COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Berhe, 2018 ONCA 930
DATE: 20181122
DOCKET: C62881

Feldman, Roberts and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Yohannes Berhe

Appellant

Yohannes Berhe, in person

Louis Strezos, duty counsel

Andrew Hotke, for the respondent

Heard: November 5, 2018

On appeal from the decision of the Summary Convictions Appeal Court dated October 17, 2016 by Justice Akhtar of the Superior Court of Justice, allowing the appeal from the sentence imposed on July 22, 2015 by Justice Hogan of the Ontario Court of Justice and dismissing the appeal from the sentence imposed on September 10, 2015 by Justice Khawly of the Ontario Court of Justice.

REASONS FOR DECISION

[1] The applicant seeks leave to appeal from the decision of the summary conviction appeal court in respect of the sentences imposed following convictions in two cases. In the first case, the summary conviction appeal judge set aside the

sentence imposed by Hogan J., because it constituted an illegal sentence under s. 731 of the *Code* with three components: a period of custody, probation and a fine. Under that section, a period of probation may be added to either a fine or a period of custody but not both. The sentencing judge had added the small fine to the sentence of custody and probation in order to reduce the amount of the victim fine surcharge.

[2] The summary conviction appeal judge corrected the illegality by removing the fine. He also imposed a $100 victim fine surcharge on each count, holding that imposing a small fine in order to reduce the mandatory victim fine surcharge is improper. In the second case, the summary conviction appeal judge upheld the sentence imposed by Khawly J., who had refused to impose a small fine as part of the sentence only for the purpose of reducing the amount of the victim fine surcharge.

[3] The issue on which the applicant seeks leave to appeal is whether the summary conviction appeal judge was correct in holding that a sentencing judge may not impose a small fine as part of a sentence for the purpose of reducing the mandatory victim fine surcharge. This issue was explained and submitted by Mr. Strezos, acting as duty counsel.

[4] Despite his helpful articulation of the issue, leave to appeal is dismissed for two reasons.

[5] First, the issue does not arise squarely on the facts of either case. The issue of the propriety of a small fine imposed only to reduce the victim fine surcharge arose on the appeal from Hogan J. to the summary conviction appeal judge, but in addressing the issue, he was entitled to impose the sentence he did. Everyone agrees that the summary conviction appeal judge turned an unlawful sentence into a lawful sentence. The applicant's complaint is that he chose to delete the fine rather than the period of custody or the probation, as the means by which to turn the sentence into a lawful one. That decision fell within an exercise of his discretion. Similarly on the appeal from Khawly J., the original sentence imposed was a legal sentence which was upheld on summary conviction appeal. Deference is owed to those decisions.

[6] Second, the appeal of this court's decision in *R. v Tinker*, 2017 ONCA 552, 136 O.R. (3d) 718, challenging the constitutional validity of the victim fine surcharge, is under reserve at the Supreme Court of Canada, where that court will have the opportunity to consider and discuss the purpose and parameters of the victim fine surcharge. That discussion may well impact the concern raised by the applicant.

[7] Accordingly, the sentences that were ultimately imposed attract deference and there is no issue of significance to the administration of justice beyond what

will likely be dealt with in *Tinker.* The application for leave to appeal is therefore dismissed.

"K. Feldman J.A."
"L.B. Roberts J.A."
"Fairburn J.A."