CANADA / JUDGMENT

R. v. Nguyen

2020 BCCA 166

COURT
British Columbia Court of Appeal

DECIDED
4 June 2020

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2020 BCCA 166 R. v. Nguyen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2020 BCCA 166

Date: 20200604

Docket: CA44974

Between:

Regina

Respondent

And

Quang Dong Nguyen

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

September 29, 2017 (R. v. Nguyen, 2017 BCSC 1918,

New Westminster Docket X078026).

Oral Reasons for Judgment

Counsel for the Appellant

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(via videoconference):

C.W. Greenwood

Place and Date of Hearing:

Vancouver, British Columbia

June 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 4, 2020

Summary:

The appellant was convicted of five offences including conspiracy to export methamphetamine and conspiracy to produce methamphetamine in New Zealand. To convict on the conspiracy counts, the judge relied on intercepted telephone communications between the appellant and an individual in New Zealand. The appellant appeals only his conviction for conspiracy to produce a controlled substance. At trial, the appellant argued that the intercepted discussions were preliminary or exploratory in nature and that there was insufficient evidence to prove that the appellant and his associate in New Zealand entered into an agreement to commit an illegal act. On appeal, he argues that the verdict is unreasonable because the evidence was insufficient for the judge to conclude that the appellant's guilt was the only reasonable inference. Held: Appeal dismissed. The arguments on appeal raise the same alternative inference that was rejected by the trial judge. The appellant can point to no error in law made by the judge and no misapprehension of the evidence. It is for the trial judge to decide if any alternative inference is reasonable enough to raise a doubt. There was ample evidence to support the conclusion that the appellant's guilt was the only reasonable inference.

[1] BUTLER J.A.: Following a trial by judge alone, the appellant, Mr. Nguyen, was convicted of three firearms offences and two drug offences: conspiracy to export a controlled substance, methamphetamine; and conspiracy to produce methamphetamine contrary to ss. 6(1) and 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ("CDSA"). He brings this appeal only against the conviction for conspiracy to produce a controlled substance. He alleges that the verdict is unreasonable and that the trial judge erred in law by failing to

measure the evidence against common law principles relating to the elements of the offence of conspiracy. For the reasons that follow, I would dismiss the appeal.

Background and Trial Decision

[2] Canadian Border Services Agency officers were suspicious of two packages of shock absorbers addressed to Linh Hoang, a Canadian citizen living in New Zealand. Two officers inspected the packages and found that the shock absorbers had been hollowed out and filled with more than 6 kilograms of methamphetamine. The packages containing the shock absorbers were turned over to the Royal Canadian Mounted Police ("RCMP") who contacted authorities in New Zealand. The New Zealand police obtained authorization to conduct wiretap surveillance on phone numbers associated with Mr. Hoang. They intercepted numerous communications between Mr. Hoang and an individual in British Columbia who was subsequently identified as the appellant.

[3] At trial, the appellant argued there was insufficient evidence for the Crown to prove that he was the user of the British Columbia phone number. He is not pursuing that issue on appeal. The appellant also argued the Crown failed to prove that he and Mr. Hoang entered into an agreement to export methamphetamine to New Zealand or that they conspired to produce methamphetamine in New Zealand. He submitted that the intercepted discussions were preliminary or exploratory in nature and were insufficient to prove a conspiracy.

[4] In reasons for judgment indexed as R. v. Nguyen, 2017 BCSC 1918, the judge set out the background and the evidence presented by the Crown. The defence did not call any evidence. The case for the Crown on the CDSA charges consisted in part of the intercepted telephone communications between the appellant and Mr. Hoang that took place between December 14, 2012 and January 29, 2013. The intercepted calls were shared with the RCMP.

[5] Before analysing the evidence, the judge acknowledged that the case in conspiracy was based on circumstantial evidence. In order to conclude that the appellant and Mr. Hoang entered into an agreement either to export or produce methamphetamine, the judge recognized that he would have to draw inferences from the indirect evidence and that he would need to find that the only rational conclusion was that the appellant's guilt was proved beyond a reasonable doubt: at paras. 15, 29.

