

CANADA / JUDGMENT

R. v. Klassen

2020 BCSC 2288

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2288 R. v. Klassen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Klassen,

2020 BCSC 2288

Date: 20201203

Docket: 30118-1

Registry: Vancouver

Regina

v.

Gerald Bernard Klassen

Before: The Honourable Madam Justice C.A. Wedge

Oral Reasons for Judgment

on Judicial Interim Release Application

Counsel for the Crown:

M. Barrenger

Counsel for the Accused:

I. Donaldson, Q.C.

C. Armitage

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 1-2, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2020

- [1] THE COURT: Gerald Klassen has brought this application for an order that he be released from custody pending the determination of his application for a ministerial review under s. 696.1 of the Criminal Code. Section 696.1 provides that a person who has been convicted of a federal offence and whose rights of appeal respecting the conviction have been exhausted may apply to the Minister of Justice on the basis that the conviction was a miscarriage of justice.
- [2] It is common ground between Defence and Crown that this court has the inherent jurisdiction to release an applicant such as Mr. Klassen. The leading case in this regard is *R. v. Phillion*, [2003] O.J. No. 3422. In the interests of time, I will not go into the basis for the Court's jurisdiction. It is set out in the detailed written submissions of both Crown and Defence, marked as Exhibits A and B for Identification, respectively, in this application. The Minister under the Code and its regulations has the power to refer a question to the Court of Appeal, order a new trial, order a new appeal, or dismiss the application.
- [3] Mr. Klassen was convicted by a jury in 1995 of first degree murder of a 22-year-old woman, Julie McLeod. Her body was found in December 1993 on the south shore of Nicola Lake near Merritt, B.C. Her partially clothed body was found in the water at the base of a boat launch ramp. It was not disputed by Mr. Klassen at trial that he had engaged in consensual sexual relations with Ms. McLeod in the vicinity of the boat ramp the evening prior to her death, nor did he dispute that he and Ms. McLeod were subsequently involved in an altercation during which, as a result, Mr. Klassen pushed her away. Ms. McLeod fell and struck her head on the ramp. However, as I have noted, he denies that there was anything other than consensual sexual contact and denies that Ms. Klassen was partially clothed when he left the scene. Mr. Klassen says that when he left the boat ramp, Ms. McLeod was alive and uttering abuse at him. He offered her a ride home, but she refused.
- [4] At trial, the jury found Mr. Klassen guilty of first degree murder on the basis that he caused her death during a sexual assault. Mr. Klassen's appeal to the Court of Appeal was dismissed in 1997. The Supreme Court of Canada refused leave to appeal the decision of the Court of Appeal.

- [5] Mr. Klassen was born in 1960 in Merritt, B.C., and was 35 years of age when convicted of the index offence. He was raised and lived in Merritt. He had no prior convictions or any prior involvement with the criminal justice system. He completed a welding program at the Northern Lights College in Dawson Creek as a young adult and returned to work as a welder in Merritt. He lived and worked there without incident until his encounter with Ms. McLeod in December 1993.
- [6] Mr. Klassen is now 60 years of age. He has served 25 years and 10 months in a medium security institution. He was denied full parole after the mandatory 25 years in custody, in large part because he has maintained his innocence all those years. While incarcerated, he refused to participate in programs for sexual offenders on the basis of his ongoing assertion that he did not sexually assault Ms. McLeod or inflict a beating on her during or following their contact. As noted earlier, Mr. Klassen's evidence has consistently been that, following consensual sex, she fell and struck her head on the boat ramp, that she was conscious and expressing anger before he left the scene. Mr. Klassen's counsel, Mr. Donaldson, acknowledges that the conduct of Mr. Klassen that evening in itself was reprehensible--in his words, "loutish at best," but it was not sexual assault nor was it murder.
- [7] The day following the discovery of Ms. McLeod's body, a forensic pathologist by the name of Dr. James McNaughton examined the body and performed an autopsy. He was the only expert witness in forensic pathology to testify at Mr. Klassen's trial. He advanced the opinion that the cause of death was a combination of trauma to the head resulting from an intentional assault, acute intoxication, and hypothermia. Dr. McNaughton opined that the injuries to Ms. McLeod's head could not have resulted from a single blow caused by a fall on the boat ramp. The trial judge instructed the jury that Ms. McLeod's head trauma must have been caused by a beating she suffered before her death. The trial judge said, "There can be little question but that Ms. McLeod was physically assaulted, beaten, and suffered considerable injuries."
- [8] An initial look at Mr. Klassen's file by the Innocence Project occurred in 2010, but the file was closed in 2013. In 2017, the Innocence Project reopened Mr. Klassen's file and eventually retained Mr. Donaldson to pursue the issue of Mr. Klassen's conviction. In February 2019, the Crown was notified by Ms. Kate Kehoe, an Ontario lawyer, that she was acting for the Criminal Conviction Review Group, or CCRG, on behalf of the Minister of Justice and would be conducting a preliminary assessment of Mr. Klassen's conviction. Under the Code and Regulations, the assessment of the CCRG is the first step in determining whether there may be a reasonable basis to conclude that a miscarriage of justice likely occurred. If that is the finding, then the application proceeds to the full investigation stage.
- [9] In 2019, Mr. Donaldson sought an opinion from a forensic pathologist with decades of experience, Dr. John Butt, concerning the conclusions drawn by Dr. McNaughton and his testimony at trial. Dr. Butt provided an opinion in September 2019 which materially undermined the conclusions of Dr. McNaughton. Dr. Butt's view, based on the evidence available to Dr. McNaughton, was that Ms. McLeod's death was accidental, resulting from

