
CANADA / JUDGMENT

R. v. Yu

2014 BCSC 206

COURT

Supreme Court of British Columbia

DECIDED

7 February 2014

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2014 BCSC 206 R. v. Yu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Yu,

2014 BCSC 206

Date: 20140207

Docket: 26018

Registry: Vancouver

Regina

v.

Esmond Jack Yu

Ban on publication: Ordered pursuant to Inherent Jurisdiction of the Court with respect to the evidence tendered and the decision at the screening hearing

until after the jury has granted or dismissed the application.

(Notice edited for publication purposes on June 4, 2021)

Before: The Honourable Madam Justice Kloegman

Reasons for Judgment

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E. Purtzki

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 9-13, 2013

Place and Date of Judgment:

Vancouver, B.C.

February 7, 2014

I. introduction

- [1] On March 1, 2012, Mr. Yu applied under s. 745.6 of the Criminal Code, R.S.C. 1985, c. C-46 for a reduction in the number of years he must spend in prison without eligibility for parole. He had met the pre-conditions listed in s. 745.6(1)(a)-(c) to bringing such an application: he had been convicted on February 6, 1999, of first degree murder; sentenced to life imprisonment without eligibility for parole for 25 years; and had served almost 17 years in prison (now 18 years, seven months).
- [2] The next stage of Mr. Yu's application was to come before me, as a judge of the superior court of criminal jurisdiction, to determine whether his application was of sufficient merit to proceed before a jury empanelled to determine whether his parole ineligibility period ought to be reduced. This is commonly referred to as the screening stage of the application.
- [3] At this screening stage, my determination is based on written material, including any reports provided by the correctional authorities or other relevant written evidence submitted to me. I have been provided with an agreed statement of facts dated November 25, 2013 and a parole eligibility report for judicial review by J. Basran, dated August 2012 together with supporting documentation (the "PER"), a parole eligibility report update for judicial review by F. O'Donoghue dated November 2013 together with supporting documentation (the "Updated PER"), a compendium of select correctional documents filed by Crown counsel, and a compendium of other documents attached to the affidavit of Jennifer Dyck and filed by Mr. Yu's counsel. I am advised that the totality of these documents by no means represents the complete correctional files concerning Mr. Yu.
- [4] If the application proceeds before a jury, potentially there will be other documents, and viva voce evidence from Mr. Yu and his supporters, as well as evidence from personnel who have been involved with Mr. Yu at the various correctional institutes in which he has been serving his prison sentence.

II. standard of review

- [5] Section 745.61(1) requires Mr. Yu to show, on a balance of probabilities, that there is a "substantial likelihood that the application will succeed". The mandatory criteria to consider in deciding whether Mr. Yu has met this threshold test are set out in s. 745.63(1)(a)-(e) and are the same mandatory criteria that juries must consider when determining whether an applicant's parole ineligibility period ought to be reduced. These criteria are:
- (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.
- [6] It should be noted that the standard of judicial review on screening applications was amended on December 2, 2011, by Bill S-6, which encompassed a number of changes to the parole eligibility regime.
- [7] In 1999, when Mr. Yu was convicted and sentenced, the standard of review required applicants to show on a balance of probabilities that their application had a "reasonable prospect of success". Since December 2, 2011, applicants must show that their application has a "substantial likelihood of success" before a jury. The mandatory factors to consider in determining the reasonable prospect of success or substantial likelihood of success have remained the same. Judicial review of parole ineligibility for those sentenced after December 2, 2011, is no longer available.
- [8] Counsel for Mr. Yu brought a challenge under s. 11(h) and s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, to the constitutional validity of the express retroactive application of the current standard of review to be applied at the screening stage of his application. He argued that Mr. Yu met the higher standard in any event, but should I find Mr. Yu could not prove a substantial likelihood of success before a jury, then I should apply the old standard of review of reasonable prospect of success, which counsel submitted Mr. Yu clearly met.
- [9] Crown counsel argued that Mr. Yu had not met the threshold test of proving on a balance of probabilities that his application was substantially likely to succeed before a jury, nor had he met the lower test that his application had a reasonable prospect of success. Crown counsel submitted, and counsel for Mr. Yu agreed, that the constitutionality or otherwise of s. 745.6 as it applied to Mr. Yu should not be decided by me unless I find Mr. Yu's application to reside somewhere in the grey area between reasonable prospect for success and substantial likelihood of success. This submission was based on the well-known principle that a court

should not decide constitutional issues that are not necessary to the resolution of the matter before it: see *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97.

