

CANADA / JUDGMENT

R. v. Rashid

2024 BCCA 183

COURT

British Columbia Court of Appeal

DECIDED

15 April 2024

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2024 BCCA 183 R. v. Rashid

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Rashid,

2024 BCCA 183

Date: 20240415

Docket: CA49083

Between:

Rex

Respondent

And

Yasin Jemal Rashid

Appellant

Before:

The Honourable Madam Justice Fisher

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
January 25, 2023 (conviction) (R. v. Rashid, 2023 BCSC 438,

Vancouver Docket 31529-2).

Oral Reasons for Judgment

Counsel for the Appellant:

J.A. Cochrane

Counsel for the Respondent:

S.E. Elliott, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

April 15, 2024

Place and Date of Judgment:

Vancouver, British Columbia

April 15, 2024

Summary:

The appellant was convicted of second degree murder and was subsequently sentenced to life imprisonment with no parole eligibility for a period of 12 years. He applies under s. 684 of the Criminal Code for the appointment of counsel to assist with his conviction appeal. Held: Application allowed. Considering the relevant factors, it is in the interests of justice that counsel be appointed. The appellant clearly lacks the competency to present the appeal, which is relatively complex, on his own. Given the sentence imposed, he faces substantial jeopardy. As to the merits, the appellant presents an arguable appeal that has elements of general importance with respect to the question of how evidence of mental disorder adduced in furtherance of an NCRMD defence may bear on the mens rea requirement for murder.

FISHER J.A.:

Introduction

- [1] The applicant, Yasin Jemal Rashid, applies under s. 684 of the Criminal Code, R.S.C. 1985, c. C-46, for the appointment of counsel to assist him with a conviction appeal. The Crown takes no position on the application and has made no submissions.
- [2] The applicant was convicted of second degree murder on January 25, 2023, and was subsequently sentenced to life imprisonment with no eligibility to apply for parole for a period of 12 years. He filed a notice of appeal of his conviction on May 19, 2023. He applied for but was refused legal aid funding for the appeal. The refusal was not for financial reasons.
- [3] In August 2023, the applicant made a s. 684 application. On September 27, 2023, Justice Saunders ordered that counsel be appointed on an interim basis:

- a) to assess the merits of the potential grounds of appeal with respect to the conviction appeal and the sentence appeal;
 - b) to order such limited transcripts as are reasonably necessary to carry out those assessments; and
 - c) if counsel considers there to be sufficient merit, to prepare, file, serve, and present a full s. 684 application with respect to the conviction appeal or the sentence appeal, or both.
- [4] This is the full s. 684 application for the conviction appeal that was contemplated by Justice Saunders' order.

Background

- [5] The applicant is 28 years old. He was born in Ethiopia and came to Canada in his late teens. He has little education and requires the assistance of an English interpreter for his legal proceedings.
- [6] The applicant has been in custody since his arrest on September 11, 2019. At that time, he had no income or personal savings. He was not employed and was living in Watson House, a residential facility for individuals with psychiatric diagnoses. He obtained legal aid for his trial.
- [7] The trial began on June 1, 2021, before Justice N. Smith without a jury. The evidence included written admissions, which largely formed the basis for the trial judge's findings of fact.
- [8] I will briefly describe the circumstances of the offence, taken from the trial judge's reasons for judgment.
- [9] The applicant and the victim, Kyle Gabriel, were both residents of Watson House. On the evening of September 10, 2019, another resident saw the applicant and Mr. Gabriel in Mr. Gabriel's bedroom on the third floor of the house. Minutes later, a mental health worker employed at the house heard loud screams and shouts from upstairs. The applicant came running down the stairs into the kitchen, then fled out the back door. Mr. Gabriel then came down the same stairs shouting and holding on to the side of his neck, which was bleeding profusely. He collapsed on the kitchen floor, suffering from cardiac arrest. He was later pronounced dead, with his death attributed to hemorrhage and associated internal injuries caused by a deep stab wound to the chest. Police who arrived at the scene found a bloodied knife on the floor of Mr. Gabriel's room. Forensic evidence obtained from the knife and other items implicated the applicant.

- [10] On the basis of this evidence, the trial judge found that the Crown had proved the essential elements of the offence of second degree murder. The defence then raised the issue of criminal responsibility under s. 16 of the Criminal Code (NCRMD) and the trial was adjourned for some time, resuming on November 16, 2022. The court then heard evidence relating to the applicant's state of mind leading up to and at the time of the offence, including psychiatric opinion evidence. The applicant did not testify.
- [11] There was no dispute, and the judge found, that the applicant was suffering from a mental disorder at the time of the offence. The applicant did not assert that he was incapable of appreciating the nature and quality of his act (the first branch of the test under s. 16). He relied only on the second branch of the test, the incapacity to know the act was wrong.
- [12] The psychiatric evidence was equivocal according to the judge. The forensic psychiatrist called by the applicant could say only that incapacity was "possible" and the applicant was "in the ballpark" of people who met the applicable legal test. He said it was very unlikely that the applicant maintained a normal moral compass at the time of the offence, but he could not comment on the degree of that distortion. The forensic psychiatrist called by the Crown considered there was insufficient psychiatric evidence on which to form any opinion on the question of incapacity due to the absence of any information from the applicant as to his perception of the circumstances of the offence.
- [13] The trial judge concluded the applicant had not discharged the burden placed upon him by s. 16 to establish on a balance of probabilities that he was NCRMD at the time of the offence and, therefore, he was bound to convict:
- [81] Mr. Rashid must show that he was more likely than not to have been incapable of knowing his action was wrong. I cannot find that to be the case because there is a critical gap in the evidence created by the lack of direct or indirect evidence of what was actually going through his mind in the critical moments when he stabbed Mr. Gabriel. While he had a mental disorder that could have deprived him of the necessary capacity, it would be pure speculation to elevate that possibility to proof on a balance of probabilities.
- [82] I therefore must find that, although Mr. Rashid was suffering from a mental disorder, he has failed to rebut the presumption of criminal responsibility, and I am therefore bound to find him guilty of second degree murder.

