
CANADA / JUDGMENT

R. v. Ngo

2009 BCSC 880

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ngo,

2009 BCSC 880

Date: 20090527

Docket: X071534

Registry: New Westminster

Regina

v.

Thong Anh Ngo

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

Counsel for the Crown:

G.E. Jose

as agent for C. Stanley

Counsel for the Accused:

A.K. Hoem

Place and Date of Trial:

New Westminster, B.C.

November 24-28, 2008

January 12, 13, May 1, 2009

Place and Date of Judgment:

Vancouver, B.C.

May 27, 2009

- [1] THE COURT: Thong Anh Ngo is charged on Count 1 with producing a controlled substance, cannabis (marihuana), contrary to s. 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 and on Count 2, with possession of a controlled substance, cannabis (marihuana), for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. Both offences are in relation to an alleged marihuana grow operation at 8697 143A Street in Surrey, B.C. (the "Residence") on September 12, 2006.
- [2] The Crown called its entire case on a voir dire held to determine the admissibility of evidence seized during a search of the Residence. At the conclusion of the voir dire, I ruled that the evidence was admissible. The reasons on the voir dire are at 2009 BCSC 153. By agreement of both counsel, all the viva voce evidence called on the voir dire was admitted as evidence at the trial and most of the exhibits marked on the voir dire were marked as exhibits at trial, with the exception of Exhibits A, D, V, X, and Y. Exhibit A was a police exhibit flow chart which described the various items that the police seized from the Residence.
- [3] The defence elected to call no evidence.
- [4] Six witnesses were called by the Crown on the voir dire: Constable Johnson, who was the exhibit officer; Constable Rantala, who was the lead investigator; Constable Large, who assisted in the investigation and arrested Mr. Ngo; Constable MacKay, who searched Mr. Ngo upon booking him in; Constable Wilson, who took a statement from the original complainant; and Sergeant Furac, who gave expert opinion evidence about marihuana grow operations. The facts which emerge from this evidence may be summarized in this way.
- [5] In the early morning hours of September 12, 2006, Constables Rantala and Large of the Surrey RCMP attended the Residence in response to a complaint from Ms. Phul Prasad, the next-door neighbour, about suspicious persons whom she thought may have been attempting to break in.
- [6] The officers looked in the area around and in back of the Residence, but did not find the suspicious males. They then returned to check for any evidence of forced entry to the Residence.

- [7] Although everything seemed to be secure on the ground floor of the Residence, Constable Large noticed a large window screen lying on the front yard, and he directed Constable Rantala's attention to it. The officers noticed a window on the second floor that appeared to be the same size and was missing a screen. That window was open, and the blinds were slightly askew. All the inside lights were off.
- [8] Constable Rantala formed the opinion that someone might have entered the Residence through the open window. He banged on the front door and rang the bell. After about a minute or a minute and a half, a light came on and the accused, Mr. Ngo, came to the door. He was not wearing a shirt, and it looked like he had just awoken.
- [9] Constable Rantala was in uniform, and his sidearm was in its holster. He told Mr. Ngo that several males had been seen on his property and he believed someone may have tried to break in. He asked if there was anyone else in the house, and Mr. Ngo indicated that he did not have a wife or kids there. Constable Rantala testified that Mr. Ngo appeared to understand what he was saying despite the fact that he was Vietnamese.
- [10] Constable Rantala told Mr. Ngo he wanted to go to the second floor to be sure no one had entered. Mr. Ngo did not make any attempt to bar his entry. Constable Rantala testified that at the front door, he was hit by a wave of warm, moist air with the odour of fresh marihuana. He also heard a humming noise coming from the basement. He noticed that a two-by-four was attached to the floor about five feet in back of the door. From the 10 or 12 other grow operations he had investigated, Constable Rantala was familiar with the odour of freshly growing marihuana, and he knew that attaching a two-by-four to the floor was a common method of barricading the door.
- [11] Constable Rantala directed Constable Large to stay at the front door, and he went upstairs with Mr. Ngo. He looked in each room, but no one was there. There were security bars on all the windows of the second floor. There was plastic sheeting and a black power cord sticking out of the closet in one of the bedrooms. The house was largely devoid of furniture except for several mattresses and sofas.
- [12] Constable Large arrested Mr. Ngo at 4:08 a.m. He placed him in the police car and asked him if he understood English. Mr. Ngo said he did. Constable Large then explained his Charter rights. There was a discussion about whether Mr. Ngo wished to call a lawyer, and he said "No, not now, in the morning, they're sleeping." Mr. Ngo was then turned over to Constable MacKay who transported him and booked him into cells. He was found to have two keys on his person, but the evidence does not establish what those keys were for.
- [13] Constable Wilson arrived at the Residence, and he and Constable Rantala then went through room by room to make sure no one was inside. They found no one and secured the Residence at 4:30 a.m.

