

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. He, 2021 ONCA 240

DATE: 20210414

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Roberts J.A. (Motions Judge)

BETWEEN

Her Majesty the Queen

Responding Party

and

Yanlin He

Moving Party

Marie-Hélène He, as agent for the moving party, acting in person

Bogdan P. Andronesi and Bryant Greenbaum, for the responding party

Heard: October 15 and 23, 2020, and March 3, 2021 by video conference

On a motion for leave to appeal from the judgment of Justice Angela L. McLeod of the Ontario Court of Justice, dated January 4, 2020, dismissing an appeal from the conviction entered on January 25, 2019 by Justice of the Peace Renee Rerup.

REASONS FOR DECISION

[1] Mr. Yanlin He moves for leave to appeal the dismissal of his appeal from his convictions for employing or otherwise engaging¹ two individuals, Mark/Xijin Xu and Gary Wu, who lacked a certificate of qualification to perform the compulsory

¹ During the hearing of the appeal, I raised the issue of whether it was Mr. He or his company who hired or engaged Messrs. Xu and Wu. In subsequent written submissions, Mr. He admitted that he engaged them.

trade of construction electrician, contrary to s. 4 of the *Ontario College of Trades and Apprenticeship Act, 2009*, S.O. 2009, c. 22 (“the Act”). Mr. He was self-represented at trial and ably assisted by his daughter, Marie-Hélène He, on his appeal to the provincial offences appeal court and to this court.

Motion for leave to admit fresh evidence

[2] In support of his motion for leave to appeal, Mr. He seeks leave to introduce as fresh evidence a newly translated excerpt of Mr. Xu’s trial evidence, accompanied by Mr. Xu’s affidavit evidence demonstrating certain errors in the initial interpretation from Mandarin to English.

[3] In my view, the new evidence of the alleged errors in the interpretation of Mr. Xu’s testimony meets the test for admission under s. 117 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and *R. v. Palmer*, [1980] 1 S.C.R. 759. Mr. Xu was Mr. He’s key witness before the Justice of the Peace, and his evidence was expressly significant to the appeal judge. The new translation could not have been obtained during the trial and, while it could have been ready for Mr. He’s first appeal, I would not enforce the due diligence requirement too strictly in light of the fact that Mr. He was self-represented at trial and assisted by his daughter on appeal: *R. v. 1275729 Ontario Inc.* (2005), 203 C.C.C. (3d) 501 (Ont. C.A.), at paras. 29-30. As noted below, interpretation issues bear on trial fairness. It is

therefore in the interests of justice that the evidence of possible interpretation errors be admitted.

Test for leave to appeal

[4] The test for leave to appeal under s. 131 of the *Provincial Offences Act*, is as well settled as it is stringent. To obtain leave, Mr. He must establish three conjunctive criteria: (i) special grounds; (ii) on a question of law alone; and (iii) that in the particular circumstances of this case it is essential in the public interest or for the due administration of justice that leave be granted: *Antorisa Investments Ltd. v. Vaughan (City)*, 2012 ONCA 586 (In Chambers), at para. 8.

[5] Provincial offences appeal judgments are intended to be final, and leave should be granted only in exceptional cases: *Ontario (Ministry of the Environment and Climate Change) v. Sunrise Propane Energy Group Inc.*, 2018 ONCA 461, 17 C.E.L.R. (4th) 174, at para. 15.

The parties' positions

[6] Mr. He submits that the Justice of the Peace and the appeal judge erred in finding that he had employed or engaged two unqualified individuals to carry out the work in issue. There is no issue that Mr. Xu was a certified industrial electrician. According to Mr. He, Mr. Xu, as assisted by Mr. Wu, was carrying out the work of an industrial electrician, a voluntary trade under the Act, and therefore did not require a certificate of qualification as a construction electrician from the College.

Mr. He says that because of the errors in the interpretation of Mr. Xu's evidence, the Justice of the Peace and the appeal judge mistakenly concluded that Mr. Xu had admitted to carrying out the work of a construction electrician. According to the fresh evidence, Mr. Xu made no such admission.

