

CANADA / JUDGMENT

R. v. Smith

1999 BCCA 747

COURT

British Columbia Court of Appeal

DECIDED

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c99-0747.html Citation: R. v. Smith Date: 19991214 1999 BCCA 747 Docket: CA026149 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA BETWEEN: REGINA APPELLANT AND: PATRICK JAY SMITH RESPONDENT Before: The Honourable Madam Justice Southin The Honourable Mr. Justice Hall The Honourable Mr. Justice Mackenzie William F. Ehrcke, Q.C. Counsel for the Appellant (Crown) No one appearing for the Respondent Place and Date of Hearing: Vancouver, British Columbia 5th November, 1999 Place and Date of Judgment: Vancouver, British Columbia 14th December, 1999 Written Reasons by: The Honourable Madam Justice Southin Concurring in by: The Honourable Mr. Justice Hall The Honourable Mr. Justice Mackenzie Written Reasons by: The Honourable Mr. Justice Hall (P. 13, para. 21) Concurring in by: The Honourable Madam Justice Southin The Honourable Mr. Justice Mackenzie Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] This application by the Crown for leave to appeal and, if leave be granted, this appeal against a suspended sentence raises two questions:
1. Has this Court the power or jurisdiction to grant leave to the Crown if the accused has been served with the notice of application for leave to appeal and notice of hearing out of the jurisdiction and is not within the jurisdiction at the time the application for leave comes on to be heard? 2. If so, is the sentence imposed by the learned judge below fit? [2] These reasons address the first question and those of Mr. Justice Hall address the second. As to the second question, I agree with the disposition proposed by him for the reasons he gives.
- [3] The accused is a 39 year old American born in the United States of Canadian parents, but, so far as the material discloses, having no right to be or remain in Canada, now residing in the State of Washington and who, in that State, had a quasi marital relationship with Lydia Rinaldo, a Canadian. By her, he had, in 1996 or 1997, a son, Mateo. In the spring of 1998, she left the accused and returned to Canada with Mateo, contrary to an order of a Washington court that Mateo not be removed from the jurisdiction of that state while litigation was in progress.

- [4] Understandably, the accused was upset and angry by this turn of events. Not so understandably, in the words of counsel for the Crown: ... [he] in April 1998, started making threats of death or bodily harm against the Rinaldo family. He left messages on their answering machine such as: "It's a good day for a funeral." "I'm the judge and jury." "Time is running out." These threats culminated in the events of May 22, 1998. The Respondent stole a firearm and ammunition, and smuggled them into Canada from the United States. He went to the Rinaldo home and waited for Lydia to return. When she arrived, he confronted her saying, "I told you I'd be coming, you fucking bitch." He then assaulted her, pushing her to the ground with [the] barrel of the gun. He pushed the barrel of the gun into her chest with sufficient force to leave a bruise. He attempted to pull the trigger of the loaded gun, but fortunately the gun jammed and no bullets were actually fired. When Lydia's brother, John Rinaldo, intervened to protect her, the Respondent pointed the gun at him and attempted to pull the trigger. Again the gun jammed. [5] He was immediately arrested and charged with seven counts: Count 1: ... hav[ing] in his possession a weapon, a .22 calibre rifle, for a purpose dangerous to the public peace, ... Count 2: ... point[ing] a firearm at John RINALDO ... Count 3: ... point[ing] a firearm at Lydia RINALDO ... Count 4: ... assaulting Lydia RINALDO [with] a weapon... Count 5: ... attempt[ing] to commit the murder of Lydia RINALDO ... Count 6: ... attempt[ing] to commit the murder of John RINALDO ... Count 7: ... knowingly utter a threat to Lydia RINALDO to cause death or bodily harm to Walter RINALDO, Angela RINALDO and Lydia RINALDO ... [6] From his arrest until his trial, a period of some thirteen and one-half months, he was in custody.
- [7] Upon his trial, at which he was represented by counsel, the learned judge, Mr. Justice Wong, found him, on the footing of reasonable doubt, not guilty of the two attempted murder counts, but guilty of the others, and entered convictions on counts 1, 2, 4 and 7. I assume no conviction was entered on count 3 because of the principle of *R. v. Kienapple*.
- [8] The learned judge, who had before him a pre-sentence report and a psychiatric report, in his reasons on sentence, said, in part, this:
- [1] ... Mr. Smith, imposing a sentence in your case is not an easy task because the circumstances were quite frightening and the charges are serious. We have had extensive evidence in this case about the family history and how it led up to the incident on that particular evening.... [2] It was clear to me during the course of the trial that you became extremely angry and basically lost your self-control on that particular evening. It was quite clear that your intention in coming to Canada was to obtain Mateo and bring him back to the United States, because you were of the view that he had been wrongfully removed. In order to carry out that task of kidnapping Mateo back, you took a firearm with you. What concerns the court is the fact that that firearm was loaded. * * * [4] I think what is fortunate in this case is, as the matter escalated and clearly the evidence indicates that when the brothers appeared and appeared to intervene, you were trying to escape from the yard. You were trying to get away at that point. While in the process initially of confronting Lydia and in your anger, what caused me concern in this case was the fact that you attempted to pull the

