Date: 19981027
Docket: CR 03584

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WING TOON LEE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from convictions under s.238(1) of the *Income Tax Act (Canada)*. Appeal dismissed.

Heard at Yellowknife on October 2, 1998

Filed: October 27, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

The Appellant appeared in person

Counsel for the Respondent (Crown): Loretta N. Colton

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REASONS FOR JUDGMENT

[1] The appellant was convicted in Territorial Court on four charges laid pursuant to s.238(1) of the *Income Tax Act (Canada)*. The charges relate to his failure to file income tax returns for the years 1994, 1995 and 1996, and a statement of assets and liabilities, all in response to notices issued and served pursuant to the Act. The appellant was fined $1,000.00 in respect of each conviction, that being the mandatory minimum penalty stipulated in the Act.

[2] The appellant was represented by counsel at his trial. That counsel has since ceased to act on his behalf. The appellant has been unable to obtain new counsel. He therefore represented himself at the hearing of this appeal. He filed no written materials but the Crown, commendably, obtained transcripts of the Territorial Court proceedings and filed a factum addressing each of the grounds listed in the Notice of Appeal. It is obvious that the appellant had the benefit of legal advice in drafting those grounds so I will address each of them as they are set out in the Notice of Appeal.

1. The Learned Trial Judge erred in law in permitting the Crown to introduce in evidence affidavits, purportedly sworn *ex juris*, but not before a Notary Public or other official competent to receive such an oath for use in the Northwest Territories.

[3] The Crown's evidence at trial consisted of a series of affidavits attesting to the contents of the notices to file the returns and information demanded, service of those notices on the appellant, and the appellant's failure to comply as required by those notices. By virtue of subsections 244(6), (7) and (9) of the Act, such affidavits are receivable as evidence of the truth of their contents in the absence of proof to the contrary. The appellant's counsel argued at trial that these affidavits should not be received in evidence as they had not been sworn in accordance with s.67 of the *Evidence Act*, R.S.N.W.T. 1988, c. E-8, which sets out certain requirements for use in the Northwest Territories of affidavits sworn outside of the Northwest Territories. Counsel argued that s.40 of the *Canada Evidence Act* makes s.67 of the territorial Act applicable:

> 40. In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

[4] The argument here comes down to the fact that the affidavits in question, having been sworn outside the territories, were sworn only before a commissioner for oaths as opposed to a notary public. Assuming, without deciding, that s.40 could require the application of the territorial statute to federal income tax prosecutions, it does not apply in this specific instance since the *Income Tax Act*, in the subsections noted above, provides expressly for the taking of such affidavits before "a commissioner or other person authorized to take affidavits". Section 40 of the *Canada Evidence Act* makes provincial and territorial laws applicable but subject to other acts of Parliament. The general provision in the territorial *Evidence Act* is therefore subject to the specific provisions of the federal *Income Tax Act*. In case of a conflict between the provisions of a special act and one of general application, those of the special act govern. The method of proof is set out in the *Income Tax Act* and territorial legislation cannot limit it or derogate from it. This ground is therefore dismissed.

2. The Learned Trial Judge erred in law in failing to give effect to the Appellant's constitutional right to remain silent and not provide conscripted evidence to an agency of the Crown, when such evidence would be material in respect of a subsisting criminal charge before the courts.

[5] At the time the appellant was served with these notices from the tax department he had already been charged with numerous Criminal Code offences, including that of keeping a common gaming house. His counsel argued at trial that the information sought

by Revenue Canada would assist the RCMP in their investigation of the criminal charges and could provide evidence against the appellant on those charges. There was no evidence called at the trial in support of these contentions so they remain somewhat speculative. These arguments may also now be moot since the other criminal charges have all been disposed of in other proceedings. I will address it, however, since it formed what may be termed an "excuse" for the appellant's failure to comply with the notices.

