

CANADA / JUDGMENT

R. v. Gould

2012 BCCA 308

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 308 R. v. Gould COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Gould, 2012 BCCA 308 Date: 20120712 Docket: CA039936 Between: Regina Respondent And Elaine Gould Appellant (Applicant) Before: The Honourable Mr. Justice Chiasson (In Chambers) On appeal from: Supreme Court of British Columbia, January 18 and May 10, 2012 (R. v. Porisky & Gould, 2012 BCSC 67 and R. v. Porisky, 2012 BCSC 771, Vancouver Docket 25339-8) Appellant: Appearing in person Counsel for the Respondent: W.P. Riley Place and Date of Hearing: Vancouver, British Columbia July 4, 2012 Place and Date of Judgment: Vancouver, British Columbia July 12, 2012 Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] This appeal considers whether to suspend a conditional sentence pursuant to s. 683(5)(f) of the Criminal Code, R.S.C. 1985, c. C-46 as well as the relationship between that section and s. 679, which provides for judicial interim release.

Background

- [2] Because Ms. Gould was convicted and sentenced with Russell Porisky, reference should be made to the reasons for judgment dealing with his application for judicial interim release in appeal CA039937 with regard to the general background facts of the appeals.
- [3] On January 18, 2012, Ms. Gould, who is Mr. Porisky's partner, was convicted of tax evasion and on May 10, 2012 received a conditional sentence of six months, to be served in the parties' residence in Chilliwack, British Columbia, as well as a fine of \$27,434.56.
- [4] Ms. Gould appeals her conviction and sentence. Discussion
- [5] Ms. Gould and Mr. Porisky filed joint submissions. They focused on the criteria for release set out in s. 679(3) of the Criminal Code.
- [6] This Court in R. v. Hornby, 2003 BCCA 649, concluded that s. 679 gave the Court jurisdiction to suspend the operation of a conditional sentence (see also R. v. Lawson, 2010 BCCA 420). In 2008, Parliament amended the Criminal Code to provide in s. 683(5)(f) that a conditional sentence may be suspended where the court or a judge "considers it to be in the interests of

justice" to do so: 683 (5) If an appeal or an application for leave to appeal has been filed in the court of appeal, that court, or a judge of that court, may, when the court, or the judge, considers it to be in the interests of justice, order that any of the following be suspended until the appeal has been determined: ...

(f) a conditional sentence order under section 742.1.

[7] In its written argument, the Crown contends that: While the enactment of s. 685(3)(f) creates a new procedure for relief from a conditional sentence pending appeal, one would expect the substantive considerations in relation to such a request to be largely the same as those governing an application for judicial interim release under s. 679. ... [I]t is reasonable to assume that the Court's exercise of discretion under s. 683(5)(f) would be informed by the same factors informing an application for release under s. 679(3)

[8] The Crown proceeded to address the factors of the strength of the appeal, whether Ms. Gould would surrender when required and the public interest.

[9] In my view, this application should be determined on the basis of whether suspension of the conditional sentence is in the interests of justice, rather than on the basis of the criteria set out in s. 679(3) of the Criminal Code, although, as will be seen, the elements of the inquiry are in some respects similar. There is no reference in s. 683(5)(f) to s. 679 or to the criteria contained therein. Suspension of a conditional sentence is not addressed in the latter section. It is addressed specifically in s. 683(5). Had Parliament intended that the criteria in s. 679(3) were to apply it could have stated so. The issue is the meaning of "interests of justice" as the phrase is used in s. 683(5).

[10] Some guidance is provided by this Court's decision in *R. v. Chek TV Ltd.* (1986), 27 C.C.C. (3d) 380, 16 W.C.B. 188. The case concerned an application for the suspension of the payment of a fine pursuant to a predecessor section to s. 685(3). The appellant argued that a consideration of the merits should govern whether it was in the interests of justice to suspend payment of a fine. This Court held this to be too narrow an approach. *Craig J.A.*, in concurring reasons, stated at p. 383: ... this Court has always acted on the principle that in a criminal case the interests of justice mean not only the interests of the accused, but the interests of the State. This, of course, stems from the judgment of Lord Chief Justice Goddard in *R. v. Malinowski* (1946), 31 Crim. App. R. 116. We have been referred to that decision many times and other courts have referred to that decision. As Mr. Justice Hinkson has pointed out in referring to the judgment of Chief Justice Culliton, in Saskatchewan, the interests of the state and the public apply equally to the term 'interests of justice'

