

CANADA / JUDGMENT

Re Gao

2023 BCSC 109

COURT

Supreme Court of British Columbia

DECIDED

18 January 2023

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2023 BCSC 109 Re Gao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Gao,

2023 BCSC 109

Date: 20230118

Docket: 33322-1

Registry: Vancouver

Tieguang Gao, Private Prosecutor

Appellant

v.

Accused (1) S.D.S., (2) E.K., (3) C.N.,

(4) K.M.R., and (5) T.H.

Respondents

Before: The Honourable Mr. Justice Riley

On appeal from: Provincial Court of British Columbia process hearing,

August 11, 2022, concerning a private information sworn by Tieguang Gao

(Vancouver Docket No. 26557-1)

Oral Reasons for Judgment

Appearing on his own behalf (Appellant):

T. Gao

Counsel for the Crown:

D.L. Mulligan

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 18, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2023

- [1] THE COURT: This is an oral ruling and I reserve the right to edit the reasons to insert references to statutes and case law. Mr. Gao seeks to appeal from the decision of a Provincial Court judge refusing to issue process under s. 507.1 of the Criminal Code, R.S.C. 1985, c. C-46, in respect of a private prosecution commenced at his instance. The Crown has applied for an order dismissing the appeal because it is not properly constituted, and because Mr. Gao has failed to comply with the Supreme Court Criminal Rules, SI/97-140.
- [2] The history of the matter can be described as follows:
- a) On 5 July 2022, Mr. Gao appeared before a judicial justice in the Provincial Court of British Columbia, at Vancouver, and swore an information under s. 504 of the Criminal Code charging five separate individuals with alleged criminal offences.
 - b) On 11 August 2022, Mr. Gao appeared before a Provincial Court judge for a process hearing under s. 507.1 of the Criminal Code. The Provincial Court judge declined to issue process.
 - c) On 7 September 2022, Mr. Gao filed a notice of appeal with respect to the decision of the Provincial Court judge refusing to issue process.
 - d) At some point thereafter, Mr. Gao made efforts to serve the notice of appeal on the individuals who are named as accused in the proposed private prosecution. Some or all of those individuals are judicial officers or officials of the Federal Court. Mr. Gao was unable to effect service on his notice of appeal on these individuals.
 - e) On 4 October 2022, Crown counsel sent a letter to Mr. Gao advising him of the Crown's position that the appeal was not properly constituted. The Crown took the position that there was, in effect - and this is not the Crown's words, but my summary - no jurisdiction for Mr. Gao to bring an appeal from the decision of the Provincial Court judge refusing to issue process under s. 507.1. Rather, the proper procedure for a person seeking to review or challenge such a decision is to bring an application for prerogative relief which, I will add, is dealt with under Part XXVI of the Criminal Code. The Crown provided in its letter a draft or

precedent for converting Mr. Gao's appeal into a prerogative relief application. The Crown also provided Mr. Gao with a draft order to unseal the transcript of the process hearing which, as I understand it, is an in camera proceeding from which one cannot obtain a transcript without first obtaining an unsealing order.

- f) On 19 October 2022, Mr. Gao appeared before Justice Ker of this Court seeking an order for substituted service of his notice of appeal on the individuals who were named as accused in his proposed private prosecution. Justice Ker dismissed the application and in the course of the hearing urged Mr. Gao to consider following the steps set out in the Crown's letter to convert his appeal into an application for prerogative relief. Justice Ker also asked Mr. Gao if he was agreeable to the orders that the Crown had suggested to properly reconstitute the proceeding and to obtain the transcript, but Mr. Gao said he wanted to consult with a lawyer first.
 - g) On 2 November 2022, there was a further appearance before Justice Ker in the nature of a case management conference. In the course of that proceeding, Justice Ker once again urged Mr. Gao to consider taking the steps set out in the Crown's letter. Justice Ker indicated that if Mr. Gao did not take those steps, the Crown may well bring an application for his appeal to be dismissed either before the date set for the hearing of the appeal or on the day that the appeal was to be heard.
 - h) The appeal was then set down for hearing for today's date, 18 January 2023.
- [3] That brings us to today's hearing date. Despite the urging of the Crown, Mr. Gao has not taken any steps to convert his matter from a summary conviction appeal into an application for prerogative relief. As a result, Mr. Gao has not given formal notice to the Provincial Court judge of a properly constituted application to challenge the validity of the judge's refusal to issue process. Moreover, Mr. Gao has not obtained an order unsealing the transcript of the process hearing, so that the transcript can be filed in this Court for the purposes of considering whether there was any reviewable jurisdictional error or failure to adhere to the principles of natural justice, in keeping with the scope of review in prerogative relief proceedings under Part XXVI of the Criminal Code: *Holland v. British Columbia*, 2022 BCSC 1388 at para. 4-5, citing *R. v. Awashish*, 2018 SCC 45 at para. 11, 20 and *R. v. M.P.S.*, 2014 BCCA 388 at para. 46; see also *Felger v. British Columbia (Attorney General)*, 2022 BCSC 1885 at para. 22-23.
- [4] For the sake of completeness, I should say that Mr. Gao has presented some material demonstrating that he has, in fact, made a fair amount of effort on his own to obtain a transcript of the process hearing. Indeed, he has even paid the transcription company for the transcript. However, the transcription company has ultimately been unable to release and certify the transcript, because the Provincial Court has taken the position that the process hearing was an in camera proceeding and an unsealing order is required before the transcript can be released. I hasten to add or refer back to the fact that the Crown has indeed provided Mr. Gao with a draft unsealing order, but Mr. Gao has been completely

