
CANADA / JUDGMENT

R. v. Couture

2004 BCCA 215

COURT

British Columbia Court of Appeal

DECIDED

16 April 2004

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2004 BCCA 215 R. v. Couture

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Couture,

2004 BCCA 215

Date: 20040416

Docket: CA031054

Between:

Regina

Respondent

And

David Raymond Couture

Appellant

THERE IS A BAN ON PUBLICATION OF THE IDENTITY OF ANY VICTIM OR WITNESS PURSUANT TO SECTION 486(4.1) C.C.C.

Before:

The Honourable Madam Justice Levine

(In Chambers)

M.K. Woodall and I. Carter

Counsel for the Appellant

B. MacLean

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

March 24, 2004

Place and Date of Judgment:

Vancouver, British Columbia

April 16, 2004

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

- [1] The appellant, David Raymond Couture, was convicted by a Supreme Court justice of two counts of second degree murder and sentenced to life imprisonment with no eligibility for parole for 16 years. He has appealed his convictions, and applies for judicial interim release pending his appeal.

The Convictions

- [2] The convictions were for the murders of two young women, his girlfriend, aged 25 and her friend, aged 19 years, in September 1986. Their decomposed bodies were found three months after they disappeared, in December 1986. The cause of death could not be determined and no forensic evidence could be obtained. The murders went unsolved until the appellant's convictions in July 2003.
- [3] There was evidence that the appellant had been physically abusive to his girlfriend. He twice suggested to a man with whom she had developed a new relationship that "maybe he should just kill her". The trial judge found that in the month before the murders the appellant was "a controlling, possessive, jealous person and given to rages".
- [4] The Crown's theory was that the appellant murdered his girlfriend in their home, murdered her friend because she was a witness to the murder, and borrowed his friend's truck to transport the bodies to the location where they were found in December 1986. At that time he asked his friend not to tell the police that he had used the truck.
- [5] In 1989, the appellant was in jail on other charges when he met Mrs. Darlene Schwab, who attended at the prison as a Christian counsellor. At their second meeting, he told her details of the two murders. After his release on parole, he lived with Mrs. Schwab and her family for eleven months.

- [6] In 1995, Mrs. Schwab divorced her husband and in 1996, she and the appellant were married. They separated in 1997, and (now) Mrs. Couture went to the police and made a statement setting out what the appellant had told her about the murders. She gave a second statement at the request of the police. The first statement was audiotaped; the second was videotaped. Neither statement was given under oath and Mrs. Couture was not cross-examined.
- [7] The appellant and Mrs. Couture reconciled subsequent to Mrs. Couture giving the statement to police. In 2000, the appellant and Mrs. Couture met with their pastor and the appellant told the pastor he was responsible for or involved in the deaths of two people 14 years before. The appellant was arrested in November 2000.
- [8] When the matter came to trial, Mrs. Couture was not compellable as a witness. The Crown sought to have her statements to the police admitted as evidence. After a voir dire, the trial judge found the statements to be admissible under the principled exception to the hearsay rule. She held that the test of necessity was met because Mrs. Couture was neither competent nor compellable to testify, and the test of threshold reliability was met, "taking into account the circumstances surrounding the two statements" (reasons for voir dire ruling, para. 17).

The Appeal

- [9] The appellant challenges the trial judge's finding that Mrs. Couture's statement met the threshold test of reliability. In her reasons for the voir dire ruling, the trial judge referred to evidence of other witnesses corroborating that of Mrs. Couture. The appellant claims that the trial judge erred in law in referring to corroborating evidence in the context of determining the threshold reliability of an out-of-court statement for the purposes of the principled exception to the hearsay rule. He relies on *R. v. Starr*, [2002] 2 S.C.R. 144 where Iacobucci J. said (at para. 217):

At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability.

[Underlining added.]

- [10] Counsel argues that the statements made by Mrs. Couture were the most significant pieces of evidence implicating the appellant in the murders and therefore this would not be an appropriate case to apply the "curative provision" in s. 686(1)(b)(iii) of the Code.

Appellant's Background

- [11] The appellant is 43 years old. He has a grade 11 education. He has resided in British Columbia since 1976. He has a lengthy criminal record, dating from 1978. In addition to offences involving property, one offence of driving while impaired and one offence each of possession and trafficking in a narcotic, he has been convicted of offences involving violence, including assault with a weapon in 1984, robbery in 1988 and assault in 2000.
- [12] The appellant was released on bail pending his trial on strict conditions. He was confined to his home with Mrs. Couture 24 hours a day, except for the purposes of employment. He was allowed to go to his counsel's office, church and medical and dental appointments, but only while accompanied by Mrs. Couture. He was required to report at least once a week to his bail supervisor. A further condition, which Crown counsel suggested was unenforceable, required Mrs. Couture to advise the bail supervisor forthwith "if there are any occurrences of concern" to her. In describing the effect of the conditions, appellant's counsel said that Mrs. Couture was effectively the appellant's "jailer".
- [13] The appellant was employed while on bail. In a supporting letter, one of his employers stated that the appellant and Mrs. Couture worked together well as a team and appeared to enjoy working together.
- [14] The trial judge commented in her reasons for sentence on the appellant's "attempts to control his life" and his conversion to Christianity which began in 1989 and has progressed since that time. She had before her 37 letters of reference filed in his support. She said (at para. 6):

The evidence at trial, along with submissions today, lead me to believe that there has been a significant change in David Couture from the man who murdered Darlinda and Karen 17 years ago. His rehabilitation may be said to have begun, but it is not certain by any means.

