In the Court of Appeal of Alberta

Citation: R. v. Luah, 2006 ABCA 217

Date: 20060712
Docket: 0403-0317-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Joe Lian Ho Luah

Appellant

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Joanne Veit
The Honourable Madam Justice Lawrie Smith

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Judge H.R. Chisholm
Sentenced the 13th and 30th days of September, 2004
(Docket: 030819288P1)

Memorandum of Judgment

The Court:

[1] Asian Arowana (Scleropages Formosus) are some of the world's rarest and most expensive fish. They are a seriously endangered species, and so Canada's ***Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act***, (1992, c. 52) forbids their import or export without a permit.

[2] The appellant contacted the relevant officer in the federal government, and learned the details of that regulatory scheme. Thanks to the internet, the appellant saw a chance to make a lot of money. He found breeders in Asia who would supply these rare fish, and found people in a number of cities in the southwestern United States who would buy them. Better still, the buyers would front-end the money necessary, so the appellant would have to invest very little. He boasted in emails of the returns which he would make on the U.S.A. "black market" with no investment of his own.

[3] He carried out the scheme, and imported dozens of these fish into Canada, and then exported them (disguised as legal merchandise) without any permit, to various buyers in different American cities. He thus violated Canadian (and American) law. Despite his many devices to conceal, American and Canadian investigators tracked him down. Canadian prosecutors charged him with that illegal export, proceeding by Indictment. The offence dates ranged over five months in mid-2001. The sentencing judge later made a fact finding that the prosecutors had overwhelming evidence, and so about eight months later, the appellant pled guilty, before any preliminary hearing. Convictions were entered for four counts.

[4] Counsel for both sides signed and filed two agreed statements of facts. One showed an estimated gross profit from sales of 72 fish, of about $65,000 to $74,000 U.S., expenses of $35,000 U.S., and so an estimated net profit of $30,000 to $39,000 U.S. Converted to Canadian funds, that was an estimated net profit of $46,000 to $59,000 Canadian.

[5] After lengthy oral argument, the sentencing judge gave reasons for sentencing occupying about four pages of transcript (exclusive of the part on time to pay). He found these facts (among others):

a. these fish are rare and sought after, and one of the most expensive in the world, but are at substantial risk of extinction.

b. the appellant knew the legal rules and that this export was totally illegal, and had to be kept secret.

c. the appellant had no criminal record.

d. the appellant was very unlikely to re-offend and did not need counselling.

e. he pled guilty before any preliminary hearing.

f. the guilty plea saved a lot of work and expense and saved travel by many witnesses.

g. (according to the first agreed statement of facts) this business was commercial, with considerable scope and immense possibilities (thanks to the internet); it kept the accused very busy; the breeder wanted to expand the business; this was just the beginning, and big future profits loomed.

h. it was a sophisticated operation with a false name and other deliberate devices to cover the appellant's tracks; he used elaborate schemes and disguises.

i. there was clear moral culpability.

j. the only motive was profit.

k. the mark-up was over 200%.

l. the appellant had lists of potential buyers in the U.S.A.

m. Parliament regards this offence as serious.

n. general deterrence should be the sole emphasis.

o. therefore, substantial monetary penalties were needed to show the community how risky this activity ought to be.

p. the appellant was a "man of modest means".

[6] The sentencing judge imposed fines of $7,500 on each count, for a total of $30,000. (Oddly, some of the certificates mis-recite this as $1,500 each). The ***Act*** also calls for an additional penalty equal to the profit, and the judge imposed an additional $30,000 for that. There was a joint submission that 10% of all monetary penalties be a fine, and that 90% should go to a fund for endangered species, and the judge approved that submission.

[7] The appellant appealed his sentence, and got a stay of all monetary penalties. During argument before us, some disagreement as to some financial facts became evident. So we adjourned the appeal and appointed the Honourable Howard Irving as a Special Commissioner. He heard live evidence in September 2005 and gave us a report. Counsel disagreed on one item, and the

Commissioner then gave a supplemental report. After that we received two successive written submissions from each counsel.

[8] The question is whether the monetary penalties were too high. It is well settled that the Court of Appeal cannot intervene unless

(a) the penalties are clearly above the top of a fairly wide range, in all the circumstances; or

(b) there is demonstrable operative error in assessing the evidence (facts); or

(c) there is operative error in principle (law).

[9] We will start with the last penalty. The ***Act*** (s. 22(5)) says that this penalty is to be equal to the profit. At the sentencing hearing, the Crown argued that the profit was $46,354 to $59,066 Canadian. The accused argued that it was under $10,000, which seems to contradict both the agreed statements of facts. The sentencing judge (without explanation) chose $30,000. The median Crown figure was $52,710. The average between that and the accused's figure is $31,355. In effect, the sentencing judge chose an amount slightly under that average.

