

CANADA / JUDGMENT

R. v. Liu

2020 BCCA 235

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 235 R. v. Liu

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Liu,

2020 BCCA 235

Date: 20200820

Docket: CA45948

Between:

Regina

Respondent

And

Huobin Liu

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Grauer

On appeal from: Orders of the Provincial Court of British Columbia, dated
September 14, 2018 (conviction) and March 8, 2019 (sentence) (R. v. Liu and Zeng,
Port Coquitlam Docket 97361).

Counsel for the Appellant

(via videoconference):

R. Thirkell

T.D. Anderson

Counsel for the Respondent

(via videoconference):

R.J. Carrier

Place and Date of Hearing:

Vancouver, British Columbia

July 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 20, 2020

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Grauer

Summary:

Mr. Liu appeals his conviction of production of marihuana. Held: Appeal allowed, new trial ordered. In rejecting the appellant's evidence and concluding that he had been engaged in the grow operation, the trial judge misapprehended and misused expert evidence.

Reasons for Judgment of the Honourable Madam Justice Bennett:

Overview

- [1] While executing a search warrant on a house suspected of containing an unlicensed marihuana grow operation, police found the appellant, Huobin Liu, in the basement among hundreds of marihuana plants. He was subsequently convicted of production of marihuana, contrary to s. 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.

- [2] On appeal, Mr. Liu alleges the trial judge erred by finding that a statement made to police was given voluntarily; in his assessment of credibility; and in his treatment of expert evidence. Mr. Liu concedes that his remedy, if successful on any of the grounds is a new trial, and not an acquittal.
- [3] In my view, the trial judge did err in his treatment of the expert evidence. I would allow the appeal on that basis and order a new trial.

Background

- [4] Kevin Cahoon is a private investigator. In the fall of 2015, the house across the street from where he lived was sold. According to Mr. Cahoon, three men of Chinese descent attended the property on a regular basis. These men were subsequently identified as the appellant, Mr. Liu; his co-accused, Chao Lun Zeng; and Xi Heng Liang. Each of Mr. Liu, Mr. Zeng, and Mr. Liang drove a different van, which Mr. Cahoon observed parked outside of the house.
- [5] Around April or May 2016, Mr. Cahoon noticed the smell of marihuana near the property. He began to pay closer attention to the house, and to photograph the people and vehicles that attended it. In mid-May, the RCMP also began conducting surveillance, apparently in response to a tip provided by Mr. Cahoon.
- [6] Photographs taken by Mr. Cahoon show that on June 5, 2016, Mr. Liu drove his van to the property, loaded garbage bags into the vehicle, and drove away. He was seen at the property either by Mr. Cahoon or by the police a number of times.
- [7] On June 8, 2016, the Coquitlam RCMP executed a search warrant of the house. They found 712 marihuana plants. The entire house was taken over by the grow operation, and the evidence suggested that no one was actually living there.
- [8] The kitchen contained little cooking equipment or food, and the floor space was filled with garbage bags of the type seen in Mr. Liu's vehicle. The bags contained used soil and the remnants of spent marihuana plants. Mr. Zeng testified that Mr. Liang paid him to haul these bags away for disposal.
- [9] Four Health Canada "Personal-Use Production Licenses -- Dried Marihuana for Medical Purposes" were located during the search. Names other than Mr. Liu, Mr. Zeng, and Mr. Liang appeared on the licenses, and the production sites for the licenses were locations other than the property. All of the licenses had expired in 2013 or 2014.
- [10] The police found Mr. Liu in the basement of the house among a number of plants and placed him under arrest. Constable Citrus Wong, a Cantonese-speaking officer, attended the scene to translate for the arresting officers.

