

CANADA / JUDGMENT

R. v. Chiang

2012 BCCA 85

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 85 R. v. Chiang COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Chiang, 2012 BCCA 85 Date: 20120223 Docket: CA038791 Between: Regina Respondent And Pai-Chih Chiang Appellant Before: The Honourable Mr. Justice Hall The Honourable Madam Justice Saunders The Honourable Mr. Justice Chiasson On appeal from: Supreme Court of British Columbia, June 4, 2010 (R. v. Chiang, 2010 BCSC 906, Victoria Docket 146467) Counsel for the Appellant: R.A. Mulligan, Q.C. Counsel for the Respondent: S.D. Cooke Place and Date of Hearing: Victoria, British Columbia December 8, 2011 Place and Date of Judgment: Vancouver, British Columbia February 23, 2012 Written Reasons by: The Honourable Mr. Justice Hall Concurred in by: The Honourable Madam Justice Saunders The Honourable Mr. Justice Chiasson Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] The appellant was charged with communicating for the purpose of obtaining for consideration the sexual services of a person under the age of 18 years, contrary to s. 212(4) of the Criminal Code, R.S.C. 1985, c. C-46. The events at issue took place on April 14, 2009. On June 4, 2010, following a trial in the British Columbia Supreme Court, the appellant was convicted of this offence by Mr. Justice Harris, who on December 10, 2010 refused the appellant's subsequent application for a stay of proceedings on the basis of entrapment.
- [2] As a result of media reports and investigative work on other police files, police officers in Saanich had reason to believe that underage females were offering sexual services via a website, Craigslist. To overcome the challenge of securing the cooperation of such young females, the police decided to set up a form of "sting" operation by posting the following ad in the erotic services section of the website: Sexy, New & Hot Reply to: freshtna16@gmail.com Sexy, young tight bodies lookin for fun. In call today only, girls from out of town in downtown Victoria area. Don't miss this you'll be sorry!!
- [3] Individuals who responded to the advertisement were given information suggesting that the females were underage, and most of these persons did not pursue the matter further. The appellant was one of two persons who did persist with efforts to obtain sexual services. He was advised in an e-mail exchange that two girls, J., aged 16 and C., aged 17, were available. He chose J. on the basis of a fake photo provided to him. In a subsequent phone call he was instructed to bring cash to a meeting with a female undercover officer posing as a procurer,

to take place in a motel parking lot in Saanich.