acute intoxication and exposure to the elements. Significantly, Dr. Butt disagreed that Ms. McLeod's head injuries were the result of an assault. More likely, he said, they were caused by accident as a result of a single blow due to a fall on the concrete.

- [10] Dr. Butt's opinion was provided to Crown counsel who was concerned by some of Dr. Butt's criticisms of Dr. McNaughton's evidence. In accordance with the best tradition of prosecuting counsel, the Crown sought its own opinion from another forensic pathologist, Dr. Lee. She was retained by the Crown to review material from Mr. Klassen's trial, particularly the forensic pathology evidence. In a report dated September 28, 2019, Dr. Lee echoed some of Dr. Butt's criticisms of Dr. McNaughton's report. Ms. Kehoe, as counsel for the Criminal Convictions Review Group, sought additional opinions from two other forensic pathologists, a Dr. Cordner, and a Dr. Williams. Those reports are largely in line with Dr. Lee's report.
- [11] The Crown quite accurately submits that Mr. Klassen's case is a challenging one from the perspective of forensic pathology. It is not for this court on this application to delve into those reports or draw conclusions from them. Suffice to say, as the Crown frankly acknowledges, there are a number of possible factors which could have contributed to Ms. McLeod's death. In terms of the head trauma suffered by Ms. McLeod, attributing them unequivocally to intentional force, as did Dr. McNaughton in the first instance, is certainly questionable. According to Dr. Butt, the head injuries were not caused by intentional application of force. The other three experts say, essentially, the head trauma could have been caused by an accidental fall or intentional force, but that forensic science could not determine which.
- [12] Further, it is concerning that Dr. McNaughton has recently softened his view as to causation. As concerning as the criticisms of Dr. McNaughton's opinion by these experts, is the manner in which his opinion was expressed in his evidence at trial. That opinion was not the same as the one to which he testified at the preliminary inquiry, nor was it completely aligned with his written report. At trial, Dr. McNaughton came up with a theory that differed from both, and was essentially conclusive of the theory of intentional force as the cause of Ms. McLeod's head trauma. This deprived counsel for Mr. Klassen the opportunity to properly prepare to challenge the evidence given by Dr. McNaughton to the jury, and on which the trial judge's instructions were based.
- [13] The issue here is whether Mr. Klassen should be released pending the decision of the Minister. Section 679(3) of the Criminal Code requires that Mr. Klassen establish three things to secure his release: first, that the application is not frivolous; second, that he will surrender himself into custody according to the terms of the bail order; and third, that his detention is not necessary in the public interest. Section 679(3) was considered by the Supreme Court of Canada in *R. v. Oland*, [2017] 1 S.C.R. 250. The court in *Oland* said the first criterion--that the application not be frivolous--creates a very low bar. The second criterion requires the applicant to demonstrate that he will not flee. At paragraphs 24 and 25 of the *Oland* decision, the court notes that the third criterion consists of two components: public

safety, and maintaining public confidence in the administration of justice. This, in turn, engages the tension between two competing interests, the first being enforceability, which is the need to respect the immediate enforceability of court judgments, and the second being reviewability, which is the acknowledgment that our justice system is not perfect and those who challenge the legality of their convictions are entitled to a meaningful review. This test can be difficult to apply when it comes to the public interest criterion, particularly where the conviction involves a serious crime such as murder, but at the same time there is a strong case for release.