- [11] While Mr. Liu was detained in a police vehicle, Constable Wong informed him that he was under arrest for possession for the purposes of trafficking and of his right to counsel. He further advised that anything Mr. Liu said could be used as evidence in court. Constable Wong did not inform Mr. Liu of his right to remain silent, or that he was also being charged with production of marihuana. Constable Wong testified that he was not "100% sure of his translation of technical Charter terms."
- [12] The police did not intend to question any of the suspects, but simply release them.
- [13] After Mr. Liu was released from his handcuffs, he told Constable Wong that he was hired by Mr. Liang to tend the crops for approximately \$3,000 per month and that he did not know who hired Mr. Liang (the "Statement"). Constable Wong's evidence was that this information was volunteered spontaneously and that he did not ask any questions of Mr. Liu to elicit it.
- [14] Mr. Liu did not testify on the voir dire hearing.
- [15] At trial, Mr. Liu acknowledged that he was present at the property on eight occasions between May 18 and June 8, 2016. He testified that he attended the property to cook for Mr. Liang, as he was trained as a chef.
- [16] Mr. Liu stated that when he saw the marihuana plants, he asked Mr. Liang if the grow operation was legal. Mr. Liang said it was and showed him four licenses. Because of his limited English skills, Mr. Liu was unable to read the licenses, but he trusted what Mr. Liang had told him.
- [17] Mr. Liu testified that on June 5, 2016, Mr. Liang advised that he would be out of town for a period in July 2016 and asked if Mr. Liu would water the plants during his absence. Mr. Liu agreed to do so in exchange for \$3,000. On June 6 and June 8, 2016, Mr. Liang showed him how to water the plants.

Trial judge's reasons

- [18] Mr. Liu challenged the voluntariness of the Statement, arguing that Constable Wong's failure to inform him of his right to silence affected his ability to exercise that right. The trial judge found that the statement was voluntary, noting that:
1. The presence or absence of a police caution regarding the right to silence is a factor in the voluntariness analysis, but is not determinative;
 2. Constable Wong advised Mr. Liu that anything he said would be given in evidence, which is half of the usual caution on the right to silence;
 3. Mr. Liu was not interrogated about the alleged offences, but rather made the statement spontaneously as he was being released; and
 4. There was no evidence of police trickery, threats, promises, or oppression.

- [19] Mr. Liu also challenged the admission of the Statement under s. 10 of the Charter. The trial judge rejected that challenge, and his decision in that regard is not challenged on appeal.
- [20] The main issue in relation to the production charge was whether Mr. Liu was participating in the grow operation prior to his arrest on June 8, 2016. The defence contention was that although Mr. Liu had agreed to care for the plants in the future, he had not actually undertaken any production-related work at the time of his arrest.
- [21] The trial judge found that Mr. Liu was directly engaged in the grow operation prior to his arrest. He rejected the suggestion that when Mr. Liu told Constable Wong that he had been hired to water the plants for \$3,000, he was referring only to work he had agreed to undertake in the future. He found that it was not plausible that someone under arrest for marihuana-related offences would volunteer information about their intention to become engaged in the operation in the future if they were not already so engaged. The trial judge concluded that Mr. Liu volunteered that information because he wanted to explain the limited nature of his involvement in the grow operation.
- [22] The trial judge also rejected Mr. Liu's explanation that he only attended the house to cook for Mr. Liang, finding that (1) if true, he would have offered that exculpatory evidence on arrest instead of implicating himself in the care of the marihuana crop; and (2) the limited space and equipment in the kitchen would only have allowed for rudimentary cooking.
- [23] The trial judge found that the circumstantial evidence supported the conclusion that Mr. Liu was involved in the production process, including:
1. Mr. Liu attended the residence on a regular basis;
 2. He was found alone with the crop in the basement of the residence on June 8, 2016;
 3. According to Staff Sergeant Patrick Murphy, called as an expert witness on the production, use, distribution, price, and packaging of cannabis marihuana, attendees at a significant grow operation "will be trusted individuals who can be expected to be engaged in the work of the grow op"; and
 4. Mr. Liu was seen transporting a full garbage bag that resembled the bag of marihuana remnants transported by Mr. Zeng and was unable to provide a satisfactory explanation of its contents.
- [24] The trial judge also considered whether Mr. Liu's professed belief that the premises were licensed constituted a mistake of fact that prevented him from forming the necessary mens rea. He found that Mr. Liu did not have an honest belief as claimed, and, in any event, such a mistake would amount to one of law and not of fact. No issue is taken with that finding.
- [25] The trial judge acquitted Mr. Liu on the possession charge, finding that he lacked sufficient control over the marihuana to ground a conviction. The Crown does not appeal that acquittal.

Issues

[26] Mr. Liu contends that the trial judge erred by (1) finding that the statement he gave to Constable Wong was voluntary; (2) drawing adverse inferences from his silence; and (3) by materially misstating the evidence of the expert, Staff Sergeant Murphy, and by drawing inferences from that evidence contrary to the decision in *R. v. Sekhon*, 2014 SCC 15.