trigger and fortunately the gun jammed, such that no bullets were expelled. While you were being chased by the brothers, again you tried to pull the trigger and it may well be in order to enable you to escape, but I shudder to think what might have happened if the gun did not jam at that point again. That is primarily the concern in this case on the matter of sentence. * * * [6] You have been in custody since the date of your arrest and the date of the incident, May of 1998, now some 13 and a half months, which is basically equivalent to 27 months in custody. Crown counsel has asked that I impose a lengthy penitentiary term. I think that if this was a case in which injury did arise to the Rinaldo family and if the gun had gone off, clearly you would not have been convicted of the lesser charges that I convicted you of, but clearly of much more serious matters. It could have been either second degree murder or manslaughter at the very least, if death ensued. I suppose that is the paramount concern of the Crown in this case, because it could have very easily escalated to that point. [7] However, I must be mindful of the fact that you are the biological father of Mateo and eventually, no doubt, you will likely have some communication with him in the future. This has indeed been a frightening experience for the Rinaldo family and I think what stands in your favour is the fact that from an early stage and throughout the pre-sentence report and psychiatric assessments, you do recognize that the Rinaldo family, to quote your expression are, "Good people," and that Lydia is a good mother. [8] In this particular case, having taken into account specific deterrence, general deterrence and the time already served, I am in agreement with the submissions of your counsel. What is appropriate here is a matter of controlling your future behaviour. [9] Pursuant to what is now s. 731(1) of the Criminal Code, the learned judge, on 30th June, 1999, suspended the passing of sentence and directed that the respondent be released on condition of a three-year probation order, a term of which, in addition to the usual terms, was that the respondent not be within a six block radius of the Rinaldo family dwelling.

[10] The respondent has since been deported from Canada.

[11] On 28th July, 1999, a judge of this Court pronounced this order: UPON the ex parte application of the Applicant pursuant to s. 30 of the Court of Appeal Act and Rule 13 of the Supreme Court Rules coming on for hearing this day; AND UPON HEARING William F. Ehrcke, Q.C., of Counsel for the Applicant; AND UPON READING the materials filed; IT IS ORDERED that the Applicant be granted leave to serve the Notice of Application for Leave to Appeal filed herein ex juris on the Respondent, Patrick Jay Smith, at or near Marysville, in the State of Washington, in the United States of America, or elsewhere in the United States of America. [12] With all respect, if this Court has power to authorize service out of the jurisdiction of a Crown application for leave to appeal sentence, that power does not come from s. 30 of the Court of Appeal Act and Rule 13 of the Supreme Court Rules. It is trite that this Court's power in criminal matters is derived, and can only be derived, from the Criminal Code and rules lawfully promulgated thereunder, which may, of course, import by reference provisions of other enactments, including enactments which have their constitutional foundation not in s. 91 of the Constitution Acts, but in s. 92.

- [13] There are no express provisions in the Criminal Code or in the Rules of this Court promulgated thereunder relating to service out of the jurisdiction.
- [14] I set out the enactments bearing on the question: The Criminal Code: Section 683 -
- (3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto. (4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada. The powers mentioned in subsection (1) have nothing to do with the issue now before the Court. Section 482 -
482. (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal. * * * (3) Rules under subsection (1) or (2) may be made * * *
- (d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence British Columbia Court of Appeal Criminal Appeal Rules, 1986 Rule 2 - Application of court rules and practice directives
- (1) The Court of Appeal Rules (Civil) B.C. Reg. 303/82, as amended from time to time, apply to appeals on matters that are not expressly provided for in these rules. * * * (4) The court and a justice have, in relation to an appeal, all of the powers that they have under the Court of Appeal Act, R.S.B.C. 1996, c. 77, and the rules made under that Act, with any necessary changes as may be applicable. Rule 4 - Appeal by the prosecutor
- (1) Where the prosecutor wishes to appeal, he shall, within 30 days after the pronouncement of the order under appeal,
- (a) file 5 copies of the notice of appeal in Form 3, and (b) serve the respondent or proposed respondent with the notice, either before or after it is filed. Court of Appeal Act Section 30 - 30 If no special provision is contained in this Act or the rules, the procedure and practice of the court is to be regulated by analogy to this Act and the rules or, if there is no appropriate analogy, by analogy to the Supreme Court Act and the Supreme Court Rules. Court of Appeal Rules (civil) Rule 3 - Service of notice of appeal
- (1) A notice of appeal or application for leave to appeal may be served on a respondent

- (a) by serving him personally, (b) by serving his solicitor of record in the court appealed from, or (c) in any other manner directed by a justice. Supreme Court Rules Rule 13 - Service Outside British Columbia This is the Rule providing for service out of the jurisdiction of civil process.