- [10] I agree with the above joint submission, but I find it useful to consider the jurisprudence and arguments under both the "substantial likelihood" and "reasonable prospect" test to ascertain a better understanding of the onus of proof contained in the current legislation, regardless of the constitutional validity of the 2011 amendment.
- [11] For example, the Supreme Court of Canada decision of *R. v. Swietlinski*, [1994] 3 S.C.R. 481, was rendered at a time when there was no screening stage requirement to applications for reduction of parole ineligibility periods. However, the Supreme Court of Canada's comments on the purpose of these applications generally, and the function and role to be played by the jury, are still valid and helpful in determining what is meant by the word "success" as it is used in s. 745.6, both before and after any amendments thereto.
- [12] In *Swietlinski*, the Court explained that the procedure under s. 745 was one for reassessing long term imprisonment imposed by law. Generally speaking, the purpose was to re-examine a court decision made at least 15 years earlier in light of new information or factors that could not have been known initially. The primary purpose of s. 745, therefore, was to call attention to changes which have occurred in the applicant's situation and which might justify imposing a less harsh penalty upon the applicant. The jury was given a broad discretion, quite different than when deciding guilt or innocence, from which no appeal could be taken. The factors which Parliament had mandated a jury to consider did not lead to a compulsory or even specific decision. They were factors, working for or against the applicant, that had to be "assessed and weighed as a whole in arriving at a conclusion" (my emphasis): *Swietlinski* at para. 14..
- [13] In *Swietlinski*, the Court even went so far as to say concepts of burden of proof such as beyond a reasonable doubt, or balance of probabilities, could not be applied where the decision lies exclusively in the domain and discretion of the jury (at para. 15). Therefore, in my view, it follows that a judge at the screening stage of a particular application should not be deciding what he or she would likely decide, on a balance of probabilities, if he or she were deciding the actual question of minimum period of parole ineligibility. As the screening judge I must instead consider the merits of Mr. Yu's case from the perspective of exercising a broad discretion based on a consideration of the whole of the evidence as it applies to the factors in s. 745.63(1)(a) through (e).
- [14] One aspect of the hearing before the jury that tempers what could otherwise be a totally unpredictable range of opinions resulting from the exercise of such a broad discretion by individual jury members, is the requirement for unanimity of conclusion. Prior to 1997, a two thirds' majority decision of a jury was sufficient to reduce a period of parole ineligibility. As a result of amendments to s. 745 in 1997, jury unanimity was and is still required.

