

Date: 20010207
Docket: CAC 164689
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NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. MacDonald, 2001 NSCA 26]

Cromwell, Hallett and Oland, J.J.A.

BETWEEN:

LESLIE WILLIAM MacDONALD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

BETWEEN:

STEWART HILL MacPHERSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: Timothy G.J. Daley for the appellants
William D. Delaney for the respondent

Appeal Heard: January 26, 2001

Judgment Delivered: February 7th, 2001

THE COURT: Leave to appeal is granted and the appeal is allowed per reasons for judgment of Cromwell, J.A.; Hallett and Oland, J.J.A. concurring.

CROMWELL, J.A.:

- [1] The appellants pleaded guilty to fraud over \$5000 and were sentenced by MacDougall, J.P.C. They had received additional money on their pay cheques at Trenton Works for overtime they did not work and claimed that they were told by the paymaster not to worry about the irregularity and to give him one-half of the money. This went on between 1996 - 1999. Mr. MacPherson was overpaid in the amount of \$19,156.00 and Mr. MacDonald in the amount of \$32,866.00. Each gave half of these amounts to the paymaster.
- [2] The Crown and defence advanced a joint sentencing recommendation for two (2) years probation and restitution of one-half of the amount of the fraud. The judge was advised that this same recommendation had been made and accepted by another judge in the case of a Mr. Fraser, another employee who was part of the same scheme. The rationale for the recommendation of restitution of one-half of the overpayment was that the appellants had only retained for themselves one-half of the total amount of the overpayment because, as noted, they had been required to give the other half to the paymaster. The judge was also advised that Trenton Works was content with this proposal and that the other one-half would be sought in a restitution order against the paymaster who was to be before the courts shortly.
- [3] The judge accepted the joint recommendation for probation but ordered restitution in the full amount of the overpayment. The appellants apply for leave and, if granted, appeal the judge's decision to order restitution of the full amount rather than one-half of the amount as submitted in the joint recommendation.
- [4] We would grant leave to appeal and allow the appeal. The Crown concedes that the submissions made to the judge on sentence were the culmination of a process of plea negotiation. The Crown also concedes that the appeal should be allowed, very fairly taking the position that it is unwilling to make submissions on appeal which might be interpreted as a repudiation of an agreement which resulted from a process of plea negotiation. While the agreement reached between counsel was, of course, not binding on the judge, the joint recommendation made to him was a fit sentence. In the circumstances, we see no sound reason for departing from it.
- [5] Leave to appeal is granted, the appeal is allowed and the restitution orders are amended by reducing the amounts ordered to be repaid by one-half.

Cromwell, J.A.

Concurred in:
Hallett, J.A.
Oland, J.A.