

2013 ABPC 217
Alberta Provincial Court

R. v. Faqi

2013 CarswellAlta 1451, 2013 ABPC 217, [2013] A.W.L.D.
4123, [2013] A.J. No. 853, 108 W.C.B. (2d) 692, 568 A.R. 65

Her Majesty the Queen and Ahmed Mohamud Faqi

H.A. Lamoureux Prov. J.

Judgment: August 14, 2013
Docket: Calgary 081167702P1

Counsel: Donna Spaner, for Crown
Tyson Dahlem, for Accused

Subject: Criminal

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Narcotic and drug control — Offences — Trafficking — Sentencing

Charges against accused of trafficking in controlled substance were stayed — Appeal by Crown was allowed, and stay was lifted — Sentencing hearing held — Accused sentenced to 18 month's conditional sentence — Accused had improved his life since arrest and had found stable employment and had married — Sentence by way of conditional sentence was fit sentence — Accused had already been deterred his previous incarceration as evidenced by bona fide attempt that he had made to turn his life around since release and before sentencing — To return accused to gaol would amount to excessive punishment, not only of accused, but also wife and unborn child who depend on him — Conditions imposed.

Table of Authorities

Cases considered by H.A. Lamoureux Prov. J.:

R. v. Faqi (2011), 2011 ABCA 284, 2011 CarswellAlta 1672, 89 C.R. (6th) 409, 54 Alta. L.R. (5th) 1, 277 C.C.C. (3d) 312, 513 A.R. 355, 530 W.A.C. 355 (Alta. C.A.) — referred to

R. v. Liparoti (2011), 2011 ABCA 250, 2011 CarswellAlta 1411, 282 C.C.C. (3d) 139, 513 A.R. 97, 530 W.A.C. 97 (Alta. C.A.) — referred to

R. v. Maskill (1981), 1981 CarswellAlta 337, 29 A.R. 107, (sub nom. *R. v. Maskell*) 58 C.C.C. (2d) 408, 1981 ABCA 50 (Alta. C.A.) — referred to

R. v. Spina (1997), 1997 CarswellAlta 510, 200 A.R. 133, 146 W.A.C. 133 (Alta. C.A.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 109 — referred to

s. 487.051 [en. 1998, c. 37, s. 17] — referred to

SENTENCING of accused on charges of trafficking in controlled substance.

H.A. Lamoureux Prov. J.:

1 The accused, Ahmed Mohamud Faqi, appeared before the Court for sentencing pursuant to a direction of the Court of Appeal of Alberta in the case *R. v. Faqi*, 2011 ABCA 284 (Alta. C.A.).

Chronology of Events

2 Mr. Faqi was charged with trafficking in a controlled substance, cocaine, on August 30, 2008. Trial commenced March 24, 2009. Mr. Faqi was convicted at trial however the Court at trial level entered a judicial stay. The Court applied the doctrine of entrapment and directed a stay on May 7, 2010. The Crown appealed. The appeal was heard by the Alberta Court of Appeal on September 14, 2011. The Court of Appeal decided that the finding of entrapment was an error in law. The Court of Appeal concluded that police conduct did not amount to entrapment as it occurred in the course of a *bona fide* investigation. The Appeal of the Crown was allowed, the judicial stay was lifted and convictions were entered against the accused on counts 1 and 2. The Court of Appeal remanded the matter back to the trial court for imposition of sentence (*R. v. Faqi, supra*).

3 On May 1, 2012, the accused was summoned to return to the Provincial Court of Alberta for sentencing. A Pre-Sentence Report was ordered and prepared.

4 Subsequent to the trial in this case, the accused committed a similar offence in Ottawa, Ontario. He was convicted of trafficking in a controlled drug and sentenced to a period of 6 months incarceration. The subsequent offence occurred in 2010.

Personal Circumstances of the Accused as at May 2013

5 The accused has now been at large without further offending since August 2010. Mr. Faqi was born in Somalia. He was sent to Canada in 1993 to Ottawa, Ontario, where he resided with his grandparents. Mr. Faqi's mother died when he was 8 years old. When Mr. Faqi arrived in Canada to reside with his grandparents, his father remained in Somalia.

6 At the age of 18 Mr. Faqi returned to Somalia to reside with his father. He resided in Somalia during a very violent time in that country's history. Mr. Faqi recalls observing violence in the streets, dead bodies in the streets, local acts of terrorism, and general states of anarchy.

