

Case Name:
R. v. Wasiluk

Between
Her Majesty the Queen, and
Lukasz Wasiluk and Jozef Szelest

[2005] O.J. No. 4148

2005 ONCJ 407

66 W.C.B. (2d) 702

Ontario Court of Justice
Brampton, Ontario

I.W. Andre J.

Oral judgment: April 21, 2005.

(107 paras.)

Sentencing -- Quantum -- Offences -- Non-Criminal Code -- Miscellaneous statutes -- Two offenders sentenced to 14 months' conditional imprisonment and 100 hours of community service for limited role in smuggling of migrants to Canada and the United States.

Sentencing -- Sentencing considerations -- No criminal record -- Guilty plea -- Sentence imposed on co-accused -- Sentencing precedents or starting point -- Seriousness of offence -- Co-operation with authorities -- Two offenders sentenced to 14 months' conditional imprisonment and 100 hours of community service for limited role in smuggling of migrants to Canada and the United States.

Two accused, Wasiluk and Szelest, pleaded guilty to smuggling migrants from India and Pakistan through Canada to the United States -- Accused's role was limited to transporting several migrants across a river in their boat -- Accused were not involved in making the arrangements to bring the migrants to Canada -- Offences were motivated by financial gain -- Co-accused who had supplied migrants received conditional sentence of 14 months -- HELD: Accused sentenced to 14 months' conditional imprisonment, 100 hours of community service.

Statutes, Regulations and Rules Cited:

Criminal Code s. 718.2(b), s. 742.1

Immigration Act s. 94(2)

Immigration Refugee Protection Act s. 117(1)

Counsel:

R. McGuirl Counsel for the Crown

C. Preobrazenski Counsel for Mr. Wasiluk and Mr. Szelest

REASONS FOR SENTENCE

1 I.W. ANDRE J. (orally):-- Mr. Wasiluk and Mr. Szelest accept the responsibility for their role in the smuggling of a number of South Asian migrants from India and Pakistan, who, on the pretext of visiting Canada were ultimately and illegally taken to the United States. This was done through the work of a loosely organized conspiracy which contained a number of different actors, some of whom were higher up on the hierarchal scheme than their counterparts.

2 For example, some conspirators arranged a trip to Canada, while others transferred the migrants from Toronto to various staging areas, typically motels, located in proximity to the United States and Canadian borders. Once there they were spirited to the United States, either by car, truck or boat. Approximately 300 aliens were smuggled, each having paid approximately \$2,500 to \$3,000 to be transferred to the United States.

3 After being apprehended, the accused accepted responsibility for smuggling 30 aliens across the Detroit River.

4 Intercepted telephone conversations implicated them in four separate trips across the river. On the first they picked up four persons at a motel in Windsor and took them over to the United States.

5 On the second they took five persons to the United States on July the 10th, 2002, while on the third on July 25th, 2002, they transported seven migrants across the river.

6 Finally, on August 14th, 2002, the accused transported three migrants across the river to the United States.

7 The accused's role was limited to transporting the migrants across the river in their boat. They were not involved in the arrangements which resulted in the migrants coming to Canada. Neither were they involved in making arrangements for them to be taken to the Windsor area.

8 Both accused were motivated by pecuniary gain. They received approximately \$300 each for each person they smuggled to the United States.

9 SUBMISSIONS: The Crown seeks a sentence of two years jail for each accused. She identifies the following as aggravated factors:

1. They were motivated by the prospect of financial gain.
2. The acts constitute a threat to the integrity of the United States and Canada.
3. The prescribed acts made it difficult for legitimate migrants to be able to come to Canada.
4. The prescribed acts constitute a threat to public safety.
5. The scheme was international in scope.
6. The scheme was a sophisticated criminal and commercial enterprise.
7. The migrants were not family members of the conspirators, but were persons who were willing to pay to break the United State's and Canada's immigration laws.
8. A large number of migrants were involved.
9. The scheme exploited the vulnerability of would be migrants.
10. This was not an isolated incident to which the accused pled guilty.

