

Picture This...Thinking about R. v. Rafilovich – B Roberts

Picture this... you, a cocaine trafficker, are out one night, driving through LA. It's the 1960s, and you just finished watching your favourite television show with your favourite actor, Rick Dalton. Then, the police arrest you. They search your house, as to be expected, and find \$42,000 in cash, and \$47,000 in cocaine, among other things. As this money was presumably obtained illegally, because why else would you keep that amount of money next to that amount of cocaine, the court seizes it due to the possibility that it is from the proceeds of crime. However, your brilliant lawyer informs you that thanks to s. 462.34 of the Criminal Code, you can ask the judge to give you some of that hard-earned money back to help finance your current legal troubles. In spite of this however, you decide to plead guilty, because like, come on. At the sentencing, the judge seizes all of the money and items related to the offences. Then, just when you thought it was over, the Judge slaps on a fine for the money you asked for to finance your case.

Does this situation sound familiar? Ok, full disclosure, I lied about the location and era, but LA in the 60s just sounds so much cooler than Ontario in 2019. Anyways, hopefully it doesn't sound familiar, but if it does, you are valid in asking whether or not it is fair for a Judge to order you to pay back money that was granted to you to help finance your criminal case! This is exactly what happened with Mr. Rafilovich, who then argued that he should not have to pay a fine for the money that was returned to him in order to fund his defence.

Let's contextualize first. The provision in question only arises when certain conditions are met. The accused must first be charged with one of the offences listed under s. 462.3(1), and property must be seized in relation to this offence. Property is allowed to be seized when it is reasonable to believe that the property in question will probably be found to be from the proceeds of crime. It must be noted that the accused is still considered innocent here, in fact, the law is required to treat them as innocent, as they have not yet been found guilty. However, the law also wants to ensure that the property is not "lost" before the outcome is revealed. Anyways, after the property has been seized, the accused is able to make an application under s. 462.34(4) to have some of the seized property returned, to help pay for reasonable legal fees. If the Judge is satisfied that the accused has no other assets to pay for their defence, they will allow the release. Now, if the property that has been seized is then found to be from the proceeds of crime, and some of it is no longer available to give back to the Crown, for various reasons, a fine may be ordered for the original amount that was seized.

Ok, now that we have some context, we can continue. This fine situation (get it?) was reviewed in *Lavigne*, and the court determined that the objectives of this legislation were to ensure that offences generating money do not benefit the offender, and to make sure that "crime does not pay." Thus, the fine that may be imposed in the event that some of the seized property is no longer able to be seized, functions to offset the unavailability of such property. In other words, even though it is no longer possible to seize that property, it was still found to be from the proceeds of crime, and as a result the accused must pay.

When money is the property being seized, and it is a significant portion of what the accused owns, the situation becomes problematic. An accused may no longer be able to afford legal counsel for their defence. Thus, the provision which allows for some money to be returned to fund legal

counsel, functions to grant the accused the ability to find counsel. It also acknowledges that the accused has not yet been found guilty, and therefore the money in question is, at the moment, considered to be the legal property of the accused. In essence, this provision serves to promote procedural fairness, and legal representation is essential to this principle.

The analysis of the court focused on this principle of ensuring procedural fairness, specifically through access to legal representation, and held that in most cases, the accused *should not* be fined for seized money that was then returned to help fund their legal defence. I have to admit, when I first read this, I strongly disagreed. After all, isn't the main function of this provision to ensure that "crime does not pay?" To me, allowing the accused to use the proceeds of crime to fund their defence seemed contradictory to this objective. However, after thinking about it, I regrettably admit, because who likes to say that they were wrong, that I was in fact wrong. Think about it. If money was not returned to those who needed it, they would most likely resort to self-representation, which the court stated itself in *Jordan* will usually have an effect on the outcome. Furthermore, accused's persons may not even attempt to regain access to these funds through fear that they will be subject to a fine, if found guilty. If you're like me, at this point, the Judge's argument is starting to sound fairly convincing, and if not, they're not done yet.

The Judge then used a potent example to establish that punishments should not be retroactively applied to those who were under the guise of the presumption of innocence. When bail is granted to an accused, who is then found guilty, the court does not impose extra time based on the fact that the accused was granted bail before the end of the trial. If this were the case, it is easy to see how no one would apply for bail, out of the fear that extra time would be added to their sentence. This is more or less the exact same situation as on the current facts; however, the consequences are even more severe. At least in the bail situation the fear is not preventing the accused from finding legal representation. I told you their example was good.

Finally, the Judge looked at whether or not granting this money was even considered a benefit at all. Firstly, noting that the court is in complete control of how much money will be returned, and that the accused needs to clearly establish their need for it, the court is also able to limit the number of hours and billing rate allowed. It was then said that clearly this is an intended benefit, as Parliament made a specific provision allowing this to happen. Furthermore, taking into consideration what was discussed above, relating to the consequences of not allowing money to be returned, it was decided that prohibiting this provision from functioning would undermine the purpose it was enacted for. After all, it was described that a fine would be appropriate if the accused lied about their need for the money, used it for something else, or gained access to further funds during the course of their trial. Therefore, while in most cases a fine should not be implemented, the court did recognize certain situations where it would be appropriate.

So, what is the moral of the story here? Well, besides that it is unwise to keep \$42,000 in cash next to \$47,000 worth of cocaine, the fact that some seized money is returned to the accused to help fund their legal defence is completely in line with procedural fairness. The court clearly illustrates the results that could ensue if the money was not returned. Furthermore, the presiding Judge has significant discretion in deciding whether or not to return the money, based on whether or not the current facts show that the accused is actually in need of it. In the event that an accused misuses the money, a fine will be issued, but in the cases where they actually needed it, it is completely appropriate to allow them access to it in order to maintain fairness in the proceedings of criminal law, and to make sure they are not penalized for not being able to afford representation.

Sources:

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

