

CANADA / JUDGMENT

R. v. Commodore

2023 BCSC 2600

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Supreme Court of British Columbia

DECIDED

21 September 2023

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2023 BCSC 2600 R. v. Commodore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Commodore,

2023 BCSC 2600

Date: 20230921

Docket: 71761-2; 71761-6

Registry: Chilliwack

Rex

v.

Darius Calvin Ray Commodore and David Allen Geoghegan

- and -

Docket: 71761-23; 71761-24; 71761-25

Registry: Chilliwack

Rex

v.

Darius Calvin Ray Commodore

Restriction on Publication: Pursuant to s. 648(1) of the C.C.C.

Before: The Honourable Justice Dley

Oral Ruling on Defence Application for Recusal

Counsel for the Crown:

S.H. Quendack

Counsel for the Accused Darius Commodore:

T.D. Anderson

E. Holzman (appearing
via videoconference)

For the Accused David Geoghegan:

No appearance

Place and Date of Trial/Hearing:

Abbotsford, B.C.

September 19, 2023

Place and Date of Judgment:

Abbotsford, B.C.

September 21, 2023

- [1] THE COURT: Mr. Commodore applies for an order that this Court recuse itself from all future matters related to his criminal prosecution, because I made findings of fact arising out of a jury verdict in the separate trial of a co-accused.
- [2] At the sentencing hearing, I stated the facts as required by s. 724(2) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code], and said that Mr. Commodore was part of a kidnapping enterprise that resulted in him shooting the victim to death.
- [3] As a result of those findings of facts, Mr. Commodore submits this Court should recuse itself from presiding over his upcoming jury trial because of a reasonable apprehension of bias.
- [4] For the following reasons, the recusal application is dismissed.

Background Facts

- [5] Messrs. Commodore and Geoghegan were jointly charged in the following Indictment:

Count 1

Darius Calvin Ray COMMODORE and David Allen GEOGHEGAN, on or about the 1st day of November, 2019, at or near Cultus Lake, in the Province of British Columbia, did, while using a firearm in the commission of the offence, commit the first degree murder of Jordan Smyth, contrary to Section 235(1) of the Criminal Code.

Count 2

Darius Calvin Ray COMMODORE and David Allen GEOGHEGAN, on or about the 31st day of October, 2019, at or near Agassiz or Cultus Lake, in the Province of British Columbia, using a firearm, kidnapped Jordan Smyth, contrary to Section 279(1.1)(a.1) of the Criminal Code.

- [6] Mr. Commodore made a successful severance application and Mr. Geoghegan's jury trial proceeded first. Mr. Geoghegan testified in his defence and said that Mr. Commodore shot Mr. Smyth. The jury found Mr. Geoghegan guilty of kidnapping simpliciter and manslaughter. It was apparent from the jury's verdict that Mr. Geoghegan's evidence was accepted.
- [7] The findings of fact included the following:
- 1) Mr. Geoghegan and Mr. Smyth were part of a scheme whereby Mr. Smyth was to be supplied with drugs that he was to smuggle into the Surrey Pretrial Centre. Mr. Smyth used some of the drugs and failed to return with the drugs.
 - 2) Mr. Commodore picked up Mr. Geoghegan from Joshua House in a stolen Jetta. Mr. Commodore had a shotgun that he fired as they were leaving the area. An expended shell was found at Joshua House and it was determined that the shell was fired from the same gun that discharged shells, located inside the Jetta and at the crime scene.
 - 3) Messrs. Geoghegan and Commodore went to the Sims' apartment where Mr. Smyth was found hiding in a bedroom closet. Mr. Geoghegan did most of the talking and told Mr. Smyth that he needed to break into a jewellery store so as to pay off the value of the drugs that he had taken. While at the apartment, Mr. Commodore placed Mr. Smyth into a headlock. Mr. Sims described Mr. Commodore as a "hot-head".
 - 4) Although Mr. Smyth did not put up any resistance, he had no choice but to accompany Messrs. Geoghegan and Commodore. The kidnapping began at that point and continued through to the gravel pit.
 - 5) Once in the car, Mr. Commodore proceeded to beat Mr. Smyth and affix zap straps on his wrists.
 - 6) Mr. Geoghegan drove them to the gravel pit. Mr. Geoghegan was not aware that Mr. Commodore was going to shoot Mr. Smyth.
- [8] In my reasons for sentencing, indexed at 2023 BCSC 1643, the following comments summarized the facts at paras. 32-36:

- [32] In summary, I conclude that Mr. Geoghegan was part of the drug-smuggling scheme. He was determined to convince Mr. Smyth that he was to return to prison with drugs for distribution. Mr. Geoghegan was the decision-maker in going to the Sims' apartment and getting Mr. Smyth. Mr. Geoghegan was the decision-maker with respect to finding Mr. Smyth, convincing him to leave the Sims' apartment, and driving Mr. Smyth to the gravel pit. Mr. Geoghegan did all of the talking.
- [33] I conclude that the actions of Mr. Geoghegan and Mr. Commodore made it apparent to Mr. Smyth that he had no choice but to accompany them out of the Sims' apartment. The kidnapping began at that point and continued through to the gravel pit.
- [34] Mr. Geoghegan knew that Mr. Smyth was restrained by zap-straps and beaten by Mr. Commodore. Other than some verbal objections, Mr. Geoghegan did not intercede to assist Mr. Smyth.
- [35] I am also convinced that Mr. Geoghegan knew that there was a reasonable likelihood that serious harm would come to Mr. Smyth in the circumstances, as they were en route to and at the gravel pit. I am not convinced that Mr. Geoghegan knew that Mr. Commodore would kill Mr. Smyth.
- [36] Those are the facts that support the convictions for kidnapping and manslaughter and upon which this sentencing shall be based.
- [9] The procedure for the finding of facts were set out in paras. 3-5 of the sentencing decision:
- [3] Section 724(2) of the Criminal Code sets out the procedure for fact-finding in the case of a jury trial. It states:

Where the court is composed of a judge and jury, the court

- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
- [4] This Court is bound by the express and implied factual implications of the verdict, but if the factual implications are not clear, then a determination must be made of the facts. In making that determination, this Court is not to try and follow the jury's reasoning but may make an independent finding of the relevant facts. A fact that is consistent only with a verdict rejected by the jury must also be rejected: *R. v. Ferguson*, 2008 SCC 6, at paras. 15 to 22.
- [5] The findings of fact do not necessarily require that the accused be given the most favourable view of the evidence: *R. v. Ward*, 2009 BCCA 409.

[10] Mr. Commodore argues that because the findings state that he was a co-principal in the kidnapping of Mr. Smyth and killed Mr. Smyth while carrying out the common unlawful purpose of kidnapping, the result is that the court has already concluded Mr. Commodore to be guilty of first degree murder. Hence, the application for recusal on the grounds of a reasonable apprehension of bias.

Discussion

[11] The leading authority addressing the concept of a reasonable apprehension of bias is *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, where de Grandpré J. said at pp. 394-395:

the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude "

I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[12] The reasonable person, as contemplated by de Grandpré J., is one who analyzes the issue with a complex and contextualized understanding. In order to find bias, there must be some indication that the judge was not approaching the case with an open mind. Those principles were set out in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at paras. 48-49:

48 We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.

49 Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

[13] The test, as enunciated by de Grandpré J., is an objective one with a two-step analysis: the person considering the alleged bias must be reasonable, and the apprehension of bias must also be reasonable in the particular circumstances.

[14] In S.(R.D.) at para. 111, the Court stated:

111 This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"

[Emphasis in original.]

[15] The recusal principles in assessing whether there is a reasonable apprehension of bias were neatly summarized in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 [Taylor Ventures] at para. 7:

[7] The leading case on recusal is *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. Counsel for the respondent correctly identified the principles governing the reasonable apprehension of bias concept as discussed in *Wewaykum* and I quote from his factum:

7. These principles are:

(i) a judge's impartiality is presumed;

(ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) the criterion of disqualification is the reasonable apprehension of bias;

(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

(v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;

(vi) the test requires demonstration of serious grounds on which to base the apprehension;

(vii) each case must be examined contextually and the inquiry is fact-specific.

