COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Davatgar-Jafarpour, 2019 ONCA 353
DATE: 20190502
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Feldman, Roberts and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent
(Appellant on the Sentence Appeal)

and

Morteza Davatgar-Jafarpour

Appellant
(Respondent on the Sentence Appeal)

Morteza Davatgar-Jafarpour, acting in person on the conviction appeal

Davin Garg, for the respondent/appellant on the sentence appeal

Ian Carter, for the respondent on the sentence appeal

Heard: November 8, 2018

On appeal from the conviction entered by Justice James A. Ramsay of the Superior Court of Justice, sitting with a jury, on September 4, 2013, and from the sentence imposed on September 30, 2013.

Roberts J.A.:

A. OVERVIEW AND FACTUAL BACKGROUND

[1] The appellant, Morteza Davatgar-Jafarpour, appeals against his multiple convictions for knowingly using forged documents, fraud, and conspiracy to

commit fraud. The Crown seeks leave to appeal against the two-year global sentence imposed.

[2] Mr. Jafarpour was the former executive director of Settlement and Immigration Services Organization ("SISO"), a non-profit organization that provided services to new immigrants through various programs. SISO received eighty percent of its funding from the federal government through Citizenship and Immigration Canada ("CIC"). The funding operated through contribution agreements by which CIC agreed to reimburse actual expenses in certain categories (such as payroll) up to a specified limit after the expenses were paid by SISO. As a result, no surplus should have arisen from SISO's delivery of CIC-funded programs.

[3] Mr. Jafarpour, assisted by his co-accused, Ahmed ("Robert") Salama, put into place and carried out over several years a large-scale fraudulent scheme against CIC. SISO submitted false information to CIC, seeking reimbursement for expenses that were not incurred and paid. Mr. Jafarpour's scheme generated a large surplus. He coerced two employees, under the threat of SISO's demise and the loss of everyone's employment, to advance the fraud by manufacturing false invoices and payroll records.

[4] The fraud ran for several years before its discovery. According to the expert forensic accounting evidence, SISO had overclaimed $1.2 million in

salaries for the 2009-2010 fiscal year, and, between 2008 and 2010, had accumulated approximately a $2.9 million surplus of revenue over actual expenses incurred and paid by SISO largely due to the fraud. CIC had recouped most of its losses by refusing to pay SISO's legitimate invoices.

[5] SISO employed about 150 employees, all of whom lost their employment when the fraud was uncovered, and the organization went into bankruptcy. Victim impact statements from SISO employees and contractors set out the emotional and financial hardships they suffered as a result of SISO's unexpected demise. According to the evidence of SISO's trustee in bankruptcy, these included the employees' outstanding *Employment Standards Act, 2000*, S.O. 2000, c. 41 claims of about $785,000, the damage to their reputations, and the difficulty in finding new employment given the stigma of association with SISO.

(i) Convictions and sentence

[6] On September 4, 2013, Mr. Jafarpour, along with Mr. Salama, was convicted by a jury of seven counts of uttering a forged document, one count of fraud, and one count of conspiracy to commit fraud, contrary to ss. 368, 380(1), and 465(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. On September 30, 2013, the trial judge imposed a two-year global custodial sentence on Mr. Jafarpour.

[7] In his reasons for sentence, the trial judge did not make a finding about the exact amount of the fraud. Nevertheless, he held that the amount was "well in excess of one million dollars" and that the statutory aggravating factor set out in s. 380.1(1.1) of the *Criminal Code* applied. He stated that this was a "big, complex, long-lasting fraud", which made out the aggravating factor set out under s. 380.1(1)(a). He also found that the statutory aggravating factor under s. 380.1(1)(d) had been proven, as Mr. Jafarpour took advantage of his high regard in the community in committing the fraud. In reviewing the expert forensic evidence, the trial judge determined that "SISO claimed $1.2 million dollars more in salaries than it actually paid out" and that "[i]n the last three years [of the indictment], it accumulated a surplus of $2.9 million". The trial judge noted that not all of that surplus would necessarily have come from CIC because only eighty percent of SISO's funding came from CIC. However, he inferred that "the overcharging of CIC was the main factor in the surplus that accumulated."

