

CANADA / JUDGMENT

R. v. Nguyen

2021 BCSC 2174

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2174 R. v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2021 BCSC 2174

Date: 20211102

Docket: X082747

Registry: New Westminster

Regina

v.

Tyrel Hieu George Mahoney Nguyen

also known as Tyrel Quesnelle

Restriction on Publication: A publication ban has been imposed pursuant to s. 486.5(1) and 486.5(9) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify any undercover officer involved in the investigation of the accused.

Restriction on Publication: Pursuant to s. 486.5(1) of the Criminal Code, and the inherent jurisdiction of the Court, a publication ban has been imposed prohibiting publication of information that could tend to identify the witness referred to as the agent in these reasons, or which could be used to identify the witness.

These publication bans apply indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraphs 8, 13, 22, 23, 29, 31, 31(2) and 32 where changes were made on January 13, 2022.

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment Voir Dire #1 - Crown Application re: Discreditable Conduct and Admissions against Interest of the Accused

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I. Introduction

[1] The accused, Tyrel Hieu George Mahoney Nguyen also known as Tyrel Quesnelle ("Mr. Nguyen") is charged with four offences. The charges are of first degree murder of Randeep ("Randy") Kang, and the attempted murder of Gary Kang and Camilo Alonso, using a firearm, all occurring October 27, 2017, at Surrey, BC, and first degree murder of Jagvir Singh Malhi, on or about November 12, 2018, at Abbotsford, BC.

- [2] Mr. Nguyen's trial is scheduled to commence a few months hence, on February 14, 2022, and is estimated to take 78 days for hearing. The trial will be by judge alone. I have been assigned as case management judge under s. 551.1 of the Criminal Code. I may or may not be the trial judge for this case.
- [3] The Crown applies for preliminary, pretrial rulings as to admissibility of evidence of discreditable conduct. The Crown also applies for a ruling as to use of a portion of the proposed discreditable conduct evidence as admissions against interest by Mr. Nguyen. Specifically, the Crown contends that some statements made by Mr. Nguyen in a music rap video that he recorded amount to admissions that he murdered Randeep Kang.
- [4] The defence concedes that all of the evidence that the Crown seeks to rely on as set out in its application materials is prima facie admissible, particularly in the case of a judge alone trial, such as this, where the concerns about prejudicial effect of the proposed evidence are substantially attenuated, as compared with a trial with a judge and jury. Having now heard the application and reviewed the proposed evidence, the defence concession is entirely appropriate.
- [5] However the defence emphasizes the comments of Justice Wedge in *R. v. Haevischer*, 2012 BCSC 1641 [Haevischer], at para. 34, in which Wedge J. emphasized that her pre-trial rulings were based upon the anticipated evidence and live issues at trial, and were therefore subject to reconsideration depending on the manner in which the evidence unfolded at trial. The Crown does not disagree with this unassailable principle.
- [6] The defence also emphasizes that whether any of the proposed evidence should be accepted or rejected, or the weight to be given to any evidence, is for the trier of fact to determine at the conclusion of the trial. This is also clearly true.

II. Background

- [7] The Crown's theory is that at the time of the offences Mr. Nguyen was a member of a criminal gang, the Brothers Keepers group (the "BK" or "BK group") which operated in the Lower Mainland and Fraser Valley of BC. The primary objectives of the BK were to traffic drugs for profit, expand their drug operations, and increase their control of the drug trade.
- [8] The Crown's theory is that Mr. Nguyen was paid by the BK to murder individuals who posed a threat to that group. The Crown's theory is that the murder of Randeep Kang and the attempted murder of Gary Kang and Camilo Alonso on October 27, 2017 and the murder of Jagvir Singh Malhi on November 12, 2018 were carried out on the instructions of the BK group, and for payment of money by the group. These were contracted and paid actual and attempted "hits".
- [9] Further detail as to the Crown's theory is set out in the Crown submissions in support of its application. In view of the position of the defence, it is unnecessary for me to set out further detail about the Crown's theory in these reasons.

