
CANADA / JUDGMENT

R. v. Kim

2007 BCCA 25

COURT

British Columbia Court of Appeal

DECIDED

15 January 2007

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2007 BCCA 25 R. v. Kim

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kim,

2007 BCCA 25

Date: 20070115

Docket: CA32667

Between:

Regina

Respondent

And

Chol Hwan Kim

Appellant

Before:

The Honourable Mr. Justice Low

The Honourable Mr. Justice Thackray

The Honourable Madam Justice Kirkpatrick

S. Goldberg

Counsel for the Appellant

V.L. Hartney

Counsel for the Respondent

M.K. Woodall

Counsel for Mr. Johnson

Place and Date of Hearing:

Vancouver, British Columbia

27 and 29 September

and 22 and 23 November 2006

Place and Date of Judgment:

Vancouver, British Columbia

15 January 2007

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Mr. Justice Thackray

The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] Police officers searched the appellant at the Vancouver International Airport on 17 May 2004. They found packages containing two kilograms of cocaine secured to his midriff and current airline tickets for Sidney, Australia via Seoul, South Korea.
- [2] On 14 October 2004, the appellant pleaded guilty before Fratkin PCJ to the offence of possession of cocaine for the purpose of exportation from Canada contrary to s. 6(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. On 3 February 2005, Watchuk PCJ sentenced him to imprisonment for three years.
- [3] The appellant applied to this court to set aside the guilty plea and remit his case to the Provincial Court for trial. He raises the defence of duress by claiming that he committed the offence and pleaded guilty under threats made by a co-accused, Sang In Choi, against his life and the lives of members of his family. He also contends that his counsel, Christopher Johnson, was in a conflict of duty because he also represented Choi against whom the Crown eventually entered a stay of proceedings.

- [4] I have come to the conclusion that Mr. Johnson was in a position of conflict and ought not to have represented both the appellant and Choi. I also conclude that the appellant's guilty plea must be set aside with the case to be returned to the trial court for the taking of a fresh plea. Therefore, I find it unnecessary to comment on the availability to the appellant of the defence of duress or on the strength of the evidence with respect to that defence.
- [5] There is no fixed category of cases or situations in which a trial court or an appeal court might set aside a guilty plea. In *Adgey v. The Queen*, [1975] 2 S.C.R. 426, 13 C.C.C. (2d) 177, Dickson J. (as he then was) said at 431 (S.C.R.):

This Court in *The Queen v. Bamsey*, [1960] S.C.R. 294, at p. 298, held that an accused may change his plea if he can satisfy the Appeal Court "that there are valid grounds for his being permitted to do so." It would be unwise to attempt to define all that which might be embraced within the phrase "valid grounds". I have indicated above some of the circumstances which might justify the Court in permitting a change of plea. The examples given are not intended to be exhaustive.

- [6] It should be noted that this is not a case in which submissions given to the trial court should have alerted either the judge who took the guilty plea or the sentencing judge to the possibility that the plea might not be valid. The concern is that in the particular circumstances of this case Mr. Johnson's duty to the appellant was in conflict with his duty to Choi such that there was a miscarriage of justice and the only remedy available is the setting aside of the guilty plea.
- [7] The appellant filed fresh evidence in this court in the form of affidavits. Crown counsel cross examined the appellant on his affidavits in our presence. Mr. Johnson also swore an affidavit as did Emil Doricic, an associate from the same law office (not a partnership) who spoke to sentence on behalf of the appellant. Both lawyers were cross examined before us by counsel for the appellant. We also received other affidavits to which I will refer as required. I would admit all the fresh evidence in the appeal.
- [8] The appellant, Choi and four others were arrested at the airport at the same time. The other four, two young men and two young women, were students who had been recruited in Korea to come here to transport cocaine to Australia. It appears that the appellant had little to do with them. The appellant says that Choi, a onetime school friend, had recruited him by offering him a free trip to Australia and later requiring him to transport contraband which Choi represented to be ground bull horn for the possession of which he would only be fined. As already noted, the appellant further says that it was Choi who threatened his life and the lives of members of his family in order to get him to participate.
- [9] It is established by an affidavit filed by counsel for the appellant and sworn by a travel agent, Sunja Lee, that a young Korean male made the airline reservations for all six accused by telephone prior to 13 May 2004. The same male attended at the travel agency and paid cash for all the tickets. The tickets for the four Korean students were issued on the 13th and the other two were issued on the 14th, the intended day of travel.

