
CANADA / JUDGMENT

R. v. Bui

2013 BCCA 168

COURT

British Columbia Court of Appeal

DECIDED

9 April 2013

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2013 BCCA 168 R. v. Bui

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bui,

2013 BCCA 168

Date: 20130409

Docket: CA040642

Between:

Regina

Respondent

And

Be Van Bui

Appellant

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, February 15, 2013

(R. v. Bui, Vancouver Registry 26258)

Oral Reasons for Judgment

Counsel for the Appellant:

N.J. Preovolos

Counsel for the Respondent:

T.C. Gerhart

Place and Date of Hearing:

Vancouver, British Columbia

April 9, 2013

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2013

- [1] GROBERMAN J.A.: This is a sentence appeal from a sentence of three years imprisonment on one count of production of marijuana. The sentence was imposed following a guilty plea, and was in accord with a joint submission by counsel for the accused and counsel for the Crown.
- [2] The offence was committed in the Strassbourg District in Saskatchewan. The matter was waived to British Columbia for disposition under s. 478(3) of the Criminal Code, R.S.C. 1985, c. C-46. At the heart of this appeal is an argument that the sentence, while within the appropriate sentencing range in Saskatchewan, is overly harsh by British Columbia standards.

Background to the Offence

- [3] The appellant purchased a farm located in Strassbourg June 2007 for the purposes of establishing an illegal marijuana grow operation on a commercial scale. In September 2007, the accused sold the farm to his brother for \$1. It appears, however, that he continued to be involved in its operations.
- [4] As a result of a barn fire at a marijuana grow operation in Vascoy, Saskatchewan on a property owned by the accused's wife, the police investigated operations at four farms owned by the accused and his relatives. In each case, they found no evidence that the farms were being used for ordinary farming purposes. Further, they found that purchases from local businesses in connection with the properties were consistent with the setting up of marijuana grow operations.

- [5] The Strasbourg property was searched in December 2007. It contained a sophisticated, large-scale grow operation. A total of 2,848 marijuana plants were found on the farm. The estimated yield of such a crop was 712 pounds of marijuana, with a value of \$1.2 to \$1.8 million if sold at the pound level. Up to three crops a year might have been grown at the operation.
- [6] A search warrant executed on the appellant's home in Burnaby located equipment associated with the cultivation of marijuana, as well as receipts and cell phone records connecting him with the Strasbourg operation.

Circumstances of the Accused

- [7] The accused was 54 years old at the time of sentencing. He was born in Vietnam, and lost his father when he was only four. His family lived in poverty. He attended school for only 3 years, and was working from the age of 10. When he was 22, he escaped to a refugee camp in Hong Kong.
- [8] He was soon sponsored, along with his wife, to come to Canada. He spoke no English at the time, but found work as a dishwasher, and then as a cook. The accused first lived in Toronto, but eventually came to Vancouver. He became a commercial crab and shrimp fisher, running his own business.
- [9] The accused and his wife have three children, who were, at the time of sentencing, 22, 21 and 13. The two oldest are daughters, who were said to be completing distinguished academic careers at university. The youngest child is a son. The appellant has no previous criminal record.
- [10] The sentencing judge was troubled by the situation of the accused, commenting on his "obvious character and many good qualities". She said that it was "truly heartbreaking to see someone who has come from such adversity to find himself in this position before the court."

The Joint Submission

- [11] The Crown and the accused presented a joint submission to the judge. They cited case law, including *R. v. Rusanov*, 2006 SKQB 491, indicating that the sentencing range for a substantial and sophisticated commercial marijuana grow operation in Saskatchewan was two to four years imprisonment.
- [12] The court also noted that co-accused who were charged in the same investigation, and who had similar levels of involvement to that of the accused, were given sentences of three years in one case and 37 months in two other cases. Two of the co-accused also had property forfeited to the Crown. A co-accused who also had the charge waived to British Columbia received an effective sentence of 37 months.

- [13] The judge agreed that a three year sentence was fit in all of the circumstances, and imposed such a sentence, along with certain ancillary orders that are not challenged on this appeal.