[8] With respect to the actual loss suffered by CIC and the impact of the fraud on the government, the trial judge held that CIC "recovered some of their loss by refusing to advance more money, including money for new work" legitimately performed by SISO. On the evidence before him, he found that CIC may have recovered all its losses or still be due up to $448,000. The trial judge also noted that the lost money was only one part of the fraud's impact because it "tied up a great [deal] of CIC's resources by causing audits that were unnecessarily

complicated by the continuing deceit." He concluded that "apart from making a restitution order inadvisable, whether substantial recovery or total recovery took place, makes little difference to sentence in the circumstances."

[9] The trial judge found that the fraud was not a breach of trust because Mr. Jafarpour was not in a trust relationship with CIC. However, he held that Mr. Jafarpour's crime was "still reprehensible" and that he "had no business abusing the good faith and benevolence of the Canadian government and thereby causing prejudice to his fellow citizens" and "no business corrupting two of his employees." While expressly not sentencing Mr. Jafarpour for breach of trust against SISO and acknowledging that "sentencing is an individual exercise", the trial judge held that "[a]buse of such an organization is worthy of denunciation and general deterrence" and it was "a tragedy to see such an organization collapse". He concluded that "Mr. Jafarpour must take his share of the blame for that event."

[10] Mitigating factors noted by the trial judge included Mr. Jafarpour's difficult and brutal experiences in leaving his former homeland, his quiet good deeds on behalf of newcomers, his adoption of two orphaned children, and his creation of an important organization that did valuable work in the community. The trial judge also acknowledged that Mr. Jafarpour previously had a sterling reputation in the community, but properly noted that his former good name could not be

considered a mitigating factor pursuant to s. 380.1(2) of the *Criminal Code* because it was relevant to the commission of the fraud.

[11] The trial judge noted that Mr. Jafarpour's motive for the fraud seemed to have been "simple empire building" of a very large non-profit organization with some $14 million in revenue and that he did not commit the specific thefts from SISO like his co-accused of which he was unaware. However, he also observed that although in line with chief executives' salaries from similar-sized non-profits, Mr. Jafarpour's "significant salary was possible, because SISO seemed to be in such good shape."

[12] As reflected in the longer sentence for Mr. Jafarpour, the trial judge saw his culpability as greater than his co-accused because Mr. Jafarpour was "the person behind the fraud, the one who put it all into motion."

[13] Crown counsel sought a sentence for Mr. Jafarpour in the range of five to six years. Counsel for Mr. Jafarpour submitted that a sentence in the range of two to three years would be appropriate. The trial judge held that the "particular circumstances of this case strike [him] as being closer to the cases in which sentences from 18 months to three years have been imposed than the cases in which the range has been set to three to five years or more." The trial judge determined that "an adequate deterrent" for Mr. Jafarpour's actions was a sentence of two years' custody in the penitentiary.

(ii) Appeal proceedings

[14] On October 29, 2013, Mr. Jafarpour's co-accused, Mr. Salama, filed his notice of appeal from conviction. The Crown filed its notice of application for leave to appeal and notice of appeal against sentence on October 30, 2013. On December 16, 2013, Mr. Jafarpour filed his notice of appeal for inmate appeals, dated December 3, 2013. On May 28, 2014, this court granted Mr. Jafarpour's motion for an extension of time to appeal. Mr. Jafarpour filed his notice of appeal against conviction on May 29, 2014. Three days later, on June 2, 2014, Mr. Jafarpour was released from custody on full parole. The Crown perfected its sentence appeal on July 15, 2014. Mr. Jafarpour's warrant expiry date was September 29, 2015. He perfected his conviction appeal on March 12, 2018 under judicial case management.

B. ANALYSIS

(a) Conviction Appeal

[15] Mr. Jafarpour submits two main grounds of appeal:

i) The Crown breached its disclosure obligations by failing to decrypt a hard drive referred to as "Hard Drive B" and produce the hundreds of documents contained in that drive. Mr. Jafarpour maintains that the documents would have supported his denial of involvement in the fraudulent scheme. Mr. Jafarpour also disputes the authenticity and

source of several electronic documents tendered in hard copy format at trial. He submits the Crown did not discharge its burden to prove the authenticity of electronic documents, contrary to s. 31.1 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

ii) Mr. Jafarpour suffered trial unfairness and a miscarriage of justice because of the ineffective assistance of his counsel at trial.

[16] I would not give effect to these grounds of appeal.

