

***R. v Rafilovich*: Does crime pay? D Reid**

The case of *R. v Rafilovich* is an examination by the Supreme Court of important legal issues relating to judicially returned funds that are used by an accused to pay for their legal defence. In this case, Rafilovich was arrested for possession of cocaine for the purposes of trafficking. During a search of Rafilovich's apartment and vehicle, police found and seized approximately \$47,000 of cocaine and \$42,000 in cash.<sup>1</sup> The cash was identified as potential proceeds of crime. At his trial, Rafilovich applied to get back the funds seized in order to pay for 'reasonable legal expenses' under s. 462.34(4)(c)(ii) of the *Criminal Code*, and argued that he had no other funds available to pay for a legal defence.<sup>2</sup> The judge granted this request and specific restrictions were put in place (e.g. maximum hours of billing were set).<sup>3</sup> Rafilovich ultimately pled guilty to several charges, and the sentencing judge imposed a term of imprisonment and the forfeiture of Rafilovich's interest in his apartment. The sentencing judge declined to impose a fine that was equal to the amount of that returned to Rafilovich in order to pay for his legal defence.<sup>4</sup> The Crown appealed this sentence, and the Ontario Court of Appeal varied the sentencing order to a fine of \$41,000 instead of the initial forfeiture.<sup>5</sup> The Court of Appeal also noted that the trial judge had to impose a fine, and did not have the discretion to order a forfeiture instead.<sup>6</sup>

The Supreme Court ultimately allowed Rafilovich's appeal and set aside the order of the Court of Appeal, stating that while the proceeds of crime regime enacted by Parliament has as its primary concern the goal of making sure 'crime doesn't pay', it is also concerned with providing access to counsel and ensuring the presumption of innocence for the accused.<sup>7</sup> The Court also states that the sentencing judge did have the discretion to order the forfeiture instead of a fine.<sup>8</sup>

This case highlights an noteworthy tension between the goals of Parliament in regards to the proceeds of crime regime. While Parliament has as its primary goal reducing the ability of an accused to benefit from potential proceeds of crime, the important considerations of access to counsel and the presumption of innocence for an accused also come into play. It is understandable why one of

---

<sup>1</sup> *R. v Rafilovich*, 2019 SCC 51 at para 12 [*Rafilovich*].

<sup>2</sup> *Ibid* at para 4.

<sup>3</sup> *Ibid* at para 13.

<sup>4</sup> *Ibid* at paras 14-15.

<sup>5</sup> *Ibid* at para 18.

<sup>6</sup> *Ibid* at para 16.

<sup>7</sup> *Ibid* at para 2-87

<sup>8</sup> *Ibid* at para 86.

the most important goals of Parliament and the Court is to ensure that 'crime does not pay'. The law does not want to allow people who have committed crimes to reap the benefits of those crimes, especially in regards to monetary gains. Allowing an accused to benefit from potential proceeds of crime with unfettered freedom would undermine the public's confidence in the justice system. Even if the accused was convicted, this would demonstrate to Canadians that there are benefits to be gained by committing crimes, and that the consequences are not a serious deterrent. This message directly contradicts the value underlying the entire justice system; that there is a consequence to violating society's agreed upon rules and laws. Based on this reasoning, it would be logical to conclude that if an accused is convicted upon their trial, then they should be made to pay a fine equivalent to that of the funds returned to them by the state for the purposes of paying for a legal defence.

However, a question to ask is if an accused upon conviction was made to pay back the funds that were returned to them in order to pay for their legal defence, would this lead to a reduction in accused persons seeking legal counsel, or a diminished quality of their defence? Access to counsel and a strong legal defence is an essential part of the justice system. It is possible though that if a fine equivalent to the cost of a legal defence was mandatory upon conviction, that a number of accused persons would elect to represent themselves or reduce their access to counsel to keep costs low. This would be an unfair disadvantage to the accused person, which becomes even more clear when considered in conjunction with the principle of presumption of innocence.

All accused persons are guaranteed the presumption of innocence within the criminal justice system. This presumption extends to an accused person who is seeking the return of potential proceeds of crime. It is important to remember that while the funds are **potential** proceeds from a criminal activity, the accused has not yet been convicted, and so the funds may also not be a benefit from a crime. While it may seem logical to conclude that if an accused is convicted then they should be made to pay the money back, the fundamental fairness of the justice system should prevent this from automatically occurring. The funds were used to mount a defence that the accused is entitled to, and they should not be punished for doing so after the fact of a conviction. Furthermore, the now convicted person is likely facing other forms of punishment, either through imprisonment or forfeiture. The mandatory implementation of a fine would be an extremely severe punishment when taken in conjunction with the other penalties. While Parliament's goal is to ensure that 'crime doesn't pay', the finding of a conviction and the punishment it entails strongly demonstrates to the offender and the public this message. It is not necessary to implement an even further punishment

of a fine upon the offender. Finally, the imposition of a mandatory fine in this case diminishes the discretion of the sentencing judge, and prevents them from tailoring a sentence that they believe is appropriate in the circumstances.

I believe that the Supreme Court's decision in this case was the correct one. It is true that an important goal within the proceeds of crime regime (and within the justice system in general) is to ensure that those who commit crimes do not benefit from the proceeds of those crimes. However, the two considerations of access to counsel and presumption of innocence are also integral principals of criminal law. The Supreme Court made the correct and balanced decision in weighing these goals by not imposing a mandatory fine and promoting the discretion of sentencing judges to make that choice on a case by case basis.

## Jurisprudence

*R. v Rafilovich*, 2019 SCC 51 at paras 2-87 [*Rafilovich*].