

CANADA / JUDGMENT

Commonwealth of Australia v. Ho

2000 BCSC 1744

COURT

Supreme Court of British Columbia

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2000 BCSC 1744

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IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE REQUEST FOR EXTRADITION OF

KIN CHUEN TOMMY HO BY THE GOVERNMENT OF AUSTRALIA

PURSUANT TO THE EXTRADITION ACT

BETWEEN:

THE COMMONWEALTH OF AUSTRALIA
APPLICANT

AND:

KIN CHUEN TOMMY HO
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BOUCK

Counsel for the Applicant: R.G. McMeans

Counsel for the Respondent: Michael Klein

Date and Place of Hearing/Trial: October 3, 2000

Vancouver, BC

INTRODUCTION

- [1] The Commonwealth of Australia seeks extradition of Mr. Kin Chuen Ho ("Mr. Ho"). Australia claims that Mr. Ho committed the following offences in Australia: conspiracy to import heroin, importing heroin, conspiracy to traffic in heroin, trafficking in heroin and possession of heroin for the purpose of trafficking in heroin.
- [2] The offences allegedly occurred between 1992 and approximately 27 September 1994. My task is to determine whether Mr. Ho should be extradited to Australia under the Extradition Act, S.C. 1999, c. 18 (the "Act").

FACTS

- [3] Counsel for Australia filed an unsworn document entitled "Certification of Record of the Case for Prosecution", dated 15 October 1999 ("the Certification"). It is signed by Mr. Glenn Thomas John Farley, Barrister and Solicitor of the Perth Office of the Director of Public Prosecutions for the Commonwealth of Australia. Mr. Farley states "that the evidence summarised or contained in the attached documents is available for trial and is sufficient under the law of Australia to justify prosecution."
- [4] According to the Certification, Mr. Ho and Mr. Wei Huan Fu ("Mr. Fu") were central figures in the alleged commission of the listed offences. The following information comes from the Certification. Unfortunately the Certification does not list the details of the investigation in chronological order. It took some time to sort out the order of events for the facts to be clear.
- [5] Mr. Fu normally resided in Shandong Province, Peoples Republic of China, and worked as a seaman. In 1992, Mr. Fu arrived in Vancouver, B.C., as a seaman on a merchant ship. Another crewmember, Mr. Jian Min Yang ("Mr. Yang"), introduced Mr. Fu to Mr. Ho. Mr. Ho asked Mr. Fu if he would like to make money by taking goods from China to Canada, and told him that Mr. Ho would pay him \$60,000 for his services. Mr. Ho said that he would introduce Mr. Fu to another friend who would meet Mr. Fu in China, and tell him what goods to bring to Canada. Mr. Fu agreed.
- [6] Mr. Fu left Canada and returned to Huang Pu, China. While in China, Mr. Fu was present when Mr. Ho telephoned Mr. Yang. Mr. Fu also spoke to Mr. Ho. Mr. Fu told Mr. Ho that he did not know the port of call for his next voyage. Mr. Ho asked Mr. Fu to call him collect in Vancouver when Mr. Fu arrived at his next port. Mr. Yang gave Mr. Ho's telephone number in Vancouver to Mr. Fu.
- [7] Later, while still in China, Mr. Fu telephoned Mr. Ho in Vancouver. Mr. Ho said that he hoped Mr. Fu could come to Canada again. In October 1995, Canadian customs officials found Mr. Yang's telephone number in Mr. Ho's possession when Mr. Ho returned to Canada from out of the country.

