
CANADA / JUDGMENT

R. v. Reynolds

2020 BCSC 143

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 143 R. v. Reynolds

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Reynolds,

2020 BCSC 143

Date: 20200206

Docket: 27705

Registry: Vancouver

Regina

v.

Damien Reynolds

Before: The Honourable Mr. Justice G.C. Weatherill

Ruling Re: Finding of Fact Following Jury Trial

for the Purpose of Sentencing

Counsel for the Crown:

G. Sair

J. Simpson

Counsel for the Accused:

G. DelBigio, Q.C.

J. Flood

Place and Dates of Hearing:

Vancouver, B.C.

January 27-28, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 6, 2020

Introduction

[1] Mr. Reynolds was charged by way of indictment with the following three counts:

Count 1

Damien REYNOLDS, between December 31, 2003 and March 1, 2017, at or near the City of Vancouver, in the Province of British Columbia, did, by deceit, falsehood or other fraudulent means, defraud the Governments of Canada and British Columbia of money in excess of five thousand dollars, by evading income taxes, contrary to s. 380(1)(a) of the Criminal Code, [R.S.C. 1985, c. C-46].

Count 2

Damien REYNOLDS, of the City of Vancouver, in the Province of British Columbia, between June 1, 2006 and March 1, 2017, being an officer and director of Feehily MacPhedran Oldfield Reynolds Ltd., and JAT 001 Holding Ltd, wilfully evaded or attempted to evade the remittance of tax or net tax imposed by the Excise Tax Act, [R.S.C. 1985, c. E-15] in the amount of \$244,929, and did thereby commit an offence contrary to paragraph 327(1)(c) of the said Act.

Count 3

Damien REYNOLDS, between December 31, 2006 and March 1, 2017, at or near the City of Vancouver, in the Province of British Columbia, did, by deceit, falsehood or other fraudulent means, attempt to defraud the Governments of Canada and British Columbia of money in excess of five thousand dollars, by claiming false losses on his 2007 and 2008 income tax returns, contrary to s. 380(1)(a) of the Criminal Code.

[2] On October 24, 2019, after 21 days of trial, the accused was convicted by a jury on all three counts.

[3] For the purpose of determining a fit and appropriate sentence, it is necessary to determine, to the extent the court is able, the facts that were found by the jury to have been essential to its verdicts.

- [4] This case illustrates the difficulties and complications that can arise when the Crown exercises its discretion to combine multiple and distinct events of alleged wrongdoing into a single count. In this case, despite the jury having been instructed that it need only be unanimous on the ultimate verdict but not on the path a juror takes to reach that verdict, the Crown submits that the Court should interpret each of the verdicts as necessarily meaning the jury was unanimous in respect of Mr. Reynolds' guilt on all modes of wrongdoing alleged in each of the three counts.
- [5] Counsel for Mr. Reynolds submits that there is no basis upon which the court is in a position to accede to the Crown's submission. He submits that there are simply too many possible avenues that the individual jurors could have followed to arrive at the verdicts. He submits that to sentence Mr. Reynolds on the basis of any wrongdoing other than what was essential to each verdict would be arbitrary, speculative and potentially based upon assertions of fact that had been rejected by the jurors.

The Applicable Law

- [6] Section 724 of the Criminal Code provides, in relevant part, as follows:

Jury

- (2) Where the court is composed of a judge and jury, the court
- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

- (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
- (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
- (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
- (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact
- [7] In *R. v. Ward*, 2009 BCCA 409, Bennett J.A. considered the role of the sentencing judge in making findings of fact necessary to impose the sentence after a jury's verdict of guilty. She stated:

[12] Section 724(2) is a codification of the common law as expressed in *R. v. Brown*, 1991 CanLII 73 (SCC), [1991] 2 S.C.R. 518, p. 523, where the Court found that a sentencing judge is "bound by the express and implied factual implications of the jury's verdict". The sentencing judge does not have to find the facts most favourable to the accused, but must not make findings inconsistent with the jury's verdict.

