

Reinforcing the Balance – R v Rafilovich 2019 SCC 51 by M Badejo

Like the tock to a metronome's tick, the rights of the accused are to serve as a balance, a counterweight, a complement to the rights and permissions of the Crown (or state). Nowhere is this more necessary than in the arena of criminal law. This idea is fleshed out in the case of *R v Rafilovich* 2019 SCC 51. A brief overview of the facts is helpful to set the stage, but it's not necessary to dive in in full for the issue at hand.

The case is largely about a judge's discretion when it comes to whether proceeds of crime – funds that came from their alleged criminal act (or ones related to it – can be used to mount a defence, or should be subject to fines instead of forfeiture. This idea is balanced by an axiom that courts hold, that of the idea that “crime doesn't (or shouldn't) pay.” Per the Supreme Court of Canada, the law allows for Crown to take these funds during the judicial process, but it may inhibit the ability of the defendant to afford a lawyer. The trial judge may waive this right to seize the property and allow some flexibility in the accused affording their lawyer of choice. In this case, Mr. Rafilovich had his money seized, and asked the trial judge if some of the seized funds could be used to pay for his own legal defense, and the judge relented. On appeal and through higher courts, it was argued that this was a form of benefiting from his crime, i.e. that this was crime being allowed to pay. It was an article of discussion all the way to the Supreme Court of Canada, where we reached our current decision.

The history of cases like this was not especially helpful on this issue, given that it was largely up to the decision of each set of circumstances; there was no hard and fast rule. That left room for the Supreme Court of Canada to elucidate and restate some of the main driving factors behind their decision.

Justice Martin, writing for the majority, agreed with the trial judge's decision to allow for the funds being used in legal defense. Per Justice Martin, the presumption of innocence is especially important and it appears to be a driving factor in her decision. It's what helps create a balanced and objective environment and protects the Charter rights of everyone involved. Additionally, if people were unable to afford a legal defense because they were not able to access their funds, it might push more people to rely on self-advocacy, which is an undoubtedly harmfully tall order for the average person and a burden too high for someone presumed innocent.

The dissent here by Justice Moldaver attempts to narrow the decision of the majority. His dissent could be interpreted as saying that this right to access the seized funds are only necessary when counsel is required in the proceedings. However, the majority of the court sides with Martin in saying that discretion and flexibility should remain for judges to make this choice in all cases – not just counsel-required circumstances.

One idea that this case truly wrestles with is how far to go with the ideal that “crime does not pay.” What extent should that notion go to? Should it punish those who are credibly accused of a serious crime, but expend money on a lawyer or lawyers? Should it only affect those who have met a certain threshold of danger? Where does it end?

In the end, we see that statutory interpretation has a major role to play here. The Court looks at the Criminal Code of Canada's s. 462.37 to determine primary and secondary objectives of the provision regarding fine or forfeiture of the proceeds, and reiterates what it was supposed to do.

From my point of view, I follow the train of thought aligned with the majority's finding. For myself, it is underscored by the idea of the need for balance and fairness in the justice system, especially with respect to criminal cases. We've established major procedural guidelines, rules and norms already for the criminal court system, and it's not only because of the gravity of the situations and decisions held at the SCC, but also for the meteoric impacts the process and decisions within the system have on the lives of the individuals involved. A professor of mine once opined that the Canadian judicial system and its commenters are overtly concerned with fairness, and I'm inclined to agree. To me, that's nothing but a good thing. Ensuring even terrible criminals who use the proceeds of crime to pay for a lawyer and other reasonable court costs they incur gives them nothing but a fair trial; if we're going to have a society that banks on working together and the rule of law, balance and the right to a fair trial – without being punished for accessing that right, guilty or not – is key, lest we start sliding down a slope with kakistocracy at the end point.