
CANADA / JUDGMENT

R. v. Tang

2015 BCSC 2047

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 2047 R. v. Tang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tang,

2015 BCSC 2047

Date: 20151106

Docket: 26393

Registry: Vancouver

Regina

v.

Yuanxi William Tang

Restriction on publication: Pursuant to ss. 486.5(1) and 648(1)

of the Criminal Code of Canada

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Crown:

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M.R. Ruttan

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T.D. Anderson

J.A. Michaels

Counsel for the Attorney General of Canada and the Royal Canadian Mounted Police:

K.J. Elvin-Jensen

A.F. Brown

Appearing on her own behalf:

C. Stefanson

Place and Date of Hearing:

Vancouver, B.C.

November 3, 2015

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2015

- [1] Yuanxi William Tang is currently being tried by a court composed of judge and jury on indictment number 26393-4. That indictment contains a single count, namely, the charge that Mr. Tang committed first degree murder of his mother, Lianjie Guo, on June 7, 2012, at Richmond, British Columbia, contrary to s. 235(1) of the Criminal Code.
- [2] The evidence on this trial is concluded, and the jury has commenced their deliberations. No verdict has yet been delivered.
- [3] I now have before me an application brought by Carrie Stefanson, CTV News, requesting the following relief:
- [A]n order granting release of the following DVD video exhibits and transcript if available, played in the trial of William Yuan Xi Tang. Exhibit 16, 19, and 21.
- [4] Exhibit 16 is a DVD containing video and audio recordings of Mr. Tang's interactions with undercover police officers on August 27, 2012. Exhibit 19 is a DVD containing similar recordings on September 7, 2012. Exhibit 21 is a DVD containing a recording of Mr. Tang's interview by the police following his arrest on September 7, 2012. One unusual aspect of the present case is that much of the conversation on the exhibits is in Cantonese.
- [5] The application is opposed by Crown counsel, and by counsel for Mr. Tang, as well as by counsel from the Department of Justice on behalf of the RCMP, all of whom take the position that the application should not be granted at this time, in light of the fact that the exhibits are likely to be used in a subsequent trial on a different indictment. In the alternative, if the application were granted, there is a concern that the release of the exhibits to CTV News could lead to the disclosure of information that could identify the undercover agents, which

could be in violation of the publication ban that was made on May 19, 2015, pursuant to s. 486.5 of the Criminal Code and could potentially endanger the safety of the undercover officers.

- [6] The applicant has not filed any affidavits or other evidence in support of the application. Nevertheless, in oral submissions Ms. Stefanson indicated that if the application is granted, CTV News would broadcast portions of the audio and video recordings on television news.
- [7] In the notice of application, the applicant relies on what she describes as a "presumption in favour of access to court exhibits", and takes the position that the application should be granted "in order to better inform the public about these proceedings." She says that "such access will better allow the applicants to broadcast reports that are complete, true and accurate with respect to these and future proceedings." In oral submissions, Ms. Stefanson said that time is of the essence, because after the jury renders its verdict, thereby bringing this trial to an end, public interest in the matter will quickly fade.
- [8] The applicant deals with the issue of the publication ban by saying this in the notice of application:

CTV is aware of the following publication ban, and will blur the images of the undercover operators prior to broadcast. If the court requires the voices of the undercover operators to be altered, CTV will also comply with that request. "Information disclosed in or in relation to the trial in this matter which could identify the undercover operators involved in the investigation of the accused shall not be published in any document or broadcast or transmitted in any way."

- [9] In my view, it is unhelpful and potentially misleading to refer, as the applicant has done in the notice of application, to a "presumption in favour of access to court exhibits", because the law relating to the release of exhibits is more nuanced than this phrase might suggest.
- [10] In *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, the Supreme Court of Canada upheld a decision refusing an application by the media for a copy of audio cassettes containing an alleged confession and a video cassette of an alleged re-enactment of a killing. These items had been entered as exhibits at the trial of N, but his conviction for murder was overturned on appeal on the basis that the evidence had been obtained in violation of N's Charter rights.
- [11] At p. 681, Stevenson J., speaking for the majority, identified "four significant factors that come into play" in deciding whether an applicant should be given access to and the ability to copy and disseminate exhibits:
- 1) The nature of exhibits as part of the court "record".
 - 2) The right of the court to inquire into the use to be made of access, and to regulate it.
 - 3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.

