Chan & Ching v. Her Majesty The Queen, 2000 NWTSC 60

Date: 2000 09 20
Docket: CR 03789

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF AN APPLICATION PURSUANT TO THE PROVISIONS OF SECTION 490(9) OF THE CRIMINAL CODE OF CANADA FOR AN ORDER RESPECTING THE DISPOSITION OF MONEY SEIZED FROM CHIN YIN (ALVIN) CHAN ON THE 27TH DAY OF DECEMBER, 1998 AT THE CITY OF YELLOWKNIFE IN THE NORTHWEST TERRITORIES.

BETWEEN:

CHIN YIN (ALVIN) CHAN
KA CHAI (JACKY) CHING

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

Appeal from an order for forfeiture of money made under s.490(9) of the Criminal Code

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories
on August 10, 2000

Counsel for the Appellant, Ka Chai (Jacky) Ching: Sid M. Tarrabain
Walter Raponi

Counsel for the Respondent: Debra Robinson

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REASONS FOR JUDGMENT

[1] This is an appeal from an order made by a Territorial Court Judge under s. 490 of the *Criminal Code*, forfeiting the sum of $89,820.00 to the Crown.

Background

[2] After Alvin Chan checked in a box for the flight he was taking from Yellowknife to Edmonton, the airline agent became suspicious for various reasons and opened the box. Upon seeing a quantity of cash, she contacted the police. When they arrived at the airport, they seized the money without a warrant. Mr. Chan's flight had already left and he was questioned on arrival in Edmonton.

[3] Very soon after the seizure, the Appellant, Mr. Ching, came forward and claimed ownership of the money.

[4] The Crown obtained one or more orders under s. 490 of the *Criminal Code* for detention of the money pending the conclusion of a police investigation. No charges were laid and the Crown eventually applied under s. 490(9) for forfeiture of the money.

[5] At the hearing before the Territorial Court Judge into both the Crown's application for forfeiture and the Appellant's application for return of the money to him, the Crown presented its evidence by way of several affidavits. Counsel for the Appellant did not seek to cross-examine on those affidavits, which dealt with the seizure of the money and the grounds for belief by the police that it was connected with the drug trade.

[6] The only *viva voce* testimony heard was from the Appellant. He said that the money represented his saved up gambling winnings which he was in the habit of keeping in cash in a box in his closet. He said he had brought the money to Yellowknife when he came to the city looking for a business in which to invest. He said he became concerned about people knowing that he had the money and so arranged for Mr. Chan, whom he described as not really a close friend, to take it to Edmonton, where he would pick it up later.

[7] The Appellant also relied on an affidavit sworn by Mr. Chan in which Mr. Chan said that he transported the box from Yellowknife to Edmonton at the Appellant's request. He said that the Appellant told him that he did not want him to know what was in the box but that it was a gift for someone and he, the Appellant would follow in three or four days and retrieve it from him. In the affidavit Mr. Chan also stated, "I do not claim ownership of the box or its contents, nor did I have any knowledge until after the seizure as to what the box contained".

[8] The Territorial Court Judge carefully reviewed the Appellant's testimony and completely rejected it. In doing so, he made the following remarks:

> I don't want to repeat myself, but I'm just left totally in a position of totally rejecting his evidence. He's not believable in any way.

> Now, where does that leave me? That leaves me with the evidence of the Crown with respect to the money. I have no evidence of anyone else's lawful possession, having rejected Ching's evidence as being incredible, unbelievable, and, may I say, lies. I discount his affidavits in evidence. There is no evidence before me upon which I can find, even on the very mild onus of a balance of probabilities, that the money is lawfully entitled to Ching.
>
> I have no evidence as to who the money's lawful owner is if there is one. That being the case, the money is ordered forfeiture to Her Majesty the Queen.

Grounds of Appeal

[9] The Appellant argued the following grounds as set out in the notice of appeal:

> 1. that the Territorial Court Judge misled counsel who appeared for the Appellant at the hearing by stating that he would deal with factual issues first and that legal issues could be argued later, thus depriving the Appellant of his ability to make full answer and defence;
>
> 2. that the Territorial Court Judge erred in law in not considering whether the monies seized were in the lawful possession of the Crown prior to the Crown being permitted to rely on the forfeiture provisions of s. 490 of the *Criminal Code*;
>
> 3. that the Territorial Court Judge erred in law in holding that there was no ownership of the money as there was ample evidence that the money was owned by the Appellant.

I will deal with the grounds in reverse order because the third ground involves what I will call, for reasons set out below, a threshold issue.