Discussion

[27] In my view, the trial judge committed reversible error when addressing the expert evidence. As there will need to be a new trial, I propose to address only that issue.

Misapprehension of evidence

Legal framework

[28] The leading case concerning errors in stating or understanding evidence is *R. v. Lohrer*, 2004 SCC 80, in which the Court (at para. 1) adopted the following reasoning from *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.):

... Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict ... If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so, even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[29] Justice Binnie, speaking for the Court in *Lohrer*, said at para. 2:

[2] Morrissey, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[30] In *Morrissey* at 218, Justice Doherty set out the parameters of what constitutes a "misapprehension of evidence" as follows:

... A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence.

[31] The ultimate question is this: did the error render the trial unfair, resulting in a miscarriage of justice? If so, the conviction is quashed and generally a new trial is ordered.

Analysis

[32] The issue relates to the trial judge misstating the substance of the evidence of the expert, Staff Sergeant Murphy. In his testimony, he was asked to opine on what type of people would have access to a grow operation. He expressed the opinion that people in the grow operation would be there "purposefully"--i.e., as participants. He went on to say that he could not account "for the stupidity of people that have grow operations, they certainly could do that, invite somebody that doesn't belong in that grow operation to it." He was also asked about the reason for the presence of the three people involved, to which he responded that they were all there for the purpose of growing marihuana and profiting from the enterprise.

[33] In cross-examination, Staff Sergeant Murphy was asked if a person running a grow operation might "have a buddy over for a beer." He replied "perhaps a trusted confidant, a friend that can keep that information discreet." In a subsequent exchange, he added:

Q Fair enough. So one -- one of the things could be the hard working cultivator had his pal over for a couple of drinks?

A Again, I think that's entirely possible. I would suggest that the cultivator would have those concerns and that pal would be well vetted and a trusted confidant.

Q Fair enough. Trusted confidant does not mean criminal confederate, though, it's just somebody who can keep their mouth shut?

A Yes.

[34] Mr. Liu testified that he only dropped by to cook and have a drink with Mr. Liang, and that he had no role in the grow operation. He was only going to water the plants when Mr. Liang went away.

[35] Mr. Liu's credibility was critical.

[36] The trial judge made the following findings:

[73] In short, for all the foregoing reasons, I do not accept his exculpatory explanation and it does not raise a doubt. I find that his statement to Constable Wong is an admission that he was involved in the grow op as someone tending the plants, after having been hired to do so by Mr Liang for \$3000 per month. As noted in the evidence of Staff Sergeant Murphy, only trusted individuals engaged as part of the grow op would be permitted regular or any attendance at the grow operation.

[80] This conclusion is supported by the circumstantial evidence of Mr. Liu's consistent attendance at the residence as documented in the last half of May 2016 up to and including June 8, 2016 when the operation ended due to police detection, and his being found alone among the plants in the basement of the residence on June 8, 2016. Further, as noted in the evidence of Staff Sergeant Murphy, attendees at a significant grow op like this one will be trusted individuals who can be expected to be engaged in the work of the grow op. The fact

that Mr. Liu, on June 5, 2016, can be seen transporting a full garbage bag resembling the bags of marihuana remnants transported by Mr. Zeng adds a further thread to the fabric of evidence supporting the conclusion that he had been engaged in the production process. Considering the admission, together with the circumstantial evidence related to his connection to the residence, leads to the conclusion that Mr. Liu's guilt on the production charge is proven beyond a reasonable doubt and the circumstances are not consistent with any other rationale conclusion.

[Emphasis added.]

[37] From the foregoing, it is clear that the trial judge misapprehended the evidence of Staff Sergeant Murphy. He confused the notion that only trusted individuals would be permitted to attend at the grow operation (for whatever reason), with the notion that only trusted individuals who were working at the grow operation would be permitted to attend the same. In my view, this misapprehension was also material, as the mistake completely undermined Mr. Liu's evidence and critically influenced the trial judge's rejection of it.

Use of the expert evidence

[38] The second issue raised by Mr. Liu relates to the trial judge's use of the expert evidence.

