CANADA / JUDGMENT

R. v. Agopsowicz

2020 BCCA 150

COURT
British Columbia Court of Appeal

DECIDED
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2020 BCCA 150 R. v. Agopsowicz COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Agopsowicz, 2020 BCCA 150 Date: 20200526 Docket: CA45951 Between: Regina Respondent And Andrew Eugene Agopsowicz Appellant Before: The Honourable Madam Justice Bennett (In Chambers) On appeal from: An order of the Provincial Court of British Columbia, dated July 26, 2018 (R. v. Agopsowicz, Surrey Docket 226172-1). The Appellant, appearing in person (via videoconference): A.E. Agopsowicz Counsel for the Respondent (via teleconference): C.E. Tomusiak Place and Date of Hearing: Vancouver, British Columbia May 20, 2020 Place and Date of Judgment: Vancouver, British Columbia May 26, 2020 Summary: Mr. Agopsowicz was convicted of assault with a weapon, assault causing bodily harm, and possession of a weapon dangerous to the public peace. He applies for an extension of time to file a notice of appeal against his convictions. Held: Application dismissed. There are no identifiable grounds of appeal that would justify granting an extension of time. Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Andrew Agopsowicz seeks an extension of time to file a notice of appeal to appeal his convictions for assault with a weapon (a hatchet), assault causing bodily harm and possession of a weapon dangerous to the public peace. He also filed an application to extend the time to appeal his sentence, but has indicated that he no longer wishes to pursue that application as he has served the sentence.

Background

[2] Mr. Shalendra Prasad was attacked by someone with a hatchet near a SkyTrain station. Mr. Agopsowicz was represented by counsel at trial. The issue was identity. The identification at trial by Mr. Prasad was, as acknowledged by the trial judge, insufficient to convict Mr. Agopsowicz. However, he was located within five minutes or so of the incident with a bloody hatchet in the waistband of his trousers. There was also a trail of blood from where Mr. Agopsowicz was arrested, directed towards the location of the offence.

[3] Mr. Agopsowicz applied for legal aid to assist him within the 30-day time period to appeal. He was denied assistance on October 10, 2018. Mr. Agopsowicz filed an application to extend the time to appeal on March 11, 2019. In his materials, he cited mental disability, lack of a lawyer, legal aid sending a booklet, and lack of access to information.

[4] In order to obtain an extension of time an appellant must satisfy certain criteria. Those criteria are:

(1) the applicant had a bona fide intention to appeal before the expiration date of the appeal date;

(2) informed the respondent either expressly or impliedly of his intention;

(3) the respondent would not be unduly prejudiced by an extension of time;

(4) there is merit in the appeal in the sense that there is a reasonably arguable ground;

(5) it is in the interest of justice, that is the interest of the parties, that an extension be granted. R. v. Smith, [1990] B.C.J. No. 2933 at paras. 4-5 (C.A.).

[5] In Clock Holdings Ltd. v. Braich, 2009 BCCA 437, this Court said, at paras. 23-24:

[23] the first four factors are not all that comprises the fifth factor, otherwise there would be no need for the fifth factor.

[24] The interests of justice encompass a myriad of factors, including the interests of the parties and compliance with the Rules of Court

[6] The Crown acknowledges that the first three factors have been established. Mr. Agopsowicz applied for legal aid within the appeal period, signalling a bona fide intention to appeal. While the Crown did not know that Mr. Agopsowicz intended to appeal, it concedes that it suffers no prejudice from the delay. It also accepts that Mr. Agopsowicz's mental health disability may have played a significant role in his delay in filing.

[7] However, the real issue in this case is whether there is some merit to the appeal. It is not in the interests of justice to grant an unmeritorious appeal an extension of time: R. v. Buencamino, 2012 BCCA 265 at para. 14.

[8] Mr. Agopsowicz argues that there was no DNA analysis of the blood found, and that it was not tied back to Mr. Prasad. He also argues that the police did not use any luminal on the hatchet, and thus did not prove there was in fact blood on it. He says that the police conducted an illegal search and seizure, and did not return his personal property. Mr. Agopsowicz also says that he has been denied appropriate medication while in prison, and was not permitted to bring a habeas corpus application (which I believe is unconnected to this case, but it matters not in terms of what I am to decide). He submits that Mr. Prasad ought not to have been believed about the attack. He complains that his treatment over the years at the hands of the mental health profession is tantamount to war crimes being committed on him.

[9] He says, quite rightly, that he will not be able to present his case on his own behalf.

[10] The issue at trial was whether Mr. Agopsowicz was the person who committed the crime. The trial judge carefully examined the eyewitness identification and concluded that, on its own, it was not sufficient for him to find that Mr. Agopsowicz was the offender beyond a reasonable doubt. The trial judge also considered the circumstantial evidence, including the close timing and proximity between the offence and Mr. Agopsowicz being found with a hatchet similar in description to that used on Mr. Prasad. The judge summarized his conclusions at para. 29 of the reasons:

[29] Clearly, as I have indicated, if the evidence about identification had only come from the descriptors, I would have had a doubt. But when I factor in some of the consistencies in the descriptors of the hatchet-wielding assailant and Mr. Agopsowicz, the very close timing that was involved, the fact that the accused was found in the area in the direction from where the assailant and his friend had just left, most particularly the particular circumstances of how the accused was found, trying to hide from the police on the SkyTrain with a fresh cut to his head consistent with the blow that Mr. Prasad inflicted on the hatchet-wielding person, and the fact that Mr. Agopsowicz was in possession of the hatchet and bleeding, leads to me to find beyond a reasonable doubt that Mr. Agopsowicz was the person who wielded the hatchet on Mr. Prasad.

[11] In my view, the circumstantial evidence was overwhelming. Having read the reasons, I do not see any ground of appeal that would justify granting an extension of time for the conviction appeal. Accordingly, I dismiss Mr. Agopsowicz's application to extend the time to file a notice of appeal against his convictions.

[12] As Mr. Agopsowicz does not wish to pursue the sentence appeal, I similarly dismiss his application for an extension of time to file an application for leave to appeal sentence.

[13] The applications are therefore dismissed. "The Honourable Madam Justice Bennett"

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