Section 490 of the *Criminal Code*

[10] The *Criminal Code* sections applicable to the Crown's application for forfeiture and the Appellant's application for return of the money are as follows:

> 490(9) Subject to this or any other Act of Parliament, if

(a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or

(b) a justice, in any other case,

is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

(c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person; or

(d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,

and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

(10) Subject to this or any other Act of Parliament, a person, other than a person who may make an application under subsection (7), who claims to be the lawful owner or person lawfully entitled to possession of anything seized and brought before or reported to a justice under section 489.1 may, at any time, on three clear days notice to the Attorney General and the person from whom the thing was seized, apply summarily to

> (a) a judge referred to in subsection (7), where a judge ordered the detention of the thing seized under subsection (3), or
>
> (b) a justice, in any other case,

for an order that the thing detained be returned to the applicant.

> (11) Subject to this any other Act of Parliament, on an application under subsection (10), where a judge or justice is satisfied that
>
> > (a) the applicant is the lawful owner or lawfully entitled to possession of the thing seized, and
> >
> > (b) the periods of detention provided for or ordered under subsections (1) to (3) in respect of the thing seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4),
>
> the judge shall order that
>
> > (c) the thing seized be returned to the applicant; or
> >
> > (d) except as otherwise provided by law, where, pursuant to subsection (9), the thing seized was forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant, the applicant be paid the proceeds of sale or the value of the thing seized.

Did the Territorial Court Judge err in holding that there was no ownership of the money?

[11] It is well-established that credibility is for the trial judge to determine. Here, the Appellant's credibility was crucial on the issue of ownership as his was the only evidence that dealt directly with that issue. Mr. Chan's affidavit did not purport to identify the Appellant as the owner of the money; it simply set out that the Appellant had asked him to take the box to Edmonton for safekeeping.

[12] The Territorial Court Judge described the Appellant's testimony as contradictory and the Appellant as "evasive, monumentally and conveniently forgetful, having made false assertions in affidavits and in evidence, putting a gloss on many of the events that transpired, and exhibiting a demeanour that leads me to the irresistible conclusion that his evidence is incredible". He found the Appellant "not believable in any way".

[13] The Appellant argued that the Territorial Court Judge failed to consider the totality of the evidence by failing to consider Mr. Chan's affidavit.

[14] As I have already noted, Mr. Chan's affidavit did not deal with ownership but only asserted that the Appellant gave him the box. Mr. Chan's assertions had to be treated with caution in any event because there was evidence before the Territorial Court Judge that he had initially told the police that someone other than the Appellant had given him the box to take to Edmonton. There was also evidence that when Mr. Chan did identify the Appellant, he consistently referred to him by the name Chang, not Ching, and his story conflicted with the Appellant's in a number of details.

[15] The Territorial Court Judge clearly found the entire story put forward by the Appellant and Mr. Chan incredible. He said the following in relation to their evidence:

> He [the Appellant] keeps what he holds out as his life savings of over a hundred thousand, still leaving 20,000 in savings in a cardboard box in his closet, this he gives to Alvin Chan to take to Edmonton.
>
> Chan, who says he came to Yellowknife to stay for a while, arrives one day, leaves the next. Cash for his tickets, in and out carrying a box that he's quick to agree with the Canadian agent's suggestion that it contained toys.
>
> I'm unable to give any credit to the testimony or the affidavits of Ching. Even his own affidavits are contradicted.

[16] When taken in context, I think the reference in the last paragraph to "the affidavits of Ching" can only mean the affidavits filed on behalf of the Appellant, which would include the affidavit of Mr. Chan.

[17] At most, an inference could have been drawn from Mr. Chan's affidavit evidence, if accepted, that the Appellant was the owner of the money in the box. It was for the Territorial Court Judge to decide whether to draw that inference. He obviously declined to do so based on his adverse findings as to the Appellant's credibility.

[18] There is no basis upon which I can find that the Territorial Court Judge's ruling as to credibility was unreasonable or not properly founded in the evidence or that he did not have regard to the totality of the evidence.

[19] A further argument made by the Appellant under this ground of appeal was that the Territorial Court Judge also erred in his ruling that, once he had rejected the Appellant's evidence, there was no evidence of anyone else's lawful possession.

[20] The Appellant relied on *R. v. Mac* (1995), 97 C.C.C. (3d) 115 (Ont. C.A.), *R. v. Rochat*, 1999 ABPC 10 (Prov. Ct.) and *R. v. Daley*, [1999] A.J. No. 1206 (Q.B.) in support of the proposition that a claimant to seized money need only prove possession on a balance of probabilities and if he does, his possession is presumed lawful. The onus then shifts to the Crown to prove taint beyond a reasonable doubt.

