

R. v. Rafliovich: Does Crime Pay?

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After Mr. Yulik Rafliovich was arrested for possession of cocaine with the purposes of trafficking, the police searched his car and apartments and found \$42,000. They seized the cash as potential proceeds of crime under Part XII.2 of the *Criminal Code* which allowed them to do so. Before the trial Mr. Rafliovich's lawyers applied under s.462.34(4) of the *Criminal Code* titled order of restoration of property or revocation or variation of order, which allows an accused to make an application to a judge to have property (or part of it) seized or subject to a restraining order released to the accused in order to pay for reasonable legal fees associated with their case. Mr. Rafliovich's application was allowed and the seized sum was returned to him to allow him to pay his legal counsel. At trial Mr. Rafliovich pled guilty to several offences and since the *Criminal Code's* proceeds of crime regime does not allow an offender to profit from their crimes part of the issue at sentencing was whether Mr. Rafliovich should be made to pay back the money he used to fund his legal defence. The sentencing judge imposed a forfeiture of Mr. Rafliovich's interest in an apartment but did not impose a fine instead of forfeiture equal to the amount of cash returned to him and used to pay his legal counsel. The Crown appealed and the Ontario Court of Appeal overturned the initial judgement imposing a fine instead of forfeiture equal to the amount returned and a 12-month prison sentence should Mr. Rafliovich not pay. The Court of Appeal found that by using the seized amount of cash to pay his legal expenses, Mr. Rafliovich's actions amounted to profiting from a crime and judges cannot use their discretion to impede the objectives of the proceeds of crime regime.

When the case appeared before the Supreme Court, they were tasked with determining whether an accused could be made to pay back proceeds of crime they have spent on their legal fees after

their case is concluded. In a decision favoring the constitutional rights of an accused the majority of the court held that in situations like Mr. Rafliovich's, sentencing judges should not impose a fine instead of forfeiture in relation to funds that have been judicially returned for the payment an accused's reasonable legal expenses. The statutory discretion to do so according to the majority must be used in accordance with the purpose of the proceeds of crime regime which is to ensure that an offender cannot benefit or get paid from a crime. However, the decision points to s.462.34(4) of the *Criminal Code* which indicates that it was also Parliament's intention to allow for seized funds to be returned in order for defendants to mount a defence for the purpose of protecting the presumption of innocence which would maintain a procedure that is fair to the accused. Justice Martin writing for the majority states that these "secondary purposes" must inform the court's interpretation of the regime's main purpose of ensuring crime is not beneficial to offenders. Therefore, it is key that this main objective does not overshadow the presumption of innocence and access to legal counsel. She also rejects the Crowns argument which essentially views the return order as a loan intended only to provide temporary relief to an accused. She finds that if such an interpretation were to stand, then it would make the ability to access to legal counsel "illusory" because accused's person may not seek a return order for fear of being fined or imprisoned later on thus dissuading them from obtaining legal counsel all together. She does however acknowledge that there may be situations where a fine is appropriate such as when the accused does not seem to have financial need or did not use the returned funds to alleviate a financial need. Mr. Rafliovich's case did not seem to fall in either of those exceptions and so a fine was not reasonable.

The dissent written by Justice Moldaver rejected the majority's interpretation of the crime proceeds regime's purpose and argued that their approach sent a message that crime does pay. In

his view imposing a fine does in fact achieve the crime proceeds regime's purpose because it ensures that offenders are not paid by their crimes. He does however note an exception to his rule and that is when a judge finds that legal counsel is necessary to the accused's constitutional rights to a fair trial. In such cases judges should exercise their discretion not to impose a fine. I find myself more inclined to agree with the majority because of the way the judgement managed to balance the competing interests at stake. I particularly like Justice Martin's emphasis on protecting the presumption of innocence and her concern with how fining after the fact may discourage some offenders from obtaining legal counsel certainly rings true. If offenders felt pressured to self-represent due to fears of paying huge fines in the event they do not win their case, it puts them at a huge disadvantage since attorneys are a key ingredient to effectively navigating the criminal justice system. While it may seem like Justice Moldaver's dissent makes intuitive sense -if you are found guilty of an offense you have committed and therefore should not get to use profits made off said offence- it does fall short because it does not adequately address the concern of discouraging offenders from seeking legal counsel. His test for when a fine should not be applied is too restrictive and places significant burdens and limitations on offender's right to access legal counsel which hampers their ability to mount a successful legal defence ultimately undermining their right to be presumed innocent.

Sources:

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18013/index.do>

<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-462.31.html>

