Conroy & company

MEDICAL MARIJUANA

Citation: United States v. Boje
2000 BCSC 0243
Date: 20000209
Docket No.: CC990245
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE UNITED STATES OF AMERICA, APPLICANT

AND:

RENEE DANIELLE BOJE, RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CATLIFF

C. Greenwood, Counsel for the Applicant
J.W. Conroy, Q.C. , Counsel for the Respondent

Place and Dates of Hearing: Vancouver, British Columbia, 1-3 November, 1999

[1] The United States of America seeks the extradition of the respondent to California to face trial on certain drug charges. During the first three days of the hearing Mr. Conroy made a number of preliminary applications. After hearing extensive argument, I declined to grant the applications and said I would provide written reasons for my decision. These are my reasons.

[2] On 29 July 1997 the applicant was seen for more than an hour moving and watering marijuana plants on the patio of a residence in Belair, California. Later that day she was seen inside the residence with three other accused persons smoking

from a glass pipe with a cannabis internet site displayed on a large television screen. The applicant was detained leaving the residence together with her co-accused Evanguelidi. After waiving her *Miranda* rights, the respondent is alleged to have told police she had met Todd McCormick two months previously and regularly visited the residence to help him tend the plants. She said that she was paid for such assistance, but "would do it for free".

[3] Later that day members of the Los Angeles County Sheriff's Office executed a search warrant of the residence in question and located and seized approximately 4,116 plants as well as documents and equipment relating to the cultivation of those plants. One of the documents seized was a lease for the residence in the name of Todd McCormick.

[4] At the start of the hearing the respondent filed a lengthy affidavit in which she described in detail her arrest on 29 July 1997 and the events which took place while she was in custody in the days that followed. After three days or so she was released on bail and in October 1997 advised that charges against her had been dropped. In May 1998 she was advised that the Federal Government would likely reinstitute the charges against her and "fearing further persecution by the U.S. Government and by the Drug Enforcement Administra- tion" came to Canada in May 1998 and, but for a brief visit to New York, has been here ever since. In February 1999 the respondent was arrested in a house in Sechelt, British Columbia "that had a medical marijuana garden in its basement". As a result, the R.C.M.P. learned of charges that were outstanding against the respondent in California. The respondent was later released on a surety bond and has claimed refugee status in Canada.

[5] The respondent is charged in California with (1) conspiracy to manufacture, distribute and possess with intent to distribute marijuana; (2)manufacturing marijuana; (3) aiding and abetting the manufacture of marijuana, all contrary to the provisions of the United States Code. Mr. Conroy concedes that there is a *prima facie* case made out from the authenticated materials that the respondent aided and abetted the manufacture of marijuana. That comes from the evidence that she and her co-accused were seen to be moving and watering marijuana plants for 1 1/2 hours on the day in question. What is not conceded is that there is any evidence of conspiracy on the part of the respondent apart from the statement she is alleged to have made concerning her having met Todd McCormick two months previously and then visiting his residence to help him tend the plants. Mr. Conroy says that his client denies making any such statement or waiving her *Miranda* rights. In her affidavit it appears that at the scene of her arrest, when asked questions by an arresting officer, she said that she was not going to say anything without first talking to a lawyer. She apparently maintained this position while she was in custody, although later that day when she was brought to a location where officers were preparing for "storming" the residence she did answer questions about the layout of Todd McCormick's house.

[6] Mr. Conroy made application for the holding of a *voir dire* to consider the voluntariness of the statement the respondent is alleged to have made as set out in the affidavit of Mr. Nordskog.

[7] Mr. Conroy submits that I should hold a *voir dire* for two reasons. First, he says that as a matter of law, unless the statement submitted in the material by the applicant is unchallenged, a *voir dire* must be held to determine its voluntariness. Alternatively, he submits that if I have a discretion to hold a voir dire I should do so

in this case because of the conflicting statements between the affidavits of Mr. Nordskog and Ms. Boje.