- [8] In 1993, Mr. Yang introduced Mr. Fu to Mr. Chuck Sun Lau ("Mr. Lau") and Mr. Kwong Yue Cheung ("Mr. Cheung"). Sometime before, while in Canada, Mr. Fu saw Mr. Ho with Mr. Lau but they were not formally introduced.
- [9] In 1994 Mr. Fu was a seaman on a vessel named Trans Aspiration. In April or May of that year, the ship was docked in a Chinese port. At that time, Mr. Yang asked Mr. Fu if he could take some personal luggage to Canada for him. They agreed to wait until Mr. Fu found out where the ship was going.
- [10] The ship then sailed to a Chinese port in Guang Zhou. While there, Mr. Fu met with Mr. Yang and Mr. Lau. They told Mr. Fu that the ship was travelling to Canada. Later that day, Mr. Yang, Mr. Lau and Mr. Cheung gave Mr. Fu and his other two crew members, Mr. Wang and Mr. Chang, three bags to take onto the ship. Mr. Lau said he would pick up the luggage in Canada and pay each of the three seamen \$20,000 on delivery. He told the seamen to put the bags some place safe on the ship but not in their rooms. That way, if customs officials found the bags the seamen could say they did not belong to them.
- [11] Once the ship was at sea, the seamen opened the bags and decided they contained heroin. They hid the contents in empty paint tins on the ship. Rather than sailing to Canada, the ship sailed to a port in Australia and then returned to China. Mr. Fu called Mr. Lau and told him he did not know where the ship was going to next. Mr. Fu left the bags on the ship.
- [12] On the next trip, the vessel sailed again to Australia and returned quickly to Huang Pu, Guang Zhou, China. Mr. Fu then phoned Mr. Lau, and arranged to meet with Mr. Lau, Mr. Cheung and the other two seamen in a local restaurant. Mr. Lau inquired about the bags. He told the seamen they would be paid when they handed the bags over in Canada.
- [13] In August 1994 Mr. Fu and Mr. Yang met Mr. Ho in Guang Zhou, China. In response to Mr. Ho's inquiry, Mr. Fu said he did not know if the ship was going to Canada on its next voyage. Mr. Ho asked Mr. Fu where he had put the "stuff" on the ship? Mr. Ho told the men that if the goods arrived in Canada, he would give them more money. A few days later, Mr. Ho told Mr. Fu to look after himself if anything happens and that he hoped to see Mr. Fu in Canada. This was the last time Mr. Fu saw Mr. Ho.
- [14] In late August 1994, the ship sailed to Geraldton, Western Australia, and arrived on 6 September 1994. While on shore the three seamen saw Mr. Lau and Mr. Cheung in front of the Seamen's Club. Mr. Fu and Mr. Wang went to Mr. Lau's hotel room along with Mr. Cheung and Mr. Lau. While there, Mr. Lau spoke to Mr. Ho on the phone. Mr. Lau gave the phone to Mr. Fu. Mr. Ho told Mr. Fu, words to the effect: "do exactly as Mr. Lau says, whatever happens later on don't worry about it."
- [15] When the call was over, Mr. Lau asked Mr. Fu for the bags. Mr. Lau then drove Mr. Fu, Mr. Wang and Mr. Chang back to the wharf. He pointed out a spot near the biggest door on a nearby warehouse. He told them to meet him there on 10 September 1994 at 4:30 A.M. with the bags. Mr. Lau said that "he and Mr. Cheung would be waiting in the car with the boot

open, and that they were to put the bags containing the stuff in the boot." He also said that he would give the seamen their money after they gave the bags to him and called him at the motel.

