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CANADA / JUDGMENT

## R. v. Ling

2008 BCCA 330

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COURT

British Columbia Court of Appeal

DECIDED

21 August 2008

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2008 BCCA 330 R. v. Ling

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Ling,

2008 BCCA 330

Date: 20080821

Docket: CA036287

Between:

Regina

Respondent

And

Michael Donald Ling

Appellant

Before:

The Honourable Madam Justice Rowles

(In Chambers)

J. Gelber

Counsel for the Appellant

W.P. Riley

Counsel for the Respondent

## Place and Date of Hearing:

Vancouver, British Columbia

15 August 2008

## Place and Date of Judgment:

Vancouver, British Columbia

21 August 2008

## Reasons for Judgment of the Honourable Madam Justice Rowles:

- [1] Mr. Michael Ling has applied for judicial interim release pending determination of his appeal from conviction of six offences, two charged under the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and four weapons offences charged under the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The appellant was convicted by a Provincial Court judge of the following charges in an indictment:
- a. Unlawfully produced a controlled substance, to wit: Cannabis (marihuana), contrary to Section 7(1) of the Controlled Drugs and Substances Act.
  - b. Unlawfully possessed a controlled substance, to wit: Cannabis (marihuana) in an amount not exceeding 3 kilograms, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.
  - c. Unlawfully possessed an unloaded restricted firearm, to wit: a .357 revolver, with readily accessible ammunition that was capable of being discharged in the firearm, without authorization, a licence, or a registration certificate for the firearm contrary to Section 95(1) of the Criminal Code.
  - d. Unlawfully possessed a prohibited weapon, to wit: a stun gun, without being the holder of a licence contrary to Section 91(2) of the Criminal Code.
  - e. Unlawfully stored, in an unsafe manner a firearm, to wit: a 12 gauge shotgun, in a manner contrary to Section 5(1)(a) of the Storage, Display, Transportation and Handling of Firearms by Individuals Regulation, made under paragraph 117(h) of the Firearms Act, contrary to Section 8(2) of the Criminal Code.
  - f. Unlawfully stored, in an unsafe manner a firearm, to wit: a .357 revolver, in a manner contrary to Section 5(1)(a) of the Storage, Display, Transportation and Handling of Firearms by Individuals Regulation, made under paragraph 117(h) of the Firearms Act, contrary to Section 86(2) of the Criminal Code.

- [3] The date of commission of each of the offences was 16 October 2004. The date the appellant was convicted of the six offences was 8 April 2008. Why there was such a long period between the date the offences were committed and the date of trial is unclear. The appellant was sentenced to two years less one day on 11 August 2008.
- [4] The main ground of appeal is that the trial judge erred in principle in admitting evidence obtained from a warrantless and unreasonable search.
- [5] Section 679 of the Criminal Code sets out the conditions under which an appellant may be released from custody pending the determination of a conviction appeal. Section 679(3) provides that a judge of the Court of Appeal may, in accordance with the section, release an appellant from custody pending appeal if the appellant establishes that:
- (a) the appeal is not frivolous;
  - (b) he will surrender himself into custody in accordance with the terms of the order; and
  - (c) his detention is not necessary in the public interest.
- [6] The Crown does not dispute that the appellant has met the first two requirements for judicial interim release. The appellant has lived in Christina Lake, British Columbia, since 1998 and has owned property there since 1999. He has deposed that he is self-employed and is the owner and operator of "Do-it-all Services". In his affidavit in support of his application, the appellant states that he cuts, collects and delivers firewood for various customers in the vicinity and that he does residential renovations, landscaping, yard work and other handy-man services. After his arrest in October 2004, he was released by the R.C.M.P. on a promise to appear and thereafter made a number of court appearances as required.
- [7] The Crown opposes the appellant's bail application on public interest grounds. The public interest involves two considerations: the protection and safety of the public, and the maintenance of the public's confidence in the administration of justice. In this case, the Crown's opposition to the appellant's release is based on public safety concerns.
- [8] It is important to recognize that denial of bail is not a means of punishment and that granting bail ensures that when a conviction appeal is not frivolous, a convicted person will not serve a sentence for a conviction that cannot be sustained. Those points were made plain in *R. v. Nguyen* (1997), 97 B.C.A.C. 86, 119 C.C.C. (3d) 269, 10 C.R. (5th) 325, McEachern C.J.B.C. (in Chambers):
- [16] It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case, is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.