[17] First, the Crown was not obliged to decrypt Hard Drive B and produce the documents it contained. Hard Drive B is a backup drive containing data from SISO's servers. The police had seized this backup drive from a third party data company hired by SISO but did not decrypt it and did not review its contents. The Crown disclosed the fact of the seizure of Hard Drive B to the defence. The defence did not request that the drive be decrypted. Rather, the defence used the fact that the police did not review the contents of Hard Drive B, as well as the absence of other documents and email transmissions, to argue that there was a gap in the Crown's case giving rise to a reasonable doubt about Mr. Jafarpour's role in the fraudulent scheme. The jury was made aware of Mr. Jafarpour's defence by his trial counsel in examinations and cross-examinations of witnesses, including Mr. Jafarpour; in trial counsel's closing submissions; and by the trial judge in his jury charge.

[18] Parts of Hard Drive B that were subsequently decrypted after trial were produced as fresh evidence on appeal. Mr. Jafarpour has not demonstrated how any of the documents on Hard Drive B would have affected the outcome of the trial. Not one of them diminishes or contradicts the ample evidence of Mr. Jafarpour's involvement in the fraudulent scheme that was put before the jury.

[19] With respect to the other evidentiary issue, Mr. Jafarpour reiterates his trial argument about the source of the "400 hard copy documents" presented by the Crown at trial. On appeal, he now disputes the authenticity of those documents.

[20] In November 2010, one of the SISO employees coerced to assist in the fraud, provided the police with the hard drive from Mr. Jafarpour's work computer and copies of Mr. Salama's work files on an external hard drive. The police uploaded the contents of both drives to a secure database and searched the database to locate relevant documents, focusing on emails with attachments. As I understand the record, the relevant documents were those 400 hard copy pages tendered as evidence. In May 2013, the Crown provided to the defence a duplicate copy of the internal hard drive from Mr. Jafarpour's work computer.

[21] At trial, Mr. Jafarpour did not dispute the authenticity of the documents. However, he asserted that they did not represent the entirety of the emails he sent and received while at SISO, despite the Crown's representations to the contrary. There were about 133 emails archived on Mr. Jafarpour's hard drive.

[22] I would not give effect to Mr. Jafarpour's argument with respect to the electronic documents. First, the authenticity of the documents was not an issue at trial. These documents were sourced both from Mr. Jafarpour's internal hard drive and the external hard drive containing copies of Mr. Salama's files. The Crown did not make the representation that all documents were sourced from Mr. Jafarpour's work computer. Second, similar to the concerns surrounding Hard Drive B, Mr. Jafarpour's trial counsel asked questions about the source of these documents in cross-examinations; he raised the uncertainty as to the source of these emails in his closing address to the jury; and the trial judge noted this issue in his charge to the jury.

[23] Overall, the verdict was firmly grounded in the hundreds of documents taken from Mr. Jafarpour's internal drive and the external drive of his co-accused, as well as testimony of the witnesses at trial which clearly established Mr. Jafarpour's orchestration of the fraudulent scheme. Mr. Jafarpour and Mr. Salama admitted that the documents submitted to the government for reimbursement of false expenses were not genuine. They each attempted to blame the other for the fraud in a cut-throat defence. However, there was a clear paper trail of myriad e-mail correspondence, which Mr. Jafarpour did not dispute as inauthentic at trial, showing Mr. Jafarpour's knowing participation in and furtherance of the fraud.

[24] I similarly reject Mr. Jafarpour's allegation of ineffective assistance of counsel. In my view, Mr. Jafarpour has failed to meet the test for such a claim.

[25] In *R. v. Cubillan*, 2018 ONCA 811, 49 C.R. (7th) 339, at para. 8, this court recently summarized the criteria that must be met to establish a claim for ineffective assistance of counsel:

> The appellant must establish on a balance of probabilities that trial counsel's conduct fell below the standard of reasonable professional assistance and that the ineffective representation resulted in a miscarriage of justice. A miscarriage of justice occurs when the ineffective representation "undermine[s] the appearance of the fairness of the trial, or the reliability of the verdict": *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 120. The unreliability of a verdict is made out where the appellant can establish that there is a reasonable probability that the verdict would have been different had he received effective representation. A reasonable probability is one that is "sufficiently strong to undermine the appellate court's confidence in the validity of the verdict": *R. v. Dunbar*, 2007 ONCA 840, at para. 23.

