See para. 7

Case Name:

United States of America v. Huynh

Between
United States of America, respondent, and
Van Ril Huynh, appellant

[**2005**] **O.J. No. 4074**

202 O.A.C. 198

200 C.C.C. (3d) 305

66 W.C.B. (2d) 680

Docket: C43139

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, M.J. Moldaver and R.P. Armstrong JJ.A.

Heard: September 19, 2005.
Judgment: September 27, 2005.

(11 paras.)

International law and conflict of laws -- Criminal law -- Extradition -- Appeals and judicial review -- Appeal by the accused from an order of committal for extradition to the United States allowed on the basis that there was no evidence of the designated offence.

International law and conflict of laws -- Criminal law -- Extradition -- Evidence.

International law and conflict of laws -- Criminal law -- Extradition -- Extraditable offences.

International law and conflict of laws -- Criminal law -- Extradition -- Legislation -- Interpretation and application.

Appeal by Huynh from an order of committal for extradition to the United States. The Canadian offences corresponding to the alleged offences in the United States were: conspiracy to launder proceeds of crime obtained by the commission of a designated offence of trafficking in a controlled substance; and attempting to launder the proceeds of crime obtained by the commission of the designated offence of trafficking in a controlled substance. The material relied on in support of the extradition justified the inference that Huynh had conspired with others to covertly transfer very large amounts of cash from the United States to Canada. The material relied on to support the extradition did not contain any direct evidence as to the source of the cash. Huynh submitted that the material contained nothing from which a trier of fact could reasonably infer either that the cash was the proceeds of trafficking in a controlled substance or that Huynh knew that the cash was the proceeds of trafficking in a controlled substance. Absent such evidence, the extradition judge could not commit Huynh for extradition.

HELD: Appeal allowed. The order for committal was quashed and Huynh was ordered discharged. The material identified by the United States permitted the inference that the cash was from the proceeds of some illicit activity. However, the United States had not offered evidence as to the source of the funds. There was nothing in the material that would reasonably permit a trier of fact to infer that the cash was the proceeds of drug trafficking and not some other illicit activity. As the Authority to Proceed identified trafficking in a controlled substance as the designated offence, the committal could not stand.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 462.31, 465(1)(c)

Extradition Act, s. 29(1)

Appeal From:

On appeal from the order of committal for extradition entered by Justice Manton of the Superior Court of Justice dated February 23, 2005.

Counsel:

Jeffrey R. Schroeder for the appellant

Robin Parker for the respondent

The judgment of the Court was delivered by

1 **D.H. DOHERTY J.A.**:-- The appellant appeals the order directing his committal for extradition to the United States. The Authority to Proceed on which the extradition hearing was based identified the Canadian offences corresponding to the alleged offences in the United States as follows:

* conspiracy to launder the proceeds of crime obtained by the commission of a designated offence of trafficking in a controlled substance, contrary to sections 462.31 and 465(1)(c) of the Criminal Code; and
* attempting to launder the proceeds of crime obtained by the commission of the designated offence of trafficking in a controlled substance.

The extradition judge ordered the appellant extradited on both charges.

2 The material relied on in support of the extradition justified the inference that the appellant had conspired with others to covertly transfer very large amounts of cash from the United States to Canada. The cash was in a secret compartment fashioned in the gas tank of the vehicle owned by the appellant. The material relied on in support of the extradition did not contain any direct evidence as to the source of the cash.

3 The appellant submits that the material contains nothing from which a trier of fact could reasonably infer either that the cash was the proceeds of trafficking in a controlled substance or that the appellant knew that the cash was the proceeds of trafficking in a controlled substance. He argues that absent such evidence, the extradition judge could not commit the appellant for extradition under s. 29(1) of the Extradition Act (the "Act").

4 The respondent accepts the test for extradition described in the appellant's submissions. Counsel contends forcefully, however, that there was a basis in the material from which the two inferences referred to above could be drawn. In the alternative, counsel argues that the description of the designated offence said to be the source of the funds as trafficking in a controlled substance was not an essential element of the charge and was in the terms of the pleading law, surplusage.

5 The appeal comes down to a determination of two issues. First, did the evidence reasonably permit the inference that the cash was the proceeds of trafficking in a controlled substance? Second, if the evidence did not permit that inference, was identification of the designated offence as trafficking in narcotics mere surplusage and, therefore, not something which had to be proved even on a prima facie level? The extradition judge did not address these issues in his reasons for committal.

6 The respondent contends that the following evidence permitted the reasonable inference that the cash was the proceeds of trafficking in a controlled substance:

* the amount of cash involved;
* the frequency with which cash was being transferred from the United States to

Canada;

* the manner of concealment of the cash suggesting a level of sophistication and a commercial operation;
* the coded conversations of participants and their obvious concerns about surveillance; and
* the anticipated evidence of a DEA officer that the modus operandi was consistent with the activities of drug dealers.

7 The material identified by the respondent certainly permits the inference that the cash was the proceeds of some illicit activity. Drug trafficking comes readily to mind as one possible source. The process of drawing inferences from evidence is not, however, the same as speculating even where the circumstances permit an educated guess. The gap between the inference that the cash was the proceeds of illicit activity and the further inference that the illicit activity was trafficking in a controlled substance can only be bridged by evidence. The trier of fact will assess that evidence in the light of common sense and human experience, but neither are a substitute for evidence. The requesting state has not offered any evidence as to the source of the funds even though its material indicates that one of the parties to this conspiracy is cooperating with the police. Despite the effective argument of counsel for the respondent, I do not think there is anything in the material that would reasonably permit a trier of fact to infer that the cash was the proceeds of drug trafficking and not some other illicit activity.

8 I also cannot accept the respondent's contention that it was not required to lead evidence that the cash was derived from trafficking in a controlled substance. Section 29(1) of the Act describes the function of the extradition judge as follows:

> A judge shall order the committal of the person into custody to await surrender if
>
> (a) <u>in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed</u> and the judge is satisfied that the person is the person sought by the extradition partner [emphasis added];

9 The Authority to Proceed identifies trafficking in a controlled substance as the designated offence from which the funds to be laundered were derived. The requesting state did not at any time in the proceedings seek to amend the Authority to Proceed to allege a different offence. Regardless of whether the offence named in the Authority to Proceed had to identify the offence beyond its generic terms in the Criminal Code, the government chose to do so in this case. Under the terms of s. 29(1), the extradition judge had to decide whether there was a basis for committal on the offence "set out" in the Authority to Proceed. The reference to trafficking in a controlled substance as the source of the funds to be laundered was part of the naming of the offence in the Authority to

Proceed.

10 I need not and do not decide the extent to which the caselaw referable to pleadings in criminal proceedings has application in the extradition context. My decision rests on the language of s. 29(1) of the Act and the specific terms of this Authority to Proceed.

11 The appeal is allowed, the order for committal is quashed and the appellant is ordered discharged.

D.H. DOHERTY J.A.
M.J. MOLDAVER J.A. -- I agree.
R.P. ARMSTRONG J.A. -- I agree.