

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Eby and Goodman*, 2005 YKSC 56

Date: 20051018
Docket No.: S.C. No. 04-1548
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

**LAURA ANN EBY and
CARY MELVIN GOODMAN**

Before: Mr. Justice R.S. Veale

Appearances:

Mr. Peter Chisholm

Mr. Edward Horembala, Q.C.

Counsel for Her Majesty the Queen

Counsel for Laura Ann Eby and

Cary Melvin Goodman

REASONS FOR SENTENCE

INTRODUCTION

[1] On October 13, 2005, Laura Eby plead guilty to one count of forgery and one count of breach of trust against the Yukon Housing Corporation involving two fraudulent transactions with a combined value of \$318,575. I convict Laura Eby on both counts.

[2] The recipient of the fraudulent transactions, Cary Goodman, plead guilty to defrauding the Yukon Housing Corporation for one count of \$158,675 and one count of \$159,900. I convict Cary Goodman on both counts.

[3] The issues to be determined are whether conditional sentences are appropriate and, if so, on what terms and conditions.

THE FACTS

[4] Counsel filed an extensive Agreed Statement of Facts which I will summarize.

[5] Since July 2001, Laura Eby was a Program Officer for the Yukon Housing Corporation. She was responsible for lending money to qualified persons under a Home Completion Program and a Home Ownership Program. Prior to her employment at Yukon Housing Corporation, Laura Eby worked as a bookkeeper for Cary Goodman. She is related by marriage to Cary Goodman.

[6] Cary Goodman is a co-owner of Yukon Appliances Ltd. since 1994 with his brother Curtis Goodman. Cary and Curtis also own Goody's Gas Ltd. since 2001, a gas and convenience store in Whitehorse.

[7] Cary Goodman ran into financial difficulties setting up Goody's Gas Ltd. As a result of the building phase of Goody's Gas and Convenience Store, Cary Goodman had exhausted the assets of Yukon Appliances Ltd., depleted his and his brother's personal assets, and had borrowed funds from family and friends, including Ms. Eby, to an approximate indebtedness of \$250,000. Both businesses became financially insolvent and required an infusion of capital to survive. Laura Eby was aware of Cary Goodman's financial difficulties.

[8] Cary Goodman also wished to acquire a property located at 1905 Centennial Street. This property is adjacent to Goody's Gas and Convenience Store and provided for future expansion.

[9] Cary Goodman was unable to obtain financing from banks or business development agencies. He could have obtained financing from one or another of the major petroleum companies, but he did not want to lose the control and financial benefits of independent ownership as opposed to a franchise financing agreement.

[10] Laura Eby and Cary Goodman discussed his financial predicament and agreed to submit a falsified Home Ownership Program application and a falsified Home Completion Loan application.

The 1905 Centennial Street Home Ownership Program Mortgage

[11] Norman Goodman is the uncle of Cary and Curtis Goodman. He is the common-law spouse of Annette Melancon. He is also the manager of Goody's Gas and Convenience Store. He provided some of the the down payment for the purchase of 1905 Centennial Street and the property was registered in his name.

[12] Ms. Eby prepared the mortgage application documents which were endorsed by Norman Goodman at the direction of Cary Goodman. Laura Eby prepared and registered a mortgage in the amount of \$159,900 against the title to 1905 Centennial Street on November 30, 2001. The proceeds were used to purchase the property.

[13] All payments on the mortgage on 1905 Centennial Street were made by Goody's Gas Ltd. and the payments were in good standing when the fraudulent mortgage was discovered in August 2002.

[14] The 1905 Centennial Street mortgage would never have been approved by Yukon Housing Corporation, but for the breach of trust of Laura Eby. The technical inspection report and photographs were fraudulent, the property had never been inspected and Norman Goodman did not occupy the property as a principal residence.

The Melancon Home Completion Program Loan

[15] The Home Completion Program is a Yukon Housing Corporation program to assist qualified applicants to renovate their homes. These loans require an inspection of the work as it progresses. The loan proceeds are paid out in instalments as the work progresses and the loans are secured by a mortgage on the renovated property.

Payments on the loan are recorded in a Home Completion Program Cost Breakdown Report at the Yukon Housing Corporation.