[Emphasis in original.]

[16] The correctness of a subsequent decision does not operate to cure a reasonable apprehension of bias. The words or conduct of the judge are to be viewed in context. At para. 100 of S.(R.D.), the Court stated:

100 In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances" However, if the words or conduct of the judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

[17] The question of bias can arise where a judge has made prior rulings in the same matter or in a matter involving the same parties.

[18] In *R. v. Downer*, [1977] O.J. No. 417, 35 C.C.C. (2d) 198 (Ont. S.C.), the court ruled that there was an apprehension of bias with respect to the same judge presiding over separate jury trials arising out of the same incident. The trial judge had appropriately instructed the jury in the first trial that credibility and weight to be attached to the evidence was exclusively within their domain. During the charge, the trial judge stated that the evidence was ample to prove that the applicant had committed a robbery. As a result of that comment, the applicants, in their separate trial, argued that there would be a reasonable apprehension if the same judge presided.

[19] In allowing the application for recusal, the court concluded that the test set out in *Nord-Deutsche Versigherungs Gesellschaft and Her Majesty the Queen*, [1968] 1 Ex. C.R. 443 [Nord-Deutsche] was no longer applicable. At paras. 6-7 of the decision, the court stated:

6 Counsel for the Crown argues that upon the accepted test a reasonable man fully apprised of the circumstances would feel no serious apprehension of bias. He points out that Judge Hurley has indicated no animosity to these accused, that there is no suggestion that his conduct on the previous trial was anything but exemplary. He relies upon the dicta of Jactett, P., in *Nord-Deutsche v. The Queen* at p. 457:

"In my view, there can be no apprehension of bias on the part of a judge merely because he has, in the course of his judicial duty, expressed his conclusion as to the proper findings on the evidence before him. It is his duty, if the same issues of fact arise for determination in another case, to reach his conclusions with regard thereto on the evidence adduced in that case after giving full consideration to the submissions with regard thereto made on behalf of the parties in that case. It would be quite wrong for a judge in such a case to have regard to "personal knowledge" derived from "a recollection of the evidence" taken in the earlier [case]. It is not reasonable to apprehend that there is "a real likelihood" that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case."

7 In my view, this test, which is almost one of judicial infallibility, is one that can no longer be applied

[20] In *R. v. Nolin*, [1982] M.J. No. 29, 1 C.C.C. (3d) 36 (Man. C.A.), leave to appeal to the Supreme Court of Canada refused December 21, 1982, the majority of the Court held that there was a reasonable apprehension of bias where the same judge dealt with evidence at a preliminary

hearing and intended to continue with the matter after it was converted to a trial proper. The judge had excluded inculpatory statements made by the accused at the preliminary hearing. The Crown had argued that there was a reasonable apprehension of bias if the same judge presided at trial.

[21] The majority at page 39 adopted the following comments from the motions judge:

I think that there is a reasonable apprehension that a judge in the same proceedings, involving the same parties, having made a determination of an important issue, might be perceived as not being able to approach it with a totally fresh and open mind, and in that degree and in that degree only do I find that there is a reasonable apprehension of bias.

[22] In dissent, Huband J. referred to Downer and concluded that the judge had gone too far in rejecting Nord-Deutsche, and stated at pages 44-45:

Jackett P. held that there was no apprehended bias and relied upon a previous judgment by Hyde J. in *R. v. Barthe*, [1964] 2 C.C.C. 269 to underline the fact that a judge does not lose his impartiality from having made prior rulings or decisions which in turn were impartially made

In my view the correct view of the matter is that which, as I understand it, was adopted by Hyde J. in *Barthe v. The Queen*, when he said that "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process". In my view, there can be no apprehension of bias on the part of a judge merely because he has, in the course of his judicial duty, expressed his conclusion as to the proper findings on the evidence before him. It is his duty, if the same issues of fact arise for determination in another case, to reach his conclusions with regard thereto on the evidence adduced in that case after giving full consideration to the submissions with regard thereto made on behalf of the parties in that case. It would be quite wrong for a judge in such a case to have regard to "personal knowledge" derived from "a recollection of the evidence" taken in the earlier cause. It is not reasonable to apprehend that there is "a real likelihood" that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case.

