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CANADA / JUDGMENT

## R. v. Clark

2006 BCCA 312

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COURT

British Columbia Court of Appeal

DECIDED

7 June 2006

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2006 BCCA 312 R. v. Clark

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Clark,

2006 BCCA 312

Date: 20060607

Docket: CA033725

Between:

Regina

Respondent

And

Colin James Clark

Appellant

Before:

The Honourable Mr. Justice Donald

(In Chambers)

Oral Reasons for Judgment

Appellant appearing In Person (In Custody)

F. Tischler

Counsel for the (Crown) Respondent

Place and Date:

Vancouver, British Columbia

7 June 2006

- [1] DONALD, J.A.: This is an application pursuant to s. 684 of the Criminal Code for court appointed counsel. The application is brought by Mr. Colin Clark who appeals from convictions for forcible confinement, several counts of firearm related offences, uttering threats, two counts of assault causing bodily harm, disobeying a no contact court order and attempting to obstruct justice. The convictions were recorded after an 18 day trial before the Honourable Judge Bagnall of the Provincial Court. She imposed a global sentence, after deduction of pre-sentence custody, of 51 months.
- [2] The circumstances of the offences are summarized in the judge's Reasons for Sentence.
- [17] On the 12th of September, 2004, Mr. Clark threatened his then girlfriend, Ms. Simmons, the complainant. He struck her, causing bruises and a black eye, among others, and he used his handgun to threaten her. The argument between them ended when Mr. Clark punched a cupboard and broke his hand. He and the complainant effectively settled down after that and they went to the hospital together the next day. On return from the hospital, they purchased and made use of some heroin, which resulted in two things. First of all, the complainant suffered an overdose and emergency personnel were called by Mr. Clark to attend to her.
- [18] During their attendance at the apartment shared by Ms. Simmons and Mr. Clark, those emergency personnel apparently removed certain drugs, including \$1,000 worth of cocaine that Mr. Clark had on consignment at the time. In addition, shortly thereafter the complainant's mother, who had been told of some of the problems the complainant was having with Mr. Clark, located his gun in the residence and removed it from the residence.
- [19] At the request of the two women, Mr. Clark left the residence on September the 13th, 2004, but he returned surreptitiously to try to locate his cocaine and his gun. When he could find neither, he made contact with Ms. Simmons, and it was repeated contact until ultimately they arranged to meet. The ostensible reason for this given by Mr. Clark was to say goodbye to Ms. Simmons as he intended to leave town.
- [20] His real intention was to make further efforts to retrieve his belongings. He confined Ms. Simmons. He struck her repeatedly, resulting in more bruises and some scratches and abrasions. He changed location with her during the course of the confinement and he consumed further intoxicating substances. Ultimately Mr. Clark fell asleep and eventually the complainant was able to escape and alert her mother and the police to the situation.

- [3] Most of the reasons for conviction are devoted to an analysis of the appellant's testimony. The judge applied the correct legal tests regarding an accused's testimony: see *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The judge found that the evidence given by the appellant was incredible and she found that it did not raise a reasonable doubt. The judge accepted the evidence of the complainant and the complainant's mother in proof of the offences.
- [4] The appellant's credibility was destroyed by what he said and did while in custody awaiting trial and because of the inconsistencies in his evidence at trial. Contrary to a court order restraining him from contacting the complainant and in an effort to alter the complainant's evidence the appellant made many phone calls from jail and tried to persuade the complainant to fabricate a story for the purpose of exculpating him, particularly with respect to the firearms offences. He also told what the judge found were a number of lies in the course of those phone calls. In attempting to fabricate evidence the appellant indirectly admitted his guilt. The trial judge rejected the appellant's efforts in his testimony to explain away what he said in those phone calls.
- [5] The appellant's proposed grounds of appeal are:

## GROUND OF APPEAL

I was convicted of these firearms offences on the testimony of one witness who claims it was mine (this gun). It was recovered at a residence I don't have access to, in a safe that I don't have the combination for. This residence belongs to the complainant/witness' mother (Diana Simmons), who turned this firearm over to the police subsequent to my arrest, stating it was mine although admitting it had been in her possession for a number of days prior.

- My fingerprints were not recovered on neither the gun, the magazine nor the ammunition.
- This firearm was not on my person or property.
- I at no time admitted possession of this firearm and state it belonged to the complainant, Jennifer Simmons.
- There is no confirmatory evidence to place this firearm in my possession at any time; is that not the test that should have been met at trial?

## Confinement

At no time during anyone's testimony did the complainant (J. Simmons) or myself testify that I forced her to come with me, restrain her if she attempted to leave, or tie her up, lock her in any place. Where is the confinement? She testified she came of her own free will, and left when she decided to.

