
CANADA / JUDGMENT

R. v. Zhao

2013 BCSC 1299

COURT

Supreme Court of British Columbia

DECIDED

30 May 2013

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2013 BCSC 1299 R. v. Zhao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zhao,

2013 BCSC 1299

Date: 20130530

Docket: 156020-1

Registry: Victoria

Regina

v.

Xiaochen Zhao

Before: The Honourable Mr. Justice B.D. MacKenzie

On appeal from: Provincial Court of British Columbia, November 21, 2012

(R. v. Zhao, Victoria Registry No. 156020-1)

Oral Reasons for Judgment

(In Chambers)

Counsel for the Crown (Respondent):

N. Preshaw

Counsel for the Accused (Appellant):

J. M. Hutchison, Q.C.

Place and Date of Trial/Hearing:

Victoria, B.C.

May 30, 2013

Place and Date of Judgment:

Victoria, B.C.

May 30, 2013

- [1] THE COURT: This is an appeal by Ms. Zhao from the sentence imposed by an experienced Provincial Court judge involving charges under the Customs Act.
- [2] Count 1 of the information states that on or about November 27, 2011, at or near North Saanich, Ms. Zhao unlawfully made a false statement or deceptive statement, verbally and/or in writing, to wit, false statements in regard to the importation of various Hermes goods, including a handbag, wallet, shoes, jewellery, scarves, and accessories, contrary to the Customs Act.
- [3] Count 2 alleges or charges Ms. Zhao with wilfully evading or attempting to evade the payment of duties on imported goods, the same items listed in Count 1.
- [4] At the sentencing in Provincial Court, the learned trial judge, after hearing full and complete submissions from defence counsel, who is continuing to act for Ms. Zhao on the appeal, and Crown counsel, who is not the same Crown counsel as has appeared today, imposed a fine on both counts of \$5,000, and gave Ms. Zhao two weeks to pay those fines.
- [5] The issue on the appeal brought by Ms. Zhao is whether the trial judge erred in principle in failing to fully consider whether a discharge could satisfy the principles of deterrence, especially specific deterrence, and whether or not a discharge would be contrary to the public interest.
- [6] Since the original notice of appeal was filed, there is now a further ground advanced by the defence that they say justifies appellate intervention, that is, there is now a significant new feature pertaining to Ms. Zhao's status in Canada on a student or study permit.
- [7] The Crown submits that the learned trial judge did not err in principle and fully considered all of the principles of sentencing, and specifically the discharge provisions, as well as Ms. Zhao's status as a foreign person in Canada on a study permit.
- [8] I will say at the outset that both counsel have made very able submissions, having regard to their respective positions today on this appeal.

- [9] Another issue that was raised by counsel for Ms. Zhao in Provincial Court was the application of the principles enunciated in *Kienapple* with respect to convictions being entered on both these counts. Defence counsel submitted that *Kienapple* did apply, having regard to the specific offences Ms. Zhao was facing on Counts 1 and 2. Crown counsel, at the sentencing hearing, submitted *Kienapple* did not apply. The trial judge agreed with the Crown at that time.
- [10] On this appeal, Mr. Preshaw, on behalf of the Crown, has agreed with Mr. Hutchison that the principles in *Kienapple* are indeed applicable to Counts 1 and 2, and concedes that there should not be convictions on both counts. Mr. Preshaw submits that a conditional stay of proceedings should be entered on the less serious of the two charges, that being on Count 1.
- [11] Having regard to the Crown's position and the authorities that I have looked at, I accept the Crown's position at this point in time that *Kienapple* does apply. As such, there will be a conditional stay of proceedings entered on Count 1, as opposed to a conviction.
- [12] With respect to that issue, Crown submits that, given that concession, it would be appropriate, if I did dismiss the appeal, to impose a \$10,000 fine on Count 2 in place of the \$5,000 fine that the trial judge imposed.
- [13] With respect to the scope of appellate review on a sentence appeal, it is clear that it is not sufficient that a reviewing court simply conclude that it might have done something differently than the trial judge. On this point, it is important to note the comments of Chief Justice Lamer, as he then was, in *R. v. C.A.M.*, 105 C.C.C. (3d) 327. At page 373, the chief justice said:

