
CANADA / JUDGMENT

R. v. Evanshen

2020 BCSC 525

COURT

Supreme Court of British Columbia

DECIDED

28 January 2020

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2020 BCSC 525 R. v. Evanshen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Evanshen,

2020 BCSC 525

Date: 20200128

Docket: 27813-4

Registry: Vancouver

Regina

v.

Luke Jared Evanshen

Before: The Honourable Madam Justice Sharma

On appeal from: Provincial Court of British Columbia,

February 4, 2019 (conviction) & April 25, 2019 (sentence)

(R. v. Evanshen, North Vancouver Docket No. 64950-1)

Oral Ruling on s. 683(5)(e) Application

Counsel for the Crown (Respondent):

J.L. Horneland

Appearing on his own behalf (Appellant):

Luke Evanshen

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2020

- [1] THE COURT: This is an application pursuant to s. 683(5)(e) of the Criminal Code to stay a probation order under s. 731. Crown opposes the relief sought.
- [2] In terms of background, the appellant was charged with five counts relating to an incident that occurred at a fitness facility in West Vancouver in July 2017. That incident involved an interaction he had with employees of the fitness facility and events surrounding his arrest, which took place while he was walking home.
- [3] The trial took place before the Provincial Court in North Vancouver starting on June 1, 2018, and continued October 17 and 18, and December 7, 2018. On February 4, 2019, the applicant was convicted of Count 1, assaulting an employee of the fitness facility, and Count 2, assaulting a police officer and resisting lawful arrest. He was acquitted on the third count of uttering threats, and the Crown stayed two other charges laid against him.
- [4] The applicant filed a notice of appeal from his conviction within a few days. That appeal was originally set to be heard on May 8, 2019. On April 10, that hearing date was set aside because the sentencing had not yet concluded and trial transcripts apparently were not yet ready.
- [5] On April 25, 2019, the trial judge sentenced the applicant to a 30-month conditional discharge concurrently on Counts 1 and 2. Pursuant to s. 730 of the Criminal Code, a person found guilty may be directed to be discharged conditionally on conditions prescribed in a probation order. The hearing date for both the conviction and sentence appeal is May 27, 2020.
- [6] Section 683(5)(e) states a court can suspend a probation order if it considers it to be in the interests of justice. Section 683(5.1) states that before making an order to stay a probation order, the court may order that an offender enter into an undertaking or a recognizance. In this case, as an alternative to dismissing the application, the Crown would seek certain orders in that regard.

- [7] Crown counsel referred me to a number of cases that set out the test for applications under this section, including *R. v. Kyzyk*, 2015 MBCA 85; *R. v. Gould* 2012 BCCA 308 and *R. v. Cadman*, 2016 BCCA 187. As articulated in those cases, the factors to consider when deciding whether the interests of justice justify suspending the probation order, and those include the following:
- a) the seriousness of the offence and circumstances surrounding it; the relative merits of the ground of appeal;
 - b) the anticipated delay for the appeal, and whether that delay would render the appeal nugatory;
 - c) the criminal background of the offender and his current circumstances;
 - d) the nature and degree of prejudice, if any, if the relief is not granted, and;
 - e) the impact of the suspension on the maintenance of public confidence in the administration of justice.
- [8] Before turning to each factor, I will briefly review the statutory basis and grounds available for the appeals that will be heard in May.

ANTICIPATED GROUNDS OF APPEAL

- [9] Section 813(a) of the Criminal Code provides that a person may appeal a summary conviction or sentence, and in relation to those appeals, ss. 683 to 689, (excepting 683(3) and 686(5)), apply with appropriate modifications. Thus, the potential grounds for appeal from conviction for the applicant are set out in s. 686(1) and for each one of those, the case law has elucidated what is required in order for him to succeed.
- [10] The first potential ground is that the verdict should be set aside on the ground that it is unreasonable or unsupported by the evidence. The question the appellate courts ask is whether there is any evidence to support the trial judge's finding, based on the totality of the evidence, and whether the verdict flows logically from those findings: *R. v. Ceal*, 2012 BCCA 19, paras. 23.
- [11] The second ground is if the trial judge made an error on a question of law. Errors of law are reviewed on a standard of correctness, and may include an erroneous interpretation or application of the law where that error is prejudicial to the accused: *R. v. Khan* 2001 3 SCR 823.
- [12] Lastly, the verdict may be set aside on any ground that constitutes a miscarriage of justice. That may arise in a wide number of circumstances. Although the notice of appeal filed by the applicant does not identify this as a ground, Crown counsel very helpfully pointed out that it could be relevant in this case, in that the applicant represented himself at trial. Justice requires a trial judge to provide some assistance to self-represented accused persons to prevent miscarriages of justice. That assistance is meant to prevent the accused from not

being able to bring out his defence with full force and effect: *R. v. Moghaddam*, 2006 BCCA 136.