- [4] When the appellant arrived by vehicle at the motel, he met the officer and confirmed that he had cash with him. The officer told him that because J. was only 16, there could be no rough sex. In para. 38 of his reasons of June 4, 2010, the judge set out the full conversation between the appellant and the undercover officer. M. is the officer and B. is the appellant: M. Hi, are you Bob? B. Yes. M. Hi Bob. I am Mckenzie. We were just talking on the phone. B. Yes. M. Ok, so did you bring the cash? B. Yeah. (The police officer testified that "Bob" pulled a roll of \$20 bills out of one of his shirt pocket and showed it to her.) M. Great. You don't need to give it to me right now. You can pay later, but I just needed to see it. B. Oh, ok. (Bob put the money back in his pocket) M. So I just want to go over some of the ground rules with you quickly. B. Ok. M. Because [J.] is only 16, there can be no rough play, or rough sex, or anything like that. B. She's only 16? (The officer testified that Bob appeared somewhat shocked) M. Well yeah, I told you that on the e-mail. B. I thought that was just a number. I didn't know. M. Well, yeah, that's how old she is. It's cool. She is a great girl and she's totally good to go and she is eager and wants to please. B. Yeah, but is that alright? M. Well no - I mean it's not the legal age of 19, but whatever. B. Oh. M. There are 16 year olds walking the streets Bob. At least this way we are trying to protect them as best we can, which is why you have to meet me first and go over the rules because we are looking out for them and their safety, right? B. No, I'm not like that, I'd never be rough. (The officer testified that Bob appeared embarrassed) Do you have some kind of card or ID for me to look at? M. No, I don't do that Bob. I don't start showing clients my ID. B. Oh. M. I don't know what you think you're walking into here Bob, but if you want [J.] she's in there and she's a great girl, but if you don't, well, that's up to you. I just needed to make sure that everything is all good with you and you understand the ground rules of what I've explained already. No rough sex and all that. B. No, I'm not like that. M. I'm sure you're not, so it's all cool and if you want [J.], she's in there (indicating to the hotel room - giving a head nod). And I'll get the money from you later or leave it with her. So, I don't know what you want to do. B. Ok. M. So you mentioned online that you were looking for straight sex, right? (The officer testified that Bob nodded affirmatively) M. It's just if you want anything else like a blow job or anal, or anything like that, then I have to know about it because I tell her so she knows what to expect, right? Because she is so young we are just looking out for her. B. Where is she? M. She's in room 147, right there. (The police officer gave a head nod indicating the room straight ahead). So once we agree, then I'll give you the key and she'll be waiting. B. Ok. M. Ok, so you're in for the \$150 for the half hour? B. Yeah, I'll check it out. M. Ok, I'll give you the key.
- [5] When the appellant used the key device to enter the room, he was confronted by police officers present inside and subsequently arrested.
- [6] The judge noted that the appellant did not testify and that he therefore had to analyze the evidence "to determine whether that evidence establishes beyond a reasonable doubt that Mr. Chiang committed the offence" (para. 42). He said the following regarding the purpose of s. 212(4):

- [52] ... The new wording in s. 212(4) focuses on communication and the purpose of communication. It is an effort to attack a mischief at its inception by preventing shopping around and exploring the possibility of procuring sexual services from those under age. It reflects a commitment to the protection of the young and vulnerable and is an effort to eradicate sexual exploitation at its source.
- [7] After finding that he had a reasonable doubt about whether the appellant's e-mail communications constituted a breach s. 212(4), the judge analyzed the exchange that occurred between the appellant and female undercover officer outside of the motel just before the appellant received the room key:
- [72] As nothing was said about age in the telephone call between McKenzie and Mr. Chiang, I conclude that there is a reasonable doubt that Mr. Chiang was communicating for the purpose of obtaining sexual services from an underage person until at least the point when McKenzie said "Well, yeah, that is how old she is."
- [73] At this point in the conversation [J.]'s age is represented to him to be 16. I must examine the remainder of the communication taking into account its context in the conversation as a whole and what Mr. Chiang's intention might have been up to that point. I have concluded, however, that in the remainder of the conversation Mr. Chiang does communicate for the purpose of (in the sense of "with the intent to") obtain for consideration the sexual services of a person under age and that this is proven beyond a reasonable doubt. Mr. Chiang asks "is that alright?" He is told "Well no - I mean it's not the legal age, but whatever". The conversation carries on. Mr. Chiang is told that there are ground rules to obey because she is so young, that there are 16 year olds walking the street and that McKenzie is protecting her and looking out for her. The conversation is predicated on [J.]'s age of 16 and assumes it. Mr. Chiang acknowledges the ground rules and says on two occasions that he would not transgress them. He says he would never be rough. He discusses his desire for straight sex, asks where [J.] is and confirms his agreement to the arrangements including the price.
- [74] At no time after he asks "is it alright?" does Mr. Chiang express any qualification to his intent to obtain sexual services from [J.] or indicate, allude to or hint at, his intention to proceed only if he ultimately satisfies himself that [J.] is of age. The conversation focuses only on Mr. Chiang assuring McKenzie that he is not the kind of person who would transgress the ground rules that are in place to protect [J.] because she is underage. His words are premised on an acceptance and acknowledgement of [J.]'s age. His words do not indicate anything other than a purpose to obtain sexual services from [J.] in the face of being told that she is 16. ...
- [88] I am satisfied beyond a reasonable doubt that during the part of the conversation beginning with McKenzie saying "that's how old she is", Mr. Chiang communicates with McKenzie for the purpose of obtaining, for consideration, sexual services from a person who is under 18. This is the only reasonable inference to draw from the totality of the evidence. No other reasonable inference is available on the evidence.