- [16] The three seamen then delivered the heroin bags to the car as arranged. Soon after collecting the bags, Mr. Lau and Mr. Cheung drove to Perth and booked into the Toorak Lodge Motel on Great Eastern Highway, Rivervale. Later Mr. Chang tried to phone Mr. Lau at his motel but was unable to reach him.
- [17] About 7:30 A.M. on 12 September 1994, in Perth, Australia, Mr. Lau gave two of the bags to an Australian police informer at the Perth International Hotel. After Mr. Lau left, the police seized the bags from the informer. Police tested the 58 packages seized at the Perth International Hotel and found that it weighed 15.59 kg, and that it was heroin.
- [18] On 13 September 1994, Mr. Fu telephoned Mr. Yang in China and asked to be paid. Mr. Yang gave Mr. Fu a new phone number for Mr. Ho, and asked that Mr. Fu call Mr. Ho. Mr. Fu called the number but all he got was a recorded message in English.
- [19] On 15 September 1994, at approximately 11:45 A.M., Australian police identified Mr. Lau, Mr. Cheung and a Nancy Chow leaving the Great Eastern Motor Lodge together in a motor vehicle. It went to the Perth International Hotel. Later on that day police saw Mr. Lau and Mr. Cheung go to the Ansett Terminal at the Perth Airport. Mr. Ho Kwong Wan ("Mr. Wan") left the Terminal with Mr. Lau and Mr. Cheung. At 5:30 P.M. that day, the police saw Mr. Wan and Mr. Cheung walk into the Perth International Hotel.
- [20] On 16 September 1994 around 11:10 A.M., police observed Mr. Lau and Mr. Wan at the All Travellers Motel in Rivervale. About 1:00 P.M. that day they saw Mr. Wan and Mr. Cheung leave the motel and drive to the Bel Eyre Motel.
- [21] On 17 September 1994 police saw Mr. Wan take a large plastic bag out of the trunk of the car and take it to his room in the Bel Eyre Motel. Later, on 17 September 1994, Australian police arrested Mr. Lau and Mr. Cheung. On 19 September 1994 the police recovered 7.6 kilograms of heroin from Mr. Wan's room at the Bel Eyre Motel, Rivervale. Police also arrested Mr. Fu. He was later convicted by the Australian courts and is now serving a sentence of imprisonment. Mr. Fu agreed to give evidence at the trial of others involved in the importation of heroin into Australia.
- [22] On 11 May 2000, Mr. Jacques Lemire, Senior Counsel, International Assistance Group, Minister of Justice of Canada, signed a document entitled "Authority to Proceed" under s. 15 of the Act. This document seeks an order committing Mr. Ho who is sought for prosecution in Australia. It goes on to state that the Canadian offences corresponding to his alleged conduct are as follows:
1. Conspiracy to import heroin contrary to s. 465(1)(c) of the Criminal Code and s. 6(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.

2. Importing heroin contrary to s. 6(1) of the Controlled Drugs and Substances Act, *supra*.
3. Conspiracy to traffic in heroin contrary to s. 465(1)(c) of the Criminal Code and s. 5(1) of the Controlled Drugs and Substances Act, *supra*.
4. Trafficking in heroin contrary to s. 5(1) of the Controlled Drugs and Substances Act, *supra*.
5. Possession of heroin for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, *supra*.

ISSUES

[23] Under s. 29(1)(a) of the Act, is there admissible evidence that:

1. Would justify Mr. Ho's committal for trial in Canada for the offences set out in the "Authority to Proceed", had those offences occurred in Canada; and
2. Satisfies me that Mr. Ho is the person sought by Australia?

ANALYSIS

[24] Section 29(1)(a) of the Act reads:

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 ...

[25] Therefore, I must decide whether there is evidence before me that would justify Mr. Ho's committal for trial in Canada had the offences occurred in Canada. The test with respect to committing an accused for trial in Canada can be found in *United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.):

[A judge] ... is ... required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

[26] I will now examine this test in relation to each offence. Because of s. 29(1)(a) of the Act and the *Sheppard* decision, I must approach the issues theoretically. First, I must place myself in the position of a British Columbia Provincial Court Judge holding a Preliminary Inquiry into the offences described in the "Authority to Proceed". Second, to avoid factual confusion, I should imagine that I am presiding over this hearing while sitting in Australia, but with the powers of a British Columbia Provincial Court Judge presiding over a Preliminary Inquiry. Third, I must apply Canadian law to the offences as if Mr. Ho allegedly committed them in Canada.

- [27] Part XVIII of the Criminal Code sets out the procedure on a Preliminary Inquiry; ss. 535 to 542. Section 24(2) of the Act gives me the powers of a Provincial Court Judge holding a preliminary inquiry, subject to any modifications the circumstances may require. However, many of the procedural elements and rules of a Preliminary Inquiry are inapplicable to an extradition hearing: *United States of America v. Dynar* (1997), 115 C.C.C. (3d) 481 at 524 (S.C.C.):
- [132] ... The obligation of the Requesting State is simply to establish a *prima facie* case for the surrender of the fugitive and it is not required to go further than this. The committal hearing is neither intended nor designed to provide the discovery function of a domestic preliminary inquiry.
- [28] It is also unnecessary to determine whether Mr. Ho's actions constituted a crime in Australia: *McVey (Re); McVey v. United States of America* (1992), 77 C.C.C. (3d) 1 at 12 (S.C.C.).
- [29] Shortly put, then, under the Act an "extradition crime" is one that if committed in Canada would be one described in the Schedule or treaty as construed according to the laws of Canada. There is nothing in the Act requiring proof that the act charged be a crime under the foreign law.
- [30] The relevant "Rules of Evidence" I must apply are found in ss. 31 to 37 of the Act. Two major differences exist between proceedings at a Canadian Criminal Code Preliminary Inquiry and proceedings held under the Act. First, at a Criminal Code Preliminary Inquiry, unless the accused otherwise agrees, the prosecution must present live witnesses who testify under oath or affirmation. The evidence's admissibility must comply with Canadian rules of evidence: *Criminal Code s. 540(1)(a); R. v. Giles* (1992), 75 C.C.C. (3d) 315 at 318 (Gow J., B.C.S.C.):