- 4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

[12] With respect to the first factor, Stevenson J. distinguished exhibits from other court documents. He said, at pp. 681-682:

An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. While they remain in its custody, the court has a duty to pass upon any request for access. That function is ordinarily exercised by its officers, such as the prothonotary here, but the court having custody of the exhibits has supervision over their use. The chambers judge here noted the Nova Scotia rule which directs that exhibits be turned over to the party producing them (Rule 30.11(6), *supra*). She observed that the reason for the rule was to relieve the court of the task of storing unwanted exhibits. The rule, however, reflects the fact that exhibits are not the property of the court.

[13] The Vickery case was decided on the basis that the accused's privacy interests outweighed the media's interest in viewing and disseminating the exhibits. The Court did not consider the effect of s. 2(b) of the Charter, because it had not been raised in the courts below.

[14] In the present case, Ms. Stefanson relies on legal principles derived from three Supreme Court of Canada decisions: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188.

[15] The *Dagenais/Mentuck* test was explained in this way in *Toronto Star Newspapers*, at paras. 26-29:

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be real, substantial, and well grounded in the evidence: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

28 The Dagenais/Mentuck test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to all discretionary actions which have that limiting effect:

While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the Charter, whether it arises under the common law, as is the case with a publication ban ...; is authorized by statute, for example under s. 486(1) of the Criminal Code which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41).

(*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 31)

29 Finally, in *Vancouver Sun*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre (Attorney General of Nova Scotia v. MacIntyre)*, [1982] 1 S.C.R. 175] and emphasized that the presumption of openness extends to the pre-trial stage of judicial proceedings. "The open court principle", it was held, "is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein" (para. 26). It therefore applies at every stage of proceedings (paras. 23-27).

[Emphasis in original.]

[16] The manner in which Dagenais/Mentuck principles might be applied to a media application for release of trial exhibits was carefully considered by Humphries J. in *R. v. Black*, 2006 BCSC 2040. The position of the parties was set out at paras. 12-14:

[12] Mr. Hayes and Mr. Burnett disagree on the application of *Toronto Star v. Ontario*. Mr. Burnett says that the Supreme Court of Canada in *Toronto Star* has extended the principles applicable to publication bans to the reproduction of exhibits -- that is, there is a strong presumption in favour of it, with a heavy burden on those resisting it. Mr. Hayes, supported by Crown and defence, says the principles established by the courts in respect to publication bans cannot be confused with an application to reproduce exhibits. Mr. Hayes says exhibits are in a different category. They are part of the court record but are not produced by the court, and there are various property rights associated with them. The onus is on the person seeking them and all relevant interests must be weighed.

- [13] He referred to *R. v. Pilarinos*, 2001 BCSC 1332, [2001] B.C.J. No. 1936, a case which was concerned with an application by various media outlets to have wide television and radio coverage of the trial. There the court enumerated a number of relevant competing interests in the context of the arguments in that case: the right to a fair trial, freedom of the press, the public interest in open justice, privacy interests of the participants, maintaining the dignity and decorum in the administration of justice, and access to justice.
- [14] The learned judge in *Pilarinos* dismissed the application to have live television and radio coverage of the trial, finding that the proposed media presence in the courtroom would jeopardize the rights of the accused to a fair trial, while denying the application would have minimal effect on the right to freedom of expression.
- [17] At paras. 19-20, Humphries J. observed:
- [19] The Supreme Court of Canada could have expressly overruled *Vickery* in *Toronto Star* but did not do so. The two decisions are, in my view, not necessarily incompatible. *Toronto Star* is a case analyzed within a Charter context. *Vickery* is not. Given the test set out in *Toronto Star* and the statement of the court that the *Dagenais/Mentuck* test must be applied flexibly and contextually, it should not be difficult to incorporate the considerations with respect to exhibits from *Vickery* into the exercise of discretion as to the release for reproduction of a particular exhibit. In my view, the factors outlined in *Pilarinos*, while considered in a different context in that case, are always relevant to the court's exercise of discretion in this area.
- [20] Since exhibits are in the court's custody, there is no automatic right of the media to take possession of them in order to reproduce them. In that sense, the applicant in this motion is properly the media. I do not consider it wise in this case to make a blanket statement as to whether the pronouncements in *Toronto Star* regarding onus and the heavy burden resting on those resisting the publication ban apply to an application to reproduce exhibits because it is not necessary to do so. Depending on the context, the nature of the exhibit applied for, and all the circumstances, the burden of establishing a right to reproduce an exhibit may vary from case to case. Ultimately, the relevant factors, which include those listed above, always have to be balanced.
- [18] In the circumstances before her, Humphries J. allowed the media's application, subject to terms to prevent the identification of undercover officers and for the protection of third-party interests.
- [19] The judgment of Humphries J. was referred to with approval by the Court of Appeal in *Global BC, A Division of Canwest Media Inc. v. British Columbia*, 2010 BCCA 169.
- [20] The present application differs from many in that the evidentiary value of the exhibits sought is not yet spent. As mentioned above, the exhibits sought will likely be used, and indeed, will likely form the core of the Crown's case, on the trial by jury on another, different, indictment.

