
CANADA / JUDGMENT

R. v. Burd

2005 BCCA 620

COURT

British Columbia Court of Appeal

DECIDED

15 December 2005

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2005 BCCA 620 R. v. Burd

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Burd,

2005 BCCA 620

Date: 20051215

Docket: CA033380

Between:

Regina

Respondent

And

William Steven Burd

Appellant

Before:

The Honourable Mr. Justice Smith

(In Chambers)

P. Benning and R.P. Thirkell

Counsel for the Appellant

F. Tischler

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

6 December 2005

Place and Date of Judgment:

Vancouver, British Columbia

15 December 2005

Reasons for Judgment of the Honourable Mr. Justice Smith:

- [1] The appellant seeks judicial interim release pursuant to s. 679 of the Criminal Code pending his appeal against a conviction of manslaughter entered against him in Kamloops on June 24, 2005, following his trial on one count of second degree murder before Mr. Justice Powers of the Supreme Court of British Columbia, sitting without a jury. On September 9, 2005, the appellant was sentenced to 46 months' imprisonment.
- [2] On this application, the appellant bears the burden of satisfying the three conditions set out in s. 679(3) of the Code, that is, he must establish on a balance of probabilities that (a) the appeal is not frivolous, (b) he will surrender himself into custody in accordance with the terms of the order, and (c) his detention is not necessary in the public interest.
- [3] The Crown concedes that the appellant has satisfied the first two of these conditions, but opposes the appellant's release on the ground that he has not established that his detention is not necessary in the public interest. The Crown does not argue that he will present a risk to public safety if he is released. Rather, while it concedes that he has an arguable appeal, it contends that the argument is so weak that the public interest requires his sentence to be enforced immediately. The Crown relies in this respect on *R. v. Mapara* (2001), 158 C.C.C. (3d) 312, 2001 BCCA 508, in which a panel of this Court refused a Crown application to set aside a judicial interim release order brought pursuant to s. 680 of the Code. Ryan J.A., who gave the reasons of the Court, said, at para. 34,

Public confidence in the administration of justice requires that verdicts, properly rendered, be enforced. Where an appellant establishes that he or she does not pose a flight risk and is unlikely to reoffend, the public interest also acknowledges that actual punishment for a crime be avoided if strong grounds exist for setting aside the verdict.

The Crown also refers to *R. v. Dunbar* (2003), 176 C.C.C. (3d) 445, 2003 BCCA 349, another case of first degree murder, where the need for the appellant to show a "very strong" ground of appeal in order to satisfy s. 679(3)(c) was reiterated.

- [4] However, the strength of the grounds of appeal is not necessarily determinative under s. 679(3)(c). In Mapara, Ryan J.A. acknowledged (at paras. 35, 36) that the likelihood of success on appeal is not the only relevant factor and that the decision involves the weighing of all relevant factors, including the strength of appeal. In the result, she said, at para. 41,
- [41] . . . Having satisfied the other criteria demanded by s. 679(3) I am of the view, weighing all of the circumstances, including the very serious circumstances of the crime itself, the appellant has established that the dictates of reviewability outweigh those of enforceability in this particular case.

[Emphasis added.]

- [5] In Dunbar, the decision turned on the conclusion that the appellant's allegations of incompetence against his trial counsel did not raise a "very strong" ground of appeal, since his affidavit evidence filed in this Court conflicted on the central ground of appeal asserted - that his counsel prevented him from testifying - with the affidavit evidence of both his trial counsel and trial co-counsel. Since this was the only factor mentioned in relation to s. 679(3)(c), it appears that there were no other relevant matters to be considered in that case.

- [6] The ground of appeal asserted in this case relates to the trial judge's treatment of self-defence. The relevant provisions of the Criminal Code are s. 34(1) and (2) and s. 37(1):

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
- (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

. . .

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

- [7] The trial judge introduced his reasons for judgment with this summary of the background and the issues he was called upon to decide:

- [1] The accused, William Steven Burd, on February 10, 2003, near Scotch Creek, British Columbia, shot and killed Richard Ingmar Christianson. Mr. Burd is charged with second degree murder. Mr. Burd and Mr. Christianson were involved in a dispute in approximately

October 2001. There is evidence of further difficulties or hard feelings leading up to February 10, 2003. Mr. Burd and Mr. Christianson were involved in a confrontation inside the Lucky Dollar store at Scotch Creek, and subsequently in the parking lot of that store. These events occurred at approximately 6 p.m. The events in the parking lot culminated in Mr. Burd shooting Mr. Christianson three times.