- [10] In April 2019, a few months after the Malhi murder, a witness approached the police with information about Mr. Nguyen; specifically, that Mr. Nguyen had confessed his involvement in the offences to the witness. The witness provided statements to the police, and later became a police agent. In these reasons the witness will be referred to as "the agent". In late 2019, the agent participated in a number of undercover operations that, the Crown says, resulted in Mr. Nguyen making further admissions about his involvement as a shooter in the offences.
- [11] The agent has a criminal record for violence, and is an unsavoury witness. He was a close and long-standing friend of Mr. Nguyen, dating back to their mid-teen years. The Crown contends that for the trier of fact to understand why Mr. Nguyen made the admissions to the agent, the Court must have a complete illustration of the relationship that existed between them, before, during, and after the offences. The Crown also argues that Mr. Nguyen's membership in the BK group provides context and motive for the offences before the court. The Crown argues that the evidence of the nature and organization of the group is necessary to show Mr. Nguyen's role within it, and why the murders and attempted murders occurred.
- [12] In overall terms, the Crown argues that the discreditable conduct evidence is probative in relation to the live issues at trial of:
1. narrative and context;
 2. motive;
 3. planning and deliberation;
 4. means and opportunity, and
 5. credibility of the agent.
- [13] As part of the discreditable conduct evidence, the Crown intends to introduce a music video featuring an artist by the name of "T-Sav", who performs a rap song entitled "My Life". The video is posted on the public video sharing website YouTube. The Crown describes the video as a montage of still photographs, many of which are photographs of Mr. Nguyen. According to the Crown's description, in the accompanying audio, the rapper tells the listeners of the trials and tribulations of his life, and describes his ultimate success. The Crown will argue that T-Sav is Mr. Nguyen. The Crown says the agent will testify about Mr. Nguyen's aspiration to become a rapper, that the agent attended a recording studio where the rap song was recorded, and that he took some of the photographs in the montage.
- [14] The Crown submits that the music video is autobiographical, and is probative of Mr. Nguyen's allegiance to the BK group, and loyalty to that group. The Crown argues that the video is probative of other issues, such as Mr. Nguyen's lifestyle and use of slang to communicate. The Crown contends that the lyrics will contribute to an understanding of slang used by Mr. Nguyen in the undercover scenarios. The Crown contends that the video corroborates the evidence of the agent, including his presence during the recording, his role

in the recording, and his relationship with Mr. Nguyen.

[15] The lyrics are difficult to decipher to the untrained ear. The Crown proposes to introduce a transcript of the lyrics heard in the video. The defence did not take issue with the transcription on the hearing of the application.

[16] The Crown intends to rely on certain specific lyrics within the video as admissions. The Crown contends that the video refers to the death of a BK associate, Gavin Grewal. The Crown contends that in the video Mr. Nguyen is rapping about his killing of Randeep Kang.

[17] The specific lyrics the Crown relies on are these:

1. Hop out the whip with a burner, bitch. Headshot. I'm dumping clips that's plural shit.
2. I heard there was a tank, half a clip into his brain.
3. I can't wait to catch you slippin', leave you face first dead. Put a hole in his fish's head, now he a dolphin. That's what he get for doin' all that talkin'. All that murder shit, stop playin', you ain't killed shit. I caught my first body when you was in school kid.

[18] As noted, the defence does not oppose admission of the video and lyrics, subject once again to possible reconsideration at trial, and the defence again emphasizes that whether the evidence should be accepted or rejected, and the weight to be given to the evidence, if any, will all be for the trier of fact at the end of the day.

III. Analysis

A. Discreditable Conduct Evidence

1. Legal Principles

[19] The parties do not disagree as to the legal principles applicable.

[20] As noted in *R. v. S.G.G.*, [1997] 2 S.C.R. 716 [S.G.G.], at para. 64, evidence which incidentally demonstrates bad character can also be directly relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means, as long as its probative value outweighs its prejudicial effect.

[21] In *Haevischer*, Wedge J. summarized the general principles applicable as follows:

[9] Evidence of discreditable conduct relating to an accused which shows only that the accused is the type of person likely to have committed the offence in question is inadmissible. As Binnie J. observed in *R. v. Handy*, 2002 SCC 56 at para. 72:

Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but "moral prejudice" and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person.