7 At the age of 25 Mr. Faqi returned to Canada where he relocated to Calgary, Alberta. Subsequent to Mr. Faqi's incarceration in Ottawa, Ontario for a period of 6 months in 2010, Mr. Faqi has made a remarkable turnaround in his life circumstances. Prior to the Ottawa offences Mr. Faqi was travelling with the wrong crowd. He was clearly in the wrong crowd on the day he trafficking cocaine to the undercover officers. However, since returning to Calgary after the 2010 incarceration in Ottawa, Mr. Faqi has married, begun employment where he is a valued employee, and disassociated himself from the previous negative influences in his life. Mr. Faqi has been employed with Cascades Recovery Inc. since November 26, 2012. He earns \$15 per hour in the maintenance department. Mr. Faqi employer has filed employment references, Exhibit 1. Cascades views Mr. Faqi in the following way:

Ahmed is one of our reliable and safety conscious employees in our plant. He is hard working and diligent. He is always present at work and is a motivated employee. Ahmed definitely shows initiative in becoming a valuable employee in the department.

8 Mr. Faqi was married in the Fall of 2012 and his wife is currently pregnant with their first child. Mr. Faqi's wife has only marginal employment as she does not speak English. The primary source of her support is Mr. Faqi.

Decision

9 The Crown seeks a penitentiary term of 24 to 30 months. They remind the Court of the starting point set by the Alberta Court of Appeal for commercial trafficking in cocaine in small quantities at 3 years (*R. v. Maskill* (1981), 29 A.R. 107 (Alta. C.A.)). The Crown notes as an aggravating factor that Mr. Faqi was not suffering from any addiction issues at the time that he trafficked in cocaine to the undercover officers. The Crown notes as a further aggravating factor that the trafficking occurred in a bar with many patrons present. However, the Crown concedes that the Court cannot consider the subsequent conviction and incarceration for trafficking in Ottawa as this offence occurred post trial and conviction in the case at bar. The Crown also concedes that the personal circumstances of Mr. Faqi subsequent to his release from jail in Ottawa are complicating the disposition of this case as it appears that Mr. Faqi has the support of Probation for a community disposition. In fact, in the opinion of Probation Mr. Faqi is a suitable candidate for community supervision provided that a series of conditions are imposed by the Court in connection with management of his presence in the community.

10 The Defence argues that the Court could impose a conditional sentence of gaol in the community for a period of 18 months to 2 years less a day and still meet the requirements of the *Criminal Code* to impose a fit sentence in law. The Defence points out that the findings of fact made at trial by the Court reduced the level of moral culpability and point to a possible factor in Mr. Faqi's personality which led to the commission of the crime, that is Mr. Faqi's overriding desire to please his friends and to get along with others in a social context. In short, the Defence says that the Court should consider that Mr. Faqi's actions do not fit the normal profile of an individual who traffics in drugs such as those who are involved in 'dial-a-dope' schemes, those who travel about in cars selling drugs to others on the street, and those who frequent the streets selling to addicts.

11 The Defence also submits that there are serious issues in re-incarcerating an individual like Mr. Faqi who has been jailed and released and then taken steps to engage in a lawful existence. The Defence further submits that if a period of incarceration is now imposed after such significant efforts have been made by the accused to turn his life around, that Mr. Faqi will fall back into the unacceptable situation that he was in prior to the charges in this case. The Defence points out that Mr. Faqi would lose his employment, be unable to support his wife, be unable to be present and provide a father figure to his soon to be born child, and essentially would fall back to the point that he was at on the day that he provided controlled drugs to the undercover officers in this case. The Defence has provided a number of decisions to the Court on sentencing which include the decision of *R. v. Spina* (1997), 200 A.R. 133 (Alta. C.A.), in which the Court of Appeal reduced a 4 year global sentence to 2 years less a day on 2 counts of trafficking in larger quantities of cocaine on the grounds that the "sentencing judge placed too much emphasis on specific deterrence and failed to give credit for the rehabilitation that had occurred" (quoted at paragraph 12 in *R. v. Liparoti*, 2011 CarswellAlta 1411 (Alta. C.A.)). The Defence also submits that the Court must sentence the accused as he presently stands before the Court and not as he was in May 2010. The Defence says that the principles of general and specific deterrence can be accomplished through a tightly crafted sentence of gaol in the community and that all of the pre-conditions to the consideration of a sentence in the community are present.