[26] The record demonstrates that Mr. Jafarpour's trial counsel was effective in bringing out Mr. Jafarpour's version of events, cross-examining the Crown's witnesses about the evidentiary deficiencies in its case, and urging the trial judge to put safeguards for Mr. Jafarpour's benefit into the jury charge, including a warning against using Mr. Salama's evidence to implicate Mr. Jafarpour in the fraud. In my view, Mr. Jafarpour's trial counsel did all that he could in the face of

the overwhelming evidence of Mr. Jafarpour's participation in the fraud that the jury was entitled to accept.

[27] There was no miscarriage of justice or unfairness here. Mr. Jafarpour has not demonstrated that his trial counsel fell below the requisite standard. Even if he had, there is no reasonable probability or even possibility that the verdict would have been any different in the light of the Crown's formidable case against him.

[28] As a result, I would dismiss Mr. Jafarpour's appeal against his convictions.

(b) Sentence Appeal

(i) Is the sentence demonstrably unfit?

[29] The Crown seeks leave to appeal against the two-year sentence that the trial judge imposed on Mr. Jafarpour. The Crown submits that a sentence of two years for this large-scale, sophisticated fraud was demonstrably unfit.

[30] Mr. Jafarpour submits that the trial judge considered all the relevant factors, made no errors in principle, and that his sentence towards the low end of the range should be given deference.

[31] I am mindful, as Mr. Jafarpour's counsel submits, that sentencing is a fact-specific exercise and the choice of an appropriate sentence is driven by the trial judge's evaluation of the unique variables in the particular case. Because sentencing is a highly individualized process, the imposition of a sentence

outside of an established range is not necessarily unfit: *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 25. The Supreme Court in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, compendiously reiterated the governing considerations at para. 58:

> There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. LeBel J. [in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 44] commented as follows on this subject:
>
> > A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[32] While not “straitjackets”, sentencing ranges cannot be arbitrarily ignored otherwise they become meaningless. As the Supreme Court acknowledged in

Lacasse, sentencing ranges "serve in any given case as guides for the application of all the relevant principles and objectives" of sentencing: at para. 57. They represent "one tool among others that are intended to aid trial judges in their work": at para. 69. And, as the Supreme Court stated, at para. 67: "a deviation from such a range or category is not an error in principle and cannot in itself automatically justify appellate intervention unless the sentence that is imposed departs significantly and for no reason from the contemplated sentences" (emphasis added). A sentence is demonstrably unfit if it unreasonably departs from the proportionality principle, a principle which requires reconciling parity of sentences and individualization: *Lacasse*, at para. 53.

[33] In my view, the two-year sentence imposed by the trial judge for Mr. Jafarpour's orchestration of the sophisticated, large-scale fraud against CIC is demonstrably unfit and cannot stand. It significantly departs without reason from the range of sentences contemplated for such a fraud. Further, it fails to give effect to the fundamental principle of proportionality and other sentencing principles, including in particular, the principles of general deterrence and denunciation. Moreover, it is inconsistent with the trial judge's own findings, given the aggravating circumstances and the absence of any significant mitigating circumstances that he found in this case.

[34] In cases of large-scale fraud, the range of sentences imposed in circumstances like the one at bar is generally three to five years: see *R. v.*

Khatchatourov, 2014 ONCA 464, 313 C.C.C. (3d) 94, at paras. 37-45; *R. v. Dobis* (2002), 58 O.R. (3d) 536 (C.A.), at paras. 36-37; *R. v. Bogart* (2003), 61 O.R. (3d) 75 (C.A.), at para. 36, leave to appeal refused, [2002] S.C.C.A. No. 398. This range reflects the substantial weight that courts must give to the principles of general deterrence and denunciation: *Bogart*, at para. 29; *R. v. Drabinsky*, 2011 ONCA 582, 107 O.R. (3d) 595, at paras. 160-161, leave to appeal refused, [2011] S.C.C.A. No. 491. As this court explained in *Bogart*, at para. 30:

> This court has affirmed that in cases of large-scale fraud committed by a person in a position of trust, the most important sentencing principle is general deterrence. Mitigating factors and even rehabilitation become secondary. In *R. v. Bertram and Wood* (1990), 40 O.A.C. 317, this court observed that most major frauds are committed – as this one was – by well-educated persons of previous good character. Thus the court held at p. 319,
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> > The sentences in such cases are not really concerned with rehabilitation. Instead, they are concerned with general deterrence and with warning such persons that substantial *penitentiary* sentences will follow this type of crime, to say nothing of the serious disgrace to them and everyone connected with them and their probable financial ruin. [Emphasis in original.]