[16] Laura Eby issued a fraudulent loan to Annette Melancon on May 10, 2002, in the amount of \$158,675. It was discovered as a result of a file audit on an unusual lump sum loan for an amount substantially more than the average loan under the program.

[17] Laura Eby, when contacted while on vacation, at first stated that there was nothing wrong with the loan. However, the loan was issued without any inspection reports and the home did not exist. Laura Eby used the same details as an existing verified loan for another property.

[18] When Annette Melancon was contacted on August 6, 2002, she advised officers of the Yukon Housing Corporation that she did not have a loan with the Corporation.

Annette Melancon is innocent of any wrongdoing. Cary Goodman and Laura Eby approached her to assist with payments to creditors through Annette Melancon's bank account on the pretext that it was necessary to prevent some of the creditors from gaining access to the business bank accounts.

[19] The program loan of \$158,675 was deposited in Annette Melancon's bank account and Cary Goodman and Laura Eby obtained signed blank cheques from

Annette Melancon to pay various creditors for debts which accumulated during the development of Goody's Gas and Convenience Store.

[20] The loan proceeds were paid out over a short period of time, including the payment of Visa funds advanced by Annette Melancon and a payment to Laura Eby's line of credit which had also been used as a source of bridge financing for the Goodman businesses.

[21] Regular monthly payments were deposited by Cary Goodman and Laura Eby to Annette Melancon's account to cover the loan payments to the Yukon Housing Corporation. The Home Completion Program loan payments were in good standing at the time of discovery in August 2002.

Events After the Discovery of the Fraud

[22] At a meeting on August 12, 2002, Laura Eby confessed to her employer that she had created the fraudulent loan files. Yukon Housing Corporation dismissed Laura Eby from her employment on August 16, 2002. Ms. Eby wrote a letter to the Yukon Housing Corporation apologizing for her wrongdoing.

[23] The Royal Canadian Mounted Police contacted Laura Eby and made arrangements for her to attend at the Whitehorse detachment to provide a statement. On August 15, 2002, Laura Eby attended at the RCMP detachment with her lawyer and voluntarily provided a statement.

[24] On August 22, 2002, the RCMP contacted Cary Goodman and he attended at the RCMP detachment with his lawyer and voluntarily provided a statement.

[25] The RCMP reported that Laura Eby and Cary Goodman were co-operative and neither had a criminal record or outstanding charges.

[26] On August 30, 2002, Norman Goodman was interviewed by the RCMP and provided a statement. On September 1, 2002, Annette Melancon was interviewed by the RCMP and provided a statement.

[27] By letter dated October 18, 2002, the lawyers for Cary Goodman and Laura Eby forwarded a proposal for repayment of the loans to the lawyers for the Yukon Housing Corporation.

[28] Repayment agreements were completed in April 2003, secured by general security agreements, mortgages on their family homes, a mortgage against the property of Yukon Appliances Ltd. and guarantees signed by their respective spouses. The repayment agreement includes \$14,000 for the legal fees incurred by Yukon Housing Corporation and substantial interest payments.

[29] Regular mortgage payments continued on the 1905 Centennial Street property until September 15, 2003, when the property was sold and the Yukon Housing Corporation loan was paid in full.

[30] Payment of the \$158,675 Melancon Home Completion Program loan continues according to the terms of the repayment agreement at a monthly rate of \$1,111.39. The offenders have doubled their restitution payments for April, May, June, July, August and September for each year since 2003.

[31] The current principal owing is \$143,980.90.

[32] The RCMP did not swear an Information alleging various *Criminal Code* offences until August 30, 2004. On June 20, 2005, I dismissed an application for a judicial stay of proceedings in a judgment cited as *R. v. Eby et al*, 2005 YKSC 49. At paragraph 26, I stated the following:

While I agree that there has been unnecessary delay on the part of the police, it is significant that it is pre-charge delay in the investigation process. That delay has not affected the trial process. In this particular case any unfairness in preventing the two accused from getting on with their lives can be mitigated in sentencing. This is not a case for a judicial stay of proceedings on the ground of trial unfairness.

Personal Circumstances of Laura Eby

[33] Laura Eby is thirty-eight years old. She is married and has two children whose ages are nine and eleven. After she was fired by the Yukon Housing Corporation, she worked as the Office Manager for Yukon Appliances until July 2005. Her counsel advises that she has been unable to obtain alternative employment and she is considering setting up her own business.