[6] The judge referred at some length to a number of authorities that outline the elements of the offence of criminal conspiracy including Papalia v. The Queen; R. v. Cotroni, [1979] 2 S.C.R. 256; R. v. Pabla, 2013 BCSC 913; R. v. Mapara, 2005 SCC 23 and R. v. Alexander (2005), 206 C.C.C. (3d) 233 (Ont. C.A.). The passages referred to by the judge explain that the essence of the offence is the proof of an agreement between two or more individuals to act together in pursuit of a common criminal objective.

[7] The judge first considered the charge of conspiracy to export methamphetamine. He noted that the early intercepted conversations concerned discussions between Mr. Hoang and the appellant about the fact that the shipment of shock absorbers had not arrived in New Zealand as expected. The judge examined those discussions and concluded at para. 38:

In my view, the intercepted telephone calls and text messages between [the appellant and Mr. Hoang] demonstrate beyond a reasonable doubt the persons initiating and receiving the transmissions were engaged in a common scheme to export illicit drugs to New Zealand. The participants initially set up where the shock absorbers were to be delivered. They became greatly concerned about the failure of the shock absorbers to be delivered into Mr. Hoang's possession in New Zealand as expected.

[8] The judge then turned to the later communications between the appellant and Mr. Hoang. When it became apparent that the packages would not arrive in New Zealand, the discussions between the appellant, described in these passages as the user of 5545 (the last four digits of the British Columbia telephone number), and Mr. Hoang turned to the alternative of setting up a facility in New Zealand for the production of methamphetamine. The judge described some of the discussions between the appellant and Mr. Hoang at paras. 46-51 of the reasons:

On January 11, 2013, after it became apparent the package would not arrive, the user of 5545 advised Mr. Hoang he had "one new thing I want to talk to you about" and was sending him a "recipe... for making this" the following week. He directed Hoang to search for the "equipments required for making this." He said if everything was found, he would "send a master person from over here" who had made the "stuff" he had just sent. The user of 5545 further said he had just talked to that person and they would "come over there and the person will manufacture that and (indiscernible) directly, the person will show you. Okay?" Hoang responded, "Yeah."

Hoang then said he would advise the user of 5545 if there were enough ingredients available and let 5545 know. The user of 5545 told Hoang there were 10 ingredients and he was to assign a number to each ingredient and advise which ingredient was not available and "we will bring it over", referring to any ingredient not available.

On January 14, 2013, there were three text messages between 5545 and Mr. Hoang. The user of 5545 requested Mr. Hoang's email address, which Mr. Hoang then sent. Later that day, the two talked on the phone. The user of 5545 asked Mr. Hoang if "he sent the email over to you yet?" Hoang replied he had not received anything. The user of 5545 said he had told "him" - the Crown says that is a referral to the cook - "to scan into the computer and... send it to you." The user of 5545 said there were six types - the Crown says that is a referral to the chemicals.

During the conversation, Hoang said, "So, so the issue is that we, we, we just want to know the, the recipe, how the ingredients, aromatics, ingredients are being cooked, that's all." The user of 5545 responded a friend in Australia had told the cook, "your side has everything", referring to the ingredients. The two talked about pricing a "new dish" and whether the cook could cook both dishes and the cook's working schedule and the best way to get the cook to New Zealand.

Mr. Hoang later that day said, "Bro, those are abbreviated words I don't understand much. I need the full name, also the stuff belong in which products?" The Crown says Mr. Hoang is referring to a list which was sent to him by the cook.

On January 29, 2013, in an intercepted call between Mr. Hoang and the user of 5545, Mr. Hoang asked 5545 if "the amount which you provided me" was for "one key." The user of 5545 responded everything would, "tally up to a total of four keys."