Legal Framework

[39] In Sekhon, the Court considered the admission of anecdotal evidence given by an expert. In that case, the expert testified to the effect that in the thousand drug cases he had been involved in, he had never seen a "blind courier"--someone who did not know that drugs were on board their vehicle. The trial judge relied on that evidence in rejecting Mr. Sekhon's testimony.

[40] The majority of the Court held:

[49] In my view, the trial judge erred in relying upon the Impugned Testimony. The fact that Sgt. Arsenault did not personally encounter a blind courier over the course of his investigations is neither relevant nor necessary, within the meaning ascribed to those terms by this Court in Mohan, to the issue facing the trial judge -- namely, whether Mr. Sekhon himself had knowledge of the drugs. The Impugned Testimony, though perhaps logically relevant, was not legally relevant because the guilt or innocence of accused persons that Sgt. Arsenault had encountered in the past is legally irrelevant to the guilt or innocence of Mr. Sekhon (see Mohan, at pp. 20-21). In other words, the Impugned Testimony was of no probative value in determining whether Mr. Sekhon knew about the cocaine in the hidden compartment. It is trite to say that a fundamental tenet of our criminal justice system is that the guilt of an accused cannot be determined by reference to the guilt of other, unrelated accused persons. Moreover, the Impugned Testimony was not necessary because determining whether Mr. Sekhon knew about the drugs is not beyond the knowledge and experience of the judge, and it is certainly not a matter that is technical or scientific in nature.

[50] The lack of relevance or probative value is, in my view, sufficient to justify the exclusion of the Impugned Testimony. However, it is worth noting the prejudicial effect that such evidence may have on a trial. I agree with Newbury J.A. to the extent that she found little to no difference between the Impugned Testimony in this case and a homicide investigator being permitted to testify that in all of the cases she or he has worked on, the accused intended the death of his or her victim. Nor do I see a difference between the Impugned Testimony and a stolen goods investigator testifying that he or she has never seen a case of innocent possession of stolen property, or an experienced fraud investigator testifying that he or she has never seen a case where a senior manager was not aware of fraudulent conduct occurring within the company (A.F., at para. 60). The inherent danger of admitting such evidence is obvious -- as Newbury J.A. pointed out:

Anecdotal evidence of this kind is just that -- anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown's favour, and of coming from the mouth of an "expert". If it can be said to be relevant to the case of a particular accused, it is also highly prejudicial. [para. 27]

This type of anecdotal evidence would appear to require the accused to somehow prove that, regardless of a particular expert's past experience, the accused's situation is different. Such a result is contrary to another fundamental tenet of our criminal justice system -- that it is the Crown that bears the burden of proving the mens rea of an offence beyond a reasonable doubt. As the appellant points out, "such evidence would logically trigger a defence need to call evidence to refute such opinions, such as a retired investigator who did experience an innocent person in similar circumstances, or a witness who could testify that he or she was in the same circumstances of the accused and was innocent" (A.F., at para. 61). At that point, the trial would become a battle of experts -- and a completely irrelevant battle at that.

[51] For these reasons, I conclude that the Impugned Testimony was inadmissible.

Analysis

[41] In this case, Staff Sergeant Murphy initially testified that anyone in the grow operation would be there for a purpose connected to the cultivation of marihuana. That evidence was tendered to prove that anyone found in the grow operation, such as Mr. Liu, had to be there to engage in criminal activity. Ultimately, his evidence was not as definitive as that given in Sekhon, but it was still anecdotal evidence that did not advance the ability of the trial judge to properly assess the evidence. Like in Sekhon, it was logically relevant, but not legally relevant.

[42] Not only did the trial judge misapprehend the evidence, he used the mistaken anecdotal evidence as one of the main bases to reject Mr. Liu's evidence, and as circumstantial evidence to support his conclusion that Mr. Liu was engaged in the work of the grow operation prior to his arrest.

[43] That evidence was inadmissible, but there was no objection to it. Further, the trial judge was not directed to Sekhon, in part because the cross-examination dampened the effect of the evidence by eliciting that persons could attend a grow operation who were not engaged in the criminal enterprise.

[44] In other words, the misapprehension of the evidence was, in my view, sufficient to order a new trial. The error was compounded when guilt was inferred based on the misstated opinion of the expert.

Conclusion

[45] In the result, I would allow the appeal and order a new trial.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Grauer"

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