

Ontario Superior Court of Justice

T.M. Dunnet J.

Heard: January 15 and April 4, 2018.

Oral judgment: May 16, 2018.

Court File No.: CR-16-50000181-0000

[2018] O.J. No. 2637 | 2018 ONSC 536

Between Her Majesty the Queen, and Muzaffar Ahmad, Accused

(28 paras.)

Counsel

Michael Coristine, for the Crown.

Mukesh Bhardwaj, for the Accused.

REASONS FOR SENTENCE

T.M. DUNNET J. (orally)

1 Muzaffar Ahmad has been found guilty of fraud over \$5,000, false pretences and possession of property obtained by crime. The charges arose from an incident on January 13, 2014 when Mr. Ahmad opened a commercial bank account at TD Canada Trust and deposited \$141,437.57 in fraudulent cheques.

2 Mr. Ahmad claimed to have had no knowledge that the cheques were fraudulent. He asserted that he was defrauded by an individual named Amir Aziz who directed him to open the bank account and gave him the cheques in purported repayment of a loan. Mr. Aziz did not testify at trial.

3 On the totality of the evidence, I was satisfied beyond a reasonable doubt that Mr. Ahmad possessed the necessary *mens rea* for the offences with which he was charged. In the alternative, I was satisfied beyond a reasonable doubt that Mr. Ahmad had his suspicion aroused to the point that he thought there was a need for inquiry, but deliberately chose not to inquire because he did not want to know the truth. Therefore, he acted in wilful blindness.

4 The key findings of fact were as follows: This was an elaborate scheme involving planning and deliberation to defraud the bank. Mr. Ahmad deliberately deceived the bank on multiple occasions, even when he was given the opportunity to clarify the role he attributed to Mr. Aziz. Further, based on his experience, Mr. Ahmad had some level of business acumen and intelligence.

5 Mr. Ahmad testified at trial that he was under a great deal of stress about potentially losing his house. He dissipated more than \$120,000 in three days and yet made no payments towards his outstanding mortgages. Instead, he paid \$22,000 in credit card debts, spent \$10,000 on a business trip to Pakistan, paid \$13,000 to an individual named Dr. Tariq Malick, gave his own wife \$30,000, purchased a \$10,000 draft payable to himself and spent \$14,000 on gold bullion. His spending patterns did not make sense, given his alleged pressures involving Mr. Aziz and the mortgages on his home.

6 On January 15, 2018, Crown counsel made submissions on sentence. Defence counsel asked for an adjournment to February 26, 2018 in order to file material. On February 26, 2018, defence counsel sought a further adjournment because Mr. Ahmad was in hospital. Defence counsel made his submissions on April 4, 2018.

7 The Crown seeks a custodial sentence of two years less one day, plus a two year probationary period, a DNA order and a fine in lieu of forfeiture. The defence seeks a 90 day intermittent sentence.

8 The Pre-Sentence Report dated January 4, 2018 states that Mr. Ahmad is a 51-year-old, first-time offender who denies committing the criminal offences. He was born in Afghanistan and educated in Pakistan. He relocated to Germany for fifteen years before immigrating to Canada in 2000. He is married with three children and has family support. He has always worked as a cook. He is currently working at an employment agency and supplements his income by doing catering work at banquet halls. He also volunteers at a mosque.

9 Following the verdict, counsel for Mr. Ahmad arranged for him to be psychologically assessed. The report of forensic neuropsychologist Romeo Vitelli states that the information for the report was based on self-reporting evidence provided by Mr. Ahmad who "seems to be a stable individual with a responsible work ethic and does not have any emotional or psychological disturbances." The report also states that Mr. Ahmad feels that he is being punished for something he did not do.

10 I find the report to be troubling because it is dated February 9, 2018 and yet makes reference to Mr. Ahmad's attendances on February 10 and February 28, 2018 after the report had been signed. Accordingly, I place little weight on the contents of the psychological report.