[9] At paras. 52-54, the judge set out the issue he had to decide and explained his conclusion that the appellant and Mr. Hoang came to an agreement to act together to produce methamphetamine in New Zealand:

Does the content of the intercepted communications between Mr. Hoang and the user of the 5545 number establish the two reached an agreement to manufacture methamphetamine in New Zealand? The Crown says it does. The defence says the discussions were preliminary in nature, that there was no agreement to engage in a joint enterprise; that the communications show, from defence's submission, "... nothing more than a suggestion about something that may, or may not, take place in the future. [That] [t]here is an absence of [any] evidence... of a meeting of minds to produce methamphetamine."

With respect, I am of the view there was a clear meeting of minds that the parties would produce methamphetamine in New Zealand. Their communications satisfy the test set out in Papalia at p. 276, cited earlier: "...there is a continuing overall, dominant plan" and while "there may be changes in methods of operation [or] personnel," those do not bring "the conspiracy to an end."

It is clear from the intercepted exchanges between Mr. Hoang and the user of the 5545 number, the two became frustrated and concerned when it became apparent the shipment of methamphetamine contained in the shock absorbers was not going to successfully arrive in New Zealand. They were concerned because they were fearful Customs officials were on to them. The intercepts are clear that, to avoid these concerns, they decided to move production of the drug to New Zealand. They had decided who the "cook" would be and his regime for travelling to and from New Zealand, the number of "soldiers" needed in the production, and the specific recipe, which was sent to Mr. Hoang by the cook, at 5545's direction.

[10] Later in the reasons, the judge referred to two lists of chemicals found in the appellant's bedroom. He noted that the lists were consistent with lists referred to in the communications between the appellant and Mr. Hoang. At paras. 78-79 of the reasons, the judge found that the lists of chemicals tied the appellant to the phone and were clear evidence of acts taken in furtherance of the conspiracy:

This evidence, that is, the list of chemicals, in and of itself, is strong and cogent evidence Mr. Nguyen was the person using the 5545 phone and taking steps in pursuance of the agreement with Mr. Hoang to produce methamphetamine in New Zealand. In an earlier long conversation between the user of 5545 and Mr. Hoang on January 11, 2013, the user of 5545 said this: "Instead of us doing, instead of us doing this way, we might as well send people straight, straight over there. Let 'em cook things, let 'em cook food for us..." Mr. Hoang replied, "Yeah... Then we don't have to go [to] the restaurant anymore."

In my view, these words, while in code, are clear evidence of the agreement reached between the user of 5545 and Mr. Hoang. The conversations as to the sending of soldiers, a cook, and the list of chemicals were all steps taken in furtherance of the conspiracy.

On Appeal

[11] The appellant argues that the verdict is unreasonable. He relies on R. v. Déry, 2006 SCC 53 for the proposition that discussions and negotiations preparatory to, and prior to a concluded agreement, do not attract criminal liability. He stresses that, in order to give an accused the benefit of a reasonable doubt, there must be a sizable domain for inchoate discussions. He says that a reasonable inference to be drawn from the intercepted communications is that the appellant and Mr. Hoang were exploring the idea of producing methamphetamine but that they had not yet agreed to do so. He argues the communications did not transcend the realm of "fruitless discussions" such that the criminal conspiracy had not "hatched".

[12] In advancing this argument, the appellant relies heavily on the intercepted discussions in which the appellant asked Mr. Hoang to investigate whether the necessary ingredients could be acquired in New Zealand. He says the appellant never received an affirmative response to that inquiry and that the discussions showed the men were preoccupied with determining if the ingredients were available. Given these circumstances, the appellant says it was reasonably open to the judge to infer that the appellant and Mr. Hoang had not reached an agreement to produce methamphetamine in New Zealand. The appellant maintains the judge erred in law in concluding that a completed agreement was reached.

[13] The appellant also says the judge erred in law "by failing to measure the evidence against established common law principles as they relate to the definitional elements of the offence of conspiracy." However, the appellant cites no specific principle or law that the judge failed to apply, apart from arguing that a concluded agreement was not made out on the evidence. That is the same argument he raises in relation to the unreasonableness of the verdict. Accordingly, I will consider only the first ground of appeal and explain why I am of the view the appellant is unable to establish that the verdict is unreasonable.