[21] The facts in the aforementioned cases are quite different. In all those cases, the money was seized from the individual who later made a claim to it. There was no dispute that he was in possession at the time of the seizure. In *R. v. Mac*, the Ontario Court of Appeal said:

> ... to establish that he is a person who is lawfully entitled to possession, the applicant need only prove that he was in possession at the time the money was seized. Upon such proof, the applicant's right to possession is presumed. The applicant need not disprove taint or criminality by proof of source or otherwise. Rather, the onus is on the Crown to prove these things. In the case at bar, the Crown simply had no such evidence, the presumption stands and was not rebutted.

[22] In this case, however, the Appellant did not have the benefit of the presumption. He was not in actual physical possession of the money at the time of the seizure. His evidence was completely rejected by the Territorial Court Judge and so he had also not established that he was in possession through Mr. Chan as his agent, considering also that the Territorial Court Judge gave no credit to Mr. Chan's affidavit.

[23] Counsel for the Appellant submitted that when the Judge said near the end of his reasons that, "There is no evidence before me upon which I can find, even on the very mild onus of a balance of probabilities, that the money is lawfully entitled to Ching", he incorrectly stated the burden of proof, putting the onus on the Appellant to prove both that he was in possession and that his possession was not tainted.

[24] I note that at the beginning of the hearing before the Territorial Court Judge, both Crown and the Appellant's counsel agreed with the following statement by the Judge as to the applicable law:

> ... And, as I understand the law, the Crown has to prove that the funds that were seized are tainted by the proceeds - - or tainted by crime beyond a reasonable doubt and the defence only has to establish on the balance of probabilities that the applicant is entitled to possession of the money...

[25] Since the Appellant had not proved that he was in possession at the time the money was seized, and therefore could not rely on the presumption set out in *R. v. Mac*, he had to bring himself within s. 490(11) and satisfy the Court that he was the lawful owner or lawfully entitled to possession of the money.

[26] In my view, that is what the Territorial Court Judge was referring to when he said that there was no evidence upon which he could find that the Appellant was lawfully entitled to the money. With the Appellant's testimony completely rejected, there was no evidence left upon which a finding of his lawful entitlement could be based.

[27] Therefore, the Territorial Court Judge did not err with respect to the burden of proof. His words simply reflect the inapplicability of the presumption of lawfulness in the circumstances before him.

[28] Did the Territorial Court Judge err in not considering whether the money was in the lawful possession of the Crown prior to the Crown being permitted to rely on the s. 490 forfeiture provisions?

[29] There is nothing unlawful about the mere possession of money, unlike, for example, narcotics. Therefore, unless the state has lawfully seized money from an individual, the state should not have the right to retain the money and it should be returned. The determination as to whether money has been lawfully seized cannot be made in a vacuum; it will depend on what rights are asserted to the money.

[30] Counsel for the Respondent argued that the fact that the Appellant's evidence was totally rejected also disposes of his argument that the Territorial Court Judge ought first to have ruled whether the seizure of the money by the police in the absence of a warrant was contrary to s. 8 of the *Charter*, which provides that everyone has the right to be secure against unreasonable search or seizure. I agree. In a s. 8 challenge, an accused first has to demonstrate a reasonable expectation of privacy in relation to the place searched or the items seized: *R. v. Edwards* (1996), 104 C.C.C. (3d) 136 (S.C.C.); *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 (S.C.C.).

Although the Appellant in this case was not an accused, the same considerations should apply. In making the factual determination as to whether there is a reasonable expectation of privacy, the totality of the circumstances have to be considered. Since the Territorial Court Judge did not believe the evidence of the Appellant, there was no factual basis upon which it could be argued that he had a reasonable expectation of privacy in the money. Accordingly, there was no basis for a claim that his s. 8 rights had been violated and no need for the Territorial Court Judge to consider that issue.

[31] Did the Territorial Court Judge mislead the Appellant's counsel by stating that he would deal with the factual issues first and legal issues could be argued later, thus depriving the Appellant of his right to make full answer and defence?

[32] At the beginning of the hearing before the Territorial Court Judge, Crown counsel asked whether any *Charter* arguments would be raised by the Appellant. Counsel for the Appellant stated that, considering the nature of the application, he wanted to leave the *Charter* argument in abeyance. He did say that the argument was that there was seizure without a warrant, thus unreasonable search and seizure. He asked for an adjournment to discuss it with Crown counsel. After the adjournment, he made no further reference to the *Charter* argument.

