
CANADA / JUDGMENT

R. v. Kwok

2002 BCCA 177

COURT

British Columbia Court of Appeal

DECIDED

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R. v. Kwok

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Chief Justice Finch

March 5, 2002

The Honourable Mr. Justice Braidwood

The Honourable Mr. Justice McKenzie

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

YEE LONG DAVID KWOK

APPELLANT

S. Goldberg

appearing for the Appellant

C. Stolte

appearing for the (Crown) Respondent

- [1] BRAIDWOOD, J.A.: Mr. Yee Long David Kwok appeals against his conviction of possession of heroin for the purpose of trafficking, pronounced 11 January 2001, following a trial by judge alone. He was sentenced to a six-month conditional sentence, followed by one year of probation. There are three main grounds of appeal seriously advanced. The appellant alleges undue delay. He further alleges that service of the notice of the Analyst's certificate was deficient, and that the verdict was unreasonable.

BACKGROUND

- [2] On 11 November 1996, an officer of the Alouette River Correctional Centre, Mr. Smith, observed a suspicious male immediately outside the fence surrounding the Centre. He was able to observe this man for some time, as he had a clear view of him from outside his office. The man came toward the fence and subsequently retreated from it several times. Because of the man's location and behaviour, Mr. Smith decided to alert Security. He continued to observe the male through his office window as he went inside to telephone Security. As he was telephoning, he saw this man throw a package over the prison fence.
- [3] Upon seeing this, Mr. Smith went back outside, picked up the package, and locked it in his vehicle. He then pursued the man who had thrown the package, leaving the Correctional Centre through a locked gate and entering the adjacent park. Once in the park, he walked approximately ninety-five paces along a trail and apprehended Kwok, who was standing slightly off the trail. No more than one and one half minutes had transpired between Mr. Smith's locking the package in his vehicle and his apprehension of Kwok.
- [4] At trial, Mr. Smith testified that he had recognized the man he apprehended as the man he had seen throw the object over the fence. The male Mr. Smith observed outside the Correctional Centre's fence had appeared to be Oriental, and had been wearing a black baseball hat, grey jacket, faded blue jeans, and white running shoes. Kwok matched this description when he was apprehended.

- [5] The history of the legal proceedings are fully set out in the Reasons of Judgment of the learned trial judge, but a brief review is as follows. Charges against Kwok were laid on 13 January 1997, but he was not tried until the beginning of January 2001. Trial was originally set for 25 September 1997, but was adjourned due to lack of court time. A new trial date was then set for 23 April 1998 (Crown had been willing to proceed as early as October 1997 but defence counsel was not available until late April 1998).
- [6] Between September 1997 and April 1998, Mr. Kwok arranged for Mr. Goldberg to replace his original counsel. However, on 23 April 1998, neither Mr. Kwok nor Mr. Goldberg appeared as scheduled. Mr. Goldberg informed the Crown by fax that day that he was unable to appear as he was in court on another matter. He requested an adjournment. Mr. Goldberg was apparently kept in court on another matter that went beyond the number of hours for which it had been scheduled. Mr. Goldberg maintains that this delay was attributable to the Court, because the judge presiding at his morning trial required him to stay into the afternoon when apparently that was not the usual practice. However, counsel sets the number of hours required for trial, so that at least some of the responsibility for Mr. Goldberg's absence from Mr. Kwok's trial must necessarily fall at Mr. Goldberg's feet. On 23 April 1998 Kwok arrived after the courtroom had been cleared, and was taken into custody on a bench warrant. He was subsequently released and remanded until 28 April 1998 to fix another trial date.
- [7] On 28 April Mr. Kwok appeared in Provincial Court in Maple Ridge. His counsel was not present. In spite of Mr. Goldberg's absence, another trial date was set for 16 June 1999. However, this date was lost when neither Mr. Goldberg nor the appellant attended to confirm it, although Mr. Goldberg had at least two opportunities to do so.
- [8] Still another date was set for 6 October 1999 (although earlier dates were available, they were not convenient for Mr. Goldberg). On 6 October Mr. Kwok elected trial by judge and jury. The preliminary inquiry was held, as a result of which Kwok was committed to stand trial.
- [9] Three different fix date appearances were subsequently scheduled in the Supreme Court. Mr. Goldberg neither attended nor provided his available dates for any of them, in spite of attempts by Crown and the trial co-ordinator to remind him of the appointments and in spite of the Court's willingness to accommodate Mr. Goldberg's schedule with respect to the scheduling of the appearances.
- [10] Mr. Goldberg then adjourned a subsequent trial date (17-18 April) although that date had been scheduled to accommodate his calendar. Crown and Mr. Goldberg afterwards agreed to another date of 29 and 30 June, with a preliminary application by defence to have the proceedings dismissed for unreasonable delay on 8 May.
- [11] On 8 May 2000, Mr. Goldberg appeared with Mr. Kwok to re-elect the mode of trial. On 7 June 2000 Mr. Goldberg filed his motion to have the charges stayed because of unreasonable delay. On 22 June 2000, when this matter came before the Court, Mr. Goldberg applied for and was awarded an adjournment until 29 June 2000. On 29 June, Mr. Kwok did not attend, and still another warrant was issued. On 6 July Mr. Kwok attended but Mr. Goldberg did not.