- [8] The appellant accepts that the actus reus of the offence is communicating but submits that the appellant, in the verbal exchange at the motel, was reacting and not communicating. Counsel argues that the appellant was just responding to a "sales pitch" from the undercover officer. He submits that the phraseology used by the appellant at the end of the exchange just before he took the key - "yeah, I'll check it out" - is consistent with such an interpretation of the verbal interchange. In a similar vein, it is argued that the appellant did not possess the requisite mens rea as it cannot be concluded that the "purpose" of his verbal expression was to obtain the proscribed services. In effect, the submission is that the trial judge should have concluded that there was a reasonable doubt about the commission of the offence charged.
- [9] Given the tenor of the conversation, there can be no doubt that the appellant was aware, at a relatively early point in the interchange, that the purported occupant of the room, J., was an underage female. He is expressly told, "it is not the legal age of 19". The balance of the conversation immediately following discloses his intention to have sexual relations with the person he believes is in the room. He agrees that any sex will not be rough and that he is only interested in "straight sex".
- [10] The judge's decision regarding the commission of the offence is largely a factual one with which we, as an appellate court, would not normally interfere: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The trial judge explained his interpretation of the conversation as follows:
- [85] ... There is nothing in the conversation, after being told what [J.]'s age is, that raises a reasonable doubt about Mr. Chiang's intentions or suggests that Mr. Chiang did not accept that [J.] was underage, or that he did not believe what he was told, or that he believed that [J.] was or might be of age and that he was going to check that out.
- [86] Finally, the phrase "I'll check it out" is used in the context of a bargain that has been struck between Bob and McKenzie.
- [87] I cannot find a basis in the reason, common sense or the evidence to attribute to the words "I'll check it out", the meaning that would allow me to find a reasonable doubt as to Mr. Chiang's purpose in communicating. [Emphasis in original.]
- [11] While I suppose it could be said that we are in as good a position as the trial judge to interpret the conversation, given the existence of the transcript, I am not persuaded we would arrive at a different conclusion because I consider his interpretation to be a rational construction of the language used by the appellant. The judge's conclusion, in my view, is soundly based on the evidence.
- [12] The appellant makes an additional submission based on authorities such as *Lemieux v. R.*, [1967] S.C.R. 492. In that case police officers, with the consent of the owner of the premises, had successfully solicited the accused to break into a dwelling house. It was held that in such circumstances, the question arose of whether the actus that had been committed was actually a crime, and that the jury should have been so charged. A verdict of acquittal was

ordered by the Supreme Court of Canada. Judson J. giving the judgment of the Court said at p. 496: On the evidence it was open to the jury to find that the owner of the house had placed the police officers in possession of it giving them authority to deal with it as they pleased and that they had not merely consented to Bard breaking into it with the assistance of others, but had urged him to do so. To break into a house in these circumstances is not an offence.