[8] As has been said many times, the role of an extradition judge is a modest one. It consists of determining whether there is sufficient evidence to establish a prima facie case that the extradition crime has been committed. It is a role similar to that of the preliminary hearing judge whose task is also to decide if the Crown's evidence establishes a *prima facie* case. Of course the form of the two proceedings is different. In an extradition hearing evidence is admissible by affidavit, and no cross-examination is allowed. In ***U.S.A. v. Smith*** (1984), 10 C.C.C. 540 the fugitive alleged there were half-truths, incomplete and misleading information in the affidavit evidence. Nevertheless the court held that refusal to admit cross-examination was not a violation of Section 7 of the Charter.

[9] Where there is some evidence of voluntariness within the statement sought to be challenged, Canadian courts have admitted the statement without the necessity of holding a voir dire. In ***U.S.A. v. Turenne*** (1998), MJ No. 541 (QB) Kauffman J.A. said at page 2;

> ...I can fully understand why the extradition judge refused the defence request for the accused to be heard: the confession was already - and properly - in the record and even if the accused was to suggest as he probably will that his declaration was not free and voluntary, as the affidavits would seem to suggest, an extradition hearing is not the time to weigh contradictory evidence. His testimony would therefore add nothing.

In ***Australia v. Lau*** (1998), B.C.J. No. 2427 the provincial court judge said at page 6;

> There is no initial requirement upon counsel for the requesting state to establish volun- tariness of an inculpatory statement to a reasonable doubt, as a pre-condition to ad-missibility. Therefore tendering authenticated documents that contain such a statement...is in my respectful view sufficient, absent the fugitive showing sufficient and compelling cause, to trigger such an inquiry.

[10] I was informed by counsel that there appears to be no reported decision of a voir dire having been held on the issue of voluntariness at an extradition hearing except in one case. That case was the ***U.S.A. v. Chao*** (1999), S.C.R. No. CC980879, a decision of this court. In that case the respondent made statements to U.S. police officers when in British Columbia. The brief oral decision of the court includes the following on page 5;

> On the face of it an issue of involuntariness does not appear to arise in this case as to require a voir dire. However, the submission of defence counsel was that the purpose of the voir dire was to challenge the statement with respect to voluntariness and also for other consideration, the behaviour of the American police officers be considered by the Minister of Justice in the event of a committal prior to surrendering of the fugitive to the United States.
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> On that basis I acceded to the holding of a voir dire. I am also of the view that because of the recent decision of the Supreme Court of Canada in

> Hodson v. The Queen any conversation by persons in detention to persons in authority must be subject to a voir dire. For those reasons a voir dire was conducted.

[11] I note that the authorities to which I have been referred do not appear to have been brought to the attention of the extradition judge in ***Chao***. Furthermore, the statement in question was made in British Columbia. I note too that the statement in ***Chao*** refers to the respondent on two occasions saying, while talking to a police officer, that he needed a lawyer. This might be a sufficient cause to enquire into voluntariness.

[12] I have been urged to follow the decision in ***Chao*** and to decide that unless an inquiry into voluntariness is waived, I must hold a *voir dire*. I decline to do so. I do not consider the law obliges me to hold a voir dire into the voluntariness of a statement on an extradition hearing without regard to the circumstances.

[13] Mr. Nordskog deposes that the respondent was given her *Miranda* rights which she waived and then made the statement to which I have referred. The respondent, through her counsel, says that she did not waive her rights or make the statement in question. What she says in her affidavit is simply that she said nothing except that she wanted to speak to a lawyer. There is obviously a conflict between the two affidavits. But the denial that the respondent waived her rights or made a statement imputed to her is not sufficient in my view to compel an extradition court to inquire into voluntariness. This situation is exactly that mentioned by Kauffman J.A. in ***Turenne*** who, referring to the denial by a respondent that his statement was free and voluntary, said that the extradition hearing was not the time to weigh such contradictory evidence. In my view the respondent has not shown a "sufficient and compelling cause" to justify such an enquiry. The law is clear that I must assume that the respondent will have a full and fair trial in California, including an investigation into the statement she is alleged to have made.

[14] Mr. Conroy's second application concerned the question of whether the material submitted by the U.S.A. constituted a crime in Canada. Affidavit material submitted by Mr. Conroy is to the effect that Mr. McCormick suffers from a painful back injury and requires marijuana for medicinal purposes. He has obtained a prescription for marijuana from a doctor in Amsterdam. Other medical evidence confirms the desirability of his taking marijuana to relieve his pain and to avoid the deleterious side effects that medications have already caused.

