

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Topp, 2011 SCC 43, [2011] 3 S.C.R. 119 | **Date:** 20110923  **Docket:** 33529 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**John Phillip Topp**

Respondent

- and -

**Attorney General of Alberta**

Intervener

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 44) | Fish J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring) |

R. *v.* Topp, 2011 SCC 43, [2011] 3 S.C.R. 119

**Her Majesty The Queen** *Appellant*

*v.*

**John Phillip Topp** *Respondent*

and

**Attorney General of Alberta** *Intervener*

**Indexed as:** R. ***v.*** Topp

2011 SCC 43

File No.: 33529.

2011:  March 23; 2011:  September 23.

Present:  McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for ontario

Criminal *law — Sentencing — Fines — Offender’s ability to pay — Burden of proof — Whether offender required to prove inability to pay a fine corresponding to funds fraudulently obtained* *— Whether trial judge erred in declining to impose a fine — Whether trial judge was bound to impose a fine in light of accused’s failure to explain what happened to misappropriated funds — Criminal Code, R.S.C. 1985, c. C‑46, s. 734(2).*

The accused used his brokerage business to defraud Canada Customs of $4.7 million. He was convicted of 16 counts of fraud and attempted fraud under the *Customs Act*. The Crown sought a $4.7 million fine in addition to imprisonment. At the sentencing hearing, the accused’s counsel asserted that the accused was unable to pay a fine, but adduced little evidence to support the assertion. No explanation was given of where the $4.7 million had gone and the Crown was unable to trace or locate the funds. The Crown urged the court to infer that the funds were still in the accused’s possession. The trial judge sentenced the accused to imprisonment but declined to impose a fine because she was not satisfied as required by s. 734(2) of the *Criminal Code* that the accused was able to pay a fine. The Court of Appeal dismissed an appeal by the Crown.

*Held*: The appeal should be dismissed.

The legislative purpose behind s. 734(2) of the *Criminal Code* is to prevent offenders from being fined amounts that they are truly unable to pay, and to correspondingly reduce the number of offenders who are incarcerated in default of payment. A court may impose a fine only if satisfied, on a balance of probabilities, that the offender has the means to pay the fine (or to discharge it under s. 736, which is not possible in this case). As a practical matter, s. 734(2) imposes a burden on the party seeking a fine to satisfy the court that the offender is able to pay. The party opposing the fine does not assume a formal burden of proof and remains free to argue that the evidence before the court should not satisfy the court that the offender is able to pay.

In the absence of a reasonable explanation to the contrary, past receipt of illegally obtained funds will often support an inference that the offender still possesses sufficient funds to pay a fine. However, a trial judge is not bound as a matter of law to reach that conclusion. The weight reasonably attributable to the past receipt of funds will vary according to at least two factors: the amount of funds acquired and the length of time that has passed between the acquisition of the funds and the imposition of sentence. Both the text of s. 734(2) and the legislative intention to avoid the incarceration of offenders who are truly unable to pay their fines support the conclusion that proof of past receipt of illegally obtained funds is not always conclusive of a present ability to pay.

The Crown is not required to identify or locate the specific assets that the offender can use to pay the fine and instead may rely on indirect evidence to prove an offender’s ability to pay. On the other hand, the text of s. 734(2) explicitly requires an affirmative finding that the offender is able to pay a fine, instead of requiring the party opposing the fine to prove that the offender is unable to pay the fine.

In this case, the trial judge committed no reviewable error in declining to impose a fine. She expressly took into account the accused’s failure to explain what had happened to the misappropriated funds. She did not fail to consider anything relevant to her decision. She did not require the Crown to locate the missing funds. She was simply not satisfied that the accused was able to pay the fine sought by the Crown. This conclusion was open to her, as a matter of law, on the facts as she found them.

**Cases Cited**

**Referred to:** *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530; *R. v. Grimberg* (2002), 155 O.A.C. 296; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321; *R. v. Dow* (1976), 1 C.R. (3d) S.‑9; *R. v. Noseworthy*, 2000 NFCA 45, 192 Nfld. & P.E.I.R. 120; *R. v. Guppy* (1995), 16 Cr. App. R. (S.) 25; *R. v. Johnson*, 2010 ABCA 392, 493 A.R. 74; *R. v. Castro*, 2010 ONCA 718, 102 O.R. (3d) 609.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 720 to 724, 724(3)(*d*), (*e*), 734(1)(*a*), (2), (5), 736.

*Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 153(*c*).

**Authors Cited**

Canada. House of Commons. *House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, p. 5872.

APPEAL from a judgment of the Ontario Court of Appeal (Moldaver, Goudge and Rouleau JJ.A.), 2009 ONCA 828, [2009] O.J. No. 4934 (QL), 2009 CarswellOnt 7307, affirming a decision of Baltman J., 2008 CanLII 20991, [2008] O.J. No. 1766 (QL), 2008 CarswellOnt 2539. Appeal dismissed.

Nicholas E. Devlin and Xenia Proestos, for the appellant.

No one appeared for the respondent.

Maureen J. McGuire, for the intervener.

P. Andras Schreck, as *amicus curiae*.

The judgment of the Court was delivered by

Fish J. —

I

1. John Phillip Topp, the respondent, was convicted in 2008 of using his brokerage business to defraud Canada Customs of $4.7 million.
2. The Crown sought a $4.7 million fine in addition to a seven-year term of imprisonment. The trial judge sentenced Mr. Topp to a total of five years’ imprisonment (2008 CanLII 20991) but declined to impose a fine because she was not satisfied that Mr. Topp was able to pay, as required by s. 734(2) of the *Criminal Code*, R.S.C. 1985, c. C‑46.
3. An appeal by the Crown was dismissed, unanimously, by the Ontario Court of Appeal (2009 ONCA 828 (CanLII)) and the Crown now appeals to this Court, with leave, against the judgment of the Court of Appeal.
4. In his submissions on sentence, defence counsel asserted that Mr. Topp was unable to pay a fine, but adduced little evidence to support his assertion and offered no explanation of where the $4.7 million had gone. The Crown, unable to trace or locate the funds, urged the court to infer that the funds were still in Mr. Topp’s possession.
5. In this Court, the Crown argues that s. 734(2) required Mr. Topp to prove he was unable to pay a fine corresponding to the funds he was shown to have fraudulently obtained. Since he failed to discharge that burden, says the Crown, the trial judge erred in law in declining to impose the requested fine.
6. I would dismiss the appeal.
7. Past receipt of illegally obtained funds does not impose an evidential burden on offenders to prove they no longer possess their ill-gotten gains. In the absence of a credible explanation, however, it will often be open to the court to infer that the offender is able to pay a fine. But the court is not legally bound to do so. The probative weight of the inference will depend on the circumstances, and therefore vary from case to case.
8. I agree with the Court of Appeal that this was a “close call” (para. 1). While another judge might well have decided differently, I agree as well that it was open to the trial judge, on the evidence and the information placed before her, to decline to impose a fine.

II

1. Mr. Topp was the owner and manager of Topp Customs Services Inc., a brokerage business that helped importers determine and satisfy their customs obligations. Between 1999 and 2001, on more than 400 separate occasions, he instead helped himself to a total of more than $4.7 million entrusted to his firm for that purpose. In each instance, Topp Customs collected from its clients the duties and taxes properly payable to the government, but submitted false documents to Canada Customs indicating that the clients owed little or nothing.
2. Mr. Topp was convicted at trial of 16 counts of fraud and attempted fraud under s. 153(*c*) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). His convictions are not in issue.
3. The sole issue on this appeal is whether the trial judge, Baltman J., erred in law in declining to impose a fine, pursuant to the Crown’s request. More particularly, the decisive question is whether Judge Baltman misapplied s. 734(2) of the *Criminal Code*. More particularly still, the question is whether Judge Baltman was bound to impose a fine in light of Mr. Topp’s failure to explain what had happened to the $4.7 million he was found by the judge to have misappropriated.
4. Section 734(2) provides:

**734.** . . .

(2) Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

1. Section 736 provides that “[a]n offender who is fined under section 734 may . . . discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a [provincial] program established for that purpose”. Ontario has not established such a program. Accordingly, unless the judge was satisfied that Mr. Topp was able to pay the fine, no fine could legally be imposed.
2. Judge Baltman declined to impose a fine. After considering counsels’ submissions, she explained her conclusion this way:

There is virtually no information about what Mr. Topp did with the stolen funds; the Crown attempted to trace the funds and found that some monies had been transferred to a bank account in Antigua, but there was nothing left to recover. Mr. Topp appears to have few tangible assets, and so where the money went remains a mystery.