[10] Now, as a result of the Commissioner's inquiry and report, it is agreed that the actual profit was higher: $35,220. Section 22(5) mandates "an additional fine equal to the court's estimation of the amount of the monetary benefits." We will assume that that means only net profits (i.e. gives credit for all expenses), a point not argued here. Even so, the actual net profits exceed the penalty. But there is no cross-appeal.

[11] The only argument by the defence against that last profit penalty, is that it is disproportionate to the ability of the accused to pay (which is much the same argument made on appeal with respect to the other fines). The Supreme Court now rejects that argument, despite the word "may" in both statutes. (See ***R. v. Lavigne***, 2006 SCC 10, 206 C.C.C. (3d) 449.) There the Supreme Court of Canada imposed a monetary penalty equal to profits of $150,000, though the accused had spent almost all the profits. Ability to pay is relevant only to time to pay, where confiscation of profits is enacted.

[12] Therefore, there is no rule of law which would let us reduce the second penalty.

[13] Now we turn to the first penalty, the fines of $7,500 per count. There were convictions entered on four counts, so this totals another $30,000. (The defence's initial factum, page 2, para. 5(a) notes an error in the court's endorsement: the grand total should be $60,000, not $54,000.)

[14] The maximum penalty is $150,000 per animal, plus 5 years in jail.

[15] At the sentencing hearing, defence counsel had told the sentencing judge that the appellant (and his wife) did not have great means, living just paycheque to paycheque, and even that drained by illness. As noted, the sentencing judge sentenced on the basis that the appellant had only "modest means".

[16] Aided by more evidence, the Commissioner now finds that for many years the appellant has been employed full-time as a skilled millwright. (His wife works part time.) He has a net worth of about $256,000, of which $164,000 are investments. Even if one left alone registered retirement savings plans of (presumably) $134,066, and left alone non-investment assets, that would still leave almost $30,000 in readily available investments.

[17] There is no principle of law that fines can only be paid out of cash, not out of other assets. That is especially true if the assets were bought after the offence. Sensible people do not leave significant sums of cash idle and uninvested. A rule against looking at investments would immunize the wealthy from paying fines.

[18] Nor is there any reason to ignore Registered Retirement Savings Plans. As the Commissioner finds, they are not exempt from execution. The appellant bought some of them after the offence, even after its discovery by the authorities (i.e. after the search of his premises). And the Crown shows that even if one or two Registered Retirement Savings Plans were cashed in, the tax payable would be small.

[19] Apart from investments, there is a lot of equity in the home, and since the offence the appellant has paid a lump sum to reduce the amount owing on its mortgage. The Edmonton house market is soaring this year as well. The accused could easily raise money against the home.

[20] To summarize, the sentencing judge imposed the fines based on a belief that there were few assets; in fact, there are considerable assets.

[21] And now the Supreme Court says that spending since the offence, or inability to pay quickly, are no answer to monetary penalties. See ***R. v. Lavigne***, ***supra***. Since the offence, this accused has repeatedly laid out significant sums of money on non-essential expenses. During that time, he could have paid these fines (penalties) several times over.

[22] Aside from ability to pay, there seems to be no other error in principle alleged. Indeed, we doubt that ability to pay is a legal question; it is likely a factual one.

[23] It was not argued that the sentence was wholly outside a proper range for crimes of this sort. The sentencing judge's conclusions about sophistication, profit motive, seriousness, and need for general deterrence, were highly relevant, clearly correct, and not disputed in argument. If any type of person plans ahead and is open to rational calculation and monetary deterrence, surely it includes the business smuggler. The appellant is the founder of a fish-collectors' club in Edmonton, making

deterrence more important. Had the appellant's disguises succeeded, or the American authorities been less vigilant, the appellant would have made much larger profits.

[24] Instead counsel for the appellant argued that the evidence was conflicting or insufficient (a flaw since cured by the Commissioner), and that in the circumstances a lighter penalty would have sufficed. The argument was that the various countervailing considerations should have got different weight. Given the standard of review, we do not see any principled ground to reduce these penalties. The certificates must be amended to conform to the amounts in the reasons. Apart from that, and time to pay, the sentences must be affirmed.

[25] The only remaining question is time to pay.

[26] Mr. Luah's counsel sought, and got, more time to file a written submission on time to pay. His submission is really just that he wants two years to pay, a period which his counsel suggests may be the maximum. The Crown now does not object.

[27] So far as we can tell, the ***Criminal Code*** does not provide for interest on unpaid fines. It is true that fines can be turned into a civil judgment, but only after default, and interest would presumably not run on the civil judgment before its making.

[28] The total owing is $60,000, and the appellant has invested sums far more than that in the interval. The crimes in question were committed to make money. The judgment in Provincial Court (as later extended) allowed monthly payments of $1000 per month to pay the fines and (by our calculations) they would have been all paid by August 1, 2009, had the appellant not got a stay pending appeal.