10 The Crown concedes the following mitigating factors:

1. Both accused pled guilty.
2. Neither has a criminal record.
3. Both provided inculpatory statements to the police.

11 The Crown submits that a conditional sentence is inappropriate, given the nature, the scale, planning, sophistication, repetitive nature and duration of the criminal conspiracy.

12 The Crown also submits that the accused played a vital role in the conspiracy, without which the scheme would not have been successful.

13 Mr. Preobrazenski demurs. He submits that the appropriate penalty in this case is a conditional sentence in the range of nine to 14 months.

14 In addition to the mitigating factors identified by the Crown, he submits that the following additional factors justify the imposition of a conditional sentence:

1. The pleas of guilty were made before a preliminary hearing.
2. The accused were involved at the lowest rung of the hierarchal ladder.
3. There was no evidence that the migrants were anything but persons seeking a better life.
4. There was no evidence that the accused exploited the migrants.
5. The accused were not involved in obtaining any fraudulent documentation in furtherance of the smuggling scheme.
6. The individual who supplied the migrants to the accused, and therefore was higher up the hierarchal chain than the accused, received a conditional sentence of 14 months. Parity and proportionality dictate that the accused should receive a lesser penalty.
7. The charges have been outstanding for some 28 months. The accused have no outstanding charges and are otherwise persons of good character.

15 ANALYSIS: The Crown is undoubtedly correct that human smuggling is a type of activity which is quite reprehensible, the more so when it is actuated by the desire for financial gain.

16 In *R. v. Elnoor*, Unreported Judgment, dated September 9th, 2003, I noted the following with respect to an accused who was also involved in this conspiracy:

"The trafficking in human beings or illegally transporting them across international borders is an egregious offence, which must be treated very seriously by the courts."

17 Such an offence, as noted by Belleghem J., in *R. v. Xu*, [2001] O.J. No. 5864, is a moral affront to legitimate immigrants who line up and wait patiently to enter either Canada or the United States. Justice Belleghem further noted that legitimate immigrants who quite properly participate in sponsoring loved ones from their homeland to join them here, face the genuine prospect that political pressure, as the result of unabated illegal immigration, could result in the immigration authorities taking a far stricter position on immigration quotas.

18 The events of September 11th, 2001, have heightened the need to ensure that unscrupulous persons do not take advantage of liberal policies towards genuine immigrants. Within Canada, the Immigration Act has been amended to provide stiffer penalties for persons found guilty of being involved in the surreptitious entries of foreigners into Canada. Within the United States, steps designed to make entry by non-citizens much more difficult have been instituted.

19 In the wake of September 11th, 2001, there is an awareness of the dangers posed by the illegal entry of persons into the United States and Canada. Often times, the true identity of the persons seeking illegal entry is not known and the true reason for gaining entry, a closely guarded secret. Invariably, the individual

who seeks to gain entry into Canada or the United States does so for economic reasons.

20 However, recent events have made it clear that many are animated by a more sinister motive.

21 I sentenced Mr. Ismail to six months in jail for his involvement in the criminal conspiracy. I described his role at paragraphs 24 and 25 of the decision as follows:

"Mr. Ismail was involved in this type of activity before the incidents for which he has accepted responsibility. He made more than one trip. He's been haggling about his fees and he plays the critical role of transporting the individuals across the border. While his family may not have been aware of the conspiracy, Mr. Ismail co-opted them without their knowledge. His daughters transported the illegal migrants from a Toronto location to his home. He used the identification to enable the illegal persons to gain entry into the United States. He also coached his quarry about lying about their identity. He recruited the U.S. contact to transport them to Texas, hardly the actions of a novice or a low level player."

22 Furthermore, at paragraph 37, I indicated that:

"His position therefore was more than just a courier. His role may have been less than that of his principal, but it was significantly more than a mere transporter of the illegal migrants across the border."

