. Delhey and Mr. Mion that they intended to do so once the water channel was properly blocked. Fourth, she held that replanting native vegetation species is "part of the voluntary restoration plan with DFO (Department of Fisheries and Oceans)". Fifth, she held that any remediation order she might issue may contradict the DFO restoration plan. On that basis, Justice of the Peace Girault concluded (at p. 34 of the transcript filed):

> So it's my view, at this stage, that I do not have sufficient information in order to impose a restoration plan. I don't think that it's required in these particular circumstances because there's already a plan that was approved by DFO with respect to the Fisheries Regulations.

[8] The Justice went on to say that in similar matters, like those involving a waterway or people fixing their beaches, she generally imposes a remediation

plan. However, she concluded that these circumstances were different, stating (at p. 36):

> I'm not prepared to issue a restoration order. So then regarding Mr. Green's comments about, you know, making an order that again I say that he has to follow through with the DFO restoration plan, I don't have the authority to do that.

Position of the Parties on Appeal

[9] The Appellant asserts two grounds for appeal: misapprehension of evidence and fitness of the sentence. On the evidence ground, the Appellant argues that the Justice of the Peace ignored evidence that the Respondents were aware that the land in question was designated a wetland before 2011. Further, the Appellant argues that the Justice of the Peace, in declining to issue a remediation order, conflated the evidence of restoring the realigned watercourse from 2009 along the southerly edge of the property, and the damaging work carried out in 2012 north of the watercourse that is the subject of the charges before the Court.

[10] On the fitness of the sentence, the Appellant argues that by merely imposing a fine, the Justice of the Peace issued an unreasonable sentence that does not take into account the factors of specific and general deterrence and reparation. These factors are particularly relevant where the Justice of the Peace determined that "development" of a wetland occurred and the evidence showed it was done for commercial purposes. The Appellant states that "a $7,500 fine imposed on the corporate Respondent amounts to nothing more than a license to undertake illegal activity."

[11] The Appellant seeks a variation of the sentence requiring a rehabilitation order of the areas stripped of vegetation and topsoil by redistributing the topsoil onto the subject lands to the satisfaction of the MVCA.

[12] On the issue of the misapprehension of evidence, the Respondents argue that there was no confusion around the evidence showing that the work done in 2012 was carried out under the 2010 DFO restoration agreement. In other words, the Respondents' position is that the damaging work on the wetland was done to conform to the DFO restoration agreement.

[13] On the fitness of sentence issue, the Respondents argue that the Appellant has no jurisdiction to request a remediation order since it did not request one in 2009-2010 when the MVCA was made aware of the work being done and the restoration work approved by the DFO. Moreover, the Respondents assert that a remediation order under s. 28(17) of the Act is not mandatory, but discretionary for a sentencing judge.

[14] The Respondents seek an order setting aside the convictions and sentences under the doctrine of interjurisdictional immunity or federal paramountcy. This argument is rejected. This Court is dealing with an appeal against a sentence, pursuant to s. 122(1) of the *Provincial Offences Act* and not an appeal against a conviction, pursuant to s. 120(1). Furthermore, I would have rejected the Respondents' arguments on such an appeal if it had been before me. These arguments have no application in the present proceedings. Firstly, the stripping of vegetation and topsoil from the subject property had a commercial objective. I will not address this argument any further as it is not properly before this Court, no appeal as to conviction having been filed by the Respondents.

[15] The Respondent seeks an order setting aside the $7,500 fine or in the alternative, imposing a reduced fine in the range of $2,000 to $3,000.

Legislation

[16] The Court may make a remediation order by virtue of s. 28(17) of the *Conservation Authorities Act* which reads as follows:

> In addition to any other remedy or penalty provided by law, the court, upon making a conviction under subsection (16), may order the person convicted to,
>
> (a) remove, at that person's expense, any development within such reasonable time as the court orders; and
>
> (b) rehabilitate any watercourse or wetland in the manner and within the time the court orders.

[17] On an appeal of sentence, s. 122 of the *Provincial Offences* Act, R.S.O. 1990, ch. P. 33, grants an appellate court power to dismiss the appeal or vary the sentence. This provision reads as follows:

> (1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,
>
> (a) dismiss the appeal; or
>
> (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted, and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.
>
> Variance of sentence
>
> (2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court.

Standard of Review

[18] Appeals against a sentence attract different standards of review than the usual standards of correctness or reasonableness. These standards have developed out of sentence appeals in both criminal cases and regulatory offences.

[19] In *R. v. Cotton Felts Ltd.*, [1982] O.J. No. 178, the Ontario Court of Appeal considered the *Provincial Offences Act* and the role of appellate judges on varying a sentence. The Ontario Court of Appeal determined that an appellate judge is not restricted to varying a sentence only where it is based on an error in principle. Rather, an appellate judge has the power and duty to form his or her own opinion on the fitness of the sentence and vary any sentence it does not consider fit.

[20] However, later jurisprudence suggests greater restraint. In *R. v. Shrophshire,* [1995] 4 S.C.R. 227, the Supreme Court of Canada held that appellate judges should not freely modify sentences because they would have sentenced differently. Rather, a sentence should only be varied where it is not fit or is clearly unreasonable.

