

CANADA / JUDGMENT

Canada (Attorney General) v. Cong

2008 BCSC 630

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 630 Canada (Attorney General) v. Cong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Canada (Attorney General) v. Cong,

2008 BCSC 630

Date: 20080516

Docket: 23926

Registry: Vancouver

In the Matter of the Extradition Act, S.C. 1999, c. 18, as amended

Between:

The Attorney General of Canada

on behalf of the United States of America

Applicant/Requesting State

And

Huyen Thi Cong

Respondent/Person Sought

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

Counsel for the Applicant/Requesting State

Kerry L. Swift

Counsel for the Respondent/Person Sought

Joseph M. Doyle

Date and Place of Trial/Hearing:

March 4, 5, 17, April 24, 25, 2008

Vancouver, B.C.

[1] The United States of America ("USA") seeks to extradite a person named Huyen Thi Cong to the state of Oregon, in relation to alleged conduct, which corresponds to the following Canadian offences:

1. Conspiracy to traffic marihuana, a Schedule II listed substance, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 and s. 465 of the Criminal Code;
2. Possession for the purposes of trafficking marihuana, a Schedule II listed substance, contrary to s. 5(2) of the Controlled Drugs and Substances Act.

[2] The USA seeks an order pursuant to s. 29 of the Extradition Act, S.C. 1999, c. 18, as amended (the "Act"), which states as follows:

29. (1) A judge shall order the committal of the person into custody to await surrender if
 - (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner; ...

The Committal Application

[3] The applicant relies upon the following evidence (collectively the "Committal Evidence"):

- a) authority to proceed ("ATP");
- b) certified record of the case for prosecution dated October 4, 2005 ("ROC");
- c) testimony of Constable S. Wirth of the Royal Canadian Mounted Police in relation to her arrest of Cong;

[4] Counsel for Cong has raised two issues:

1. That the applicant has not proven that the respondent is the same person as the Person Sought;
2. The evidence in its entirety is not sufficient to justify a committal on the offence of conspiracy to traffic in marihuana or for the offence of possession for the purpose of trafficking.

Identification

- [5] There are two aspects to the issue of identification. The first aspect is that there must be prima facie evidence that the person before the court is the person who engaged in the alleged conduct that underlies the extradition request. This is known as "identification as part of the prima facie case".
- [6] The second aspect is that there must be evidence that the person before the courts is the person sought by the extradition partner? This is known as "identification of the person sought". The standard of proof in this regard is a balance of probabilities: *United States of America v. Wong* (1995), 98 C.C.C. (3d) 332 (B.C.C.A.) at para. 69, leave to appeal to S.C.C. refused, [1995] S.C.C.A No. 286. It is with the second aspect of identification that the respondent takes issue. They claim that, on the admissible evidence, the USA has not proven on a balance of probabilities that the person arrested at the Vancouver Airport by Constable Wirth is the same person depicted in the photograph attached to the ROC.
- [7] Section 37 of the Act deals with evidence of identification:
37. The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:
- (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
 - (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.
- [8] In *Wong*, the extradition judge had compared the person before the court with the photographs in evidence. The Court of Appeal stated, at para. 65:
- [65] The learned judge's method of comparing the photographs in the evidence with the fugitive before him was in accordance with the method used in *Re United States of America and Peltier*, June 18, 1976, B.C.S.C, Vancouver 760176, at p. 37. In *Peltier*, Mr. Justice Schultz reviewed a large number of authorities on the sufficiency of identification and the method of identification and concluded by comparing *Peltier* with the photographs in evidence that *Peltier* was the person displayed in the photographs. Mr. Justice Schultz applied the decision of *Pratte J.A. in Jang v. U.S.A.*, May 7, 1975, F.C.A., and the decision of *Ruttan J. in Re Low*, [1976] 2 W.W.R. 560 (B.C.S.C.) at p. 566.
- [9] A similar decision was made by the Supreme Court of Canada in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, where the trial judge had reviewed a video tape of a robbery and concluded: "...that the person who committed that robbery is Mr. Nikolovski, and I can't ignore that". The Supreme Court of Canada held, at para. 22:

- [22] So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity.
- [10] Counsel for Cong has made two admissions regarding identification:
1. There is no issue that the person arrested by Constable Wirth is the person in court.
 2. There is no issue that the statement made by Cong to Constable Wirth (as discussed below) was voluntary in the legal sense.