- [10] Although it is not necessary to the argument of the appellant, it is interesting to note that the affidavit of Ms. Lee exhibits tickets issued to Choi, So Han Jo and Lee In Seung for travel to Seoul via Tokyo, Japan on 24 March 2004 returning directly to Vancouver on the 4th of April. There was another ticket issued to Choi for the same routes with a departure date of 9 March and a return date of 16 March. We can reach no conclusions from this evidence of extensive travel by Choi but the evidence would likely have been of interest to the police and a statement from the appellant might have added context sufficient to support continuation of the prosecution of Choi.
- [11] Ms. Lee also swore that after 17 May 2004 she received a telephone call from the same young Korean male who had purchased the airline tickets. He told her that the tickets had not been used and that he wanted a refund. She advised the man that a refund would be given upon return of the tickets. The evidence does not disclose who obtained release of the tickets from police custody, but Ms. Lee swore that Mr. Johnson telephoned her later about the refund. On 30 September 2004 her agency issued and delivered a cheque payable to Mr. Johnson for \$7,285.40 representing the cost of the tickets less 25% and the agency's handling charges. Mr. Johnson confirmed in his affidavit that he received this money as part of his fees but he was unable to recall many of the details as to how this came about.
- [12] The police knew Choi to be an associate of a known drug dealer. Choi's name on the airline manifest for Korean Air flight 72 scheduled to depart on the offence date triggered the interest of the police in the activities of all six accused. All the co-accused except Choi possessed cocaine when arrested. Choi had \$6,100 in his possession. In preparing its case it was the theory of the Crown that Choi was the overseer of the other five accused. However, the prosecutor ultimately concluded that this theory was not provable beyond a reasonable doubt.
- [13] We learned from the evidence of Mr. Johnson that his retainer and a later refresher of it came from a source unknown to him as the person would not give his name. There is no suggestion in the evidence that this person, whoever he was, had any connection with the appellant.
- [14] Mr. Johnson met with all six accused while they were in custody and he did not require any further payment of fees from them. He was successful in securing the release of Choi and later of the appellant on bail. He could not recall the source of the appellant's \$10,000 cash bail that he received and posted on the appellant's behalf on 4 June 2004. He thought the source might have been the appellant's brother or it might have been Choi. The appellant testified that his parents were in Korea at the time and that neither he nor any other member of his family was in a position to provide such funds. He did not know the source of the money. There is no reason to reject this evidence.
- [15] Upon fulfilment of the terms of his bail recognizance, the appellant would have been entitled by law to return of the money posted. However, he was required to sign an assignment of the money to Choi, an event not recalled by Mr. Johnson in his evidence. The

bail assignment is also signed by Choi. For the purposes of this appeal, the only conclusion I can reach is that Choi provided the appellant's bail money or acted as the agent of somebody else who did so. Whatever might be the truth of the matter, it was in Choi's best interests to assist the appellant in the hope that he would not provide the prosecution with evidence to complete its case against him.

- [16] The appellant testified that he and the five other accused met with Mr. Johnson two days after their arrests. He claimed that Mr. Johnson told them that a friend of Choi had paid him. He accepted Mr. Johnson's advice to apply for bail. The appellant said that he did not trust his lawyer because he was also Choi's lawyer and he feared that what he said to him would get back to Choi. He also said that he had had no previous experience with court matters and did not know how to contact another lawyer. After his release on bail he saw Choi at Mr. Johnson's office and at court in Richmond.
- [17] The appellant claimed that he continued to feel threatened by Choi. He also claimed that Mr. Johnson told him that if he pleaded guilty he would be sentenced to less than two years in prison and would not be deported to Korea, assertions I am unable to credit. He swore in his affidavit of 9 February 2005 that on 14 October 2004 (the day he pleaded guilty) Choi told him "that I must plead guilty so that the charges against him [Choi] would be dropped so there would no longer be a threat to the life of me and/or my family". Mr. Johnson told him that the charge against Choi would be dropped.
- [18] The four Korean students also pleaded guilty on 14 October 2004. On the same day, the court ordered delivery to Mr. Johnson of the money seized from Choi at the airport.
- [19] A week later the Crown directed a stay of proceedings as against Choi.
- [20] Sentence proceedings with respect to the appellant had been fixed for 1 November 2004. With the concurrence of the Crown and for reasons not at all clear to me, it was arranged that the sentencing of the appellant would take place before a judge other than the judge charged with the sentencing of the four Korean students. Fratkin PCJ sentenced those four on 21 October 2004. He concluded that a sentence of four years was appropriate for each of them. Taking into account the time each had spent in custody (more than five months), he imposed sentences of three years.
- [21] Mr. Johnson testified that he recognized that if this matter went to trial he would then be in a conflict position and the appellant and Choi would have to be represented by separate counsel. He was not asked by counsel to articulate the conflict. It is clear to me that from the beginning there was a conflict between his duty toward the appellant and his duty toward Choi. That conflict became stark when it was decided that the appellant would plead guilty and the Crown would be asked to enter a stay of proceedings against Choi.