- [14] The Crown says the third criterion applies to this case. The Crown frankly acknowledges the central question on this application is not whether Mr. Klassen should be released, but the terms of his release plan. The Crown acknowledges Mr. Klassen's application is not frivolous. In fact, says Crown counsel, the application is far from frivolous given the evidence of the forensic experts and the challenges to the pillars of Dr. McNaughton's opinion at trial.
- [15] With respect to the second factor, risk of escape, in my view, there can be little doubt that Mr. Klassen will surrender himself into custody should the Minister deny his application. Mr. Klassen was on bail for a full year before his trial in 1995 with no breaches and returned to custody thereafter. I will not go into the various reports filed by Corrections officials during Mr. Klassen's 25-plus years' incarceration, except to say that, on the basis of those reports, I am satisfied that he is not a flight risk and that, in fact, and in the words of the Corrections official who testified in this application, he was a "good inmate."
- [16] The Crown acknowledges that Mr. Klassen's ongoing detention is not necessary, but, as just noted, the central question concerns the terms of his release. He has been institutionalized for a quarter-century in a medium security facility. He has not had the advantage of a stay in minimum security or a significant number of escorted leaves from the facility. However, it should be noted that it is most likely that this state of affairs is the result of the Catch-22 created by Corrections policies and those followed by the Parole Board: That is, an inmate who does not admit guilt regarding the index offence and therefore does not express remorse is unlikely as a result of these policies to cascade down to minimum security, to be granted day parole, or be granted full parole. Mr. Klassen is a perfect example of this. While he has had only a handful of minor insubordination infractions over 25 years and has expressed his bitterness towards the justice system which he believes has deprived him of 25 years of his life, he has been a compliant, hard-working inmate. He has not participated in any of the problematic institutional subcultures. He has not been involved in any incidents of violence. He has never been found in possession of drugs or suspected of consuming bootleg alcohol, yet he has been repeatedly denied a transfer to minimum security; even after serving the mandatory 25 years for first degree murder, he has been denied full parole because he has consistently asserted his innocence. That, in my view, is a classic Catch-22.

- [17] So, yes, Mr. Klassen has been institutionalized, but does that mean he should continue to be institutionalized after 25 years and 10 months by ordering that he be released to a halfway house or other community facility which also houses other inmates? Mr. Klassen is in a somewhat unique position, as properly conceded by the Crown. He has a very large extended family which has maintained contact with him throughout his time in custody, and which wants to open its home to him; it is a family committed to assisting him with his integration into society. Lori Ann Ford, as well as her mother, husband, and two adult sons have offered to have Mr. Klassen live in their home. Ms. Ford has known Mr. Klassen for 45 years. Her mother married Mr. Klassen's father. She speaks with Mr. Klassen at least three times per week. Importantly, Ms. Ford and her spouse are prepared to act as sureties in the amount of \$200,000 which is the equity in the home in which they live. That is certainly a vote of confidence from persons who know Mr. Klassen. Ms. Ford's mother is retired and spends most of her time in the house. Ms. Ford and her spouse are semi-retired. They participate in community events and have a relationship with a group known as Long-term Inmates Now in the Community, or L.I.N.C. The family home has received a very positive community assessment requested by the Mission Institution.
- [18] Mr. Klassen's counsel urged the court to release Mr. Klassen to his family rather than to a halfway house. Mr. Barrenger, on behalf of the Crown, and again in the finest traditions of the Crown, advised the court that, after much consideration, he supports the release to the family as per the draft order which is now Exhibit 5 in these proceedings. He acknowledges that, in the circumstances of this case, it will provide Mr. Klassen with the best prospects of success upon his release. Mr. Klassen already has some job prospects and is working with the John Howard Society to facilitate counselling for a variety of issues including reintegration. Mr. Barrenger advises the court that he has provided input into the draft terms of release advanced by Mr. Donaldson and that Mr. Donaldson has incorporated that input into the draft order, Exhibit 5.
- [19] For all of these reasons, I am satisfied that Mr. Klassen ought to be released as soon as practicable in the terms of the draft order, Exhibit 5.
- [20] I want to express my gratitude to counsel for the Crown and Defence for the manner in which they have dealt with this matter throughout. And Mr. Klassen, I wish you luck.

"The Honourable Madam Justice C.A. Wedge"

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