COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Tran, 2023 ONCA 11
DATE: 20230110
DOCKET: C69115

Feldman, Zarnett and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Quoc Tran

Appellant

Michael W. Lacy and Sara Little, for the appellant

David Friesen, for the respondent

Heard: September 9, 2022

On appeal from the conviction entered by Justice Beth A. Allen of the Superior Court of Justice on April 30, 2020, with reasons reported at 2020 ONSC 2742, and from the sentence imposed on March 12, 2021, with reasons reported at 2021 ONSC 1888.

Copeland J.A.:

[1] The appellant was convicted of one count of fraud over $5,000 and one count of possession of proceeds of crime over $5,000, contrary to ss. 380(1) and 354(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. He was sentenced to a conditional sentence of imprisonment of two years less a day. He now appeals

from conviction, and seeks leave to appeal the sentence and, if leave is granted, appeals from the sentence imposed.

[2] I would allow the appeal, set aside the convictions, and order a new trial. The appellant raises a number of grounds of appeal, but I only find it necessary to address one. The central credibility finding by the trial judge against the appellant was tainted by two errors that affected the fairness of the verdict. First, the trial judge made the central credibility finding in a procedurally unfair manner. She based it on an issue that the Crown did not raise in submissions and on which the Crown did not cross-examine either defence witness. Further, the trial judge misapprehended material evidence in making the same credibility finding. These errors resulted in a miscarriage of justice that requires a new trial. In light of my conclusion on the conviction appeal, I need not address the sentence appeal.

Background

[3] The appellant was jointly charged with Hai Ha with fraud and possession of proceeds of crime. The basic allegations were as follows. Mr. Ha was a customer service representative for a fibreglass insulation company. Using false return documents he created, Mr. Ha credited approximately $518,000 from the company to various credit cards, including a number of cards in the appellant's name. In total, approximately $291,000 was credited to credit cards in the appellant's name between 2011 and 2014.

[4] Mr. Ha pled guilty in advance of the appellant's trial.

[5] The Crown led no *viva voce* evidence at trial. Rather, the underlying credit card transactions were tendered at trial through an agreed statement of facts, supported by documentation for each transaction. The agreed statement of facts was clear that the appellant did not contest that the credit card transactions had happened; however, it was also clear that he did not admit knowledge of the fraudulent acts by Mr. Ha against the company for which Mr. Ha worked.

[6] The appellant testified in his defence. He denied knowing that the credit card transactions conducted by Mr. Ha were fraudulent.

[7] The appellant testified that he met Mr. Ha in 2005 through mutual friends. They "hit it off", and bonded over their shared background as Chinese refugees born in Vietnam. They became good friends.

[8] The appellant testified that in mid to late 2010, Mr. Ha approached him for a loan. Mr. Ha said his money was tied up in his business, and he needed money to help his father who was undergoing treatment, much of which was not covered by OHIP. Mr. Ha seemed sad and down. It reminded the appellant of the hardships he and his family had endured when they came to Canada. The appellant spoke to his wife and then agreed to lend Mr. Ha money. The appellant testified that he loaned Mr. Ha $240,000. The loan was made in cash, over a few months starting in February 2011, in increments of $60,000. The amount to be paid back would be

$300,000, amounting to approximately 26% interest. The appellant gave extensive evidence explaining his sources of income, including sources in cash, which the defence argued supported his contention that he had sufficient funds to have made the large cash loan. There was no written documentation for the loan.

[9] The appellant testified that Mr. Ha told him that because his money was tied up in his company, he would have to repay the loan through credit card transactions from his company. The appellant testified that he believed Mr. Ha owned the company that gave him the credits. The appellant testified that he kept a monthly rolling tab of the money being repaid.

[10] As mentioned above, the appellant testified that he had no knowledge that the credit card transactions were fraudulent. He testified that when the police called him at his workplace on September 7, 2015 and asked him to turn himself in at a police station (without telling him on the phone what for), he was shocked. At first, he thought it was a joke. The officer then started reading his legal name and address, and he realized it was not a joke. He attended at a police station to turn himself in and was arrested. The police told him that he had received money he should not have. He was released from the station after a few hours. The appellant testified that he had not communicated with Mr. Ha between the time he was charged and his trial.

[11] Mr. Ha also testified for the defence. He had been subpoenaed to trial by the Crown, but because the Crown's case went in through an agreed statement of facts, he ultimately testified as a defence witness.