- [13] With regard to sentence appeals, appellate courts generally defer to sentencing judges, but an appeal may be successful if the sentencing judge committed an error in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor and how it impacted the sentence, or if the sentence is demonstrably unfit. (*R v. Agin*, 2018 BCCA 133).
- [14] In this case, the range of sentences available was from an absolute discharge to six months in jail. Crown submitted it is significant to this application that the applicant received the second least onerous sentence.
- [15] In his notice to appeal from conviction, the applicant identifies excessive use of a police dog as his sole ground of appeal, and he relies on *Mohamed v. City of Vancouver*, 2001 BCCA 290. With regard to the appeal from sentence, his notice simply restates s. 718.2(a) of the Criminal Code, that a sentence should be increased or decreased to account for relevant aggravating or mitigating circumstances.
- [16] I begin by noting that on its face, neither notice of appeal raises issues that are capable of being successful. With regard to the conviction appeal, the applicant has identified a civil case which is, of course, of no assistance to him on a conviction appeal. With regard to sentencing, he has not, in fact, identified a ground of appeal.
- [17] Crown did not take the position, which it was entitled to do, that the application for those reasons ought to be dismissed outright. Instead, Crown counsel identified what she best understood for the points the applicant wanted to make and framed them as best as she was able to into the existing legal framework. I commend Crown counsel for taking the time to do that because it assisted the court a great deal.
- [18] As I told the applicant during the hearing, it would assist the court very much if he could precisely identify his appeal, the legal ground of his appeals.

ANALYSIS

- [19] The sole issue is whether the interests of justice justify suspending any portion of the probation order in this case. I turn first to the seriousness of the offence and the circumstances surrounding it.
- [20] While a conviction for a simple assault is not at the high end of serious criminal offences, I do note that there is case law suggesting that that does not apply to a count of assaulting a police officer. In *R. v. Craig*, 2016 BCSC 618, a 2016 decision of the Supreme Court, this Court stated that assaulting a police officer is a significant consideration in passing sentence, because police officers' duties put them in vulnerable situations. Indeed, in *R. v. Allen*, the Ontario Superior Court stated it may be that for this type of an offence, a conditional discharge is inherently unfit. For that reason, I do not think this factor supports suspending

the probation.

- [21] The appeal will take place in four months. I appreciate that the applicant feels that any more time in which he is subjected to conditions he finds unpalatable is too long. However, from a legal point of view, the appeal has taken place in a very timely manner. The appeal will not be rendered nugatory. The accused was convicted in February 2019, but not sentenced until April 2019. Accordingly, the appeal is taking place 13 months into a 30-month conditional discharge. In my view, the law does not support a conclusion that delay would support suspending the probation order.
- [22] I must add that a portion of the delay was caused by how long it took to get the transcripts, but also the sentencing reasons. I understand Crown has now graciously ordered the reasons for judgment on sentence, despite the obligation on the applicant to do so. The importance of that is that at least some portion of the delay was occasioned by the applicant.
- [23] For convenience, I will address the remaining factors together, because that is the best way to capture the applicant's submissions. Those factors are: the relative merits of the ground of appeal, his current circumstances, and the nature and degree of prejudice with regard to whether the relief is granted, as well as maintenance of confidence in the administration of justice.
- [24] It is my understanding that the applicant has no criminal record. I further note that Crown stated that a conditional discharge does not result in a criminal record. However, both of those factors would be in favour of the applicant's position. The applicant also referred to his current circumstances.
- [25] The applicant made a number of submissions that range outside the scope of his notice of appeal. As noted, Crown did not rely on that alone for its position that the application should be dismissed, even if it was entitled to do so. I add that in addition to being outside the scope of the notice to appeal, there was no evidentiary basis for me to consider those allegations. Nevertheless, if legally relevant, I have considered the statements that the applicant made, even if they went beyond the notice.
- [26] The applicant also made a number of statements and allegations that are not legally relevant to the issues before me. I understood him to say that even if that was the case, he wanted his submissions on those matters to be on the record. For that purpose alone, I will attempt to summarize, in a general way, some of the reasons why he says not only should both his appeal succeed, but why I should suspend probation.
- [27] These are some of the allegations that were raised:
- a) The District of North Vancouver and the police are together engaging in a campaign of illegal and unjustified harassment of him, possibly for politically motivated purposes, but certainly for improper purposes.