[29] Since the stay in January 2005, it should have been possible to earn 4% on money invested, which for $60,000 would be $3400 income to now. Since the date of the search, that income would be $11,400. Over the next year, the income on $60,000 would be $2400 (or on $36,000 it would be $1440). Even inflation has run about 4% per year. We do not suggest adding interest to the fine, but this shows how the appellant's capacity to pay has increased with time, and the purchasing power of the fine has declined.

[30] That consideration increases if one sees the whole history. The court proceedings have not moved quickly. A chronology is very useful:

May - September 2001	Offence dates
October 2, 2001	Search warrant executed at appellant's home and business and evidence of illegal Arowana export seized
July 16, 2003	Prosecution began by Information

September 15, 2003	First court appearance
October 20, 2003	Adjourned without election
October 30, 2003	Adjourned without election
November 27, 2003	Adjourned without election
January 15, 2004	Adjourned without election, warrant vacated
February 5, 2004	Provincial Court elected, plea of not guilty entered
May 10, 2004	Adjourned at defence request
August 20, 2004	Adjourned at defence request
September 13, 2004	Plea changed to guilty
September 13, 2004	Fines imposed, time to pay granted
September 30, 2004	Time to pay postponed and monthly instalments reduced
October 13, 2004	Appeal to Court of Appeal from sentence filed
December 8, 2004	Sentence Appeal Books filed
January 7, 2005	Appellant's factum filed
January 17, 2005	Respondent's factum filed
January 24, 2005	Appeal argued and adjourned
January 24, 2005	Fines' payment stayed pending appeal
January 28, 2005	Commission Order entered
September 6 - 7, 2005	Commissioner heard evidence
October 2005	Written argument to Commissioner
November 24, 2005	Oral argument to Commissioner
March 28, 2006	Report of Commissioner

April 24, 2006	Supplementary report of Commissioner
May 15, 2006	Appellant filed further written argument to Court of Appeal
June 5, 2006	Respondent filed further written argument to Court of Appeal
June 28, 2006	Appellant filed further written argument to Court of Appeal
July 7, 2006	Respondent filed further written argument to Court of Appeal

[31] After amendment, the sentencing judge ordered that the appellant pay $10,000 quickly, then $1000 per month. Had there been no stay because of the Commission hearing, the following would all have been paid by now:

(a)	lump sum $10,000 (due February 2005)	$10,000
(b)	monthly payments of $1000 each June 1, 2005 to July 1, 2006	14,000
	Total due to date	$24,000

[32] Given the appellant's investments, there is no reason that that sum should not be available now, subject to a few days' investment paperwork. We order that the appellant pay $24,000 on account of the $60,000 fine, within 10 days of the date of this Memorandum of Judgment.

[33] The latest request to the Court of Appeal by the appellant is that he be given as much as two years to pay. When that two years would begin is not stated by either counsel. We are to give the order which the sentencing judge should have given in September 2004. Two years from then is September 2006. Two years from this Memorandum would be July 2008. But there is no reason to pretend that having to pay a fine is a surprise to the appellant. He has never disputed the appropriateness of a significant fine. Nor should one pretend that he has been unable to build up a reserve fund (which he has done). So making the two years start from today would be too slow. Nothing in the Commission evidence or report, or in the written argument since, would have led the appellant reasonably to doubt that he would be paying at least what the sentencing judge ordered. This appeal process has already given extra time. Therefore, we order that any balance owing on the $60,000 fines be paid on or before July 1, 2007.

[34] In the meantime, we see no reason why the $1000 monthly payments ordered by the sentencing judge in 2004 should not be made, and the appellant does not argue that they should not. Still less does he offer any reason why he cannot or should not make those monthly payments. We order that the appellant pay $1000 on or before the first of each month toward the fines, the first payment due on August 1, 2006, and the last due on June 1, 2007.

[35] To recap, this is the schedule:

(a)	lump sum in 10 days		$24,000
(b)	monthly payments of $1000 per month, August 1, 2006 to June 1, 2007		$11,000
(c)	balance on July 1, 2007		$25,000
		Total	$60,000

[36] The Crown points out that s. 734(4) (5) of the ***Act*** deems a term of imprisonment in default of payment to be imposed at sentencing.

[37] If the ***Criminal Code*** had let us send the matter back to the sentencing judge to find some more facts, no Commissioner would have been necessary, and no new judicial officer would have had to get up to speed. Much time and expense would have been saved by everyone. Parliament should consider giving Appeal Courts the power to send matters back to the sentencing judge to correct or rehear, in the way that a Court of Appeal hearing a conviction appeal (or a civil appeal) can order a new hearing.

Appeal heard on January 24, 2005
Report of Commissioner dated March 28, 2006
Supplemental Report of Commissioner dated April 24, 2006
Further Written Arguments dated May 15, June 5, June 28 and July 7, 2006

Memorandum filed at Edmonton, Alberta
this 12th day of July, 2006

Côté J.A.

Veit J.

Smith J.

Appearances:

E. Bottcher
for the Respondent

P.J. Royal, Q.C.
for the Appellant