COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ling, 2014 ONCA 808
DATE: 20141118
DOCKETS: C55118, C56412, C56544

Feldman, Epstein and Benotto JJ.A.

BETWEEN

C55118

Her Majesty the Queen

Respondent

and

Wan Shun Ling

Appellant

AND BETWEEN

C56412

Her Majesty the Queen

Respondent

and

Yan Shi

Appellant

AND BETWEEN

C56544

Her Majesty the Queen

Respondent

and

Yaoquan Jian

Appellant

Matthew Gourlay, for the appellant, Wan Shun Ling

Saman Wickramasinghe, for the appellant, Yan Shi

Misha Feldmann, for the appellant, Yaoquan Jian

Lisa Csele, for the respondent

Heard: October 10, 2014

On appeal from the convictions entered on November 21, 2011 and the sentences imposed on February 14, 2012 by Justice Faye E. McWatt of the Superior Court of Justice, sitting without a jury, with reasons reported at 2012 ONSC 654.

ENDORSEMENT

[1] The appellants were each convicted of six charges arising out of their involvement in a clandestine drug lab. The following are the convictions under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"):

1. Possessing MDMA for the purpose of trafficking, contrary to s. 5(2);
2. Producing MDMA, contrary to s. 7(1);

3. Possessing ketamine for the purpose of trafficking, contrary to s. 5(2);

4. Producing ketamine, contrary to s. 7(1);

5. Possessing methamphetamine for the purpose of trafficking, contrary to s. 5(2);

6. Producing methamphetamine, contrary to s. 7(1).

[2] The appellants appeal conviction and sentence.

CONVICTION APPEALS

[3] On conviction, Mr. Shi and Mr. Jian argue first that the activities at the drug lab did not constitute "production" for the purposes of s. 7(1) of the *CDSA*. This issue was conceded at trial, and rightly so. The pill factory was "altering the…physical properties" of the chemicals, MDMA, ketamine and methamphetamine, used to make the pills: see *CDSA*, s. 2(1).

[4] Their second submission is that the verdicts were unreasonable because there was not sufficient evidence linking them to the production and to the drugs in the house. They do not challenge their convictions on possession for the purpose of trafficking the drugs found in the van that they loaded and in which they drove away.

[5] We do not accept this submission. The case on production was circumstantial. The trial judge considered all of the evidence, including the fact that the house was clearly a drug lab; Mr. Shi and Mr. Jian had keys to the house; and they came and loaded the van with the pills. There was also the

expert evidence of Sergeant Culver. Taken together, these circumstances indicated that Mr. Shi and Mr. Jian were not just couriers but were involved in the entire production operation and had possession in the sense of control over all the drugs in the house. The trial judge was entitled to make that finding. We see no error in her conclusion.

[6] Mr. Ling submits that the identity evidence was unreliable and should not have been accepted by the trial judge. He refers to the officer recognizing Mr. Ling in the cell after his arrest as akin to an in-dock identification, and points as well to what he alleges was the unreliable way the police copied and recorded the receipts they said they took from Mr. Ling's wallet.

[7] In our view, there was overwhelming evidence of identification of Mr. Ling. A police officer identified Mr. Ling as the man who drove a van containing barrels of caffeine to the house on October 16, 2007. The man was then observed driving a beige Toyota Corolla, which had been rented by Mr. Ling. Mr. Ling drove the same Toyota Corolla to the house on October 19, when he was arrested. Furthermore, when he was arrested, Mr. Ling had receipts in his wallet (which were all photocopied by police) for machinery and other paraphernalia related to drug production, which machinery and other paraphernalia were found in the house on October 19. The trial judge accepted the police officers' evidence that they were diligent in keeping the documents from each appellant's wallet separate.

[8] The conviction appeals are dismissed.

SENTENCE APPEALS

[9] Mr. Ling received a global sentence of 16 years. Mr. Jian and Mr. Shi were each sentenced to 14 years.

[10] They argue that the trial judge erred in principle in identifying and taking into account their lack of remorse as an aggravating factor. They further submit that, having regard to the quantity and the particular type of drugs, the sentences are overly severe and manifestly unfit.

[11] We agree that the trial judge erred in considering lack of remorse as an aggravating factor. On a conviction after a trial, a sentencing judge should usually not consider absence of remorse as an aggravating factor: see *R. v. J.F.*, 2011 ONCA 220, 105 O.R. (3d) 161, aff'd on other grounds, 2013 SCC 12, [2013] 1 S.C.R. 565, at paras. 84-85. As Rosenberg J.A. explained in *R. v. Valentini* (1999), 43 O.R. (3d) 178 (C.A.), at para. 82:

> Lack of remorse is not, ordinarily, an aggravating circumstance. It should only be considered aggravating in very unusual circumstances such as where the accused's attitude toward the crime demonstrates a substantial likelihood of future dangerousness. Even then the trial judge must be careful not to increase the sentence beyond what is proportionate having regard to the circumstances of the particular offence.

[12] However, we are nonetheless of the view that the sentences are in accord with applicable sentencing principles and objectives. The trial judge correctly

identified several important aggravating factors. Mr. Jian and Mr. Shi were “an integral part” of the drug operation, and Mr. Ling was “obviously a trusted member of the group producing the pills.” This case was one of the two largest ecstasy laboratories that police had seen in Canada. The appellants were involved in drug production for purely financial motives. Methamphetamine is very addictive, and MDMA and ketamine, while less addictive, are still dangerous to human health. The ecstasy pills were specifically packaged to appeal to entry-level users. Furthermore, the officers found pills packaged as ecstasy or MDMA, which in fact contained methamphetamine, a more dangerous drug. Deterrence was a particularly strong factor – appropriately so.

[13] Furthermore, in our view the sentences are proportionate to the gravity of the criminal activity and the degree of responsibility of each offender.

[14] We see no reason to interfere with the trial judge’s exercise of discretion in imposing the sentences she did. The appeals against sentence are dismissed.

“K. Feldman J.A.”

“G.J Epstein J.A.”

"M.L. Benotto J.A."