- b) He is being targeted because there is some type of animus arising from his involvement in civic affairs.
 - c) The court has been complicit in a blatant violation of his humanity in the manner in which he was convicted, considering the manner also of his arrest and the circumstances that led to the charges being laid.
 - d) The courts should have the ability to have convicted persons on probation report not to a probation officer, but to a spiritual advisor.
- [28] The applicant believes he is raising legitimate and serious issues of concern to society in general. I make no comment on that, except to say it was clear that the applicant does hold these views strongly. However, as I explained to him, this is not the correct forum to canvass those issues. The court has an obligation to the citizens of British Columbia to be vigilant that precious court resources are directed only at matters that are within our jurisdiction.
- [29] Turning then to the applicant's submissions that do have some nexus to legal issues before me, I will look at what is stated in the notice of appeal. It identifies only one issue: the use of the police dog was excessive and the applicant specifically relies on the civil case. He has not identified in the notice how the civil case, which was brought in the context of acquittals after a criminal trial, assist his appeal.
- [30] Accordingly, on its face, the notice of appeal does not raise a meritorious ground. However, during oral submissions, he expanded his notice of appeal to include not only the use of the dog, but the conduct of the arresting officer. The facts found by the trial judge indicate that the police officer testified and the trial judge accepted that, fearing the applicant was going to punch him, the arresting officer punched the applicant first.
- [31] Crown submits that the issue of the degree of force used by a police officer was relevant at trial only to the issue to determine whether the police acted in lawful execution of their duties: *R. v. Plamondon*, [1997] BCJ No. 2757 (C.A.).
- [32] Crown submits the judge made no legal error in his analysis or conclusions on that issue. In particular, the trial judge had to assess whether he believed the arresting officer held an honest and reasonable belief that the applicant was about to punch him in the face. Whether the judge erred on that issue depends almost entirely on the trial judge's assessment of credibility of witnesses. This is a matter on which appellate courts usually extend deference to trial judges. While it is not for me to decide, and the applicant can make argument at the appeal itself, at this stage I do not view that ground supports a conclusion that the appeal is strong.

- [33] The applicant submitted that convicting him of assault in the face of the video evidence was erroneous, justifying overturning his conviction. As I understood it, he submits that it is an unjust result for him to have been charged and convicted and not the complainant, who in fact committed a simple assault on him first. The decision whether to charge someone rests with Crown counsel. The fact that the complainant was not charged was not a legal issue at trial, nor anything a trial judge could have remedied, in any event.
- [34] Also, accepting for the moment that there was a physical altercation initiated by the complainant (and I note I do not think that was the finding made by the trial judge), the entire circumstances have to be analyzed and that could conceivably result in only one of the people being charged and then convicted. Whether that is correct or not again depends upon the interpretation of evidence. To succeed on an appeal in terms of assessment of evidence, the appellant must demonstrate that there was no evidence to support the conviction. In my view, in light of the fact that the case turned largely on credibility, the degree of merit remains low.
- [35] The applicant submitted that the trial judge's findings in the context of his conviction for assault relied on the video evidence and he says it was unreasonable. That is again a question of fact and has a low chance of succeeding.
- [36] The applicant raised during his oral submissions an allegation that his trial was unfair because the person who called the police from the club (Mr. Henrickson) was not called as a witness. This person was originally listed as a Crown witness at the trial, but was not called. Crown informs me that the applicant was advised of his right to call this person to testify. The applicant submits the trial judge precluded that somehow or prevented him from doing so.
- [37] This ground was not identified in the notice of appeal nor in the application materials. Because of that, I am unable to comment on the strength of the submission. What I can say is that if the applicant properly raises this as a ground of appeal, and there is an evidentiary foundation for his position (I explicitly make no comment on that) there remains the issue of whether that fact was material to any legal conclusions made by the trial judge. I can see no nexus in that regard at this point, and so I find that does not strongly support suspending the probation.
- [38] The applicant submits that the arresting officer over-reacted and, having punched him in the face first, there is an obvious and inherent violation of his rights. He says that is the basis upon which his conviction should be overturned.
- [39] As I have noted before, the arresting officer's use of force was only relevant to the legal issue of whether his conduct was in the lawful performance of his duty. That required viewing all of the surrounding circumstances. The trial judge considered that issue and made certain findings on credibility. Specifically, he concluded that the arresting officer was responding to what he found to be an actively resisting and sometimes non-responsive person (the applicant). Again, the consideration of that issue turned on credibility. While there is a

possible avenue for the applicant to argue at appeal that the trial evidence does not support the verdict because the findings were unavailable to the trial judge, that is a high standard to meet. Given some of the undisputed evidence that is referred to in the judgment, I find that this, too, does not have a strong support for the application.

