
CANADA / JUDGMENT

R. v. Larsen

2001 BCCA 617

COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

BEFORE THE HONOURABLE

Madam Justice Levine

September 24, 2001

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

ANDREW WAYNE LARSEN

APPELLANT

J. Ray

appearing for the Appellant

B. Johnstone

appearing for the Respondent

- [1] LEVINE, J.A.: On April 30, 2001, the appellant was convicted by a Supreme Court justice of one count of first-degree murder and sentenced to the mandatory minimum sentence of life-imprisonment with no parole eligibility for twenty-five years. The appellant filed a Notice of Appeal against his conviction on May 9, 2001. He seeks judicial interim release, pursuant to s. 679(3) of the Criminal Code, pending the determination of his appeal.
- [2] The conviction arises out of charges laid in the spring of 1999. The offence, the sexual assault and murder of a 16-year-old girl, occurred on October 13, 1978. The appellant was charged after the police obtained a blood sample from the appellant and matched his DNA profile to a sample of semen found in the mouth and larynx and on the sweater of the victim.
- [3] The appellant raises three grounds of appeal:
- [1] The trial judge erred in failing to grant a stay of proceedings, or other remedy, due to the destruction of relevant evidence.
- [2] The trial judge erred in admitting a pathologist's report as an exception to the hearsay rule.
- [3] The trial judge erred in finding that the appellant had validly consented to the seizure of his bodily substances.
- [4] The appellant was born in 1956 and is now 44 years of age. He was 22 when the offence took place. He has lived in the Lower Mainland all of his life. He has a grade 10 education and worked in construction and for the federal Fisheries Department from 1986 through 1998. He has not been employed and has received Employment Insurance and social assistance since March 1998.
- [5] The appellant was married in 1980, divorced in 1994, and has three children ages 20, 16 and 14. Until his arrest, he had regular contact with all three of his children. He moved in with his mother and father in Maple Ridge in 1994 and has continued to reside with his mother after his father's death in 1997. His mother acted as surety for the appellant's release on bail pending his trial, posting as security the equity in her home of \$138,000. She has agreed to act as surety if he is released pursuant to this application.

- [6] The appellant has one conviction other than that which is the subject of this application: a narcotics conviction in 1980. He has had problems with alcohol and drug abuse. In 1994, he attended a treatment centre and since then has attended Alcoholics Anonymous three times a week. He recently completed a course directed to preparation of resumes, job search techniques and basic computer operations.
- [7] Section 679(3) of the Criminal Code sets out the criteria an appellant must establish to secure his release on bail pending the determination of a conviction appeal. The relevant portions state:
- 679(3) ... 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 [1] the appeal or application for leave to appeal is not frivolous;
- [2] he will surrender himself into custody in accordance with the terms of the order; and
- [3] his detention is not necessary in the public interest.
- [8] These provisions were reviewed in reasons for judgment written by Madam Justice Ryan and concurred in by Saunders and Levine JJ.A. in *R. v. Mapara*, 2001 BCCA 508, released on September 6, 2001. As in *Mapara*, the Crown's position in this case is that it concedes the appellant's grounds of appeal are not frivolous, but argues that he has not established he poses no flight risk or that his detention is not necessary in the public interest.
- [9] On the issue of flight risk, the Crown says that although the appellant's roots are in the Lower Mainland and he has no financial resources to go elsewhere, the fact that he faces 25 years in prison provides an incentive to flee and not to appear for his appeal. Appellant's counsel points out that he was released on bail from shortly after his arrest in March 1999 until his conviction in April 2001 and fulfilled all of the conditions. I am persuaded that the appellant has established that he will surrender himself into custody in accordance with the terms of an order, if made, allowing him to be released.
- [10] The issue, as in *Mapara*, is the public interest. The Crown raised no concern that the appellant is dangerous or will offend. Its concern is to maintain public confidence in the administration of justice. It argues that the community in which both the appellant and the victim resided has lived with this unsolved crime for 20 years, and that it would be shocked, knowing the nature and circumstances of the crime, if the appellant were released after he has been convicted.
- [11] In *Mapara*, Ryan J.A. analysed the objectives and principles underlying s. 679(3)(c) to determine whether public confidence in the administration of justice will be offended by the release of an offender who has been convicted of first degree murder. At paras 34 through 36 and 38, she said:

- [34] I agree with the analyses in Farinacci and Baltovich. Public confidence in the administration of justice requires that verdicts, properly rendered, be enforced. Where an appellant established that he or she does not pose a flight risk and is unlikely to re-offend, the public interest also acknowledges that actual punishment for a crime be avoided if strong grounds exist for setting aside the verdict. [35] In *Demyen* when Culliton C.J.S. speaks of 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. [38] In the end, I agree with counsel for the Crown that bail for first degree murder will be granted in the rarest of cases. Not because it is a principle that emerges from the cases, but because that will generally be the result when one balances the dictates of enforceability and reviewability found in the public interest aspect of s. 679(3) of the Code. Nor does the Code favour release as suggested by the appellant. Release is favoured only after the appellant establishes that he or she meets the criteria set out in s. 679(3). [12] Thus a decision on this application requires an analysis of the strength of the appellant's grounds of appeal.
- [13] The first ground is the dismissal of the appellant's application for a stay of proceedings because of lost evidence. The lost evidence was 28 hairs found in the clenched fist of the deceased. There was then no scientific method for determining the actual source of the hairs. The hairs were inspected visually by an analyst in the hair and fibre section of the R.C.M.P. forensic laboratory in Vancouver, who testified at the trial. She concluded from her inspection that the hairs were not those of the appellant, because they were a different length from his hair. Although the R.C.M.P. policy was to retain evidence like the hairs for five years, they were not disposed of until 1992, when the hair and fibre section was merged with the Biology section. The trial judge found that when the hairs were disposed of, the state of the science of DNA analysis was such that it would not have been possible to analyze the hairs to identify their source.
- [14] The trial judge found that in destroying the hairs the appellant's s. 7 right to full answer and defence had not been violated by either a breach of the Crown's duty to disclose or an abuse of process, but because it could not be said what DNA analysis might have revealed, if performed after the appellant's arrest, he concluded there was a "realistic possibility" that DNA testing of the hairs might have assisted the appellant in his defence. He went on to hold that a stay of proceedings, which is granted only in the "clearest of cases", was not appropriate. He held that the defence was not prohibited from making full answer and defence and the remedy lay in an instruction to the jury (which the accused subsequently

reelected not to have) to place the burden for the loss of the evidence on the Crown.

- [15] The appellant claims that in adopting the remedy of a jury instruction, the trial judge failed to consider the prejudice to the accused from not having the hairs available for the purposes of his defence.
- [16] The second ground of appeal is the admissibility of hearsay evidence of a pathologist who performed the autopsy on the victim, wrote two reports, and has since died. The first report was admitted as a declaration made in the course of duty and both reports were admitted under the "principled exception" of necessity and reliability.
- [17] The appellant says the trial judge failed to consider the prejudice to him because of his inability to cross-examine the deceased pathologist.
- [18] The third ground is that the appellant's consent to the taking of a blood sample for DNA analysis was not validly obtained. The appellant alleges that his s. 10(b) Charter rights were violated.
- [19] Crown counsel argues that the appellant will not succeed in establishing any of these alleged errors when they are subjected to a considered analysis of the relevant law.
- [20] While it is obviously inappropriate for me to weigh or comment on these arguments to any extent on this application, particularly when I have not had access to any of the evidence, I am persuaded that these are not, in the words of Ryan J.A., "very strong grounds [that] tip the scale in favour of reviewability."
- [21] I have reviewed and considered all of the material before me, including the submissions of counsel, the reasons for the rulings and judgement of the trial judge and the authorities. I conclude that the criteria for release set out in Mapara are not met in this case. The appellant has not established that his release is in the public interest. His application for bail is therefore denied.

The Honourable Madam Justice Levine

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