- [10] However, evidence of discreditable conduct may be admissible where it is both relevant to a material issue at trial, and its probative value outweighs its prejudicial effect: see, for example, *R. v. S.G.G.*, [1997] 2 S.C.R. 716.
- [11] The exclusionary rule includes similar fact evidence, where the Crown seeks to advance evidence that the accused committed discreditable acts similar to the offence with which he or she is charged. However, the rule also applies to discreditable conduct that bears no similarity to the offence charged: *R. v. Mahalingan*, 2008 SCC 63 at para. 160. In the present case, the Crown seeks to introduce discreditable conduct evidence which bears no similarity to the offences with which the Accused are charged.
- [12] There is no closed list of purposes for which discreditable conduct evidence may be relevant, and courts have admitted it on a range of bases. The Crown in the present case identifies several purposes for which it says the proposed discreditable conduct is relevant, primarily: narrative and context; motive; opportunity and means; and, witness credibility.
- [22] Justice Wedge went on to discuss the admissibility of discreditable conduct evidence specifically in the context of narrative, motive, opportunity and means, and credibility of witnesses. These purposes overlap with the Crown's purposes in this case. I adopt paras. 13-27 of *Haevischer*, in this respect.
- [23] To be admissible, evidence must be relevant. However, relevance is a low hurdle to clear: *R. v. Sipes*, 2011 BCSC 640, at para. 42; *R. v. Skeete*, 2017 ONCA 926 [*Skeete*] (leave to SCC ref'd: [2018] S.C.C.A. No. 508) at para. 145. The evidence must only be reasonably capable of belief: *Haevischer*, para. 29, citing *R. v. Handy*, 2002 SCC 56, at para. 134.
- [24] As Justice Watt explained in *Skeete*:
- 145 The threshold for relevance is not rigorous. To decide whether an item of evidence is relevant, a judge must determine whether, as a matter of human experience and logic, the existence of particular fact, directly or indirectly, makes the existence (or non-existence) of a material fact more probable than it would be without the evidence. That a single item of evidence may give rise to different or competing inferences does not warrant its exclusion for want of relevance: [citation omitted].
- [25] However a trial judge has a discretion to exclude evidence that is otherwise relevant, material and admissible where the prejudicial effect of the evidence outweighs its probative value: *Skeete*, para. 151. In particular, in relation to evidence of the accused's extrinsic misconduct, evidence of bad character or disposition is inadmissible unless the Crown is able to demonstrate on a balance of probabilities that the probative value of the evidence exceeds its prejudicial effect: *Skeete*, para. 147; *Haevischer*, para. 10.

- [26] In conducting the weighing exercise of probative value versus prejudicial effect, the trial judge is only deciding the threshold question of whether the evidence is worthy of being heard by the jury, not the ultimate question of whether the evidence should be accepted and acted upon by the trier of fact: Skeete, at para. 154.
- [27] While concerns about the prejudicial effect of evidence are attenuated where a case is heard by a judge alone, without a jury, such concerns do not disappear entirely: Haevischer at para. 32.
- [28] Two forms of prejudice are particularly pertinent. The first is moral prejudice, being the risk that evidence will be used to draw the prohibited inference that the accused is the kind of bad person likely to commit the offence charged. The other is reasoning prejudice, which includes risks that the trier of fact may be distracted from deciding the issue in a reasoned way due to the inflammatory nature of the evidence, or confusion as to the real issues in the case. Relevant considerations include the extent to which the proposed evidence is discreditable, the extent to which it may support an inference of guilt based solely on bad character, the extent to which it may confuse issues, and the accused's ability to respond to the proposed evidence: Haevischer, paras. 30 and 31.

2. The Evidence

- [29] In view of the defence concession, it is unnecessary to review the Crown's proposed evidence in detail. Should the need arise, there is a complete record of the Crown's proposed evidence set out in the Crown's application materials. The source evidence is detailed in the Crown's book of materials filed as Exhibit 1 on the application, and is categorized in the Crown's summary of the proposed evidence filed as Exhibit 2.
- [30] In its submissions, the Crown summarizes the proposed evidence in two categories:
- A. Evidence of criminal conduct, such as how the relationship between the agent and Mr. Nguyen developed, Mr. Nguyen's involvement in the drug trade, Mr. Nguyen's involvement in acts of violence, and Mr. Nguyen's possession and use of firearms.
- B. Mr. Nguyen's association with the BK, including his tattoos, the music video, and his motive for the murders.
- [31] The Crown's "proposed evidence" summary further categorizes the relevant evidence in terms of:
- 1) anticipated viva voce evidence of the agent;
 - 2) documentary evidence about Mr. Nguyen's tattoos and other BK tattoos; and
 - 3) the music video evidence.