In the course of his decision granting the writ of prohibition, Grange J. suggests that the test applied by Jackett P. in the *Nord-Deutsche* case, *supra*, should not be applied. I can well understand why Grange J. granted prohibition on the application before him. The comments of Judge Hurley indicated a conclusion on his part as to the guilt of the accused, even though that was not a necessary judicial conclusion in the case before him. Judge Hurley made a gratuitous statement which he was under no duty to make in order to reach a proper disposition of the matter. It was not necessary for Grange J. to find that the *Nord-Deutsche* case had been overruled in order to grant prohibition. I am of the view that Grange J. went too far in suggesting as he did that the decision of Jackett P. should no longer be followed. I cannot agree with the conclusion drawn by Grange J. that the decision of the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board* has overturned the statement of the law by Jackett P.

- [23] I am not bound to follow Downer and I respectfully decline to do so. I prefer the reasoning of Huband J. I also note that there was no reference in Downer to the decision in *R. v. Rowbotham* (No. 1), [1976] O.J. No. 1660, 2 C.R. (3d) 217 (Ont. C.C.). Rowbotham was decided in the year prior to Downer, and it may be that the Downer court was not referred to that earlier decision. Of particular note are the comments at paras. 4-5 of Rowbotham which deal with jury trials and the reality that it is the jury which determines guilt or innocence. I agree with those comments.
- [24] Mr. Commodore's argument fails to take into account the mandatory provisions of s. 724(2) (a), which states that the court must accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty.
- [25] It is the jury's verdict that governs the findings of fact. The jury only delivers the verdict, it does not give reasons or pronounce the findings of fact that are necessary for sentencing purposes. Although the trial judge may find any other relevant fact that was disclosed by evidence at the trial to be proven, the court is bound to accept the jury's verdict that dictates the facts, express or implied.
- [26] To follow Mr. Commodore's argument to its logical conclusion would mean that whenever there is a severed trial and a finding of guilt on the first trial, any references to the remaining accused in the findings of fact would automatically result in an apprehension of bias if the same judge presided over the remaining accused. That cannot satisfy the test as set out by de Grandpré J. Each case must be assessed within its particular circumstances and in the context of the particular proceeding.
- [27] It would be disingenuous to ignore the jury's verdict in the Geoghegan trial and not refer to Mr. Commodore in the findings of fact. It was in the context of finding facts arising out of that verdict and as needed for sentencing that the reference was made to Mr. Commodore's involvement, based on the evidence as presented to and taken by the jury.
- [28] The trier of fact or decision maker in Mr. Commodore's trial will be a new jury. There is a publication ban in effect. The new jury will not be aware of the evidence that had previously been given, nor will it be aware of the findings of fact as they relate to Mr. Geoghegan. There will be some differences in the evidence to be presented. For example, Ms. Loewen will not testify as to any involvement of Mr. Commodore. Her evidence at the Geoghegan trial included inculpatory statements he made to her.
- [29] Mr. Snowden had testified that Mr. Geoghegan admitted his involvement in the events and what Mr. Geoghegan told him of Mr. Commodore's actions. Mr. Snowden will not be a witness in this trial.
- [30] The Crown will take no issue with Vetrovec cautions being given with respect to Ms. Loewen, Mr. Sims, and Mr. Geoghegan. In the first trial, only Ms. Loewen was subject to the Vetrovec caution.