The task of the Criminal Code justice presiding at a preliminary inquiry is to decide whether he should order the accused to stand trial or discharge him. To obtain an order that the accused stand trial, the Crown must, as evidence, present sufficient facts to make out a *prima facie* case. The accused is entitled to challenge not only the credit worthiness of presented evidence but also the admissibility as evidence of facts which the Crown seeks to present. As and when necessary, the justice must rule upon the issue of admissibility. Ordinarily, the only consequence of a ruling upon admissibility is that a presented fact in whole or in part is admitted as evidence or it is not.

- [31] However, the Act allows for the admission of unsworn evidence such as the Certification: *United States of America v. Bruce Desmond Debarros a.k.a. Joseph Jean Meyers*, (9 February 2000), Toronto Registry, E-9/99 (Ont. Sup. Ct. J.) at para. 34.
- [32] Second, at a Criminal Code Preliminary Inquiry witnesses may be cross-examined by the defence: *Criminal Code s. 540(1)(a)*. Under the Act, there does not appear to be a right to cross-examine the foreign official who signed the Certification: see *United States of America v. Drysdale* (2000), 71 C.R.R. (2d) 133 at 144 - 146 (Ont. Sup. Ct.). In that case counsel for the alleged fugitive requested an order allowing cross-examination by video-link of deponents

who swore various affidavits on behalf of the extradition partner. Dambrot J. rejected the application at 146:

Accordingly, I reject the argument that s. 7 of the Charter provides to the Applicants a right to cross-examine the affiants who swore the affidavits tendered by the requesting state by video link.

[33] Keeping these differences in mind, I will now examine the nature of the crimes Mr. Ho allegedly committed as described in the Authority to Proceed.

1. Conspiracy To Import Heroin

[34] Section 465(1)(c) of the Criminal Code sets out the statutory definition of a conspiracy. It reads in part:

465(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy: ...

(c) every one who conspires with any one to commit an indictable offence ... is guilty of an indictable offence ...

[35] Section 6(1) of the Controlled Drugs and Substances Act, *supra*, states that "... no person shall import into Canada ... a substance included in Schedule I ...". Schedule I of that Act lists heroin as a controlled substance, and s. 6(3)(a) of that Act states that the offence of importing heroin is an indictable offence.

[36] To convict Mr. Ho of conspiracy to import heroin, the prosecution must prove:

- (a) the identity of Mr. Ho as the offender;
- (b) the time and place of the offence as set out in the Certification;
- (c) that there was a conspiracy to commit the indictable offence of importing heroin;
- (d) that Mr. Ho was a member of the conspiracy; and
- (e) that Mr. Ho intended to be a member of the conspiracy.

(a) Identity of Mr. Ho as the Offender

[37] At the hearing before me, the prosecutor called Mr. Gahan to identify Mr. Ho as the person involved in these alleged offences. He was a Canada Customs intelligence officer who examined Mr. Ho when he re-entered Canada at the Vancouver, B.C. International Airport on 26 October 1995. Mr. Ho's flight originated in Bangkok, Thailand with a stop in Hong Kong. Mr. Gahan was also present on a previous occasion when Mr. Ho returned from a trip to China. Documents, including a photocopy of his passport containing his picture, were filed as evidence.

[38] Additionally, the Certification contains a picture of Mr. Ho that matches the appearance of the person who appeared before me during this hearing. Mr. Fu identified Mr. Ho from the pictures contained in the Certification. Therefore, I find the identification evidence meets the test in *Sheppard*, *supra*, and in s. 29(1)(a) of the Act.