Legal framework

- [14] Section 684 provides for the appointment of counsel by a justice of this Court in the following circumstances:

684(1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[15] There are two requirements for the appointment of counsel under this provision: (1) the accused must have insufficient means to obtain legal assistance; and (2) the appointment of counsel must be in the interests of justice: *R. v. Silcoff*, 2012 BCCA 463 (Chambers) at para. 21.

[16] It is clear that the applicant lacks sufficient means to retain counsel and there is no dispute on that issue. The issue here is whether it is in the interests of justice that he has the assistance of counsel for his appeal.

[17] The meaning of the "interests of justice" in the context of s. 684 encompasses both broad based societal concerns and the more specific interests of a particular accused, including his ability to present his appeal without counsel: *R. v. Bernardo* (1997), 121 C.C.C. (3d) 12 (Ont. C.A.). In considering the "interests of justice", the relevant factors include:

- a) the points to be argued on appeal;
- b) the complexity of the case;
- c) any point of general importance in the appeal;
- d) the applicant's competency to present the appeal;
- e) the need for counsel to find facts, research law or make argument;
- f) the nature and extent of the penalty imposed; and
- g) the merits of the appeal.

Silcoff at para. 23; *R. v. Costello*, 2021 BCCA 59 (Chambers) at para. 3. These factors reflect two related concerns: (1) whether an appellant will be able to effectively present his appeal without the assistance of counsel; and (2) whether the court will be able to properly decide the appeal without this assistance: *R. v. Butler*, 2006 BCCA 476 at para. 9.

[18] As for the merits, the threshold requirement is an arguable appeal. In assessing this, regard must be had to the applicable standard of review on the proposed appeal. Although the opinion of the Legal Services Society is a relevant consideration, it is only one factor. Ultimately even where other factors favour the appointment of counsel, it will not be in the interests of justice to do so where an appeal has no merit: see *Silcoff* at paras. 24-27 and the cases cited therein.

Consideration of the factors

- [19] It is clear that the applicant lacks the competency to present the appeal and will need counsel to analyze the record and prepare a factum. He has a little education, limited English language skills and there is evidence of mental health issues. He faces substantial jeopardy given the life sentence imposed. I agree with counsel's submission that this case is relatively complex.
- [20] The issues the applicant proposes to raise do not necessarily challenge the trial judge's NCRMD analysis (or at least do not focus on them), rather they challenge the absence of an analysis that the requisite mens rea for second degree murder had been established, particularly in light of the mental health evidence adduced at trial.
- [21] The applicant asserts the following errors by the trial judge:
1. failing to consider whether the Crown had proven the mens rea for murder beyond a reasonable doubt;
 2. failing to consider whether a mental disorder falling short of incapacity exempting the appellant from criminal responsibility affected his ability to form the specific intent required for murder; and
 3. determining that there was no direct or indirect evidence of the appellant's state of mind at the time of the offence such that making determinations about this was purely speculative.
- [22] These issues are quite different from those considered by Legal Aid BC in refusing the applicant legal aid for his conviction appeal, which focused on the trial judge's rejection of the NCRMD defence.
- [23] In my view, the applicant presents an arguable appeal that has elements of general importance on the question of how evidence of mental disorder adduced in furtherance of an NCRMD defence may bear on the mens rea requirement for murder. The Supreme Court of Canada has directed courts to be mindful of evidence of mental health where relevant to issues of intent and criminal responsibility: *R. v. Lawlor*, 2023 SCC 34.
- [24] Proof of mens rea is the primary issue raised by the applicant. He says the judge erred by finding that once the mental element of the actus reus (voluntariness) had been determined, mens rea for murder had been proven. He says there was no admission as to mens rea and the judge's finding that the Crown had proven the essential elements of the offence of murder is not supported by the evidence.
- [25] The applicant contends that the judge should have considered the NCRMD defence before determining whether he had the necessary specific intent for murder. This sequence is consistent with cases such as *R. v. Chaulk*, [1990] 3 S.C.R. 1303 and *R. v. David*, (2002) 61 O.R. (3d) 1 (C.A.).

- [26] The applicant further contends that the judge provided no analysis of specific intent and did not consider how his mental disorder affected his ability to form specific intent. This is especially problematic, he says, in light of the judge's finding that the applicant was suffering from a mental disorder at the time of the offence.
- [27] I note that there was some confusion about the procedures used in this case as it appears that the judge rendered his verdict before the s. 16 defence was asserted and evidence was called thereafter. There may be a question as to whether the court is entitled to re-open the issue of mens rea after a verdict has been rendered. But, I understand the applicant's argument to go to the root of the judge's finding on means rea as being without a sufficient evidentiary base.
- [28] Finally, the applicant also challenges the judge's finding that there was no direct or indirect evidence of what he was thinking at the time of the offence. He says there was indirect evidence from which inferences could have been drawn about his state of mind. While this issue may have less merit given the standard of review, I consider the overall appeal to clearly meet the merits threshold.

Disposition

- [29] Therefore, applying the principles that govern an application under s. 684(1) of the Criminal Code, I consider it to be in the interests of justice that counsel be appointed in this matter. The application is allowed for the appointment of counsel in respect of the conviction appeal.

"The Honourable Madam Justice Fisher"

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Prepared on 29 October 2026 · Esheria