Docket No: CAC154193
Date: 20001110

NOVA SCOTIA COURT OF APPEAL

[Cite as: *R. v. Tran*, 2000 NSCA 128]

GLUBE, C.J.N.S., CROMWELL and SAUNDERS, JJ.A.

BETWEEN:

QUOC DUNG TRAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Kevin G. Coady for the appellant William D. Delaney for the respondent
Appeal Heard:	September 14, 2000
Judgment Delivered:	November 10, 2000

THE COURT: The appeal is dismissed per reasons for judgment of Saunders, J.A.; Glube, C.J.N.S. and Cromwell, J.A., concurring.

Saunders, J.A.:

[1] The appeal was heard on September 14, 2000. After considering the submissions of counsel, the appeal against conviction was dismissed. Leave to appeal sentence was granted but the appeal was dismissed, all with reasons to follow. These are those reasons.

[2] By indictment dated October 21, 1997, the appellant, Mr. Quoc Dung Tran, together with Mr. Van Khoe Nguyen were charged:

> ...that they on or about the 22nd day of April, 1997, at, or near Halifax Correctional Centre, Halifax Regional Municipality, in the County of Halifax, Province of Nova Scotia, did conspire together to murder Alireza Roshanimeydan, contrary to s. 465(1)(a) of the Criminal Code of Canada.
>
> AND FURTHER did conspire together to commit the indictable offence of obstructing justice by arranging to have a witness in a murder trial killed, to wit: Alireza Roshanimeydan, contrary to section 465(1)(c) of the Criminal Code of Canada.
>
> AND FURTHER did wilfully attempt to obstruct the course of justice in a judicial proceeding by attempting to hire Barry Mombourquette to kill a witness in a murder trial, contrary to Section 139 of the Criminal Code of Canada.
>
> AND FURTHER at the same place aforesaid between the 1st day of February, 1997 and the 23rd day of April, 1997, did conspire together with each other and with Frank Liephardt [sic] to murder Alireza Roshanimeydan, contrary to Section 465(1)(a) of the Criminal Code of Canada.

[3] Following a two-day trial before the Hon. Justice D. Merlin Nunn, December 8-9, 1998, Mr. Tran was acquitted on the first two counts in the indictment. He was convicted of the fourth count. He was also convicted of

the third count but a stay was entered by virtue of the rule against multiple convictions, **R. v. Kienapple**, [1975] 1 S.C.R. 729.

[4] On January 29, 1999, the appellant was sentenced to seven and a half years in a federal penitentiary.

[5] Before addressing the merits of the appeal, it would be useful to briefly canvass some of the background to this unusual case. The Halifax police were involved in the investigation of a homicide that occurred on December 8, 1996. The victim was a man by the name of Alireza Sharifrazi. He was killed at Friends' Convenience Store. The two people charged with his murder were the appellant and Van Khoe Nguyen. Police investigators identified an eye witness to that homicide, Mr. Alireza Roshanimeydan, also known as Ali Roshani.

[6] While awaiting their trial on the charge of murdering Mr. Sharifrazi, the appellant and Mr. Nguyen were remanded in custody at the Halifax Correctional Centre. Sometime prior to April 2, 1997, the police were approached by Mr. Frank Liebhardt, who offered to assist them in their

investigation. Mr. Liebhardt had been incarcerated in the same unit as the appellant and his co-accused. Liebhardt met with police on April 3, 1997. Ultimately, the Halifax Police agreed to provide Mr. Liebhardt with a cash payment in exchange for the information he offered. Mr. Liebhardt disclosed to the police that, at the invitation of the appellant and Mr. Nguyen, he discussed the crime with which they were charged and reviewed the documentation given to them through Crown disclosure. Liebhardt testified that they came to the conclusion that the only hope in "beating" the murder charge was “to get rid” of the witness who was identified in the Crown disclosure materials. The trial judge found that Mr. Liebhardt agreed with them that “the job would be done” whether he killed the witness himself or got someone from Toronto to do it. Mr. Liebhardt was subsequently incarcerated in Dorchester Penitentiary where he came to have second thoughts about his agreement with the appellant and Mr. Nguyen to kill or arrange the killing of the key Crown witness. Mr. Liebhardt approached the police who then devised a plan by which Mr. Liebhardt would attend at the Halifax Correctional Centre, together with an undercover police officer, Cst. Barry Mombourquette. The idea was that Cst. Mombourquette would enter the facility posing as a lawyer and that

Mr. Liebhardt would then introduce Mombourquette to the appellant and Mr. Nguyen as the "hit man" he had brought in from Toronto. The Crown's case at trial consisted of the evidence given by the two police investigators, together with the testimony of Mr. Liebhardt and the undercover police officer, Cst. Mombourquette. The defence did not call evidence.