[7] The College argues that the alleged interpretation errors had no effect on the outcome of the trial or the appeal. Even without the alleged admissions of Mr. Xu, the evidence of the College's inspector, John McCollum, established that Mr. Xu, as assisted by Mr. Wu, was carrying out the work of a construction electrician and that he lacked a certificate of qualification for this compulsory trade. According to the College, the unchallenged fact that Mr. Xu was a certified industrial electrician was irrelevant because he was carrying out the work of a construction electrician, contrary to s. 4 of the Act. In any event, the issues raised do not transcend the case at hand. Leave to appeal should be refused.

Factual Background

[8] Mr. He's company, Crossing Air Tech Systems Inc., contracted with JSI Store Fixtures to install two spray booths and two air make up units in the premises that JSI was renovating. Crossing Air Tech Systems designed and manufactured the booths and units in its own facilities and then moved them for installation to JSI's premises. The installation of the booths and units required Mr. Xu, a certified industrial electrician, as assisted by Mr. Wu, to attach the booths and units to the

electric grid of JSI's premises. Crossing Air Tech Systems was not engaged to perform any other work in relation to JSI's premises.

[9] On two occasions, John McCollum, an inspector for the College, attended the premises and observed Mr. Xu and Mr. Wu, "measuring, cutting, bending, and installing the conduit [of the booths and units] to the wall and power control" of JSI's premises. He ascertained that neither Mr. Xu nor Mr. Wu had been issued a certificate of qualification as a construction electrician by the College, a compulsory trade. He subsequently issued a summons to Mr. He for employing or otherwise engaging Mr. Xu and Mr. Wu, who did not have certificates of qualification to perform the work of construction electricians, contrary to the provisions of s. 4 of the Act.

[10] At trial, the Justice of the Peace accepted Mr. McCollum's evidence that Mr. Xu and Mr. Wu were performing the work of construction electricians on a construction site and that Mr. He, who had engaged them, was their supervisor. She also accepted certified copies of College records indicating that Mr. He, Mr. Xu and Mr. Wu did not hold certificates of qualification in the trade of construction electrician. As a result, she convicted Mr. He of the offences as charged and imposed a global fine of \$7,000 and one year's probation.

[11] On appeal to the provincial offences appeal court, Mr. He was permitted to file fresh evidence in support of his argument that Mr. Xu and Mr. Wu were not

carrying out the work of a construction electrician but rather the work of an industrial electrician. The appeal judge dismissed his appeal. She found that while Mr. Xu was a qualified industrial electrician, he had admitted to performing the work of a construction electrician without a certificate of qualification from the College.

Analysis

[12] Mr. He raises two issues. First he submits that the Justice of the Peace erred in her application of the provisions of the Act concerning the scope of work for the compulsory trade of construction electrician as opposed to the scope of work associated with the voluntary trade of industrial electrician. Second, relying on the fresh evidence, he suggests that the erroneous interpretation of Mr. Xu's trial evidence affected his right to a fair trial. I will consider each in turn.

[13] It is helpful to start with the statutory framework in issue.

[14] Mr. He was charged with two offences under s. 4 of the Act. Section 4 provides that:

No person shall employ or otherwise engage an individual to perform work or engage in a practice that constitutes engaging in the practice of a compulsory trade unless the individual holds a certificate of qualification in that trade that is not suspended or unless the individual is an apprentice in that trade and is working pursuant to a registered training agreement that is not suspended.

[15] A “certificate of qualification” is defined in s. 1 of the Act as “a certificate of qualification issued by the Registrar on behalf of the College”. A “compulsory trade” means a trade prescribed under the regulations as a compulsory trade and includes a construction electrician. Section 11(1) of *Scope of Practice – Trades in the Construction Sector*, O. Reg. 275/11 sets out the scope of work carried out by a construction electrician. Relevant to this appeal, this work includes: “Measuring, cutting, threading, bending, assembling and installing conduits and other types of electrical conductor enclosures that connect panels, boxes, outlets and other related electrical devices”. Section 11(2) provides that the scope of practice of a construction electrician excludes work performed by a person who “is permanently employed in an industrial plant at a limited purposes occupation in the electrical trade”.

