COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Ng,***
2008 BCCA 535

Date: 20081222
Docket: CA036117; CA036122

Between:

Regina

Appellant

And

Wai Chi (Michael) Ng

Respondent

BAN ON DISCLOSURE
pursuant to s. 486.4(1) *C.C.C.*

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman

P.R. LaPrairie — Counsel for the Appellant

M.P. Klein — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
9 October 2008

Place and Date of Judgment: Vancouver, British Columbia
22 December 2008

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] This is an intended appeal by the Crown and an intended cross appeal by the accused, Wai Chi (Michael) Ng, if leave is granted, of sentences totalling fifteen months imposed in Provincial Court for the following offences, of which Mr. Ng was convicted on a 22-count information:

> Count 2
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> Wai Chi (Michael) NG, between the 1st day of July, 2001 and the 8th day of March, 2004, at or near the City of Vancouver, in the Province of British Columbia, and in the

country of the People's Republic of China, did organize, induce, aid or abet the coming into Canada of [Y.H.W.], a person who was not in possession of a valid visa, passport or other document required by the Immigration and Refugee Protection Act, thereby committing an offence pursuant to Section 117(1) of the Immigration and Refugee Protection Act.

Count 5

Wai Chi (Michael) NG, on or about the 3rd day of July, 2002, at or near the Vancouver International Airport, in the City of Richmond, in the Province of British Columbia, did counsel, induce, aid or abet or attempt to counsel, induce, aid or abet [Y.H.W.], to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of the Immigration and Refugee Protection Act, hereby committing an offence pursuant to Section 126 of the Immigration and Refugee Protection Act.

Count 11

Wai Chi (Michael) NG, between the 1st day of April, 2004 and the 15th day of May, 2004, at or near the City of Vancouver, in the Province of British Columbia, did procure, attempt to procure or solicit a female person, [L.Y.T.], to have illicit sexual intercourse with another person, contrary to Section 2l2(1)(a) of the Criminal Code.

Count 12

Wai Chi (Michael) NG, between the 1st day of July, 2002 and the 15th day of May, 2004, at or near the City of Vancouver, in the Province of British Columbia, did procure, attempt to procure or solicit a female person, [Y.H.W.], to have illicit sexual intercourse with another person, contrary to Section 212(1)(a) of the Criminal Code.

Count 21

Wai Chi (Michael) NG, also known as Michael Ng, between the 1st day of September, 2002 and the 20th day of July, 2004, inclusive, at or near Vancouver, in the Province of British Columbia, did keep a common bawdy-house at 2263 Kingsway Avenue, Vancouver, contrary to Section 210(1) of the Criminal Code.

The trial judge acquitted him on all other counts.

[2] The maximum penalties are: under count 2, ten years (fewer than ten persons involved); under count 5, five years; under counts 11 and 12, ten years; and under count 21, two years. Mr. Ng received concurrent sentences of nine months for each of the two offences committed under the ***Immigration and Refugee Protection Act***, S.C. 2001, c. 27 ("the ***Act***"), and six months consecutive thereto but concurrent to each other on each of the three ***Criminal Code*** offences. Hence the total of fifteen months.

[3] The five convictions and fifteen acquittals followed a lengthy trial. In his reasons for judgment at trial, the judge described the various counts and the witnesses who testified as follows:

> [1] Michael Ng is charged with twenty two offences as set out in information 164042. He is charged in Counts I through 7 with offences contrary to sections 117, 118 and 126 of the *Immigration and Refugee Protection Act* (*IRPA*).

[2] Counts 8 through 10 are assault related offences contrary to sections 266, 267(a) and 264.1(1) of the *Criminal Code*. The Crown conceded there was insufficient evidence to convict Mr. Ng of assault with a weapon as charged in Count 8 but submits there is sufficient evidence to convict him of common assault.

[3] Mr. Ng is charged in Counts 11 through 17 and Count 21 with prostitution related offences contrary to sections 210(1) and 212(1)(a),(g),(h), and (j) of the *Criminal Code*. These charges include procuring, attempting to procure or soliciting [Y.H.W.] and [L.Y.T.] to have illicit sexual intercourse with another person: procuring [Y.H.W.] and [L.Y.T.] to enter Canada for the purpose of prostitution; aiding, abetting or compelling [Y.H.W.] and [L.Y.T.] to engage in or carry on prostitution; living off the avails of prostitution; and keeping a common bawdy house.