- [32] I accept that the discreditable conduct evidence the Crown proposes to adduce should be admitted into evidence subject, of course, to the potential for reconsideration at trial, if necessary, and, of recognition that the trier of fact will determine whether the evidence should be accepted at all, and what weight might be given to it, at the end of the day. The evidence meets the low threshold for admissibility as relevant evidence, and its probative value exceeds its potential for prejudice.
- [33] In relation to the question of weighing probative value versus the potential for prejudice, it must be recognized that the proposed evidence is, generally speaking, central to the Crown's theory of the case. So for instance, since the Crown's theory is that Mr. Nguyen committed the offences as a contract killer for the BK, the Crown must lead evidence pertaining to the BK and Mr. Nguyen's alleged association with it. I accept the Crown's submissions that the evidence is relevant to the expected live issues at trial of motive, planning and deliberation, and means and opportunity. Much of the proposed evidence is relevant to the agent's credibility. The evidence of the agent is central to the Crown's case. The evidence is also relevant as narrative and context evidence, although I accept that, as the defence notes, courts must avoid simply allowing so-called "narrative" evidence to be used as a vehicle for the admission of evidence that is otherwise inadmissible and prejudicial: *R. v. Borel*, 2021 ONCA 16, at para. 48.
- [34] The trial judge has a duty to warn the jury that evidence of bad character cannot be used to determine guilt simply on the basis that the accused is the type of person to commit the crime: *S.G.G.*, para. 65. Therefore, in a judge alone trial, the trial judge must self-instruct, and carefully adhere to this principle.

B. Admissions

- [35] The Crown will be tendering the video as evidence in its case, as previously discussed, for various purposes. In addition, as noted, it seeks to rely on certain passages in the lyrics as admissions against interest. Therefore the issue here is whether the Crown may rely on what are alleged to be admissions, in addition to the other purposes for which the Crown seeks to rely on the evidence.
- [36] On the basis of the evidence of the agent and the video itself, it appears the Crown will have little difficulty establishing that the music video is a statement of the accused.
- [37] The question of whether an artistic work or expression such as a poem, story, rap song or video can be adduced as evidence has been considered in a number of cases.

- [38] In *R. v. Campbell*, 2015 ONSC 6199, the Crown sought to rely on a rap video made by the accused, as a confession to the murder. The court noted that in the case of lyrics generally, and especially when it comes to rap music lyrics, it is risky to take words literally. The mere fact that an artist records a rap song with lyrics that refer to drugs, guns, violence and the like cannot be taken as an admission that the artist was involved in such activities. Justice Nordheimer stated:
- [25] Absent some other evidence that would establish that the artist is truly speaking about a personal experience, there is a fundamental flaw in asserting that such first person lyrics are the truth. There is an even greater danger in asserting that they can be taken as amounting to a confession.
- [39] The court noted the highly prejudicial effect of the evidence, in a jury case, and was not satisfied that the probative value of the evidence outweighed its prejudicial effect.
- [40] However in other cases the courts have admitted rap music lyrics as, potentially, admissions: *R. v. Millard*, 2017 ONSC 5275, at para. 54; *Skeete*, at paras. 144-195. In *Skeete*, the court rejected the trial judge's analysis of probative value versus prejudicial effect, but considered that issue afresh, and concluded that the rap lyric was properly admitted into evidence. The court noted that there was a significant nexus between the lyric tendered for admission and the offence with which the appellant was charged (para. 187), and that the trial judge provided careful limiting instructions, reminding the jurors that the lyrics were a form of artistic expression, and may not represent the belief of the accused.
- [41] In *R. v. Mills*, 2019 ONCA 940, the Court accepted that rap lyrics can carry artistic meaning while at the same time reflecting real life events: para. 122. The Court noted:
- [122] For instance, while we agree with the sentiment that no one would seriously think that just because someone writes and sings about having shot a sheriff he or she actually engaged in that act, if charged with that exact act, accompanied by other circumstantial evidence suggesting the singer actually committed that act, it may be that the lyrics would take on a much more probative posture.
- [42] The Crown points to a number of indicia suggesting that the music video is based on real life events experienced by Mr. Nguyen. The title of the rap music video is "My Life". Mr. Nguyen is the performer. The song commences by reference to the death of Gavin Grewal, alleged to be a BK group associate. Photographs and depictions of Gavin Grewal are seen numerous times throughout the video. Alongside images of Gavin Grewal in the video, Mr. Nguyen features photographs of himself, other associates, and his dog. The Crown contends that the shooting referred to is that of Randeep Kang, and that there are statements in the video that coincide with the actual facts of the Kang killing, such as shooting a person in the head multiple times, the victim's body size ("tank"), and the Crown's theory as to Mr. Nguyen's motives (or perhaps his justifications, I would suggest) for the murder.

[43] I accept that the probative value of the lyric evidence outweighs its potential for prejudice, in this judge-alone trial. I accept that the specific lyrics the Crown relies upon should be admitted into evidence as potential admissions, subject to all appropriate cautions and limiting instructions. I emphasize once again that whether the evidence is ultimately accepted or rejected, and the weight to be given to the evidence, will be for the trial judge to determine in the context of the evidence at trial as a whole.

[44] Accordingly, the Crown's applications are allowed.

"Verhoeven J."

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