[6] I am prepared to assume, for the sake of this argument, that a tax return filed in response to a notice or demand to file could provide incriminating evidence in some circumstances. The traditional view has been that statements made under compulsion of statute which tend to incriminate the maker are not, for that reason alone, inadmissible in criminal proceedings. Since the advent of the *Charter of Rights and Freedoms*, such statements may be excluded, however, under s.7 of the Charter ("principles of fundamental justice") which can provide a residual protection beyond the specific protection of s.13 of the Charter ("right against self-incrimination") where a statement would be otherwise admissible. For a detailed discussion of this point, see *R. v. White* (1998), 122 C.C.C. (3d) 167 (B.C.C.A.).

[7] The point though is that the appellant's protection against self-incrimination is one to be invoked in the criminal proceedings if the statements, which he is compelled to give by statute, are sought to be used in that prosecution. There is nothing that allows him to avoid the obligation to comply with the notices. His recourse was to seek an order excluding that information in the criminal proceedings if the Crown sought to use that information against him. The claim to protection against self-incrimination was not only speculative at the trial stage here but also premature. This ground is dismissed.

3. The Learned Trial Judge erred in law in failing to make the obvious inference that the Royal Canadian Mounted Police and the Department of Revenue Taxation were working in concert in respect of the charges against the Appellant and that the demands made by the Department of Revenue were not made for the purposes set out in the *Income Tax Act*.

[8] The appellant's counsel argued at trial that one can assume that Revenue Canada and the RCMP were working together and that there was an oblique motive to the demand issued by Revenue Canada. It was suggested that the demands were not issued for the legitimate aim of tax collection but to obtain evidence relating to the criminal investigation. How it may relate to that investigation was not explained. No evidence was called on this point. So again the foundation for this argument is speculative.

[9] The learned trial judge dealt with this issue as follows:

> I am asked to make some inferences, whether by judicial notice or just by inference, that whatever the income tax authorities, whatever documents or information they get, they automatically share and will share with the R.C.M. Police investigating an accused on the proceeds of crime case. I am asked to infer that the two agencies are walking hand in hand in their prosecution or pursuit of Mr. Lee. I can't make that inference. Nor, in my respectful view, can I come to that conclusion based on judicial notice. It is way too far for me to go. I do not believe that I can infer that the income tax authorities are acting as an investigating arm of the R.C.M. Police or vice versa. It seems that Mr. Lee has got himself embroiled with criminal charges and he is also embroiled in tax problems. One is a criminal process, one is a quasi-criminal or regulatory process ...
>
> The state, representing the public, has an interest in people paying taxes on taxable income. For one reason or another the income tax authorities have focused on the accused and have made some demands pursuant to authority set out in the legislation. I am unable to come to any conclusion that there is an indirect or oblique motive here. There is no such evidence.

I respectfully agree with these conclusions. This ground is also dismissed.

[10] I wish to add that, if there had been evidence to suggest that Revenue Canada was sharing information it received with the RCMP and that such information was relevant to the investigation of the criminal charges against the appellant, the solution may not be to relieve the appellant from his obligation to file tax returns. The more appropriate solution may be to erect some protective measures against communication of the information by one agency to the other (as was done by the Federal Court of Appeal in *Tyler v. M.N.R.* (1990), 91 D.T.C. 5022).

4. The Learned Trial Judge erred in law in failing to consider the defence of reasonable mistake of fact by the Appellant.

[11] I am unsure as to what is meant by a "reasonable mistake of fact" in this ground. It was not a point specifically addressed at trial nor was it referred to by the appellant at the hearing of this appeal. From my review of the trial transcripts I gleaned only one point that may come within this issue.

[12] At the trial the appellant testified that when he received the notices he gave them to his lawyer to take care of (this is a matter to be discussed under the final issue of "due diligence"). He said that he did not feel the documents were important because he had

no employment income (he referred to himself as being "retired") and because it was the government that owed him money (by way of GST rebates). So it may be said that his failure to comply with the demands to file returns was due to his mistaken belief that he did not have to do so if he did not owe any taxes.