The matter was adjourned until 13 July 2000, on which date Mr. Goldberg sent an agent, and the trial was set for 10 and 11 January 2001. Mr. Goldberg applied again to adjourn the trial on 4 January 2001.

- [12] After much ado, the matter came before Mr. Justice Preston on 10 January 2001, at which point Mr. Goldberg applied once again to have the charges stayed or the trial adjourned because of unreasonable delay. The trial judge dismissed these applications.

ON APPEAL

1. Whether the Appellant Suffered Unreasonable Delay.

- [13] I begin by observing that most of Mr. Goldberg's argument was spent asserting that the trial judge's criticism of his conduct was unjustified. The learned trial judge wrote, in part, as follows:

- [39] It was unfortunate that there was insufficient time available in the Provincial Court to hear this matter on the first trial date, November 25, 1997, six and one-half months after that trial date had been set. The matter could have proceeded later that year but for the trial calendar of the accused's then lawyer, Mr. Xeurub. From the outset of Mr. Goldberg's involvement, all delay can be attributed to his actions. The first notice the Crown had that Mr. Goldberg was acting was the receipt of a fax on the April 23, 1998 trial date. As a result of the mis-estimation of the length of a trial in another court, he did not attend. From that date forward Mr. Goldberg pursued a course of action that can only be described as disgraceful. [40] The conduct of most counsel in criminal matters in the courts is above reproach. There are, however, counsel who intentionally conduct proceedings before the court in a manner that makes a mockery of the criminal process. [41] There is no factual foundation for Mr. Goldberg's submission that the proceedings have been unreasonably delayed. A threshold case for unreasonable delay has not been made out.

- [14] As my colleague Mr. Justice Mackenzie has stated, however, Mr. Goldberg's argument would have been better brought by separate counsel. In any event, I do not find the trial judge's criticisms unwarranted, for reasons which I will outline below, and keeping in mind that the real issue in this case is the issue of delay.

- [15] Alleging undue delay in breach of s. 11(b) of the Charter, the appellant contends that the trial judge erred in refusing to grant a stay of proceedings. Mr. Goldberg observes, quite correctly, that the trial could not proceed as originally scheduled (25 September 1997) owing to lack of court time. He further argues that he was kept from attending on the second date (23 April 1998) because he was unexpectedly required to continue another trial that was supposed to have ended in the morning.

- [16] However, both Mr. Goldberg and his client missed the January 1999 pre-trial conference. The record shows that Kwok was warned about the importance of attending, with or without counsel, but it was the appellant's failure to attend in a timely fashion between 4 and 8 January 1999 that resulted in the loss of 16 June 1999 trial date. The material does not disclose any reason for Mr. Goldberg and/or his client's many other absences on subsequent dates.
- [17] As stated in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 S.C.R., the burden of establishing a breach of the appellant's Charter rights on a balance of probabilities is upon the appellant. In that case, McLachlin J. (as she then was), concurring in the result, outlined the responsibility of a trial judge in assessing whether or not a violation of s. 11(b) has occurred (at 30):

The first task is to determine whether a *prima facie* or threshold case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. If the delay is reasonable having regard to similar cases, the application will fail. If the accused has waived his right to an early trial date, the application will fail. If the reasons for the delay are in large part attributable to the accused, the *prima facie* case will not be made out and it is unnecessary to proceed further. [18] After citing the passage that I have cited above, the trial judge concluded that a threshold case for unreasonable delay had not been made out. He found that all of the delay since Mr. Goldberg became counsel was attributable to the conduct of the appellant and his counsel. Mr. Goldberg, the judge opined, had attempted to "make a mockery of the criminal process". Among other things, the trial judge was critical of Mr. Goldberg's attempts to defer the election of mode of trial, and his repeated adjournments.