- [2] The Crown argues that Mr. Burd has committed murder. The defence argues the evidence supports self-defence as a complete defence. The defence also argues that in the event self-defence does not apply, the issue of provocation reducing the offence to manslaughter must be considered. The defence further argues that if self-defence does not apply to all three shots fired, the evidence requires me to consider whether the third shot fired may have been fired accidentally. If it resulted from an unlawful act, the correct verdict is not guilty of second degree murder, but guilty of the lesser included offence of manslaughter.
- [8] The fatal events began when an abiding animosity between Mr. Christianson and the appellant erupted in an argument inside the Lucky Dollar store. Mr. Christianson punched the appellant in the face, causing him to bleed. Shortly afterward, Mr. Christianson left the store. As the appellant left, he walked past Mr. Christianson, who was seated in his truck speaking with his two companions, Mr. Carter and Ms. Luttman, through the open door. As the appellant entered the cab of his truck parked nearby, Mr. Christianson attacked him with a knife. The appellant, while fending off the attack, picked up a gun from the floor of his truck and fired it four times. The first shot struck Mr. Christianson in the arm. The second shot missed. The third shot, which severed Mr. Christianson's aorta and would have killed him within one to ten minutes, entered his back. The fourth shot was to his head. It killed him instantly.
- [9] The trial judge concluded that s. 34(2) of the Criminal Code exonerated the appellant in respect of the first and third shots. The alleged error arises out of the trial judge's treatment of self-defence in respect of the fourth and fatal shot.
- [10] The circumstances surrounding this shot were described by the appellant in his testimony as follows. The muzzle flash of the first shot blinded him and he fired again, not knowing whether Mr. Christianson was still there. He felt trapped inside his truck and he headed instinctively for the store. He was terrified. He thought he saw Mr. Christianson about six to eight feet away coming toward him and he fired again. He did not know if any of the shots hit Mr. Christianson. He was distracted momentarily by some movement and when he looked back, Mr. Christianson was no longer there. He continued toward the store and as he came near Mr. Christianson's vehicle, he saw Mr. Christianson lying on his side on the ground. He approached Mr. Christianson and pointed the gun at him. He saw that Mr. Christianson's eyes were open and his right arm was over his chest. He saw no sign of injury. He saw movement on his right, where he believed Mr. Carter and Ms. Luttman to be, and he turned to look. When he looked back, he saw Mr. Christianson's right arm move. He jerked backward and the gun fired. He did not recall pulling the trigger and, he said, he had no intention of doing so.

- [11] The trial judge did not reject the appellant's version of these events. While he acknowledged that there were questions about the appellant's credibility, he concluded, in respect of the fatal shot,
- [130] . . . I find that I am left with a reasonable doubt about whether Mr. Burd intended to fire the final shot. His dealings with Mr. Christianson in the past and his reactions to Mr. Christianson's behaviour do not indicate the kind of animosity that would lead to a deliberate killing as the Crown suggests.
- [131] Therefore, I must find Mr. Burd not guilty of second degree murder but guilty of the lesser included offence of manslaughter.
- [12] The appellant submits that, in light of the finding that he did not fire the fourth shot intentionally, the trial judge erred in treating the firing of the shot as the act to be justified as an act of self-defence. Although he did not say so expressly, counsel agree that the unlawful causal act upon which the trial judge based the manslaughter conviction was the act of pointing the firearm at Mr. Christianson, an offence under s. 87 of the Code. Thus, the appellant submits, the act to be justified as self-defence was the pointing of the firearm, not the unintentional firing of the shot, and the critical time is the time at which the gun was pointed, not the time at which the shot was fired.
- [13] The trial judge found that neither s. 34(1) nor s. 34(2) were applicable in respect of the final shot. However, he did not discuss the possible application of s. 37(1).
- [14] The appellant's position is that, given the findings that Mr. Christianson had just attacked him with a knife and that he was justified in firing the first three shots in self-defence, he was justified under s. 37(1) in pointing the gun at Mr. Christianson when he saw him lying on the ground, with his eyes open and with no sign of injury, in order to protect himself from a repetition of the assault. In his submission, pointing the gun at Mr. Christianson in the circumstances was a proportional response to the harm he subjectively and reasonably apprehended, and the trial judge erred in failing to consider s. 37(1) in this context.
- [15] In response, the Crown submits that any need for the appellant to defend himself no longer existed when he approached Mr. Christianson and pointed the gun at him, since Mr. Christianson was lying wounded and disabled on the ground. Thus, the appellant was not acting to defend himself against the assault or a repetition of it in pointing the gun. The Crown says there was no need to consider s. 37(1) because there is no air of reality to the alleged defence.
- [16] There is some support for the Crown's submission in the trial judge's findings that, Mr. Christianson was clearly disabled laying [sic] on the ground. Mr. Burd did not have to point at him or shoot him in order to repel any attack.
- and that,