- [13] I do not consider Lemieux to be of any assistance to the appellant in the present case. In Lemieux, the consent provided by the authorities and the homeowner eliminated the criminal character of "breaking into" the premises. As observed by this Court in *James v. R.*, [1969] 1 C.C.C. 278, the actus reus aspect of the crime was obviated. In the present case, the crime consists of communicating for a certain purpose. Any consent alleged to have been given by a state agent is irrelevant. When an individual communicates for the prohibited purpose, the offence is complete.
- [14] Additionally, the appellant advances an argument in this Court that the trial judge erred in declining to grant a stay of proceedings on the basis of the doctrine of entrapment. It is submitted that the conduct of the police crossed permissible boundaries.
- [15] The appellant cites the authorities of *Mack v. The Queen*, [1988] 2 S.C.R. 903, and *R. v. Swan*, 2009 BCCA 142, 244 C.C.C. (3d) 108. Both of these cases, as well as another case relied on by counsel for the respondent, *Barnes v. The Queen*, [1991] 1 S.C.R. 449, were drug cases. In *Mack*, it was found that an informer enlisted by the police had been extremely persistent in urging the appellant to supply him with drugs and had even engaged in somewhat threatening behaviour. After referring to the informer's very persistent solicitation of the appellant, which went on for a period of several months, Lamer J. giving the judgment of the Court said:
159. Perhaps the most important and determinative factor in my opinion is the appellant's testimony that the informer acted in a threatening manner when they went for a walk in the woods, and the further testimony that he was told to get his act together after he did not provide the supply of drugs he was asked for. I believe this conduct was unacceptable. If the police must go this far, they have gone beyond providing the appellant with an opportunity. I do not, therefore, place much significance on the fact that the appellant eventually committed the offence when shown the money. Obviously the appellant knew much earlier that he could make a profit by getting involved in the drug enterprise and he still refused. I have come to the conclusion that the average person in the position of the appellant might also have committed the offence, if only to finally satisfy this threatening informer and end all further contact. As a result I would, on the evidence, have to find that the police conduct in this case was unacceptable. Thus, the doctrine of entrapment applies to preclude the prosecution of the appellant. In my opinion, the appellant has met the burden of proof and the trial judge should have entered a stay of proceedings for abuse of process.

- [16] Swan involved a species of "cold calling" by an undercover police officer using a telephone number given to her by a fellow officer. The police were investigating what is often termed "dial-a-dope" activity. This Court observed that the information in possession of the undercover officer who made the call to the appellant, "did not give rise to a reasonable suspicion that the person who answered the phone was engaged in drug related activity" (para. 23). The Court was able to distinguish the case of Barnes and held that the "cold calling" operation utilized by the police, "based on a bare minimum of information ... and with a complete disinterest in distinguishing between anonymous tips ... and more reliable tips providing further information about a particular suspect or telephone number" (para. 36), amounted to unacceptable police conduct. A stay of proceedings was ordered.
- [17] In Barnes, the police in Vancouver had targeted a particular area of the city where drug trafficking was very prevalent. An undercover officer walked along the targeted mall area attempting to buy drugs from persons who appeared, in her opinion, inclined to engage in the sale of such drugs. A majority of the Supreme Court of Canada found that the defence of entrapment was not available to the accused, who had sold some hashish to the undercover officer. It was held that the police were engaged in a bona fide investigation targeting the high incidence of drug trafficking in that location. The Supreme Court held that the doctrine of entrapment was not applicable in these circumstances.
- [18] The type of crime being investigated by the police in the present case has about it an "inchoate" quality. It is the same type of offence as Internet luring of children for a sexual purpose. At para. 25 of *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, Fish J. said the following about this type of illegal activity (luring): It will immediately be seen that s. 172.1(1)(c) creates an incipient or "inchoate" offence, that is, a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime. It criminalizes conduct that precedes the commission of the sexual offences to which it refers, and even an attempt to commit them. ...
- [19] Modern Internet facilities afford easier access to young people for individuals minded to exploit their youth and vulnerability: see Legare at para. 26 citing the comments of Doherty J.A. in *R. v. Alicandro*, 2009 ONCA 133, 246 C.C.C. (3d) 1. In this shadowy new Internet universe, these comments of Lamer J. at paras. 16-18 of Mack are apposite:
16. One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission. In addition, some crimes are more difficult to detect. As Chief Justice Laskin in *Kirzner v. The Queen*, [1978] 2 S.C.R. 487, explained at pp. 492-93: Methods of detection of offences and of suspected offences and offenders necessarily differ according to the class of crime. Where, for example, violence or breaking, entering and theft are concerned, there will generally be external evidence of an offence upon which the police can act in tracking down the offenders; the victim or his

family or the property owner, as the case may be, may be expected to call in the police and provide some clues for the police to pursue. When "consensual" crimes are committed, involving willing persons, as is the case in prostitution, illegal gambling and drug offences, ordinary methods of detection will not generally do. The participants, be they deemed victims or not, do not usually complain or seek police aid; that is what they wish to avoid. The police, if they are to respond to the public disapprobation of such offences as reflected in existing law, must take some initiatives.