- [19] It is trite law that, absent a palpable and over-riding error, an appellate court cannot interfere with the trial judge's findings of fact. Nor do I believe that the trial judge committed manifest error, misunderstood, or ignored, relevant evidence. On the contrary, there was overwhelming evidence available to substantiate the conclusions of the trial judge.
- [20] *Morin*, supra, confirms that the accused's waiver of time periods will, more often than not, mean that the accused cannot meet the threshold case required in order to establish a Charter breach. Where the length of the delay warrants an inquiry into the reasons behind that delay, the court begins by considering whether the accused has waived, in whole or in part, his right to complain. Agreement by an accused to a future date will, in most circumstances, create an inference that the accused has waived his right to subsequently allege unreasonable delay: *R. v. Smith* (1990), 52 C.C.C. (3d) 97 (S.C.C.) at 109; *R. v. Brassard* (1993), 85 C.C.C. (3d) 287 (S.C.C.). Certainly, in the case at bar, the accused agreed, and indeed chose, to adjourn trial dates.

[21] The Morin case also stresses that other reasons for the delay must be considered. Where the delay is attributable to the accused (and/or counsel, for the two cannot be separated here), the chances of his meeting the threshold case are again unlikely. Crown is not, for instance, responsible for delay created by defence counsel's calendar: *R. v. Allen* (1996) 110 C.C.C. (3d) 331 (Ont. C.A.), *aff'd* 119 C.C.C. (3d) 1 (S.C.C.); *R. v. MacPherson* 1999 BCCA 403. The position taken by the defence is central to an inquiry into unreasonable delay:

It will be noted that although there is no duty on the appellant to seek an earlier date, however, when questions may arise, the position taken by defence from time to time is relevant. *R. v. Nguyen* (T.T.) (1998), 110 B.C.A.C. 185 at 187 [22] The total delay in this case was approximately 48 months, counted from the swearing of the Information until the conclusion of sentencing. Of those 48 months, the actions of the defence, including non-attendance of the appellant and/or his counsel, adjournments sought by counsel, and delay created by counsel's calendar, caused some 33 months of the delay. I accept the Crown's submission that the institutional delay in the case at bar was within the acceptable limits. I reject Mr. Goldberg's charge that, because of some suggested and undefined bias towards him, the trial judge minimized the delay caused by court backlog.

[23] Based upon the facts I have outlined above, I am of the opinion that the trial judge correctly found that a threshold case had not been made out. I am in agreement with the Crown's submission that this case falls into the category referred to by Sopinka J. in *Morin*, *supra*, (at 24) where, "the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial date" as the delay benefits, rather than prejudices, them. Counsel appears to have overlooked that the purpose of s. 11(b) is to "expedite trials and minimize prejudice and not to avoid trials on the merits" (*Morin*, *supra*, at 3).

Whether the Certificate of Analysis Was Properly Admitted at Trial?

[24] The appellant argues that the admission of the Certificate of Analysis (the "Certificate") into evidence at the preliminary hearing does not constitute notice for the purposes of the trial. He maintains that the Certificate ought not to have been admitted as there was no proof of service upon the accused, as required by s. 9(3) of the Narcotic Control Act R.S.C. 1985, c. N-1 (the "NCA"), which states as follows:

No certificate shall be admitted into evidence pursuant to subsection (1) unless the party intending to produce it, has before trial, given to the party against whom it is to be produced reasonable notice of that intention together with a copy of the certificate.