. . .

. . . As I am not persuaded the accused has the ability to pay a fine, none is imposed. [paras. 6 and 33]

1. An appeal by the Crown was dismissed by the Ontario Court of Appeal. In its brief endorsement, the Court of Appeal described the matter as “a close call”, but found that “it was open to the trial judge, on the record before her and the submissions of defence counsel, to find that the respondent did not have the ability to pay the fine” (para. 1).

III

1. Subject to s. 734(2), the court may impose a fine “in addition to or in lieu of any other sanction” that the court is required or authorized to impose (s. 734(1)(*a*)).
2. In this case, the Crown urged the court to impose a fine in addition to a lengthy term of imprisonment. In other cases, the offender seeks the imposition of a fine in lieu of a more severe punishment. Moreover, the court may impose a fine where none is requested by either side. Section 734(2) applies in all three instances: The court can only impose a fine if it is satisfied, on the basis of the record before it, that the offender has the means to pay the contemplated fine (or to discharge it under s. 736).
3. The legislative purpose behind s. 734(2) is to prevent offenders from being fined amounts that they are truly unable to pay, and to correspondingly reduce the number of offenders who are incarcerated in default of payment. In proposing its adoption in 1994, the then-Minister of Justice explained the rationale behind s. 734(2) this way:

[translation] At the present time, nearly a third of the people liable to incarceration in provincial jails are in that situation because they did not pay fines. . . .

The bill recognizes this situation.

These provisions state that the court must be convinced that the offender can pay the fine contemplated before imposing it.

(*House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, at p. 5872)

1. And the effect of the provision was thus described by this Court in *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 47:

. . . Parliament rejected in general the notion that a fine should be set without regard to an offender’s ability to pay. A means inquiry is now a condition precedent to the imposition of a fine except where otherwise provided by law.

1. An affirmative finding that an offender is able to pay is therefore required before a fine can be imposed. In the absence of evidence capable of supporting that finding, the party seeking a fine cannot succeed.
2. Section 734(2) does not impose a formal burden of proof on the party seeking a fine. As a practical matter, however, it does so to this extent. As a matter of law, the court cannot impose a fine unless it is satisfied that the offender is able to pay. This necessarily involves an affirmative finding based on the evidence and information properly before the court pursuant to ss. 720 to 724 of the *Criminal Code*. Absent a sufficient basis for that finding, the party seeking the fine cannot legally succeed.
3. In this sense, s. 734(2) imposes a burden on the party seeking the fine to satisfy the court that the offender is able to pay. To discharge that burden, the proponent of the fine may rely on all the relevant material before the court on sentencing ― including evidence or information provided by any other party, or otherwise properly elicited by the judge pursuant, for example, to s. 723(3) of the *Criminal Code*.
4. The party opposing a fine ― often, but not always, the offender ― is entitled, of course, to present any evidence or information admissible on sentence and tending to show that the offender is unable to pay. But that party, in opposing the fine, does not assume a formal burden of proof ― evidential or persuasive. He or she remains free to argue that the evidence relied on by the proponent of the fine should not satisfy the court that the offender is able to pay.
5. In determining whether the record contains sufficient evidence to “satisfy” the court that the offender can afford to pay the contemplated fine, the trial judge must be satisfied, *on a balance of probabilities*, of the offender’s ability to pay. The balance of probabilities standard is appropriate, in the context of s. 734(2), for two reasons.
6. First, as a logical matter, the word “satisfied” in this context cannot signify anything less than the balance of probabilities standard. It would make little sense for a trial judge to be satisfied that an offender could pay a contemplated fine, but not believe that the offender was, more likely than not, able to pay it.
7. Second, the balance of probabilities standard accords with s. 724(3)(*d*) of the *Code*. Section 724(3)(*d*) states:

**724.** . . .

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

. . .

(*d*) subject to paragraph (*e*), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence . . .

Paragraph (*e*) states that aggravating facts must be proved by the Crown beyond a reasonable doubt. The finding that an offender is able to pay a fine is not an aggravating fact.

IV

1. In the absence of a reasonable explanation to the contrary, past receipt of illegally obtained funds will often ― but not always ― support an inference that the offender still possesses sufficient funds to pay a fine at the time of sentencing: *R. v. Grimberg* (2002), 155 O.A.C. 296, at paras. 17-20; *R. v. Desjardins* (1996), 182 N.B.R. (2d) 321 (C.A.), at para. 29; *R. v. Dow* (1976), 1 C.R. (3d) S.‑9 (B.C.C.A.), at pp. S.‑14 to S.‑15; *R. v. Noseworthy*, 2000 NFCA 45, 192 Nfld. & P.E.I.R. 120, at para. 21; *R. v. Guppy* (1995), 16 Cr. App. R. (S.) 25 (C.A.). See also *R. v. Johnson*, 2010 ABCA 392, 493 A.R. 74, at para. 23; *R. v. Castro*, 2010 ONCA 718, 102 O.R. (3d) 609, at para. 34, which deal with restitution orders, a related but different matter.
2. As stated earlier, the strength of that inference will depend on the circumstances and vary from case to case. None of the cases mentioned have addressed the issue in the precise circumstances of this case. Nor have they fully canvassed the legal issue before us on this appeal: Is a trial judge notonly *permitted*, but *bound* *as a matter of law*, to find that an offender still possesses the fruits of his crime, unless the offender explains what happened to the funds?
3. I would answer that question in the negative, essentially for two reasons.
4. First, in my view, the weight reasonably attributable to the past receipt of funds will vary with at least two factors: the length of time that has passed between the acquisition of the funds and the imposition of sentence, and the amount of funds acquired. The more time that has passed since the acquisition of the funds, the less likely it is that the offender still possesses the full amount. And the lower the amount of funds acquired, the less likely it is that the offender still possesses much or all of the funds. A small sum is more likely than a large sum to be gone in its entirety.
5. Sentencing courts must retain their accepted measure of discretion in determining how much weight they should assign to proof of past possession, bearing in mind the variables I have mentioned and other factors they find relevant in the particular circumstances of the case. For example, where much time has passed and little money was stolen, past possession alone may not satisfy the court ― even in the absence of an explanation by the offender ― that the offender can still pay the fine. On the other hand, recent possession of a large sum will generally suffice, in the absence of a credible explanation, to satisfy the court that the offender still controls a significant chunk of the stash. In both cases, the past acquisition of fraudulently obtained funds will have the same probative effect as past possession of legally acquired assets.
6. Second, the text of s. 734(2) and the legislative intention to avoid the incarceration of offenders who are truly unable to pay their fines support the conclusion that proof of past receipt is not always conclusive of a present ability to pay. Under s. 734(5), Mr. Topp would receive a substantial prison term if he defaulted on the $4.7 million fine and was unable to show at the time of default that he no longer possessed the fraudulently obtained funds. It seems to me more consistent with the text and purpose of s. 734(2) to permit trial courts to discharge their duty under that remedial provision judicially. And this they cannot do without determining for themselves whether they are satisfied, in light of all the circumstances and the materials placed before them, that the offender is able to pay a fine.
7. The Crown submits that the offender bears an onus to explain what happened to the funds because the offender is in a better position to obtain and adduce relevant evidence than the Crown. It is often impossible for the Crown to trace the proceeds of crime. In the present case, for example, the Crown lost track of the fraudulently obtained funds after tracing them to a bank account in Antigua.
8. This submission is attractive at first glance but loses its appeal on closer scrutiny.
9. First, the Crown is not required to identify or locate the specific assets that the offender can use to pay the fine, though direct evidence of this sort, when available to the Crown, is by its nature particularly persuasive. In its absence, the Crown may instead rely on various types of indirect evidence to satisfy the trial judge of the offender’s ability to pay ― including evidence that the offender had possession of impugned funds in the relatively recent past, evidence of an ongoing lavish lifestyle, and evidence of the offender’s earning potential.
10. Second, the Crown’s argument disregards the text of s. 734(2). It may be desirable from a truth-seeking perspective to place an evidentiary onus on the party that is best positioned to produce evidence. Parliament well understood that the offender is better positioned to produce evidence of his finances than the Crown. But Parliament has nonetheless explicitly chosen to require an affirmative finding that the offender is *able* to pay a fine, instead of requiring the offender who opposes a fine to satisfy the court that he or she is *unable* to pay.
11. The Crown also argues that the interpretation of s. 734(2) should be influenced by case law relating to restitution and the common law rules regarding the imposition of fines. With respect, the cases cited by the Crown are readily distinguishable.
12. In *Johnson* and *Castro*, the Alberta and Ontario Courts of Appeal respectively held that, in the context of a *restitution* order, past receipt of ill-gotten gains places a burden on the offender to explain where they have gone. Restitution, however, differs from a fine in two important respects. First, and perhaps most important, restitution orders are not subject to s. 734(2). Second, an offender who defaults on a restitution order ― unlike an offender who defaults on a fine ― is not subject to imprisonment as a consequence.
13. In *Noseworthy*, the Newfoundland Court of Appeal held that the offender bears the burden of affirmatively establishing his inability to pay. That case, however, dealt with a fine imposed under the *Excise Act*, R.S.C. 1985, c. E-14, which at the time was not subject to s. 734(2) (the section has since been amended to apply to fines imposed under all acts of Parliament). The Court of Appeal’s decision addressed the allocation of burdens under the common law and not the interpretation of s. 734(2).