(b) Time and Place of the Offence

[39] According to the Certification, this offence took place in or around Perth, Australia between 6 September 1994, when Mr. Ho told Mr. Fu to do exactly as Mr. Lau ordered, and 17 September when police completed the arrests of Mr. Lau, Mr. Cheung and others.

(c) Conspiracy to Commit the Indictable Offence of Importing Heroin

[40] Next, is the question of conspiracy to commit an indictable offence. A conspiracy is an agreement to perform an illegal act or to achieve a result by illegal means: *R. v. Douglas* (1991), 63 C.C.C. (3d) 29 at 40 (S.C.C.). Circumstantial evidence can be used to prove a conspiracy if it leads to the conclusion or inference that those involved agreed to effect the unlawful purpose: *R. v. Paradis* (1934), 61 C.C.C. 184 at 186 (S.C.C.).

[41] Importing heroin is an indictable offence: *Controlled Drugs and Substances Act*, *supra*, at s. 6(3)(a). Because of the evidence relating to the activities of Mr. Ho, Mr. Lau, Mr. Fu and others at or around 6 September 1994, there is sufficient evidence of Mr. Ho being part of a conspiratorial agreement to commit the indictable offence of importing heroin.

(d) Mr. Ho's Membership in the Conspiracy

[42] Mr. Ho spoke on the telephone to Mr. Lau and Mr. Fu on 6 September 1994. Mr. Ho told Mr. Fu to do exactly what Mr. Lau said in relation to the packages. Mr. Fu and his two seamen friends later put the heroin in a car as directed by Mr. Lau. At the very least, the members of the conspiracy to import were Mr. Ho, Mr. Lau, Mr. Fu, Mr. Cheung, Mr. Wang and Mr. Chang.

(e) Mr. Ho's Intention to be a Member of the Conspiracy

[43] The last ingredient the prosecution must prove is the intention of Mr. Ho to be a member of the conspiracy to import heroin. Intention is a state of mind. When deciding upon Mr. Ho's intention, I am entitled, as a matter of common sense, to draw the inference that a sane and sober person intends the natural and probable consequences of his or her voluntary acts. The only reasonable inference is that Mr. Ho intended to be a member of the conspiracy for the purpose of committing the offence of importing heroin.

[44] From this analysis, I find there is sufficient evidence of a conspiracy to import heroin between Mr. Ho, Mr. Lau, Mr. Fu and others to meet the test for committing Mr. Ho for trial under the Act. Therefore, I order his extradition on this charge.

2. Importing Heroin

- [45] Section 6(1) of the Controlled Drugs and Substances Act, *supra*, states that "no person shall import into Canada ... a substance included in Schedule I". Schedule I of that Act lists heroin as a controlled substance, and s. 6(3)(a) of that Act states that the offence of importing heroin is an indictable offence.
- [46] To convict Mr. Ho of importing heroin the prosecution must prove:
- (a) the identity of Mr. Ho as the offender;
 - (b) the time and place of the offence as set out in the Certification;
 - (c) that Mr. Ho imported heroin; and
 - (d) that Mr. Ho intended to import heroin.
- (a) and (b) Identity of Mr. Ho as the Offender, and Time and Place of the Offence
- [47] For the reasons set out in the discussion of the charge of conspiracy to import heroin, I find that there is sufficient evidence to satisfy elements (a) and (b).
- (c) Importation of Heroin by Mr. Ho
- [48] With respect to ingredient (c) the law says that the ordinary meaning of the word "import" should apply: *R. v. Bell* (1983), 8 C.C.C. (3d) 97 at 110 (S.C.C.). That is, simply to bring goods into the country or to cause them to be brought into the country. The offence is complete when the goods enter the country. It is not necessary for the prosecution to show that the accused actually carried the goods into the country. Neither is it necessary to show the presence of the accused at the point of entry: *R. v. Bell*, *supra*, at 111.
- [49] It is quite possible for "A" (Mr. Ho), while at town "X" (Vancouver), to make all the arrangements and perform all the acts required to import illicit goods into town "Y" (Perth, Australia). The focus must be upon the acts done by the accused in relation to the act of importation, regardless of the accused's location: *R. v. Bell*, *supra*, at 110 - 111; B. MacFarlane, R. Frater and C. Proulx, *Drug Offences in Canada*, 3rd ed., (Aurora: Canada Law Book Inc., 1999) at 7.160 - 7.180. Although Mr. Ho was in Canada when the heroin arrived in Australia, he can still be committed under the Act for importing heroin into Australia.
- [50] The act of importation is complete when the vessel arrived at its destination in Perth, Australia and Mr. Fu, Mr. Chang and Mr. Wang unloaded the heroin: *R. v. Miller* (1984), 12 C.C.C. (3d) 54 at 83 (B.C.C.A.).
- (d) Mr. Ho's Intention to Import Heroin Into Australia

