

CANADA / JUDGMENT

R. v. Dhaliwal

2006 BCCA 43

COURT

British Columbia Court of Appeal

DECIDED

23 January 2006

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2006 BCCA 43err1 R. v. Dhaliwal COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Dhaliwal, 2006 BCCA 43 Date: 20060123 Docket: CA033587 Between: Regina Respondent And Jagpal Singh Dhaliwal Appellant Before: The Honourable Madam Justice Saunders (In Chambers) Oral Reasons for Judgment D. Markovitz Counsel for the Appellant P. Eccles Counsel for the (Crown) Respondent Place and Date: Vancouver, British Columbia 23 January 2006

- [1] SAUNDERS, J.A.: Mr. Dhaliwal applies for judicial interim release pursuant to s. 679 of the Criminal Code pending his appeal from conviction and sentence. On 25 June 2005 Mr. Justice Romilly, sitting alone, convicted Mr. Dhaliwal of importing cocaine and possession of cocaine for the purpose of trafficking. On 7 November 2005 he entered a conditional stay on the possession count and sentenced Mr. Dhaliwal to incarceration for a term of six years on the importation count.
- [2] Section 679(3) of the Criminal Code establishes the criteria an applicant must meet to attain release pending the determination of his appeal: . . . the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
- (a) the appeal or application for leave to 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] Mr. Justice Romilly concisely set out the circumstances of the offence in his reasons on sentencing:
- [4] The accused is the owner operator of a transport truck and at the material time he was operating under an agreement to haul goods to and from the United States of America on September 20, 2003, at the Canada-U.S. border, Canada Customs officials found six kilograms of cocaine secreted in a hidden compartment in the cab of his truck. The cocaine was between 82% and 91% pure and was valued at between \$192,000 and \$210,000.
- [4] In his reasons for conviction there is more detail:

- [3] At all material times, the accused was the owner/operator of a transport truck. He entered into an agreement with Spady Transport Ltd ("Spady") to haul goods to and from the United States of America. Under the agreement with Spady, the truck was registered in the name of Spady for the sole purpose of obtaining the benefit of their fleet insurance. The agreement also stated that the accused was not allowed to carry any passengers unless they had a signed waiver.
- [4] On September 20, 2003, the accused passed through the Pacific Highway Border Truck crossing into the United States of America. At the border crossing his truck was stopped by U.S Customs and searched. The search was conducted by Inspector Schmidt, an officer with U.S. Customs. Inspector Schmidt testified that when checking the cab area of the accused's truck he noticed that the bunk did not lift up as it normally does in the hundreds of trucks that he examines each day. He noticed three hidden compartments covered by a piece of sheet metal with some loose screws around the sheet metal door. He testified that this was certainly not something that was constructed by the manufacturer of the truck, Kenworth. The officer also noted duct tape in the area of the sheet metal door. He was of the view that it was the type of duct tape that is commonly available in hardware stores. Officer Schmidt took a photograph of the area at the request of the R.C.M.P.
- [5] On September 27, 2003, Inspector Schmidt again noticed the truck come through the border crossing. During his inspection of the truck on that occasion he took the opportunity to again look at the area of the cab of the truck where he had noticed the three hidden compartments on September 20, 2003. On this occasion he noticed that the screws which held the sheet metal door in place were no longer loose and instead they were in place holding the sheet metal door closed.
- [6] Inspector Schmidt testified that on neither of these occasions did he mention anything about his suspicions to the accused driver of the truck. He did, however, enter a report of his suspicions onto the computer system and on October 1, 2003, he advised Canadian Customs of his observations.
- [7] As a result of the information they received from Inspector Schmidt, Canadian Customs put the truck on a "watch for" list. At approximately 2:25 a.m. on October 10, 2003, the truck was searched by Canadian Customs on its return trip from the United States of America. In a search of the cab area of the truck the Customs officials found approximately six kilograms of cocaine in a Nike bag in the secret compartment of the cab area that was previously observed by Inspector Schmidt. The sheet metal door that covered this secret compartment was screwed into place. The cocaine was between 82% to 91% pure and was valued at between \$192,000.00 and \$210,000.00. No identifiable fingerprints were found on the seized cocaine. There was no access to the seized drugs from the outside of the truck.
- [8] In the cab of the truck the Customs officers also found a cordless drill together with some drill bits.