[4] Counts 18 and 19 are offences contrary to section 139(2) of the *Criminal Code*. These counts alleged Mr. Ng attempted to obstruct justice. The Crown conceded there was no evidence to support a conviction on Count 19.

[5] Counts 20 and 22 are allegations of threatening contrary to section 264.1(1) of the *Criminal Code*. The complainant of the threat in Count 20 is [G.Z.W.]. The Crown conceded there was no evidence to support a conviction on Count 22 which related to [H.J.T.].

[6] This case occupied many days of trial. The Crown and Defence agree the principal issue in this case is the credibility of the complainants [Y.H.W.], [L.Y.T.], and [G.Z.W.]. A number of police officers also testified in regards to the execution of search warrants and to an undercover operation which police conducted. Two officers from Immigration Canada testified. Lastly, Mr. Dandurand was qualified as an expert in human trafficking. Mr. Dandurand prepared a report which was filed. He also testified *viva voce*.

[4] In his trial judgment, the judge thoroughly discussed the evidence and resolved the credibility issues. The Crown did not succeed on the main thrust of its case which was that Mr. Ng had engaged in human smuggling with respect to the two complainants, [Y.H.W.] and [L.Y.T.], and had assaulted them. Their evidence was not believed except to the extent that it was confirmed by evidence independent of them.

[5] With the appellant's assistance, [Y.H.W.] travelled under false documents to Canada from China in July 2001 (count 2) and misrepresented her identity upon her arrival at the Vancouver International Airport (count 5). Mr. Ng was then married with children and living in Vancouver. He had travelled to China where he began an intimate relationship with [Y.H.W.]. He also assisted her in obtaining an identity card under a false name in this province.

[6] Mr. Ng owned and operated a massage parlour behind his family residence on Kingsway Avenue in Vancouver. After her arrival in Vancouver, [Y.H.W.] lived in a basement suite in the residence for about two months before she began to work in the massage parlour as a prostitute. Mr. Ng procured her to so conduct herself from July 2002 until May 2004, almost two years (count 12).

[7] For about six weeks in 2004, Mr. Ng procured [L.Y.T.] to work as a prostitute in his massage parlour (count 11). [L.Y.T.] is [Y.H.W.]'s sister-in-law. Mr. Ng and [Y.H.W.] travelled to China together and returned with [L.Y.T.] on 7 March 2004. She lived in the basement suite with [Y.H.W.] for a short time and then began working in the massage parlour as a prostitute.

[8] The massage parlour was a common bawdy house for the lengthy period of time encompassed by count 21. There was evidence obtained by the police in an undercover operation

from which it should be inferred that, at least during the latter part of that period, there were acts of prostitution at the massage parlour by women other than the two women named in counts 11 and 12.

[9] In sentencing submissions in the trial court, the Crown contended that a global sentence of five years for the five convictions was required. The Crown maintains this position on appeal. It says that the sentencing judge failed to recognize that the immigration offences in counts 2 and 5 were aggravated by two factors set out in the ***Act*** – profit and sexual exploitation. The Crown says further that the sentences were demonstrably unfit in the circumstances.

[10] Mr. Ng maintains that the sentencing judge's findings of fact precluded a conclusion that the immigration offences were committed for profit and exploitation. He says that the offences were all at the low end of the range of seriousness and that the sentences imposed were excessive. Therefore, a conditional sentence would have been appropriate as of the date of sentencing, 23 April 2008. He further says that as of the date of the hearing of the appeal he had served 51/2 months and the appropriate disposition in this court would be to reduce the sentences to time served.

[11] The trial judge described Mr. Ng's personal circumstances as follows:

> [15] The defence submits that Mr. Ng has been on bail for over two years. He has been compliant with the terms of his bail. He is forty-five years of age. He has no criminal record. He was born in China, he came to Canada in 1980. He is a Canadian citizen, he has two children, a son who is twelve and a daughter who is nine. He is divorced from his wife and he financially supports his children. He has been steadily employed since coming to Canada, although he had minimal education in China and his English is limited. He is presently working full time in construction. He has been working since this matter arose in order to support his family.

