

CANADA / JUDGMENT

R. v. Picard

2020 BCCA 107

COURT

British Columbia Court of Appeal

DECIDED

14 April 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 107 R. v. Picard COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Picard, 2020 BCCA 107 Date: 20200414 Docket: CA46093 Between: Regina Respondent And Louis Andrew Picard Appellant Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Mr. Justice Hunter On appeal from: An order of the Provincial Court of British Columbia, dated March 7, 2019 (conviction) (R. v. Picard, Vancouver Docket 247190-1). Counsel for the Appellant: T.B. Magder Z. Zwanenburg, Articled Student Counsel for the Respondent: E. Laurie Place and Date of Hearing: Vancouver, British Columbia March 9, 2020 Place and Date of Judgment: Vancouver, British Columbia April 14, 2020 Written Reasons by: The Honourable Mr. Justice Willcock Concurred in by: The Honourable Madam Justice Fenlon The Honourable Mr. Justice Hunter Summary: The respondent Crown applies to quash the conviction appeal on the basis that this Court does not have jurisdiction to hear the appeal or to order the relief sought. The notice of appeal and the appellant's factum identify no basis upon which the conviction could be set aside or a new trial ordered and no appeal is taken from the sentence. Rather, the appellant seeks to have a ruling made by the trial judge on a voir dire set aside on the basis it constitutes an error of law. Held: Application granted, appeal quashed. An appellate court has no jurisdiction in a conviction appeal to make declarations on questions immaterial to the verdict where neither an acquittal nor a retrial are sought. Reasons for Judgment of the Honourable Mr. Justice Willcock:

[1] The Crown applies to dismiss this appeal from conviction for possession of methamphetamine and possession of cannabis contrary to s. 4(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, on the ground that we do not have the jurisdiction to hear the appeal or grant the relief the appellant seeks.

[2] On March 30, 2018, the appellant was arrested at a tent in which he was then living on Alexander Street in Vancouver, British Columbia. He was found to have on his person three bags, two of which each contained three grams of cannabis marihuana, and one of which contained .89 grams of what was initially believed to be heroin, but turned out to be cannabis resin. Two bags of crystal methamphetamine, each weighing in excess of two grams, were later found on the appellant when he was taken into custody and searched at the police station. A search of his tent revealed the presence of additional quantities of crystal methamphetamine and cannabis marihuana and some fentanyl.

- [3] He was charged with four counts:
- a) Possession of methamphetamine and fentanyl for the purpose of trafficking;
 - b) Possession of methamphetamine for the purpose of trafficking;
 - c) Possession of heroin for the purpose of trafficking;
 - d) Possession of cannabis, not exceeding three kilograms, for the purpose of trafficking.
- [4] At trial, the appellant contested the authority of the police to search his tent without a warrant. That challenge was dismissed on a voir dire by the trial judge ("voir dire #2") and the evidence obtained on the search was admitted into evidence.
- [5] The charges of possession for the purpose of trafficking were dismissed because the trial judge accepted the appellant's evidence that he is an addict and habitually uses large amounts of both cannabis and methamphetamine. The judge was left with a reasonable doubt that the appellant was trafficking. The appellant was convicted of the lesser, included simple possession offences, to which he admitted, and was sentenced to one day in jail after credit for 60 days in pre-trial custody. He appeals his conviction but has not sought leave to appeal his sentence.
- [6] The notice of appeal identifies the following grounds:
- a) error "in determining the Appellant's tent was not a home";
 - b) error "in determining that the search of the Appellant's tent was valid"; and
 - c) such other grounds as counsel may advise.
- [7] The appellant's factum (at p. 24) identifies no ground of appeal other than an allegation it was an error to admit the substances found on the search of the tent into evidence. The relief sought is an order "that the appeal be allowed and the judgment on voir dire 2 in this matter be set aside."
- [8] The Crown says the Court has no jurisdiction to entertain the appeal and has no power to grant the relief sought by the appellant. It contends the conviction does not rest upon evidence obtained on the search of the tent. The appellant had cannabis marihuana, cannabis resin and crystal methamphetamine on his person when he was arrested. He does not appeal his sentence. The outcome will not be affected by success on appeal. The Crown therefore says we cannot consider the appellant's case as framed. It submits that s. 686 of the Criminal Code, R.S.C. 1985, c. C-46 permits us to allow an appeal where an appellant seeks to have a verdict or judgment set aside, but not otherwise. Relying on the judgment in *R. v. DeJong* (1996), 74 B.C.A.C. 146, it says we cannot hear interlocutory appeals in criminal matters or make declaratory orders.
- [9] In *DeJong*, Rowles J.A. for the Court wrote:

- [15] It is useful to begin with the general principle that in criminal matters there is no right of appeal save as provided by statute. The Court of Appeal has no inherent jurisdiction to hear an appeal.
- [10] After describing the judicial history of the case, which was initiated by a petition for a declaratory order, she noted:
- [18] Section 675 enumerates the rights of appeal of accused persons in proceedings by indictment. An accused may appeal to the Court of Appeal against conviction, sentence, a finding of unfitness to stand trial, or a verdict of insanity. The present appeal does not fall within any of those categories.
- [11] She then canvassed the limited jurisdiction to grant "Extraordinary Remedies", contained in ss. 774-784 of the Criminal Code, and appeals in such cases, and concluded of the scheme as a whole:
- [20] The effect of these provisions of the Criminal Code is to prohibit interlocutory or collateral appeals with respect to proceedings in indictable criminal matters.
- [24] The prohibition against interlocutory appeals by either the Crown or the defence in criminal matters has recently been reaffirmed by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 94 C.C.C. (3d) 289 at p. 302.
- [28] Finally, I note that the powers of the Court of Appeal in criminal matters, which are set out in ss. 686-687 of the Criminal Code, do not confer a power to make declaratory orders such as those sought in Part IV of the accused's factum.
- [12] The Crown argues that what is being sought here is neither a new trial nor an acquittal but, rather, a declaration that evidence that ultimately proved to be inessential to the conviction ought not to have been admitted. While the question whether a tent occupied by a person in the appellant's position is a home is a matter of significant public interest that will eventually have to be resolved, it is not open to us to address if the conviction appeal is not well-founded.
- [13] The appellant says whether an error of law affects a verdict is a question to be decided on the hearing of the appeal on the merits. He contends it is implicit in the existence of the curative proviso in s. 686(1)(b)(iii) of the Criminal Code that appellate courts can and will decide questions that do not ultimately bear on guilt or innocence. Relying on *R. v. Duguay*, 2019 BCCA 53, and *R. v. Rajaratnam*, 2019 BCCA 209, the appellant submits we have a discretion to hear and decide questions that are moot where it is in the interests of justice to do so, bearing in mind judicial economy and the proper adjudicative function of the court.
- [14] The appellant says the decision on *voir dire* #2 has been relied upon by other courts as a precedent and says, for that reason, we should exercise our discretion to permit the appeal to proceed to a hearing on the merits. That submission presumes there is a discretion and ignores the question whether we have jurisdiction to hear the appeal.

- [15] The jurisdictional issue is apparent in this case because the appellant does not seek the relief we have jurisdiction to grant on a conviction appeal: an order that the conviction be set aside and an acquittal entered or an order for a new trial. Such relief was apparently sought in the cases he cites as authority for the proposition that we can address moot issues on criminal appeals.
- [16] While appellate courts occasionally address issues that are ultimately found to be immaterial to the outcome, they cannot hear appeals in criminal cases that ab initio are founded upon questions irrelevant to the verdict. The curative proviso is intended to permit appellate courts to uphold convictions despite an error of law, where the error is immaterial, it is not an invitation to hear appeals from rulings that cannot impact upon the ultimate outcome.
- [17] In *Rajaratnam* the Crown appealed acquittals on a number of grounds, including an argument that the trial judge had erred in excluding evidence in an affidavit sworn by an officer of the Royal Thai Police, tendered pursuant to the provisions of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.). The trial judge held s. 36 of that Act infringes on an accused's right to a fair trial and to make full answer and defence and, therefore, violates ss. 7 and 11(d) of the Charter. As a result, the Crown was not permitted to tender the hearsay and opinion evidence in the affidavit and the documents attached. On appeal, the Crown sought to rely only upon travel histories appended to the affidavit, not the objectionable hearsay and opinion evidence. The Crown argued the trial judge had erred in excluding that limited evidence but acknowledged the admission of the travel histories alone would not affect the outcome. That concession rendered the judge's constitutional ruling moot. This Court nevertheless dealt with the issue:
- [17] The Crown concedes if the trial judge is found to have erred in excluding the travel histories, then that error, standing alone, would not support an order for a new trial. The Crown accepts that to succeed on this appeal it must succeed on at least one of its other grounds, therefore, the question of the validity of s. 36 is technically "moot" or, as Justice Southin would say, "academic": see *Island Tug & Barge Ltd. v. Communication, Energy and Paperworkers Union, Local 601*, 2002 BCCA 201 at para. 2. It is, however, well-established that a court has the discretion to determine a moot appeal or a moot issue when it is in the interests of justice to do so: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353; *R. v. Duguay*, 2019 BCCA 53 at paras. 57–59.
- [18] The moot issue could only be considered in *Rajaratnam* because the Crown continued to argue the acquittals were undermined by an error of law and sought to have them set aside. The case stands for a proposition that is not in doubt: when an appeal is properly before an appellate court, it is able to address questions that are technically moot where it is in the interests of the administration of justice to do so.