Constable Wirth's Evidence

- [11] The evidence of Constable Wirth was that, on March 25, 2007, she attended at the Canadian Custom Border Service Agency, at the Vancouver International Airport, to arrest an individual pursuant to a warrant. Once arrived, she was given a Canadian Passport, belonging to Huyen Thi Cong by Officer Pannu of the Canadian Border Services Agency, who was the arresting officer. Constable Wirth stated that she was told by Officer Pannu that the passport belonged to the individual they had in custody. At that time, Cong was in what Constable Wirth called the "Lawyer's Room", which I understand is an interview room. There, Cong was speaking with a Vietnamese interpreter and a lawyer named Roger Bachelor. Constable Wirth said she compared the photograph in the passport to the individual in the lawyer's room and was satisfied that she was dealing with the same person.
- [12] When Cong had finished speaking with Mr. Bachelor, she was released into the custody of Constable Wirth, who placed Cong in the back of her police cruiser. In her direct examination, Constable Wirth said that "while secure in the rear of my police cruiser I asked her her name, to state her name in full and asked for a date of birth. While she was giving such, I was putting that in my computer terminal in the car to verify her identification." Constable Wirth testified that Cong identified herself as Huyen Thi Cong, and stated that her date of birth was April 7, 1970. When asked whether she had provided Cong with any "further" information, Constable Wirth stated that "I did. I rearrested her. I advised her that she was being arrested on a Canada-wide warrant and I gave her her Charter rights and warning."
- [13] Apart from the use of the word "further" in Ms. Swift's question regarding "further information", the evidence in direct examination did not suggest the sequence in which Cong was 1) rearrested, Chartered, and given a warning about her right of silence, and 2) asked for her name and date of birth.
- [14] By contrast, in cross-examination, Constable Wirth was taken to and relied upon her notebook, which contained the times at which these events took place.

- [15] In cross-examination, Constable Wirth said that she rearrested Cong and read her s. 10(a) and s. 10(b) rights at 22:58. S. 10 of the Charter states that:
10. Everyone has the right on arrest or detention
 - a) to be informed promptly of the reasons therefore;
 - b) to retain and instruct counsel without delay and to be informed of that right; and
 - c)
- [16] With respect to her 10(a) Charter warning, Constable Wirth stated that she could not recall the specifics of the Canada-wide warrant other than that it was for conspiracy to traffic in marihuana under the Controlled Drugs and Substances Act. In cross-examination, she stated that this is what she told Cong. She admitted, however, that the warrant was issued with respect to a proposed extradition proceeding and that she did not know that at the time. It is clear from the warrant that it was in respect to a conspiracy to traffic in marihuana and was under the Extradition Act. Later in her testimony, Constable Wirth said she could not recall if she actually specified that it was a CDSA warrant.
- [17] When, still at 22:58, the constable asked if Cong understood the warning concerning the right to contact a lawyer in private, the constable's notes stated that Cong replied: "A little bit. Not very much." Cong was then asked if she wanted to call a lawyer to which she answered "Yeah", followed by the statement "Lawyer doesn't tell me. I don't know why I am arrested." She was asked what her lawyer's name was and she replied "Johnson". In Constable Wirth's notebook, there was the word "Johnson" written at 22:30 hours, approximately thirty minutes before Constable Wirth asked Cong if she wanted to call a lawyer. Constable Wirth believes that she got that name from Officer Pannu while Cong was in the lawyer's room at the airport but could not remember with any certainty the context in which it was written down.
- [18] Constable Wirth gave evidence in cross-examination, supported by her notes, that, at 23:02, she gave Cong the police warning informing her of her right of silence and then, after 23:05, inquired as to Cong's name and date of birth.
- [19] Cong was taken to the Richmond detachment where more information was given by the accused concerning her height, weight, address and race.