[51] The prosecution must also prove that Mr. Ho intended to import heroin: R. v. Wah Sing Chow (1927), 48 C.C.C. 144 at 145 - 146 (B.C.C.A.); R. v. Blondin (1970), 2 C.C.C. (2d) 118 at 131 - 132 (B.C.C.A.). Applying the common sense inference mentioned above, it seems clear that Mr. Ho intended to import the heroin into Australia when he told Mr. Fu to do what Mr. Lau says. Therefore, the only reasonable inference is that Mr. Ho intended to import the heroin into Australia.

[52] From this analysis, I find there is evidence before me of Mr. Ho's conduct that would justify his committal for trial on the charge of importing heroin. Therefore, I order his extradition on this charge.

3. Conspiracy to Traffic in Heroin

[53] Again, s. 465(1)(c) of the Criminal Code sets out the statutory definition of a conspiracy. It reads in part:

465(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy: ...

(c) every one who conspires with any one to commit an indictable offence ... is guilty of an indictable offence ...

[54] Under the Controlled Drugs and Substances Act, supra, s. 5(3)(a), it is an indictable offence to traffic in heroin.

[55] To convict Mr. Ho of conspiracy to traffic in heroin, the prosecution must prove:

- (a) the identity of Mr. Ho as an offender;
- (b) the time and place of the offence as set out in the Certification;
- (c) that there was a conspiracy to commit the offence of trafficking in heroin;
- (d) that Mr. Ho was a member of the conspiracy; and
- (e) that Mr. Ho intended to be a member of the conspiracy.

(a) and (b) Identity of Mr. Ho as the Offender, and Time and Place of the Offence

[56] As stated above, I find that there is sufficient evidence to satisfy ingredients (a) and (b).

(c) Trafficking in Heroin

[57] With respect to ingredient (c), alleging Mr. Ho was part of a conspiracy to traffic in heroin, I adopt the analysis set out above in relation to the charge of conspiracy to import heroin and find that there was also a conspiracy to traffic in heroin. In doing so, I am applying the law relating to trafficking in heroin set out in point 4 below. Given the volume of heroin found by the Australian authorities, there is sufficient evidence of a plan to traffic in heroin to satisfy this ingredient.

(d) Mr. Ho's Intention to Traffic in Heroin

[58] Applying the law on intention I find that the only reasonable inference is that Mr. Ho intended to conspire to traffic in heroin. There is evidence that would justify committal for trial on the charge of conspiracy to traffic heroin. Therefore, I order his extradition on this charge.

4. Trafficking in Heroin

[59] Trafficking is defined in s. 2 of the Controlled Drugs and Substances Act, *supra*, to include selling, administering, giving, transferring, transporting, sending or delivering the substance. Section 5(1) of the statute makes it an offence to traffic in heroin.

[60] To convict Mr. Ho of trafficking in heroin, the prosecution must prove:

- (a) the identity of Mr. Ho as an offender;
 - (b) the time and place of the offence as set out in the Certification;
 - (c) that Mr. Ho committed the offence of trafficking in heroin; and
 - (d) that Mr. Ho intended to traffic in heroin.
- (a) and (b) Identity of Mr. Ho as the Offender, and Time and Place of the Offence

[61] Again, I find sufficient evidence to satisfy ingredients (a) and (b).

(c) Commission of the Offence of Trafficking

[62] Ingredient (c) involves a determination as to whether Mr. Ho trafficked in heroin. From the evidence submitted, it appears that Mr. Ho was not physically present when the heroin arrived in Australia. There is no evidence that he directly sold the heroin to anyone.

