

CANADA / JUDGMENT

R. v. Soomel

2020 BCCA 118

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 118 R. v. Soomel COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Soomel, 2020 BCCA 118 Date: 20200430 Docket: CA45819 Between: Regina Respondent And Ravinder Singh Soomel Appellant Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Mr. Justice Fitch On appeal from: An order of the Supreme Court of British Columbia, dated December 6, 2018 (R. v. Soomel, 2018 BCSC 2240, Vancouver Docket 26947). Counsel for the Appellant: B.R. Anderson C.D. Rose Counsel for the Respondent: L.A. Ruzicka Place and Date of Hearing: Vancouver, British Columbia December 13, 2019 Written Submissions Received: January 8 and 22, 2020 Place and Date of Judgment: Vancouver, British Columbia April 30, 2020 Written Reasons by: The Honourable Madam Justice Fenlon Concurred in by: The Honourable Mr. Justice Willcock The Honourable Mr. Justice Fitch Summary: The appellant is serving a life sentence without eligibility for parole for 25 years for first degree murder. After serving 18 years of that sentence, he applied for a reduction in the number of years of parole ineligibility under s. 745.6 of the Criminal Code. His application was dismissed at the screening stage. Held: Appeal allowed and matter remitted to court below for rehearing. The screening judge erred in law by attributing moral culpability to the appellant for a second murder. Although the appellant had been charged with another first degree murder, he had pleaded guilty to the lesser included offence of conspiracy to commit murder. Pursuant to s. 606(4) of the Criminal Code, that plea resulted in an acquittal on the original charge and the elements of the offence of murder could not be attributed to the appellant in subsequent proceedings. Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] Ravinder Singh Soomel is serving a life sentence for murder. After serving 18 years of that sentence, he applied for a reduction in the number of years of imprisonment before parole eligibility under s. 745.6 of the Criminal Code, R.S.C. 1985, c. C-46, commonly known as the "faint hope" provision. His application was dismissed at the screening stage -- a decision Mr. Soomel now appeals.

Background

- [2] Mr. Soomel became involved in the drug trade while in his teens. In September 2000, when he was 20 years old, he was the leader of a planned execution, organizing and enlisting four accomplices to murder Mr. Sohi, a rival drug dealer who was also only 20 years old. Mr. Soomel was convicted of first degree murder in 2003 and sentenced to life imprisonment without eligibility for parole for 25 years.
- [3] In December 2008, while serving that sentence, he was charged with first degree murder of Mr. Herle. That offence occurred in 1997, about three years prior to the murder of Mr. Sohi, and two weeks after Mr. Soomel's 18th birthday. Mr. Soomel agreed to assist in the contract killing of Mr. Herle, who was 20 years old. Mr. Soomel and his co-perpetrator hid in bushes outside Mr. Herle's residence. When Mr. Herle and his girlfriend left the residence, Mr. Soomel and the other man ambushed them. Both men were brandishing handguns and had their faces covered with ski masks. Mr. Soomel pointed one handgun, and the other man shot Mr. Herle nine times at close range in the head and torso. Mr. Soomel pleaded not guilty to first degree murder and entered a guilty plea to the lesser included offence of conspiracy to commit murder. He was sentenced to five years' incarceration following a joint submission.
- [4] For the first years of his sentence for the murder of Mr. Sohi, Mr. Soomel was detained in a maximum security institution and was heavily entrenched in the institutional drug subculture. He was often anti-authoritarian and defiant. Some time after his brother's death at the hands of a rival drug dealer in 2009, Mr. Soomel's behaviour shifted. By the time of the application underlying this appeal, Mr. Soomel had cascaded down to a minimum security institution where he had been held for four years.
- [5] Mr. Soomel completed all recommended courses outlined in his correctional plan. He finished his high school education, obtained post-secondary credits, took a number of vocational training programs, and had been successfully employed in numerous capacities in the institution. In addition, Mr. Soomel had been granted temporary escorted absences from prison by the Parole Board of Canada. The Legislative Scheme
- [6] Parliament enacted the faint hope clause in 1976 in conjunction with the abolition of the death penalty. To address concerns over the lengthy periods of parole ineligibility -- 25 years in the case of first degree murder -- it was decided that offenders should be given an opportunity, 15 years into their sentence, to apply for a reduction in that period. The purpose of the faint hope regime is to call attention to changes in an offender's circumstances which might at that point justify imposing a lesser period of parole ineligibility: *R. v. Swietlinski*, [1994] 3 S.C.R. 481 at 492; *R. v. Dell*, 2018 ONCA 674 at paras. 11-14.