- [40] No error of law has been identified by the applicant, either in his materials or his oral submissions. I appreciate the difference between a verdict unsupported by the evidence and a verdict based on an error of law may be a distinction difficult for a self-represented litigant to understand. However, I am satisfied that the applicant was able to express before me all the issues he wants to argue at the appeal, and no matter how they are characterized, whether evidentiary or legal, I am not persuaded that any of them have a degree of merit that would justify suspending his probation.
- [41] The applicant framed most of his submissions in light of what he believes has been a great injustice visited upon him.
- [42] My conclusions in the preceding paragraphs apply equally to the consideration of the topic of miscarriage of justice. None of them, even if successful, rise to that level.
- [43] As discussed earlier, the issue of whether there was a miscarriage of justice and the degree to which the trial judge met the duty to assist a self-represented litigant to ensure defence comes out in full, is something the Crown did address. Crown identified in the submissions numerous instances where the trial judge explained the trial process, provided guidance on cross-examination generally, and directly assisted the applicant's cross-examination of witnesses by clarifying questions. Lastly, Crown says that there was basically adjournment of the trial in order to accommodate the applicant's desire to seek some advice.
- [44] The applicant did not identify, by references to the transcript or in any other evidence, the precise way in which the trial judge failed to provide assistance as required. Because this argument depends very heavily on what the trial judge said and did, there is no basis before me upon which I could find that the applicant has a meritorious appeal on this ground, and it was his obligation to set that out.
- [45] With respect to the appeal from sentence, the reasons for judgment have not yet been issued by the trial judge. I understand that the transcript remains with that judge. It is virtually impossible for me to judge the strength of an appeal from sentence without having a copy of the reasons. However, I have to note again that it is difficult to envision that there would be a strong case, given my previous discussion that some case law has suggested that a conditional discharge for assaulting a police officer is *prima facie* unfit, in that it is too lenient.
- [46] The last factor to consider is the nature and degree of prejudice, if any, if relief is not granted, as well as the impact of a suspension of a probation order on maintenance of confidence in the administration of justice.

- [47] The applicant has addressed his circumstances and discussed the prejudice that he feels comes from the probation order, and some of those comments veered between what I categorized as relevant and not relevant. However, taking them all into account, I am not persuaded the impacts he has identified do rise to the level of prejudice as required by the legal test. The conditions that have been imposed on him in the probation order are light, in the ranges of available and commonly seen in these courts and, in my view, are not specifically onerous. I appreciate the applicant feels they are onerous, but that is not the test before me.
- [48] I also note that some of the concerns raised do not arise from the probation order, but rather from directions that may have been given to the applicant by the probation officer, such as the time, place, and frequency of reporting. Those are not issues that support suspending the probation order.
- [49] The other factor identified was the prohibition on the consumption of alcohol. That is a very common condition in these courts, although Crown correctly identified there are circumstances in which it might be restricted to public consumption. In this case, the trial judge's conclusion that the applicant's degree of intoxication was a very significant contributor to the offences and to his resistance of arrest and resulted in injury. Therefore, it was not that the consumption of alcohol took place in public that animated the decision, but instead the degree of intoxication.
- [50] Accordingly, the location of the consumption of alcohol is not really what was important. In that scenario, I am unable to find there is any legal error or miscarriage of justice in that condition being imposed as a blanket prohibition.
- [51] Lastly, I find public confidence in the administration of justice does not support suspending the probation order because this was a conviction including an assault on a police officer. The applicant is challenging that conviction, which of course he is entitled to do, but in society's eyes, resisting arrest and assaulting a police officer represents behaviour that can reasonably produce fear and apprehension in the public. Police officers are first and foremost there to protect the public, and an assault on them threatens the public's sense of security.
- [52] I realize the applicant disagrees that in this case the police acted appropriately, but that is an issue for the appeal and it does not meet the test here for suspending probation.
- [53] In light of all of those reasons, I dismiss the application.

"Sharma J."

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