The Charter Argument

- [20] The respondent argues that Cong's s. 10(a) right was violated because she was never informed of the reason for her arrest.
- [21] I am satisfied that Constable Wirth never told Cong that she was being arrested pursuant to a warrant relating to the Extradition Act and I am satisfied that Constable Wirth erroneously informed Cong that the Canadian-wide warrant was in respect to conspiracy to traffic in marihuana under the Controlled Drugs and Substances Act.

[22] In *R. v. Evans*, [1991] 1 S.C.R. 869, at 886, McLachlin J. said:

The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 at p. 424, 44 C.R. (3d) 17, 12 C.R.R. 354 (Ont. C.A.). A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the court in *R. v. Black* (1989), 50 C.C.C. (3d) 1 at p. 12, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

[23] The fact that Cong told Constable Wirth that "lawyer doesn't tell me. I don't know why I'm arrested." reinforces my view that there was a breach of Cong's s. 10(a) Charter right. As stated above, I am satisfied that Constable Wirth misinformed her of the reason for her arrest. Furthermore, it appears from this quotation, that Cong did not understand what she had been told. It is unsettling that an officer, knowing that Cong had previously been communicating with the help of a Vietnamese interpreter, would hear Cong's words and not take steps to secure the aid of an interpreter to ensure that Cong understood the reason for her arrest. The above-quoted portion of *Evans* focuses on "knowing" the reason for one's detention, not merely being told of the reason. If the rights guaranteed by the Charter are not understood by the holder of those rights, their value is seriously compromised.

[24] The respondent further argues that her s. 10(b) rights were violated. Cong immediately expressed the desire to speak to counsel once her rights were read to her. She even gave the name of her lawyer. I am satisfied that she was not given a reasonable opportunity to contact counsel. In addition, and as mentioned, it was well known to Constable Wirth that Cong had requested and received a Vietnamese interpreter when she was in the lawyer's room at the Vancouver airport. Again, no attempt was made by Constable Wirth to obtain a Vietnamese interpreter.

[25] It is well settled that once a person under arrest expresses the desire to speak to counsel the person must be afforded reasonable opportunity to do so and all questioning must cease; *R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1242.

[26] There is potentially conflicting evidence as to whether Cong told Constable Wirth her name and date of birth before or after she was Chartered and declared that she wanted to speak to her lawyer. On direct examination, the sequence of questions make it appear that she gave her name and date of birth prior to receiving her Charter warning but in cross-examination it is apparent she was given her Charter warning at the same time she was rearrested at 22:58 hours, and that she was asked for her name and date of birth afterward.

- [27] That potential conflict in the evidence must be resolved in favour of Cong. By Constable Wirth's evidence in cross-examination, it is clear that Cong was asked her name and date of birth after she had stated that she wished to speak with her lawyer. It was never argued that Constable Wirth asked these questions twice, and, indeed, it would have been illogical for her to do so.
- [28] The Crown has made an argument under s. 24(2) of the Charter for the admissibility of the evidence in the event that it was obtained as a result of a Charter breach. As I will find that, even with the exclusion of this evidence, there is adequate evidence for identification, I will not address that argument here. Suffice to say that I am satisfied that Cong's rights under ss. 10(a) and 10(b) of the Charter have been unjustifiably violated and I therefore exclude any statement given by Cong after she was arrested by Wirth.

Limited Use of Identification Information

- [29] The Requesting State submits that the evidence obtained from the accused in respect to her name and date of birth is admissible as the failure of Constable Wirth not to take the necessary steps to ensure that she had arrested the proper person would in fact amount to negligence. They say, that there is ample authority for the admission of the identification evidence and rely upon the cases of *Re: O'Connor*, [1927] 1 D.L.R. 558 (S.C.); *Osayimwen v. The Queen* (2006), 210 C.C.C. (3d) 434 (Ont. Sup. Ct.); *R. v. Griffin*, [1979] B.C.J. No. 702 (C.A.), *R. v. Oliynyk*, 2005 BCSC 386; *aff'd* 2008 BCCA 132; *R. v. Adam*, 2006 BCSC 1884, *R. v. Tran*, 1999 BCCA 535, and *USA v. Graham*, 2004 BCSC 1768. All those cases, however, are either pre-Charter cases or are cases where there are no Charter violations.
- [30] I am satisfied that a police officer must be able to ensure that the person she has arrested is the individual named in the warrant. However, where an individual's Charter rights were breached to obtain that information, I am satisfied that it should be used only for the limited purpose of confirming that the correct person has been arrested and should be not used to prove the identity of that individual in proceedings such as these.