11 The mitigating factors are as follows:

- (a) Mr. Ahmad is a middle-aged offender;
- (b) He has no prior criminal record;

- (c) He has support from his family and friends;
- (d) He appears to have been a contributing member of society in some form since his arrival in Canada; and
- (e) There has been some recovery of the funds lost.

12 In *R. v. Williams*, [\[2007\] O.J. No. 1604](#) (S.C.), at para. 30, Hill J. provided a non-exhaustive list of circumstances that have been recognized as aggravating factors in white collar breach of trust cases. While this case does not involve a breach of trust, the list of considerations is relevant in assessing the appropriate sentence, including:

- (a) The nature and extent of the loss: The loss is almost \$80,000.
- (b) The degree of sophistication of the dishonesty and the degree of planning, skill and deception: The record is silent as to how the cheques payable to Invesco, a multinational investment company, were intercepted and came into Mr. Ahmad's possession. It is clear that there was a significant, deliberate and elaborate plan to register a company to mirror the information on the cheques, open a bank account to mirror the company that was registered, converse with bank employees and "sell" the company that was registered.
- (c) Whether the sole motivation is greed: Mr. Ahmad was supporting his family and had a substantial credit card debt. He gave cash to his wife, paid credit card and other debts, spent money on a business trip, purchased a bank draft and tried to buy gold. Even if it was not the sole motivation, greed was a partial motivating factor.
- (d) The number of dishonest transactions undertaken in the commission of the offence: There was planning and deliberation in the execution of the fraud. Mr. Ahmad went to great lengths to conceal the money trail by attending different branches in order to make it difficult to trace the funds.
- (e) Where there exists little hope of restitution: Forty-four percent of the monies have been dissipated.
- (f) The offender was caught as opposed to voluntary termination of the criminality: Mr. Ahmad was arrested when he went to the bank to pick up the gold bullion that he had ordered.

13 I do not believe that Mr. Ahmad has remorse for the crimes he has committed. He does have remorse for the consequences of the crimes. While genuine remorse may be a mitigating factor, lack of remorse in these circumstances is not an aggravating factor.

14 The primary sentencing objectives for these types of cases are denunciation and deterrence and the need to convey the message that bank fraud will not be tolerated.

15 The recent case of *R. v. Hussein*, [2016 ONSC 3672](#), is instructive. The accused was found guilty of defrauding banks by the use of fraudulent master business agreements and by attempting to cash cheques that were not payable to him.

16 The accused was 46 years old and well-educated. The cheques involved exceeded \$400,000, but no one suffered any financial loss. The accused had a criminal record, including a prior conviction for uttering a forged document, and he was on probation at the time of the offences.

17 Turnbull J. found that the offences in *Hussein* were serious, planned and motivated by greed.

18 At para. 22, Turnbull J. stated:

Counsel helpfully provided me with a series of authorities to assist me in this matter. Both counsel have agreed that on the scale of "frauds" this was a serious offence. In *R. v. Dovis* ([2002](#), [58 OR \(3d\) 536](#)) (C.A.) the Court of Appeal held that ordinarily frauds of this nature merit a penitentiary sentence in the range of 3 - 5 years. When mitigating circumstances are present, a sentence may be reduced to the reformatory range. I am not satisfied that mitigating circumstances exist in this case to reduce the sentence to a reformatory range.

19 Having considered the seriousness of the frauds, the number of transactions, the fact that the transactions took place within a short period of time and the fact that no financial loss occurred, Turnbull J. imposed a period of incarceration of thirty months.

20 In *R. v. McEachern* ([1978](#), [42 C.C.C. \(2d\) 189](#)) (Ont. C.A.), the Ontario Court of Appeal substituted an eighteen-month jail sentence for the suspended sentence imposed by the trial judge. The accused bank manager had forged cheques in the amount of \$87,000 to complete the purchase of a property after he was unable to secure a loan.