[7] In his written factum, the appellant advanced two grounds of appeal against his conviction, first that Justice Nunn erred in finding that there was proof, beyond a reasonable doubt, that there was a conspiracy to murder Alireza Roshanimeydan, and second that the trial judge erred in finding, on a balance of probabilities, that the appellant was a member of a conspiracy to murder Alireza Roshanimeydan. As to sentence, the appellant says it was excessive in light of the features of the case and his own circumstances.

[8] The initial thrust of the appellant’s first and second grounds of appeal were that the verdict was unreasonable or could not be supported by the evidence. That was also the approach taken by the Crown in responding to

the appellant's first two grounds of appeal. However, in oral argument counsel for the appellant enlarged his submission to include alleged error of law on the part of the trial judge. Counsel cited three cases, **R. v. B.(G.)(No. 3)**, [1990] 2 S.C.R. 57; **R. v. Morin** (1992), 76 C.C.C. (3d) 193 (S.C.C.) and **R. v. Mara**, [1997] 2 S.C.R. 630, decisions not included in the appellant's written submissions but raised during oral argument.

[9] Undoubtedly those decisions are three leading cases on what constitutes an error of law and involve appeals from acquittals. They stand for the proposition that an appellate court only has jurisdiction to allow a Crown appeal from acquittal if it is shown that there was an error of law at trial. By contrast this case on appeal follows the accused's conviction and accordingly, on the facts of this case, this court has jurisdiction to allow an appeal if it finds that there was an error of law or if it decides that the verdict was unreasonable.

[10] In argument, the appellant urged that the facts at trial were largely "undisputed". It is the appellant's position that Justice Nunn erred when he found beyond a reasonable doubt, based on the "undisputed" facts, that

there was a conspiracy to murder Mr. Roshanimeydan; when he found on a balance of probabilities that the accused was a member of the conspiracy; and when he found the facts met the test set out in **R. v. Carter** (1982), 67 C.C.C. (2d) 568 (S.C.C.).

[11] In his oral submissions, counsel for the appellant stated:

> The defence in their closing [at trial] essentially do [sic] not dispute the facts as advanced by the Crown but argue that such facts do not meet the tests in **Carter**.... It is the respectful submission of the appellant that given the undisputed nature of the facts in this particular case that these grounds raise, grounds one and two raise questions of law, or at least mixed law and fact, and such should be reviewed before the court would look at a s. 686 review as to the reasonableness of the verdict which I believe ties into the third ground, third test in **Carter**.

[12] Accordingly, the appellant's principal submission during oral argument was that whether those "undisputed" facts amount to a conspiracy, is a question of law and that while this court ought to address the reasonableness of the conviction, it should first determine if an error of law occurred. Put another way, the appellant argued that it is a matter of law whether the undisputed facts in this appeal amount to a conspiracy.

[13] In the appellant's submission, the facts here do not constitute a conspiracy and accordingly the trial judge erred as to the legal effect of the undisputed facts when he concluded that a conspiracy was proved. At the heart of this submission lies the appellant's assertion that the discussions between him and his co-conspirators were simply that, nothing more than "discussions" or "negotiations" but never amounting to a "concluded agreement". We disagree. We have carefully reviewed the evidence and we are satisfied that Justice Nunn made no error in determining the legal effect of the facts before him. Such were sufficient to satisfy all the essential elements of a conspiracy as described in such cases as **R. v. O'Brien**, [1954] S.C.R. 666; **Papalia v. The Queen**, [1979] 2 S.C.R. 256; and **R. v. Dynar**, [1997] 2 S.C.R. 462.

[14] In **R. v. Dynar, supra**, the court held at para. 86:

> (a) *What is a Criminal Conspiracy?*
>
> In R. v. O'Brien, [1954] S.C.R. 666, at pp. 668-69, this Court adopted the definition of conspiracy from the English case of Mulcahy v. The Queen (1868), L.R. 3 H.L. 306, at p. 317:
>
> > A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act

> in itself, and the act of each of the parties ... punishable if for a criminal object....