[13] In *R. v. Ferguson*, 2008 SCC 6 (CanLII), [2008] 1 S.C.R. 96, the Supreme Court of Canada considered the issue of the fact-finding process after a jury verdict. The Court reiterated the principles in *Brown* and s. 724(2). They said the following at paras. 16-8:

16 This poses a difficulty in a case such as this, since, unlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.

17 Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, 1991 CanLII 73 (SCC), [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (Criminal Code, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict [page107] rejected by the jury: *Brown*; *R. v. Braun* (1995), 1995 CanLII 16075 (MB CA), 95 C.C.C. (3d) 443 (Man. C.A.).

18 Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 1994 ABCA 402 (CanLII), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

[14] In summary, a sentencing judge does not have to arrive at a complete theory of the facts, but only needs to find sufficient facts in order to impose sentence. ...

[Emphasis added.]

- [8] As is made clear from the foregoing, where a fact is not express or implied in the jury's verdict and is necessary for the purpose of determining the appropriate sentence, the sentencing judge must make his or her own finding for the purpose of sentencing, to the extent that he or she is able to do so: *R. v. James*, 2018 BCSC 1586 at para. 36. Facts that are implicit in the jury's verdict of guilty are not determinations of the sentencing judge but are simply his or her elucidation of the facts the jury logically and necessarily must have relied on to convict the accused: *R. v. Punko*, [2012] 2 S.C.R. 396 at paras. 11-12.
- [9] Section 724(3)(d) and (e) of the Criminal Code together with the decision of the Supreme Court of Canada in *Ferguson*, instruct that where the sentencing judge is relying on an aggravating fact, he or she must be convinced of the existence of that fact beyond a reasonable doubt. Section 380.1(1) of the Criminal Code provides that where a court imposes a sentence for fraud under this provision, it shall consider inter alia the magnitude of the fraud as an aggravating circumstance. Although the provisions of s. 380.1(1) were not enacted until 2011 and, hence, were not in force at the time of the offences in issue, counsel in this case concede that, all of the facts in dispute at this hearing related to the quantum of the fraud/evasion and are considered aggravating facts for the purpose of sentencing. Accordingly, as the sentencing judge, I must be convinced of the existence of each of these disputed facts beyond a reasonable doubt.

Summary of Evidence

Counts 1 and 3

- [10] The Crown submits that one of the key determinations the jury was required to make in respect of both Counts 1 and 3 was the date upon which Mr. Reynolds became a resident of Canada for income tax purposes.
- [11] The evidence presented by the Crown at trial demonstrated that Mr. Reynolds had a significant personal and business presence in and connection with Canada as at January 25, 2006 when he moved his wife and children from Australia to Vancouver where they had been previously residing. That evidence was summarized at para. 99 of the Jury Charge.
- [12] The evidence presented by the Crown also demonstrated that, on January 4, 2008, Mr. Reynolds entered into a loan agreement with Quest Holdings Ltd. ("Quest"). Pursuant to this, Quest loaned Mr. Reynolds \$2 million secured by, among other of Mr. Reynolds' holdings, his shares in publicly traded companies called Buffalo Gold Ltd. ("Buffalo Gold") (3 million shares) and Longview Capital Partners Inc. ("Longview") (15 million shares). He also pledged his shares in a private company called Kyoto Planet Group ("Kyoto") (35,045,542 shares).

- [13] Mr. Reynolds filed his Canadian personal income tax return for the year 2007 in April 2008. He filed it on the basis that he had become a resident of Canada on January 25, 2006. He reported in it that he owed income taxes for \$1,571,531. Both his tax lawyer and his accountant (who prepared the income tax return on Mr. Reynolds' behalf) advised him to use the January 2006 residency date.
- [14] As a result of the global economic crash in the fall of 2008 and the consequential drop in the loan to value ratio required by Quest, the Buffalo Gold and Longview shares were sold by Quest such that Mr. Reynolds' debt to Quest was reduced significantly.
- [15] In January 2009, Mr. Reynolds' tax lawyer filed a Notice of Objection on Mr. Reynolds' behalf in respect of his 2007 Notice of Assessment. It stated that Mr. Reynolds had not become a resident of Canada until September 7, 2006 and that, in the result, and because of the deemed disposition and deemed reacquisition rules related to securities upon becoming a resident, the net capital gains as set out in his 2007 income tax return had been overstated by \$2,417,672 and \$899,721 in respect of his Buffalo Gold and Longview shares respectively.
- [16] The Notice of Objection calculations included a reported loss of \$4,003,855 on the sale of 16,035,420 Kyoto shares, creating an allowable business investment loss ("ABIL") of \$2,001,928 which Mr. Reynolds claimed to reduce his taxable income. Mr. Reynolds did not provide the Canada Revenue Agency with any explanation or supporting documents for his claimed ABIL. Ultimately, it was disallowed by the Canada Revenue Agency.
- [17] On the basis of the resulting adjusted cost bases, Mr. Reynolds also claimed a capital loss in his 2008 income tax return of \$20,146,921.64, 50% of which (or \$10,073,460.82) was eligible to be applied to offset his 2008 income of \$255,930 and \$1,371,751.48 was available to offset his 2007 income through a requested Loss Carryback, thereby reducing his tax liability for both years to NIL, and leaving the balance of the net capital loss (\$8,701,709.34) to offset taxable income in future years.
- [18] In early January 2011, Quest forgave the balance of the debt and returned the Kyoto shares to Mr. Reynolds.

