
CANADA / JUDGMENT

R. v. Christhurjah

2016 BCSC 2552

COURT

Supreme Court of British Columbia

DECIDED

14 December 2016

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2016 BCSC 2552 R. v. Christhurajah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Christhurajah,

2016 BCSC 2552

Date: 20161214

Docket: 26117

Registry: Vancouver

Regina

v.

Kunarobinson Christhurajah

Lesly Jana Emmanuel

Nadarajah Mahendran

Thampeernayagam Rajaratnam

Restriction on publication: pursuant to s. 648(1)

of the Criminal Code of Canada

Before: The Honourable Mr. Justice Ehrcke

Oral Ruling on Applications 43 and 44

Counsel for the Crown:

C.F. Hough

C.B. Tait

Counsel for the Accused K. Christurajah:

C.L. Leggett

Counsel for the Accused L.J. Emmanuel:

R.A. (Sandy) Ross

Counsel for the Accused N. Mahendran:

M. Nohra

M.J. Gismondi

Counsel for the Accused T. Rajaratnam:

V.M. Williams

Place and Date of Hearing:

Vancouver, B.C.

December 6, 12 and 13, 2016

Place and Date of Judgment:

Vancouver, B.C.

December 14, 2016

- [1] THE COURT: Thampeernayagam Rajaratnam, along with three other men, is being tried before a jury with an offence contrary to s. 117 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27. The theory of the Crown is that Mr. Rajaratnam acted as an agent in Thailand for one or more of the migrants that arrived in Canada in August 2010 aboard the MV Sun Sea without required travel documents.
- [2] One of the migrants that was called by the Crown to give evidence before the jury was Dhushandh Gandhi. Upon the ship's arrival in Canada, he was assigned Migrant Number B158 and was interviewed on several occasions by the Canadian Border Services Agency (the "CBSA") and by the RCMP.
- [3] In his direct evidence before the jury in October 2016, Mr. Gandhi testified that when he arrived in Bangkok in April 2010, he was taken to an apartment where a man called Soka or Shoka gave him food and told him to take a nap. They spoke in Tamil. He described Soka as a man of average body type with salt-and-pepper hair, no facial hair, about five foot seven inches tall, and in his forties. At the end of his direct examination on October 25, 2016, he identified the accused, Mr. Rajaratnam, in court as the person he knew as Soka.

- [4] In cross-examination, Mr. Rajaratnam's counsel, Ms. Williams, asked Mr. Gandhi about a statement he had given to the RCMP on September 3, 2010, in which he said that Migrant B165 gave him fish curry, but he did not change his in-court testimony that Soka is the one who gave him food. He testified that he was being truthful on September 3, 2010, when he told the police that B165 gave him food, but he now does not remember that person. He testified that he does not know why he told the police it was B165. Mr. Rajaratnam is not Migrant B165.
- [5] During his testimony in October 2016, Crown counsel never asked Mr. Gandhi if, during his interviews in 2010 with the RCMP and with the CBSA, he had ever identified a photograph of Soka or Shoka. Similarly, defence counsel never asked him this.
- [6] On November 15, 2016, Crown counsel advised that he intended to call RCMP Sgt. Gregory to testify that during an October 12, 2010, interview, she showed Mr. Gandhi some photographs and he selected a photograph of Mr. Rajaratnam as being Soka.
- [7] Ms. Williams objects to the calling of this evidence and filed a notice of application on December 6, 2016, seeking to have the evidence of Sgt. Gregory excluded on the basis that its probative value is outweighed by its prejudicial effect. She submits that the Crown initially took the position that it would not rely on pretrial identification by the migrant witnesses, but would instead rely only on their in-court identification. She submits that she conducted her cross-examination of Mr. Gandhi on that basis, and that is why she never asked Mr. Gandhi about whether he had picked out a photograph of her client during interviews with either the RCMP or the CBSA. She submits that she would have conducted her cross-examination differently if the Crown had not advised her that it would be relying only on the in-court identification.
- [8] Referring to *R. v. McKinnon*, 2014 BCSC 721, and other cases, Ms. Williams submits that it would be prejudicial to her client to permit the Crown now to call Sgt. Gregory to testify about pretrial identification procedures.
- [9] As well, Ms. Williams refers to *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.) and *R. v. Starr*, [2000] 2 S.C.R. 144, for the proposition that since the Crown did not ask the witness about his pretrial identification, the Crown cannot now lead that evidence through the police.
- [10] In *Starr*, Iacobucci J. writing for the majority explained the effect of *Tat* in this way at para. 221:

The scope of the "prior identification" exception to the hearsay rule was recently thoroughly canvassed in the lucid reasons of Doherty J.A. in *Tat*, supra. As Doherty J.A. sets out, there are two situations in which out-of-court statements of identification may be admitted for the truth of their contents. First, "prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial" (pp. 497-98). Second, such statements are admissible "where the identifying witness is unable to identify the accused at trial, but can testify that he or she previously gave an accurate description or made an accurate

identification" (p. 500). In the latter circumstance, Doherty J.A. explained, "the identifying witness may testify to what he or she said or did on those earlier occasions and those who heard the description given by the witness or witnessed the identification made by the witness may give evidence of what the witness said or did" . . .