The Remaining Evidence Regarding Identification

- [31] The evidence that the person before the court is sought by the Requesting State consists of the following:
1. The Canadian Customs Border Service Agency provided Constable Wirth with a Canadian Passport in the name of Huyen Thi Cong. Constable Wirth compared the photograph in the passport to the individual that was in the Lawyer's Room, and was satisfied that she was dealing with the same person.
 2. When Constable Wirth arrived at CCBSA Office at the airport, Cong was in the Lawyer's Room where she, according to information received from Constable Wirth, was speaking to Legal Aid with the assistance of a Vietnamese interpreter.

3. Constable Wirth identified Cong in court.

[32] Attached to the ROC as Exhibit 1 is a photograph that was obtained from the Insurance Corporation of British Columbia and, which was used to have Cong identified by Minh Hong Pham and by Hine Van Woertz, two individuals who were involved with the alleged conspiracy. Woertz will testify that he lived with and was romantically involved with Cong while Pham will testify that he rented and lived in the same house as Woertz and Cong.

[33] The name of the person sought by the Requesting State is the same as that contained in the Driver's Licence and photograph marked Exhibit 2 to the ROC. It is admitted that Exhibit 1, the photograph used by Pham and Woertz to identify Cong, is the same photograph as that in Exhibit 2. Exhibit 2 also provides particulars regarding Cong's physical characteristics, namely the colour of her eyes, hair, weight, height, and sex.

[34] I am satisfied, by my own comparison of the person who appeared before me and the driver's licence photo and information attached to the ROC, that the person before me is the same individual as that referred to in that document. I also accept that Constable Wirth received a passport that had been taken from the person who appeared before me and that the passport was issued to Huyen Thi Cong. Thus, I am satisfied that there is ample evidence to conclude that Huyen Thi Cong, the person who appeared before me, is the person that the USA is requesting to have extradited.

The Evidence in the ROC Regarding Conspiracy to Traffic in Marihuana and Possession of Marihuana for the Purposes of Trafficking

[35] Cong argues that the ROC does not establish that she was a party to the conspiracy to traffic in marihuana or that she was in possession of marihuana on November 16, 2002.

[36] For the sake of convenience, I am setting out some of the evidence contained in the ROC.

Overview

[37] On November 16, 2002, the United States Drug Enforcement Administration ("DEA") Agents in Portland, Oregon, with the Portland Police, participated in an investigation, which resulted in the arrest of Randall Alan Clarke, Daniel Grant and Philadelphia Police Officer Hien Van Woertz in Portland, Oregon on federal drug charges. The authorities seized 838.5 pounds of British Columbia marihuana, approximately 57 pounds of pseudoephedrine and approximately \$50,000.00 U.S. currency. Within a few days, DEA Agents located another conspirator, James Bradford Myers, who admitted to his role in the drug distribution conspiracy.

[38] During the conspiracy, almost every week from May through November 16, 2002, marihuana and later ephedrine were smuggled from British Columbia to a warehouse located in Oregon. The drugs were supplied by Canadian brokers who arranged for the drugs to be delivered to Clarke and Patrick O'Brien in British Columbia. Clarke and O'Brien would then secrete the drugs in hollowed out or "coffined" units of lumber which were transported to

the United States. The lumber was delivered to a business, B&P Lumber Reman, in Dundee, Oregon. Every Saturday, combinations of Myers, Grant, Clarke or O'Brien would distribute the drugs to two separate lists of customers and/or their couriers. Huyen Thi Cong was a customer of Clarke and O'Brien. Van Woertz was a courier for Cong and would come to Oregon to pick up marihuana and take it to Cong in Seattle, Washington.