- [9] In this case, it is the Crown's submission that consideration of the appellant's criminal record, the timing and nature of the offences he has committed, the circumstances leading to the outstanding drug and weapons charges against him, his breaches of conditions of release and his breaches of a s. 109 Criminal Code weapons prohibition demonstrate why the release of the appellant pending appeal would pose a serious risk to public safety.
- [10] The appellant has a criminal record dating back to 1987. I will not refer to all of the offences of which the appellant has been convicted but only those that are relevant to arguments on this bail application. In March 1987, the appellant was convicted of assault causing bodily harm and in August 1987, of assault. In November 1992, he was convicted of assault and assault causing bodily harm. In both 1994 and 1996 he was convicted of possession of a narcotic. In 1998 he was convicted of assault causing bodily harm and breaking and entering and committing an indictable offence. On 6 June 2000, the appellant was convicted of possession of marihuana for the purpose of trafficking and production of marihuana. The sentence imposed for those offences was one of 18 months imprisonment with probation for one year. A mandatory ten-year weapons prohibition under s. 109 of the Criminal Code was also imposed.
- [11] Section 109 of the Criminal Code provides that where a person is convicted of an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the Controlled Drugs and Substances Act, the court that sentences the person shall, in addition to any other punishment that may be imposed for that offence, "make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance" for a minimum ten-year period.
- [12] The drug offences of which the appellant was convicted in 2000 were the result of the discovery of a marihuana "grow" operation he had on his property in Christina Lake. The offences committed in October 2004 and for which convictions were entered in April 2008 resulted from the discovery of a "grow-op" on the same Christina Lake property.
- [13] The eighteen-month prison term to be followed by a one-year period of probation imposed as part of the June 2000 sentence would have expired when the October 2004 drug and firearms offences were committed. However, the weapons prohibition under s. 109 of the Criminal Code was still in effect.
- [14] The weapons offences committed in October 2004 are particularly serious when viewed in the context in which they were found. The police described the property owned by the appellant as a compound. There are three outbuildings on the property as well as a trailer which the appellant used as his residence. The police seized 149 marihuana plants in three different locations on the property. Twenty-two plants were removed from a fenced area on the property. Those plants were six feet tall and grew above the height of the fence. From a detached garage on the property, the police removed 111 plants. From the bedroom of a detached residence on the property the police seized 16 plants. The garage and the detached

residence were locked and the police seized keys from the appellant that opened both. The way in which the buildings on the property accommodated the production of marihuana as well as the quantity of plants removed are entirely consistent with a commercial operation.