23 The Crown also submits that the recent enactment of the Immigration Refugee Protection Act, increasing the maximum penalty, pursuant to Section 117(1), to life imprisonment for this type of activity, is not only reflective of the seriousness with which the legislature views these types of activities, but the need to increase the penalties for these types of offences. Specifically, the Crown contends that the penalty be imposed under Section 117(1) of the new Immigration Refugee Protection Act, should be greater than that which would have been imposed under its predecessor, which was Section 94(2) of the Repealed Immigration Act.

24 I concur with the Crown's submissions to that effect, since it is bolstered by a number of court decisions. For example, *R. v. Cribb*, [1993] N.J. No. 291, paragraphs 87 to 90; *R. v. Kergan*, [1985] A.J. No. 502, paragraph four and paragraph seven and *R. v. McMerty*, [1987] O.J. No. 507, Ontario Court of Appeal, pages four to five.

25 To be sure, some courts have been hesitant to conclude that an increased penalty should inexorably follow a statutory increased penalty, see *R. v. Chappell*, [1992] P.E.I.J. No. 2. However, in my view, a statutory increased penalty is a legislative signal that the sentencing in paradigm has shifted towards a regime of tougher sentences than that which previously existed.

26 APPROPRIATE RANGE: The Crown seeks a sentence of two years in jail for each accused, while the defence counters with a range of nine to 14 months. A perusal of the cases involving human smuggling under the old legislation may provide some guidance about the appropriate sentencing range in this case. For example, in *R. v. Muhme*, [1992] N.S.J. No. 125, the Nova Scotia Provincial Court sentenced a German National, convicted of smuggling 13 East Indian persons into Canada to 15 months in custody and fined him \$5,000. The court noted at page 15 that:

"We are dealing with a person who is a cog in the wheel of trafficking in those human beings and they are attempting to come in by illegal means into the country. I think that general deterrence here is the overriding factor."

27 In *R. v. Roo*, Unreported, Justice Allen of the Ontario Court of Justice, accepted a joint submission of seven months pre-trial custody and an additional 34 months incarceration for an accused who admitted to smuggling 31 aliens in five separate trips across the Canada/U.S. border. In a second scheme, Mr. Roo provided a number of illegal immigrants to an organization which proceeding to smuggle "in excess of 400 people across the border."

28 In *R. v. Min* [2001], Unreported, Justice Rosemay of the Ontario Court of Justice, accepted a joint submission of four years jail for the smuggling of a number of foreign persons across the Canada/U.S. border. The Federal prosecutor advised the Court:

"It was confirmed that over a four month period from November 27th, 2000, to March 26th, 2001, in excess of 400 Asian migrants were smuggled into the United States from Canada by Mr. Min and the organization he headed. The majority of migrants were Korean, but some of them were Chinese. Although the smuggling organization was a loose and fluctuating affiliate of partners and employees, rather than a rigid corporate hierarchy, investigation did establish that Mr. Min was the prime organizing mind behind the Canadian operation."

29 A factor in the joint submission was that Mr. Min had a very severe medical condition.

30 In the recent case of *R. v. Balchand*, Unreported, July 24th, 2002, Justice Hawke of the Ontario Court of Justice accepted a joint submission for a six month conditional sentence for the accused, who pled guilty to two counts of conspiring to unlawfully cause persons to enter the United States through Canada. On two occasions, the accused used his vehicle to pick up the illegal migrants from his principal's residence and from other Toronto locations and deliver them to a co-conspirator. The accused and his principal then picked up the illegal migrants after they were transported across the border and took them to New York.

31 Justice Hawke accepted the joint decision after "balancing the defendant's role" in the operations.

32 In *R. v. Li*, [2001] B.C.J. No. 748, a jury convicted the Accused and two others of unlawfully inducing, aiding or abetting a group of persons who did not hold valid Canadian passports to come to Canada, contrary to Section 94(2) of the Immigration Act then. The legal scheme involved 190 persons and cost the Canadian authorities \$10 million to apprehend the vehicle involved and to process the illegal migrants. In sentencing the accused, the judge placed emphasis on the following aggravating factors:

1. The operation was a lucrative criminal operation motivated by financial gain.
2. The operation required relatively sophisticated planning and organization.
3. The vehicle was outfitted with sophisticated communication and electronic equipment.
4. Each accused played a pivotal role in the organization.

