
CANADA / JUDGMENT

R. v. Christhurajah

2017 BCSC 230

COURT

Supreme Court of British Columbia

DECIDED

2 February 2017

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2017 BCSC 230 R. v. Christhurajah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Christhurajah,

2017 BCSC 230

Date: 20170202

Docket: 26117

Registry: Vancouver

Regina

v.

Kunarobinson Christhurajah

Restriction on publication: pursuant to ss. 517(1) and 648(1)

of the Criminal Code

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment on Bail Application

Counsel for the Crown:

M. Loda

Counsel for the Accused K. Christhurajah:

C.L. Leggett

Place and Date of Hearing:

Vancouver, B.C.

January 30, 2017

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2017

- [1] THE COURT: Kunarobinson Christhurajah is charged with committing an offence contrary to s. 117 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA]. The allegation is that between August 1, 2009 and August 13, 2010, he knowingly organized, induced, aided, or abetted the coming into Canada of one or more persons not in possession of required travel documents. The Crown has proceeded by way of a direct indictment.
- [2] Mr. Christhurajah has been in custody since August 12, 2010, although part of that time was attributable to his detention for immigration purposes. He was not arrested for this offence until May 14, 2012. A bail hearing was held before Sigurdson J. on January 30, 2013. In an oral decision on February 8, 2013, Mr. Justice Sigurdson ordered that Mr. Christhurajah remain in custody pending his trial (*R. v. Aseervatham* (8 February 2013), Vancouver 26117 (B.C.S.C.)).
- [3] In 2016, Mr. Christhurajah applied again for his release pending trial, and in reasons delivered June 28, 2016, I confirmed his detention order: *R. v. Christhurajah*, 2016 BCSC 1334.
- [4] The trial before judge and jury of Mr. Christhurajah and his three co-accused commenced in October 2016. The apparent delay in the commencement of the trial is explained largely by the fact that the parties had to await the decision of the Supreme Court of Canada in *R. v. Appulonappa*, 2015 SCC 59, on the Constitutional validity of s. 117 of the IRPA.
- [5] On January 25, 2017, the jury found Mr. Christhurajah's three co-accused not guilty. The jury was not able to reach a unanimous verdict with respect to Mr. Christhurajah, and the Crown intends to proceed with a new trial against him. Mr. Christhurajah now applies for his release pending the new trial.
- [6] In his judgment of February 8, 2013, Sigurdson J. observed that pursuant to s. 515(6)(b) of the Criminal Code, Mr. Christhurajah bears the onus of showing that his detention is not justified, since he is charged with an indictable offence and he is not ordinarily resident in Canada.
- [7] Mr. Justice Sigurdson concluded that Mr. Christhurajah's detention was justified on the primary and the tertiary grounds; that is, the danger that he would not attend trial and the risk to public confidence in the administration of justice if he were released. Sigurdson J. summarized the facts as follows:

- [7] The circumstances of the offence and the applicant's alleged involvement are as follows. On August 12, 2010, the accused, 32 years old, was arrested off the coast of Vancouver Island on the MV Sun Sea which contained 492 undocumented Sri Lankan nationals, one having died in transit. It is alleged that Mr. Christhurajah masterminded the operation. He incorporated a company, Sun & Rshiya Company Ltd., and in March 2010, purchased a ship which was renamed the MV Sun Sea. It is alleged that Mr. Christhurajah also operated as an agent identified as "Anthony" to smuggle people to Canada and had secured passengers for another ship that was ultimately detained in Canadian waters, as well. In the course of his preparation to smuggle people, it is alleged that Mr. Christhurajah leased apartments or safe houses in Bangkok where migrants could live awaiting departure to be smuggled to Canada.
- [8] Mr. Christhurajah and three other accused, Nadarajah Mahendran and Thampeernayagam Rajaratnum and Thayakaran Markandu, were arrested by the Thai police with supplies and parts alleged believed destined for the MV Sun Sea. The Thai police, in conducting a search, obtained a briefcase with documents of Mr. Christhurajah, including contracts for voyage for migrants aboard the MV Sun Sea and passports. The charges in Thailand related to possession of excessive quantities of motor oil. The three others mentioned above were deported after pleading guilty, but Mr. Christhurajah was released pending the hearing, as he was living in Thailand and was in possession of a valid work permit. He failed to appear and a warrant for his arrest was issued. That warrant remains outstanding.
- [9] It is alleged that Mr. Christhurajah was the kingpin or main person, as I stated earlier, organizing this voyage. He and his wife allegedly flew down to come on the voyage and he was the last person on the ship. Mr. Christhurajah boarded the MV Sun Sea on June 25, 2010. Some of the passengers were on board waiting for weeks. According to the Crown, the fee paid or payable to the agent alleged to be Mr. Christhurajah was between \$20,000 and \$30,000. The Crown says that the gross fees payable were in excess of \$12 million to \$13 million, and that with the cost of fuel, the purchase of the vessel by Mr. Christhurajah for about \$176,000 and the cost of water and food, the profit would exceed \$10 million.
- [10] The ship accommodated a maximum crew of 13. The Crown alleges the conditions were deplorable with the passengers using a limited number of makeshift latrines while the captain and Mr. Christhurajah were living far from luxury, but had bathroom facilities and better food than the passengers. The Crown alleges that the accused and his wife, as well as the captain and the crew, had better food than the passengers who were in the hold of the ship and the women and the children who were on a deck living under tarps. The photographs of the passengers support the deplorable and dangerous condition of the ship for its ocean crossing. The Crown asserts that the vessel was carrying fuel in its ballast tanks because there was insufficient capacity for the long voyage and it describes the operation as a sophisticated one, something that the accused's counsel disputes.
- [8] Mr. Justice Sigurdson described Mr. Christhurajah's personal circumstances in this way:

- [13] The accused's counsel points out that his client is married, has a child born in Canada, and has a brother and his wife here, the brother being on board the vessel, and his wife and child - that is the wife and child of the accused - and his brother live in Vancouver on East 51st Avenue. He points to the fact that although there were a number of decisions, ultimately Mr. Christhurajah was released from custody in Immigration proceedings. He relies on the comments of the adjudicator whose decision that the accused be released from Immigration detention was upheld on judicial review. The adjudicator pointed to his wife, young child in Canada, a brother here, and a woman named Vaithiyanathan who is prepared to act as a surety and post \$20,000, something that Mr. DelBigio nevertheless says is not necessary to secure the accused's release.
- [9] In ordering the detention of Mr. Christhurajah, Sigurdson J. wrote:
- [27] I think that under the present circumstances, after a consideration of all the material before me, that the detention of the accused is required under both the primary and tertiary ground. I conclude that in connection with the secondary ground, the accused, if released on proper conditions, would not commit an offence or interfere with the administration of justice. However, the accused's continued detention is justified on the primary and tertiary grounds.
- [28] I think that the accused remains a flight risk. His travelling on a false Indian passport, the fact that he failed to show at the Thailand proceedings, and the circumstances of the offence, given the unlikelihood of him being allowed to remain in Canada indicate that he remains a flight risk. I have also taken into consideration the fact of and suspension of Justice Silverman's order. In my view, the release plan proposed by the accused is inappropriate to relieve my flight risk concerns.
- [29] In terms of the tertiary ground, the circumstances show a very strong case against the accused for a serious crime for which he is facing a lengthy prison term. I have taken into account the circumstances of the offence, where for enormous cost to passengers and great risk to them, they were exploited for a substantial profit. I think that a right-thinking person knowing the relevant circumstances would lose confidence in the administration of justice if the accused were released.
- [30] I have taken into account that the validity of s. 117 is under appeal and, if the Crown does not take steps to move the appeal expeditiously or does not receive a stay, that may well be a change in circumstances justifying a further application by the accused. In the meantime, the accused will be detained.
- [10] In my decision of June 28, 2016, I found that as of that date, there had not been a material change in circumstances, and, like Sigurdson J., I found that Mr. Christhurajah's detention was required on the primary and the tertiary grounds.
- [11] Counsel for Mr. Christhurajah contends that there has now been a material change in circumstances that justifies his release pending his new trial.

