

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CRI 2007-004-22697**

**THE QUEEN**

v

**LIANYI ZHENG**

Hearing: 24 April 2009

Appearances: A R Burns for Crown  
G Morison for Zheng

Judgment: 15 June 2009

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**JUDGMENT OF ALLAN J**

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*In accordance with r 11.5 I direct that the Registrar endorse this judgment  
with the delivery time of 2.45 pm on Monday 15 June 2008*

*Solicitors:*

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*G Morison, PO Box 2728, Shortland St, Auckland*

[1] During the latter part of 2006, the police were engaged in surveillance operations concerning suspected large scale drug dealing activities involving, predominantly, Cantonese speaking Chinese and members of the Vietnamese community. Much of the surveillance work was undertaken pursuant to interception warrants granted by Judges of this Court. The police investigation, known as “Operation Ice-Age”, terminated on 19 December 2006, when a number of persons were arrested and charged. Some of them now face trial in this Court, although no trial date has been set.

[2] Mr Zheng currently faces just one count of supplying the class A controlled drug methamphetamine (count 25). Two other accused also face count 25, but the Crown case is that they are suppliers in their own right. In other words, those accused who face count 25 are not charged as parties.

[3] Mr Zheng now applies pursuant to s347(1) of the Crimes Act 1961 for an order discharging him, upon the basis that the evidence disclosed by the depositions is insufficient to justify a trial.

### **Legal principles**

[4] The correct approach to the application of s347 is now well settled. It is conveniently summarised in the judgment of the Court of Appeal in *Parris v Attorney-General* [2004] 1 NZLR 519, amplifying that Court’s earlier judgment in *R v Flyger* [2001] 2 NZLR 721. At paragraph [13] of *Parris* the Court of Appeal said that:

There should be a s347 discharge when, on the state of the evidence at the stage in question, it is clear either that a properly directed jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions are likely to amount to much the same thing.

[5] And further, at paragraph [14]:

The test must be administered pretrial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict. Unless the case is clear-cut in favour of the accused, it should be left to the jury to decide. ...The constitutional divide between trial Judge (law) and jury (fact) mandates that trial judges intervene in the factual area only when, as a matter of law, the evidence is clearly such that the jury could not reasonably convict or any such conviction would not be supported by the evidence.

## **The evidence**

[6] The Crown case against Mr Zheng relies entirely upon certain telephone conversations intercepted on 14 November 2006. Two of the principal offenders are alleged to have been a Mr Voong and a Mr Zhou. The latter has already been convicted.

[7] The Crown case is that the applicant acted as a go-between on behalf of Mr Voong in a transaction that took place between Mr Voong and Mr Zhou, involving the exchange of money for drugs. The Crown case against Mr Zheng is that, acting on Mr Voong's instructions, he collected a Louis Vuitton bag from Mr Voong at the Sky City Casino and took it to a meeting with an associate of Mr Zhou, probably in the underground carpark at the Casino. There, the Crown asserts, the applicant exchanged the bag containing money for another bag containing methamphetamine, which he delivered to Mr Voong. It is the alleged possession of drugs by the applicant on the return journey that supports the charge against him, on the Crown case.

[8] The evidence against the applicant is slender. In essence, the Crown relies upon two telephone calls in which the applicant is a participant and one in which he is not. The first occurred just after 10 pm on 14 November 2006. The English version, translated from the Cantonese, reads:

22.04.52	Tac Kin Voong makes a call to (021) 826668 and speaks to Lianyi Zheng. (Translated from Cantonese by Cyril Young)
Zheng	Yes.
Voong	Taking five small ones if it is the right one.

Zheng Is he/she going up? Has he/she gone up? Has he/she been up?

Voong That's right, you go down and tell him/her later on. Ok?

Zheng Uh-huh.

Voong That small, small ones.

22.05.10 (Call ends.)

[9] The Crown case is that the reference to "five small ones" is a reference to 5 ounces of methamphetamine, and that in this telephone discussion Mr Voong is instructing Mr Zheng to uplift 5 oz of methamphetamine in return for the cash in the Louis Vuitton bag, provided that the quality is acceptable.

[10] The second conversation occurred about 25 minutes later. The English version of the second discussion reads:

22.27.48 Tac Kin Voong makes a call to (021) 826 668 and speaks to Lianyi Zheng (translated from Hakka by Stella Huang)

Zheng Hello.

Voong ... where is he?

Zheng Ha?

Voong Where is he? Do you see him?

Zheng Have met, got it.

Voong So I go back to ... (cut over)

Zheng I am at the main door and wait for you to come back.

Voong Ha?

Zheng Do you come back to the main door?

Voong Do I come back at the main door? Oh I am turning to, to that road, 'Chung Hua'.

Zheng Oh.

Voong I return you to 1000.

Zheng No need. I, I that girl went back and I do not have the card to go up there.

Voong such a bad person, let her go.

Zheng            Maybe think I am useless.

Voong            Damn. No. Damn. She doesn't let you, are you still going up again?