[12] At para. 17 of his sentencing reasons, the trial judge correctly stated the sentencing principles most applicable to this case and then outlined the Crown position and the defence position:

> [17] The principles of denunciation and deterrence are of primary importance for all of these offences, but Mr. Ng's rehabilitation must also be considered in the imposition of any sentence.
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> [18] The Crown filed material relating to the immigration offences. These materials and the authorities outline the seriousness of human smuggling. It is apparent there is an increasing awareness, nationally and internationally, of the implications of human smuggling. In *R. v. Li* (2001) B.C.S.C. 458 our Supreme Court set out the costs, both monetary and social, caused by the illegal entry of large number[s] of people into Canada. The Crown submits the aggravating factors include Mr. Ng bringing [Y.H.W.] into the country and shortly thereafter having her work in his massage parlour as a prostitute. The Crown submits even if consensual, this was exploitive and degrading. In this sense the Crown submits the smuggling was profit motivated and done for the purpose of exploiting [Y.H.W.]. The Crown says the operation run by Mr. Ng was well organized and sophisticated.
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> [19] The defence on the other hand submits Mr. Ng was found guilty of only assisting [Y.H.W.]'s entry into the country and there was no reliable evidence that this was done to exploit her financially. The defence submits Mr. Ng and [Y.H.W.] were romantically involved and this provides some of the context in which these offences were committed. In addition, the defence submits that although there is documentary evidence as to [Y.H.W.]'s financial gain from working at the massage parlour, there was no credible evidence as to the degree to which Mr. Ng benefited financially.

[13] The judge discussed the sentences in immigration cases cited by counsel as follows:

> [26] As with many offences, there is a wide range of behaviour which constitutes an offence under s.117 and 126 of the *Immigration and Refuge Protection Act*. At the one end of the range is the wholesale smuggling of many people for significant financial gain. *R. v. Li* (supra) provides an example of this. That case involved a highly organized, sophisticated and large scale operation which illegally landed a hundred and ninety people, including children, on the west coast of Vancouver Island. The operation was very dangerous. Each passenger was to pay or owed the offenders thirty to forty thousand dollars. The offenders in that case received four years in jail. *R. v. Tewana* (2005) O.J. No. 4676 involved the smuggling of a hundred and twenty people, each were charged between twenty-five hundred and three thousand dollars. That was also a large scale and sophisticated operation. The accused in that case received three years in jail. In *R. v. Wasiluk* (2005) O.J. No. 4148 the accused was part of the operation set out in *R. v. Tewana* (supra) and had smuggled thirty people across the Detroit River. The accused received three hundred dollars per person that he brought into the country. Notwithstanding the offenders were part of a sophisticated smuggling scheme for profit, on their guilty plea the accused received a fourteen month conditional sentence and a hundred hours of community work service.
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> [27] *R. v. Ballo* (2004) O.J. 5312 is a case involving an offence under s.117(1) in which a foreign national was attempting to smuggle his daughter into Canada. The sentence was five and a half months, which was the time he had spent in pre-trial custody which would equate to, on the usual principles, an eleven month sentence.
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> [28] The Crown cited a number of cases from other jurisdictions, including England, Australia, New Zealand and the United States. Although these cases may underscore the international concern for human smuggling, they are of limited value in deciding what sentence is appropriate in this case. Most of those cases involve large scale and sophisticated smuggling rings. It is also difficult to compare the sentencing regimes in those jurisdictions to that in Canada.

[14] After discussing other cases that were not particularly helpful on the facts, the judge determined, at para. 30, that there appeared to be a range of eleven months to four years for facilitating a person or persons in coming illegally into Canada under s. 117 of the ***Act***. Except for the ***Ballo*** case, the circumstances in these cases were more serious than the circumstances in the present case.

[15] At para. 34 of his sentencing reasons, the trial judge found that there was a link between the immigration and the prostitution offences but that the link was “more limited … than suggested by the Crown.” In the next paragraph he determined that imprisonment was appropriate for both types of offence. With respect to the immigration offences, he said that “(t)hese types of offences can and do compromise the integrity of our borders and as such, are a threat to public safety …”. He accepted that the sentencing factors of denunciation and deterrence required custodial sentences. Then he imposed the sentences I have described above before going on to consider, and reject, the suitability of a conditional sentence.