[33] At the conclusion of the Appellant's testimony, his counsel asked to file written submissions because of the amount of the material to be referred to and because, he said, he felt submissions would be quite lengthy. The Territorial Court Judge said he wanted to deal with the evidentiary matters then, having heard only the one witness, and that if there were particular legal points to be addressed, they could be reserved.

[34] Crown counsel then made her submissions, arguing that the Appellant's story should not be believed and that the Court ought not be satisfied either that the Appellant was the owner of the money or that he had been in possession of it and entrusted it to Mr. Chan. Alternatively, she argued that if it was found that the Appellant was in possession of the money, it was tainted by crime. The Crown's position, based on inferences which could be drawn from the police evidence, was that the money was the proceeds of drug transactions engaged in by a third party connected to Mr. Chan.

[35] Counsel for the Appellant submitted to the Judge that the Appellant should be believed despite the contradictions in his evidence. He took the position that the

Appellant was the owner of the money and that, if anything, Mr. Chan was his agent. He also stressed that the Appellant had no criminal record and that the police evidence linked him only to suspected, not convicted, drug dealers. He submitted that the Crown had not satisfied the onus of proving taint beyond a reasonable doubt. He made no further request to file written submissions.

[36] The Territorial Court Judge then proceeded to make his decision.

[37] The Appellant's argument is that I should infer that his very experienced counsel at the hearing wished to make written submissions on the *Charter* issue and was precluded from doing so by the way in which the Territorial Court Judge proceeded to a ruling after hearing the oral submissions.

[38] I am not satisfied, however, that the inference should be drawn. It was obvious from the Crown's cross-examination of the Appellant and the submissions of both counsel, that the Appellant's credibility was in issue. That is what the Judge wanted to deal with. In finding the Appellant not credible, and rejecting his claim to ownership, he left no ground upon which the Appellant could make a s. 8 *Charter* challenge for the reasons I have indicated above on that issue. His adverse ruling on credibility effectively ended the matter. It seems to me that the statement by counsel for the Appellant at the beginning of the hearing, that considering the nature of the application he wanted to leave the *Charter* argument in abeyance, correctly recognized that the threshold issue would be the Appellant's credibility.

[39] As the s. 8 argument is the only issue upon which it is suggested counsel wished to file written submissions, I find no merit in the submission that the Territorial Court Judge misled the Appellant's counsel and deprived him of the ability to make full answer and defence.

Mr. Chan's position

[40] A further argument put forward by the Appellant was that the Territorial Court Judge failed to consider the position of Mr. Chan in all this. He submitted that although Mr. Chan denied ownership of the money, there was no question that it was in his possession, which must be presumed lawful as stated in *R. v. Mac*. Therefore, the argument goes, the Crown is not entitled to forfeiture and the money must be returned to Mr. Chan in accordance with s. 490(9)(c).

[41] But Mr. Chan himself did not ask the Territorial Court Judge and does not now ask in this Court that the money be returned to him. Although he was originally named as a co-appellant in this appeal, he abandoned his appeal prior to it being heard.

[42] With Mr. Chan not asking for the money, I do not see how the Appellant, whose own claim has been rejected, can demand the return of the money to Mr. Chan.

[43] The Territorial Court Judge was correct in saying that after rejection of the Appellant's claim, he had no evidence as to who the lawful owner of the money is, if there is one.

[44] The concluding part of section 490(9) provides that the judge hearing the application may, if possession of the thing seized by the person from whom it was seized *is* unlawful, and the lawful owner or person lawfully entitled to possession is not known, order forfeiture. The word "is" suggests that the pertinent time of possession is the time when the application is made. In this case, since Mr. Chan did not assert a claim to the money and since the only claim he could have asserted at the time of the hearing, based on the evidence before the Territorial Court, was completely dependent on the Appellant's claim, which was rejected, Mr. Chan's possession would, I think, have to be said to be unlawful, quite apart from the uncontradicted Crown evidence of taint. Therefore, under s. 490(9), the Territorial Court Judge had the discretion to order forfeiture and there is no basis upon which to say that he erred in the exercise of that discretion.

[45] For the foregoing reasons, the appeal is dismissed.

[46] The written and oral submissions of all counsel were very helpful and I thank them for same.

V. A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 20th day of September, 2000.

Counsel for the Appellant, Ka Chai (Jacky) Ching: Sid M. Tarrabain
Walter Raponi

Counsel for the Respondent Crown: Debra Robinson