In *Shropshire*, this Court recently articulated the appropriate standard of review that a court of appeal should adopt in reviewing the fitness of sentence under s. 687(1). In the context of reviewing the fitness of an order of parole ineligibility, Iacobucci J. described the standard of review as follows, at para. 46:

An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

The court then went on to say:

As my learned colleague noted, this standard of review traces part of its lineage to the jurisprudence of the British Columbia Court of Appeal. As Bull J.A. described the nature of a trial judge's sentencing discretion in *R. v. Gourgon* (1981), 58 C.C.C. (2d) 193, at p. 197:

... the matter is clearly one of discretion and unless patently wrong, or wrong principles applied, or correct principles applied erroneously, or proper factors ignored or overstressed, an appellate Court should be careful not to interfere with the exercise of that discretion of a trial Judge.

The court went on to say further:

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

- [14] There is no doubt that significant deference should be accorded to trial judges when it comes to sentence appeals.
- [15] I will deal briefly with the acknowledged facts that led to the guilty pleas. On November 27, 2012, Ms. Zhao returned from a trip to Las Vegas. She arrived at the Victoria airport. She filled out a declaration card falsely claiming she was importing only \$710 of clothing and footwear. She presented that declaration card and, because of concerns of the initial customs officer, a secondary examination was demanded. At that time, she had discussions with the officer about her stay in Canada and studying at the University of Victoria.
- [16] During a search of Ms. Zhao's luggage, two receipts for goods from stores in Las Vegas were located, totalling roughly \$59,000; \$57,000 of it was from the Las Vegas Hermes store. Ms. Zhao confirmed she had purchased these items and had lied on her declaration card.
- [17] The duties that were evaded were approximately \$9,000. When those duties were combined with the penalties that were imposed by the customs officials at the airport, the total financial ramifications or repercussions to Ms. Zhao were approximately \$15,400. Moreover, and significantly, with respect to the trial judge's reasons for sentencing, during that search another receipt was found that was dated November 19th. It is acknowledged that at that time Ms. Zhao returned from a trip and again, did not declare everything she had purchased when she was filling out her declaration card.
- [18] It was in those circumstances that the Crown submitted, as is apparently the usual submission of Crown in circumstances involving Customs Act violations, that fines totalling the equivalent of the duties evaded would be appropriate, that being roughly \$10,000.
- [19] As I have stated, defence counsel made complete and full submissions to the sentencing judge with respect to the application for a discharge.
- [20] Turning now to the personal circumstances of Ms. Zhao. She is a Chinese citizen and is 24 years of age. She came to Canada in 2006, has learned English and has enrolled at the University of Victoria. She is now in the third year of an economics program. During the sentencing hearing, a letter from a faculty member spoke highly of her, stating that she was an excellent student and had a great deal of potential.

- [21] If allowed to remain in Canada, she hopes to graduate with a degree in economics, sometime in December of this year. She is hoping to enter the banking industry or some other financial type of career if she remains in Canada.
- [22] At the sentencing hearing, it was submitted that Ms. Zhao has travelled extensively back and forth to China since arriving in Canada, and that there is no suggestion that she has been in breach of the Customs Act Regulations, apart from this occasion that is before the court and the prior occasion for which she was not charged, based on the receipt that the customs officer found in her baggage on November 27th.
- [23] It goes without saying, having regard to the items that were in Ms. Zhao's possession when coming back from Las Vegas, the number of trips she has made to China, and her ability to promptly pay significant fines and penalties, that, as Mr. Hutchison says, Ms. Zhao is the beneficiary of belonging to a very wealthy Chinese family, her father apparently a business person in Beijing.
- [24] The trial judge was advised that Ms. Zhao has no prior criminal history and no convictions under any regulatory offences. It was emphasized that she entered a plea of guilty and there were mitigating issues pertaining to English not being her first language and the fact that the items that were not declared were gifts for Ms. Zhao's family. Perhaps most significantly, there was no attempt by Ms. Zhao to dispose of not only the receipts that were the foundation for these charges, but also the one receipt from her prior trip. I must agree with counsel that retention of the receipts is indeed quite unusual for a sophisticated smuggler who intends to deceive the customs authorities.
- [25] Be that as it may, the guilty pleas were entered and, after hearing submissions, the trial judge noted that:

The argument made for a discharge involves her status in Canada

- [26] As a result, it was clear the sentencing judge was aware of the potential ramifications a conviction may have on Ms. Zhao's status in Canada, given that her study visa was set to expire in March of this year.
- [27] At paragraph 8 of his decision, the trial judge noted that Ms. Zhao is "not facing deportation" and noted that there was no suggestion at that time that her current visa would be cancelled. He then went on to say:
- ... but there is a real possibility, and perhaps a likelihood, that she will not be renewed.
- [28] So in those circumstances, I agree that, unlike the sentencing judge in the recent Supreme Court of Canada decision in *Pham*, the sentencing judge was aware of the possibility or the likelihood that there would be potential immigration consequences.

- [29] In his reasons, the trial judge found that as there was some degree of planning, in the sense that one has to plan not to fulfil the obligations under the Customs Act with respect to a full and frank declaration, and the fact that on her previous trip Ms. Zhao did not declare all the goods she brought back to Canada, because of the need for specific or individual deterrence, Ms. Zhao should be "sanctioned in a serious manner."
- [30] At this point in time, I will state that I cannot agree with defence counsel that there was a lack of appreciation of any of the mitigating factors that were put before the sentencing judge, or that he did not give sufficient consideration to the fact that most of these items were gifts. I cannot find an overriding error in his overall consideration or assessment of the facts that were before him at that time.
- [31] I will first deal with the defence submissions that there is now a significant new feature that, when combined with all of the other circumstances of both the offence and this offender, warrants the setting aside of the original sentence and the imposition of a discharge so as to avoid the imposition of a criminal conviction.
- [32] However, before I go any further, I wish to emphasize that I agree wholeheartedly with Mr. Preshaw when he says the following at paragraph 33 of his written submissions:

Economic crimes involving the failure to pay tax and duties are often committed by persons of good character with no previous history of criminality. General and specific deterrence are important factors in sentencing in cases of this sort. Each traveler who enters Canada must consider whether to make an honest declaration to Customs. They should be influenced by the knowledge of the consequence if they chose not to do so.

The Customs system is based on trust. Customs Officers cannot verify every declaration or there would be no resources left for other border concerns such as security. Each person who enters the country has an obligation to assist in this endeavour by making an honest declaration. Failure to do so should be denounced by this Court.

- [33] Again, I agree with those observations and statements. As a result, I agree with the trial judge that a "serious sanction" is appropriate and necessary to deal with both specific and general deterrence, as well as the codified principles of sentencing in s. 718.
- [34] I now return to what has developed since the sentencing in Provincial Court. Since then, there has been documentation sent to Ms. Zhao requiring her to appear before a Border Services hearing as a result of the convictions that were entered in Provincial Court on these two offences.
- [35] In the notice mandating her appearance for a hearing, the Border Services officer who prepared the report, in compliance with the mandatory provisions of the Immigration and Refugee Protection Act, and under the general heading of "Criminality", has concluded, in my opinion quite properly, that because of these convictions under the Customs Act, Ms. Zhao is now "inadmissible" to remain in Canada. Moreover, now that the Minister has directed that there be an admissibility hearing, it appears s. 45 of the Act mandates a

mandatory removal order because, as a foreign national convicted of an indictable offence, even though the Crown proceeded by way of summary conviction here, it is a hybrid offence and, by definition, deemed indictable for the purposes of s. 36 of the Act, the Act now requires a finding of inadmissibility.