Count 2

- [19] At trial, the Crown led evidence that Mr. Reynolds was responsible for the operations of two Canadian companies, JAT 001 and Feehily. The Crown alleged that he failed to remit the GST or HST owing for these two different companies and in two distinct time periods: the years 2009 to 2012 and 2006 to 2008, respectively.
- [20] The Crown's case was based upon evidence that they say demonstrated that Mr. Reynolds supplied property or services over \$30,000 for four consecutive quarters, that these were provided with a reasonable expectation of returning a profit, and that he knowingly diverted the GST or HST payments.

Parties' Positions

Counts 1 and 3

- [21] Based on the foregoing evidence, Crown Counsel submits that the only logical inference from the verdicts on Counts 1 and 3 is that the jury found Mr. Reynolds became a resident in Canada for income tax purposes in January 2006 and, therefore, the jury had to have found that he failed to report, or underreported, his income in each of the years, by each of the modes and in each of the quantums alleged at trial on those counts.
- [22] Defence counsel submits that the Crown is seeking to have the Court not only go behind the verdict, but beyond the verdict, by arguing that sentencing should be based upon particularized amounts of evaded tax rather than the amount set out in the counts ("in excess of \$5,000"). He points out that the jury was specifically instructed that the Crown need only prove that tax exceeding \$5,000 was (or was attempted to be) evaded and that there was no requirement for proof of a precise amount (Jury Charge, at para. 61). Given that instruction, together with the instruction that the jury need not be unanimous on the route it follows to reach its verdicts (Jury Charge, at para. 188), defence counsel submits that this court can do nothing more than find that the only fact essential to the jury's verdicts on Counts 1 and 3 was evasion or attempted evasion of an amount exceeding \$5,000.

Count 2

- [23] Crown submits that the evidence at trial clearly demonstrated that the elements of the offence were met for both companies and time periods. Therefore, the Crown submits that sentencing ought to proceed on this basis.
- [24] Defence counsel, on the other hand, argues that there is no way to know which of the two discreet allegations the jury found Mr. Reynolds had committed, or whether they found both and, therefore, sentencing ought to proceed based upon the lesser of the two, that is, his failure to remit GST or HST in the amount of \$27,750 for Feehily.

Analysis

- [25] While there is a certain initial persuasiveness to defence counsel's arguments, in my view, they are answered by the requirement for the court in such circumstances to do its best "to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict": Ferguson at para. 16. Furthermore, the analytical framework articulated in Ferguson, and summarized concisely by Mr. Justice Riley of this court in James, begins with acceptance, as proven, of all facts essential to the jury's verdict as the starting point for the analysis. Then, only when necessary, the sentencing judge may exercise discretion to decide additional facts to find a proper sentence (James, at para. 51; Ferguson, at paras. 17-18). Therefore, it is open for me to find facts beyond the minimum essential elements of the offences for the purpose of imposing a fit sentence.

[26] However, where, as here, the factual implications of the jury's verdicts are ambiguous, in coming to my own independent determination of the relevant facts, where those facts will be considered aggravating circumstances for the purpose of sentencing, I must be convinced of the existence of each of them beyond a reasonable doubt. Otherwise, there is substantial risk of Mr. Reynolds being sentenced based upon a mode of fraud or evasion that the jury rejected. Such an outcome would be unjust.