33 The court sentenced the 32 year old Li, a first offender, to four years in jail, less 22 months credit for 11 months pre-trial custody.

34 In *R. v. Graprasad and Samaroo* [2003], Unreported, Justice Allen of the Ontario Court of Justice sentenced the two accused to three years and a conditional sentence of two years less a day respectively, after they pled guilty to one count of conspiracy to violate American immigrations laws. Within an eight month period, the accused, along with 16 others, were involved in 20 trips across the Canada/U.S. border, involving 40 illegal aliens. Mr. Graprasad had previously been convicted of a similar offence, for which he had been incarcerated for six months, while Ms. Samaroo was a first offender.

35 Justice Allen accepted a joint submission of three years incarceration for Mr. Graprasad and a conditional sentence of two years less a day for Ms. Samaroo.

36 Two other cases provide assistance in determining the appropriate range of sentence in this case. They are important since:

1. That of *R. v. Naboulsi* relates to a person higher up the conspiracy ladder than the accused in this case.

37 Furthermore, pursuant to Section 718.2(b) of the Criminal Code, the imperatives of general deterrence, specific deterrence and denunciation must be tempered by those of proportionality.

38 To that extent, similar offenders who commit similar offences in similar circumstances should receive, to the extent that that is possible, a similar sentence.

39 In *R. v. Naboulsi*, Justice Hawke sentenced the accused to a 14 month conditional sentence after he pled guilty to two counts of conspiracy to violate the immigration laws of Canada. Significantly, the Crown sought a penitentiary sentence of two to three years, since Mr. Naboulsi was an organizer for the Windsor exit area.

40 The Crown also suggested that the accused was at a higher level of involvement than a number of other co-conspirators. I can summarize Mr. Naboulsi's role in three incidents as follow.

1. On June 18th, he asked the chief architect of the conspiracy, Mr. Tewana, to bring the immigrants to Windsor. They are then transferred to his vehicle. Later, Mr. Naboulsi advised Mr. Tewana that the immigrants have gone. Mr. Szelest and Mr. Wasiluk presumably took them across the river.
2. On June 20th, Mr. Naboulsi picked up four migrants from a hotel and took them to his home. He speaks to an unknown person about money arrangements. He presumably handed the migrants over to the accused in the instant case.
3. On July 9th or 10th, 2002, Mr. Naboulsi is advised that five migrants were sent to Windsor.

41 Justice Hawke on page eight concluded that there was no further information regarding that incident.

42 On July 25th, 2002, Mr. Naboulsi's principal advised him that seven migrants were sent to a motel in Windsor. Mr. Naboulsi picked them up and later advised Mr. Tewana that they had been taken across the border.

43 On August the 15th, 2002, Mr. Tewana advised Mr. Naboulsi that three migrants were in a motel in Windsor. Later that day Mr. Naboulsi told Mr. Tewana that the migrants have been transported.

44 On August 31st and September the 1st, 2004, the agreed statement of facts in that case indicated that four migrants were transported by boat to the United States.

45 Lastly, on September 24th, 2002, arrangements were made to transport approximately five migrants to the United States, but Mr. Naboulsi apparently failed to do so.

46 Based on the above, Justice Hawke concluded that the Crown was unable to show that the defendant was a shipper or an organizer or "however else you want to characterize it."

47 In *R. v. Oh*, Unreported, January 30th, 2004, Justice Durno sentenced an accused to a conditional sentence of two years less a day for his role in a conspiracy which smuggled 100 persons annually into the United States.

