

In the Court of Appeal of the Northwest Territories

Citation: R. v. Wong, 2007 NWTCA 05

Date: 200712 05
Docket: A-1-AP2007000019
A-1-AP2007000020
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent
(Plaintiff)

- and -

Kan Siu (Ken) Wong

Appellant
(Defendant)

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Sentence by
The Honourable Mr. Justice J.E. Richard
Dated the 11th day of October, 2007

**Memorandum of Judgment
Delivered from the Bench**

Slatter J.A. (for the Court):

[1] The appellant appeals his sentence, arguing that the trial judge erred in not accepting a joint submission from counsel. The respondent Crown agrees that the trial judge should have accepted the joint submission.

[2] The accused pled guilty to a serious charge of conspiracy to traffic in cocaine. He also pled guilty to related charges of laundering the proceeds of crime and tax evasion.

[3] The accused waived his preliminary inquiry on the conspiracy charge, and pled guilty at an early stage. He indicated he would plead guilty to the money laundering and tax evasion charges before the investigations were complete and the charges had even been laid. As the trial judge pointed out “The Crown prosecutor concedes that a tremendous amount of resources would have been expended by the police continuing to gather evidence and to hire forensic accountants etc. to bring those charges before the Court, but those expenditures were not necessary because of Mr. Wong’s early agreement to plead guilty to those additional charges”.

[4] A joint submission was made on the following basis:

a) 4 years imprisonment on the conspiracy charge;

b) 1 year consecutive on the money laundering charge;

c) a \$96,000 fine, and in default of payment 1 year imprisonment concurrent to the other sentences, on the tax evasion charge;

d) 6 months credit for remand time, and;

e) a \$400,000 fine in lieu of a forfeiture pursuant to section 462.37 (3)(e) of the Criminal Code, with a 3 year consecutive sentence in default of payment.

[5] The sentence of the trial judge is different from the joint submission, in that he imposed a 5 year term of imprisonment on the conspiracy charge, and he made the 1 year term in default of paying the \$96,000 fine consecutive to the other sentences, rather than concurrent with them.

[6] In *R. v. G.W.C.*, 2000 ABCA 333, 89 Alta. L.R. (3d) 217 the court reviewed the principles regarding joint submissions. At paras. 17-18 the court noted that the effectiveness of plea bargaining is undermined if there is no certainty in the process, and that accordingly joint submissions that are within the appropriate range should be accepted. That being said, the trial judge does not have to adopt a joint submission that is unfit or unreasonable. In *R. v. MacDonald*, 2004 ABCA 295, 357 A.R. 43 the court noted that if a trial judge is not going to accept a joint submission, counsel should be advised in a timely way and given an opportunity to explain why the joint submission is fit. In this case the trial judge failed to warn counsel that he was concerned about the fitness of the joint submission, and to give them an opportunity to justify it.

[7] The trial judge concluded that the custodial portion of the conspiracy sentence was unfit: “I find that any sentence less than 5 years imprisonment for the cocaine conspiracy charge would be contrary to the public interest and unreasonable”. It was an error for the trial judge to segregate one portion of the joint submission and determine if it, standing alone, was unfit. The joint submission must be considered as a whole.

[8] The joint submission considered as a whole was not unreasonable or outside the range of sentencing that would be appropriate. The negotiated joint submission enabled the police, the Crown and the courts to save considerable resources. The sentence as a whole is a firm one and would have the necessary deterrent effect. Drug trafficking is a crime of greed, and the sentence imposes a significant financial penalty on the accused of \$496,000. Considered as a whole, the joint submission was within the appropriate range and should have been accepted.

[9] Counsel have also brought to the Court’s attention that the sentence is in one respect illegal, because s. 239(2) of the *Income Tax Act* requires a term of imprisonment in addition to the fine.

[10] The appeal and the cross-appeal are accordingly allowed. The sentence is varied to correspond with the joint submission made to the trial judge, with the exception that a 1 year concurrent sentence will be added to the sentence on the charge of tax evasion.

Appeal heard on November 22, 2007

Memorandum filed at Yellowknife, NWT
this _____ day of December, 2007

Slatter J.A.

Appearances:

R. Davidson
for the Appellant

C. Gagnon
for the Respondent