[35] It is well established that, "a penitentiary sentence is the norm, not the exception, in cases of large-scale fraud and in which there are no extraordinary mitigating circumstances": *R. v. Leo-Mensah*, 2010 ONCA 139, 101 O.R. (3d)

366, at para. 11, leave to appeal refused, [2010] S.C.C.A. No. 170. As this court explained in *Drabinsky*, at para. 160, the sentencing principles of general deterrence and denunciation for large-scale commercial frauds will "most often find expression in the length of the jail term imposed." For these reasons, as noted above, large-scale frauds like the one in this case ordinarily merit a sentence in the range of three to five years: see *Khatchatourov*, at paras. 37-45; *Dobis*, at paras. 36-37; *Bogart*, at para. 36.

[36] At trial, counsel for Mr. Jafarpour referred to cases where offenders who engaged in large-scale fraud received a sentence outside of the three-to-five-year range. However, the individual circumstances in those cases materially differ from the facts as found by the trial judge in the present case: the fraud was much shorter, not particularly sophisticated, and all of the stolen frauds were recovered: *R. v. Clarke* (2004), 189 O.A.C. 331 (C.A.); the offenders pleaded guilty and co-operated with the police: *Bogart*; *R. v. Wilson* (2003), 174 C.C.C. (3d) 255 (Ont. C.A.); or the offender played a small role in the fraud orchestrated by others: *R. v. Solleveld*, 2014 ONCA 418, 120 O.R. (3d) 678.

[37] The individual circumstances described in the above cases that led this court to uphold sentences outside the range are not present in Mr. Jafarpour's situation. As the trial judge found, the fraud orchestrated by Mr. Jafarpour was large-scale, sophisticated, complex, and occurred over several years. While the trial judge did not specify the exact amount of the fraud, based on his findings,

the expert forensic evidence, and the evidence of the trustee in bankruptcy for SISO, the fraud was at least between $2 and $2.5 million.[1]

[38] In the circumstances of this case, there were few significant mitigating factors and none that would have justified such a marked departure from the established range for large-scale frauds. The most significant mitigating factors apparent from the record before the trial judge include that Mr. Jafarpour is a first-time offender, suffered hardship in the country of his birth, and enjoys the support of his family and many members of the community. While his fraud allowed him to command a significant salary for leading a large non-profit corporation, there is no evidence of the additional aggravating factor that Mr. Jafarpour otherwise personally appropriated the fraudulently obtained funds like his co-accused. As earlier noted, s. 380.1(2) of the *Criminal Code* stipulates that Mr. Jafarpour's previously sterling reputation should not be considered as a mitigating circumstance because it was relevant to the commission of the fraud.

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[1] SISO's auditor, Tony De Luca, testified that the revenue and expenses that SISO claimed in 2008, 2009, and 2010 resulted in a surplus of $2.9 million. In his report, dated September 13, 2013 the exact figure is $2,954,196. Mr. De Luca was unable to opine as to CIC's actual loss. He measured in each fiscal year from 2008 to 2010 the surplus SISO actually received by overclaiming, which may have resulted in a more conservative measurement of the fraud. For fiscal year 2010, Mr. De Luca calculated the surplus as $503,661. By examining the expenses, forensic accountant, Scott McBride, measured in just fiscal year 2010 the amount SISO claimed for reimbursement against actual expenses as $1.2 million. SISO's trustee in bankruptcy, Bradley Newton, testified at the sentencing hearing that CIC filed a proof of claim for $2.49 million and that SISO's claims against CIC for payment of legitimate invoices from 2010 totalled $2,052,000. CIC determined that $250,000 of SISO's claims were ineligible and refused to pay them in order to recoup the monies fraudulently overbilled by SISO. The trial judge accepted that 80% of SISO's revenues came from CIC and that most but not all the surplus could therefore be attributed to the fraud. Eighty percent of the $2,954,196 surplus that accrued over the period from 2008 to 2010 equals $2,363,356.80.

[39] Moreover, the trial judge found seriously aggravating factors that were not significantly attenuated by his findings of mitigating factors. For the purpose of empire-building, Mr. Jafarpour orchestrated and furthered the large-scale misappropriation of public funds over an extended period during which he continued to receive significant remuneration as SISO's director and chief executive officer because of SISO's apparent good shape. Mr. Jafarpour engaged in additional deceit and dishonesty to cover up the fraud and misled the auditors. His actions materially contributed to the bankruptcy of SISO and the resulting emotional and financial damage to its many employees and contractors. While certainly entitled to proceed to trial, Mr. Jafarpour did not have the mitigating benefit of a guilty plea.

