CITATION: R. v. Gaya, 2010 ONCA 860
DATE: 20101217
DOCKET: C51656

COURT OF APPEAL FOR ONTARIO

Doherty, Moldaver and Cronk JJ.A.

BETWEEN

Her Majesty The Queen

Appellant

and

Saad Gaya

Respondent

Beverly Wilton, Nicholas E. Devlin and Ghazala Zaman, for the appellant

Paul Slansky, for the respondent

Heard: September 21, 2010

On appeal from the sentence imposed by Justice S. Bruce Durno of the Superior Court of Justice on January 18, 2010, with reasons reported at 2010 ONSC 434.

By the Court:

Background

[1] On September 28, 2009, the respondent, Saad Gaya, entered a plea of guilty before Durno J. of the Superior Court of Justice to one count in an indictment as follows:

> [B]etween the lst day of March 2006 and the 2nd day of June 2006, in the City of Mississauga, in the City of Toronto, in the Township of Ramara and elsewhere in the Province of Ontario, did commit an indictable offence to wit, doing anything with intent to cause an explosion of an explosive substance that was likely to cause serious bodily harm or death to persons or was likely to cause serious damage to property, contrary to section 81(1)(a) of the *Criminal Code*, for the benefit of, at the direction of, or in association with a terrorist group, namely Zakaria Amara and others, thereby committing an offence contrary to s. 83.2 of the *Criminal Code*.

[2] As in the case of his co-conspirator, Saad Khalid (see our reasons in *R. v. Khalid*, released concurrently), the respondent's guilty plea was followed by a *Gardiner* hearing in which the respondent unsuccessfully attempted to reduce his level of moral blameworthiness by claiming that he only knew that the bomb or bombs were likely to cause substantial damage to property, but that he did not know they would likely result in death or serious bodily injury. Based on evidence that the respondent knew the intended target was somewhere in Toronto, as well as other facts about the plot that were known to the respondent, the sentencing judge was satisfied beyond a reasonable doubt that the respondent was wilfully blind as to whether the explosions would likely cause death or serious bodily harm. As we noted in *Khalid*, at para. 3, wilful blindness is the same as knowledge in the eyes of the criminal law.

[3] On January 18, 2010, the respondent was sentenced to 4 ½ years imprisonment. In arriving at that sentence, the sentencing judge credited the respondent with 7 ½ years for

the 43 ½ months he had spent in pre-sentence custody. Hence, the respondent received the equivalent of a 12-year sentence.

[4] With respect to parole, the sentencing judge declined to make an order under s. 743.6(1.2) of the *Criminal Code*, R.S.C. 1985, c. C-46, requiring that the respondent serve one half of his sentence before being eligible for parole.

[5] The Crown applies for leave to appeal and if leave is granted, seeks to have the respondent's sentence increased to an effective sentence of 17 or 18 years' imprisonment. The Crown also seeks an order under s. 743.6(1.2) of the *Criminal Code* requiring that the respondent serve one half of his sentence before being eligible for full parole.

[6] For reasons that follow, we would grant leave to appeal and increase the respondent's effective sentence from 12 to 18 years. Taking into account the 7 ½ years credited for pre-sentence custody, we would increase the sentence from 4 ½ years to 10 ½ years. We would also make an order under s. 743.6(1.2) of the *Criminal Code* requiring that the respondent serve one half of his sentence (5 years and 3 months) before he may be released on full parole.

The Offence and the Respondent's Role in it

[7] The respondent was a willing and active participant in a plot formulated by Zakaria Amara to blow up the Toronto Stock Exchange Tower, the CSIS Headquarters on Front Street in Toronto, and an unspecified military base east of Toronto. Based on the

sentencing judge's findings, the respondent did not know the precise buildings that Amara was targeting, nor did he know that he was to drive a truck containing a bomb to one of the targeted locations. However, in accordance with the sentencing judge's findings on the *Gardiner* hearing, the respondent knew that he was engaged in a plot which, if successful, would likely result in death and serious injury.

[8] The details of the bomb plot and the horrific consequences that would have resulted had it succeeded have been described in our reasons in *Khalid* and in *R. v. Amara* (also released concurrently), and need not be repeated. The pertinent facts for the purpose of this appeal are that the respondent joined the conspiracy on March 22, 2006, three weeks after Khalid had become involved in it. Like Khalid, the respondent was recruited by Amara. He and Khalid were given the responsibility of renting space for storing the ammonium nitrate that Amara needed to make the bombs. After the ammonium nitrate was purchased – through the involvement of a police agent – the respondent and Khalid were given the task of storing it at the rented premises. On June 2, 2006, he and Khalid were arrested together while in the process of off-loading 3 tons of ammonium nitrate into an industrial unit in Newmarket that Khalid had rented.

[9] At the time of his arrest, the respondent had over $9,000 in cash in his knapsack. Also found in his knapsack was a memory stick containing a lengthy audio message saved on May 12, 2006 from Amara to him and Khalid. Amara in his message gave the respondent the responsibility of obtaining a chemical compound and some laboratory

equipment needed to manufacture the bombs. The message also gave instructions to Khalid to do reconnaissance of potential targets in downtown Toronto.[1] In addition, Amara indicated in the message that he agreed with the respondent and Khalid's suggestion to move the bombing date forward.

[10] Based on the totality of the evidence, including a statement that the respondent gave to the police following his arrest, the sentencing judge determined at para. 121 that his "degree of responsibility remains relatively high, albeit not as high as others in the plot." In discussing the aggravating factors in the respondent's case, the sentencing judge commented at paras. 48-49:

> The offender knew that they were considering targeting locations in Toronto on his own admission to police and on what I found he heard Amara tell Khalid about doing surveillance in downtown Toronto. Any bombs in Toronto would likely have drastic results.
>
> He knew he was contributing to a bomb plot and that they were getting two tons of ingredients. While he did not know all the details because the leaders did not tell him, that plan if implemented would have enormous ramifications for those close to the bomb, for the community at large and the country.