There must be an intention to agree, the completion of an agreement, and a common design. Taschereau J., in O'Brien, supra, at p. 668, added that:

> Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, **I have no doubt that there must exist <u>an intention to put the common design into effect</u>. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement.** [Emphasis in original.] [bold added]

And at para. 87:

In Papalia v. The Queen, [1979] 2 S.C.R. 256, at p. 276, Dickson J. (as he then was) described the offence of conspiracy as "an inchoate or preliminary crime". In setting out the necessary elements of the offence, he noted at pp. 276-77 that:

> The word "conspire" derives from two Latin words, "con" and "spirare", meaning "to breathe together". To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: Paradis v. The King (1933), 61 C.C.C. 184 at p. 186, [1934] 2 D.L.R. 88 at p. 99, [1934] S.C.R. 165 at p. 168. The actus reus is the fact of agreement: Director of Public Prosecutions v. Nock, [1978] 3 W.L.R. 57 at p. 66 (H.L.). The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. <u>The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy</u>. [emphasis added in **Dynar**]

[15] To conspire is to agree and to possess a genuine intention to participate. A conspiracy exists if there is an agreement to do an unlawful act (or to do a lawful act by unlawful means) and there is an intention to carry out the agreement. Our review of the evidence confirms that Mr. Tran was a full participant in the agreement and had every intention of seeing that the agreement to murder the chief Crown witness be carried out. The evidence clearly showed that Mr. Tran had, as Justice Taschereau observed in **O'Brien, supra**, "the will to attain the object of the agreement." Justice Nunn made no error when giving proper legal effect to that evidence. Nor do we accept the appellant's argument that there was no evidence admissible directly against the appellant that he was a party to the conspiracy.

[16] Having found no error of law, we turn now to the appellant's alternative argument, that is that the verdict is unreasonable or cannot be supported by the evidence.

[17] Section 686(1)(a)(i) of the **Criminal Code** reads as follows:

> 686.(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence. . .

Our function in reviewing verdicts for unreasonableness was described in **Corbett v. The Queen** (1974), 14 C.C.C. (2d) 385 (S.C.C.)

> ...the question is whether the verdict is unreasonable, not whether it is unjustified. The function of the Court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. (at p. 389)

[18] In assessing the reasonableness of Justice Nunn's decision the central question is whether the verdict is one which a properly instructed trier of fact, acting impartially, could have reached. To answer that question, we have applied the standard for review as set out by the Supreme Court of Canada in **R. v. Biniaris**, [2000] 1 S.C.R. 381; **R. v. Yebes**, [1987] 2 S.C.R. 168 and in **R. v. Burns**, [1994] 1 S.C.R. 656, in which latter case McLachlin, J. (as she then was) said at p. 663:

> In proceeding under s. 686(1)(a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it... Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

[19] Having reviewed, re-examined and re-weighed the evidence, we find that it is reasonably capable of supporting the verdict reached by Justice Nunn. He summarized all of the evidence led. He applied that evidence properly to the elements of the offence(s) with which the appellant was charged. He specifically found as a fact that when Mr. Liebhardt was at the Halifax Correctional Centre he had an intent to carry out the murder or to get someone else to do it. After his review of the evidence, Justice Nunn was satisfied beyond a reasonable doubt that an agreement had been reached between the appellant and Mr. Liebhardt and Mr. Nguyen to commit an unlawful act, that is to murder the eye witness, Alireza Roshanimeydan. He held that their discussions and conduct could lead to no other conclusion. All three discussed and agreed that the only way to beat the charges was to get rid of the eye witness. They discussed the manner of committing the murder, the arrangements for payment and how to inveigle the victim to a location where he could be killed. After detailing the evidence and, in particular, the interventions by the appellant during their discussions with the undercover police operator, wherein the appellant voiced and signalled his concurrence, Justice Nunn said:

> [a]ll point to the agreement and the intention to achieve the object. Mr. Tran was a full participant, not just a bystander, his involvement was more than that of passive acquiesence...

[20] In the appellant's factum it was suggested that if Mr. Liebhardt had no intention to carry out the murder, there could be no conspiracy. However, Justice Nunn noted specifically that even if he were wrong with respect to his finding that Mr. Liebhardt originally had an intent to either carry out the murder or get someone else to do it, it would not detract from his finding that the appellant and Mr. Nguyen had themselves reached an agreement, fully intending to carry it out, with respect to eliminating the key Crown witness. There was a clear evidentiary basis for his conclusion. Each of the necessary elements of the offence of conspiracy were made out.

