CANADA / JUDGMENT

R. v. Lam

2005 BCCA 216

COURT
British Columbia Court of Appeal

DECIDED
6 April 2005

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2005 BCCA 216 R. v. Lam

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lam,

2005 BCCA 216

Date: 20050406

Docket: CA032157

Between:

Regina

Respondent

And

Vince Lam,

also known as Kwan Ming Lam

Appellant

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Low

Oral Reasons for Judgment

M. Sanders

Counsel for the Appellant

M.A. Maisonville

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

6 April 2005

[1] LOW J.A.: This is an appeal of a sentence of imprisonment for one year imposed by Godfrey P.C.J. concurrently on each of one count of theft in excess of $1,000 and one count of fraud in excess of $5,000. The appellant, who was 56 years old at the date of sentencing with no prior convictions, pleaded guilty to both offences. He says the judge erred in not imposing a conditional sentence. A judge of this Court granted leave to appeal when releasing the appellant on bail on 4 August 2004.

[2] The appellant was an immigration consultant operating through his company, Focus Canada Immigration and Business Consultants Inc. He assisted people wanting status in this country, particularly people from Hong Kong, Taiwan and China.

[3] Between 28 December 1992 and 19 January 1994, the appellant stole $150,000 from one of his clients, Tsung Hsiung Chen. Between 8 December 1995 and 11 January 1996, the appellant defrauded another of his clients, Ching Yee Lam of $106,250. None of these monies have been recovered.

[4] Under Canadian immigration laws during the time periods set out in the information people seeking immigration eligibility could invest $150,000 in government-approved funds for a period of three years to improve their chances of getting status. The appellant owned shares in Everest Capital Corporation, a company based in Saskatchewan that managed an approved investment fund. The appellant legitimately received commissions for monies he raised for the fund.

[5] In 1992, Mr. Chen consulted the appellant about immigrating to Canada and the appellant proposed making use of the investment program. Mr. Chen signed a subscription form for Everest Capital. In April 1993, Mr. Chen paid $50,000 to an intermediary who took it to the appellant. The appellant refunded $13,500 to the intermediary as some sort of fee. In October 1993, Mr. Chen paid the appellant an additional $100,000 personally, the cheque being made out at the appellant's direction to Focus Canada. The appellant gave Mr. Chen a receipt for the $150,000 investment.

[6] Thereafter the appellant processed Mr. Chen's immigration application with the false assertion that Mr. Chen had invested $150,000 in Everest Capital. Mr. Chen and his wife were accepted as investor immigrants and landed in that capacity in Vancouver in May 1994. When they made later enquiries of the appellant about the status of the investment he put

them off by telling them the fund had their address incorrect and then he avoided them by not keeping appointments and being unavailable by telephone. Finally, in 1997 the Chens obtained the address of Everest Capital in Saskatchewan. They got in touch with the fund managers directly and learned that Everest Capital never received the $150,000. They were able to confront the appellant in person and he claimed that things were mixed up because Mr. Chen had paid the investment amount in two instalments. Then he said he did not put the monies in the fund because Everest Capital owed him money.

[7] The appellant told the Chens in January 1998 he would contact them after he returned from a trip to Hong Kong. He did not do so and the appellant has never reimbursed Mr. Chen for the money he stole. Immigration Canada subsequently learned that there was no deposit with Everest Capital. However, officials of that ministry accepted that there was no wrongdoing on the part of the Chens and did not disturb their immigration status. Mr. Chen stated that he lost money that was to have been used for the education of his children.

[8] The victim in the second count and her family resided in Hong Kong and her parents lived in Richmond. In December 1995, the parents consulted the appellant about arranging for their daughter to obtain immigrant status. They were then in their mid-seventies and wanted their daughter near them as they got older. The appellant suggested a $250,000 investment under the program. The appellant later saw the victim in Hong Kong. She gave him $6,250 for the application fee.

[9] Later in Vancouver the appellant suggested to the parents that their daughter invest $100,000 in the appellant's travel agency, Highlight Travel Ltd. The result was a share-purchase agreement under which most of the investment was to be represented by a shareholder loan plus the daughter was to receive 24 per cent of the common shares of the company. The appellant provided a copy of a covering letter indicating that he had sent the daughter's immigration application to the Canadian Consulate General in Los Angeles. On the strength of this the Chens had their daughter send $100,000 to the appellant who deposited it to the account of Highlight Travel.

[10] To the appellant's certain knowledge the investment in the travel agency did not qualify under the investment program. It was not an approved fund and did not qualify under the entrepreneur part of the investment program because that part requires the applicant/ investor to have an active role in the business.

[11] The appellant never filed the victim's immigration application as he represented he had done. He never forwarded the $6,250 application fee and the corporate records of the travel agency company show that shares were never issued in the victim's name. She got nothing for her money and the appellant lied to her in the summer of 1996 when he told her that he had forwarded her immigration application and she should get a response in a month or so. In January 1997, she learned from the consulate office that the application had not been received. She and her family attended on the appellant and, without telling him what they knew from the consulate, asked for a copy of the application and a receipt for the fee. He

made excuses and when confronted with the written advice from the consulate that no application had been received he promised to refund the money with interest. He gave them a post-dated cheque that later proved to be drawn on a bank account that had been closed.

[12] Further attempts by the parents to get the money were fruitless. The victim never immigrated and now lives in Shanghai. She lost her home and business in Hong Kong. She has received no recompense from the appellant.