- [15] The amendments in 1997 not only increased the number of jurors from eight to 12 required to be in agreement on the minimum period of parole ineligibility; they also imposed for the first time the necessity to pass through a screening test by a judge sitting alone. If the application had no reasonable prospect of success before a jury, it would not be allowed to proceed and the applicant had to wait another two, three or five years before he or she could apply again.
- [16] Earlier cases analyzing the threshold test of reasonable prospect of success undoubtedly did so from the perspective of viewing applications that theretofore would have automatically proceeded before a jury, regardless of potential for success or failure. Thus the decision of *R. v. D.E.K.*, 2001 MBQB 350, and those that followed it, stood for the proposition that a judge should not dismiss any application that was "not hopeless" (at para. 44). The rationale was that a court should not usurp the function of the jury at this initial stage.
- [17] However, as time went on, and applications continued through the screening process, the courts appear to have slowly tightened up the old threshold test. In *R. v. Dulay*, 2009 ABCA 12, the Court of Appeal interpreted "reasonable prospect of success" to mean "a reasonable possibility of success" and found that the screening judge correctly did not assess the probability that a jury would reduce the applicant's parole ineligibility period (at para. 15). However, by 2010, courts were equating reasonable prospect with "reasonable probability" (*R. v. Davis*, 2010 ABQB 804 at para. 15), or "reasonable likelihood" (*R. v. Schaeffler*, [2009] O.J. No. 3175 (S.C.J.) at para. 3).
- [18] On March 25, 2011 (two days after Bill S-6 received royal assent), the Ontario Superior Court in *R. v. Phillips*, 2011 ONSC 1914, aff'd 2012 ONCA 54, rejected the earlier interpretation of reasonable prospect as "not hopeless" and substituted instead a higher test of "realistic probability" (at para. 9). The Ontario Court of Appeal upheld the screening judge's opinion that the threshold test embodied more than merely showing that a case is not hopeless, although it cautioned against substituting synonyms for the language in the statute (2012 ONCA 54 at paras. 6-7).
- [19] The rejection by the Ontario Court of Appeal of the "not hopeless" concept of screening for success coincided with the amendments to s. 745.6 made by Parliament in 2011. As is reflected in the 40th Parliament House of Commons Debates (2d Sess., No. 74), the Senate Debates (3rd Sess., No. 22), and the Senate Standing Committee on Legal and Constitutional Affairs (3rd Sess., June 9, 2010), the introduction of the higher pre-screening standard of judicial review for applications was partially in response to jurisprudence which had held that the previous reasonable prospect test was a low threshold to cross.
- [20] Thus it is clear that the developing case law and legislative changes have resulted in a requirement for an increasingly higher threshold degree of merit to be reflected by the facts of an applicant's particular case. At the current time, substantial likelihood of success has been described as "a probability or promise of succeeding [t]hat is of real value; or valid" (*R. v. Poitras*, 2012 ONSC 5147 at para. 19), and a "truly meritorious" case (*R. v. Gayle*, [2013] O.J.

No. 4124 (S.C.J.)). All the cases decided under the new s. 745.61 agree that "substantial likelihood" creates a more stringent test than "reasonable prospect of success", regardless of whether that latter test is defined as a realistic probability or something less: (Poitras; Gayle; R. v. Morrison, 2012 ABQB 619 at para. 30; R. v. McAuley, 2012 ONSC 3732 at para. 14).

- [21] In conclusion, I must assess and weigh the evidence before me on a balance of probabilities to determine whether it is substantially likely that a jury will exercise its broad discretion unanimously to reduce, or terminate altogether, the period of parole ineligibility for Mr. Yu.
- [22] To meet the mandate of s. 745.61(2), I must consider the evidence before me in the context of the nature of the offence, Mr. Yu's character, his conduct while institutionalized, information from the victim's family, and any other relevant evidence.

A. Nature of the Offence

- [23] Mr. Yu, at the age of 18, murdered his friend Kenneth Mah, who was also aged 18, in Mr. Ma's apartment. Mr. Yu was assisted by his co-accused, Mr. Cho. Witnesses at Mr. Yu's second trial testified that Mr. Yu told them he strangled Mr. Ma while Mr. Cho held Mr. Ma down. Mr. Ma struggled and pleaded for his life. Mr. Yu, in statements attributed to him in an Assessment for Decision report dated December 2011, described how he used duct tape to bind Mr. Ma's hands and mouth before he strangled him.
- [24] Forensic evidence led at trial suggested that Mr. Ma had received at least one blow to his face before death.
- [25] Mr. Yu and Mr. Cho wrapped Mr. Ma's body in a plastic garbage bag and hid it under the bed in Mr. Ma's apartment. Later they went back to move Mr. Ma's body but the building manager had changed the locks to his suite. Mr. Yu and Mr. Cho then made various attempts to sell Mr. Ma's Mercedes and to access his bank account.
- [26] All murders are heinous and unforgivable. Some are more cruel than others, and some, despite being unforgivable, are more understandable than others. There is no doubt that this murder was cruel and to a certain extent, defies comprehension. The Court of Appeal agreed with defence counsel on appeal that it was an "odd" killing (R. v. Yu, 2000 BCCA 626 at para. 3). Mr. Yu, Mr. Cho and Mr. Ma were only 18 years old and had been school friends. The motive for the murder remains unclear. Some of the reports suggest it was monetary greed, some suggest it was revenge for ridicule, some suggest it may have been gang related, and a later report suggests Mr. Yu may have been affected by psychological abuse from his father. Regardless of motive, the static feature of this factor that remains unchangeable is that it was a cruel and senseless killing.

