

CANADA / JUDGMENT

R. v. Li

2021 BCCA 114

COURT

British Columbia Court of Appeal

DECIDED

16 March 2021

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2021 BCCA 114 R. v. Li

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Li,

2021 BCCA 114

Date: 20210316

Docket: CA47049

Between:

Regina

Respondent

And

Wei Li

Appellant

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
October 18, 2019 (R. v. Li, Victoria Docket 172348-1).

The Appellant, appearing in person:

W. Li

Counsel for the Respondent:

S. Gillespie

Written Submissions Filed:

January 21, February 9 and 16,
and March 1, 2021

Place and Date of Judgment:

Vancouver, British Columbia

March 16, 2021

Summary:

Application to extend the time within which to file a conviction appeal dismissed because the proposed appeal lacks merit.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Wei Li applies for an order extending the time for filing a notice of appeal from his conviction by a judge sitting with a jury on a charge of arson. The notice was filed approximately eight months late. The parties have agreed that the application be dealt with in writing.
- [2] It should be noted that Mr. Li's notice refers to both a conviction appeal and a sentence appeal. He was sentenced to two years' imprisonment on January 17, 2020: 2020 BCSC 113. As Mr. Li is now on full parole, he seeks to advance only a conviction appeal.
- [3] After legal aid refused to fund Mr. Li's appeals, he applied to this Court under s. 684 of the Criminal Code, R.S.C. 1985, c. C-46, for the appointment of state-funded counsel for the conviction appeal. That application was dismissed by Justice Newbury on the basis that Mr. Li's proposed grounds of appeal had little likelihood of success: 2021 BCCA 3. Mr. Li now wishes to prosecute that appeal himself. The Crown opposes the granting of an extension, primarily on the basis that it is not in the interests of justice to do so; the Crown says Mr. Li has not articulated any arguable grounds of appeal.
- [4] For the reasons that follow, the application is dismissed.

Circumstances of the Offence

- [5] The trial took place in October of 2019. A concise summary of the facts is contained in the trial judge's reasons for sentence:

- [3] On October 3, 2017, at 10:02 a.m., a fire broke out in a duplex dwelling house owned by the accused, Mr. Li, at 318 Uganda Avenue in Esquimalt, a municipality within Greater Victoria. The accused did not reside at the property but rented it to tenants. The basement suite was vacant as the previous tenant, Tara Koshman, had moved out a day or two earlier. The upper floor was rented and occupied by a person called Billy Montgomery. The adjoining half of the duplex was owned and occupied by Ms. Irene Brett who had sold the other half of the residence to the accused a year or so before.
- [4] For quite some number of months before the fire, the accused had been involved in a pitched and heated dispute with Mr. Montgomery. He had served Mr. Montgomery with an eviction notice and relations between them had become extremely volatile. On the day of the fire, the accused arrived at the property and entered the basement suite. Mr. Montgomery was present in the upper part of the house with his overnight guests, Amanda Watson and Shane Daley. Mr. Montgomery was angry that the accused had showed up unannounced and he yelled at the accused through the floor and basement door including, the jury was told, racial epithets. Eventually, Mr. Montgomery, Mr. Daley, and Ms. Watson all departed leaving the accused alone on the property.
- [5] The jury must necessarily have found that the accused entered the garage and intentionally set fire to Mr. Montgomery's belongings therein. I am satisfied on all of the evidence that he did this to intimidate Mr. Montgomery or to force him off the property or both. The fire seriously damaged or destroyed Mr. Montgomery's personal property within the garage consisting of a variety of items of unknown value that he had collected with the intention of selling. The garage and the duplex were also damaged. Quite clearly, the jury rejected the accused's defence that the fire must have been ignited by an electrical spark when the accused attempted to turn on the garage light. The jury decided instead that the accused intentionally set the fire.
- [6] I am persuaded beyond a reasonable doubt, furthermore, that on all of the evidence, his doing this was a premeditated act and that he used gasoline as an accelerant. In this latter connection, I note, in particular, the online inquiries from the preceding day about the safe transportation of gasoline in plastic containers; his text message to his neighbour Irene Brett, that someone had threatened to burn the house down; the unexplained presence of a jerry can containing gasoline in the basement suite; and the fact that the firefighter primarily responsible for extinguishing the fire reeked of gasoline afterwards.
- [7] There is no doubt, moreover, that immediately after setting the fire, the accused fled the scene and drove directly to the Victoria Airport to board a flight to Eastern Canada. He arrived at the airport just after 10:30 a.m., half an hour or so after the fire was ignited. The accused proceeded through airport security and asked for assistance because he was in pain from burns to his hands, neck, and face. He confirmed to airport staff that there had been an explosion at his house and that he had left the property without reporting the resulting conflagration to the authorities. Medical assistance was summoned and, finding the situation to be highly suspicious, airport staff contacted the police who attended and

arrested the accused.