17. The same point is made by Estey J. in *Amato*, supra, at p. 457. I would note that in addition to so-called "victimless" or "consensual" crimes, active law enforcement techniques may be used to combat crimes where there are victims, but those victims are reluctant to go to the police because of intimidation or blackmail, as may be the case with the offence of extortion. Further, some criminal conduct may go unobserved for a long time if the victims are not immediately aware of the fact that they have been the subject of criminal activity, in the case, for example, of commercial fraud and also bribery of public officials. In general it may be said that many crimes are committed in secret and it is difficult to obtain evidence of their commission after the fact.
18. Obviously the police must be given considerable latitude in the effort to enforce the standards of behaviour established in the criminal law. This has long been recognized by the common law (see R. Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs" (1951), 60 Yale L.J. 1091, at pp. 1091-92). Laskin C.J., in *Kirzner*, supra, noted at p. 493 that with respect to consensual crimes, the police employ a number of people and techniques: They may, for example, use a spy, either a policeman or another person, to obtain information about a consensual offence by infiltration; they may make arrangements with informers who may be parties to offences on which they report to the police to enable the other parties to be apprehended; or the police may use decoys or themselves act under cover to provide others with the opportunity to commit a consensual offence or to encourage its commission. Going one step farther, the police may use members of their force or other persons to instigate the commission of an offence, planning and designing it ab initio to ensnare others. [Emphasis added.]
- [20] In the present case, the police had a credibly based belief that conduct prohibited by s. 212(4) of the Criminal Code was occurring in their area. This factual basis for the investigation distinguishes the matter at hand from cases such as *Swan*. The type of conduct at issue is of the sort referred to in the above passage as consensual criminal activity. As is not uncommon with this particular type of criminal activity, it proved difficult for the police to enlist the cooperation of young persons who were actual or potential victims. It was determined that a form of "sting" operation would be required to ferret out people minded to prey on the vulnerabilities of young targets. I am in agreement with this submission made by the respondent in written argument:

21. ...

- b) The erotic services section of Craigslist is analogous to the geographic area referred to in *R. v. Barnes*. Random virtue-testing is permissible as part of a bona fide inquiry directed at a circumscribed area where it is reasonably suspected that criminal activity is occurring. In such a case, the police are entitled to present any person associated with the site, whether placing an ad or responding to one, with the opportunity to commit the s. 212(4) offence. ...
- [21] The reach of the investigation was carefully limited through the nature of the investigative tool employed, specifically an ad on Craigslist that spoke of "young bodies". Most of the persons who responded to the ad resiled from further proceeding when there was a suggestion of the involvement of underage females. The appellant, however, persisted in his efforts to obtain sexual services. The interaction between the undercover officer and the appellant outside the motel room did not involve pressing and persistent conduct as was found to be present in *Mack*. The judge made a specific finding at para. 70 of his reasons, dated December 10, 2010, that the undercover officer did not "induce" the appellant to take the room key and enter the room. I consider this a reasonable finding on the evidence. This is a case that, on its facts, is at a considerable remove from the "clearest of cases" where a stay of proceedings would be available on the basis of the doctrine of entrapment. I am in respectful agreement with the trial judge that the police conduct in this case did not exceed proper investigative limits.
- [22] Since I would not accede to any of the arguments advanced on behalf of the appellant, I would dismiss this appeal from conviction. "The Honourable Mr. Justice Hall" I agree: "The Honourable Madam Justice Saunders" I agree: "The Honourable Mr. Justice Chiasson"

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