[34] She is a long-time resident of this community and because it is small, I have no doubt that she suffers from a certain stigma that may remain a long time. The personal pain that she has was well expressed by her mother-in-law who wrote:

Laura made a mistake in her life, which has deeply affected her and her family members. Laura and her family understand the seriousness of the charges. She has suffered greatly during this long period of waiting to find out how this part of her life story will be written. She has held her head up high and has internalized this situation far too long. I personally feel that Laura will never do anything like this again and we all look forward to being able to put it behind us. Laura has suffered the loss of a good job and chances of promotion and a career in the government sector. She has the humiliation of trying to find another job with the stigma of this situation constantly following her. Laura did not gain anything financially from this situation. Laura's compassion for other people let her to do something that was harmful to her without thinking of the future consequences. She has been walking this path and thinking a lot on this chapter of her life and I know she has learned her lesson well and will never forget it. ...

Personal Circumstances of Cary Goodman

[35] Cary Goodman is thirty-seven years old, married and has four children between the ages of three and fifteen. He is also a long-time resident of this community and has felt the stigma of his offence.

[36] He is fortunate that he has his businesses to operate and he has continued to be successful. That permits the repayment of the fraudulent loans and his financial support of his family.

[37] He is concerned that his conviction may affect his future business productivity.

The Law of Sentencing

[38] The fundamental purpose of sentencing is to achieve one or more of the objectives of denunciation of unlawful conduct, deterrence of offenders and others, separation of offenders where necessary, rehabilitation of offenders, making reparation for the harm done to the community and the promotion of a sense of responsibility in offenders.

[39] In the circumstances of these particular offenders, the focus of the sentence will be on denunciation, deterrence, reparation to the community, and taking responsibility.

[40] Sentences are increased or reduced to take into account relevant aggravating or mitigating circumstances. The *Criminal Code* deems it to be an aggravating circumstance when the offender abused a position of trust or authority in relation to the victim.

[41] The Parliament of Canada has also directed judges to take into consideration the principles that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances and that all available sanctions other than

imprisonment that are reasonable in the circumstances, should be considered for all offenders.

[42] This brings me to the subject of conditional sentences. Parliament passed this legislation for the specific purpose of reducing reliance on incarceration in Canada and to increase the use of restorative justice in sentencing.

[43] There are four factors that must be established before a conditional sentence can be ordered under section 742.1 of the *Criminal Code*:

1. that there is no minimum term of imprisonment for the offences;
2. that the appropriate range of sentence is a term of imprisonment of less than two years;
3. that the court is satisfied that serving the sentence in the community would not endanger the safety of the community; and
4. that serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[44] The Supreme Court of Canada stated in *R. v. Proulx*, 2000 SCC 5, in its summary at paragraph 127, that no offences are excluded from the conditional sentencing regime and there are no presumptions in favour of or against conditional sentences for specific offences. Nor is any party under a burden of proof to establish that a conditional sentence is appropriate or not in the circumstances. The Supreme Court specifically stated at subparagraph 8 of paragraph 127:

A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances,

however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.

[45] I also note that the Supreme Court of Canada made it clear that if a conditional sentence is imposed, house arrest should be the norm, not the exception (paragraph 117).

[46] The Yukon Court of Appeal has recently considered the appropriateness of conditional sentences in the case of *R. v. Reid*, 2004 YKCA 4. In that case, a woman in her mid-thirties stole the sum of \$212,000 from her employer over a period of three years. The Territorial Court imposed a conditional sentence of eighteen months followed by two years of probation. In setting aside the conditional sentence, the Court of Appeal stated at paragraph 15:

In a case like this where the sums involved are significant, the time period of the embezzlement was lengthy, there is little hope of restitution and there is found to be an absence of remorse on the part of an accused, it seems to me that generally such circumstances would militate in favour of a substantial period of incarceration. I consider that the judge here erred in principle when he imposed a conditional sentence, having regard to the circumstances of this case. Having regard to the circumstances of the offence and this offender, it seems to me that the suggestion made at the time of sentence by the Crown that something between two and three years incarceration was called for was a proper submission. The imposition here of a conditional sentence failed to give proper effect to the need for denunciation and deterrence of this class of crime. ...