[11] In *R. v. Weinkauff*, 2008 SKCA 99, 236 C.C.C. (3d) 121, G.R. Jackson J.A. observed at para. 10: What does the phrase "interests of justice" mean in the context of s. 683(5)? In *R. v. Sunoco Inc.* [[1986] O.J. No. 3071, 11 C.P.R. (3d) 572 (Ont. C.A.)] Cory J.A. (as he then was) wrote: 5 The subsection indicates that the applicant must demonstrate that it is "in the interests of justice" to stay the payment of the fine. I recognize that the phrase "the interests of justice" must be considered from the viewpoint of the public as well as the accused: see *R. v. CHEK*

TV Ltd., a judgment of the British Columbia Court of Appeal, released February 28, 1986, as yet unreported [now reported at 27 C.C.C. (3d) 380], and R. v. Demyen (1975), 26 C.C.C. (2d) 324. 6 Nevertheless, to repeat a truism, each application will have to be considered in light of its own facts. A number of factors will have to be weighed in determining whether a court should exercise its discretion to stay. For example: Are the grounds of appeal weak or strong? Is the fine imposed out of all proportion to others levied for the same offence or is it disproportionate to the facts of the offence? Was there merely a technical breach of a statute or was it a flagrant violation? How long a period will elapse before the appeal can be heard? What is the likely effect of the levying of the fine upon the accused? Thus, the phrase "interests of justice" has come to permit the weighing of a group of factors including the public interest and a consideration of the strength of the grounds of appeal.

- [12] I agree with this conclusion and add that, in my view, taking into account the interests of the public and of the state engages a consideration of the Mapara analysis of reviewability versus enforceability (see R. v. Mapara, 2001 BCCA 508, 158 C.C.C. (3d) 312 at paras. 34-36).
- [13] Mr. Justice Doherty, writing for the court in R. v. Bernardo (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), stated at p. 131: The phrase 'the interests of justice' is used throughout the Criminal Code. It takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis. I consider that this statement accurately summarizes the approach that should be taken under s. 683(5) of the Criminal Code.
- [14] I am not convinced that the reasoning in R. v. Ali, 2008 BCCA 147, 77 B.C.L.R. (4th) 289 and R. v. Dawydiuk, 2008 BCCA 243, 256 B.C.A.C. 233 is applicable to a proceeding under s. 683(5). Although the section refers to obtaining leave to appeal, it does not distinguish between proceedings involving both conviction and sentence appeals and those dealing with sentence appeals alone in the introductory, empowering language of the section, in apparent contrast to s. 679. Subsection (f) is concerned solely with a sentence; it applies to proceedings involving conviction appeals alone, combined conviction appeals and sentence appeals and sentence appeals alone. Unlike s. 679, it does not provide for a separate regime for proceedings involving a sentence appeal alone.
- [15] In my view, the interests of justice must take into account the circumstances of the offender. As noted, the balance between enforceability and reviewability must be considered. In that context, the merits of the conviction appeal (if there is one), or the seriousness of the offence for which the offender has been convicted (if there is not), and the merits of the sentence appeal (again, if there is one), are relevant to the analysis.
- [16] In this case, a factor supporting release is the fact Ms. Gould has no prior criminal record and that she is a homemaker with responsibility for children.
- [17] For the reasons expressed in Mr. Porisky's application, I consider the appeal from conviction to be without merit: to be frivolous. I take into account the fact that Ms. Gould may contend that she did not participate in criminal activities to the extent found by the trial judge, but

that is a finding of fact for which there appears to be ample evidence. I am concerned that Ms. Gould will have served her sentence before her appeal is heard. In my view, it is unlikely that a division of this Court would disturb a conditional sentence of six months in the circumstances of this case. I consider the sentence appeal to be very weak.

[18] The application of Ms. Gould to suspend her conditional sentence is dismissed.

[19] Ms. Gould was fined \$27,434.56. She applies to suspend payment. The Crown takes the same position as it did with Mr. Porisky's application. Taking into account the circumstances of Ms. Gould, which are adversely affected by those of Mr. Porisky, I conclude that it is in the interests of justice to suspend payment of the fine pending the determination of this appeal. "The Honourable Mr. Justice Chiasson"

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