

CANADA / JUDGMENT

R. v. Wucherer

2004 BCCA 602

COURT

British Columbia Court of Appeal

DECIDED

18 November 2004

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2004 BCCA 602 R. v. Wucherer COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Wucherer, 2004 BCCA 602 Date: 20041118 Docket: CA031547 Between: Regina Respondent And Paul Joseph Wucherer Appellant Before: The Honourable Mr. Justice Oppal (In Chambers) Oral Reasons for Judgment S. Goldberg Counsel for the Appellant S. Brown Counsel for the Respondent Place and Date: Vancouver, British Columbia 18 November 2004 (application for judicial interim release)

- [1] OPPAL J.A.: The appellant seeks judicial interim release pending the determination of his appeal from a conviction of manslaughter for which he was sentenced to a term of imprisonment of three and a half years. He had initially been charged with first degree murder.
- [2] The circumstances of the offence are that on 19 September 2002 the appellant caused the death of Manfred Stewart. The appellant lived in the downstairs portion of the same Squamish residence as Mr. Stewart and his wife. There had been some animosity between the parties who had known each other for some time. While the motive for the killing is not entirely clear, it is apparent that the appellant was under the influence of cocaine and/or alcohol at the time of the commission of the offence.
- [3] The appellant is 33 years old. He is an aboriginal person from the Ojibway Nation. He was born in Ontario. He has a grade 12 education. He had been steadily employed in the construction business until the commencement of these proceedings.
- [4] He has a criminal record. In 1989 he was convicted of attempting to obstruct justice and making harassing telephone calls and was sentenced to a term of three years imprisonment for the obstruction count and one year concurrent for the harassment count. In 1993 he was convicted of common assault and sentenced to a term of imprisonment of 10 days and a period of probation of one year. More recently, he was convicted of assault in 1995 and was sentenced to a fine of \$400.00 as well as a term of probation of one year. In 2002 he was convicted of criminal harassment and was given a suspended sentence together with probation for a period of 12 months. He has deposed that if he is granted release he will reside with his parents in their residence in the city of Vancouver. His parents are in court and are apparently supportive.

- [5] A number of persons filed letters of good character in his support when he was sentenced. The common theme in the letters is that the appellant is a good person of good character, a good worker, but has had difficulties with alcohol and drugs. It is clear that the appellant's problems are for the most part attributable to his abuse of alcohol and drugs.
- [6] The appellant has advanced two grounds of appeal against conviction. The first relates to the jury selection process and the second relates to a demand for disclosure.
- [7] I will deal with the first ground. Prior to jury selection, the trial judge made an order under s. 638 that the accused have a right to challenge prospective jurors for cause. During the selection process a juror expressed some concern relating to his basic knowledge and understanding of the English language. The person was sworn as a juror. He then became a trier under s. 640 and participated in the selection of the twelfth and final juror. At some stage the trial judge made an inquiry of the juror relating to his knowledge and understanding of English. After the accused was put in charge the juror was discharged under s. 644. At that stage the appellant's counsel made an application for a mistrial. The application was refused. The appellant's position is that the judge made a reversible error. The Crown has argued that there is no merit to this ground of appeal. I must disagree with the Crown for the trial judge obviously had some concerns about the juror's knowledge of English in discharging him. At the very least, there is some merit in this issue.
- [8] In the circumstances I need not deal with the second issue which does not appear to be as compelling as the first.
- [9] Under s. 679(3) the Court of Appeal may release an appellant pending the determination of his appeal providing the appellant is able to show on a balance of probabilities that:
- (a) the appeal or application for leave to 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.
- [10] In this case, I have no difficulty in concluding that the appeal is not frivolous in that there is some merit to it. I am also satisfied that he will surrender himself into custody in accordance with the terms of the order. The Crown has argued that it would be contrary to the public interest to grant release pending appeal in the circumstances of this case having regard to his past record and his conviction for a crime of violence. Public interest may be assessed in a number of different ways. The subsection (3)(c) relating to public interest has been the subject of some judicial discussion. In *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, this Court concluded that it would not be against the public interest to release the appellant after a conviction of second degree murder because he had no criminal record, was not a flight risk and was not likely to re-offend and that public confidence in the system would not be undermined if he were released.

- [11] The issue which arises in this application is whether it would be against the public interest to release a person who has been convicted of a serious crime of violence. That issue was addressed by Chief Justice McEachern in *Nguyen*, supra, wherein at para. 22 he stated:
- [22] Moreover, as a great many offences involve some violence, the fact that there is violence cannot of itself be conclusive against release as there would otherwise be very few cases where a detention order should not be made. An important consideration is whether the violence occurred in circumstances of malevolent rather than foolish or spontaneous intent. It is important to consider whether the applicant is a person prone to violence or cruelty or whether she or he became caught up in circumstances where awful things sometimes happen. Without stating any rule which can be applied to every case, it is my view that detention pending appeal will not always be necessary for young men or women fighting on a Saturday night, even though awful consequences sometimes result.
- [12] I am satisfied that by imposing appropriate conditions regarding the consumption of alcohol and/or drugs that concerns relating to violence can be addressed.
- [13] What is of greater concern here is whether the principle of public interest would be offended in light of his conviction for a crime of violence and, further, whether the reputation of the administration of justice would suffer in the eyes of right thinking people. I am satisfied after some consideration that in the particular circumstances of this case the principle of public interest will not be compromised or offended if this appellant were released. There will be an order accordingly.
- [14] I take it one of the conditions of release has to do with the consumption of alcohol or drugs. (discussion with counsel)
- [15] OPPAL J.A.: I do not think the dates are that far away. I do not know what your schedule is, Mr. Goldberg, but I am going to, you know, one of the concerns we have regarding public interest is an expeditious resolution of the matter and I agree with Ms. Brown that six months to the end of June is a substantial distance away and we are near the end of November now so I am more inclined to set a date sometime near the end of March. (discussion with counsel)
- [16] OPPAL J.A.: I am going to set it to March 18 and you are in these courts enough that if an extension is needed at that time you can speak to it. (discussion with counsel)
- [17] OPPAL J.A.: I am going to leave it the 18th of March and hopefully something can be done by that time. "The Honourable Mr. Justice Oppal"

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