

# COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Huang, 2013 ONCA 240

DATE: 20130416

DOCKET: C54305 and C54340

Doherty, MacPherson and Cronk JJ.A.

BETWEEN

DOCKET: C54305

Her Majesty the Queen

Respondent

and

Ying Huang

Appellant

AND BETWEEN

DOCKET: 54340

Her Majesty the Queen

Respondent

and

John Huang

Appellant

Zachary Kerbel, for the appellant, John Huang

Frank Addario and Megan Savard, for the appellant, Ying Huang

David Littlefield and Sabrina Montefiore, for the respondent

Heard: April 9, 2013

On appeal from the convictions entered by Justice Robert F. Scott of the Superior Court of Justice, sitting without a jury, dated August 26, 2011.

## **By the Court:**

### **A. John Huang's Appeal**

#### **I. Introduction**

[1] After a trial by judge alone, the appellant was convicted of conspiracy to produce marijuana, production of marijuana and possession of marijuana for the purposes of trafficking. He was acquitted of a series of counts related to utilities theft. He was sentenced to four and one-half years' imprisonment, after six months' credit for pre-sentence custody and restrictive bail conditions.

[2] The appellant appeals from his convictions. His principal ground of appeal is that the trial judge's conduct during the trial, in particular, his intervention during the Crown's cross-examination of the appellant, gave rise to a reasonable apprehension of bias and undermined the appearance of fairness in this case.

[3] For the reasons that follow, we agree that the trial judge's impugned comments gave rise to a reasonable apprehension of bias that fatally compromised trial fairness. It follows that there was a miscarriage of justice and a new trial is required.

#### **II. Discussion**

[4] The charges against the appellant arose in connection with his role as a real estate agent for the purchasers of several properties in eastern Ontario that were used as the locations of marijuana grow operations. The Crown's theory was that the appellant, using his position as a realtor, acted in concert with others to acquire the relevant properties for the

purpose of producing large quantities of marijuana plants. Alternatively, the Crown maintained that the appellant aided or abetted others to produce the marijuana plants.

[5] The appellant claimed that he was an innocent dupe. He testified at trial that he had no knowledge that the properties were going to be used to grow marijuana and only learned of their use for this illegal purpose after his arrest. He said that he had been approached by the purchasers to represent them in the relevant sales transactions because they had either seen his advertisement in a Chinese newspaper, or they were from the same part of China as is the appellant and were referred to him by his wife through her contacts in the Chinese community.

[6] The Crown's case against the appellant was circumstantial. The appellant's credibility was the core issue at trial.

[7] The appellant was tried before a judge alone, together with his co-accused, Ying Huang. The Crown maintained that the appellant and Ying Huang were co-conspirators, and that the appellant had represented Ying Huang on the purchase of 28 Hickory Grove in Belleville, one of the properties used for a marijuana grow operation.

[8] During his examination-in-chief, the appellant agreed that he had acted as the realtor for the purchaser of this property. However, he testified that the buyer was Yan Huang, not Ying Huang. He said that he never met Ying Huang until after his arrest and that he had only met Yan Huang once, when he first showed her the Hickory Grove property. The Crown countered that Ying Huang had impersonated Yan Huang, and that Ying Huang was the real purchaser of the Hickory Grove residence.

[9] During the Crown's cross-examination of the appellant, Crown counsel challenged the

appellant's assertion that he had only met Yan Huang once, in February 2009, when he first showed her the Hickory Grove property for potential purchase. In doing so, counsel confronted the appellant with a mutual release document regarding the Hickory Grove property that appeared to have been signed by Yan Huang and witnessed by the appellant in mid-March 2009.

[10] At this point in the cross-examination, the following exchange took place:

Q. Did you ever see Yan Huang after that?

A. Who?

Q. Yan Huang, Peng Zeng's wife, did you ever see her after that first trip?

...