- [39] On November 16, 2002, an undercover police officer pretending to be a courier for one of Clarke and O'Brien's customers gave his vehicle to Clarke at the Home Depot store in Southeast Portland, Oregon for the purpose of receiving drugs. Clarke was followed by agents as he drove the undercover vehicle a short distance away where he gave the vehicle to Grant. Grant was followed when he took the undercover vehicle to a storage unit. When Grant returned the vehicle to the Home Depot parking lot, Agents discovered that the vehicle then contained a large athletic or hockey-type bag, which contained 57 pounds of ephedrine powder.
- [40] Later that day, Grant was arrested when he returned to the storage locker. In the storage locker, Agents found over 300 pounds of marihuana in hockey-type bags. Two additional storage lockers contained hundreds of pounds of marihuana. The total gross weight of the marihuana seized on November 16, 2002 was 838.5 pounds.
- [41] Van Woertz, a Philadelphia Police Officer under administrative leave, was arrested on November 16, 2002 at the Home Depot parking lot while attempting to pick up approximately 250 pounds of marihuana from Grant.

Van Woertz's Testimony

- [42] Van Woertz is expected to testify that he met Cong through an internet chat room in the spring of 2002 while he was living in Philadelphia. He later visited Cong in Vancouver and they became romantically involved. In September, 2002 Van Woertz moved to Seattle, Washington with his friend Minh Pham. Cong often visited Van Woertz in Seattle.
- [43] Cong offered Van Woertz and Pham the opportunity, which they accepted, to make between \$6,000.00 and \$20,000.00 a week transporting marihuana. Cong instructed them to purchase clean telephones, a vehicle which could be used to transport the marihuana and to obtain a residence in which to store the marihuana. Cong paid for these items on the understanding that Van Woertz would repay her through the transportation of the marihuana. Once these items were obtained, Cong took Van Woertz and Pham to a warehouse in Seattle, Washington where they obtained approximately 100 boxes of frozen shrimp. The boxes were taken to their new residence. Inside the residence Cong instructed Van Woertz and Pham to open the boxes and inside were approximately 25 bags containing approximately 75 to 100 pounds of marihuana.

- [44] In November of 2002, Cong directed Van Woertz to go to Portland, Oregon to pick up marihuana. On November 9, 2002 Van Woertz and Pham travelled in the recently purchased van to Portland, Oregon and picked up 200 pounds of marihuana. The marihuana was contained within large hockey bags. Van Woertz and Pham took the marihuana to Seattle, Washington where it was delivered to Cong, who was waiting at the Seattle residence. Cong paid \$5,000.00 to both Van Woertz and Pham for transporting the marihuana.
- [45] On November 16, 2002 Van Woertz received instructions, from an unknown caller on Cong's behalf, to travel again to Portland, Oregon to obtain marihuana. Van Woertz and Pham followed the instructions and took the van to the Home Depot store where they left the vehicle. Van Woertz was later arrested during the controlled delivery of 250 pounds of marihuana. Pham avoided arrest and fled the scene. After Van Woertz's arrest, Cong requested paperwork from Van Woertz to show that he had been arrested and that the marihuana had been seized by police, to show her associates that she was not responsible for the loss of the drugs.
- [46] During the period from September to November, 2002, Cong instructed Van Woertz to open two separate bank accounts to assist her in transferring money. Van Woertz opened an account with the U.S. Bank and one with Bank of America. Cong gave Van Woertz \$10,000.00 U.S. and asked that he divide the money equally and deposit it into the accounts and to obtain cashiers cheques payable to Cong and to Cong's mother. Van Woertz then mailed the cheques to Cong's address in Vancouver, B.C.
- [47] Van Woertz was indicted during this investigation and later pleaded guilty to conspiracy to distribute marihuana. He was sentenced to 24 months imprisonment by the United States District Court in Oregon.