THE SENTENCE

[47] In this case, the Crown and defence have agreed that the offenders should be treated the same for purposes of sentencing. I am in agreement with that because Laura Eby, while being in breach of the public trust, was not a beneficiary of the crime to

the extent of Cary Goodman. That said, I will turn to the aggravating and mitigating circumstances of these offenders.

[48] The aggravating circumstances which indicate an increased sentence are:

1. the theft of the sum of \$318,575 from the people of the Yukon is a large sum;
2. the stolen money was to assist Yukoners in need of assistance for housing purposes;
3. the fraudulent scheme was complex, planned and carried out over many months;
4. the theft was for personal business greed or ambition.

[49] The mitigating circumstances are also significant:

1. Laura Eby and Cary Goodman accepted responsibility for their criminal conduct immediately by giving statements to the RCMP;
2. they have no previous criminal records;
3. they have entered into a repayment agreement with Yukon Housing Corporation and have made regular monthly payments with the result that the fraud of \$318,575 has been reduced to approximately \$143,000;
4. they have provided substantial security from both personal and business assets to ensure that the taxpayers money will be repaid;
5. as I indicated in a previous judgment, there has been unnecessary pre-charge delay in that it took over two years to lay the charges when there was full cooperation from the offenders. While this has delayed the administration of justice, it has also had the benefit of allowing the offenders to demonstrate their responsibility in paying back the public's money;

6. the offenders have plead guilty, thereby avoiding great expense to the taxpayers.

[50] Stealing significant amounts of money from the public purse could result in a penitentiary jail sentence. This is so because even though the particular offenders may have learned their lesson, it is necessary to ensure that others are deterred. It is also necessary to express society's condemnation of such conduct.

[51] However, Parliament also recognized, and the *Proulx* case has confirmed, that a conditional sentence can provide significant denunciation and deterrence. In this case, the Crown and defence agree that a conditional sentence is appropriate. I am in agreement for the following reasons:

1. there is no minimum term of imprisonment for these offences;
2. the appropriate range of sentence is a term of imprisonment of less than two years. While a penitentiary sentence must be considered in these circumstances, I am satisfied that these offenders, because they immediately addressed their crimes and wrongdoing, do not merit the sanction of a penitentiary term of imprisonment. However, their crime and wrongdoing certainly deserve our denunciation;
3. I am also satisfied that a conditional sentence to be served in the community is appropriate because there is a minimal risk, if any, that these offenders will re-offend or endanger the community;
4. I am also satisfied that a conditional sentence in these circumstances is consistent with the fundamental purpose and principles of sentencing set out in sections 718 and 718.2 of the *Criminal Code*. The clear direction of

Parliament is to reduce reliance upon incarceration. While some may argue that denunciation can only be achieved by incarceration for these offences, this Court is not of that view. There is a considerable social stigma in a community of this size that these offenders will have to face on a day-to-day basis. There is no anonymity that may be found in larger communities. A sentence served in the community has no reduction for good behaviour and must be served in full. Breaches can result in the offenders being brought back to court and incarcerated.

House Arrest v. Curfew

[52] This raises the issue of the distinction between house arrest and being placed under curfew. There is a significant difference. House arrest is an order that requires the offender to be, in effect, incarcerated in their own home, except for limited circumstances with the permission of the Court or the sentence supervisor.

[53] A curfew, on the other hand, gives the offender the freedom to move about in the community at their own discretion so long as they comply with the general conditions of their sentence and return to their residence for the hours of curfew, typically 9:00 p.m. to 7:00 a.m. when many citizens are in their homes in any event.

[54] Considering the aggravating factors that I have listed, I am of the view that this conditional sentence should include house arrest. That will ensure that the circumstances of these offences are properly denounced. This case is distinguishable from *R. v. Zenovitch*, 2001 YKSC 52, where the offender was a single parent with a child.