A. No.

Q. I wonder if you could turn to page 15 of Mr. McKinney's file...Do you have page 15 there?

A. Yes.

Q. This is the mutual release.

A. Yes, I, I did, made it.

Q. Pardon me?

A. I made this, ah, ah, mutual release paper.

Q. And it's signed March the 12th, '09 by Yan Huang and you witnessed her signature?

A. Yes, should be her signature.

Q. But you told me you only saw her once, at the property?

A. Yes.

Q. And that was early February?

A. Yes.

Q. This is March, March 12th?

A. Yes. I remember I made this paper. I think my wife took the paper and asked her to sign it.

Q. But that's your signature, isn't it, Mr. Huang because you witnessed your boss's signature right below it?

A. Right.

Q. That is your signature, isn't it?

A. Yes.

Q. And this is an important document, isn't...

A. Yes.

Q. I believe you told us yesterday that this was getting out of a real estate deal and for you that means losing commission which in this case is about \$6,500.00?

A. Yes.

Q. This document is worth \$6,500.00 to you?

A. Yes.

Q. You must have seen her a second time?

A. No.

Q. You didn't?

A. I never, I never saw her again. There was, there were signatures several times, other times all my wife who brought the paper and ask her to sign them.

Q. But Mr. Huang, if we look at page 15, you are signing this document saying that you witnessed Yan Huang sign it on March the 12th?

A. Yes.

Q. Is that false?

A. I don't think it is false.

Q. Well, did you or did you not...

THE COURT: I'm going to have you stop right there for a minute. Do you understand what perjury is, Sir? Do you want to take a minute with your counsel and she will instruct you what perjury is and that usually it incorporates about a year in custody.

THE WITNESS: I don't think it's, it's false.

THE COURT: Counsel is standing. Just a minute. Yes? Do you want to take a minute and speak to him about what perjury is about?

MS. SCHOFIELD: Well, Your Honour, with all due respect, Your Honour, I don't think that it is proper for Your Honour to interject and caution him about perjury at a point when he is trying to explain an answer. It hasn't...

THE COURT: Either he is present or he is not present. He has testified that he didn't witness the signature, whereas the document he signed says he did.

MS. SCHOFIELD: Well, the document itself...

THE COURT: Either he is there or he is not there, all right.

MS. SCHOFIELD: I think he has already said he wasn't there.

THE COURT: All right, you don't have to caution him about perjury, counsel. Thank you.

MS. SCHOFIELD: Well, Your Honour, it's not whether I should caution him or not about perjury but I have concerns that if Your Honour believes that we are entering into perjurious evidence, you are obviously the Trier of fact and I have concerns about this trial, frankly. If Your Honour has those concerns then...

THE COURT: I have concerns, Counsel. I'll tell you that right now but he may be able to explain them. I just wanted to make sure that he didn't get himself entrapped into something that might cause some other charges. That's all I'm saying, all right.

MS. SCHOFIELD: Okay, okay. I don't think that...

THE COURT: Do you want to counsel him with respect to what perjury means? That's all.

MS. SCHOFIELD: No I don't. I don't think that...

THE COURT: That's all I'm looking for, all right.

MS. SCHOFIELD: Okay.

THE COURT: I just want to make sure he doesn't get himself in a real jam here.

MS. SCHOFIELD: Okay, understood, Your Honour.

THE COURT: All right. Thank you. Go ahead, Counsel.

MS. HURLEY: Mr. Huang, did you sign this document having witnessed Yan Huang's signature?

A. Yes, I signed the paper.

Q. Did you witness Yan Huang sign it?

A. No.

[Emphasis added.]

[11] The appellant argues that this interjection by the trial judge reveals that he had pre-judged the appellant's credibility before the appellant had been given an opportunity to explain himself and before all the evidence and the submissions of counsel had been heard. The trial judge's remarks, the appellant says, were improper and gave rise to a reasonable apprehension of bias.

[12] We agree. The clear implication of the trial judge's suggestion that the appellant required advice from his counsel on the meaning and consequences of perjury was that the appellant was being untruthful in his evidence to the court, such that criminal sanctions might follow. This unprompted insinuation by the trial judge occurred at a critical point during Crown counsel's cross-examination of the appellant on an apparent material contradiction in his testimony, when the appellant was in the course of offering an explanation for the suggested contradiction. The trial judge's comments clearly impugned the creditworthiness

of the appellant's testimony by suggesting that he had or was about to commit perjury.