[12] Mr. Ha testified that he met the appellant in 2005 and they became friends.

[13] Mr. Ha went to the appellant in late 2010 seeking a loan. He told the appellant that he needed the money to assist his father, who had suffered a stroke, with significant physical therapy and treatment expenses. The appellant gave Mr. Ha the loaned money, $240,000, in a couple of instalments in January or February 2011. The loan was to be repaid with 26% interest. Mr. Ha testified that ultimately he only used $60,000 to $75,000 of the loan for his father's treatment expenses. Unbeknownst to the appellant, Mr. Ha used the rest of the loan for drugs, gambling, and at strip clubs. He did not disclose his substance abuse or gambling issues to the appellant.

[14] Mr. Ha testified that he purposely targeted the appellant for his fraudulent scheme, and that he took advantage of their shared cultural background and friendship to mislead the appellant and persuade him to lend the money. Mr. Ha testified that he misled the appellant by telling him that he (Mr. Ha) had a partnership in the company from which he issued the credits to the appellant's credit cards. Mr. Ha testified that it was his suggestion to the appellant to pay back the loan by the credit card transactions. Mr. Ha testified that he was solely

responsible for the scheme involving fraudulent returns to his employer, and did not disclose this fact to the appellant.

[15] Mr. Ha testified that his evidence at trial was the first time he had ever told the appellant that the funds he was using to repay the loan were fraudulently obtained. He testified that he felt too ashamed to tell the appellant the truth until he came to testify. He also testified that his release conditions ordered him not to communicate with any alleged parties to the fraud, including the appellant.

[16] Crown counsel at trial (not Mr. Friesen) challenged the evidence of both the appellant and Mr. Ha in cross-examination. In particular, Crown counsel suggested to both the appellant and Mr. Ha that there was no loan, and that the appellant was aware of the fraudulent scheme. Both men denied that suggestion. Crown counsel also challenged the appellant's evidence that he had a large amount of cash available to make a loan in cash. The Crown's position at trial was that there was no loan to be paid back, and the appellant was a party to the fraud based on having actual knowledge of the fraud. In the alternative, the Crown argued that even if there was a loan from the appellant to Mr. Ha, the appellant was willfully blind as to the source of the funds being used to pay him back, given the unusual method of repayment, and on this basis was a party to the fraud.

[17] The only issue at trial was whether the Crown had proven beyond a reasonable doubt that the appellant had the *mens rea* required for fraud and possession of the proceeds of crime.

[18] The trial judge rejected the evidence of both the appellant and Mr. Ha. She rejected the existence of a loan from the appellant to Mr. Ha, and found that their evidence was concocted to prevent the appellant from being convicted of fraud.

Analysis

[19] The Crown had a strong circumstantial case against the appellant based on the documentary evidence, and the unusual nature of the credit card transactions. But it was not an overwhelming case. The only contested issue at trial was whether the appellant had knowledge of the fraudulent nature of the transactions.

[20] Given this context, the trial judge had to weigh the force of the Crown's circumstantial case and the credibility of the defence evidence, in the context of the evidence as a whole, and decide whether the Crown had met its burden to prove the appellant's knowledge of the fraudulent nature of the transactions beyond a reasonable doubt.

[21] Unfortunately, the trial judge made a central credibility finding in a procedurally unfair manner, and materially misapprehended evidence in making that finding. These errors resulted in a miscarriage of justice and require a new trial.

[22] The trial judge began her analysis of the credibility of the evidence of the appellant and Mr. Ha and whether the Crown had proven the *mens rea* for fraud as follows:

> I find it impossible to believe that [the appellant] only found out about the fraud leading to his arrest when Mr. Ha was on the witness stand at [the appellant's] trial. Although Mr. Ha said he was too embarrassed to tell [the appellant] sooner, I find it rather far-fetched that he would say nothing to [the appellant] for five years and leave [the appellant] suspended in ignorance on the basis of his charges. Further, I do not believe that [the appellant] would not make it his business to inquire into the details of what he contends destroyed his life and long-established career. [Emphasis added.]

[23] The trial judge then went on to explain a number of other aspects of the defence evidence that she did not accept and found implausible.