- [31] Mr. Geoghegan's criminal record was sanitized to some degree at his trial. That will not be the case here. His cross-examination by defence counsel will not be constrained to the extent that it was when questioned by Crown counsel.
- [32] The result is that this will not be the same trial that this Court presided over with respect to Mr. Geoghegan. The jury will be making different and fresh assessments of the evidence, as will the Court when charging the jury.
- [33] I depart from the comments in Downer with respect to the concerns that the jury might be influenced by the judge's assessment of the evidence. Juries are given instructions, and it is expected and assumed that the instructions will be followed. Juries are charged with the most complicated of cases and given complex instructions. Juries routinely follow the instructions and return verdicts.
- [34] The jury will be instructed that it is not my role to express any view on the guilt or innocence of Mr. Commodore, but if I do inadvertently, it must be ignored. The jury will be told that even though I or counsel express views of the evidence, it is the jury's understanding of the evidence that counts. To suggest that the jury might fail to follow the instruction that it is the sole judge of the facts would not give a jury the credit that it deserves.
- [35] There has been no prior ruling with respect to Mr. Commodore's credibility. Contrast that with the case where the accused's testimony has not been credible within a voir dire. The judge rules on the voir dire and proceeds with the trial, even though there has been a finding that the accused was not credible. The judge is presumed to disabuse his or her mind with respect to the credibility issue.
- [36] Take an example of a trial where, in the course of a voir dire, the court hears evidence of a full and complete confession, finds the accused not credible regarding his version of events, but rules the evidence to be inadmissible. A person who is not informed or with knowledge of all the relevant circumstances might conclude that there existed an apprehension of bias where the trial judge continued to preside over the trial. However, the informed person with knowledge of the relevant circumstances would understand that the judge would simply disabuse his mind as to what has been heard and carry on.
- [37] In *R. v. M.P.S.*, 2013 BCSC 1905, at paras. 13-14, the court said the following:
- [13] In *R. v. Novak* (1995), 59 B.C.A.C. 152, a judge found the accused guilty of two counts of assault arising out of two separate incidents which were tried separately, one after the other. In the first trial the trial judge had made adverse credibility findings against the accused. The British Columbia Court of Appeal was of the view that this did not necessarily result in a reasonable apprehension of bias. Prowse J.A. stated at para. 7:

7 The fact that a trial judge has ruled adversely in a previous case on the credibility of either a defence witness or the accused does not necessarily result in a reasonable apprehension of bias. Something more is required showing a predisposition by the adjudicator with respect to the accused's credibility, such as to amount to pre-judgment of the result of the second hearing. In this case, that "something more" is lacking.

[14] In *R. v. G.H.* (2002), 165 O.A.C. 56, at para. 6 the following appears:

[6] Trial judges are constantly called upon to assess credibility in making rulings on pre-trial motions and voir dires during the trial. It is a necessary and accepted part of the judicial role and the administration of justice that those conclusions will not impermissibly flow through to the trial proper. A trial judge's assessment of the credibility of an accused during the trial will depend on what the accused says during his or her testimony, that is if the accused chooses to testify. [Emphasis added in M.P.S.]

[38] I conclude that in these circumstances, there is no basis for a reasonable apprehension of bias. The decision maker in this trial will be a new jury. There are no findings from the Geoghegan trial that are binding on this trial. There have been no credibility findings with respect to Mr. Commodore. This matter will be decided only on the evidence that is adduced on this trial.

[39] I can do no better than to repeat what was said in *Taylor Ventures* at paras. 8-9, as it relates to the concern that findings of fact in the Geoghegan trial raise an apprehension of bias:

[8] Applying those principles to the present case I cannot accept the appellant's contention that there exists a reasonable apprehension of bias. On the question of transposing evidence from other proceedings into this trial the judge said:

[11] The question has been raised whether I will take into account evidence heard in other proceedings in coming to a determination of the outcome of this Trial. Judges clearly only listen and are guided only by the evidence heard at trial and there is no difficulty for judges to disabuse their minds of evidence heard in other matters even if the context of those other matters involves some or all of the same parties and issues. As well, judges are often having to disabuse their minds in the context of voir dires, press coverage, legislative debate and the supposed views of the community expressed in social discussion. Judges must and will ignore what is not in evidence. I must also say that our memory of previous cases often has a fairly short "shelf life".

[9] Any reasonable, well informed person would accept the judge's assurance that he would decide the case only on the evidence admitted at the trial. This duty is so basic to the judicial function that the appellant's concern amounts to nothing more than groundless suspicion.

[40] An informed person viewing the question realistically and practically, and having thought the matter through, would conclude that there is no reasonable apprehension of bias.

[41] I therefore conclude that Mr. Commodore's application for recusal must fail.

"Dley J."

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Prepared on 28 October 2026 · Esheria