48 Mr. Oh was involved in the transportation of 102 aliens. He drove the aliens from the airport to the place where they stayed in Toronto. He drove them to Sarnia on numerous occasions and also made hotel reservations for them. The 42 year old divorcee spent one month in pre-trial custody. There was no evidence that he made large amounts of money in the scheme. He had strong community ties.

49 Justice Durno described his involvement as follows, page seven:

"He was not at the top of the criminal hierarchy in the conspiracy. He was not a broker, rather he was a facilitator, a lieutenant of Choi, doing what Choi wanted him to do in a business that may very well have been expanding."

50 Of other conspirators who were lesser involved, Justice Durno noted at page seven that:

"Some who received lower sentences, no doubt transported more people, because they

were the people who drove the individuals across the border."

51 In my view therefore, a sentence within the reformatory range is appropriate in these circumstances. It is a range which reflects the role played by the accused in the conspiracy. That role is to transport, for a fee, the aliens delivered to them by Naboulsi across the Detroit River.

52 APPROPRIATENESS OF A CONDITIONAL SENTENCE: Section 742.1 establishes four conditions precedent for the imposition of a conditional sentence. These are:

1. There is no statutory minimum to imprisonment.
2. The Court must impose a term of imprisonment of less than two years.
3. The safety of the community would not be endangered by the offender serving the sentence in the community.
4. The conditional sentence would be consistent with the fundamental purpose and principals of sentencing set out in Section 718 to 718.2.

53 It is clear that based on the above, the first two conditions have been met. With respect to the third condition, I note the following:

1. Neither has a criminal record.
2. Neither has outstanding charges.
3. Neither has had any difficulties following the arrest.
4. Reference letters on behalf of both accused suggest that they are well thought of in their church communities.

54 A letter dated September 23rd, 2003, from the President of the Polish People's Home Associates, indicates that Mr. Szelest has been a member of the organization in good standing for ten years.

55 Another letter from his parish priest indicates that he an "active parishioner" who is an usher at Sunday celebrations.

56 I am satisfied, based on the above information, that the safety of the community would not be compromised if either offender served his sentence within the community.

57 The last criterion involves a consideration of whether a conditional sentence would be inconsistent with the need for general deterrence and denunciation. Put another way, is the need for denunciation and general deterrence so pressing that incarceration is the only substitute suitable way to express society's condemnation?

58 In my view, the need for these two considerations are not so great that the only sentencing option is actual jail.

59 It should be noted parenthetically, that a conditional sentence is not incompatible with general deterrence.

60 Despite Justice Hawke's finding in Naboulsi that the accused was neither a shipper nor organizer, he was much closer to the apex of power in the conspiracy than the two accused in this case.

61 The same can be said of the accused in R. v. Oh, who incidentally smuggled or was involved in the smuggling of more than three times the number which the accused in this case transported across the river.

62 In the Ismail case, the accused also had a greater involvement in the conspiracy than Mr. Wasiluk and Mr. Szelest. He used his family without the latter's knowledge in the scheme. He also fraudulently used official documents in moving the aliens from one destination to another. This is undoubtedly a very serious matter which has severely compromised the integrity of the Canada and U.S. borders. These types of incidents have fostered the impression from our friends to the south that the United States/Canadian border is frighteningly porous, because of the lax nature of the Canadian border authorities. That is not necessarily

the case, but often times, impressions are perceived as if they are reality.

63 This, however, does not mean that the accused should automatically be incarcerated because of their role in this matter. Others who were higher up in the chain of control received conditional sentences.

64 In my view, the imperatives of proportionality and parity dictate that the accused should receive a similar disposition, the more so given their otherwise impeccable backgrounds.

65 Accordingly, stand up, the sentence I will impose will be a conditional sentence. It will be a sentence of 14 months, to be served conditionally. The mandatory terms will apply. Those terms involve a reporting to the supervisor as soon as possible.

66 The additional terms are as follows: You should both of you abstain from owning, possessing or carrying any weapon, including any offensive weapon, ammunition, explosive substance or weapon as defined in the Criminal Code.