The Length of Sentence

[55] The Crown suggests a range of twenty to twenty-four months while the defence submits that twelve months is appropriate. In my view, a sentence in the upper range is fit for these circumstances. But I must also take into consideration the fact that Laura Eby and Cary Goodman have taken responsibility for their offences. They cooperated fully with the police and made significant repayment with the guarantees for the balance outstanding. This should be contrasted with the alternative of no cooperation, full trial and then contrition or apology after conviction. The two approaches are very different and consideration must be given to those that make reparation and demonstrate responsibility early in the process. I find a sentence of fifteen months to be fit and proper.

The Restitution Order

[56] The Crown seeks a restitution order requiring Laura Eby and Cary Goodman to make monthly payments of \$1,111.39 to the Yukon Housing Corporation. The defence opposes this order on the grounds that fully-secured repayment arrangements have been made separately with the Yukon Housing Corporation. While it may be the case that civil remedies will ensure repayment, I am of the view that regular monthly payments during the sentence should be required. This sentence is premised upon, among other factors, the responsibility that Laura Eby and Cary Goodman have taken to repay the public purse. Therefore, a breach of that obligation during the sentence should have more than mere civil consequences. I will therefore include the restitution payment as a condition.

[57] Laura Eby and Cary Goodman, please stand. I sentence each of you to a term of imprisonment of fifteen months to be served in the community under the following conditions:

1. You must keep the peace and be of good behaviour.
2. You must appear before the court when required to do so by the court.
3. You must report to a conditional sentence supervisor:
 - a) within two working days, and
 - b) thereafter, when required by your supervisor and in the manner directed by your supervisor.
4. You must remain within the Yukon Territory unless you have written permission from the court or your supervisor to be out of the Yukon Territory.
5. You must notify the court or your supervisor in advance of any change of name or address, and promptly notify the court or your supervisor of any change of employment or occupation.

House Arrest

6. You must reside at a residence approved by your supervisor and not change your residence without your supervisor's written consent.
7. You must remain inside your residence except for reporting to your supervisor, as your supervisor requires.
8. You are to present yourself at the door of your residence when requested by staff of the Yukon Justice Community and Correctional Services department or Police Officers in order to confirm your compliance with this condition.

9. You are to answer your home telephone when called by staff of the Yukon Justice Community and Correctional Services department or Police Officers in order to confirm compliance with this condition.
10. Your supervisors may give you written permission to be away from your residence for the purpose of:
 - a) Going directly to your place of work or education and working or studying and then returning directly to your residence after working or studying. For Laura Eby, work includes seeking employment or a business opportunity.
 - b) Attending counselling approved by your supervisor.
 - c) Shopping for two hours twice each week.
 - d) Participating in a meeting or an organized religious faith.
 - e) Exercise of a total of five hours per week.
 - f) Christmas Eve, Christmas Day, New Year's Eve, New Year's day.
 - g) Extracurricular activities of your children.
 - h) Approved community service.
11. When you are away from your residence you must not enter any premises where the primary commodity for sale is alcohol, including government liquor stores, beer and wine stores, taverns, pubs, licensed lounges, cabarets, special events facilities, strip bars and gambling casinos.
12. When you are away from your residence, you must carry this order and your supervisor's written permission letter with you at all times, and you must

produce this order and the written permission letter to any Peace Officer who stops or questions you for any purpose.

Community Service Work

13. You must perform 120 hours of community service under the supervision of your supervisor or such person as your supervisor appoints for that purpose. You must complete the community service to the reasonable satisfaction of your supervisor by the end of the conditional sentence.

Prohibited Substances

14. You must abstain absolutely from the possession or consumption of alcohol or other intoxicating substances, illicit drugs, or drugs which require a Doctor's prescription, except that you may consume drugs which require a Doctor's prescription in the manner and in the amounts directed by the prescribing Doctor.
15. You must not have any alcohol or other intoxicating substances, illicit drugs or non-prescribed drugs at your residence.
16. You must allow your supervisor or any Peace Officer to inspect your residence to see that you have complied with this condition.
17. You must provide breath samples or urine samples or both on the demand of your supervisor at any time, and on the demand of any Peace Officer who reasonably suspects that you have breached the abstention condition.

Restitution Payments

18. You must, jointly and severally make monthly payments in the amount of \$1,111.39 to the Yukon Housing Corporation for the duration of the conditional sentence.

[58] These sentences are concurrent on each count.

[59] The statutory victim of crime surcharge in the amount of \$100 each shall be payable forthwith.

Veale J.