File No. 34897

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N :

HOANG ANH PHAM

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIAITON OF REFUGEE LAWYERS, CRIMINAL LAWYRS ASSOCIATION OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, AND THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

APPELLANT'S REPLY FACTUM

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

HOANG ANH PHAM

Appellant

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CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIAITON OF REFUGEE LAWYERS, CRIMINAL LAWYRS ASSOCIATION OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, AND THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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APPELLANT'S REPLY FACTUM
Rule 3.(1) of the *Rules of the Supreme Court of Canada*

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1. The Respondent raises two new arguments in its factum[1] which were not raised in the courts below or in the Respondent's response to the application for leave to appeal. Consequently, they are not addressed in the Appellant's factum.

2. The first new argument is that the Court of Appeal could not modify the Appellant's sentence by one day because (a) there was no error in principle and the sentence is not unfit, and (b) the Appellant failed to adduce fresh evidence to explain why the immigration consequences of the sentence were not addressed and/or that he was deprived of the effective assistance of counsel. The second new argument is that the

[1] Respondent's Factum, paragraphs 69-94. The Respondent has acknowledged by writing to the Registrar that these paragraphs reflect the new arguments, except for paragraphs 78 and 79 which the Respondent agrees should be modified or struck. See Motion Record, *Affidavit of Erika Chozik*, Exhibit "A".

Appellant's matter ought to be remitted to the court below for resentencing. These arguments must both be rejected.

(a) This Court ought not to hear or give effect to these new arguments.

4. It is fundamentally unfair for the Respondent to now raise these new, factually driven, arguments or complain that the evidentiary record is somehow deficient. A respondent may raise additional issues in defence of an appeal, but not if it might have been necessary to adduce evidence in the court below in respect of it. In *Giguère v. Chambre des notaires du Québec*[2], this Court refused to send a case back to a tribunal for reconsideration because the argument was raised for the first time in the Court, stating:

> This Court does not favour issues being raised for the first time in an appeal to this Court. Such belatedly raised arguments deprive the Court of the benefit of consideration by the courts below, and may have other undesirable consequences.

6. Where an evidentiary basis is lacking for an argument raised for the first time on appeal, the remedy is to refuse to hear that arguments or give it no effect.[3] This is not just a rule of economy. It is one intended to ensure that the course of justice is not frustrated. The Respondent ought not be given a fourth opportunity to raise the issue by remitting the matter to the Court of Appeal: the remedy is to refuse to hear or give effect to those new arguments.

7. It would be profoundly unfair to the Appellant to remit this matter back to the Court of Appeal. The Court of Appeal has already decided this case and the Respondent sat silent on these points. The evidentiary basis upon which leave to appeal was granted is that (i) the Appellant is facing deportation as a result of the sentence of two years and (ii) the trial Judge was not alive to this relevant consideration at sentencing. Those facts cannot be disputed. No further evidence is required in order for this Court to decide the issues upon which leave was granted.

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[2] [2004] 1 S.C.R. 3 citing: *R. v. Potvin*, [1993] 2 S.C.R. 880 at p.916

[3] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1101; *Caron v. Canada (Employment & Immigration Commission)*, [1991] 1 S.C.R. 48 at para. 12; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 3.

(b) The Respondent is estopped from raising these new arguments by the concessions it made in the court below.

8. In the Court below, the Respondent *conceded* that the sentence ought to be varied by one day to restore the Appellant's ability to appeal against deportation for serious criminality. In doing so, the Respondent conceded that there *was* jurisdiction for the Court of Appeal to grant a *de minimus* variation of sentence. This concession also eliminated the need for the factual record the Respondent now demands.

9. The Respondent's submission that the comments of Mr. Justice Martin - "a joint submission of two years less a day would have been agreed had trial counsel been aware of the collateral consequence flowing from a two year sentence" – were without foundation in the record is internally inconsistent.[4] The Respondent's factum at para. 69 again concedes that: "the Crown would not have opposed a request for a gaol sentence of only one day less and there is no reason to think that the sentencing judge would not have acceded to it."

10. The Crown's concession that the sentence be reduced by one day in the court below was informed[5] by the very material, the affidavit of Esther Trung-Lam[6]. The Crown was thus alive to the probability (though not the *certainty*) that trial counsel did advise the Appellant of the immigration consequence of a two-year joint submission and that the joint-submission was not informed in this regard. The Crown's choice to concede the appeal rather than press for more evidence on these points precludes the Respondent from raising evidentiary concerns now. To allow the Crown to argue otherwise would occasion real prejudice to the Appellant.

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[4] Respondent's Factum, paragraph 23

[5] The Respondent acknowledged that this affidavit was "provided to counsel for the respondent conducting the appeal in the court below. Information contained in the affidavit informed the decision made by counsel for the respondent in the court below to accede to a variation of sentence by one day." Motion Record to Permit Reply Factum, *Affidavit of Erika Chozik*, Exhibit "A".

