COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Khou, 2019 ONCA 189
DATE: 20190311
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Juriansz, Pepall and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nao Khou

Appellant

David Parry, for the appellant

Katie Doherty, for the respondent

Heard: March 4, 2019

On appeal from the convictions entered by Justice Mavin Wong of the Ontario Court of Justice on October 6, 2016, with reasons reported at 2016 ONCJ 865, and from the sentence imposed on December 6, 2016.

REASONS FOR DECISION

[1] The appellant appeals his convictions on three counts of fraud over $5,000 and possession of property obtained by crime over $5,000, contrary to ss. 380(1)(a) and 354(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. He also seeks leave to appeal his custodial sentence of two years less a day.

[2] He appeals his conviction on the sole ground that the trial judge erred by dismissing his s. 11(b) application. He abandoned the ground of appeal relating to the role of *amicus* prior to the hearing of the appeal.

[3] The appellant was arrested and charged on September 30, 2013. Representing himself, he was arraigned on March 3, 2015, and elected trial in the Ontario Court of Justice. After making extensive inquiries, the trial judge determined that the appellant was completely unprepared to represent himself. On March 4, 2015, she adjourned the trial so that the appellant could reapply for legal aid and for the appointment of *amicus*. *Amicus* was appointed on March 23, 2015 and the trial was set to resume on October 19, 2015. On October 19, 2015, it was determined that the interpreter in attendance was unable to interpret for the trial. Consequently, the trial was further adjourned and resumed on November 30, 2015. The trial comprised 13 days and concluded on July 19, 2016.

[4] The total delay in the case greatly exceeded the presumptive ceiling of 18 months for provincial court trials specified in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, which was released on July 8, 2016 near the end of this trial. In the *Jordan* framework, this was a transitional case in which the Crown had to rebut the presumption of unreasonable delay on the basis of exceptional circumstances.

[5] The trial judge found there were two reasons why this case took so long to complete. First, the appellant had come to court ill-prepared on March 3, 2015,

when his trial was set to begin, completely unable to defend himself. The trial judge noted that he had no pen nor paper, that he could not read or write English, that he did not have the disclosure with him, and that he had a limited education. Furthermore, he required an interpreter. The trial judge found the appellant's inability to represent himself was an exceptional circumstance that was reasonably unforeseen and reasonably unavoidable by the Crown. Second, the trial judge found that the case was complex because of the number of witnesses, the volume and nature of the disclosure, and the fact that the appellant was self-represented.

[6] On appeal, the appellant contends that it should have been plainly obvious to the Crown and to the court much earlier that *amicus* would be required in this case. Certainly the need for *amicus*, where one is required, should be identified as early as possible. However, on the facts of this case, the trial judge did not err in finding that the need for *amicus* was not reasonably apparent before March 3, 2015. At the appellant's pre-trial appearances, particularly those of July 23, 2014 and February 9, 2015, in response to questions from the presiding judge, the appellant consistently and repeatedly assured the court that he had read the disclosure, that he had read it carefully, and that he had the assistance of a computer literate person in reading the disclosure in electronic form. Though he required an interpreter, he was at all times adamant that he was able to represent himself. On March 3, 2015, the Crown was ready to proceed, the court was available, but the appellant was unprepared to defend himself. His inability to do

so caused the adjournment of the trial to October 19, 2015. On this record, we are satisfied that October 19, 2015 was the earliest available date for the resumption of a trial of this length.

[7] The trial judge was correct in concluding that under the *R. v. Morin*, [1992] 1 S.C.R. 771 analysis this period of time "would have been considered either defence caused delay or, a more generous interpretation, neutral in the s. 11(b) calculus."

[8] The trial judge correctly observed that all involved were reasonably relying on the framework that existed for the determination of s. 11(b) claims prior to *Jordan*. After the case was necessarily adjourned, *amicus* did not raise s. 11(b), and while the appellant may not have understood the issue, he did not either. Rather, he recognized that the court was trying to help him have a fair trial. The s. 11(b) application was pursued following the release of *Jordan*, after all of the evidence had been adduced and the Crown had made its closing submissions.

[9] The trial judge did find there was additional delay attributable to the Crown due to the lack of an accredited interpreter. This additional delay was from October 19 to November 30, 2015.

[10] On these findings, the trial judge calculated that the total operative delay in the case was 18 months and 14 days. She concluded there was no unreasonable delay and dismissed the appellant's s. 11(b) application.

[11] We are not persuaded there is any reversible error in the trial judge's conclusion. The appeal against conviction is dismissed.

[12] On the sentence appeal, we are not persuaded that the trial judge made any erroneous findings of fact. It was open to her to find the appellant played a central role in the fraud, and that he enlisted others in carrying it out. The Crown concedes that the mandatory victim fine surcharge order included in the sentence should be set aside.

[13] Leave to appeal sentence is granted, the mandatory victim fine surcharge order is set aside, but the remainder of the sentence appeal is dismissed.

"R.G. Juriansz J.A."
"S.E. Pepall J.A."
"P. Lauwers J.A."