21 In *McEachern*, the accused was 34 years old and had no criminal record. Howland C.J.O., writing for the court, found that the gravity of the offences called for the imposition of a custodial term and there were no exceptional circumstances which would justify a lesser punishment.

22 Defence counsel provided the court with 18 cases as follows: *R. v. Oton*, [2012 ONSC 861](#); *R. v. Taylor* ([2003](#), [180 C.C.C. \(3d\) 495](#)) (Ont. C.A.); *R. v. Drummond*, [2016 NLTD\(G\) 67](#), [381 Nfld. & P.E.I.R. 320](#); *R. v. Pastore*, [2017 ONCA 487](#); *R. v. Lewis* ([2000](#)), [231 NBR \(2d\) 90](#) (Q.B.); *R. v. Callender*, [2009 CanLII 72039](#) (Ont. S.C.); *R. v. Klaus*, [2000 BCCA 533](#), [144 B.C.A.C. 293](#); *R. v. Kalonji*, [2010 ONCA 111](#); *R. v. Ramzy*, [2014 ONCJ 30](#); *R. v. Dhudwarr*, [2012 ONCA 422](#); *R. v. Sangha*, 2007 CarswellOnt 4288 (S.C.); *R. v. Bittle*, [1996 CarswellOnt 3300](#) (C.J.); *R. v. Nanne*, [1995 CarswellOnt 2739](#) (C.J.); *R. v. Gagne*, 1992 CarswellOnt 5197 (C.J.); *R. v. Burkart*, [2006 BCCA 446](#), [214 C.C.C. \(3d\) 226](#); *R. v. Malvoisin*, [2006 CanLII 33304](#) (Ont. C.A.); *R. v. MacRae* ([2006](#)), [205 O.A.C. 305](#) (Ont. C.A.); and *R. v. Taipow* ([2005](#)), [203 O.A.C. 219](#) (Ont. C.A.).

23 Although defence counsel did not review the cases for the court's benefit, I have noted on my review of many of the cases, which are distinguishable on their facts, that the courts imposed mid to upper reformatory sentences following a guilty plea.

24 Accordingly, I am of the opinion that in the circumstances of this case, the appropriate sentence for fraud over \$5,000 is 15 months' imprisonment. The sentence for false pretences and for possession of property obtained by crime shall be served concurrently to the sentence for fraud over \$5000.

25 Upon release from custody, Mr. Ahmad will serve a period of probation for two years subject to the following conditions:

1. Keep the peace and be of good behavior;
2. Appear before the court when required to do so;
3. Notify the court or the probation officer in advance of any change of name or address;
4. Report within 72 hours of release from custody in person to a probation officer;
5. Report thereafter as required;
6. Attend and actively participate in any counselling as directed by the probation officer;
7. Notify the probation officer of any employment and/ or business activity, such as obtaining employment, incorporating a business, being named as part of a business, forming any business partnerships or opening business accounts;
8. Not to be in possession of any identification or financial instruments that are not in the name of Muzaffar Ahmad other than for an immediate family member; and
9. Not to attend any TD Bank in Canada.

26 Mr. Ahmad has no assets and he is the sole provider for his wife and three children. He earns \$36,000 annually plus monies from part-time catering jobs. I have considered the provisions of s. 462.37 of the *Criminal Code* and their objectives and in the particular circumstances of this case I do not find that a fine in lieu of forfeiture is appropriate.

27 I have taken into account Mr. Ahmad's lack of a criminal record, the nature of the offences, the circumstances surrounding their commission and the impact that a DNA order will have on his privacy and security of the person. I am satisfied that it is in the best interests of the administration of justice to make an order authorizing the taking of a DNA sample.

28 Accordingly, pursuant to s. 487.051 of the *Criminal Code*, Mr. Ahmad is ordered to provide samples of bodily substances that are reasonably required for the purpose of DNA analysis.

T.M. DUNNET J.