[6] Record of the Respondent, Tab 8, p.40 to 78.

(c) The Respondent is wrong to say that there was no fresh evidence on the appeal below.[7]

11. Fresh evidence, in the form of the Appellant's correctional records[8], was filed in the court below with the consent of the Respondent.[9] These records established that there had been a significant change in the Appellant's circumstances since the sentencing. This fresh evidence identified the Appellant, for the first time[10] on record before a court, as a non-citizen of Canada and confirmed that, post-sentencing, he was facing deportation.[11] The Respondent is wrong to say that the fresh evidence would not have met the "due diligence" requirement set out in *Levesque*.[12] It did – *otherwise the Crown would not have consented to its admission.* Diligence is not a prerequisite for admission of fresh evidence on appeal and its absence, especially in criminal cases, should not be used to deny admission of compelling evidence otherwise in the interests of justice.[13]

(d) The standard of ineffective assistance of counsel is inappropriate to a determination of the fitness of sentence.

12. The Respondent asserts that an appellate seeking appellate relief from an unduly harsh sentence must show, on a balance of probabilities, that his sentencing hearing was unfair because he was deprived of the effective assistance of counsel. While the conduct of counsel may raise concerns, the absence of complaint cannot preclude relief from an otherwise disproportionate or unfit sentence. The test proposed by the Respondent is wrong and unfair, has no foundation in sentencing jurisprudence in this Court or any provincial appellate court and is contrary to the interests of justice.

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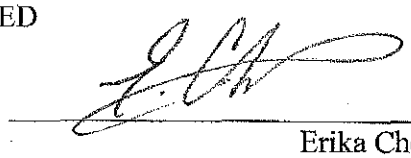
[7] Respondent's Factum, paragraphs 69, 82, 83
[8] Record of the Respondent, Tab 8, pp.51-77
[9] Motion Record, *Affidavit of Erika Chozik*, "Exhibit A".
[10] Contrary to the assertion in the Respondent's Factum (paragraphs 74,86) the pre-sentence does not identify the Appellant as a non-citizen of Canada[10] or alert anyone as to immigration consequences of a two-year sentence. A small box at the top of right hand corner (Appellant's Record, Tab 12, p.81) says "Citizenship/Nationalité" "Vietnamese". It does not expressly refer to the Appellant's status in Canada.
[11] The record shows that towards the end of his sentence, the Appellant was referred for an admissibility hearing. Record of the Respondent, Tab 8, p.54.
[12] 2000 SCC 47 [Appellant's Book of Authorities, Vol I, Tab 12]
[13] *R. v. Levesque*, 2000 SCC 47 [Appellant's Book of Authorities, Vol I, Tab 12] at para. 14-20

13. Appellate intervention on sentence is not limited to errors of principle and unreasonableness[14] – it is also permitted where there is a failure to consider any relevant factor, including immigration consequences, unappreciated at sentencing. This basis for intervention exists regardless of whether the failure to balance and weigh the relevant factor pursuant to s.718 of the *Criminal Code* occurs through inadvertence, incompetence or ignorance. Appellate sentence review is concerned with *fit sentencing* and *just results*. The degree of deference afforded a decision depends on the nature of the sentencing proceeding.[15] Deference cannot be given on a question that was not before the sentencing judge. Appellate intervention is not without jurisdiction where it is based on a significant change in an offender's circumstances so that the original sentence, while not outside the range or otherwise unfit when it was imposed, is disproportionate to the offence or where the effect of the sentence is not what the parties or the judge intended.[16]

14. The Respondent is wrong in stating that the Appellant does not challenge the fitness of the two-year sentence.[17] The appeal below was against a sentence of two years which, though within the range available for the offence, *was unfit* because a relevant factor had not been considered and because the immigration consequences made it disproportionate. The appeal in this Court is from the decision of the Alberta Court of Appeal, which, amongst other serious errors, refused to give effect to these concerns. To be clear, it is very much the position of the Appellant that the two year sentence is *unfit* because, in light of the immigration consequences, it is disproportionate to the offence and the moral blameworthiness of this offender.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 13th, 2013



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[14] Respondent's Factum, para. 70-76
[15] *R. v. M. (C.A.)*, [1996] S.C.R. 500 at para. 88-91. [Appellant's Book of Authorities, Tab 14]
[16] *R. v. Trang*, 2012 ABCA 180; *R. v. Lakatos*, 2011 ONCA 318 [Appellant's Book of Authorities, Vol II, Tab 55]; *R. v. Diep*, 2010 ABCA 71; *R. v. Iamhong*, 2009 ONCA 478 [Appellant's Book of Authorities, Vol. II, Tab 51]; *R. v. Haultain*, 2012 ABCA 318 [Appellant's Book of Authorities, Vol II, Tab 55]
[17] Respondent's factum paragraph 72.

TABLE OF AUTHORITIES