Standard of Review

[14] A verdict is reasonable under s. 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46, if it is one that a properly instructed jury acting judicially could have rendered: R. v. Biniaris, 2000 SCC 15. In order to consider if a verdict is reasonable, an appellate court may re-examine, and to some extent reweigh and consider the effect of evidence. The limited weighing of evidence is done in light of the standard of proof in criminal cases: R. v. Villaroman, 2016 SCC 33 at para. 55.

[15] Where the Crown's case depends on circumstantial evidence, the question is whether the trier of fact, acting judicially, could be satisfied that guilt is the only reasonable conclusion based on the totality of the evidence: Villaroman at para. 55. Importantly, it is fundamentally the role of the trier of fact to decide if any alternative conclusion is reasonable enough to raise a doubt: Villaroman at para. 56.

Analysis

[16] The appellant argues the evidence before the trial judge was insufficient for the judge to conclude that the appellant's guilt was the only reasonable inference. The Crown contends there was a "powerful body of evidence" on which the judge could base his conclusion. In my view, the Crown is correct. The judge carefully reviewed the intercepted communications between the appellant and Mr. Hoang and explained what he understood to be the relevance of those communications. He noted that they had agreed on many of the specifics for the production of methamphetamine including the recipe, the quantity and details about the "cook" who would travel to New Zealand. In addition, the judge took into account the overall context of these communications that occurred after the appellant and Mr. Hoang became frustrated by the difficulties they encountered in trying to ship methamphetamine to New Zealand. The judge further noted that the list of ingredients found in the appellant's bedroom was "strong evidence" that the appellant had conspired to produce methamphetamine: at para. 78. In short, there was ample evidence before the judge for him to conclude that the only reasonable conclusion was the appellant's guilt.

[17] The appellant argues the decision in Déry supports his proposition that the intercepted communications were merely preparatory discussions. Mr. Déry had been convicted of attempting to conspire to commit theft and of attempting to conspire to unlawfully possess the proceeds of a theft. The Supreme Court of Canada, per Fish J., acquitted Mr. Déry because attempting to conspire to commit a substantive offence is not a crime. The trial judge in that case had found there was insufficient evidence to convict Mr. Déry of conspiracy because he never actually agreed to commit the crime: at paras. 7, 51. The question for the Court was "whether criminal liability attaches to fruitless discussions in contemplation of a substantive crime that is never committed, nor even attempted, by any of the parties to the discussions": at para. 37.

[18] The key difference between Déry and the case at bar is that in Déry, the trial judge concluded there was never any agreement to commit a crime, "bogus or bona fide": at para. 37. The agreement to commit an illegal act, or a lawful act through unlawful means, is the essential element of conspiracy. Absent an agreement, there can be no conspiracy. An agreement "exposes the otherwise hidden intentions of the parties to it": Déry at para. 48.

[19] In the case at bar, the judge concluded that the appellant and Mr. Hoang formed an agreement to produce the same drug that they also had attempted to ship to New Zealand. The judge found a "clear meeting of minds that the parties would produce methamphetamine in New Zealand": at para. 53. The intercepted communications represented more than mere "fruitless discussion": the appellant and Mr. Hoang discussed specific ingredients; how to source the ingredients; the relative quantities of the ingredients in the recipe; who would "cook" those ingredients; and the required equipment. Given the intercepted communications, the context that the shipment of methamphetamine to New Zealand had been delayed, and the list of ingredients found in the appellant's bedroom, there was sufficient evidence for the judge to conclude that the only reasonable inference was that the appellant had conspired to produce methamphetamine.