- [19] Similarly, in *Duguay*, no question of jurisdiction arose. Following his conviction, the respondent was sentenced to a period of imprisonment and two years' probation. His probation order included conditions requiring him to reside in a residence approved by his probation officer and to attend treatment and counselling as directed. The respondent's application to vary the terms of the order was dismissed. He appealed, arguing that the probation order improperly delegated a judicial function. The summary conviction appeal judge held the sentencing judge lacked jurisdiction to impose the conditions. The Crown appealed, raising two questions of law concerning the interpretation of s. 732.1(3)(h) of the Criminal Code. By the time the appeal came on for hearing, the probation order was spent and the issues on appeal were therefore moot. We nevertheless heard and allowed the appeal, reinstating the original sentence. Justice Fitch, writing for the Court said:
- [57] It is common ground that the appeal is moot as the probation order is now spent. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, the Court identified two steps in a mootness analysis. First, the court must determine if the tangible and concrete dispute has disappeared and the issue has become academic. Second, the court must determine whether to exercise its discretion to hear the case, considering the three rationales underlying the mootness doctrine: the lack of an adversarial context, the concern for judicial economy, and the concern for preserving the proper adjudicative function of the court: at 358-63.
- [58] The court should exercise its discretion to hear the case if it raises an issue of public importance such that it is preferable to allocate scarce judicial resources to resolve the issue rather than incur the social cost of leaving it unresolved: *Borowski* at 361. In *R. v. Smith*, 2004 SCC 14, Binnie J. noted that *Borowski* provides the principled framework within which the court must consider whether it is in the interests of justice for an appeal to proceed: at paras. 20, 41.
- [20] In *R. v. Smith*, upon which Fitch J.A. relied, there was, similarly, no question of jurisdiction. *Smith* initiated an appeal but died before the appeal was heard. Justice Binnie clearly states, at the outset: 4 The appeal was properly constituted by a notice of appeal filed before *Smith's* death. While the appeal was rendered moot by that death, the court had a discretion to proceed with a moot appeal, provided the discretion was exercised in accordance with judicial principles: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 358. However, the discretion to hear the appeal of an individual who dies pending the hearing of his or her appeal should be exercised only in exceptional circumstances where the death of the appellant is survived by a continuing controversy which, notwithstanding the death of the individual most directly affected by the appeal, requires resolution in the interests of justice. There are no such exceptional circumstances in this case. The appeal should therefore be dismissed. [Emphasis added.]
- [21] He elaborates: 21 It is well established that appeals are solely creatures of statute: see *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 958; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at pp. 69-70; *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773; and *Welch v. The King*, [1950] S.C.R. 412, at p.

428. See also s. 674 of the Criminal Code which provides that, "[n]o proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences." Section 675(1) provides the source of jurisdiction for the appeal, i.e., "[a] person who is convicted . . . may appeal to the court of appeal . . . against his conviction" (emphasis added [by Binnie J.]). This language presupposes that at the time of the filing of the notice of appeal, the person convicted is alive and thus competent to initiate the appeal. The relevant procedure is outlined in the Supreme Court of Newfoundland and Labrador -- Court of Appeal Criminal Appeal Rules (2002), SI/2002-96, rule 3. The continuing jurisdiction of the Court of Appeal in this case rested on the notice of appeal that was properly filed during Smith's lifetime. [Emphasis added, except where noted.]

- [22] So, where an appeal is properly constituted by a notice of appeal, an appellate court has jurisdiction and in exceptional circumstances may exercise that jurisdiction to address questions of law that are moot. The standard mootness analysis described in *Borowski* as applied, for example, in *Duguay*, does not permit us to clothe ourselves with jurisdiction to hear an appeal that is not properly constituted.
- [23] An appeal, even where it is cast as an appeal from conviction, is not properly constituted if the appellant seeks only to set aside a ruling on a *voir dire* that has no impact on the verdict. It is not an answer to this shortcoming in this case to say that is merely a defect in the pleadings that can be remedied because not only does the appellant fail to seek an order setting aside the conviction, he identifies no ground in the notice of appeal and makes no argument in the *factum* intended to achieve that result.
- [24] I would quash the appeal. "The Honourable Mr. Justice Willcock" I AGREE: "The Honourable Madam Justice Fenlon" I AGREE: "The Honourable Mr. Justice Hunter"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/01/2020BCCA0107.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-picard-2020>

Prepared on 24 October 2026 · Esheria