- [22] The appellant was born in Korea in 1982. He came to Canada for schooling in 1997, at age 15. His parents and siblings arrived during the following year. When arrested, the appellant was 22 years old. Although he finished his schooling here and attended the B.C. Institute of Technology, his proficiency in English is less than complete. Some credit has to be given to his assertion that after his arrest he was in strange territory and did not adequately understand what his options were.
- [23] Assuming he was to be convicted of the drug offence, a main concern of the appellant was that he avoid a sentence of two years or greater. He has landed immigrant status only and is subject to automatic deportation if so sentenced. If sentenced to less than two years, he might be able to avoid deportation. Therefore, he had to be represented by counsel who, in addition to being free to explore possible defences (including duress), had to be free to explore all avenues that might lead to this post-conviction goal. One thing to consider was to offer to give information to the Crown that would assist it in making its case against Choi and also to offer to testify against Choi. Such co-operation by the appellant might have persuaded the prosecutor to participate in a joint submission for a sentence of less than two years, or at least it might have persuaded the court that such a sentence was merited because of the appellant's co-operation. Because he also represented Choi, Mr. Johnson was unable to advise this course of action, much less put it into effect.
- [24] Counsel for the appellant cited the case of *R. v. Burlingham*, [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7. In that case, the court ruled inadmissible certain derivative evidence obtained by police investigators as the result of a confession found at trial to be inadmissible because of the effective denial to the accused of his right to counsel in breach of s. 10(b) of the Canadian Charter of Rights and Freedoms. That case has no relevance here because the appellant was not denied a right to effective legal representation as a result of any conduct by an agent of the government. The Charter has no application. This case falls to be decided on the basis of principles existing long before constitutional enactment of the Charter.
- [25] In *R. v. W.(W.)* (1995), 100 C.C.C. (3d) 225, 25 O.R. (3d) 161 (C.A.), at 235 - 236, Doherty J.A. stated the law with respect to joint representation as follows:

While there can be no absolute bar against the joint representation of co-accused, joint representation puts counsel's obligation of undivided loyalty to each client at risk: *R. v. Silvini*, supra, at p. 257. In attempting to serve two masters, counsel may do a disservice to the interests of one or both. Counsel who undertake the joint representation of co-accused assume the heavy burden of ensuring that they are not placed in a position of representing interests which are or may be in conflict: *Law Society of Upper Canada, Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1992), rule 5. Where counsel fails to perform that duty and undertakes the representation of interests which do or may conflict, the court will order counsel removed from the record: *Re Regina and Speid* (1983), 8 C.C.C. (3d) 18, 3 D.L.R. (4th) 246, 37 C.R. (3d) 220 (Ont. C.A.); *R. v. Robillard* (1986), 28 C.C.C. (3d) 22, 23 C.R.R. 364, 14 O.A.C. 314 (C.A.).

- [26] The above passage deals with identification of a conflict in the trial court. When the issue is raised for the first time on appeal, the concern is whether, as stated by Doherty J. A. at 236 in W.(W.), "on a review of the trial record supplemented by . . . fresh evidence, the [appellant has] demonstrated that [his] joint representation resulted in a miscarriage of justice". As I have already indicated, I think the appellant here has discharged that burden.
- [27] On the facts this case is indistinguishable from this court's decision in R. v. Stork and Toews (1975), 24 C.C.C. (2d) 210 in which the court permitted withdrawal of guilty pleas by two appellants and directed a new trial.
- [28] It is fundamental to our criminal court system that counsel representing an accused person must be free from any conflict between his duty to that accused and his duty to another accused person. In the present case, (in the absence of an informed waiver the by appellant) the conflict existed from the very beginning. In the circumstances of this case, no counsel could have represented both the appellant and Choi without being in a conflict of duty. The appellant was denied effective assistance of counsel from the outset and there was manifest unfairness to him resulting in a miscarriage of justice.
- [29] It must be emphasized that whether counsel acting for more than one accused in the same matter is in a conflict of duty and whether the conflict leads to a miscarriage of justice will always depend on the circumstances of the particular case. In the present case it is likely that if Choi had also been found in possession of cocaine at the airport Mr. Johnson would not have been in a position of conflict.
- [30] I wish to add that this decision should not be seen to be a reflection on the ethics or competence of either defence counsel. Mr. Johnson did no more than err in assuming that the appellant concurred in the course of conduct and that he had given him complete instructions. He should have recognized the conflict I have described but I have no doubt he thought he was acting in the best interests of all his clients. Mr. Doricic did not become involved until after the guilty plea and he did a thorough and capable job of preparing for and speaking to sentence.
- [31] I would set aside the appellant's guilty plea and remit the charge to Provincial Court for a fresh arraignment.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Mr. Justice Thackray"

I agree:

"The Honourable Madam Justice Kirkpatrick"

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Prepared on 28 October 2026 · Esheria