

Her Majesty the Queen (respondent) v. Ying Huang (appellant)  
(C54305)

Her Majesty the Queen (respondent) v. John Huang (appellant)  
(54340; 2013 ONCA 240)

**Indexed As: R. v. Huang (Y.)**

Ontario Court of Appeal  
Doherty, MacPherson and Cronk, J.J.A.  
April 16, 2013.

**Summary:**

Ying Huang was tried as a co-conspirator, together with John Huang. The charges against John arose in connection with his role as a real estate agent for the purchasers of properties that were used for marijuana grow operations. The Crown maintained that John had represented Ying on the purchase of one of the properties. Like John, Ying was convicted of conspiracy to produce marijuana, production of marijuana and possession of marijuana for the purposes of trafficking. She was also convicted of several counts related to utilities theft. Both appealed from the convictions, on the principal ground that the trial judge's conduct gave rise to a reasonable apprehension of bias, resulting in a miscarriage of justice.

The Ontario Court of Appeal allowed the appeals and ordered a new trial before a different trial judge. The trial judge's impugned comments gave rise to a reasonable apprehension of bias that fatally compromised trial fairness. It followed that there was a miscarriage of justice.

**Courts - Topic 691.1**

Judges - Disqualification - Bias - Reasonable apprehension of bias - Effect of - [See fourth **Criminal Law - Topic 4867**].

**Criminal Law - Topic 4574**

Procedure - Conduct of trial - Interventions by trial judge - [See fourth **Criminal Law - Topic 4867**].

**Criminal Law - Topic 4852**

Appeals - Indictable offences - Grounds of appeal - Miscarriage of justice - [See first and third **Criminal Law - Topic 4867**].

**Criminal Law - Topic 4867**

Appeals - Indictable offences - Grounds of appeal - Bias - The accused was tried before a judge alone, together with his co-accused - The Crown's case against the accused was circumstantial - The accused's credibility was the core issue at trial - The accused appealed from his convictions - The Ontario Court of Appeal agreed that the trial judge's comment that the accused required the advice of his counsel on the issue of perjury, in the midst of his cross-examination by Crown counsel, gave rise to an inescapable apprehension that the trial judge had concluded, at that early point, that the accused was

not to be believed - The trial judge's comments called his fairness and impartiality into serious question - Moreover, the trial judge's insinuation of perjury could also have intimidated the accused and effectively undermined his ability to respond to further questioning by Crown counsel - The "very high test for the demonstration of a reasonable apprehension of bias" had been met - It followed that there was a miscarriage of justice and a new trial was required - It was not for the court to speculate on what the result might have been had the accused received a fair hearing - See paragraphs 11 to 17, 22.

#### **Criminal Law - Topic 4867**

Appeals - Indictable offences - Grounds of appeal - Bias - The charges against the accused arose in connection with his role as a real estate agent - He was convicted - His principal ground of appeal was that the trial judge's intervention during the Crown's cross-examination of the accused gave rise to a reasonable apprehension of bias - As soon as the trial judge mentioned perjury, defence counsel objected to the propriety of the trial judge's intervention - The Ontario Court of Appeal rejected the Crown's submission that the accused's trial counsel was to be faulted for failing to object to the trial judge's remarks - Her objection was timely, restrained and entirely appropriate - "In any event, the failure by counsel to object, or to seek a mistrial, has never been taken to constitute a waiver by an accused at a criminal trial of his or her rights, especially as fundamental and unqualified a right as the entitlement to a fair and impartial trial." - See paragraphs 20 and 21.

#### **Criminal Law - Topic 4867**

Appeals - Indictable offences - Grounds of appeal - Bias - Ying Huang was tried as a co-conspirator, together with John Huang - The charges against John arose in connection with his role as a real estate agent for the purchasers of properties that were used for marijuana grow operations - The Crown maintained that John had represented Ying on the purchase of one of the properties - Like John, Ying was convicted of conspiracy to produce marijuana, production of marijuana and possession of marijuana for the purposes of trafficking - The Ontario Court of Appeal agreed with Ying's submission that the trial judge's inappropriate interjection during the Crown's cross-examination of John, gave rise to a reasonable apprehension of bias that fatally undermined trial fairness in respect of Ying, as well as John - The improper interjection occurred at the point John attempted to defend his assertion that he had not met Ying until after his arrest and that the buyer of the property was Yan Huang - That exculpatory evidence bore directly on Ying's culpability - A miscarriage of justice occurred regarding both accused, and a new trial was required - See paragraphs 25 to 31.

#### **Criminal Law - Topic 4867**

Appeals - Indictable offences - Grounds of appeal - Bias - The Ontario Court of Appeal agreed with the accused that the trial judge's impugned comments in this case gave rise to a reasonable apprehension of bias that fatally compromised trial fairness - The court observed that "[t]his is the second time in less than one year that this court has allowed appeals relating to judgments of this trial judge on the basis of reasonable apprehension of bias. In both instances, the perception of bias arose because of improper and unwarranted interventions by the trial judge during the examination of witnesses ... In

both instances, public resources were wasted, great inconvenience to the parties resulted and the integrity of the administration of justice was tarnished. It bears repetition that trial judges, like appellate judges, must preside in a judicious fashion. Trial judges are, at bottom, listeners. As this court said in *R. v. Hossu* (2002) ... "[i]t is counsel's job, not the trial judge's, to explore inconsistencies in a witness' testimony." - See paragraphs 32 and 33.