[63] However, there is evidence that he was a party to the offence of trafficking under s. 21(1)(b) of the Criminal Code, when he instructed Mr. Fu to give the heroin to Mr. Lau. Mr. Ho aided or helped Mr. Fu in Mr. Fu's criminal purpose of delivering the heroin to Mr. Lau. In these circumstances the law treats Mr. Ho as a principal offender: *R. v. Roy* (1900), 3 C.C.C. 472 at 476 - 477 (Que. S.C.); *R. v. Preston* (1949), 93 C.C.C. 81 at 83 - 84 (S.C.C.).

(d) Mr. Ho's Intention to Traffic in Heroin

[64] To commit Mr. Ho as a party to the offence of trafficking in heroin, the evidence must show he had an intention to do so. From the above facts there is no doubt that Mr. Ho encouraged Mr. Fu to deliver the heroin to Mr. Lau. Thus, he intended to be a party to the offence of trafficking in heroin: *R. v. Greyeyes* (1997), 116 C.C.C. (3d) 334 at 348 - 349 (S.C.C.).

[65] I find there is sufficient evidence to justify Mr. Ho's committal for trial on the charge of trafficking heroin. Therefore, I order his extradition on this charge.

5. Possession of Heroin for the Purpose of Trafficking

- [66] Under ss. 5(2) and (3) of the Controlled Drugs and Substances Act, *supra*, a person who possesses heroin for the purpose of trafficking is guilty of an indictable offence. That Act defines "possession" as meaning "possession within the meaning of subsection 4(3) of the Criminal Code."
- [67] Section 4(3)(a) of the Criminal Code gives the word "possession" a very wide meaning. A person has possession of an item if he or she has personal possession of that item. The person also has possession of the item, if he or she knowingly has that item, in another person's physical possession.
- [68] To convict Mr. Ho of possession of heroin for the purpose of trafficking, the prosecution must prove:
- (a) the identity of Mr. Ho as the offender;
 - (b) the time and place of the offence as set out in the Certification;
 - (c) that Mr. Ho committed the offence of possessing heroin for the purpose of trafficking; and
 - (d) that Mr. Ho intended to traffic in heroin.
- (a) and (b) Identity of Mr. Ho as the Offender, and Time and Place of the Offence
- [69] As before, I find that ingredients (a) and (b) are proven to the extent required under the Act.
- (c) and (d) Possession for the Purpose of Trafficking and Intention to Traffic in Heroin
- [70] Here there is evidence that Mr. Ho possessed the heroin because he knowingly had the heroin in Mr. Fu's physical possession when Mr. Ho spoke to Mr. Fu on the telephone from Australia on or about 6 September 1994.
- [71] The issue is, did Mr. Ho possess the heroin for the purpose of trafficking? Answering this question requires a trier of fact to determine the intention of a person who possesses illegal drugs. The question to be resolved is, did Mr. Ho intend to possess the heroin for his personal use, or for the purpose of trafficking. An intention to traffic can be inferred where an accused person is in possession of a large quantity of illegal substances: *R. v. Wilson* (1954), 11 W.W.R. (N.S.) 282 at 283 (B.C.C.A.).
- [72] In this case, the Certification states that relatively large amounts of heroin were involved. Furthermore, on the telephone Mr. Ho told Mr. Fu to give the heroin to Mr. Lau. Finally, the Certification contains information demonstrating that Mr. Ho aided or abetted Mr. Fu in giving the heroin to Mr. Lau. Under s. 21 of the Criminal Code, Mr. Ho did not have to possess the substances himself to be a party to the offence of possession for the purpose of trafficking: *R. v. Miller* (1984), 12 C.C.C. (3d) 54 at 87 (B.C.C.A.); *R. v. Aranson* (1993), 78 C.C.C. (3d) 1 at 45 - 47 (B.C.C.A.).

[73] I find there is sufficient evidence of Mr. Ho's possession and intention to commit the crime of possession for the purpose of trafficking in heroin to justify his committal for that charge. Therefore, I order his extradition on this charge.

JUDGMENT

[74] Under s. 29(1) of the Act I order Mr. Ho's committal into custody to await his surrender to the Australian authorities for the equivalent Australian offences described in the Authority to Proceed.

"J.C. Bouck, J."

The Honourable Mr. Justice J.C. Bouck

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