- [14] A search warrant was obtained, which was executed by Constable Rantala, Constable Johnson, and Constable Large. The door on the main floor leading to the basement was locked with a door lock of the sort that would be used for a bathroom or bedroom. Constable Rantala removed the pins from the door hinges to gain access to the basement. In the basement, a large number of marihuana plants were found growing, along with lighting equipment, soil, and other paraphernalia typical of a marihuana grow operation. The basement windows had metal security bars. There was no living area in the basement.
- [15] What the officers observed upon searching the Residence is documented by the booklet of 43 photographs that was marked as Trial Exhibit Number 4. The main floor of the home was sparsely furnished, but there were places to sleep and bedding. There was a calendar and personal photos on the wall outside the kitchen area. The bathroom was full of toiletries. There was a computer on a desk in an area off the kitchen. There was food in the kitchen. On the fireplace mantel in the den, there was what appears to be a family photograph and a tax statement addressed to "Lai Huyen N, 8697 143A St., Surrey." A vehicle was parked in the driveway of the Residence, and the registration records, marked as Exhibit 1, show it was owned by "Lai Ngoc Huyen, 15027 99A Ave, Surrey, B.C."
- [16] The photographs in Exhibit 4 also show what was in the basement. There was fertilizer, fans, tubing, lights, ballasts and capacitors. There were two different rooms in the basement in which marijuana plants were growing as shown in the diagram marked as Exhibit 3. That diagram also shows ballasts and three fans in the basement. Samples taken from the plants were sent off for analysis which confirmed that they were cannabis (marihuana).
- [17] In order to prove that this was a grow operation, the Crown called Sergeant Furac who was qualified as an expert witness in various aspects of the cultivation and trafficking of marihuana, including the roles played by different participants in grow operations. Sergeant Furac did not attend the Residence, so he did not see any of the plants or paraphernalia himself. In giving his opinion evidence, he relied on what the investigating police officers observed. Referring to the police exhibit flow chart, which was marked Exhibit A on the voir dire, Sergeant Furac said there were 328 plants, 216 of which were in the vegetative stage.
- [18] This poses a problem for the Crown, because Exhibit A on the voir dire never became an exhibit at trial, and no other evidence was led as to the precise number of plants found in the Residence. During submissions, Crown counsel applied to reopen the Crown's case to adduce that evidence, but leave to do so was refused. Defence counsel submits, therefore, that Sergeant Furac's opinion can be given no weight because part of the basis for his opinion has not been supported by admissible evidence at trial.

- [19] I agree that there is one part of Sergeant Furac's opinion that must fall as a result of having no precise evidence of the number of plants, and that is his opinion as to the value of the crop being grown. He testified that this operation would produce a crop worth between \$36,900 and \$53,300. That calculation depended on knowing the exact number of plants in the Residence. As the evidence about the exact number of plants was led only on the voir dire and not on the trial proper, that part of Sergeant Furac's opinion can carry no weight.
- [20] The same argument does not apply to other aspects of Sergeant Furac's evidence, however. While there was no evidence at trial of the precise number of plants, it is clear from the photograph booklet entered at trial as Exhibit 4, especially photographs numbered 26, 28, 31, and 32, that there must have been well in excess of 100. The photograph booklet also shows the paraphernalia used in raising these plants. Sergeant Furac specifically referred to the various photographs in giving his opinion. He said that photograph 43 shows a grow schedule used for keeping track of the feeding of the plants. He said photograph 26 shows plants in the flowering stage with healthy soil and manicured leaves which encourages the growth of flowers. He said that photographs 31 and 32 show a growing room lined with reflecting Mylar and plants beginning to flower. He noted a fire extinguisher in photograph 21, which he said is common in grow operations. He said that photographs 23 and 24 show an electrical panel common in grow operations. He said photograph 25 shows a storage area with bags of commercial soil mix, and photograph 27 shows aluminum ducting for ventilation used for grow operations. Photograph 33 shows an electrical area with relays and capacitors required for the grow lights.
- [21] Thus, I am satisfied that even without the police exhibit flow chart, the booklet of photographs that was entered at trial supplied sufficient evidence to provide a firm foundation of support for Sergeant Furac's opinion that the plants and equipment in the basement of the Residence were part of a commercial marihuana grow operation.
- [22] Relying on the photographs, Sergeant Furac also gave evidence about the significance of what was found on the main floor and upstairs areas of the Residence. He said that photographs 9, 11, 13, 14, 17 and 18 show sleeping areas in which there are limited personal effects, which he said is common in grow operations so that people who are there protecting the crop do not have to leave the Residence and risk detection. He said the bars on the windows are common in grow operations. He said the propane tank is also typical, often being used either to power a CO2 generator or for cooking, as the stove is often disconnected so that a 220 volt feed line is available. Sergeant Furac agreed that in this case there was no evidence of a CO2 generator or of an electrical bypass.
- [23] Sergeant Furac described the roles played by different persons in running a commercial grow operation. He said it is not uncommon for the contractor to hire a gatekeeper, that is, someone whose role it is to live in the home to prevent entry by the police or by persons trying to steal the marihuana. The gatekeeper gives the home a lived-in look that diverts suspicion and that protects the crop. He said the fact that children's toys may be seen in photograph 35 and that children's photos are seen in number 37 is not inconsistent with the

gatekeeper role. In such an arrangement, the contractor gets the profit from the crop and pays the gatekeeper room and board.