[16] The Crown contends that the trial judge failed to adequately consider profit motive and sexual exploitation as aggravating factors in the immigration offences. These factors and others are set out in s. 121 of the ***Act***:

> **121.** (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

> (*a*) bodily harm or death occurred during the commission of the offence;
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> (*b*) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
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> (*c*) the commission of the offence was for profit, whether or not any profit was realized; and
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> (*d*) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

[17] The Crown did not attempt to prove that Mr. Ng was part of a criminal organization. There is no basis for a conclusion that he might have been so involved. There was no finding that he was paid by anybody to assist [Y.H.W.] in travelling to Canada and entering this country illegally.

[18] The trial judge found that there was some link between Mr. Ng's conduct in helping [Y.H.W.] to enter Canada illegally and her later prostitution. However, he also said that the intimate relationship between Mr. Ng and [Y.H.W.] had to be taken into account. He found at para. 22 that this relationship existed before and after he assisted her in coming to this country and even after the police investigation. He described their relationship as being complex. It seems that the judge found that the nature of the relationship made the subsequent sexual exploitation a less serious factor with respect to the immigration offences than it otherwise might have been.

[19] This is in keeping with the acquittals of Mr. Ng of procuring [Y.H.W.] to enter Canada for the purpose of prostitution (count 13) and of procuring [L.Y.T.] to do the same (count 14). In his trial judgment, the judge gave the following reasons for these two acquittals:

> [134] Counts 13 and 14 are counts of procuring [Y.H.W.] and [L.Y.T.] to enter Canada for the purposes of prostitution. The Crown submits if [Y.H.W.]'s and [L.Y.T.]'s evidence is accepted, the elements of these offences have been made out. [Y.H.W.]'s evidence as to her relationship with Mr. Ng both in China and in Canada was so contradictory that her evidence in conjunction with the evidence as a whole is not sufficient to prove the elements of Count 13 beyond a reasonable doubt.
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> [135] [L.Y.T.] also gave conflicting statements regarding Mr. Ng's involvement with her ultimately becoming involved in prostitution. [L.Y.T.] also gave conflicting evidence as to [Y.H.W.]'s role in having her come to Canada. In view of this conflicting evidence, the evidence as a whole does not prove beyond a reasonable doubt Mr. Ng procured [L.Y.T.] to enter Canada for the purposes of prostitution. Counts 13 and 14 are dismissed.

[20] Given these findings of the trial judge, it would be inconsistent with the acquittals on counts 13 and 14 to over-emphasize the subsequent sexual exploitation in the context of the immigration offences. The factor of sexual exploitation, however, must be examined more closely when we consider the fitness of the sentences for the prostitution offences.

[21] The immigration sentencing cases relied upon by the Crown involved more serious circumstances and, in some cases at least, offenders with existing criminal records. Mr. Ng, who had no prior record, assisted one person to illegally enter Canada, apparently without compromising her physical safety. It seems that there are no reported sentencing decisions in immigration cases that involve comparable facts. If the two immigration offences were the only offences for which Mr. Ng had been convicted, it would have been my opinion that the concurrent nine-month sentences were at the low end of the scale but not unfit.

[22] I take a different view with respect to the six-month consecutive sentences imposed for the three prostitution offences and with respect to the global sentence imposed.

[23] All the offences committed by Mr. Ng involved significant moral turpitude and the two complainants and other women were victims of his greed and opportunism. His criminal conduct was for almost two years. Although the trial judge recognized the need for denunciatory and deterrent sentences, in my opinion the sentences of six months concurrent for each of the three prostitution offences did not adequately address that need. It was correct to make the prostitution offences consecutive to the immigration offences, but the global sentence of fifteen months is not fit.

[24] In his trial judgment, the judge made findings with respect to the financial arrangement between Mr. Ng and [Y.H.W.]. He rejected her evidence that she was required to pay Mr. Ng $11,000 per month. Mr. Ng's financial records and a search of his premises did not support this evidence. There was a finding that Mr. Ng delivered to [Y.H.W.]'s father in China "a significant amount of money". The court rejected the Crown's assertion that Mr. Ng had financial control of [Y.H.W.]. She had "independent access to her financial resources" and "to a certain extent each trusted the other with their money" (para. 69).