**Cases Noticed:**

*R. v. Stewart* (1991), 43 O.A.C. 109 (C.A.), reld to. [para. 16].  
*Committee for Justice and Liberty Foundation et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369; 9 N.R. 115, reld to. [para. 17].  
*R. v. Curragh Inc. et al.*, [1997] 1 S.C.R. 537; 209 N.R. 252; 159 N.S.R.(2d) 1; 468 A.P.R. 1, reld to. [para. 22].  
*Lloyd v. Bush et al.* (2012), 292 O.A.C. 251; 2012 ONCA 349, reld to. [para. 32].  
*R. v. Hossu (E.)* (2002), 162 O.A.C. 143; 167 C.C.C.(3d) 344 (C.A.), reld to. [para. 33].

**Counsel:**

Zachary Kerbel, for the appellant, John Huang;  
Frank Addario and Megan Savard, for the appellant, Ying Huang;  
David Littlefield and Sabrina Montefiore, for the respondent.

These appeals were heard on April 9, 2013, before Doherty, MacPherson and Cronk, J.J.A., of the Ontario Court of Appeal. The Court delivered the following judgment, with reasons, dated April 16, 2013.

Appeals allowed;  
new trial ordered.

Editor: E. Joanne Oley

**Courts - Topic 691.1**

Judges - Disqualification - Bias - Reasonable apprehension of bias - Effect of - The Ontario Court of Appeal agreed with the accused that the trial judge's impugned comments in this case gave rise to a reasonable apprehension of bias that fatally compromised trial fairness - The court observed that "[t]his is the second time in less than one year that this court has allowed appeals relating to judgments of this trial judge on the basis of reasonable apprehension of bias. In both instances, the perception of bias arose because of improper and unwarranted interventions by the trial judge during the examination of witnesses ... In both instances, public resources were wasted, great inconvenience to the parties resulted and the integrity of the administration of justice was tarnished. It bears repetition that trial judges, like appellate judges, must preside in a judicious fashion. Trial judges are, at bottom, listeners. As this court said in *R. v. Hossu* (2002) ... "[i]t is counsel's job, not the trial judge's, to explore inconsistencies in a witness' testimony." - See paragraphs 32 and 33.

### **Criminal Law - Topic 4574**

Procedure - Conduct of trial - Interventions by trial judge - The Ontario Court of Appeal agreed with the accused that the trial judge's impugned comments in this case gave rise to a reasonable apprehension of bias that fatally compromised trial fairness - The court observed that "[t]his is the second time in less than one year that this court has allowed appeals relating to judgments of this trial judge on the basis of reasonable apprehension of bias. In both instances, the perception of bias arose because of improper and unwarranted interventions by the trial judge during the examination of witnesses ... In both instances, public resources were wasted, great inconvenience to the parties resulted and the integrity of the administration of justice was tarnished. It bears repetition that trial judges, like appellate judges, must preside in a judicious fashion. Trial judges are, at bottom, listeners. As this court said in *R. v. Hossu* (2002) ... '[i]t is counsel's job, not the trial judge's, to explore inconsistencies in a witness' testimony.'" - See paragraphs 32 and 33.

### **Criminal Law - Topic 4852**

Appeals - Indictable offences - Grounds of appeal - Miscarriage of justice - The accused was tried before a judge alone, together with his co-accused - The Crown's case against the accused was circumstantial - The accused's credibility was the core issue at trial - The accused appealed from his convictions - The Ontario Court of Appeal agreed that the trial judge's comment that the accused required the advice of his counsel on the issue of perjury, in the midst of his cross-examination by Crown counsel, gave rise to an inescapable apprehension that the trial judge had concluded, at that early point, that the accused was not to be believed - The trial judge's comments called his fairness and impartiality into serious question - Moreover, the trial judge's insinuation of perjury could also have intimidated the accused and effectively undermined his ability to respond to further questioning by Crown counsel - The "very high test for the demonstration of a reasonable apprehension of bias" had been met - It followed that there was a miscarriage of justice and a new trial was required - It was not for the court to speculate on what the result might have been had the accused received a fair hearing - See paragraphs 11 to 17, 22.

### **Criminal Law - Topic 4852**

Appeals - Indictable offences - Grounds of appeal - Miscarriage of justice - Ying Huang was tried as a co-conspirator, together with John Huang - The charges against John arose in connection with his role as a real estate agent for the purchasers of properties that were used for marijuana grow operations - The Crown maintained that John had represented Ying on the purchase of one of the properties - Like John, Ying was convicted of conspiracy to produce marijuana, production of marijuana and possession of marijuana for the purposes of trafficking - The Ontario Court of Appeal agreed with Ying's submission that the trial judge's inappropriate interjection during the Crown's cross-examination of John, gave rise to a reasonable apprehension of bias that fatally undermined trial fairness in respect of Ying, as well as John - The improper interjection occurred at the point John attempted to defend his assertion that he had not met Ying until after his arrest and that the buyer of the property was Yan Huang - That exculpatory

evidence bore directly on Ying's culpability - A miscarriage of justice occurred regarding both accused, and a new trial was required - See paragraphs 25 to 31.