- [24] Defence counsel submits that the accused should be acquitted of both counts. He points out that there is no evidence that the accused set up the electrical system with the grow lights and ventilation fans and, indeed, no evidence that he even had the knowledge or experience to do so. There is no evidence that the accused set up the operation or that he maintained, watered, or harvested the plants. Defence counsel points out that there is no evidence the accused had a key for the door to the basement, and he therefore submits that the accused did not have the element of control necessary for possession. In the alternative, if the accused was in possession, defence counsel submits that because the number of plants and their value have not been established, the element of possession for the purpose of trafficking has not been proven beyond a reasonable doubt.
- [25] I agree with defence counsel that if the Crown's case depended on proof that the accused personally handled the marihuana plants, then that proof is lacking. The Crown's theory, however, is that Mr. Ngo was a party to the offence, because he aided and abetted others.
- [26] As discussed above, although the Crown has failed to prove at trial the exact number of plants or their actual value, it is clear from the photographic evidence that there were at least 100 plants and that the basement was filled with the paraphernalia commonly used for a commercial grow operation. The large and elaborate set-up in the basement can lead to no other reasonable inference than that the plants were being grown for the purpose of trafficking. That evidence can lead to no other reasonable inference than that someone was producing a controlled substance in the Residence and had possession of that controlled substance for the purpose of trafficking.
- [27] Section 2 of the Controlled Drugs and Substances Act provides that possession has the same meaning in that Act as in s. 4(3) of the Criminal Code, which in turn provides:
- 4(3) For the purposes of this Act,
- (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
 - (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.
- [28] In addition, a person may be found to be in possession as a party pursuant to s. 21 of the Criminal Code: *R. v. Zanini*, [1967] S.C.R. 715; *R. v. Terrence*, [1983] 1 S.C.R. 357. Section 21 provides:

21(1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[29] Mr. Ngo was sleeping in the Residence when the police arrived, although the house did not have the sort of furnishings or personal belongings that one would expect if he were an innocent owner or tenant. The various letters and bills found in the Residence clearly connect him to that address in a substantial way. B.C. Hydro records show that on September 12, 2006, the Hydro account for the Residence was in the name of Thong A. Ngo and had been in his name since February 2, 2006. On the computer desk near the kitchen, there were a number of bills in the name of the accused, including a B.C. Hydro bill dated August 10, 2006, a Terasen bill dated August 9, 2006, and a Shaw Cable bill dated August 10, 2006. On the counter in the kitchen near the refrigerator, there was what appeared to be a demand letter dated July 27, 2006, from a lawyer in relation to an AMEX account addressed to Ngo, Thong at 8697 143A St, Surrey, B.C. From this evidence, I find that the only reasonable inference is that the accused had been staying in the Residence and had a substantial connection to it for a period of at least several months. He was in a position to exercise control over who entered the house.

[30] The evidence does not establish whether the accused had a key to the basement door. He may have had a key, but if so, the Crown has not proven it. A key was found in his possession at the time of his arrest, but no evidence was led as to what that key was for. The door leading to the basement was opened by Constable Rantala by removing the pins from the hinges. It is possible the accused would have had ready access to the basement, but the Crown has not proven that he did so.

[31] Although the Crown has not proven beyond a reasonable doubt that the accused had access to the basement or that he personally cared for the plants, I am nevertheless satisfied beyond a reasonable doubt that he aided and abetted whoever was in charge of this marihuana grow operation and that he is, therefore, a party to the offence of producing a controlled substance and a party to the offence of possession for the purpose of trafficking. I am satisfied that he must have been aware of the plants in the basement because of the strong odour observed by the police officers and the noise of the fans. From the bars on the windows and security mechanism for the front door, he must have been aware that the home had been made secure against intruders looking for the valuable crop in the basement. As well, since he was occupying the main floor of the Residence and since the only way into the basement was from the main floor, he had a measure of control over who could enter the basement even if he himself did not have a key for the basement door.

- [32] The fortification of the house against outsiders is an important fact implicating the accused. Having taken the precaution of putting bars on the windows and installing a barricade for the front door, the principals clearly were concerned to regulate who would have access to the Residence. They would not, therefore, have permitted the accused to occupy the upper floors of the Residence unless he were a part of the operation.
- [33] On the basis of Sergeant Furac's evidence, I am satisfied beyond a reasonable doubt that the accused was staying in the Residence for the purpose of making it look lived in and for the purpose of keeping possible intruders away from the marihuana crop being produced in the basement. His actions had the effect of aiding others in the production of a controlled substance and aided them in possession for the purpose of trafficking. I can draw no other reasonable inference from the evidence before me than that the accused did these things with the knowledge and intention of aiding the principal or principals in these crimes and he is, therefore, a party to both offences on the indictment.
- [34] I find him guilty as charged on both counts.

The Honourable Mr. Justice W. F. Ehrcke

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