

CANADA / JUDGMENT

R. v. Monk

2004 BCCA 1

COURT

British Columbia Court of Appeal

DECIDED

5 January 2004

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2004BCCA0001.htm COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Monk, 2004 BCCA 1 Date: 20040105 Docket: CA30666 Between: Regina Respondent And Darcy Jonathan Monk Applicant Before: The Honourable Chief Justice Finch (In Chambers) D. Markovitz Counsel for the Applicant B.H. Johnstone Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia December 11, 2003 Place and Date of Judgment: Vancouver, British Columbia January 5, 2004 Reasons for Judgment of the Honourable Chief Justice Finch:

- [1] The applicant applies for the assignment of counsel under s.684 of the Criminal Code. It is common ground that he has no financial means to pay for counsel himself. The Legal Services Society refused to fund his conviction appeal. The Crown did not suggest that the applicant was capable of arguing the appeal on his own. The only issue on this application is whether there is an arguable appeal, one with sufficient merit to warrant the appointment of counsel.
- [2] The applicant was convicted of manslaughter at a re-trial by judge and jury on a charge of second degree murder. He had been acquitted at his first trial, but the Crown succeeded on appeal in obtaining a new trial. After his conviction the applicant was sentenced to ten years imprisonment, the judge having given credit for two years pre-trial custody. Mr. Markovitz has acted for the applicant throughout.
- [3] On application to the Legal Services Society for the funding of an appeal, the Society agreed to pay for an appeal against sentence. However, the Society refused to fund an appeal from conviction. On the advice of senior counsel, and following a review of his decision, the Society took the view that the proposed conviction appeal lacked sufficient merit.
- [4] The applicant's proposed grounds of appeal include error in the trial judge's charge on party liability under s.21(1) and (2) of the Criminal Code, and error in his refusal to admit the applicant's out-of-court exculpatory statement made to the police about 30 hours after his arrest, because there was no explicit suggestion of recent fabrication.
- [5] On this application for the assignment of counsel, Crown counsel did not concede that there was a meritorious ground of appeal, but Mr. Johnstone drew to my attention *Lucas v. The Queen* [1963] 1 C.C.C. 1 as authority which might support the admissibility of the applicant's

out-of-court statement. In Lucas, Kerwin C.J.C. for the majority said at pp.10-11: It was open to the defence to obtain evidence from the appellant to the effect that he had made a statement to the police, following his arrest, which was similar to the evidence which he had given at the trial.

- [6] The general rule against the admissibility of self-serving statements has been subsequently considered by the Supreme Court of Canada in *R. v. Simpson and Ochs* [1988] 1 S.C.R. 3, 38 C.C.C. (3d) 481, and *R. v. Evans* [1993] 2 S.C.R. 629. It does not appear to me that the proposition quoted from Lucas has ever been overruled. The relevant authorities have recently been discussed in *R. v. Liu* [2003] O.J. 74, a decision of the Ontario Superior Court of Justice. See also: P. McWilliams, Q.C., *Canadian Criminal Evidence*, 3rd ed. 1997 and Sopinka, Letterman and Bryant, *The Law of Evidence in Canada*, 1992.
- [7] In my respectful opinion there is sufficient merit in this ground of appeal to make it desirable in the interests of justice for the applicant to have legal assistance in the preparation and presentation of his appeal. Accordingly, I direct that Mr. Markovitz be assigned to act on the applicant's behalf under the provisions of s.684. "The Honourable Chief Justice Finch"

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