[16] There is no similar prohibition in the Act against employing or otherwise engaging an individual to perform a “voluntary trade”. A “voluntary trade”, as prescribed by the regulations, includes an industrial electrician. Section 20 of *Scope of Practice – Trades in the Industrial Sector*, O. Reg. 276/11 provides that the scope of practice of an industrial electrician “includes installing, maintaining, testing, troubleshooting and repairing industrial electrical equipment, and associated electrical and electronic controls, and hydraulic and pneumatic equipment in industrial, manufacturing and power plants” (Emphasis added).

[17] Mr. He argues that the Justice of the Peace erred in finding that his workers were carrying out the work of a construction electrician. He submits that his workers were not working on the construction of the premises but only engaging in the electrical work of an industrial electrician that was necessary to install the booths, which were manufactured elsewhere.

[18] The difficulty with Mr. He's position is that he has not raised an issue of law. He challenges the Justice of the Peace's application of the Act's provisions to the facts of the case. This is not an issue of law, but an issue of mixed fact and law. Moreover, Mr. He has not pointed to any error in the Justice of the Peace's interpretation of the relevant provisions of the Act nor of the evidence. Rather he challenges her findings of fact to which this court owes deference on appeal absent palpable and overriding error.

[19] The admitted work of installing the booths went beyond electrical work on the booths themselves. Rather, the uncontroverted evidence of Mr. McCollum, Mr. He and Mr. Xu, notwithstanding the alleged interpretation errors, is that Mr. Xu and Mr. Wu were carrying out work to connect the booths to the power grid of the premises in the midst of a construction site. This was not work performed solely on equipment in an "industrial, manufacturing or power" plant. There is also no dispute that Mr. Xu and Mr. Wu did not have certificates of qualification as construction electricians from the College. It was therefore open to the Justice of the Peace to conclude that they were carrying out the work of construction

electricians and that Mr. He had employed workers to perform the work of construction electricians who were not certified by the College.

[20] Mr. He's allegation of errors in the interpretation of Mr. Xu's evidence is more concerning. An interpreter's failure to properly interpret key evidence may amount to trial unfairness and may give rise to a breach of an accused's right to an interpreter under s. 14 of the *Canadian Charter of Rights and Freedoms*: *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 977; *R. v. Rybak*, 2008 ONCA 354, at paras. 60-62; 233 C.C.C. (3d) 58, leave to appeal refused, [2008] S.C.C.A No. 311. As such, this raises an issue of law.

[21] However, the test for leave requires me to go on to consider whether in the particular circumstances of this case it is essential in the public interest or for the due administration of justice that leave be granted. In my view, it is not. While I am prepared to accept the unchallenged evidence of the new translation, it does not affect the basis for the Justice of the Peace's convictions.

[22] At its highest, the new translation demonstrates that Mr. Xu did not admit that he was carrying out the work as a construction electrician. However, it does not affect the accuracy of the interpretation of his evidence about the nature of the work that he did admit having performed and that the Justice of the Peace determined was the work of a construction electrician. There was no dispute about the tasks that Mr. Xu and Mr. Wu were carrying out. The question was whether

they constituted the work of a construction electrician or an industrial electrician. The evidence of Mr. McCollum and Mr. He is that the work in issue was carried out on a construction site; this was not work on equipment in an industrial plant. The Justice of the Peace's conclusion that the work carried out by Mr. Xu and Mr. Wu amounted to the work of a construction electrician, a compulsory trade, was open to her to make on the record before her.

[23] As a result, there is no basis to support Mr. He's submission that the erroneous interpretation of Mr. Xu's evidence led to a miscarriage of justice.

[24] I would also note that while extremely important to Mr. He, this matter does not transcend the parties. It is fact-driven based on the particular circumstances of the case. Moreover, it is common ground that the College is winding down and that the Act will be repealed and replaced with a new statute. As such it is not essential to the public interest or the due administration of justice that leave be granted.

Disposition

[25] Accordingly, Mr. He's motion for leave to appeal is dismissed.

“L.B. Roberts J.A.”