[21] More recently, in *R. v.* Turcotte, [2000] O.J. No. 1316 (ONCA), the Ontario Court of Appeal outlined the principles and limitations on an appellate court hearing a sentence appeal. These can be summarized as follows:

(1) The sentencing judge is entitled to considerable deference;

(2) A sentence may be varied where,

a) it is demonstrably unfit or clearly unreasonable;
b) It falls outside the acceptable range normally imposed for similar offences;
c) there was an error in principle;

d) the sentencing judge failed to consider a relevant factor; or
e) the sentencing judge underemphasized or overemphasized appropriate factors.

[22] In my opinion, these principles apply to sentences imposed for provincial offences.

[23] As stated, the general rule for an appellate court hearing a sentence appeal is to give considerable deference to the sentencing justice.

[24] However, with respect, I find that the Justice of the Peace made significant errors in this case. Firstly, the imposition of a $7,500 fine was clearly unreasonable in the circumstances of this case for a number of reasons.

[25] In 2009, the Respondent, Mr. Mion, through his company, assured DFO by letter that all remediation work related to the realigned water channel would be "performed under the guidance of the MVCA". The Respondents never consulted with the MVCA for the work performed in 2012.

[26] The trial Justice found that by sometime in 2009, the Respondents became aware that the subject property was environmentally protected and/or designated as a wetland. Despite this knowledge, the Respondents proceeded to develop the land without authorization.

[27] Due to the Respondents' work, a previously designated wetland area no longer exists, for all intents and purposes.

[28] Furthermore, the Respondents admitted that the purpose of the original work to realign the water channel was for future development and sale (see trial transcript, Vol. 2, page 75). In effect, the Respondents' work in 2012, though

purported to be part of the DFO restoration plan, was also for commercial purposes.

[29] Based on these aggravating factors, a single fine of $7,500 is clearly unreasonable and inconsistent with the sentencing principles of specific and general deterrence and reparation. This is a situation of a corporate defendant which engaged the services of a construction company to illegally alter a protected wetland. A fine in the amount of $7,500 – minimal from a corporate perspective – is a small price to pay for destroying a wetland and reaping the benefits of a more commercially viable property.

[30] A global reading of the Trial Justice's Reasons makes plain that she conflated the DFO restoration plan from 2010 and the remediation of the wetland area damaged in 2012. In her Reasons for Sentence, Justice of the Peace Girault consistently states that the remediation orders sought by the Appellant were covered by the DFO restoration plan. However, the DFO restoration plan refers only to restoring the realigned water channel (Exhibits 8 and 10). It makes no mention of a wetland or the listing of conditions for remediating a wetland. The DFO restoration plan is separate and apart from a remediation plan that may have been ordered for the damaged wetland. The conflation of these two separate issues constituted a palpable and overriding error which caused the trial justice to impose an unreasonable sentence for the circumstances of this case.

Does a $7,500 fine without a remediation order, fall outside the acceptable range normally imposed for similar offences of unauthorized property development?

[31] Where individuals or corporations develop a property without authorization, courts generally impose a removal or remediation order.

[32] For example, in *R. v. Geil*, three defendants, a husband, wife and their farm corporation, were accused of dumping gravel in a designated wetland without proper authorization. The defendants were charged and convicted for undertaking a development contrary to s. 28(16) of the *Conservation Authorities Act*. The sentencing justice issued a maximum fine of $10,000 against the husband, $1,500 against the wife and $1,000 against the corporate defendant. Additionally, the sentencing judge issued a rehabilitation order with respect to a portion of the development undertaken without the necessary permit. The defendants appealed the conviction and sentence on grounds unrelated to the fitness of the rehabilitation order. Justice Hearn dismissed the appeal (see *R. v. Geil,* (2012), ONCJ 740).

[33] In *R. v. Hanna*, (2011), CarswellOnt 16033, four defendants – a husband, wife, and two construction companies – were accused of constructing a side addition to a house in a designated erosion hazard zone along a shoreline without proper authorization. The defendants pled guilty to committing an offence under s. 28(16) of the *Conservation Authorities Act.* The two construction companies received fines of $7,500 and $2,500 respectively. The husband and wife were each ordered to pay a $5,000 fine and each was subject to a probation order for two years under s. 72 of the *Provincial Offences Act*, with a condition that they reconstruct a seawall on their property. The Crown had requested a removal order of the new construction pursuant to s. 28(17) of the *Conservation Authorities Act.* The sentencing judge denied the removal order finding that it was unreasonable, highly punitive and not necessary. The Crown appealed against the sentence to refuse a removal order. Justice Cooper considered the aggravating factors, including that the defendants were knowledgeable in land development and knowingly defied the Conservation Authority, stating (*R. v. Hanna*, (2012), ONCJ 715 at paragraph 19):

> "[i]f this sentence is permitted to stand, the Halton Region Conservation Authority and its rules would be a laughing stock, and others would be easily encouraged to disobey them. Specific deterrence and general deterrence are the governing sentencing principles in this appeal."