- [27] However, there is another static feature of the nature of the offence that may work to Mr. Yu's favour, to some extent. Mr. Yu was a high school adolescent male when he committed the murder. Although at 18 years old he was tried as an adult, it is unlikely that at 18 years old he had reached full maturity of judgment. That is why, generally speaking, relative youth is a mitigating factor in sentencing and a positive factor to consider on parole eligibility applications.

B. Character of the Applicant

- [28] I agree with Crown counsel that this factor overlaps to a certain extent with Mr. Yu's shocking conduct at the time of the murder and his poor conduct during his earlier period of incarceration. Nonetheless, in my view, the evidence shows a steady, albeit slow progression toward maturity, insight and remorse.
- [29] At the time of the murder, Mr. Yu appears to have had no criminal history, no disciplinary problems at school other than self-reported absences, and no significant issues with authority. He and his family had immigrated from Hong Kong in 1989 when Mr. Yu was 13 years old. He maintained high academic grades throughout high school, despite his initial struggle with the English language. He completed grade 12 while detained at the pre-trial centre. While he resided at home he had no problems with substance abuse. He has never been diagnosed with any mental disorder. The PER refers to the Vancouver Police indicating Mr. Yu's associates were gang involved, but there is no other evidence to suggest Mr. Yu himself was a gang member. Mr. Yu has not demonstrated violence either before or since the killing of Mr. Ma.
- [30] In short, what was known about Mr. Yu's character before the murder did not in any way foreshadow such a serious crime.
- [31] As discussed below, Mr. Yu has incurred several institutional charges since admission into federal custody. These were all drug related. By 2008 Mr. Yu was a full blown heroin addict, denoting a serious weakness in character. Between 2009 and 2011 he was on opioid therapy. Apparently he has struggled to overcome his addiction and since 2011 he has been drug free, suggesting a hidden strength of character.
- [32] Crown counsel submits that Mr. Yu has psychological difficulties that should cause concern. Counsel submits that the PERs reiterate Mr. Yu's difficulty incorporating and applying cognitive and other psychological skills into his own thinking. Counsel highlights observations recorded in 2001 that Mr. Yu's beliefs were self-centered and reflected a victim stance. In 2010 and 2012 he was noted to have trouble controlling his own emotions. The PER illustrates that although Mr. Yu successfully completed the institutional maintenance programs in February 2011, he was still assessed as needing improvement in the area of managing harmful emotions.