- [15] She also referred to evidence that indicated that the appellant "still has problems with his anger".

Statutory Criteria for Release

- [16] On this application for judicial interim release, the appellant must establish that he has met the three criteria set out in section 679(3) of the Criminal Code:
- (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.

[17] The Crown takes no issue with the first two matters. Crown counsel concedes that the appeal is not frivolous, although she argues that it will fail. Nor is she concerned that the appellant will not surrender himself into custody in accordance with an order. On the evidence before me, I too am satisfied that the appellant has established the first two of the three criteria he must meet.

The Public Interest

[18] The issue on this application is whether the appellant's detention is necessary in the public interest.

[19] The meaning of the "public interest" in the context of s. 679(3) of the Code was considered by McEachern C.J.B.C (as he then was) in *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269 (B.C.C.A. (chambers)) and by Ryan J.A. in *R. v. Mapara* (2001), 158 C.C.C. (3d) 312 (B.C.C.A.).

[20] In *Nguyen*, the applicant for release had been convicted of second degree murder, while in *Mapara* the conviction was for first degree murder. In both cases, the point was made that Parliament has provided for the release of all offenders pending appeal, including convicted murderers. In this context, McEachern C.J.B.C. discussed the purpose for bail pending appeal in *Nguyen* (at para. 16):

Considering bail applications with the public in mind can mean different things in different contexts. In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case, is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.

[Underlining added.]

[21] In *Mapara*, Ryan J.A. echoed McEachern C.J.B.C.'s statement of the purpose of bail (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.

[22] She summarized the principle underlying the analysis of the public interest as the balance between enforceability and reviewability, stating (at para. 35) that "[v]ery strong grounds will tip the scale in favour of reviewability" and (at para. 36):

Depending on the demonstrated strength of the grounds, other factors, such as the circumstances of the offence - for example, premeditated violence - and inordinate delay will be matters to weigh in the balance. The essential question, however, will be whether the appellant has been able to establish that enforceability is outweighed by reviewability.

[23] In the case of first degree murder, as in Mapara, premeditation is a condition for the conviction. That is not the case where, as in this case and Nguyen, the conviction is for second degree murder. The degrees of premeditation and violence are relevant. McEachern C.J.B.C. made this point in Nguyen (at paras. 22-3):

Moreover, as a great many offences involve some violence, the fact that there is violence cannot of itself be conclusive against release as there would otherwise be very few cases where a detention order should not be made. An important consideration is whether the violence occurred in circumstances of malevolent rather than foolish or spontaneous intent. It is important to consider whether the applicant is a person prone to violence or cruelty or whether she or he became caught up in circumstances where awful things sometimes happen. Without stating any rule which can be applied to every case, it is my view that detention pending appeal will not always be necessary for young men or women fighting on a Saturday night, even though awful consequences sometimes result.

On the other hand, where the offence appears to have been committed with wanton, deliberate or cruel violence, particularly against vulnerable victims such as children or aged persons, or by persons with substantial criminal records or by persons already on bail or parole for similar offences, then the public may well lose respect for the administration of justice if detention is not continued after conviction.

[Underlining added.]

Disposition of this Application

[24] In addition to the material filed on this application, I have reviewed the transcripts of the statements made by Mrs. Couture to the police, the evidence on the voir dire of the other witnesses referred to by the trial judge in the portion of her reasons for her voir dire ruling to which the appellant takes objection and the submissions on sentencing. From my review of the evidence and the principles relevant in considering the public interest on an application for release pending appeal, I have concluded the appellant has not established that his detention is not necessary in the public interest.

[25] I have considered the following factors in reaching this conclusion:

- (a) On an application by a convicted offender for release pending appeal, the presumption of innocence does not apply as it does when bail is granted pending the trial (see *R. v. Demyen* (1975), 26 C.C.C. (2d) 324 at 326 (Sask. C.A.), quoted in *Mapara* at para. 25). Thus, the fact that the appellant was released pending his trial and apparently complied with the strict conditions imposed on him carries little weight in determining whether the confidence of the public in the administration of justice would be affected by his release pending appeal.
- (b) There were two murders. Their circumstances suggest violence that occurred in "circumstances of malevolent rather than foolish or spontaneous intent" (*Nguyen* at para. 22). The evidence indicated that the appellant was prone to violence. His girlfriend was vulnerable within the abusive relationship. Her friend was murdered to hide the girlfriend's murder.
- (c) The trial judge expressed reservations about the appellant's rehabilitation and anger management. The evidence indicates that prior to and at the time Mrs. Couture made her statement to police, she had been subject to abuse by the appellant and their relationship was unstable. While the supporting letters filed on behalf of the appellant at his sentencing indicate that they now have a stable and loving relationship, I am not persuaded that conditions requiring that Mrs. Couture act as the appellant's "jailer" are appropriate.
- (d) I am of the view that the appellant's appeal is arguable, but does not meet the standard of "very strong grounds" suggested in *Mapara*.

[26] For the above reasons, I dismiss the application for release pending appeal.

"The Honourable Madam Justice Levine"

Corrigendum: April 20, 2004

There is a Ban on Publication of the identity of any victim or witness pursuant to section 486(4.1) C.C.C.

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