- [6] In the hearing this morning the appellant summarized his position as a lack of confirmatory evidence in support of the Crown's case, contending that the complainant's evidence alone was not enough to prove the case.

- [7] The appellant's application for legal aid was rejected by the Legal Services Society on 9 December 2005. That decision was confirmed on review on 16 December 2005. The rationale for the refusal is contained the following passage from the Legal Services Society letter dated 9 December 2005 to the appellant:

...

The main issue in your case was creditability. The appellate court will not interfere with the trial judge's credibility findings unless that assessment is not supported by the evidence. In your case the trial judge makes many references to inconsistencies in your evidence to support her credibility findings. Further, it would appear that she also approached the evidence of the complainant with caution and only convicted you on those counts where her evidence was corroborated by other evidence. In these circumstances there is no likelihood that the appellate court would interfere with the trial judge's credibility findings.

There is no error of law indicated on the record that would provide you with a successful ground of appeal. The content of the numerous telephone calls that were presented in evidence supports the convictions. I understand that an argument was made that the complainant had emoted to fabricate her evidence when she was told by the police officer that you had a girlfriend in Ontario. However, it is clear that she was initially reluctant to give a statement to the police and that that statement predates any knowledge of the girlfriend in Ontario.

Since it is unlikely that a conviction appeal would be successful in your case your application for legal aid funding of that appeal must be rejected.

The appellate court will not interfere with a sentence unless it is demonstrably unfit or clearly unreasonable.

The trial judge refers to the appropriate sentencing principles in her reasons. She took into account your prospects for rehabilitation and her observations of changes in your demeanour during the course of the trial. The sentence imposed was well below the range of sentences proposed by the Crown and well within the range of sentences appropriate to the nature of the offences before the court. Given your record of convictions of other crimes involving violence it is unlikely that the appellate court would conclude that the total 51 month sentence imposed in relation to these offences is either unfit or unreasonable. You will note that there was a mandatory one year consecutive sentence included in that total.

Since it is unlikely that a sentence appeal would be successful in your case your application for legal aid funding of that appeal must also be rejected.

- [8] The factors relevant to a s. 684 application were recited in the case of *R. v. Michael Allison Rennie*, 2002 BCCA 4:
- [4] In *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632, I summarized the factors to be considered on an application under s. 684 (at paras. 4-6):

The factors to be considered on an application under s. 684 have been considered in a number of decisions of chambers judges in this Court, including *R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.), *R. v. Silva*, [1997] B.C.J. No. 1730 (C.A.)(QL), *R. v. Lamirand*, [1999] B.C.J. No. 581 (C.A.)(QL) and *R. v. Aiwekhoe*, [2000] B.C.J. No. 869 (C.A.)(QL).

The second part of s. 684 (usually considered first) requires an assessment of the financial ability of the applicants to retain counsel on their own behalf. The appellants must establish that they are not entitled to legal aid.

Whether it is "desirable in the interests of justice" that counsel be assigned requires consideration of such factors as the points to be argued on appeal; the complexity of the case; any point of general importance in the appeal; the applicant's competency to present the appeal; the need for counsel to marshal facts, research law or make the argument; the nature and extent of the penalty imposed; and the merits of the appeal.

...

- [6] Of the factors to be considered on the question of whether it is in the interests of justice to assign counsel, the most significant in this case are the general importance and merits of the appeal. If the appeal has some general importance and a reasonable chance of success, the appellant's personal circumstances are such that the interests of justice would favour assigning counsel. On the other hand, if the appeal has neither general importance nor merit, then it is not appropriate for this Court to make an order assigning counsel.
- [9] The appellant cannot afford a lawyer and legal aid has been refused. I doubt that the appellant has the ability to assemble the necessary materials for the appeal and to articulate the arguments. The application must be decided on the merits. As stated in the Rennie decision, it is not in the public interest to appoint counsel on a case with no reasonable prospects of success.
- [10] With respect, I agree with the Legal Services Society assessment of the appellant's chances. The case revolves completely around credibility. The trial judge carefully examined the evidence in her reasons for conviction. She had the advantage of seeing and hearing the witnesses over 18 days. She explained in considerable detail why she could not accept the appellant's testimony. The Court of Appeal must give deference to credibility findings of a trial judge and can interfere only when clear error is demonstrated. In my judgment, that is not possible in this case.
- [11] For these reasons I dismiss the application.
- [12] The notice of appeal was filed out of time in this case. The explanation for the delay was the processes with the Legal Services Society in considering the legal aid application. The Crown does not contest that that is a reasonable explanation for the delay but challenges the extension on the ground that there is no merit in the appeal.

[13] For the reasons that I have given I must accede to the Crown's position in that regard.  
Accordingly, the application to extend is dismissed.

"The Honourable Mr. Justice Donald"

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