- [36] The appellant therefore says this is a most significant development in this case, and the possibility or likelihood that her study visa would not be renewed has clearly moved from a mere possibility or likelihood to the certainty that she will now be deemed and has been deemed inadmissible to remain in Canada.
- [37] When combined with the principles set forth by the Supreme Court of Canada in *Pham*, which clearly notes and, to a great degree Mr. Preshaw follows on the comments of Judge Fradsham in the case that you provided to me, Shaheen, that whilst in and of itself it will not be sufficient to impose a discharge, it is clearly a relevant factor and a significant one which, combined with all of the other circumstances, should be taken into account in determining what is a fit and proper sentence in these circumstances.
- [38] I accept the defence submission that there is now certainty with respect to Ms. Zhao's inadmissible status, which is a significant feature that clearly was not before the learned trial judge.
- [39] Moreover, even though, in my opinion, this conclusion is sufficient for me to consider whether the original sentence is fit, I will also state that I am satisfied the appellant has established that the sentencing judge erred in principle by concluding a discharge with conditions, with or without further sanctions, would not be considered a serious sanction. I am satisfied that was an error in principle and would also justify appellate intervention.
- [40] I have considered all of the authorities both counsel have provided to me. The several Provincial Court decisions that simply imposed fines that were similar to the duties evaded have not been helpful, given the lack of details with respect to the circumstances of the offenders in those particular cases, but I have considered all of the authorities and all the principles that have been stated therein.
- [41] In conclusion, given the circumstances of this offence and the circumstances of Ms. Zhao, and notwithstanding the seriousness of the offence and the reliance by the authorities to a great degree on the honesty and trust of citizens and foreigners alike who enter Canada, I am satisfied that it would be in Ms. Zhao's best interests and not contrary to the public interest if a conditional discharge with conditions and community work service, in addition to a victim surcharge, were imposed.
- [42] Indeed, as counsel has pointed out with respect to the issue of the public interest, if Ms. Zhao is allowed to stay in Canada, she might very well become one of those skilled immigrants who, over the years, have in fact been a benefit to society as a whole.

- [43] However, I do note, as Crown has pointed out, the imposition of a discharge might still prompt the Border Services to exercise its discretion not to renew Ms. Zhao's study permit. That, of course, is for them to determine in their sole discretion.
- [44] As a result, there will be a conditional discharge imposed. There will be a period of probation of nine months attached to it, and I do not impose that period of probation to, in any way, attempt to influence or otherwise affect the discretion of the Border Services, as I have just pointed out.
- [45] The conditions will be written down: Keep the peace, be of good behaviour, and report to court if called upon to do so. Report immediately to a probation officer -- it is four o'clock -- report to a probation officer by 4:00 p.m. tomorrow, Mr. Hutchison, May 31, 2013, thereafter as and when directed. The registry will give Ms. Zhao the address. Advise the probation officer of your current residential address at all times, not change without prior permission of the probation officer.
- [46] Under the direction and supervision of the probation officer, Ms. Zhao is to successfully complete 100 hours of community work service. The first 30 hours are to be completed by August 1st, at least 30 hours by August 1st, at least 30 more by October 1st, and the remainder on or before December 1st. If they are all completed prior to those dates, that is excellent.
- [47] I am satisfied that the discharge, the work service, and what I am also going to do in a moment will assist Ms. Zhao in understanding the importance of complying with the legitimate rules and regulations of her host country.
- [48] There will also be a victim surcharge of \$10,000. I am satisfied, as Judge Higinbotham was below, that the \$10,000 imposed is appropriate. I am satisfied that it would be appropriate for me to direct that the \$10,000 the registry has received by way of the fines that were imposed can be applied to the surcharge that I have just imposed.
- [49] In conclusion, I am satisfied that the totality of this disposition in its entirety will foster a sense of responsibility in Ms. Zhao and, at the same time, satisfy all the other relevant principles of sentencing that I have already referred to.
- [50] Mr. Preshaw, is there anything I have left out or you are uncertain of?
- [51] MR. PRESRAW: No, My Lord, I think I have it, thank you.
- [52] THE COURT: Okay. Mr. Hutchison?
- [53] MR. HUTCHISON: No, thank you, My Lord.
- [54] THE COURT: You will make sure that your client understands fully the necessity to comply with all of those conditions?
- [55] MR. HUTCHISON: I will indeed and I'll be taking her immediately to the registry.

[56] THE COURT: Thanks, gentlemen.

[57] MR. PRESRAW: Thank you, My Lord.

[58] MR. HUTCHISON: Thank you, My Lord.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B .D. MacKenzie

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