- [33] However, the Assessment for Decision document prepared in November 2011 observed that since Mr. Yu was transferred from Kent Institution to Matsqui Institution, his progress had steadily improved. He was no longer involved in the drug subculture or institutional politics, had addressed his heroin addiction, had addressed his emotions through counselling, and had matured into a more thoughtful and respectful individual. He had demonstrated a pattern of satisfactory institutional adjustment and no special interventions had been required (Assessment for Decision 2011 at p. 5).
- [34] On the other hand, at page 7 of the same document, the author describes Mr. Yu as "an introvert and likely institutionalized", preferring to isolate himself from social activities which exacerbates his social awkwardness.
- [35] The updated PER states that Mr. Yu participated in one-to-one counselling with a psychologist which ended in March 2013 with his transfer to William Head Institution. Mr. Yu's targets were to improve his social skills and build a support group.
- [36] An Assessment for Decision dated March 25, 2013, states that Mr. Yu has made steady progress in terms of understanding his risk factors including associates, attitude and poor emotions management. Among other things, he has focused on building positive sources of support within the institution including church volunteers, M2 volunteers, LINC In Reach workers and his institutional work supervisor.
- [37] From the outset, Mr. Yu was consistently assessed as a low to moderate risk of reoffending, but other areas such as attitude, associates and social interaction indicated high need for improvement. These latter areas have now been reassessed as moderate need for improvement.
- [38] Significantly, Mr. Yu's security classification has been reassessed and he has been reclassified as a minimum security offender and voluntarily transferred to William Head Institution, a minimum security facility.
- [39] Crown counsel conceded that clearly Mr. Yu had made gains, especially in the last two years. However, Crown submitted that Mr. Yu's behaviour while in custody raised concerns about his character.

C. Conduct under Sentence

- [40] Once again Crown counsel submitted that although Mr. Yu's recent conduct under sentence was commendable, his most recent serious institutional charge occurred less than five years ago. Counsel submitted that Mr. Yu needed more time without new charges to demonstrate that his rehabilitation has taken hold.
- [41] According to the PER, Mr. Yu incurred seven institutional charges. He was found guilty of two, two were dismissed, and three were withdrawn. The two charges for which he was found guilty involved heroin and drug paraphernalia found in Mr. Yu's cell and on his person. Counsel for Mr. Yu conceded that Mr. Yu had experienced difficulty during the

earlier stages of his incarceration, but submitted that these difficulties were caused by his heroin addiction. Counsel submitted that after Mr. Yu was placed in a substance abuse program he stopped using drugs and became the model prisoner he is today.

- [42] Since 2009, Mr. Yu has been involved in the chapel and prison theatre group, worked as a peer counsellor and tutor in ESL, facilitated a suicide awareness program, successfully completed vocational training as an electrician and maintained an A average in the financial management program with Thompson Rivers University.
- [43] The above evidence indicates a steady progression and commitment towards rehabilitation. In my view, there is a substantial likelihood that a jury would be satisfied that Mr. Yu is now on the right path and would not view his prior negative conduct under sentence as determinative.

D. Victim Information

- [44] At the time of sentencing, no submissions or victim impact statements were provided to the Court from Mr. Ma's family, who were living in Hong Kong at the time.
- [45] On the application before me, Crown filed an email from Mr. Ma's father opposing the reduction of the period of parole eligibility for Mr. Yu due to the severity of the crime, lack of feeling or emotion by Mr. Yu, and concern that he might contact or irritate Mr. Ma's family. However, Mr. Ma also stated that he will respect any future decision of the Court.

E. Other Information and Conclusion

- [46] Counsel for Mr. Yu submits that Mr. Yu has expressed remorse and taken full responsibility for the murder. He has developed insight into all his risk factors.
- [47] Crown submits that this remorse and unqualified taking of responsibility has come very late and only recently. Further, Mr. Yu does not appear to have community support. He has never lived alone or worked in the community. In short, Crown submits that there has not been enough time for the Court to have confidence that the positive changes illustrated by Mr. Yu have taken root.
- [48] This concluding submission by Crown highlights the real issue in Mr. Yu's application. It may be that a jury will agree that Mr. Yu needs more time before applying for parole, but I think there is a substantial likelihood, a probability or promise of success that is valid, of real value and that Mr. Yu has a case of substantive merit. His current position is much stronger than the applicants in *Postras* or *R. v. Crick*, 2012 ONSC 5695, who denied committing the offences, or the applicant in *Gayle* who only showed qualified remorse.
- [49] Accordingly, I grant the application and give leave to Mr. Yu to proceed with a hearing before a jury pursuant to s. 745 of the Criminal Code.

"Kloegman J."

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Prepared on 29 October 2026 · Esheria