[13] The impugned remarks were not innocuous. The appellant's credibility was the central issue at trial. The trial judge's declaration that the appellant required the advice of his counsel on the serious issue of perjury – in the midst of his cross-examination by Crown counsel – gives rise to an inescapable apprehension that the trial judge had concluded, at this early point in the trial, that the appellant was not to be believed.

[14] That the trial judge himself attached significance to this exchange is confirmed by his reasons. In rejecting the appellant's evidence as "incredible", the trial judge stated: "I find that he misled the Court on a number of critical issues: ... 5. his not knowing the co-defendant Ying "Tina" Huang at the relevant times, including the details of the purchase of 28 Hickory Grove, Belleville."

[15] The impartiality of a trial judge is essential to achieve trial fairness. In this case, the trial judge's comments called his fairness and impartiality into serious question. His comments would strongly suggest to the reasonable observer that he had formed the belief that the appellant was being less than truthful.

[16] Moreover, the trial judge's insinuation of perjury could also have intimidated the appellant and effectively undermined his ability to respond to further questioning by Crown counsel. This, too, compromised trial fairness: see *R. v. Stewart*, [1991] O.J. No. 81 (C.A.), at pp. 11-12.

[17] In these circumstances, we have no hesitation in concluding that the very high test for the demonstration of a reasonable apprehension of bias has been met. In our opinion, an informed person, "viewing the matter realistically and practically and having thought the



matter through”, would think that it was more likely than not the trial judge in this matter, consciously or unconsciously, would not decide the appellant’s trial fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394.

[18] The Crown contends that the trial judge explained his remarks by indicating that he “just want[ed] to make sure [the appellant] doesn’t get himself in a real jam here”. The Crown further submits that defence counsel at trial, in effect, waived any impropriety in the trial judge’s interjection by indicating, in response to this proffered explanation by the trial judge, “Okay, understood, Your Honour” and by failing to object further and seek a mistrial on the basis of the trial judge’s remarks.

[19] We reject this contention. The suggested “explanation” by the trial judge did not ameliorate the appearance of unfairness occasioned by his remarks. To the contrary, it exacerbated it. The words uttered by the trial judge and relied upon by the Crown as constituting a benign explanation for the trial judge’s perjury references themselves reveal that the trial judge considered the appellant’s answers to Crown counsel’s questions as triggering possible further criminal consequences. The appellant was already “in a jam”: he was defending himself before the court on criminal charges. The trial judge’s reference to the appellant getting himself “in a real jam” can only be understood as meaning that the appellant, in the trial judge’s view, stood at risk of further criminal charges. Indeed, the trial judge had earlier said as much when he told defence counsel: “I just wanted to make sure that he didn’t get himself entrapped into something that might cause some other charges.”

[20] Nor do we accept the Crown’s submission that the appellant’s trial counsel is to be faulted for failing to object to the trial judge’s remarks. As soon as the trial judge mentioned perjury, defence counsel was on her feet, objecting to the propriety of the trial judge’s

intervention. She promptly went on to explain that, in light of the trial judge's comments, she had "concerns about this trial". In our view, her objection was timely, restrained and entirely appropriate.

[21] In any event, the failure by counsel to object, or to seek a mistrial, has never been taken to constitute a waiver by an accused at a criminal trial of his or her rights, especially as fundamental and unqualified a right as the entitlement to a fair and impartial trial.

[22] Nor is it for this court to speculate on what the result might have been at the appellant's trial had he received a fair hearing. The failure to afford the appellant a fair trial is fatal to the convictions entered against him and a new trial is required. See *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537.

[23] We therefore conclude that the appeal must be allowed and a new trial ordered on this ground. In light of this conclusion, it is unnecessary to address the other grounds of appeal raised by the appellant. We should not be taken, therefore, as commenting on those grounds.