Count 1

[27] Despite the breadth of time span set out in Count 1, the Crown's case at trial was much more limited in scope. The Crown alleged that Mr. Reynolds:

- a) failed to report at least \$258,681 of income earned while working and carrying on business in Canada during 2004;
- b) failed to report at least \$351,064 of income earned while working and carrying on business in Canada during 2005;
- c) underreported income of \$1,564,494 in 2006 by falsely claiming he became a resident in Canada on September 7, 2006, when he had actually become a resident in Canada on January 27, 2006; and
- d) claimed a false ABIL of \$2,001,928 when filing his 2008 personal income tax return.

[28] Because Count 1 was drafted to capture, and was tried on the basis of, multiple distinct incidents and modes of fraud in a single count, it is impossible to know whether the jury found Mr. Reynolds guilty of fraud in respect of his conduct in 2004, 2005, 2006, 2008, or in one or more of those years. As already stated, the law in Canada, at least at present, is such that the jury was only required to have been unanimous as to the essential elements of the offence of fraud charged in Count 1. The jury was not required to have been unanimous on the facts establishing those essential elements: *R. v. M.R.H.*, 2019 SCC 46; *R. v. Cadman*, 2017 BCCA 204 at para. 15. In the result, one of the jurors could have been persuaded of Mr. Reynolds' guilt with respect to 2004, but found him innocent with respect to all other years. Another juror may have been persuaded that Mr. Reynolds did nothing wrong in 2004, but that he was guilty of fraud with respect to 2008. Still another juror may have been persuaded that Mr. Reynolds was guilty of fraud with respect to both 2006 and 2008.

[29] Nevertheless, the Crown asks the court to come to its own independent determination of the relevant facts found by the jury. In essence, the Crown is asking the Court to re-weigh all of the evidence presented at trial and conclude for itself which of the four different modes of fraudulent conduct were proven beyond a reasonable doubt to the satisfaction of the jury.

[30] The Crown's case at trial in respect of Mr. Reynolds' conduct for the years 2006 and 2008 involved complex tax issues, voluminous electronic documentation, multifaceted and intricate corporate structures.

- [31] The court is in no position to "accept as proven" any fact that was unanimously found by the jury as proof of the elements of fraud. Indeed, it is impossible to conclude that the jury was satisfied beyond a reasonable doubt as to any particular mode of fraud alleged by the Crown. Simply because the Crown put forward evidence which it says was proof of each mode of fraud does not mean the jury agreed. The jury could have been satisfied of Mr. Reynolds' guilt with respect to tax evasion in respect of any one or more of the years 2004, 2005, 2006 or 2008.
- [32] Although I am not bound to find the facts in favour of the accused (Ward, at para. 12), in my view, Mr. Reynolds is entitled to the benefit of the doubt created by the manner in which the Crown chose to frame the indictment and prosecute its case at trial.
- [33] The evidence supporting the Crown's case on two of the alleged modes of fraud within Count 1 was straightforward and persuasive. Mr. Reynolds received T4s for employment income derived from a Canadian company in respect of each of the 2004 and 2005 tax years. He did not file a Canadian income tax return for either year. In coming to my own independent determination of the relevant facts, I find, beyond a reasonable doubt, that Mr. Reynolds committed fraud by working and carrying on business in Canada in 2004 and 2005 and failing to report employment income of \$258,681 in 2004 and \$351,064 in 2005. The evidence regarding the other two allegations forming Count 1 (fraud in respect of the years 2006 and 2008) was much less clear and persuasive and, therefore, I am not convinced beyond a reasonable doubt that Mr. Reynolds was guilty of these acts. The Court is unable to independently come to any other determination based upon the evidence at trial on Count 1 beyond a reasonable doubt.
- [34] Sentencing on Count 1 will be based upon a finding of guilt with respect to Mr. Reynolds having failed to report a total of \$609,745 in taxable income.

Count 2

- [35] With respect to Count 2, again, despite the breadth of the time span set out in Count 2, the Crown's case at trial was more measured, alleging that Mr. Reynolds failed to remit GST/HST in respect of the two listed companies as follows:
- a) \$27,750 in GST owing on behalf of Feehily for the years 2006 to 2008; and
 - b) \$121,179 in GST/HST owing on behalf of JAT 001 for the years 2009 to 2012.