[15] Mr. Conroy has submitted the reasons for judgment of the Provincial court in ***R. v. Parker*** in the Ontario Court of Justice, Provincial Division, as well as ***Wakeford v. Canada***. Mr. Parker and Mr. Wakeford are men who have demonstrated the need for marijuana for medical purposes and who were granted interim constitutional exemption from the Controlled Drugs and Substances Act under Section 24.1 of the Charter of Rights and Freedoms. The interim exemption was to remain in force until the Minister of Health decided on an application for exemption pursuant to Section 56 of the former Act. Mr. Wakeford I am told has received his exemption. In the case of Mr. Parker it appears that the Provincial court has "read down" sections of the Controlled Drugs and Substances Act so as to exempt from their ambit persons possessing or cultivating cannibis for their personal medically approved use. I am told that others have received exemptions under Section 56 similar to the exemption given to Mr. Wakeford. The ***Parker*** case is under appeal in Ontario.

[16] Mr. Conroy submits that Mr. McCormick, if he was subject to Canadian law, would either not be subject to the offending sections in the Controlled Drugs and Substances Act because he would have been in possession of marijuana for his personal medically approved use, or he would have received an exemption under Section 56 of that Act.

[17] In my view the assertion that Mr. McCormick required marijuana for his personal medically approved use would raise a defence in Canada to charges brought here that are analogous to the charges which he faces in California. It is clear law that I am not to consider defences as an extradition judge. Furthermore, the applicant says that these matters raise live issues that will probably be explored in California; for example, the question of Mr. McCormick's bona fide possession of marijuana for medicinal purposes in view of the discovery of 4,112 plants at his residence.

[18] Mr. Conroy has referred to Proposition 215 in California which I am told constitutes statutory permission for the medical use of marijuana. Mr. Greenwood informs me that the applicant will take the position in California that the prosecution of Mr. McCormick is under a United States federal statute and that the Californian law which may otherwise provide a defence is of no relevance. These are all plainly matters for the Californian court to inquire into and are not for me to determine.

[19] I further declined to adjourn the hearing to permit the calling of further evidence concerning the use of marijuana for medical purposes in California as I saw no useful purpose in hearing that evidence in light of my foregoing reasons.

[20] Mr. Conroy's final application was that the hearing be adjourned to allow him to adduce *viva voce* evidence concerning what he submitted was the political nature of the prosecution of the respondent in the United States. Under Section 15 of the previous Extradition Act an extradition judge was obliged to receive any evidence tending to show that the crime of which the fugitive was accused was an offence "of a political character". That section has not been carried forward into the new Extradition Act. Accordingly I do not consider I should hear evidence that is not relevant to my modest task as an extradition judge in ascertaining if the applicant has made out a prima facie case.

[21] In ***Pacificador v. Phillipines Republic of*** (1993), 83 C.C.C. (3d) 210, the Ontario Court of Appeal held that but for s. 15,

> The extradition judge would have no power to admit evidence relevant to issues other than the question of whether a prima facie had been established. (p. 219)

[22] In ***Pacificador*** extradition was sought on the charges of murder or attempted murder. These offences were removed by the relevant treaty in that case from the category of political offences in s. 15. In the result it was held that evidence which could have been admissible through s. 15 lost its relevance and hence its admissibility.

[23] In spite of the absence of any statutory power to hear evidence irrelevant to the purpose of an extradition hearing, I still appear to have some discretionary power to

do so. If I do, I decline to exercise it in this case. I agree with the comments of Blair J. in ***U.S.A. v. Honslauder*** (1993), 13 0R (3d) 44 that,

> "Building a case for another purpose" is not consistent with the nature of the extradition hearing, which is designed simply to provide a summary and expeditious determination as to whether there is sufficient evidence to commit the fugitive for surrender. A court is entitled to control its own process. It is not an effective or necessary use of judicial time to have judges sitting passively by while counsel rummage about in evidence which is admittedly completely irrelevant to their mandate at hand, albeit that such an exercise may yield useful results for the fugitive at a later stage.

[24] In any event the respondent, if an order is made against her, will have full opportunity to present material to the appropriate authority to support her belief that she is being prosecuted for some political purpose. I decline to spend judicial time acting as a mere spectator in that endeavour.

"Catliff, J."