## **B. Ying Huang's Appeal**

### **I. Introduction**

[24] Ying Huang was tried as a co-conspirator, together with John Huang. Like Mr. Huang, she was convicted of conspiracy to produce marijuana, production of marijuana and possession of marijuana for the purposes of trafficking. Unlike Mr. Huang, she was also convicted of several counts related to utilities theft. As she was incarcerated for 33 months prior to sentencing, she was sentenced to time served. She appeals from her convictions.

## II. Discussion

[25] It was the Crown's theory at trial that Ying Huang was an active participant in the illegal production of marijuana at various of the relevant properties and that she acted as the "banker" or "accountant" for her fellow drug conspirators. The Crown maintained that she was the actual purchaser of 28 Hickory Grove in Belleville and that she had impersonated Yan Huang when acquiring this property in an effort to distance herself from the grow operation at that site.

[26] The defence contended that the appellant was not part of the conspiracy and that a different person – Yan Huang – had purchased the Hickory Grove residence and was involved in the grow operations at that and other locations.

[27] Of the various grounds of appeal advanced by this appellant, it is necessary for the disposition of her appeal to address only her argument that, on the basis outlined above regarding John Huang's appeal, the trial judge's conduct in this case gave rise to a reasonable apprehension of bias. She submits that this bias fatally undermined the appearance of fairness in respect of the entirety of this joint trial, resulting in a miscarriage of justice relating to her and Mr. Huang. Accordingly, she contends, her convictions cannot stand and she, too, is entitled to a new trial.

[28] We agree with submission. The reasonable apprehension of bias arising from the trial judge's inappropriate interjection during the Crown's cross-examination of Mr. Huang infected the appearance of fairness and impartiality for both accused. Indeed, this was particularly acute in respect of Ms. Huang. The trial judge's improper interjection occurred precisely at the point during Mr. Huang's cross-examination when he was attempting to defend his assertion that he had not met Ying Huang until after his arrest and that the buyer of the 28

Hickory Grove property was Yan Huang, not Ying Huang. This exculpatory evidence bore directly on Ying Huang's culpability for the offences charged and, if accepted, would have led to her acquittal on some and perhaps all the charges against her.

[29] We have already concluded that the test for the demonstration of a reasonable apprehension of bias is met in this case. Our reasons for that conclusion, set out above in connection with John Huang's appeal, apply equally to this appeal. In our view, that apprehension of bias also fatally compromised the fairness of Ms. Huang's trial.

[30] By suggesting to the reasonable observer, through his remarks regarding Mr. Huang's testimony, that he had formed the belief that Mr. Huang was being less than truthful in his evidence concerning Ying Huang and her alleged involvement in the purchase of the 28 Hickory Grove property, the trial judge's conduct gave rise to the apprehension that he did not believe the exculpatory evidence of Mr. Huang. This evidence was a critical plank in Ying Huang's defence. As a result, the trial judge's improper intervention had the inevitable effect of undermining trial fairness in respect of Ying Huang, as well as John Huang.

[31] Accordingly, we conclude that a miscarriage of justice occurred regarding both accused. Ying Huang's appeal must be allowed and her convictions set aside. A new trial is required for both Ying Huang and John Huang.

### **C. Concluding Observation and Dispositions**

[32] We make a final observation. This is the second time in less than one year that this court has allowed appeals relating to judgments of this trial judge on the basis of reasonable apprehension of bias. In both instances, the perception of bias arose because of improper and unwarranted interventions by the trial judge during the examination of witnesses: see

*Lloyd v. Bush*, 2012 ONCA 349. In both instances, public resources were wasted, great inconvenience to the parties resulted and the integrity of the administration of justice was tarnished.

[33] It bears repetition that trial judges, like appellate judges, must preside in a judicious fashion. Trial judges are, at bottom, listeners. As this court said in *R. v. Hossu*, (2002), 167 C.C.C. (3d) 344, at para. 35, “[i]t is counsel’s job, not the trial judge’s, to explore inconsistencies in a witness’ testimony.”

[34] The appeals are allowed and a new trial in respect of each appellant before a different trial judge is ordered.

Released:

“APR 16 2013”

“Doherty J.A.”

“DD”

“J.C. MacPherson J.A.”

“E.A. Cronk J.A.”