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CANADA / JUDGMENT

## R. v. Van Dyke

2012 BCCA 464

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COURT

British Columbia Court of Appeal

DECIDED

2 November 2012

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2012 BCCA 464 R. v. Van Dyke

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Van Dyke,

2012 BCCA 464

Date: 20121102

Docket: CA040305

Between:

Regina

Respondent

And

Bradley Jay Van Dyke

Appellant

Before:

The Honourable Madam Justice Saunders

(In Chambers)

On appeal from Supreme Court of British Columbia, March 23, 2012

(R. v. Gill and Van Dyke, Quesnel Registry 24238-5)

Oral Reasons for Judgment

Counsel for the Appellant:

R. Peck, Q.C.

Counsel for the (Crown) Respondent:

F. Tischler

Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2012

Place and Date of Judgment:

Vancouver, British Columbia

### **November 2, 2012**

- [1] SAUNDERS J.A.: Mr. Van Dyke applies for judicial interim release pursuant to s. 679 of the Criminal Code, R.S.C. 1985, c. C-46. His appeal is from conviction. Section 679(3) requires, in an appeal from conviction, that the appellant must establish, in order to be released from custody pending the appeal, that:
- (a) the appeal is not frivolous,
  - (b) he will surrender himself into custody in accordance with the terms of the order, and
  - (c) his detention is not necessary in the public interest.
- [2] The Crown agrees that the first criteria, whether the appeal is frivolous, is not a high threshold, and that Mr. Van Dyke has met it. It agrees as well that Mr. Van Dyke has shown he will likely surrender into custody pursuant to a bail order. The Crown opposes the order sought, however, on the third criteria. It says that Mr. Van Dyke has not demonstrated that his detention is not necessary in the public interest.
- [3] Mr. Van Dyke's appeal is from conviction by a jury on four counts: break and enter, aggravated assault, use of a firearm in committing an indictable offence, and discharging a firearm with intent to wound, maim or disfigure. He was convicted with his co-accused, Mr. Gill, who was charged with the same offences. Mr. Van Dyke was sentenced in October of this year to a term of imprisonment of three years three months, after taking into consideration pre-trial custody.
- [4] The charges arose out of the break in of a cabin in 2009, occupied by a person tending a commercial grow operation on behalf of the cabin's owner, and the beating and shooting of the occupant. The occupant testified that on the night of the attack the two appellants appeared at the cabin. He said he heard some noise outside the cabin, opened the front door and was struck in the mouth with a metal bat. The occupant testified that he stepped back and searched for something to protect himself with, that the two appellants entered the cabin, that Mr. Gill had a baseball bat and Mr. Van Dyke had a gun, that Mr. Gill told the

occupant to lay on a mattress on the floor, that he did so and that Mr. Gill started hitting him with the bat, including to his legs and feet. The occupant testified he managed to get up and flee to the door at which time Mr. Gill yelled at Mr. Van Dyke to shoot him and Mr. Van Dyke did so, hitting him in the abdomen, and again in the arm.

- [5] The occupant had an extensive criminal record and it was agreed that his evidence would be subject to a Vetrovec warning. Prior to the start of the trial, counsel agreed that the evidence of the two appellants' involvement in grow-ops was admissible to help explain the theory of motive and certain evidence was admitted to establish animus between the parties, not to admit the truth of the contents. During the trial there was a ruling that certain evidence could not be elicited but the appellant says that the Crown proceeded to elicit the prohibited evidence anyway.
- [6] The theory of the defence was that the occupant should not be believed and that there was no physical evidence to corroborate his version both of who was at the cabin and what happened.
- [7] The notice of appeal asserts four grounds of appeal, all relating to the judge's charge to the jury:
1. the judge erred in failing to provide any limiting instruction on the use the jury could make of the bad character evidence adduced at trial.
  2. the judge erred by thereby taking from the jury issues that were not clearly admitted by the defence at trial.
  3. the judge erred by failing to adequately put the defence theory to the jury;
  4. the judge erred by failing to provide the jury with an adequate Vetrovic warning.
- [8] In seeking to satisfy me on the third criteria, that his detention is not necessary in the public interest, counsel for Mr. Van Dyke refers to the decision of a division of this court in *R. v. Mapara*, 2001 BCCA 508, which describes the public interest in terms of the likelihood that the appellant is dangerous or will re-offend, and in maintaining public confidence in the administration of justice. In *Mapara* Madam Justice Ryan, for the court, adopted the analysis of Justice Arbour in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.) at pp. 47-8:

... The "public interest" criterion in s. 679(3)(c) of the Code requires a judicial assessment of the need to review the conviction leading to imprisonment, in which case execution of the sentence may have to be temporarily suspended, and the need to respect the general rule of immediate enforceability of judgments.

Public confidence in the administration of justice requires that judgments be enforced. The public interest may require that a person convicted of a very serious offence, particularly a repeat offender who is advancing grounds of appeal that are arguable but weak, be denied bail. In such a case, the grounds favouring enforceability need not yield to the grounds favouring reviewability.

On the other hand, public confidence in the administration of justice requires that judgments be reviewed and that errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake. ...

[9] Madam Justice Ryan said:

[34] I agree with the analyses in Farinacci and Baltovich. Public confidence in the administration of justice requires that verdicts, properly rendered, be enforced. Where an appellant establishes that he or she does not pose a flight risk and is unlikely to re-offend, the public interest also acknowledges that actual punishment for a crime be avoided if strong grounds exist for setting aside the verdict.