[40] The trial judge imposed a sentence that departed inexplicably and significantly from the contemplated range. The two-year sentence represented a 50% deviation from the lowest end of the established range for large-scale frauds and was inconsistent with his own findings of seriously aggravating factors about Mr. Jafarpour's conduct and the nature of the fraud in this case. His own findings required a longer penitentiary sentence than the two years imposed to properly reflect the principle of proportionality and the important purposes of general deterrence and denunciation.

[41] The trial judge's findings that there was no breach of trust towards CIC and likely no substantial unrecovered losses do not serve as distinguishing individual features that could support the two-year sentence imposed.

[42] In *Khatchatourov*, this court rejected the argument that the three-to-five-year sentencing range for major frauds is reserved for frauds involving a breach of trust and significant losses. At para. 39, MacPherson J.A. for the court writes:

> The four-year custodial sentences imposed are within the appropriate range for this large-scale, sophisticated fraud, even though the appellants were not in a position of trust with the financial institutions or, in a legal sense, with all of the personal victims, and the consequences for the primary victim – the public purse – were not "devastating".

[43] The same aggravating conduct that underlies and informs the aggravating nature of breaches of trust are present here. While Mr. Jafarpour may not have strictly been in a position of trust in relation to CIC, there can be no question, as the trial judge found, that Mr. Jafarpour blatantly abused his position as the director and chief executive officer of a non-profit organization and breached the good faith of CIC.

[44] That CIC was successful in recouping most if not all its losses does not justify a sentence outside the sentencing range: *Drabinsky*, at para. 5. Fraud on government is not a "victimless crime", as "it takes money from the public purse" and "from all those who rely on it": *Khatchatourov*, at para. 44. As the trial judge

noted in this case, CIC also incurred considerable expense to carry out the forensic audits that uncovered the extent of the fraud.

[45] As the Quebec Court of Appeal succinctly noted in *R. v. Coffin*, 2006 QCCA 471, 210 C.C.C. (3d) 227, at para. 46, which involved the infamous "sponsorship scandal" fraud against the government:

> The fallacious argument that "stealing from the government is not really stealing" cannot be used to downplay the significance of this crime. The government of the country has no assets itself; rather, it manages sums common to all of its citizens. Defrauding the government is equivalent to stealing from one's fellow citizens.

[46] In my view, the circumstances of this case invoke aggravating factors for fraud set out in s. 380.1(1) of the *Criminal Code* including that the magnitude and duration of the fraud were significant, Mr. Jafarpour took advantage of his high regard in the community, and he tried to conceal records of the fraud. While the fraud did not directly involve the 150 employees of SISO, as the trial judge found, Mr. Jafarpour had to take his share of blame for the demise of SISO and the unemployment of its employees. As the trial judge also acknowledged, under s. 380.1(2), he was not to consider as mitigating circumstances Mr. Jafarpour's employment, employment skills or status or reputation in the community because those circumstances were relevant and contributed to the commission of the offence.

[47] In these circumstances, even based on the case law proffered by Mr. Jafarpour, the two-year sentence, without explanation, fell well below the appropriate sentencing range for similar large-scale frauds that, as a norm, is a penitentiary sentence of at least three years. The two-year sentence represents a 50% deviation from the bottom of the established range. The sentence did not reflect the predominant sentencing principle of proportionality because it failed to adequately take account of the sentences typically imposed for large-scale frauds committed in similar circumstances as well as the individual circumstances of this particular case. As a result, mindful of the great deference owed to the trial judge's exercise of his discretion, I am nevertheless of the view that the sentence is demonstrably unfit and should be increased.

[48] In my view, having regard to the particular circumstances of this case, the appropriate global custodial sentence would be four years. Deducting the two years already served, this would leave Mr. Jafarpour with two years to be served.

(ii) Is re-incarceration in the interests of justice?

[49] Mr. Jafarpour submits that given the long passage of time and his rehabilitative efforts, he should not be re-incarcerated to serve the two years remaining in his sentence. According to Mr. Jafarpour, re-incarceration is not necessary for the purposes of general deterrence and denunciation and will not serve the other principles of sentencing.