Analysis

- [14] The range of sentences given for particular offences may vary from province to province. The importance of respecting the experience and values of a community in imposing a sentence on an offender was noted by the Supreme Court of Canada in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 92:

It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

- [15] The sentence imposed in this case is somewhat longer than the sentence that might have been imposed in a similar case in British Columbia - see the discussion of sentencing ranges for commercial marijuana production in *R. v. Koenders*, 2007 BCCA 378. As Hall J.A. observed in *R. v. Lister*, 2003 BCCA 269 at para. 10, "sentences imposed for marijuana offences in British Columbia seem to be perhaps generally more lenient than sentences imposed for this class of offence in Saskatchewan." In *Lister*, this Court affirmed that where charges are waived from Saskatchewan to British Columbia under s. 478(3), it is appropriate to give consideration to the range of sentence in Saskatchewan.
- [16] In the case before us, the sentence imposed appears to be well within the range according to local standards in Saskatchewan. It matches the sentences handed out to co-accused who appear to have had a level of involvement in the crime similar to that of the accused.
- [17] The appellant argues, however, that the sentence is excessive by British Columbia standards, and must be reduced. He places substantial reliance on the decision of this Court in *R. v. Shaw*, 2005 BCCA 380. In that case, an accused reluctantly agreed to a joint submission on a charge of production of marijuana. The production occurred in Saskatchewan, and was of a moderate scale, within the accused's home. The joint submission was for a term of imprisonment of two years. On appeal, the majority of this Court found the sentence to be harsh, and substituted a conditional sentence of two years less a day. The appellant contends that, based on *Shaw*, the sentence imposed in the case before us should be adjusted to be more reflective of the range of sentence appropriate in this province.

- [18] In *Shaw*, the Court acknowledged that there is a strong interest in maintaining the integrity of plea bargains, and in avoidance of forum shopping. Both of those factors militate against interfering with a sentence based on a joint submission where charges have been waived into British Columbia. In *Shaw*, however, the majority of the Court was concerned that to uphold the sentence would be to endorse a situation where the Crown had driven too hard a bargain for the waiver of jurisdiction. The judgment reflects a concern that the Crown had, perhaps, demanded a sentencing premium in exchange for waiving the matter to British Columbia.
- [19] That concern is not present in the case before us. In light of the sentencing cases cited to us, and the treatment of co-accused, there is no reason to suspect that the Crown demanded any premium on the sentence in exchange for a waiver to British Columbia.
- [20] The sentence agreed to by the accused appears to be higher than might be imposed in this Province for a similar offence if it occurred here. It is not, however, so far from the norm as to be wholly disproportionate to the circumstances of the offence and of the offender. It is important to recognize the sentencing values of the jurisdiction where the offence occurred. In this light, the sentence cannot be characterized as being unduly harsh or unfit.
- [21] Apart from the failure of the sentencing judge to apply British Columbia sentencing standards to the case, the appellant does not suggest that there was any error of principle in her analysis. As I have indicated, it was not incumbent on the judge to apply British Columbia sentencing standards; she was required to give precedence to the Saskatchewan standards. I do not suggest that the trial judge would have been in error had she also given secondary consideration to the range of sentence that might have been applicable had the crime been committed in British Columbia. Counsel did not cite British Columbia cases, however, and it was not incumbent on the sentencing judge to do so.
- [22] The Court must be mindful of the local sentencing norms in the region where the offence occurred. It must also accord substantial respect to a joint submission, so as to uphold the integrity of plea negotiations. Finally, it must accord deference to the discretion exercised by the sentencing judge. Unless it is shown that the sentence imposed in a situation such as the present was unfit, it is not the place of this Court to interfere. I am not persuaded that the sentence imposed was unfit, and I would deny the appeal.
- [23] Before concluding, I wish to comment briefly on an issue that is of concern to the Court. The appellant has candidly admitted that it was always his intention, despite proceeding with the joint submission, to appeal the sentence to this Court. He did, in fact, file his Notice of Appeal the same day that the sentence was imposed. In those circumstances, the appellant's conduct, in urging the trial court to impose a sentence he considered "illegal", is troubling.
- [24] In the circumstances, I would grant the application for leave to appeal sentence, but deny the appeal.
- [25] DONALD J.A.: I agree.

[26] NEWBURY J.A.: I agree.

[27] DONALD J.A.: Leave is granted. The appeal is dismissed.

"The Honourable Mr. Justice Groberman"

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