At this time, Mr. Burd was not repelling any assault. I am satisfied that although all of these events happened quickly, there was a sufficient break in the chain of events that it was clear to Mr. Burd that Mr. Christianson was no longer a threat.

- [17] Nevertheless, those findings were apparently made in the context of s. 34 and it appears that the trial judge did not have s. 37(1) in mind.
- [18] It is difficult to attempt to assess the strength of the appeal on an application such as this and I can do no more than say that, on the basis of the materials before me, it appears that the appeal is arguable and that it is more than "frivolous".
- [19] I turn now to whether there are relevant matters other than the strength of the appeal to be considered.
- [20] A case that is often cited in this Court on the application of s. 679(3)(c) is *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269 (B.C.C.A., Chambers), McEachern C.J.B.C. The appellant in that case was convicted of second degree murder after an altercation at a nightclub that resulted in the beating death of a man. He was sentenced to imprisonment for life without eligibility for parole for 10 years. On his application for release pending appeal, the Chief Justice examined a number of authorities and observed that,
- [18] . . . The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause "ordinary reasonable, fair-minded members of society" or persons informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case, to believe that detention is necessary to maintain public confidence in the administration of justice.

[Citations omitted]

- [21] I am unable to discern any such factors in the circumstances of this case.
- [22] The offence of which the appellant was convicted was manslaughter. It is a violent crime with terrible consequences. Nevertheless, it does not involve an intention to kill. Indeed, the trial judge here could not conclude that the fatal shot was fired intentionally. Thus, the relevant unlawful act was the pointing of the gun at the deceased. Moreover, the appellant endured years of intimidation and animosity from Mr. Christianson arising out of their relationship prior to the fateful night. There was no evidence that the appellant had ever instigated violence against Mr. Christianson and he did not instigate the violence on this occasion. Mr. Christianson punched him in the face inside the store. The trial judge found that the appellant was attempting to avoid further violence by leaving the scene. However, Mr. Christianson attacked him in the parking lot with a knife. Thus, the killing occurred at the conclusion of a brief and violent episode in which the appellant, in fear for his life, fired his gun in self-defence. No culpable homicide can be said to be other than a very serious criminal offence but, on the scale of such homicides, this one is at the less egregious end.

- [23] Moreover, the apparent character and antecedents of the appellant tend to favour his release. He has a criminal record consisting of two offences, a drinking-driving offence in Vancouver in 1985 and careless storage of a firearm in Chase, a relatively rural area, in 1994. As I have already noted, there is no suggestion that he is a danger to the community if he should be released pending his appeal.
- [24] Prior to his trial, the appellant worked as an apartment caretaker and, as well, as a construction labourer when work was available. He has a wife and a teenage son and he intends to reside with them if he is released pending his appeal. Until his arrest on this offence in February 2003, he resided on rural property that he owns in Celista, B.C. While it is of less relevance now that the presumption of innocence has been rebutted by his conviction, it is worth at least noting that he was on bail for more than two years pending his trial and that he attended all required court appearances.
- [25] These decisions are always difficult. However, taking all of the circumstances into consideration in this case, I am satisfied that ordinary, reasonable, fair-minded citizens informed of the circumstances of this case, Charter values, and the philosophy behind s. 679(3) of the Criminal Code, would not consider the appellant's detention to be necessary in the public interest, provided it is made subject to appropriate conditions.
- [26] In my view, the appellant has met the preconditions set out in s. 679(3) of the Criminal Code. Accordingly, his application for judicial interim release pending appeal is granted on the same terms and conditions as were applicable during his release pending trial, with all necessary adjustments including an appropriate adjustment to the surrender date. If counsel feel the need to speak to the specifics of those terms and conditions, or if they seek other terms and conditions, they may arrange with the registry to appear for that purpose.

"The Honourable Mr. Justice Smith"

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Prepared on 29 October 2026 · Esheria