[50] This court has generally been reluctant to re-incarcerate an offender who has served the sentence originally imposed and has been released into the community: *Leo-Mensah*, at para. 15; *R. v. F. (D.G.)*, 2010 ONCA 27, 98 O.R. (3d) 241, at para. 33. Factors such as delay and an offender's meaningful progress in the community may militate against re-incarceration: *F. (D.G.)*, at para. 33. The court must consider whether the principles of denunciation and deterrence require re-incarceration or whether the community is best protected if the offender continues along the rehabilitative path that he has followed since his release from custody: *R. v. Smickle*, 2014 ONCA 49, 306 C.C.C. (3d) 351, at para. 20. I also recognize that re-incarceration imposes a considerable additional hardship: *R. v. Inwood* (1989), 48 C.C.C. (3d) 173 (Ont. C.A.), at p. 184. The overarching issue is whether re-incarceration is in the interests of justice: see *R. v. Cheng* (1991), 50 O.A.C. 374 (C.A.), at para. 5; *R. v. Boucher* (2004), 186 C.C.C. (3d) 479 (Ont. C.A.), at para. 33.

[51] The delay in this case is concerning. It cannot all be laid at the Crown's feet. Rather, Mr. Jafarpour's actions account for most of the delay: he filed his notice of appeal in the inmate appeals stream in December 2013, over a month and a half later than his co-accused; he sought and was granted an extension of time to appeal in May 2014, more than eight months following his convictions and seven months following the Crown's appeal against sentence; he raised and then abandoned an application for counsel under s. 684 of the *Criminal Code*; he

sought decryption of Hard Drive B; and he pursued the ground of ineffective assistance of counsel which, even with case management by this court, took almost three years to process. I also note that in February 2015, Mr. Jafarpour firmly rejected the Crown's suggestion that the sentence appeal be heard before the conviction appeal. While Mr. Jafarpour had every right to take these positions and advance these issues on appeal, he cannot then rely on the long delay of his own creation as a bar to re-incarceration when it would be otherwise in the interests of justice.

[52] That said, I do not believe that re-incarceration would be in the interests of justice in the circumstances of this case. In my view, the principles of denunciation and general deterrence do not require re-incarceration and the public is best protected if Mr. Jafarpour's rehabilitative path remains uninterrupted. I say this for the following reasons.

[53] First, the relatively short amount of time that Mr. Jafarpour would serve in custody before full parole would not be required to advance the principles of denunciation and deterrence and could harm Mr. Jafarpour's rehabilitative efforts. Mr. Jafarpour was released on full parole in 2014 after spending about eight months in custody. Given his impeccable behaviour while in custody and since his release, Mr. Jafarpour would again likely be released after serving eight months of the additional two years of his sentence. He is the main breadwinner for his family and re-incarceration would cause them great hardship.

[54] Mr. Jafarpour is firmly on the path to rehabilitation and is highly unlikely to re-offend. He was a first-time offender and is now 59 years old. Trained as a medical doctor and a refugee from his home country where he suffered persecution, he re-established himself in this country and devoted himself to serving other refugees and new immigrants. The letters of support submitted on his behalf glowingly recount his many achievements, not the least of which is his family's adoption of two orphaned children. However, his criminal actions have eclipsed his previous legitimate and considerable personal and community achievements, including through SISO. His former sterling reputation is in tatters. While he orchestrated this large-scale fraud and reaped the prestige and benefits from leading a large non-profit corporation, it does not appear that Mr. Jafarpour profited from his actions in the same way that others did who were involved in the fraudulent scheme. Importantly, Mr. Jafarpour has steadily progressed in his rehabilitation, remaining steadily employed, and has not re-offended or otherwise stumbled in any way during the significant period that has elapsed since his release.

[55] Having balanced all these factors, I am of the view that re-incarceration would not be in the interests of justice in this case.

[56] Accordingly, I would grant the Crown leave to appeal sentence and allow the appeal, increase the sentence by two years, but stay the execution of the additional sentence.

C. DISPOSITION

[57] I would dismiss Mr. Jafarpour's appeal against his convictions.

[58] I would grant the Crown leave to appeal against sentence, allow the sentence appeal and substitute a global custodial sentence of four years. For the reasons stated, I would stay the execution of the balance of the sentence of incarceration not yet served.

Released: May 2, 2019 "KF"

"L.B. Roberts J.A."
"I agree. K. Feldman J.A."
"I agree. Fairburn J.A."