- [21] To allow those exhibits now to be broadcast in the media would be to invite the public to form pre-conceived opinions of their evidentiary significance, long before the jury trial on the other indictment has begun. In my view, the real and substantial risk that this poses for the proper administration of justice cannot adequately be addressed by alternate measures, such as editing or allowing a challenge for cause during jury selection. The salutary effects of refusing release of the exhibits prior to the subsequent trial outweigh the deleterious effects on the media and the public, including the right to freedom of expression.
- [22] The situation in the present application is in many ways similar to that in *R. v. Terezakis*, 2006 BCSC 721. In that case, like the present case, the media applicants sought access to video recordings on DVD that had been entered as exhibits during the accused's trial. In that case, like the present case, the video recordings would likely form a central part of the evidence on a subsequent trial. One difference between that case and the present case is that in *Terezakis*, the subsequent trial would be of a co-accused.
- [23] In refusing the media application in *Terezakis*, Holmes J. found that release of the exhibits would compromise the fairness of the upcoming trial. She wrote, at paras. 17-24:
- [17] The videotape evidence is distinctive, dramatic, and memorable. A person who views all or some of it now will likely remember it, and what he or she thought of it, when shown the videotape evidence in Mr. Goosen's trial nine months from now.
- [18] As was the jury's task in Mr. *Terezakis*' trial, the jury's task in Mr. Goosen's trial will be to determine the meaning and effect of the videotape evidence. To place in the public domain isolated extracts of that evidence, and necessarily to invite public discussion of its meaning, would be essentially to invite the general public to determine Mr. Goosen's case before the jury is selected.
- [19] It might be argued that the risk of contamination of the jury pool that this would entail would be no greater than that flowing from the numerous media reports of Mr. *Terezakis*' trial, including the verdicts. Some reports have been quite descriptive. However, the reports and descriptions are necessarily and obviously those of the respective authors. Jurors are routinely instructed to disregard the reports and opinions of others, and to decide the case on the evidence before them. The jurors in Mr. Goosen's trial will be so instructed. An instruction to disregard another person's views of evidence presented in a different trial will be much easier to follow than an instruction to disregard one's own pre-formed views as to the very evidence that is the case against Mr. Goosen.
- [20] I have considered whether a challenge for cause procedure could avoid the problem by identifying potential jurors whose ability to judge Mr. Goosen's case impartially on the evidence might have been affected by media broadcast of the videotape evidence. I conclude that it could not.

- [21] First, it is difficult to describe the videotape evidence with any precision without potentially colouring jurors' views of its meaning and effect, including by emphasizing certain aspects of what is shown.
- [22] Second, if the videotape evidence is described only in very general and neutral terms, potential jurors might well not recall having previously viewed it, and would recall the broadcast only when shown the videotape evidence in the trial.
- [23] Finally, I have considered whether a challenge for cause procedure could appropriately involve some brief showing of an extract from the videotape evidence, and have concluded that such a procedure would likely create more problems than it would solve.
- [24] For all these reasons, I conclude that broadcast of the videotape evidence or portions of it would prejudice Mr. Goosen's right to a fair trial by an impartial jury.
- [24] I respectfully adopt those observations of Madam Justice Holmes, and find that they apply with comparable force to the application now before me.
- [25] I conclude that the right to a fair trial by an impartial jury on the subsequent indictment would be seriously compromised by the release of the exhibits at this time and that risk cannot adequately be addressed by alternate measures. The real and substantial risk that this poses for the proper administration of justice can only be adequately met by refusing the application for release of the exhibits, and the salutary effects of refusing the application outweigh the deleterious effects on the media and the public.
- [26] For these reasons, the application of Ms. Stefanson for release of the exhibits is dismissed.

The Honourable Mr. Justice W.F. Ehrcke

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