- [12] I am satisfied that the events at the previous trial do constitute a material change of circumstance that justifies a change in Mr. Christhurajah's custodial status. Specifically, the assessment of the anticipated strength of the Crown's case must now be considered weaker than it was before the start of the previous trial.
- [13] At the previous trial, the Crown sought to rely on a large body of evidence, including numerous documents from Thailand. The Crown anticipated that that evidence would be admitted pursuant to the provisions of ss. 36(1) and (2) of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) [MLACMA].
- [14] During the course of the previous trial, counsel challenged the constitutional validity of those provisions. In a judgment indexed as R. v. Christhurajah, 2016 BCSC 2400, I ruled that ss. 36(1) and 36(2) of the MLACMA are inconsistent with the rights guaranteed under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms, and are of no force and effect pursuant to s. 52(1) of the Constitution Act, 1982.
- [15] As well, the Crown called a witness in the previous trial, Mr. Kiniman, through whom it sought to have admitted various documents relating to the purchase and ownership of the M/V Sun Sea. Those documents were not admitted, as it was found that Mr. Kiniman did not have personal knowledge of their execution.
- [16] For these reasons, the body of evidence tending to inculcate Mr. Christhurajah at the previous trial turned out to be substantially weaker than was anticipated at the start of the trial.
- [17] The anticipated strength of the Crown's case was an important consideration in the previous decisions leading to Mr. Christhurajah's detention order. At para. 29 of his judgment, Sigurdson J. described it as "a very strong case against the accused for a serious crime for which he is facing a lengthy prison term." In my view, that characterization is now open to some doubt.
- [18] The strength of the Crown's case is a relevant factor in determining whether the accused's detention is necessary on the primary ground to ensure his appearance at trial: U.S.A. v Johnson, 2011 BCSC 1095 at para. 45. Pursuant to s. 515 (10)(c)(i) of the Criminal Code, the apparent strength of the prosecution's case is also an important factor in assessing whether detention is necessary to maintain confidence in the administration of justice (the tertiary ground).
- [19] Mr. Christhurajah's wife, who was on the M/V Sun Sea with him, has been granted refugee status by the Immigration and Refugee Board. She lives in Vancouver, along with the couple's five-year-old daughter, who is a Canadian citizen, and who was born in British Columbia about eight months after the arrival of the M/V Sun Sea. Mr. Christhurajah's brother-in-law, who was also on the ship, has been granted Canadian permanent residence status.

- [20] Mr. Christhurajah's wife attends a church in Vancouver, where she met and became friends with Mr. Samuel Nalliah and his family. Mr. Nalliah has indicated a willingness to act as a surety for Mr. Christhurajah if necessary.
- [21] I am satisfied that the detention of Mr. Christhurajah pending his new trial is no longer necessary on either the primary, secondary, or tertiary grounds. The fact that he has family living in Vancouver, including his daughter with Canadian citizenship, lessens the risk that he will be tempted to flee the jurisdiction.
- [22] I order that Mr. Christhurajah may be released pending his new trial upon entering into a recognizance in the amount of \$10,000 with one surety, upon the following conditions:
- (a) Keep the peace and be of good behaviour;
 - (b) Appear before the Court when required to do so;
 - (c) Report to a bail supervisor within 24 hours of his release, and thereafter, as and when directed by his bail supervisor, but in any event, not less than once per week in person;
 - (d) Surrender all travel documents, including passports, and not to apply for or seek to obtain any travel documents;
 - (e) Reside with his wife and daughter at 3678 Knight Street, Vancouver, British Columbia, V5N 3L5, and not change his residence without the prior written approval of his bail supervisor;
 - (f) Remain at all times within the lower mainland of British Columbia.
 - (g) Have no contact, directly or indirectly, with Lesly Jana Emmanuel, Nadarajah Mahendran, or Thampeernayagam Rajaratnam.

The Honourable Mr. Justice W.F. Ehrcke

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