[13] In my opinion, this "excuse" is not available to the appellant. Subsection 150(2) of the *Income Tax Act* expressly imposes an obligation on a person to comply with a notice or demand to file a return "whether or not the person is liable to pay tax". This provision was the subject of comment by Morrow J.A. in *R. v. Merkle* (1979), 80 D.T.C. 6027 (Alta. C.A.):

> Looking at the wording of 150(2) it is clear to me that for a person such as the present respondent to come forward with such an excuse as 'I have no tax to pay' would be not acceptable as an excuse to avoid prosecution. Indeed, it might be reasoned that the very use of the language 'whether or not he is liable' is an indication by the legislature that it did not intend to rule out 'all' defences, only that one.

This ground is therefore dismissed.

5. The Learned Trial Judge erred in law in failing to take into account the evidence of the Appellant that he was in jail and, therefore, unable to provide the necessary returns to the Department of Revenue as required by the demand.

[14] There is no issue with the point that the offences of which the appellant was convicted are ones of strict liability. Therefore, the appellant can avoid conviction if he establishes on a balance of probabilities that he took all reasonable steps to avoid the particular event, i.e. failing to file the demanded material within the time stipulated in the notices. In other words, the defence of "due diligence" is available to the appellant.

[15] The appellant was in jail at the time he was served with the notices. He testified at trial that he gave the notices to his lawyer in the belief that his lawyer would take care of it. There was no evidence as to what instructions, if any, he gave to his lawyer or what additional information he may have sought from others. In addressing this issue, and the argument that it was impossible for the appellant to comply because he was incarcerated, the trial judge said:

> The evidence I have before me is that the accused received some papers, which I find to be the papers duly served as set out in the affidavits, and that he didn't particularly look

> at them. He gave them to his lawyer, claiming like O.J. Simpson, "I give my lawyer everything; he takes care of it." Is that due diligence? Without instructing counsel, without directing counsel what to do with the documents, without asking counsel's advice. Nothing. Simply to hand the documents over to counsel and wash one's hands of it. In my respectful view, that is not the exercise of due diligence. It requires something more. Mr. Lee could have instructed counsel to, by way of example, write the income tax authority and explain his predicament in terms of access to papers, put together a pro forma return, submit the demands to an accountant. There are many, many things he could have done. He himself in his jail cell, I'm sure, could have come up with a statement of assets and liabilities in rough form. Simply turning the document over to a professional and washing one's hands of it is a far cry from the exercise of due diligence.

[16] The defence of due diligence has been described as "proof that (the accused) took all the care which a reasonable man might have been expected to take in all the circumstances": *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 (S.C.C.), at page 344. The defence clearly requires the exercise of genuine care and attention. Whether an accused acted with due diligence is a question of fact that depends on the circumstances of the particular case. The trial judge in this case had the benefit of all of the evidence and submissions. He came to a conclusion that he was clearly entitled to come to on the basis of that evidence. I cannot say he erred in law or in his assessment of the evidence.

[17] My function sitting on this appeal is not to substitute my opinions for those of the trial judge, but to decide whether the verdicts are ones that a properly instructed trier, acting judicially, could reasonably have rendered. On that basis this ground must also be dismissed.

[18] At the hearing of this appeal, the appellant submitted what may be termed "additional evidence" by saying that he instructed his lawyer to bring him the necessary forms so that he could file the required tax returns. This "evidence" was not given under oath but consisted of statements from counsel table. Obviously it fails the test for fresh evidence on appeal as enunciated in *R. v. Palmer*, [1980] 1 S.C.R. 759. Even if I accept it as true, however, it still fails to establish due diligence. As noted by the trial judge, one simply cannot pass along this type of notice to a lawyer (or any other professional advisor) and simply wash one's hands of it, at least not in these circumstances. Therefore, even if I accept this submission, I would dismiss the appeal.

[19] With respect to sentence, the fines imposed by the trial judge were ones he had to impose as minimum penalties. There is no basis for interfering with them.

[20] In the result the appeal is dismissed.

J.Z. Vertes
J.S.C.

Dated this 27th day of October, 1998

The Appellant appeared in person

Counsel for the Respondent (Crown): Loretta N. Colton

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