[35] In Demyen when Culliton C.J.S. speaks of the necessity for the appellant to show "something more" than the requirements of paragraphs (a) and (b) of s. 679(3) to establish that his detention is not necessary in the public interest, he must be referring to the necessity for the appellant to show that the principle of enforceability is outweighed by that of reviewability. In my view the strength of the interest of reviewability must primarily be measured by examining the likelihood of the success of the appeal. Very strong grounds will tip the scale in favour of reviewability.

[36] Depending on the demonstrated strength of the grounds, other factors, such as the circumstances of the offence - for example, pre-meditated violence - and, inordinate delay will be matters to weigh in the balance. The essential question, however, will be whether the appellant has been able to establish that enforceability is outweighed by reviewability.

[10] In *R. v. Burd*, 2005 BCCA 620, Mr. Justice Smith of this court sitting as a single justice in chambers, applied *Mapara*, picking up language from the oft-quoted judgment of Chief Justice McEachern in *R. v. Nguyen* (1997), 119 C.C.C. (3d) (B.C.C.A.), as one of the "ordinary, reasonable, fair-minded citizens informed of the circumstances of this case, Charter values and the philosophy behind s. 679(3) of the Criminal Code",

[11] In *Nguyen* Chief Justice McEachern observed that Parliament has not excluded certain offences from the application of the judicial interim release provisions, and commented on the distinction between bail and sentence, the former being designed largely to ensure that convicted persons do not serve sentences for convictions not properly entered against them. In so saying he was foreshadowing the discussion of the concept of 'reviewability'. In *R. v. Tyhurst* [1991] B.C.J. No. 2301, 3 B.C.A.C. 45, Mr. Justice Taylor, observed:

The offences concerned are, of course, highly reprehensible. ... Parliament has expressly approved the release of convicted persons pending appeal, and that all crimes are necessarily reprehensible, most highly reprehensible.

- [12] Thus in Mapara and Nguyen, both cases of murder, the appellant was released from custody on judicial interim release, in Tyhurst, a case of sexual assault, the appellant was released, and in Burd, the accused was released from custody on a case of conviction for manslaughter.
- [13] On behalf of Mr. Van Dyke it is said that his grounds of appeal are strong, and this supports release pending appeal, thereby to avoid the potential he will serve a sentence for a crime on which the conviction may be set aside. To that end a substantial submission was filed in chambers espousing each of the grounds of appeal.
- [14] Mr. Van Dyke has also filed an affidavit discussing his personal circumstances. He deposes that his criminal record in the last five years is one count of driving while prohibited, conviction in March 2009, and one count of production of marihuana, conviction in November 2009. He deposes that he was on judicial interim release for a considerable period just prior to the trial, and between trial and sentencing, without breach of his terms of release, that his father, who resides in Ontario, has a terminal illness and has now outlived the median period of survival for the illness, that he wishes to visit his father again if permitted to do so by this court, and that he has employment in the event he is released.
- [15] The Crown, in response, says the grounds of Mr. Van Dyke's appeal are not as strong as contended by the appellant, and that the circumstances of this case were serious and aggravated. The Crown refers to the role of Mr. Van Dyke in the events, as found by the jury, of shooting a fleeing man, and that there is an involvement of the illegal drug trade, which puts the offence towards the serious end of the spectrum. In support the Crown refers to another case named R. v. Nguyen, 2000 BCCA 431, (2000) 143 B.C.A.C. 161, a case involving discharge of a firearm with intent to wound, aggravated assault, assault simpliciter and pointing a firearm, which arose from what might be described in the vernacular, as is this one, a 'home invasion', and in which the appellant was not released.
- [16] It is always a difficult task for a single judge who ought not to say too much about the merits of a case that will be heard by a division of at least three judges, to assess the merits of an appeal based upon an incomplete record and less than complete submissions on the merits. However, something needs to be said. I have been assisted by the reasonably full description of the grounds of appeal provided by counsel for Mr. Van Dyke and been provided with the jury charge, all sufficient to be able to appreciate, at least on a cursory level, the substance of the submissions intended to be made at the hearing of the appeal.
- [17] I am satisfied that there is real substance to the grounds of appeal, and that they go beyond the modest description of 'not frivolous', a consideration that makes the issue of reviewability somewhat more urgent. I also have in mind the circumstances of Mr. Van Dyke's father.
- [18] On the other side, this is a case involving firearms and personal injury. I am troubled in this case that the offences were violent, that they involved the carrying of a gun to the cabin and the discharge, twice, of the gun, that the surrounding circumstances were involved with the

drug trade, and that the appellant has another conviction in relation to production of marihuana. Given these considerations, I cannot say that Mr. Van Dyke's detention is not necessary in the public interest. Considering the standard of the ordinary, reasonable, fair-minded citizen informed of the circumstances of this case, it seems to me that Mr. Van Dyke's release would tend to undermine public confidence in the administration of justice.

- [19] The application is dismissed. I am sure counsel will move with expedition to have the appeal heard as soon as is reasonable within the requirements of the Rules. If there is a direction that will assist in accomplishing this they may ask the court to become involved in facilitating the hearing.

"The Honourable Madam Justice Saunders"

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