V

1. In declining to impose a fine, the trial judge in this case considered counsels’ submissions and all of the information and evidence before her. She expressly took into account Mr. Topp’s failure to explain what had happened to the money he was found beyond a reasonable doubt to have misappropriated. Nothing in the record indicates that she failed to consider anything relevant to her decision. In the end, the judge plainly declared that she was not satisfied that Mr. Topp was able to pay the fine requested by the Crown. She could reasonably have concluded otherwise, but she was not legally bound to do so.
2. The Crown submits that the trial judge erred in law by imposing a formal requirement on the Crown to locate Mr. Topp’s misappropriated funds. This submission is without merit. It is clear from the transcript of the hearing on sentence that the trial judge imposed no such burden on the Crown:

THE COURT: . . . There’s been no explanation offered on where the -- how the money was spent. So, you can’t say that there is no lavish lifestyle. All you can say is the Crown wasn’t able to find it which may only speak to someone’s skill in concealing it.

DEFENCE COUNSEL: . . . Mr. Topp’s prior counsel offered carte blanche for the government to go look anywhere they wanted. He’d sign any documents. . .

THE COURT: But it’s not their job. They are not the ones that got the money. Who better than the person who received the money to explain what happened to it? So, it may be an argument that it’s not obvious that it was spent in that way, but I don’t think you can suggest that it wasn’t in fact spent that way. [A.R., at pp. 217-18]

Contrary to the Crown’s submission, the trial judge thus recognized that the Crown was not required to locate the missing funds. She committed no error of law in this regard.

1. Nor did the trial judge commit a reviewable error in deciding not to impose a fine. She was simply not satisfied, as required by s. 734(2), that Mr. Topp was able to pay. This conclusion was open to her, as a matter of law, on the facts as she found them. On the evidence and information before her, the judge was not bound to infer, on the balance of probabilities, that Mr. Topp was able to pay the fine sought by the Crown. Seven years had passed between Mr. Topp’s acquisition of the fraudulently obtained funds and the hearing on sentence. Mr. Topp was by then 64 years old, had lost his licence to work as a customs broker, was unlikely to find future employment, and had “few tangible assets” (A.R., at p. 32).
2. Another judge, I repeat, could certainly have decided otherwise, but I agree with the Court of Appeal that Judge Baltman committed no reviewable error in deciding as she did.

VI

1. For all of these reasons, as stated at the outset, I would dismiss the appeal.

*Appeal dismissed.*

Solicitor *for the appellant:  Public Prosecution Service of Canada, Toronto.*

Solicitor *for the intervener:  Attorney General of Alberta, Edmonton.*

Solicitors appointed by the Court as *amicus curiae:  Schreck Presser, Toronto.*