[20] The appellant invites us to focus on the discussion between the appellant and Mr. Hoang in which the latter expresses some concern about being able to obtain all of the ingredients in New Zealand. In doing so, he is asking this Court to consider the evidence in a piecemeal fashion. The proper approach, as explained in R. v. Duong, 2019 BCCA 299, at para. 64, is to assess the evidence cumulatively:

In reviewing inferences drawn from circumstantial evidence, the evidence must be assessed cumulatively and not in a piecemeal fashion: R. v. Tahirsylaj, 2015 BCCA 7 at paras. 29, 38. Thus, although individual pieces of circumstantial evidence may be "reasonably or rationally explained away", the ultimate question is whether, on the whole of the evidence, the Crown has proven that the accused's guilt is the only reasonable inference: Tahirsylaj at para. 38. Individual items of evidence are "links in the chain of ultimate proof" and must not be examined separately and in isolation: Uhrig at para. 13, citing R. v. Morin, [1988] 2 S.C.R. 346 at 361.

[21] An examination of the whole of the evidence shows that the appellant and Mr. Hoang were aware of the need to obtain the ingredients and that they could either find them in New Zealand or bring them from British Columbia. The appellant suggested, "[i]f there's anything that can be sent from over here or brought over there from here then we will bring it over." The appellant also observed that he had received information to the effect that all of the ingredients could be found in New Zealand. The judge could conclude from this evidence that the conspirators were aware of their recipe requirements and had options in place to obtain those ingredients.

[22] More importantly, it was not necessary for the Crown to establish that the ingredients were readily available or that the conspirators had settled on how they would source all of those ingredients. The offence was proved by establishing that the appellant and Mr. Hoang

agreed to produce methamphetamine, and that is what the judge found. The offence of conspiracy only requires the intention to commit the substantive offence and it does not matter from an objective point of view whether the commission of the offence was actually possible: United States of America v. Dynar, [1997] 2 S.C.R. 462 at para. 105.

[23] The appellant's argument that the judge erred in law in concluding that a completed agreement was reached misconceives the standard of review to be applied in these circumstances. It is for the trier of fact, not the appellate court, to assess whether alternate inferences are merely possible or whether they rise to the level of being reasonable. As this Court explained in Duong at para. 65:

Of fundamental importance is the principle that it is the role of the trier of fact to assess whether alternative inferences are merely possible, or whether they are reasonable. On appellate review, "absent unreasonableness, it is not for [an appellate court] to speculate upon alternative inferences" or revive inferences that the trial judge reasonably rejected: R. v. De Aquino, 2017 BCCA 36 at para. 33; R. v. Robinson, 2017 BCCA 6 at para. 38, aff'd 2017 SCC 52. In all cases, it is fundamentally for the trier of fact to draw the line that separates reasonable doubt from speculation: Villaroman at para. 71.

[24] Here, the appellant advances the same argument on appeal that he made in the court below. He raises the same alternative inference that was considered and rejected by the judge: at paras. 52-53. The trial judge was asked to draw the line separating reasonable doubt from speculation and he did so. The appellant can point to no error in the judge's statement of the legal principles applicable to conspiracy and no misapprehension of the evidence. Indeed, the appellant concedes that the inference drawn by the judge was available. As Saunders J.A. noted in R. v. Coffey, 2020 BCCA 75, at para. 18, in considering this ground of appeal we are bound to recognize that it is for the trier of fact to decide if any alternative inference is reasonable enough to raise a doubt.

[25] Here, the judge inferred from his review of the relevant evidence that the appellant and Mr. Hoang entered into an agreement to produce methamphetamine. He also concluded that the alternate inference put forward by the appellant did not raise a reasonable doubt. In my view, the appellant is unable to demonstrate that the judge's conclusions were unreasonable. Indeed, I would agree that the only reasonable inference from the totality of the evidence was the appellant's guilt on the charge of conspiring to produce methamphetamine.

Disposition

[26] I would dismiss the appeal.

[27] SAUNDERS J.A.: I agree.

[28] WILLCOCK J.A.: I agree.

[29] SAUNDERS J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Butler"

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Prepared on 29 October 2026 · Esheria