[25] There was no finding of fact about the financial arrangement between Mr. Ng and [L.Y.T.]. Having rejected the evidence of [Y.H.W.] about the financial arrangements between herself and Mr. Ng in his trial judgment, the judge made no finding as to how much Mr. Ng benefited financially from his prostitution operation. In his sentencing reasons at para. 21, the judge accepted that Mr. Ng "stood to gain financially from the operation of the massage parlour" and added that "it is difficult on the evidence presented to determine to what degree he benefited". He added at para. 24 that the massage parlour "did not appear … to be particularly sophisticated" and that the prostitution was "easily uncovered when the police began their investigation".

[26] These findings led to dismissal of count 17, living off the avails of prostitution between 1 July 2002 and 15 May 2004. In his trial judgment at para. 137, the judge stated that the evidence did not prove the offence. Although the appellant received money and profit from the prostitution activity, the evidence did not meet the requirement of proof as stated by this court in ***R. v. Bramwell*** (1993), 86 C.C.C. (3d) 418 (B.C.C.A.). The law requires more than a flow of money from the prostitute to the accused. Living off the avails of prostitution means doing so "parasitically".

[27] The trial judge, however, did not find that Mr. Ng was only a hired gatekeeper for the prostitution business. The evidence goes much further than that. The massage parlour was Mr. Ng's business. He operated it under a corporate name. He kept payroll records that showed that [Y.H.W.] (under the name of [F.Q.Y.], the name on her false identity card) received gross monthly pay of $1500 and net monthly pay of $1240. A ledger shows that she worked at the massage parlour for each day of 2003.

[28] The police undercover operation "left no doubt that sexual services were being provided [at the massage parlour] and Mr. Ng was the person in charge" (trial judgment, para. 106). There was evidence that Mr. Ng collected fees for the rental of the rooms and advised customers to negotiate "special services" with the women in the massage rooms. One of the police officers, Detective Wong, returned from the massage room and told Mr. Ng that he wanted a younger female and Mr. Ng said that would cost $300. Mr. Ng told Detective Torvik that he could have a room for $60 per hour, as he pointed to a sign on which room rates were posted. He told the detective that he had four rooms and four girls. (This was after [Y.H.W.] and [L.Y.T.] had ceased working at the massage parlour.) When asked, he said that there would be no problem providing sexual activity. It is apparent that Mr. Ng controlled the prostitution business.

[29] Although there was no credible evidence as to the specific financial arrangement between Mr. Ng and the prostitutes, it must be inferred that he was running an ongoing operation for profit. The trial

judge failed to give sufficient emphasis to the profit motive and the duration of the operation.

[30] There are very few reported cases on sentencing for prostitution offences. Some are for keeping a common bawdy house in which fines were imposed and upheld on appeal – see ***R. v Chan***, [1981] B.C.J. No. 1322 (C.A.) (Q.L.) and ***R. v. Wong***, [1980] B.C.J. No. 654 (C.A.) (Q.L.). Those cases are not helpful because they involved the letting of hotel rooms to prostitutes and there were no convictions for procuring. Procuring cases resulted in prison sentences of the equivalent of several years but the offences were committed by accused with criminal records, other offences were involved or there was an element of physical coercion – see ***R. v. Tang***, [1997] A.J. No. 460 (C.A.) (Q.L.) and ***R. v. Miller***, [1997] O.J. No. 3911(C.J. Gen. Div.) (Q.L.).

[31] Mr. Ng kept a common bawdy house for almost two years. He employed more than two prostitutes. He was convicted of procuring two of them to have illicit sexual intercourse, one of them, [Y.H.W.], over a lengthy period of time. He ran a prostitution business from which he profited. Deterrence is a significant factor in sentencing for these offences. Because of the moral turpitude involved, denunciation is an equally significant factor. The sentences imposed for the prostitution offences do not adequately speak to these factors and are unfit. The global sentence is inadequate.

[32] I would grant the Crown leave to appeal. I would allow the appeal and increase the global sentence by one year, to 27 months. For the reasons I have stated above, I would not disturb the sentences for the immigration offences. I would increase the sentence for the procuring offence charged in count 12 ([Y.H.W.]) to 18 months and for the other procuring offence (count 11) and the bawdy house offence (count 21) to 12 months each, these three sentences to be served concurrently to each other and consecutively to the sentences for the immigration offences.

[33] Because the global sentence precludes making the sentences conditional, I would refuse Mr. Ng leave to cross appeal.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Groberman"