[13] From the two crimes, the appellant obtained a total of $256,250.

[14] The Crown suggested a gaol sentence of 12 to 18 months. The defence agreed with the range but argued for a conditional sentence. In rejecting the defence submission, the judge said this:

[8] I have read and considered all of the cases counsel have placed before me, and I will provide copies of the indexes of the cases in the case book for the court file to be appended to my reasons should this case go further. The issue is whether general deterrence requires a jail term, and if so should it be served in the community. I think it fair to conclude that the case law in British Columbia generally dictates a custodial sentence for white-collar crime where the theft and fraud is of this magnitude and committed in what is effectively a breach of trust situation. The real issue is whether the accused should be allowed to serve his time by way of a conditional sentence.

[9] I've read carefully the cases presented by the defence. The situations where a conditional sentence has been imposed have almost always involved full restitution plus an additional factor such as youth, old age, health issues, or family support issues. I appreciate there are some anomalies such as R. v. Wilson, [2003] BCJ No. 620, that is the Band manager case, but generally speaking, the issue of general deterrence seems to be foremost in these type of cases, and for good reason, as the former Chief Justice McEachern observed in R. v. Hoy, [1998] BCJ No. 1649, "I cannot help but comment that this is an offence where there may be more value or more usefulness in the principle of general deterrence than in many other types of offences."

[10] The people in the local financial community, at least those who know about this matter, and no doubt there will be a considerable number, will recognize it as simply not acceptable, although they probably already know that, to steal from clients. At least now they will understand that there are serious legal consequences when that happens and when it is discovered. I would adopt that language of the former Chief Justice and simply substitute the phrase Immigration consultant community for that of financial community.

[11] The Crown indicates that the issue of the conduct of Immigration consultants has raised concerns in this country generally and refers to a report authored by a Parliamentary advisory committee on the regulating of Immigration consultants dated May the 8th, 2003, referring to the many, many concerns voiced about the conduct of Immigration consultants.

[12] I accept that there is the mitigating factor of a guilty plea. I understand the accused has the support of some members of his community as indicated by the letters of reference, and I also appreciate there is some twenty to $30,000 available for restitution. Nonetheless, the sums taken were significant. This happened twice over a four-year period. Mr. Lam is well educated and a man of some business experience. He simply chose to put his financial wellbeing ahead of his clients in these cases by stealing from and defrauding them. He may well legitimately make significant amounts of money in the future sufficient to repay his victims. I certainly hope he does because it's been ten years and eight years respectively that these people have been without their money, causing in the case of the victim in Count 3 life-shattering results.

[13] In these circumstances, I do not think if appropriate to impose a conditional sentence. General deterrence requires real jail. Accordingly, there will be a period of incarceration for one year.

[15] The judge also ordered restitution in the amount of $256,250. The appellant pleaded guilty in July 2003 but for reasons that are not clear sentencing was delayed until 15 July 2004. The appellant has been on bail pending the hearing of the appeal since 4 August 2004.

[16] The appellant contends that the sentencing judge put too much emphasis on general deterrence and on the absence of restitution. He argues that the prerequisites to a conditional sentence set out in R. v. Proulx, [2000] 1 S.C.R. 61, were not adequately considered by the judge. The four prerequisites are: (1) that the offence is not one punishable by a minimum term of imprisonment; (2) the appropriate sentence is two years less a day or lower; (3) the safety of the community would not be endangered by the imposition of a sentence to be served in the community; and (4) a conditional sentence would be consistent with the principles and goals of sentencing found in ss. 718 and 718.2 of the Criminal Code. The appellant points out that the first three of these prerequisites are met in the present case and the court said in the Proulx case that general deterrence, one of the fundamental goals of sentencing, can be accomplished by the imposition of a conditional sentence.

[17] The appellant contends further that the judge erred in not specifically making a finding on the third factor in Proulx. In my opinion, it is implicit in her reasons that the sentencing judge found in the appellant's favour on this factor and based her reasons on the principle of deterrence that comes under the umbrella of the fourth factor. I do not accept that this experienced judge overlooked the third factor. It is to be assumed that, because she did not explicitly mention it, that she found that there would be no danger to the community if she otherwise saw fit to impose a conditional sentence. During submissions, the Crown did not argue otherwise and there is nothing in the circumstances of this case that would support such a submission. I see no merit on this argument.

[18] The circumstances of these offences are egregious. The appellant was in a position of trust and stole from and defrauded a substantial sum of money from people who relied upon his integrity and needed his assistance in achieving an important goal in their lives. He lied, deceived and stalled over a long period of time. He says that now he is involved in a viable international commercial enterprise in the field of medical science involving kidney and other human organ transplants. He claims that he hopes to make restitution as a result of this enterprise but provides no particulars as to the extent of his involvement, his prospects of cash flow and profit, or whether he put capital into it and, if he did, where he obtained that capital. At the time of sentencing he had owed the money obtained through his crimes for about ten years and he has given no explanation as to why he has made no attempt at restitution.

[19] The sentencing judge did not overemphasize general deterrence. The sentence in this case was in keeping with sentences in similar cases before this court of theft or fraud involving a breach of trust, a substantial sum of money, and harm to vulnerable victims. I am not persuaded that there was any error in the reasoning of the judge. The sentence was fit and I would dismiss the appeal.

[20] RYAN J.A.: I agree.

[21] HALL J.A.: I agree.

[22] RYAN J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Low"

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