[Emphasis added.]

The Legal Aid Refusal

[6] In refusing to fund a conviction appeal, legal aid considered the following issues:

- a. Whether the trial judge erred in instructing the jury;
- b. Whether the guilty verdict was unreasonable or unsupported by the evidence;
- c. If the criminal records of some of the Crown witnesses were not in evidence, whether the absence of that evidence supports an appeal;
- d. Whether the absence of evidence of witnesses from Mr. Li's Air B&B supports an appeal;
- e. Whether Mr. Li suffered from the ineffective assistance of counsel;

Ground (d) relates to the fact that at the time of the offence, Mr. Li resided in Montreal, Quebec; he testified he stayed at an Airbnb when he came back to Victoria a few days before the fire occurred.

[7] In assessing Mr. Li's application, legal aid obtained transcripts of: (a) Mr. Li's testimony; (b) counsel's jury addresses; and (c) the jury charge. Those transcripts have been filed with this Court and I have read them.

The Section 684 Application

[8] On his application for state-funded counsel, Mr. Li advanced a position at odds with what he had advanced at trial. At trial he testified the fire started accidentally when he switched on a light in the garage. Further, he testified that he heard people in the basement suite just before the fire started, but was clear in his evidence that he had not seen anyone. However, on the s. 684 application he asserted the fire had been set by Mr. Montgomery and his "team" of gang members. In his written submissions Mr. Li stated:

I strongly believe part of the team was on site when the fire broke out. I met two persons who jumped out of the basement. Their car was seen driving away fast from the house right after the fire.

[9] Mr. Li alleged that gang members discouraged witnesses he wished to call from coming to court, but did not provide any information as to who those persons are and what evidence they can give. He also alleged his counsel was ineffective and that the trial judge had erred in several respects, including by not giving the jury a "Vetrovec warning" (see *R. v. Vetrovec*, [1982] 1 S.C.R. 811) with respect to Mr. Montgomery. Defence counsel did not ask the judge to give a Vetrovec warning.

- [10] Justice Newbury concluded it would not be in the interests of justice to appoint counsel. She opined that the failure to give a Vetrovec warning was not significant given that the Crown had acknowledged Mr. Montgomery's credibility was doubtful and that its case did not depend on his credibility. In conclusion, she stated:
- [21] At the end of the day, I do not find that the factual assertions and arguments Mr. Li now seeks to advance could or should have been advanced at trial, given the defence of accidental ignition of the fire by Mr. Li himself. I agree with the Crown that the whereabouts and conduct of Mr. Montgomery and his friends were essentially background information and that the evidence regarding gasoline, a gasoline can and Mr. Li's strange flight from the scene were likely what led to his conviction. In my opinion, it is not in the interests of justice to require that counsel be appointed at public expense to permit Mr. Li now to change his story completely and seek another trial, blaming his lawyer. Such an appeal has little likelihood of success.

The Present Application

- [11] In his notice of application for an extension of time, Mr. Li states his grounds of appeal as follows:

2.1 Miscarriage of justice by prosecutor and witnesses. The prosecutor withheld and manipulated key evidences [sic] and cheated the jury and my lawyer. He facilitated the witnesses to present perjured evidences [sic].

2.2 The judge made errors of law and gave misdirections to the jury.

The judge failed to follow proper trial practice and standards, made mistakes on key evidences and admitted faulse evidences [sic].