[21] In his assessment of the evidence and, in particular, testing the reliability of the testimony of Mr. Liebhardt, Justice Nunn recognized the heightened level of suspicion and scrutiny that ought to be applied. At 27 years old, Mr. Liebhardt had an extensive criminal record, having been convicted of 54 criminal offences for fraud and other dishonest conduct and facing more than 100 related, outstanding charges in Ontario at the time that he gave evidence at this trial. While obviously this is not a case of a

jailhouse informant repeating a "confession" he overheard, but rather two inmates conspiring with him to commit the crime, nonetheless the unique circumstances coupled with Mr. Liebhardt's extensive record required the exercise of considerable caution in testing its reliability. That was done.

[22] We see no basis for disturbing the learned trial judge's verdict.

[23] We turn now to the appellant's argument that the evidence linking the appellant to the conspiracy consisted of nothing more than Mr. Tran's attempt to assist Mr. Nguyen in his communications with Cst. Mombourquette. It must be recalled that the appellant and Mr. Nguyen were jointly charged with murdering Mr. Alireza Sharifrazi. Both stood to benefit by the elimination of the Crown's eye witness. Justice Nunn commented specifically on the confirmatory evidence provided by Cst. Mombourquette which described the appellant as an equal participant in conversations relating to the elimination of this witness and that the appellant took an active role in the agreement, as opposed to merely assisting his co-accused.

[24] We note, in particular, the repeated offers by Mr. Tran, in his conversations with Mr. Liebhardt and Constable Mombourquette, to help pay the cost of this contract killing. There was also evidence that the appellant provided information on where Mr. Rashani worked and how he could be located in order to kill him. All of that evidence provided a reasonable basis for finding the appellant's likely membership in the conspiracy, thus permitting Justice Nunn to consider evidence of the acts and declarations of Mr. Nguyen in furtherance of the objects of that conspiracy, as evidence against Mr. Tran on the issue of his guilt.

[25] As announced at the conclusion of the hearing, the appeal against conviction is dismissed.

[26] The appellant submits that his sentence of seven and a half years' imprisonment is excessive. Section 687(1) of the **Criminal Code** provides:

> 687.(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by the law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

[27] Our function in considering "the fitness of the sentence" is to determine whether the learned trial judge erred in principle, failed to consider a relevant factor, overemphasized certain appropriate factors, or whether the sentence is "demonstrably unfit" or "clearly unreasonable". See **R. v. Harris** (2000), 181 N.S.R. (2d) 211, particularly § 38 - 53. Here the appellant has not identified any error in principle or any failure on the part of the trial judge in considering relevant factors or overemphasizing appropriate factors. The appellant's submission is simply that the sentence is demonstrably unfit or clearly unreasonable.

[28] In **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193, Iacobucci J., writing for the court, said at page 209:

> ...An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.
>
> I would adopt the approach taken by the Nova Scotia Court of Appeal in the cases of **R. v. Pepin** (1990), 98 N.S.R. (2d) 238, and **R. v. Muise** (1994), 94 C.C.C. (3d) 119. In **Pepin**, at p. 251, it was held that:

> ...in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles of [if] the sentence is clearly or manifestly excessive.

[29] Iacobucci, J. quoted at p. 210 with approval the following remarks by Hallett, J.A. in **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.) at p. 124:

> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere. My view, that this is the correct approach for an appeal court, is not based on the notion that a trial judge has had the advantage of seeing and hearing the witnesses. This reason is expressed in some of the older cases as being the underlying reason for non-interference; that rationale clearly does not apply to a guilty plea. My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion that is the true basis upon which courts of appeal review sentences when the only issue is whether the sentence is inadequate or excessive.

[30] In **R. v. C.A.M.** (1996), 105 C.C.C. (3d) 327 (S.C.C.), Lamer, C.J., writing for the court, further elaborated on the deference due the decisions of sentencing judges. He recognized those judges' "unique qualifications of experience and judgment from having served on the front lines of our criminal justice system". He said at p. 375:

> ...I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in

> substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

[31] The appellant was convicted of entering into a conspiracy to murder the principal witness against him while in custody awaiting trial on a charge of murder. Those features are unique and in themselves distinguish this case from any relied upon by the appellant. It would be difficult to imagine a more aggravating set of circumstances. The appellant's criminal conduct strikes at the very foundation of the administration of justice. His actions demand strict denunciation and very serious penal consequences. The sentence imposed by Justice Nunn is clearly not excessive. We would not disturb it.

[32] The appeal against conviction is dismissed. As to sentence, we grant leave but the appeal is dismissed.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.