- [5] The case, thus, was, on the issue of knowledge, purely circumstantial.
- [6] Mr. Justice Romilly set out the relevant principles as to the burden of proving knowledge and regarding proof through use of circumstantial evidence. He found "there is an irresistible inference" that Mr. Dhaliwal had the requisite knowledge and control. He then referred at some length to *R. v. Jenner*, [2005] MBCA 44, discussing the circumstances and conclusions in that case and ending with:
- [28] Similarly, in the case at bar no reasonable explanation was offered to rebut the irresistible inference that the accused had knowledge and control of the cocaine found in his truck. . . . He found no rational inference consistent with innocence.
- [7] On behalf of Mr. Dhaliwal it is said that this treatment of the circumstantial evidence and the conclusion that there was an irresistible inference of knowledge is an error that is likely to succeed on a conviction appeal. On behalf of the Crown it is said that the circumstantial evidence easily supported the conviction, and that the appeal is without merit.
- [8] I am satisfied that the ground of appeal meets the relatively low threshold of s. 679(3)(a), that is, I am satisfied that the appeal is not frivolous.
- [9] The second criteria is the issue of compliance with the surrender requirement. Mr. Dhaliwal is 40 years old. He has resided in Canada since 1986 when he and his parents came to Canada under sponsorship of his brother. He is married and has two children aged 9 and 12. He has no previous criminal record, and he has complied with all reporting and surrender requirements of previous court orders. Although he now stands convicted of the offences for which he was charged, and in this the circumstances before me differ from those before the trial court making the previous orders, the circumstances persuade me that Mr. Dhaliwal has met the burden under s. 679(b).
- [10] This leaves for consideration s. 679(3)(c), consideration of the public interest. The objectives of s. 679(3)(c) were discussed in this Court's decision in *R. v. Mapara*, 2001 BCCA 508, which in turn applied *R. v. Farinacci*, (1993) 86 C.C.C. (3d) 32 Ont. C.A. and *R. v. Baltovich*, 470 O.R. (3d) 761. Madam Justice Ryan, in *Mapara*, recognized that the competing principles are enforceability and reviewability. She cited with approval the discussion of public interest from *Farinacci* and Mr. Justice Rosenberg's statement in *Baltovich* that "the matter that is most influential on the question of the public interest is the strength of the grounds of appeal", and said:
- [35] In *Demyen* when Culliton C.J.S. speaks of the necessity for the appellant to show "something more" than the requirements of paragraphs (a) and (b) of s. 679(3) to establish that his detention is not necessary in the public interest, he must be referring to the necessity for the appellant to show that the principle of enforceability is outweighed by that of reviewability. In my view the strength of the interest of reviewability must primarily be measured by examining the likelihood of the success of the appeal. Very strong grounds will tip the scale in favour of reviewability.

- [36] Depending on the demonstrated strength of the grounds, other factors, such as the circumstances of the offence - for example, pre-meditated 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.
- [11] In this case I have only the reasons for judgment of the learned trial judge from which to assess as best I can, the strength of the appeal. Knowing only that, and accompanied by Mr. Markovitz's explanation of the ground of appeal, I cannot say that it reaches at the strength referred to by Madam Justice Ryan as tipping the scale in favour of reviewability.
- [12] The conviction in this case was of importing cocaine through use of Mr. Dhaliwal's commercial vehicle that crossed the border as part of the normal trade between Canada and the United States of America. The substance carried into Canada is illicit and does untold damage. Importation is a vital link in the chain from production to retail trafficking, and necessarily engages others in criminal activity at both ends of the trip. That is, the offence is part of a criminal enterprise, unlike some of the "one of" cases I was referred to, such as R. v. O'Grady, 1999 BCCA 711. In this case, and given my view of the merits of the appeal, and notwithstanding Mr. Markovitz's strong submissions on behalf of Mr. Dhaliwal as to his personal circumstances, I am of the view that public confidence in the administration of justice does not favour the application. That is, I am not satisfied that Mr. Dhaliwal's detention is not necessary in the public interest.
- [13] The trial of this case was not long. The issue described is discreet. Hearing dates this spring are available. The principle of reviewability and the interests of the public, in my view, will be best served by this case proceeding with dispatch. To the extent that my comments may assist in having this appeal brought before a panel of this Court as soon as reasonably practicable, I would ask the registry to accommodate Mr. Markovitz, on behalf of Mr. Dhaliwal, with an early hearing date when the appeal is ripe for that step.
- [14] The application is dismissed. "The Honourable Madam Justice Saunders" Correction: 10 February 2006 In reasons for judgment dated January 23, 2006, the following change should be noted: The list of Counsel has been corrected and should read as follows: D. Markovitz Counsel for the Appellant P. Eccles Counsel for the (Crown) Respondent

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/06/00/2006bccca0043err1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-dhaliwal-2006>

Prepared on 27 October 2026 · Esheria