- [15] The danger of violence associated with marihuana "grow-ops" is notorious. In this case, a loaded shotgun was found in the clothes closet of the master bedroom of the appellant's trailer and a hand pistol was found between the mattress and the box-spring in the same bedroom. In the hallway, a stun gun was found in a jacket pocket. There was live ammunition found on the kitchen table. Two sets of scales were found in a cupboard in the kitchen.
- [16] On 19 November 2004, which was about one month after the appellant had been arrested on the drug and weapons offences in October 2004, the police found the appellant, along with three others, on his Christina Lake property with a substantial quantity of freshly cut marihuana. Five hundred stocks of marihuana were hanging on clothes lines in one building and five hundred forty stocks were drying in another. As well, three boxes of ammunition for a .357 revolver were found and \$6,050 in cash was seized from the appellant's residence.
- [17] It appears that the freshly cut marihuana found by the police in November 2004 was probably grown on Crown land adjacent to the appellant's property as the police observed that there was a worn path and a garden hose running from the appellant's property to the Crown land from where marihuana plants appear to have been taken. The appellant was charged under ss. 7(1) and 5(2) of the Controlled Drug and Substances Act in relation to this incident and under s. 86 of the Criminal Code for careless storage of ammunition and under s. 117.01(1) for possession of ammunition while he was prohibited from doing so by reason of the order made under s. 109 Criminal Code in June 2000. Those charges have not yet come to trial.
- [18] Counsel for the appellant submitted that the subsequent discovery of harvested marihuana plants on the appellant's property ought to be seen as part of the earlier October offence, for had the police been thorough in their search, the plants on Crown land would also have been seized at that time. Counsel submitted that by the later harvesting of the plants, the appellant could simply be seen as "cutting his losses" on the earlier seizure. That remarkable submission does not assist the appellant. In my opinion, what the actions of the appellant in November 2004 demonstrate is that despite his conviction in 2000 for cultivation of marihuana and possession for the purposes of trafficking and his arrest a month earlier for the same offences, he will persist in his criminal misconduct if it suits his purposes.
- [19] The appellant's disregard for the law is further evidenced by an event that occurred between the time of his conviction and sentencing in 2008. Following his conviction, the appellant was released on bail pending his sentencing hearing which was scheduled for 11 August 2008. On 26 July 2008, the appellant reported to the RCMP that he had had a breaking and entering at his property and that his crossbow had been taken. The RCMP investigation report reads as follows:

LING reporting that his house was broken into last night (2008-07-25). LING states that he was out of the house between the hours of 2130 and 0030 hrs (2008-07-26), when he came home the front door was unlocked. LING didn't know anything was wrong till he went into his bedroom and noticed that his safe moved. LING the noticed that some jewellery an unknown friend gave him was missing as well, went into the 2nd bedroom and noticed the broken window. LING states also missing is an Excalibur crossbow, a rifle pellet gun, Nike duffel bag with clothing and a LG flip cell phone.

Entry gained by the window, broken and then pulled outside, believed exit through the door as LING states had been locked when he went out.

Excalibur crossbow accessories box seized for possible prints as LING states it had been moved.

LING does not have any suspects at this time.

[20] Possession of the Excalibur crossbow the appellant reported stolen from his Christina Lake home is a clear violation of the ten-year s. 109 Criminal Code weapons prohibition imposed on the appellant at the time he was sentenced in 2000. Photographs in the affidavit material of the type of crossbow the appellant reported stolen clearly show that it is a sophisticated and formidable weapon.

[21] I further note that on 14 July 2008, the appellant was charged with committing aggravated assault on 1 June 2008, the complainant being his girlfriend. While the complainant's subsequent recantation weakens the Crown's case against the appellant, it is nevertheless clear from the appellant's record, which includes convictions for assault causing bodily harm in 1987, 1992 and 1998, that he is no stranger to violence.

[22] Under s. 679(3) of the Criminal Code, the appellant has the onus of showing that the three conditions set out in the subsection have been met. While the first two conditions have been met, I am not satisfied that the appellant has met the third.

[23] In light of the appellant's criminal misconduct described above, including the breach of the weapons prohibition he was under, I am of the view that there is a serious risk of the appellant committing further crimes if he is released on bail pending appeal, including crimes of marihuana production and trafficking. Of particular concern in this case is the appellant's failure to adhere to the s. 109 Criminal Code weapons prohibition while again using his Christina Lake property as a venue for the production of marihuana. The appellant has a record for crimes of violence and the location in the appellant's bedroom of the hand pistol and shotgun strongly suggests his readiness for violence. As noted earlier, the danger of violence associated with marihuana "grow-ops" is notorious.

- [24] Concern for public safety is also heightened by the fact that after his conviction for the drug and weapons offences in June 2008, and while on bail awaiting sentencing, the appellant reported that his crossbow had been taken in a break-in at his home. This incident is a further indication that there can be no assurance that the appellant, if released pending his appeal, would be mindful of and adhere to the conditions of his release.
- [25] In my opinion, public interest in ensuring that the appellant will not serve a sentence for offences not properly entered against him must yield to the public interest in ensuring the safety of the public.
- [26] The application is dismissed. In view of the outcome, counsel ought to take steps to expedite the appeal.

"The Honourable Madam Justice Rowles"

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