[24] There are two interrelated problems with the finding quoted above. First, it was made in a procedurally unfair manner because it was based on issues that Crown counsel at trial did not raise with the defence witnesses in cross-examination or in submissions. Second, it is based on a material misapprehension of evidence. I address each issue in turn.

[25] The finding by the trial judge that it was inherently unbelievable ("far-fetched") that the appellant and Mr. Ha had not communicated after the appellant was charged was made in a procedurally unfair manner. Although Crown counsel at trial challenged the credibility of the evidence of both the appellant and Mr. Ha, at no point did Crown counsel suggest to either of them that they had

communicated after the appellant's arrest or that they had colluded or concocted their evidence. Nor did Crown counsel in closing submissions make any argument that the trial judge should find that the appellant and Mr. Ha must have communicated after the charges and concocted their evidence. Thus, a central reason the trial judge gave for rejecting the evidence of both the appellant and Mr. Ha – that she found it inherently unbelievable that they had not communicated about the substance of the charges after the appellant was charged – was never raised either in cross-examination or in submissions by Crown counsel at trial. As a result, the appellant had no opportunity to address the trial judge's concerns about concoction either in his evidence or in submissions at trial. Further, because of this procedural unfairness, and the fact that the issue only arose in the reasons for judgment, trial counsel for the appellant had no opportunity to object.

[26] The procedural unfairness of the trial judge's approach is evident given that the appellant and Mr. Ha were prohibited from communicating prior to the trial by their release terms. Mr. Ha testified in examination-in-chief that his release terms prohibited him from speaking to the appellant. He also testified that an order made at the time of his sentencing continued the prohibition on him communicating with the appellant. However, because the issue of whether the appellant and Mr. Ha concocted their evidence and whether it was inherently unbelievable that they did not communicate after the appellant was charged was raised by the trial judge for the first time in her reasons for judgment, the appellant was denied the opportunity

to respond to these concerns. The appellant ought to have been given an opportunity to respond to these concerns, and would have, had these concerns been raised in his cross-examination.

[27] The appellant testified about the date of his arrest, his surprise at being charged, and his release from the police station. The appellant also testified that he did not speak to Mr. Ha between the time he was charged and the trial. The appellant was not specifically asked, either in examination-in-chief or in cross-examination, about the terms of his release. Mr. Lacy asserted on appeal that the appellant was bound by a term of his release on an undertaking after his arrest not to communicate with Mr. Ha. Crown counsel on appeal did not contest this fact. But because the trial judge based a central credibility finding on an issue that was not the subject of cross-examination of either the appellant or Mr. Ha, the defence was denied the opportunity to respond with this evidence that bore directly on the issues that concerned the trial judge.

[28] This brings me to the second problem with the adverse finding made by the trial judge quoted above. In coming to the conclusion that the defence evidence was not credible and that it was inherently unbelievable that the appellant and Mr. Ha had not discussed the charges in the time between when the appellant was charged and his trial, the trial judge misapprehended material evidence. She failed entirely to address an obvious explanation, for which there was evidence in the trial record, for why the appellant and Mr. Ha would not have communicated in that

time period – because Mr. Ha was subject to release conditions that prohibited them from communicating with each other.

[29] Mr. Ha gave uncontested testimony that he was prohibited by his release conditions, and later an order made at sentencing, from speaking to the appellant.

[30] The trial judge gave no consideration anywhere in her reasons to Mr. Ha's evidence that his release conditions and then an order imposed on sentencing prohibited him from speaking to the appellant. The trial judge was not required to accept this evidence as an explanation for why the appellant and Mr. Ha did not speak. But she was required to consider the evidence that they were legally prohibited from speaking before rejecting as inherently unbelievable the evidence of the appellant and Mr. Ha that they had not communicated about the substance of the charges after the appellant was charged.

[31] It was, of course, open to the trial judge to reject the defence evidence and not be left in a reasonable doubt by it. But she would have had to do so in a procedurally fair manner, and based on an assessment of the trial record that was free from material misapprehension of evidence on issues essential to her reasoning process leading to conviction: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 541; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2.

[32] Here, the trial judge found that it was inherently unbelievable that the appellant and Mr. Ha had no discussion of the charges against the appellant

between the time of the charges and the appellant's trial without considering at all a viable explanation for why they would not have discussed the charges in that time period – Mr. Ha's uncontested evidence that he was subject to release conditions, and then an order imposed at sentencing, that prevented them from communicating. And she did so when the theory on which she found them not to be credible – that they must have communicated between the time they were charged and the trial – was not put to either man by the Crown in cross-examination or raised by the Crown in submissions, depriving the appellant of the opportunity to fully respond to the case against him.