- [12] In the affidavit Mr. Li filed in support of this application, he asserts that:

- "The prosecutor withheld and manipulated one key evidence, the criminal record of one of the key witness Shane Daley"; Crown counsel "manipulated and fooled" his lawyer into believing Mr. Daley had a "clean record" when, in fact, he was a "long-time gangster" who "had to change his name after committing so many crimes."
- "The Crown witnesses gave perjured evidence by framing and setting me up."
- "The judge failed to give out a least 5 'Vetrovec warnings' to the jury. The whole trial was tainted without proper trial practice and standards."
- "The judge made mistakes on a key evidence in his charge to jury. [Ms. Watson] was there on [October] 3 instead of [September] 30 of 2017."
- "I heard two persons were [sic] running and jumping out of the house when I went inside the basement. Their car was seen driving away fast by witness on the site."

· "My lawyer was also cheated and manipulated to believe that 2 persons with clean records just joined [Mr. Montgomery] by chance. Otherwise, he could come out with different defence strategy which would further impact the outcome of the trial."

[13] In its memorandum of argument, the Crown has included a criminal record printout for Mr. Daley entitled "Ministry of the Attorney General: JUSTIN Conviction List". "JUSTIN" is an acronym for British Columbia's Justice Information System. That record contains the following information:

- On December 6, 2017, Mr. Daley was sentenced to pay a fine of \$500 and prohibited from driving for one year on a charge of driving while prohibited (offence date: August 2, 2015).
- On October 4, 2018, Mr. Daley was sentenced to 12 months' probation on a charge of assault (offence date: July 6, 2018).

The printout states Mr. Daley also uses the surname Dalaey.

[14] Mr. Li filed a reply in regard to this record, in which he states:

1.1 The witness Shane did have some criminal records which were having direct significances to the key moments for my case. My lawyer was never told anything about this result.

When the fire broke out in 2017, he had been being [sic] charged of Prohibition Driving for more than 2 years.

When my trial was undergoing, he had been serving his sentence in 2019.

My defense lawyer told me that there was no reason for him not to raise the issue if he were told the truth, because that information was the best defense tool a lawyer could ever imagine.

1.2 We were NEVER told there was such a name as Shane Dalaey. Not in the disclosure, not in the court, not anywhere. And we had tried hard but failed to generate this report by using the name Shane (Christopher) Daley from the disclosures before my trial.

Analysis

[15] I begin by addressing Mr. Li's allegation of prosecutorial misconduct, i.e., that the Crown deliberately failed to disclose the criminal records of Mr. Daley and Ms. Watson. I see no merit in this allegation. It is one for which no evidentiary foundation has been provided. It is also an allegation that was not raised on the s. 684 application. Of note is that Mr. Li has not provided anything from his trial counsel to substantiate this serious accusation.

[16] While neither Mr. Li nor the Crown has provided me with the disclosure given to Mr. Li's counsel, it is clear from Mr. Li's counsel's closing address to the jury and the trial judge's charge that Mr. Montgomery's criminal record was disclosed; the trial judge referred to it as a "long criminal record". Given that Mr. Montgomery's record was disclosed, it is extremely unlikely that the Crown would have withheld Mr. Daley's and Ms. Watson's records (assuming she has one) given their evidence was far less important to the Crown's case than

that of Mr. Montgomery. It is difficult to see what benefit the Crown would have gained from not disclosing those records.

- [17] I see no merit in Mr. Li's assertion that the trial judge misstated the evidence in charging the jury. In particular, while reviewing the evidence, the judge did state that Ms. Watson was at the property on October 3, 2017, i.e., the day of the fire. The judge discussed the charge with counsel prior to delivering it and made several changes at their request. Neither counsel had any post-charge comments.
- [18] With respect to *Vetrovec*, I agree with Newbury J.A. that "[t]he failure to give a *Vetrovec* warning would not have been significant in the circumstances": at para. 18. Mr. Montgomery was the only Crown witness for whom such a warning might have been given. However, Mr. Montgomery's evidence was essentially background information; the acrimonious nature of his relationship with Mr. Li was common ground and he did not testify that Mr. Li set the fire. In his closing address, Crown counsel placed limited weight on Mr. Montgomery's evidence, instead relying on evidence of motive, opportunity, and pre- and post-offence conduct, much of which was not in dispute.
- [19] As for Mr. Li's assertion that there are witnesses who can support the version of events he seeks to advance, he has still not provided any information as to who those persons are and what evidence they can give.
- [20] Given there is no merit in the grounds of appeal Mr. Li seeks to advance, it is not in the interests of justice to extend the time for the filing of his notice of appeal.

Disposition

- [21] This application is dismissed.

"The Honourable Mr. Justice Frankel"

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