67 For the first seven months of your conditional sentence you should remain in your residence at all times, except for the following, to report to the supervisor, for medical emergencies, to go to and come from work, except on Saturdays, between 1:00 p.m. and 4:00 p.m., to enable you to purchase items of food, personal items.

68 You should have no association or contact with Mr. Ali Naboulsi, Mr. Ahmad Nawaz Tewana.

69 Furthermore, both of you is to perform 100 hours of community service and upon successful completion of the community hours, you should present proof to your supervisor that you successfully completed these community hours. Any additional conditions, Madam Crown?

70 MS. McGUIRL: No, Your Honour, except for the remaining seven months, would there be a curfew imposed?

71 THE COURT: Yes, I am coming to that.

72 MS. McGUIRL: Oh.

73 THE COURT: All right. For the remaining seven months of your conditional sentence, you should remain in your residence between 11:00 p.m. and 6:00 o'clock a.m., except for work purposes or employment purposes or medical emergency, or except with the permission of your supervisor.

74 MR. PREOBRAZENSKI: Also for educational purposes, just in case he's -- I think the younger -- just in case of educational purposes, Your Honour ...

75 THE COURT: Okay.

76 MR. PREOBRAZENSKI: ... in terms of coming to and fro.

77 THE COURT: Well, I will just make it, or for the purpose, Madam Clerk, with respect to the house arrest, or for the purpose of going to or coming from school.

78 MS. McGUIRL: Your Honour, in the first seven months, this perhaps would be an exception my friend might raise, but my friend and I have had discussion and I know that -- at least my understanding is that his clients are quite active in the religious community and I don't know if he'd be seeking an exception for ...

79 THE COURT: All right.

80 MS. McGUIRL: ... to go directly to and from religious services. I

81 THE COURT: That's generous of you, Madam Crown. Except for participating in church activities. Madam Clerk, except for participating in church activities. Mr. Preobrazenski?

- 82 MR. PREOBRAZENSKI: Well, I have nothing to -- further to add than that, sir. I mean, it's ...
- 83 THE COURT: Madam Crown?
- 84 MS. McGUIRL: Yes, though it was my suggestion, I was perhaps wondering about narrowing that to directly to and from religious services. I think there's probably a weekly service and ...
- 85 THE COURT: Okay. So just ...
- 86 MS. McGUIRL: ... I just think religious activities might be very broad and ...
- 87 THE COURT: All right then. Okay, then Madam Clerk, except for going to and coming from church. Is that good?
- 88 MS. McGUIRL: Thank you, Your Honour.
- 89 MR. PREOBRAZENSKI: Sure.
- 90 THE COURT: All right. Gentlemen, do you understand these conditions?
- 91 MR. WASILUK: Yes.
- 92 THE COURT: Do you appreciate ...
- 93 MR. SZELEST: Understand.
- 94 THE COURT: Do you appreciate you have an obligation to obey these conditions?
- 95 MR. WASILUK: Yes.
- 96 THE COURT: And do you understand that if you breach any of these conditions and it is found that you have breached these conditions, you could well be forced to serve the unexpired portion of your conditional sentence in jail. Do both you understand that?
- 97 MR. WASILUK: Yes.
- 98 MR. SZELEST: I understand.
- 99 THE COURT: Thank you. Any charges to be withdrawn, Madam Crown?
- 100 MS. McGUIRL: I don't believe so, Your Honour.
- 101 THE COURT: Well ...
- 102 MR. PREOBRAZENSKI: But if there are, Your Honour ...
- 103 THE COURT: If there are, in fact, your intention is to withdraw them?
- 104 MS. McGUIRL: Yes.
- 105 THE COURT: Thank you kindly and I thank both counsel for their assistance, tremendous assistance, in this matter.
- 106 MR. PREOBRAZENSKI: Thank you very much, Your Honour.
- 107 MS. McGUIRL: Thank you very much, Your Honour.