[11] The sentencing judge also observed at para. 46 that the respondent's involvement in the plot was "not a spur of the moment knee jerk reaction". His first involvement was

---

[1] The sentencing judge found that the respondent heard Amara's message to Khalid about doing surveillance in downtown Toronto. In responding to the Crown's sentence appeal, the respondent challenged this finding. In our view, this was a finding that the sentencing judge was entitled to make, particularly given that the memory stick containing the message was found in the respondent's possession and given the absence of any conflicting evidence from the respondent.

on March 22, 2006, a little more than two months prior to his arrest. According to the sentencing judge, the respondent "was part of those plotting to place a bomb or bombs to protest Canada's involvement [in Afghanistan] for at least a month."

The Offender

[12] The sentencing judge noted that, although the respondent was 21 years of age at the time of the hearing, he was an 18-year old first offender at the time of the offence and the youngest person charged in the bomb plot. He accepted the joint findings of forensic psychiatrists retained by the respondent, Dr. Ramshaw and Dr. Cohen, that the respondent was naïve and immature when he joined up with Amara. Nonetheless, the sentencing judge found the respondent to be "an intelligent young man, not one with learning deficits" (para. 121). As the respondent had acknowledged to police, he was certainly "able to put two and two together."

[13] The sentencing judge also took into consideration that the respondent had entered a plea of guilty and that he was the only one of his co-accused to have given a statement to the police following his arrest. In his statement, the respondent had provided the police with some information "they did not have before". However, according to the sentencing judge at para. 61, "he was clear he did not want to point fingers, was inconsistent at times, and obviously hesitant to go too far".

[14] The sentencing judge also referred to the joint psychiatric opinion that the

respondent did not suffer from any major mental illness or psychiatric disorder. The respondent's avowed reason for participating in the plot was to pressure Canada into withdrawing troops from Afghanistan. He had told Dr. Ramshaw that "he knew what he was doing was wrong but the prevention of death and suffering in Afghanistan was much more important than the destruction of property." In his statement to the police, the respondent said that Amara had told him "that maybe he was that one person God [had] chosen who was going to make a difference" and that "he [the respondent] would be a hero in the eyes of God."

[15] The sentencing judge further noted at para. 71 that the respondent had good family support and support from a wide range of friends and community members. Based on information from various sources, including the respondent himself, the sentencing judge concluded at para. 68 that the respondent was "genuinely remorseful" for his actions.

[16] The sentencing judge, at para. 73, was also satisfied that the respondent had taken some steps towards rehabilitation and that he did not present a "significant risk to himself or others in the short-term period." However, he noted Dr. Ramshaw's concern that, in view of the respondent's past behavior, "risk over the long-term period cannot be ruled out" and that "counselling, including cognitive behavioural therapy", should be undertaken.

The Sentence

[17] After reviewing in considerable detail the circumstances surrounding the offence, the background and character of the offender, the aggravating and mitigating factors, the governing principles of sentencing and the various sentences imposed in other cases involving terrorism, the sentencing judge determined that a fit sentence was one of 12 years' imprisonment. That was two years less than the sentence he imposed on Khalid. Although the sentencing judge did not specifically address the rationale for the two-year differential, he noted at para. 124 that Khalid's involvement in the offence "was more significant than [the respondent], he was involved longer, did more and was involved in recruiting another person. He [Khalid], however, was the first to plead guilty."

Analysis

[18] We see little distinction between the culpability of Khalid and the respondent. However, we accept that it was open to the sentencing judge to make a distinction between the two offenders and to sentence the respondent to a shorter sentence. We would not interfere on that basis. In raising the respondent's sentence, we have respected the distinction drawn by the sentencing judge.

[19] Our reasons for increasing the respondent's effective sentence from 12 to 18 years are essentially the same as those that have led us to increase Khalid's sentence from 14 to 20 years. In short, we are respectfully of the view that the sentence imposed on the

respondent did not adequately reflect the unique nature of terrorism-related crimes, nor did it adequately reflect the enormity of the respondent's crime and the role he played in it. Like Khalid, the respondent played an essential role in a scheme which, if implemented, could have killed countless people and left the entire country changed very much for the worse.

[20] As with Khalid, in the respondent's case, the sentencing judge over-emphasized the significance of the mitigating factors relating to the respondent and reduced the sentence below the appropriate range. Taking into account all the mitigating factors applicable to the respondent, a sentence of 20 to 25 years would not have been out of line. However, given the distinction that the sentencing judge drew between Khalid and the respondent, and given our conclusion that Khalid's sentence should be increased by 6 years, we would only increase the respondent's sentence by the same amount.

Disposition

[21] In the result, we would allow the appeal and increase the respondent's effective sentence from 12 years to 18 years. Taking into account credit for pre-sentence custody, we would increase his sentence from 4 ½ years to 10 ½ years.

[22] The sentencing judge, in declining to impose the presumptive period of parole ineligibility set out in s. 743.6(1.2) of the *Criminal Code*, underemphasized the enormity of the respondent's crime and over-emphasized his rehabilitative prospects. In our view,

had the sentencing judge approached the case as we believe he should have, he would have come to a different conclusion on the issue of parole ineligibility.

[23] Accordingly, an order will go requiring that the respondent serve one half of his sentence (5 years and 3 months) before he may be released on full parole. The ancillary orders made by the sentencing judge shall remain the same.

Signed: "Doherty J.A."

"M. J. Moldaver J.A."

"E. A. Cronk J.A."

RELEASED: "DD" DECEMBER 17, 2010