[34] Justice Cooper set aside the sentence, remitted the fines, and ordered the removal of the lakeside house addition at the expense of the defendants.

[35] Finally, in *R. v. Allen*, (2008) CarswellOnt 9307, a defendant was accused of placing rocks in a watercourse without proper authorization. The defendant was charged and convicted of interfering with a watercourse contrary to s. 28(16) of the *Conservation Authorities Act*. The sentencing judge did not impose a fine, but ordered the removal of material from the watercourse with the assistance of the Conservation Authority. An appeal against the sentence was dismissed, with the removal order being upheld. (see *R. v. Allen*, (2009), ONCJ 486)

[36] In each of these cases involving similar issues of unauthorized property development, courts have included a remediation or removal order. It is also noteworthy that these cases involved what appear to be far less damaging environmental offences – dumping gravel, building a house addition and placing rocks – than the Respondents' actions which involved stripping vegetation from a wetland. In my view, the Justice of the Peace, in the present matter, clearly erred in failing to impose an order to rehabilitate the wetlands.

Did the sentencing justice fail to consider "restoration" as a relevant factor?

[37] In my view, the Justice of the Peace failed to consider restoration as a relevant factor on sentencing. Under the *Conservation Authorities Act*, restoration is one of the stated purposes of the legislation. Section 20(1) of the Act reads:

> [t]he objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the

> conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals.

[38] In *Maitland Valley Conservation Authority v. Cranbrook Swine Inc.*, [2003] O.J. No. 1433 (ONCA), the Ontario Court of Appeal stated (at paragraph 57) that the *Conservation Authorities Act* is a "crucial provincial law" with a stated purpose which includes restoration.

[39] In her Reasons for Judgment, Justice of the Peace Girault states that "the Conservation Authority is a public welfare legislation to basically regulate and safeguard sensitive natural areas from encroachment" (see Reasons for Judgment, Volume 3, page 12). In her Reasons for Sentence, she states that she has to balance the purposes or sentencing and the purposes of the legislation (see Reasons for Sentence, Volume 3, page 31). However, the legislative purpose of restoration is not mentioned in the sentencing Reasons and the sentence imposed fails to properly address, in any meaningful way, the relevant factor of restoration.

Did the sentencing justice underemphasize the primary sentencing principles of specific and general deterrence in imposing only a fine and rejecting the Appellant's request for a restoration order?

[40] In my view, the trial justice failed to give appropriate consideration and weight to the sentencing principles of specific and general deterrence. Although she appears to have turned her mind to these principles and correctly mentioned the case of *R. v. Cotton Felts Ltd., supra,* and the need, in public welfare offences, to impose a fine significant enough to deter people from committing these offences, the resulting sentences were grossly inadequate and inconsistent with the purpose and principles of the legislation.

[41] As stated by the Ontario Court of Appeal in *R. v. Cotton Felts Ltd.*, *supra*, at paragraph 20, deterrence remains the paramount principle of sentencing in regulatory offences.

[42] I share the views of Justice Harris in the matter of *Beaulieu v. Milton (Town)* (2015), ONCJ 779, at paragraph 24, when he opined:

> "deterrence, both general and specific, is the primary principle of sentencing in these regulatory cases. In other words, the sentence should send a message both to the specific defendants and to others in the community that such behaviour will not be tolerated."

[43] A $7,500 fine imposed on a corporation with a stated purpose to develop land does not deter that corporation from damaging a wetland in the future. Such a fine is a small price to pay for moving a wetland designation and opening up land for development. As it stands, the Respondents can pay their fines, proceed with restoring the watercourse and be left with land no longer designated as a wetland.

[44] Moreover, a $7,500 fine imposed on a corporation or an individual would not deter others from developing wetland areas. Corporations or individuals in the business of land development would surely view this sentence as a license to illegally develop a wetland to remove its protected designation, pay a small fine and be left with ready-to-build property.

[45] The trial justice erred by underemphasizing specific and general deterrence in imposing a $7,500 fine on the corporate Respondent and suspending the passing of sentence on the Respondent, Mr. Mion. Sentences of this nature do not adequately deter future behaviour. Only a significant fine and a remediation order address the principles of sentencing in the circumstances of this case. If the Respondents and other like-minded individuals and corporations

know that developing a wetland will result in an order to remediate that land back to its wetland character, these entities will be deterred.

Disposition

[46] The Appeal of sentence is granted as against both Respondents. I will not interfere with the suspended sentence as against Mr. Mion as this is worthy of deference in the circumstances, although I would have imposed a similar fine on Mr. Mion as that imposed on the corporate Respondent, had I been the trial Justice. However, this Court hereby issues an Order pursuant to s. 28(17) of the *Conservation Authorities Act,* as against both Respondents (jointly and severally) requiring that each rehabilitate and restore the wetlands to conform with the guidelines and requirements set by the Mississippi Valley Conservation Authority with 6 months of the date of this Order or such further time period as the MVCA may permit in writing.

Released: April 19th, 2017

Signed: Justice Diane M. Lahaie