Pham's Testimony

- [48] Pham is expected to testify that in September of 2002 he moved from Philadelphia to Seattle, Washington with his friend, Van Woertz. In Seattle, Pham and Van Woertz rented a house where they lived with Van Woertz's girlfriend, Cong. Pham was approached by Van Woertz and offered money to transport marihuana for Cong. Pham agreed. Pham was present when Van Woertz and Cong purchased a van which was used to transport the marihuana. Pham registered the vehicle in his name at the request of Van Woertz and Cong.
- [49] Pham assisted Van Woertz and Cong in transporting three loads of marihuana. The first load was obtained in Seattle, Washington from a seafood market. The marihuana was contained within boxes of frozen shrimp and taken to Van Woertz and Pham's residence in Seattle where Cong, Van Woertz and Pham removed and repackaged the marihuana. Pham was paid \$200.00 to \$300.00 by Cong for his assistance.

- [50] In early November, 2002 Cong directed Pham and Van Woertz to go to Portland, Oregon to pick up four large hockey bags containing marihuana. Pham and Van Woertz then transported the marihuana back to Seattle, Washington where Cong was waiting at their residence. Pham and Van Woertz acquired the marihuana from two white males, one of whom was driving a white van with a bicycle logo on the side (DEA Agents will testify that this was Grant's van).
- [51] On November 16, 2002 Pham and Van Woertz travel to Portland, Oregon to obtain another shipment of marihuana. During the trip, Van Woertz was arrested while attempting to take possession of the marihuana. Pham fled the scene and returned to Seattle where he met with Cong. Pham and Cong later travelled to Portland, Oregon so Cong could hire an attorney for Van Woertz and attend his Court proceedings.

Sufficiency of the Evidence For Committal On the Basis of Conspiracy to Traffic Marihuana

- [52] The USA is not arguing that the 25 bags of marihuana that were packed in the boxes of frozen shrimp were involved with the conspiracy charge or with the possession for the purpose of trafficking. They are relying upon the November 9 and November 16, 2002 events to prove the conspiracy to traffic and on the November 16, 2002 event to prove possession for the purposes of trafficking.
- [53] Cong argues that there is no evidence that she is part of a broad and extensive conspiracy and that the evidence of the two co-conspirators, Van Woertz and Pham, fails to describe the scope necessary to infer that Cong was part of an agreement that underlies the broad conspiracy.
- [54] With respect to s. 29(1) of the Act, the law was recently summarized in *United States of America v. Ferras*, 2006 SCC 33. Paragraph 46 states as follows:
- [46] Section 29(1)'s direction to an extradition judge to determine whether there is admissible evidence that would "justify committal" requires a judge to assess whether admissible evidence shows the justice or rightness in committing a person for extradition. It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot "justify committal". The evidence need not convince an extradition judge that a person sought is guilty of the alleged crimes. That assessment remains for the trial court in the foreign state. However, it must establish a case that could go to trial in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.

- [55] The British Columbia Court of Appeal considered the impact of Ferras, in *United States of America v. Graham*, 2007 BCCA 345, with respect to the test for committal. Donald J.A. explained that the Ferras approach did not exclusively focus on the reliability and availability of the evidence, but also involved a judicial "holistic appraisal of the case" to ensure that there is a plausible case and that the person sought is not committed on an inadequate evidentiary basis. At para. 32, Mr. Justice Donald said:
- [32] In summary, Ferras stands for the proposition that extradition judges now have the discretion to disregard evidence shown to be unreliable or unavailable and in respect of the evidence that remains, to determine by an assessment of the evidence, including a limited weighing of the evidence, whether it is sufficient for a properly instructed jury acting reasonably to reach a verdict of guilty in Canada.
- [56] Hall J.A., while in general agreement with the reasons of Donald J.A. added, at para. 41:
- [41] I wish, however, to note that I would consider it an extremely rare situation when an extradition judge could properly enter upon a consideration of the credibility of proposed witnesses. Credibility is pre-eminently a jury question to be left to be considered by the trier of fact. Unreliability of evidence could arise for instance from serious deficiencies in a body of circumstantial evidence or from the opportunity for a witness to know or observe factual matters. But the mere fact that a witness might be thought by an extradition judge to be of less than stellar credibility would not normally suffice as a ground to refuse a committal order. That sort of issue, in my opinion, is best left to be decided by a trial court.
- [57] In respect to the issue of conflicting evidence, Rogers J., in *United States of America v. Asiegbu*, 2006 BCSC 1378, said at para. 45:
- [45] Coming back to the assessment prescribed in Ferras, I have to ask: does the fact that there is conflicting evidence on an element of an offence mean that a trial judge must necessarily take the case away from the jury? The answer to that question is patently "no". In fact, a jury's primary task is to resolve those very conflicts, and having done so, to arrive at conclusions of fact concerning the elements of the offence. Rather than being dangerous to ask the jury to resolve conflicts in the evidence, the law requires that the jury be given that task and trusts that it will perform it properly. If it would not be dangerous or unsafe to leave this evidence with a jury, then, according to Ferras it passes muster in an extradition order and an order for committal should follow.
- [58] Cong points out numerous inconsistencies in the evidence of Van Woertz and Pham but, as stated in *Asiegbu*, that is a matter for the jury.
- [59] Cong also argues that the November 16, 2002 transaction where an "unknown caller on Cong's behalf" provided directions for Van Woertz to go to Portland, Oregon, to pickup drugs, is inadmissible or should be afforded no weight. The evidence of the phone call, according to Cong, is double hearsay and, according to her, it is doubtful that such evidence could be admitted in the United States.