[15] I approach this issue with certain, to me, fundamental propositions in mind:

1. The Queen's Courts, at common law, have no jurisdiction over persons beyond the Realm, unless by domestic law, i.e. by statute, such jurisdiction is conferred. See *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1987), 18 B.C.L.R. (2d) 360 at 365 (S.C.), *aff'd.* (1988) 23 B.C.L.R. (2d) 1 (C.A.); and *Re Shulman and The Queen* (1975), 23 C.C.C. (2d) 242 (B.C.C.A.).
2. No court can proceed in the absence of a party to a proceeding unless that party has been given notice of the proceeding or, by an enactment, there is power to dispense with notice. The root of this is the maxim, *audi alteram partem*. Allied to this is the common law tradition that we do not try accused persons in *absentia*.
3. Notice does not mean notice in fact. It means notice authorized by law. [16] I have no doubt that Parliament, if it chose to do so, could enact expressly that notices of appeal and notices of application for leave to appeal might be served out of the jurisdiction.

[17] The question before us is whether Parliament, by ss. 482 and 683, has used words apt to confer upon this Court the power to authorize service out of the jurisdiction of process initiating a Crown appeal, and, if it did, whether our Rules do authorize such service by the roundabout way of importing civil rules of procedure into them.

[18] On their face, the words are sufficient. However, if a notice of appeal or application for leave is an originating instrument, then I would be reluctant to conclude that Parliament had authorized an intrusion into another sovereign state's jurisdiction over those within its territory in the absence of express words to that effect.

[19] However, in my opinion, neither a notice of appeal nor application for leave is an originating instrument. It is simply an extension of the trial process. What is fundamental is that Canada had jurisdiction over the person of the accused when, for a crime committed in Canada, he was arrested within Canada's borders, a jurisdiction which continued when he was present at his trial. That jurisdiction over his person was not lost when, having been convicted and sentenced, he ceased to be within the Realm.

[20] There is thus nothing offensive to concepts of comity in concluding that the respondent was lawfully served outside the jurisdiction. He having therefore received lawful notice, this Court is entitled to proceed in his absence. "THE HONOURABLE MADAM JUSTICE SOUTHIN" I AGREE: "THE HONOURABLE MR. JUSTICE MACKENZIE" Reasons for Judgment of the Honourable Mr. Justice Hall:

[21] My colleague, Madam Justice Southin, has addressed the first of the two questions which she identifies in her reasons. I agree with her disposition of the first question for the reasons she gives.

- [22] I turn then to the second question, the fitness of the sentences imposed consequent upon conviction.
- [23] The respondent in this case smuggled a firearm and ammunition across the border and waited at the Rinaldo home for Lydia Rinaldo to return home. A violent scene then followed. The appellant pointed the loaded firearm at his ex-partner, Ms. Rinaldo, and at her brother and appeared to be endeavouring to pull the trigger. Apparently, the weapon jammed, a fortuitous circumstance that prevented serious injury or homicide of the potential victims. The history of this appellant prior to these terrifying events portrays a person who has shown a distinct lack of ability to control his temper. I would say he presents a continuing threat to the safety of the members of this family.
- [24] Disputes between persons formerly in a spousal relationship can be very bitter. Perhaps for that reason, Parliament has indicated in Code s. 718.2 that an offender, who in committing an offence abused a spouse or child may be treated more severely because of this aggravating circumstance. This respondent appears to have had continuing difficulty in dealing in a civilized fashion with persons formerly in a spousal relationship with him.
- [25] One of the purposes of a sentence is to deter individuals from continuing to offend against the criminal law. This is referred to usually as the principle of specific deterrence. Given the dangerous and frightening conduct of this respondent on the day in question, conduct that did not result in grave injury or death only by the fortuitous circumstance of a jammed weapon, I consider the suspended sentences ordered by the learned trial judge wholly inadequate to satisfy the need for specific deterrence. This disposition could also, I venture to suggest, be perceived as a lack of denunciation of such behaviour. Severe treatment of offenders who conduct themselves as did this respondent will hopefully deter other individuals who may be minded to try to settle spousal controversies by the use of violence and weapons.
- [26] In my respectful view, the only fit sentence for this offender was a significant period of incarceration in a federal institution. While a higher sentence could well be justified on the alarming facts of this case, I propose to order that there be imposed on this respondent concurrent terms of two years imprisonment on all charges on which he was convicted. I am not overlooking the fact that this respondent had at the original time of sentence spent some 13 months in pre-trial custody. However, in my view, that time, often viewed as roughly equivalent to double that time spent in custody after sentence, is simply not a significant enough period of imprisonment having regard to the circumstances of this very dangerous and deliberate criminal activity.
- [27] I doubt if at his age, a term of probation is either meaningful or useful for this respondent. Only the sanction of imprisonment seems to me likely to impress upon this offender the need to refrain from conduct of this sort in future.

[28] Accordingly, I would grant leave to appeal and would allow this appeal and substitute a sentence of two years concurrent imprisonment on all charges. I would maintain the ten year firearms prohibition order. I would allow the appeal accordingly. "THE HONOURABLE MR. JUSTICE HALL" I AGREE: "THE HONOURABLE MR. JUSTICE MACKENZIE"

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