[25] However, as the appellant acknowledges in his factum, this Court has repeatedly held that, for the purpose of s. 9(3) of the NCA, the filing of a Certificate of Analysis at the preliminary inquiry constitutes sufficient notice for its admission at trial: *R. v. Chang* (1996), 106 C.C.C. (3d) 87 (B.C.C.A.) at 92; *R. v. Norris* (1993), 35 B.C.A.C. 133 at 139. The appellant cites no authority for his countervailing position. I do not know why this argument was advanced.

Whether the Verdict was Unreasonable?

"Possession For the Purposes of Trafficking"

- [26] The appellant argues that his conviction was unreasonable as there was no evidence that he knowingly trafficked to a person in jail and there was insufficient evidence of trafficking.
- [27] The test for an unreasonable verdict is strict. This Court cannot substitute its view for that of the trial judge. The question is whether, looking at the whole of the evidence, the trial judge could reasonably have adjudged as he did: *R. v. Biniaris*, [2000] 1 S.C.R. 381; *R. v. Yebes*, [1987] 2 S.C.R. 168. In the instant case, there was more than ample evidence allowing the trial judge to convict. Not only was the evidence sufficient, it was overwhelming.
- [28] Regarding possession, the trial judge accepted that the package retrieved by Mr. Smith was the object that had been thrown by the accused. Regarding the matter of trafficking, the trial judge found that the packaging of the heroin and the accompanying syringe (the rock used to weigh the package down enough to throw it), was a clear indication that the heroin was not for Kwok's personal use but was to be trafficked or delivered to another. No doubt such conclusion was buttressed by the fact that Kwok threw the afore-mentioned bundle over the fence and into the Correctional Centre.
- [29] Defence counsel maintains that, since it was not clear whether Kwok knew the fence surrounded a prison, Kwok's throwing of the package over the fence is equally consistent with his attempting to discard it. This submission, to say the least, cannot be accepted. The offense for which the appellant was convicted does not require that the appellant knowingly trafficked to a person in jail. The fact that the packaging was consistent with use in the drug trade, coupled with the fact that the accused intentionally threw that package over the fence, is sufficient to make out the charge.

Identification

- [30] The appellant also argues that the trial judge failed to deal adequately with the issue of identification. With respect to this issue, there was conflicting evidence. Mr. Smith, as I have outlined, had the opportunity to observe the male who threw the object as the latter repeatedly approached the fence. Mr. Smith testified that he pursued the man and found the same individual, less than a minute and a half afterwards, wearing the same clothing. Mr. Smith afterwards identified the appellant in court.
- [31] The accused, in contrast, maintained that he was not the man who threw the object over the fence. He maintained that he was in the park adjoining the Correctional Centre to watch birds and enjoy the solitude. The trial judge found the appellant's evidence "vague and unsatisfactory" and his assertion that there were others in the adjoining park "inconsistent" with other evidence that the park was otherwise deserted.
- [32] Counsel cites the case of *R. v. W.D.*, [1991] 1 S.C.R. 742 and *R. v. Burns*, [1994] 1 S.C.R. 656 at 664, the latter as it particularly relates to eyewitness evidence. Defence argues that the Reasons refer neither to the frailties of eyewitness evidence nor to the principles set out in

R. v. W.D. However, I note that the trial judge is not required to demonstrate that he knows the law or has considered all aspects of the evidence. Nor is he required to explain why he does not entertain a reasonable doubt as to the accused's guilt. Rather, trial judges "are presumed to know the law with which they work day in and day out.": R. v. Burns, [1994] 1 S.C.R. 656 at 664. Both the difficulties associated with eyewitness evidence, as treated in R. v. Atfield (1983), 25 Alta. L.R. (2d) 97, and the method of assessing an accused's testimony, as set out in R. v. W.D., supra are common knowledge to judges required to engage in such assessments. In short, Reasons for judgment, although sparse, are more than adequate in this simple case. From them, court can infer that the trial judge engaged in the appropriate analysis. I am satisfied, in short, that there was sufficient evidence, as outlined above, upon which the trial judge could reasonably infer, after applying the relevant considerations, that it was the appellant who was in possession of the heroin at issue, and that he meant to engage in trafficking.

[33] Accordingly, I would dismiss the appeal.

[34] FINCH, C.J.B.C.: I agree.

[35] MCKENZIE, J.A.: I agree.

[36] FINCH, C.J.B.C.: The appeal is dismissed.

"The Honourable Mr. Justice Braidwood"

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