Zheng            ah, ah.

Voong            I am coming to pick you up.

Zheng            I am at the main entrance.

22.28.45        (Call ends.)

[11]    The third discussion occurred a few minutes later. The English version reads:

22.35.21        Tac Kin Voong makes a call to (021) 118 9872 and speaks to Right Tong Zhou (translated from Cantonese by Cyril Young))

Zhou            Hello.

Voong            Tell, tell the stupid kid ... it has been given. I, I, I arrived here. With my brother in law/uncle at the back, didn't see, my my brother in law/uncle holding a bag.

Zhou            He left with the bag still on his shoulder/back.

Voong            Fuck, I can see him still sitting there now, right?

Zhou            Huh?

Voong            Fuck, it is only that the stupid kid left it in the car?

Zhou            He never came up here.

Voong            Huh? No, your stupid kid, left it in the car.

Zhou            Huh?

Voong            Given, it's been given to him.

Zhou            The bag given to him?

Voong            Huh?

Zhou            No.

Voong            How come no? Fuck. Stupid, you ask that stupid kid and see, that stupid kid is a bit crazy.

Zhou            Hold on to it, hold on to it.

22.36.08        (Zhou gives phone to an unknown male (UKM)).

UKM I gave him the stuff, and he left. I turned around and left immediately ...

Voong Fuck his mother where is your car? See if you have left it in the car or not.

UKM What did you say?

Voong The car, left it in the car or not? The bag, the 'LV' bag.

UKM No, he didn't give me the bag, he didn't leave anything behind.

Voong Fuck his mother's cunt, is there, is the bag, the 'LV' bag in the car?

UKM No. I saw him with the bag on his shoulder/back, I know that you are talking about the 'LV' bag. He had it on his shoulder /back when leaving.

Voong I know, I know the 'LV' bag/ Fuck his mother, you look in the car and see if it is left in the car? In your car.

UKM No.

Voong Have you looked in the car yet?

UKM there is nothing in the car.

Voong I will ring and ask him.

22.36.50 (Call ends)

[12] The expression 'UKM' among the parties refers to an unknown male who, on the Crown case, was an assistant to Mr Zhou and was the person with whom the applicant met in order to exchange the money for drugs. The Crown places considerable emphasis on the statement by this person to the effect that he "... gave him [Zheng] the stuff, and he left". The Crown says that "the stuff" was drugs.

[13] Operation Ice-Age terminated on 19 December 2006. Mr Zheng, among others, was arrested and interviewed. A search warrant was executed at his residence. Nothing of consequence was found there.

[14] During the course of his interview Mr Zheng explained that he was a gambling companion of Mr Voong and that they frequented the Sky City Casino together. On occasion he made loans to Mr Voong. The case for Mr Zheng is that he agreed to deliver the Louis Vuitton bag containing, as Mr Zheng thought, \$3000,

to an associate of Mr Zhou, by way of repayment of a loan earlier made by Mr Zhou to Mr Voong. Mr Zheng says that he picked nothing up in return.

[15] Mr Burns advises the Court that at trial there will be extensive evidence of a code used by certain of the accused, from which it will be plain that they were engaged in large scale drug activities. One accused, who has pleaded guilty and has been sentenced, will confirm the detail of the coded language employed.

[16] Mr Morison says that Mr Zheng was not a party to the use of coded language and, to the extent that it is suggested he was, the evidence will be challenged.

[17] During the course of his interview with the police, Mr Zheng denied any knowledge of, or participation in, drug related activity.

[18] The Crown relies heavily on two brief statements during the second and third telephone discussions. The first is Mr Zheng's comment "Have met, got it". The second is the statement of the unknown male to the effect that "I gave him the stuff and he left". The Crown says that these statements are inconsistent with Mr Zheng's claim to have delivered the money, but taken away nothing in return.

[19] While that may be so, there is no evidence as to what constituted "it" or "the stuff". The Crown says it would be open to the jury to draw the inference that in each case the references are to methamphetamine. But, in my opinion, that would simply amount to an exercise in speculation. The position may well be different if there was other evidence to connect Mr Zheng with drug related activities, but he denied any such involvement and nothing relevant was found at the time of execution of the search warrant. There is no evidence that any co-accused has asserted that Mr Zheng was knowingly involved in drug dealing.

[20] There may well be a significant degree of suspicion, but that is not enough. The Louis Vuitton bag was never found; neither was the bag which the Crown contends Mr Zheng returned to Mr Voong. Mr Zheng himself denies that there was any such bag. Even if it did exist, there is no reliable evidence (either direct or

inferential), to support the argument that Mr Zheng must have known that it contained methamphetamine.

### **Conclusion**

[21] Although questions of credibility and weight must be determined by a jury, this is a case in which, in my opinion, a properly directed jury could not reasonably convict. A guilty verdict against Mr Zheng would, in my view, necessarily involve a degree of impermissible speculation. For that reason Mr Zheng is entitled to be discharged on count 25, pursuant to s347 of the Crimes Act 1961.

**C J Allan J**