- [60] In *United States of America v. Yang* (2001), 157 C.C.C. (3d) 225 (Ont. C.A.), Rosenberg J.A., in upholding the constitutionality of s. 32(1)(a) of the Act, found that hearsay evidence contained in a properly certified record of a case is admissible at an extradition hearing without the need for further inquiry. The Court stated, at para. 11:
- [11] it is apparent that various types of evidence that would not be admissible at a Canadian trial are admissible at the extradition hearing. In particular, hearsay is admissible although it would not meet a common law or statutory exception and would not meet the necessity and reliability requirements set out by the Supreme Court in cases such as *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257, and *R. v. Smith*, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257, 94 D.L.R. (4th) 590. Thus, as I will describe below, the record of the case in the appellant's case consisted entirely of second- or third-hand hearsay that would probably not be admissible in a Canadian trial. The impugned provisions would also permit admission of character or opinion evidence at the extradition hearing although such evidence might not be admissible at a Canadian trial.
- [61] That hearsay is presumptively admissible in a record of the case tendered in conformity with s. 32(1)(2) of the Act was affirmed by the Supreme Court of Canada in *Ferras*, at para. 28:
- [28] The Act provides that evidence is admissible if it is either properly certified pursuant to s. 33(3) in the case of proceedings on the record of the case or in accordance with the treaty in proceedings under the treaty method of submitting evidence. The evidence may be hearsay, and under the treaties at issue in the *Ortega* appeals, the evidence need not include certification that it is available for trial.
- [62] The Court goes on to state, at para. 31:
- [31] The requesting state's certificate is intended to provide a threshold indicator of reliability by reference to the requesting state's standards.
- [63] In the case at bar, the evidence of the conspiracy includes the fact that once the drugs were delivered to Dundee, Oregon, every Saturday, combinations of Myers, Grant, Clark, or O'Brien, would distribute the drugs to two separate lists of customers and/or their couriers. It is alleged, in the overview of the ROC, that Cong was a customer of Clark and O'Brien and that Van Woertz was a courier for Cong
- [64] It is further stated, in the ROC, that Cong offered Van Woertz and Pham the opportunity to make between \$6,000 and \$20,000 a week transporting marihuana, and that they accepted such remuneration. It is also alleged that Cong instructed them to purchase clean telephones, a vehicle which would be used to transport the marihuana and to obtain the residence in which to store the marihuana, and that Cong paid for these items on the understanding that Van Woertz would repay her.