12 If we begin at the starting point for commercial trafficking of small amounts of cocaine at 3 years, the Court must then engage in an analysis of the significant aggravating and mitigating features before arriving at a final decision. In that context, the level of moral culpability is a factor to be considered along with personal circumstances of the accused and the recommendations of probation. The Court must also examine the context of the trafficking and whether there were other signs of commercial activities such as scales, large amounts of cash, all of the paraphernalia associated with trafficking. Finally, the Court must consider whether the principle of general and specific deterrence has to some extent already been addressed through Mr. Faqi's incarceration in Ottawa, Ontario, and the Court must examine what Mr. Faqi has done with his life since he was released from gaol in Ontario.

13 Taking into account all of the foregoing, the Court concludes that a sentence by way of conditional sentence of gaol in the community is a fit sentence. The Court is of the view that Mr. Faqi has already been deterred to a significant extent from

his previous incarceration in Ottawa and that is evidenced by the *bona fide* attempt that he has made to turn his life around since release from gaol and before sentencing in this case. The Court is also of the view that to return Mr. Faqi to gaol at the time, in a penitentiary, would in fact amount to excessive punishment, not only of Mr. Faqi, but also of others who depend on him for support - his wife and unborn child.

14 Accordingly, this Court sentences Mr. Faqi to a sentence of gaol in the community, a conditional sentence of 18 months with the following terms and conditions:

1. The accused shall keep the peace and be of good behaviour and report to the Court when required to do so.
2. The accused shall report to a Probation Officer within 24 hours of the date of conditional sentence, in person, and thereafter in the manner and at the times as directed by Probation.
3. The accused must provide written proof of his residential address to Probation at the time of his first report and he shall not change that residential address without prior written approval of Probation.
4. Probation is directed to arrange counselling and programming for the accused to address family of origin issues, psychological counselling, financial management, and any other counselling that is required in the opinion of Probation. The accused is ordered to attend all counselling and programming as directed by his Probation Officer, sign releases to allow Probation to access his records and provide proof of attendance and completion of all counselling directed by his Probation Officer.
5. The accused shall maintain a curfew and remain in his home or on the grounds of his home between the hours of 10 p.m. and 6 a.m., 7 days a week, answering the door of residence or a landline telephone during curfew hours to confirm his presence. The following exceptions are permitted to the curfew hours imposed by the Court:
 - a. Attendance at employment verified by the accused to Probation, travelling to and from employment.
 - b. Medical issues, appointments for the accused, his wife and his child.
 - c. Shopping for the necessities of life with a maximum of one hour per day.
 - d. Attending all counselling treatment programming as directed by Probation, attending Probation, or any other exception approved in writing in advance by Probation.
 - e. Any other exception approved in writing by Probation.
6. The accused shall maintain a landline telephone during the period of the conditional sentence without call forwarding features and shall answer the landline telephone when it rings during curfew hours.
7. The accused shall present himself at the door or his residence or at the door of a surveillance vehicle in response to directions of surveillance or of peace officers during the hours of curfew.
8. Whenever the accused is outside of his residence he will carry with him the conditional sentence and any written authorizations provided by Probation and produce it on demand of a peace officer or a surveillance officer.
9. The accused shall complete community service work to the satisfaction of Probation, 80 hours, at least 5 hours per month, and in any event complete all community service work no later than 30 days prior to the expiration of the conditional sentence order.
10. The accused shall work, take an educational course or upgrading or receive vocational training or some combinations of these tasks as approved by Probation.

11. The accused is prohibited from buying, having in his possession or consuming any intoxicating substances including alcohol and any drug not prescribed to him by a doctor or a dentist. The accused is also banned from any liquor store, wine shop, bar, lounge, tavern or any other place where the main business is the sale of alcohol.

Ancillary Orders

15 There shall be a mandatory weapons prohibition pursuant to s. 109 of the *Criminal Code*. The Court will consider the Crown's application for forfeiture of controlled drugs seized and any cash associated with those controlled drugs.

16 The Court considers whether a DNA order pursuant to s. 487.051 of the *Criminal Code* would be appropriate. The Court is not satisfied that it is of the best interest of administration of justice to make the order and declines to grant a DNA order.

Order accordingly.

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