- [11] The present case does not fall within the second branch of Tat where the witness is unable to identify the accused at trial, but rather testifies that he made a previous accurate identification. In the present case, Mr. Gandhi was able to and did identify the accused Mr. Rajaratnam in court.
- [12] The present case thus falls within the first branch of Tat. In such cases, Tat and Starr hold that "prior statements identifying or describing the witness are admissible where the identifying witness identifies the accused at trial."
- [13] In neither Tat nor Starr does the Court say that the witness who identifies the accused in court must testify to the accuracy of a previous identification before evidence of that previous identification may be admitted.
- [14] Accordingly, the fact that neither the Crown nor the defence asked Mr. Gandhi about pretrial identification is not a bar to the Crown now calling that evidence through the person or persons who conducted pretrial identification procedures.
- [15] As the cases make clear, where the witness has made an in-court identification, the purpose of leading evidence of prior out-of-court identification procedures is to provide the trier of fact with the circumstances that culminated in the in-court identification. This is appropriate because generally it is the earliest identification that has the greatest probative value, since any subsequent identification may be influenced by the prior identification.
- [16] The evidence of Sgt. Gregory concerning the October 12, 2010, RCMP interview, during which she showed Mr. Gandhi some photographs and he selected a photograph of Mr. Rajaratnam as being Sokan, is admissible under the first branch of Tat. In order to accommodate Ms. Williams' concern that her cross-examination of Mr. Gandhi was predicated on the assumption that no evidence of pretrial identification was going to be led, the Crown will have to agree to recall Mr. Gandhi to make him available for further cross-examination by Ms. Williams if she so wishes. I am satisfied that this is sufficient to remedy any prejudice caused by counsel's expectation that no evidence of pretrial identification would be called.
- [17] In sum, I find that the evidence of Sgt. Gregory should not be excluded on the basis that its probative value is outweighed by its prejudicial effect. Accordingly, Application Number 43, filed December 6, 2016, is dismissed.

- [18] There is, however, a further complication in the present case. Sgt. Gregory conducted her photo lineup procedure with the witness on October 12, 2010, but a few weeks earlier on September 20, 2010, a CBSA officer also showed photographs to Mr. Gandhi. The Crown therefore has offered to call Sean Murphy, the officer who conducted the September 20, 2010 CBSA interview, in order to put before the jury the circumstances of that identification.
- [19] This led Ms. Williams, on December 12, 2016, to file Notice of Application Number 44 seeking a ruling under ss. 7 and 24(1) of the Charter to exclude the evidence of Mr. Murphy on three bases: first, that his typed notes do not meet the criteria for past recollection recorded; second, that he has destroyed his original handwritten notes of the interview; and third, that there is prejudice arising from the late admission of this evidence.
- [20] As to the first objection, it is premature. We have not yet heard Mr. Murphy testify, either at trial or on a voir dire, and accordingly there is no basis to assume that the Crown will attempt to tender his typed notes as past recollection recorded. It may be that he is able sufficiently to refresh his memory that there will be no need to resort to the principle of past recollection recorded. Alternatively, there may be other documents, such as the annotated photocopies of the pictures he showed the witness, which might qualify as past recollection recorded.
- [21] These are issues that may need to be explored on a voir dire, but they are premature on Application Number 44.
- [22] Ms. Williams' second argument in favour of excluding Mr. Murphy's evidence is that he has destroyed his original handwritten notes of his interview. There is a typed summary which is attached as an exhibit to the affidavit of Jeremy Wong, but it is apparently compiled from his original handwritten notes which no longer exist. Ms. Williams submits that this constitutes negligently destroyed evidence for which no reasonable explanation has been provided. She submits that the only appropriate remedy is to exclude the evidence of Mr. Murphy.
- [23] I do not agree. Mr. Murphy was not part of the police investigation leading to the criminal charges in this case. His task, like that of the other CBSA members, was unrelated to any criminal investigation. It was, rather, to determine for the CBSA's administrative purposes, who the migrants on the Sun Sea were and whether they were properly admissible to Canada.
- [24] As Mr. Murphy's handwritten notes were not the fruits of a criminal investigation, he did not have a duty to preserve them for the purposes of this criminal trial. As the handwritten notes were not shared with the RCMP, they did not have a duty to ensure that they were preserved. The present case is therefore distinguishable from the cases cited by Ms. Williams. This is not a case of negligent destruction of police evidence, and there is no basis for the remedy sought by Ms. Williams.

- [25] Ms. Williams' third argument is that her client is prejudiced by the Crown's delayed decision to call evidence of pretrial identification. As I have already indicated, I am satisfied that any prejudice can adequately be addressed if the Crown offers to recall Mr. Gandhi for further cross-examination.
- [26] The Crown is therefore permitted to call Sean Murphy, as well as Sgt. Gregory, as witnesses to testify about pretrial identification procedures conducted in respect of Mr. Gandhi, provided that the Crown agree to recall Mr. Gandhi for further cross-examination by Ms. Williams if she so wishes.
- [27] Applications Number 43 and Number 44, filed December 6 and December 12, 2016, respectively, are dismissed.

The Honourable Mr. Justice W.F. Ehrcke

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