There is no way of knowing whether the jurors were unanimous in respect of Mr. Reynolds' guilt regarding both companies, or either of them.

- [36] In coming to my own independent determination of the relevant facts, I am satisfied beyond a reasonable doubt and, so find, that Mr. Reynolds provided services through JAT 001 such that an obligation to remit GST/HST was triggered under the Excise Tax Act, that Mr. Reynolds was aware of that obligation through his accountant, and willfully failed to remit the tax. I am not satisfied, beyond a reasonable doubt, on the evidence presented as a whole

that Mr. Reynolds was aware of a corresponding obligation regarding services provided by Feehily.

- [37] Sentencing on Count 2 will be based upon a finding of guilt with respect to Mr. Reynolds having failed to remit GST/HST for a total of \$121,179.

Count 3

- [38] The Crown's case at trial regarding Count 3 alleged that Mr. Reynolds attempted to defraud the governments of tax revenue by claiming false capital losses for his 2007 and 2008 personal tax returns on shares he had surrendered to Quest as security for the \$2 million loan.
- [39] During this hearing, the Crown argued that, in order to have convicted on Count 3, the jury must have decided Mr. Reynolds became a resident of Canada for tax purposes in January 2006 rather than in September 2006 as he claimed in this Notice of Objection.
- [40] But, as the jury was instructed (Jury Charge, at paras. 91-95), a finding that Mr. Reynolds was physically present in Canada is not necessarily the same as him having been a resident in Canada for tax purposes. For tax purposes, residency is governed by the provisions of s. 250(5) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) of which deems a person not to be a resident of Canada if the person is, under a tax treaty with another country, resident in the other country. The Crown did not lead any evidence regarding Mr. Reynolds' residential ties to Australia during the period January to September 2006. It cannot be said that the jury must have been satisfied beyond a reasonable doubt that Mr. Reynolds was a resident of Canada for tax purposes during that period.
- [41] There are a number of plausible ways in which the jury could have concluded that the claimed capital loss was false. It could have been satisfied beyond a reasonable doubt that the shares of a particular company (one or more of the approximately 30 that were listed in Schedule 3 to Mr. Reynolds' T1-2008 income tax return) reported as having been disposed of were not disposed of. It could have concluded that the reported proceeds of sale were inaccurate. It could have concluded that the reported adjusted cost base(s) of the shares in question were false. None of these scenarios is tied to or dependent upon Mr. Reynolds' residency.
- [42] Moreover, the Crown presented evidence regarding the reorganization of various corporate entities to demonstrate that Mr. Reynolds acquired shares in certain corporations at a cost that differed from the reported adjusted cost bases. Indeed the Crown told the jury during its closing submissions that Mr. Reynolds' fraud included his reporting of incorrect adjusted costs bases. The court is left without any basis for determining which pathway the jury took in arriving at its guilty verdict on Count 3. A sentence based on an avenue of fraud that the jury did not convict on would be unjust.

- [43] I agree with defence counsel that the jury's finding of guilt on Count 3 was not necessarily the result of it having accepted that Mr. Reynolds attempted to defraud the governments by claiming a false residency date. The court has no way of determining the basis upon which the jury concluded the claimed capital loss was false. Although s. 724(2)(b) of the Criminal Code provides that the court "may" find any other relevant fact that was disclosed by the evidence at trial, in the circumstances of this case, I must be satisfied beyond a reasonable doubt of the existence of that fact.
- [44] Given the manner in which Count 3 was drafted and the evidence at trial unfolded, I find that the only independent determination the court can reach of the relevant facts proven by the Crown beyond a reasonable doubt is that Mr. Reynolds was guilty of attempting to defraud the governments of money in excess of \$5,000. Sentencing on Count 3 will be on that basis.

Conclusion

- [45] Mr. Reynolds will be sentence based upon the following findings of fact that are implicit in the jury's verdicts:
- a) Count 1: he defrauded the governments of income tax payable on \$609,745 in unreported income for the years 2004 and 2005;
 - b) Count 2: he failed to remit GST/HST of \$121,179; and
 - c) Count 3: he attempted to defraud the governments of money in excess of \$5,000.

"G.C. Weatherill J."

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