[33] Crown counsel argues that even if the trial judge erred in failing to consider the fact that the appellant and Mr. Ha were prohibited from communicating with each other by Mr. Ha's release terms, it was not a material misapprehension and was not an essential part of her reasoning process: *Lohrer*, at para. 1; *Morrissey*, at p. 541. I would reject this argument.

[34] In my view, the trial judge's finding that it was inherently unbelievable that the appellant and Mr. Ha had not discussed the substance of the charges between the time the appellant was charged and his trial was a material and essential part of her reasoning process. Although in her reasons the trial judge outlined a number of other reasons why she did not believe the defence evidence, she gave prominence to her disbelief that they had not communicated between the time of the charges and the appellant's trial. The paragraph quoted above is the first

paragraph of her credibility analysis. She then revisited her disbelief that they had not communicated midway through her credibility analysis, stating:

> Then there is what [the appellant] said was a "coincidence", that Mr. Ha asked for a cash loan of the approximate amount that Mr. Tran just happened to have stored in the safes. This, together with the other credibility problems in the evidence, just seems too convenient to be accepted as true. This only adds to what I regard as a fantastic story Mr. Ha and [the appellant] have concocted to prevent [the appellant] from being convicted of fraud. [Emphasis added.]

[35] The trial judge's repeated reference to her belief that the appellant and the respondent had communicated – and indeed, "concocted" their evidence – makes clear that her conclusion that it was inherently unbelievable that they had not communicated was material to her assessment of the credibility of the defence evidence, and was an essential part of her reasoning process.

[36] In oral submissions, counsel for the appellant argued that the trial judge committed a further error of drawing an adverse inference against the appellant's credibility based on concoction in the absence of independent evidence of fabrication: *R. v. Iqbal*, 2021 ONCA 416, at paras. 56-59. In light of my conclusion that the trial judge's credibility findings are tainted by procedural unfairness and misapprehension of evidence, it is not necessary to address this argument.

[37] Counsel for the Crown argues that if the court finds that the trial judge erred in law in her assessment of the defence evidence, we should apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. In substance, the Crown argues

that its circumstantial case was so strong, based on the agreed statement of facts, that no trier of fact could have had a reasonable doubt based on the defence evidence. According to the Crown, at a minimum, the evidence proved wilful blindness on the part of the appellant.

[38] Even if the errors identified are properly characterized as errors of law, I am not satisfied that this is an appropriate case to apply the curative proviso. As noted above, this case turned on the trial judge's assessment of the Crown's circumstantial case and the credibility of the defence evidence as measured against the Crown's burden to prove the charges beyond a reasonable doubt. I accept that the Crown had a relatively strong circumstantial case. However, the appellant testified, and denied knowledge of the fraud. The trial judge's finding rejecting the credibility of the defence evidence was tainted by error. Although the proviso may be applied in cases where credibility is the central issue, appellate courts must be cautious in doing so: *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para. 145; *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at pp. 706-07, 737; *R. v. Raghunauth* (2005), 203 O.A.C. 54 (C.A.), at para. 9.

[39] The appellant was entitled to a fair assessment of his evidence in the context of the evidence as a whole, untainted by the procedural unfairness of the trial judge rejecting the credibility of defence evidence on a basis not raised by Crown counsel either in cross-examination of defence witnesses or in submissions, or by the material misapprehension of evidence on issues essential to the trial judge's

reasoning: *R. v. S.R.*, 2022 ONCA 192, 79 C.R. (7th) 162, at para. 15; *R. v. Alboukhari*, 2013 ONCA 581, 310 O.A.C. 305, at paras. 36-38; *R. v. Thain*, 2009 ONCA 223, 243 C.C.C. (3d) 230, at paras. 37-38. The procedural unfairness and misapprehension of evidence in this case related to a central aspect of the trial judge's assessment of the credibility of the defence evidence. I am not satisfied that this is an appropriate case to apply the proviso.

Disposition

[40] I would allow the appeal, set aside the convictions, and order a new trial.

Released: January 10, 2023 "K.F."

"J. Copeland J.A."
"I agree. K. Feldman J.A."
"I agree. B. Zarnett J.A."