- [65] The evidence in the ROC is that once the items were purchased, Cong took Van Woertz and Pham to a warehouse in Seattle where they obtained approximately 100 boxes of frozen shrimp that was taken to their new residence. Inside, Cong allegedly instructed Van Woertz and Pham to open the boxes where there were approximately 25 bags containing 75 to 100 pounds of marihuana.
- [66] On Saturday, November 9, 2002, Cong allegedly directed Van Woertz to go to Portland to pick up marihuana. Van Woertz and Pham then allegedly took the 200 pounds of marihuana to Seattle, and delivered it to Cong in return for \$500 each.
- [67] On Saturday, November 16, 2002, Van Woertz claims to have received instructions from an unknown caller on Cong's behalf to travel to Portland, Oregon, to obtain marihuana. Following those instructions Van Woertz and Pham are alleged to have taken the van to Home Depot where Van Woertz was later arrested during a controlled delivery of 250 pounds of marihuana. Van Woertz's is expected to testify that, after his arrest, Cong requested paperwork from him to show that he had been arrested and that the drugs had been seized by police. It is suggested that she needed this documentation to show her associates that she was not responsible for the loss of the drugs.
- [68] The need for Cong to show that she was not responsible for the loss of the drugs is consistent with my view that she was the operating mind behind this conspiracy to traffic in marihuana.
- [69] It is not clear whether Woertz and Pham actually had possession of the marihuana on November 16. The ROC says that they were "attempting to pick up approximately 250 pounds of marihuana" and that Woertz was arrested during a "controlled delivery of 250 pounds of marihuana". Cong argues that that is not sufficient evidence of possession. There is, however, no issue that Woertz's van, which was initially paid for by Cong, was used in the transportation of the drugs and that Woertz was there to pick up the van, which supposedly contained the marihuana. The logical inference would be that the marihuana was in the van as that was what Woertz was arrested for and plead guilty to. His plea of guilty, however, cannot be used against Cong.
- [70] There is also the fact that the 838.5 pounds of marihuana that was seized on November 16 was, according to the testimony of the chemist, the amount that was seized on "the same day from Clark and Grant". Cong, therefore says there was no marihuana in the van. I disagree that this inconsistency should prevent committal.

[71] In *USA v. Hulley*, 2007 BCSC 976, Cullen J. stated, at para. 25:

... the inconsistencies within and between their accounts and with other evidence summarized in the ROC and SROC, those are issues of ultimate reliability rather than threshold reliability and do not negate the justice or rightness of committal in this case. I start with the proposition that the evidence tendered by the requesting state is subject to a presumption of reliability.

[72] I am satisfied that the evidence contained in the ROC is admissible and that there is sufficient evidence to justify committal on the basis of conspiracy to traffic marihuana.

Sufficiency of the Evidence for Committal on the Basis of Possession for the Purposes of Trafficking

[73] Cong's position is that there is no analysis of the drugs involved in the first two transactions. It is only the November 16 transaction in which the drugs were seized. It is admitted that the amounts seized on that date was consistent with possession for the purposes of trafficking but that the evidence does not connect Cong to that transaction as they say there is no reliable evidence of Cong's involvement.

[74] I have already dealt with the issue of hearsay evidence and, in my view, some weight should be given to that evidence because the individual that called obviously knew where to pick up the marihuana. The evidence of Van Woertz - that Cong requested paperwork from him to show that he had been arrested and the marihuana was seized by police to show her associates that she was not responsible for the loss of the drugs - is consistent with her being the operating mind behind the conduct of Van Woertz and Pham. The essential element of possession under s. 4(3)(b) of the Criminal Code is the measure of control on the part of the person deemed to be in possession by that provision. To establish control for the purpose of constructive or joint possession, the Crown need not prove actual physical control by the accused. It is sufficient if there is evidence of the accused exerting power or authority over the subject matter; *R. v. Terrence*, [1983] 1 S.C.R. 357.

[75] All the evidence suggests that Cong not only had knowledge and control of the drugs in question; she had constructive possession or joint possession at the relevant times.

[76] Having already found the evidence in the ROC admissible, I am satisfied that there is sufficient evidence to justify committal on the basis of possession for the purpose of trafficking.

Disposition

[77] I have found that, despite the exclusion of some evidence as a result of a breach of Cong's rights under ss. 10(a) and (b) of the Charter, there is adequate evidence for identification. I have also found that there is sufficient evidence in the ROC to justify committal. As this is the case, I order that Cong be committed for extradition.

"The Honourable Mr. Justice F. W. Cole"

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