- [7] To put the nature of a faint hope application in context, it is helpful to recognize that an applicant is in effect only asking a judge for a chance to ask a jury for a chance to ask the parole board for early parole. It is the Parole Board of Canada that ultimately decides whether parole will be granted.
- [8] Under the original faint hope regime, an offender applying for review had an automatic right to have a jury empaneled to hear the application. That changed in 1996, when Parliament amended the provision to include a judicial screening procedure: An Act to amend the Criminal Code (judicial review of parole ineligibility) and another Act, S.C. 1996, c. 34. Thereafter, an applicant was required to first convince a judge on a balance of probabilities that there was a "reasonable prospect" that the application would succeed before a jury. In addition, persons convicted of more than one murder were no longer eligible to apply, even if the offences had been committed prior to the amendments.
- [9] In December 2011, the faint hope regime was amended yet again: An Act to Amend the Criminal Code and Another Act, S.C. 2011, c. 2. Parliament made the test for judicial pre-screening more onerous, requiring the judge to be satisfied on a balance of probabilities that there is a "substantial likelihood" that a jury will unanimously agree to reduce the applicant's parole ineligibility: *Dell* at paras. 13, 19 and 24. As with the 1996 amendments, the changes made in 2011 are stated to apply to all applications made after the amendment came into force, regardless of when the underlying offence was committed. (A more expansive review of the objects and history of the faint hope clause may be found in *R. v. Simmonds*, 2018 BCCA 205.)
- [10] In the present case, Mr. Soomel challenged the constitutional validity of the retrospective application of the more onerous threshold screening test, i.e., the change from "reasonable prospect" to "substantial likelihood". The Ontario Court of Appeal in *Dell* found that retrospective application to be a breach of s. 11(i) of the Charter, but the substantial likelihood test remains in force in British Columbia. Although challenges to the new threshold test have been filed in this province, it has not been necessary for courts to decide the constitutional issue because they have found, in the circumstances before them, that the outcome would remain the same based on either form of the test: see, for example: *R. v. Yu*, 2014 BCSC 206 at paras. 8-10; *MacMillan v. British Columbia*, 2015 BCSC 2298 at paras. 7-9; *R. v. Chow*, 2016 BCSC 781 at para. 4. The screening judge took the same approach in Mr. Soomel's case: 2018 BCSC 2240 at para. 6. The Screening Application
- [11] The screening judge began by noting that, in assessing the application, he was to consider the same five criteria the jury would consider if the matter were to proceed to stage two:
- a) the character of the applicant;
 - b) the applicant's conduct while serving the sentence;
 - c) the nature of the offence for which the applicant was convicted;

- d) any information provided by a victim at the time of the imposition of the sentence, or at the time of the hearing under this section; and
 - e) any other matters that the judge considers relevant in the circumstances.
- [12] In considering the criteria, the judge reviewed Mr. Soomel's institutional history, including security incidents in 2007 in which Mr. Soomel's mother, father and brother tested positive on the prison's ion scanner for possible drugs on a number of occasions. The judge stated that Mr. Soomel's character at the time of the offence remained important on the application, saying "[h]is character today is informed not only by that dark past, but also by his conduct while serving his sentence". The judge reviewed submissions describing Mr. Soomel's marked progress over the past seven years and "strongly encouraging letters of support" including two written by employees of Correctional Services Canada, one from the Salvation Army, another from the John Howard Society, and two letters from employees at the prison in which Mr. Soomel was then being held.
- [13] The judge set out his conclusion in two paragraphs:
- [31] Addressing first the substantial likelihood test, I do not find, on the balance of probabilities, that there is a substantial likelihood a 12 member jury would find unanimously that Mr. Soomel's parole ineligibility should be reduced.
- [32] The more difficult question, of course, is whether Mr. Soomel satisfies the reasonable prospect test. Is there a reasonable prospect of a jury unanimously reducing the ineligibility period? I have reached the conclusion that there is not. I view Mr. Soomel's prospect at this stage as being more of a long shot than what could be termed a reasonable prospect. I do not believe a jury voting unanimously could get past the fact that Mr. Soomel killed two times, once in the first degree murder he orchestrated, and the other in the conspiracy to gun down a man in front of his girlfriend. When I link that to Mr. Soomel's unsatisfactory record for approximately the first 12 years of his incarceration, and the articulate and vehement objection of Mr. Sohi's sister, Mr. Soomel's marked improvement in the last six years is commendable, but it is not enough. On Appeal
- [14] Mr. Soomel appeals under s. 745.62(1) of the Criminal Code which provides: The applicant or the Attorney General may appeal to the Court of Appeal from a determination or decision made under s. 745.61 on any question of law or fact or mixed law or fact.
- [15] Mr. Soomel raises three grounds of appeal:
1. Did the screening judge err in law by attributing to Mr. Soomel moral culpability for a murder of which he had been acquitted?
 2. Did the screening judge err in law by considering inadmissible or legally irrelevant evidence such as the conduct of Mr. Soomel's brother and parents?

3. Did the screening judge err in law by finding Mr. Soomel's character at the time of the offence to be the determinative factor on the application? Standard of Review
- [16] There has been limited appellate consideration of the standard of review applicable to screening decisions. In *R. v. Dulay*, 2009 ABCA 12, the Alberta Court of Appeal recognized that the particular standard to be applied will depend on the nature of the error in issue:
- [8] Errors of law are reviewed on a correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. However, *Dulay* does not argue any error of law. Rather, he argues that the screening judge lost sight of what his role was and moved into the role of the jury by weighing conflicting evidence. *Dulay* also argues that the screening judge's decision is inconsistent and is therefore unreasonable. The screening judge's findings will not be interfered with unless they are "clearly wrong, unsupported by the evidence or otherwise unreasonable": *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 at para. 9.
- [17] Section 745.62(3) governs appeals from screening decisions. It provides that ss. 673 to 696 of the Criminal Code apply to an appeal from a screening decision "with such modifications as the circumstances require". Those sections include both the provisions governing sentence appeals (s. 687) and the provision governing appeals from conviction and acquittal (s. 686). Which provision should be applied (with modifications) to appeals from screening decisions?
- [18] The Crown submits that the screening judge's discretionary order is akin to a sentencing decision and should therefore be reviewed in accordance with the principles governing sentence appeals set out in *R. v. Lacasse*, 2015 SCC 64 and *R. v. Agin*, 2018 BCCA 133. The Crown relies on *Swietlinski*, in which the majority held that "the jury's decision is not essentially different from the ordinary decision regarding length of a sentence": at 493. I note however, that *Swietlinski* was decided before the introduction of the threshold screening hearing, and addressed the jury's ultimate decision as to whether the applicant's parole eligibility should be reduced.
- [19] While I agree with the Crown that the screening judge's decision is a discretionary one to be reviewed on a deferential standard, I do not agree that the appeal should be dealt with on the same basis as an appeal from sentence. It is noteworthy that s. 687 authorizes this Court on a sentence appeal to either vary the sentence or dismiss the appeal. Sending the matter back for rehearing is not an option: 687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
- (b) dismiss the appeal. [Emphasis added.]

- [20] Further, the limited role of this Court on a sentence appeal flows from the nature of the sentencing exercise at first instance. A sentencing judge must balance a number of competing sentencing principles to determine a fit sentence within a range of possible outcomes. In contrast, the screening judge on a faint hope application has a binary choice: send the application to the jury for determination, or put an end to the application. Whether a screening judge sends the application on or refuses to do so, the decision does not directly affect the offender's sentence. It affects, rather, a limited but important right granted by Parliament to offenders facing life in prison without eligibility for parole for 25 years to apply for leniency. The clause is "essentially a plea for mercy": Dell at para. 83. It reflects the hope that people can change, that prisoners may be reformed, and the view that such efforts should be encouraged and rewarded. It has been described as "a special procedure" aimed at providing input from the community on the potential release of the offender: R. v. Vaillancourt (1989), 49 C.C.C. (3d) 544 at 550 (Ont. C.A.).
- [21] In my view, an appeal from a screening decision dismissing an application under s. 745.61 should be reviewed using the criteria in s. 686 of the Criminal Code, which provides in part: 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or (iii) on any ground there was a miscarriage of justice;
 - (b) may dismiss the appeal where (i) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a), (ii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(i) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;
- [22] Having addressed the basis for review on appeal from a screening decision, I turn now to the first ground of appeal.
1. Did the screening judge err in law by attributing to Mr. Soomel moral culpability for a murder of which he had been acquitted?
- [23] Mr. Soomel submits the judge erred in law by attributing moral culpability to him for two murders in determining whether he had met the screening threshold. He points to the following key passages from the judgment:

- [24] Mr. Soomel was party to another killing two years earlier, when he was 18
- [32] . I do not believe a jury voting unanimously could get past the fact that Mr. Soomel killed two times, once in the first degree murder he orchestrated, and the other in the conspiracy to gun down a man in front of his girlfriend. When I link that to Mr. Soomel's unsatisfactory record for approximately the first 12 years of his incarceration, and the articulate and vehement objection of Mr. Sohi's sister, Mr. Soomel's marked improvement in the last six years is commendable, but it is not enough. [Emphasis added.]
- [24] The Crown submits the judge simply misspoke, using imprecise language to describe the two offences. The Crown says that, at most, the statements reflect a mistake of fact based on a misapprehension of the evidence -- that is, that the accused was convicted of two murders rather than one murder and one conspiracy to commit murder. The Crown submits that the judge was entitled to consider the circumstances of the two offences outlined in the Agreed Statement of Facts, and says, further, that in the context of the reasons as a whole it cannot be said that the misapprehension had any material bearing on the judge's decision: *R. v. Ngo*, 2009 BCCA 301 at para. 64.
- [25] I would not accede to this submission. It is apparent from the reasons that the judge understood that Mr. Soomel's second conviction was for conspiracy to commit murder. However, in my respectful view, the judge erred as to the legal effect of the conspiracy conviction. He did so by going behind the conviction to consider that the circumstances of that offence could have supported a conviction for murder. As a result, he assigned to Mr. Soomel moral culpability for two murders, rather than one.
- [26] Although Mr. Soomel had been charged with the first degree murder of Mr. Herle in 1997, he had pleaded guilty to the lesser included offence of conspiracy to commit murder. Pursuant to s. 606(4) of the Criminal Code, he was thereby acquitted of the original charge: 606 (4) Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if the plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court. [Emphasis added.]
- [27] Mr. Soomel's acquittal on the first degree murder charge of Mr. Herle estops the Crown from arguing in future proceedings that Mr. Soomel was guilty of the additional elements contained in the original charged offence. That is so because those additional elements have irrevocably and conclusively been determined in the accused's favour by virtue of the s. 606(4) plea: *R. v. M. (R.A.)* (1994), 94 C.C.C. (3d) 459 at 465 (Man. C.A.); *R. v. A.D.M.*, 2018 ONSC 3514 at para. 15; *R. v. Mahalingan*, 2008 SCC 63 at para. 31; *R. v. Grdic*, [1985] 1 S.C.R. 810 at para. 37.

- [28] In fairness to the screening judge, it is apparent from a review of the transcript that he was led into error by the submissions of Crown Counsel (not counsel on appeal). For example, Crown contended that Mr. Soomel's application most resembled *R. v. MacMillan*, 2015 BCSC 2298, because "[b]oth men were responsible for two homicides". In addition, Crown made the following submissions in referring to the conspiracy to commit murder offence: [CROWN COUNSEL]: So just moving on to page 11, and at the top I'm just pointing out here that these applications are statute-barred for individuals who are convicted of more than one murder. And that's by operation of Section 745.6(2). This is at the top of page 11. THE COURT: Yes. Just let me -- [CROWN COUNSEL]: Mr. Soomel has not been convicted of more than one murder. THE COURT: Right. [CROWN COUNSEL]: So he's not statute-barred. However, he has been a direct party to more than one murder. The Crown submits that this is a significant factor that would reduce the likelihood that his application before a jury would succeed. THE COURT: Right. But your point is -- your point is what you're wanting me to infer is that he just gets in under the wire because he's got a murder charge, first-degree murder, and the other is a first cousin, so to speak, in the conspiracy. Is that right? [CROWN COUNSEL]: Well, I think it goes even further to say that the other he was a party to a murder. [Emphasis added.]
- [29] This theme was picked up again by Crown later in his submissions: THE COURT: Right. And here your point or part of it is that there was, what, a plea to a conspiracy? [CROWN COUNSEL]: That's correct. Arising out of the circumstances in which he was a party to a murder. So I'm not suggesting that he's statute-barred from making this application. THE COURT: Right. [CROWN COUNSEL]: But I'm suggesting that it's something that Your Lordship can take into account when assessing the character of the applicant and the circumstances of the offence, the fact that Parliament specifically indicated that individuals who are convicted of more than one murder are statute-barred from making this type of an application. [Emphasis added.]
- [30] In my view, it was wrong in law for Crown Counsel to characterize Mr. Soomel as a party to more than one murder, and to suggest to the judge that he could take into account the fact that Mr. Soomel "just gets in under the wire" since offenders who have committed two murders are no longer allowed to apply under the faint hope clause.
- [31] As to the effect of this error, the Crown has not established that it did not have an impact on the screening judge's decision to deny Mr. Soomel an opportunity to plead for leniency before a jury. Quite to the contrary, the error lies at the heart of the judge's analysis. He reasoned as follows: "I do not believe a jury voting unanimously could get past the fact that Mr. Soomel killed two times, once in the first degree murder he orchestrated, and the other in the conspiracy to gun down a man in front of his girlfriend": para. 32. Nor can it be said that dismissal of the application was inevitable. Accordingly, this is not an appropriate case to invoke the curative proviso.

- [32] In light of the conclusion I have reached on the first ground of appeal, it is not necessary to address the remaining grounds.
- [33] Mr. Soomel submits this Court should set aside the order below and direct that a jury be convened to consider his application. Although I agree that the order below must be set aside, in my view the matter should be remitted to the trial court for a new screening hearing and consideration of the constitutional issue in the event that the screening judge finds it necessary to address that issue.

Disposition

- [34] I would allow the appeal, and remit the matter to the court below for rehearing. "The Honourable Madam Justice Fenlon" I AGREE: "The Honourable Mr. Justice Willcock" I AGREE: "The Honourable Mr. Justice Fitch"

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