unwilling to seek that order. For some reason, Mr. Gao appears to be under the belief that the whole issue of limited access to the transcript is some kind of a conspiracy, and that the insistence on an unsealing order is intended to somehow deny him his day in court. That could not possibly be the case, considering that the Crown has actually drafted and provided Mr. Gao with an unsealing order, but Mr. Gao has been unwilling to follow that process. In the result, the Court is not able to consider the merits of the issues that Mr. Gao wishes to raise with respect to the Provincial Court judge's refusal to issue process.

- [5] I should say - based on what has been presented to me in the form of judicial decisions from other courts - that the underlying allegations that Mr. Gao wishes to pursue in his proposed private prosecution flow out of Mr. Gao's continuing grievances with officials within the Workers Compensation Board in Ontario, the Ontario courts, and the Federal Court, and that there are judgments in both of these courts characterizing Mr. Gao's conduct as vexatious or frivolous in nature. See *Gao v. Ontario (WSIB)*, 2014 ONSC 6497 at para. 19-23; *Gao v. Ontario WSIB* (15 September 2021), Doc. No. T-890-21 (F.C.T.D.) (per T. Horne, Prothonotary) [unreported] at p. 4.[1]
- [6] That brings me to the Crown's application to dismiss the appeal for failure to comply with the Rules. I agree with the Crown on two key points.
- [7] First, I agree with the Crown that the appeal is not properly constituted. Summary conviction appeals are statutory in nature and there is no statutory jurisdiction to bring an appeal unless it is provided for in the Criminal Code. There is no statutory right to appeal from a decision refusing to issue process under s. 501.7 of the Criminal Code. Indeed, s. 507.1(5) expressly states that the only recourse from a refusal to issue process under that section is to bring an application to compel the judge or justice to issue process. That is basically an application for prerogative relief in the nature of mandamus under Part XXVI of the Criminal Code. All of this is abundantly clear from the Criminal Code itself, but is also reinforced by the case law the Crown has cited. See, in particular, *Holzbauer v. British Columbia (Attorney General)*, 2021 BCSC 1354, *aff'd* *Holzbauer v. British Columbia (Attorney General)*, 2021 BCCA 458 at para. 17-19; see also *R. v. McHale*, 2010 ONCA 361 at para. 19, affirming that the proper way to challenge the refusal of a justice or provincial court judge to issue process under s. 507.1 is by way of an application for mandamus.
- [8] This is not merely a matter of form over substance. An application for prerogative relief must be served on the decision maker, in this case a judge of the Provincial Court, and the decision maker would have the right to participate in the process. The same cannot be said in a summary conviction appeal, where the decision maker is not considered an interested party for the purposes of the appeal proceeding. What is more, the scope of review in prerogative relief is fundamentally different from and in many ways more limited than the scope of review on an appeal: *Holland* at para. 4-6; *Awashish* at para. 2; *M.P.S.* at para. 46. Since the proceeding has not been framed properly, this Court is not in a position to meaningfully assess whether there is any basis for granting an extraordinary remedy in the nature of prerogative relief.

- [9] Second, I agree with the Crown that Mr. Gao has not complied with the Rules by failing to obtain and file with this Court a transcript of the proceedings in respect of which he seeks to appeal. Even where an appeal is properly constituted and there is jurisdiction to pursue it, the appellant is obliged (under Rule 6(5)) to obtain and file the transcript in advance of the hearing. This has not happened here. As I say, there is an indication that Mr. Gao has actually tried to obtain the transcript, but he has refused to get an unsealing order, despite the urging of the Crown to do so and despite being given the necessary precedent for such an order.
- [10] Now, I should say I gave serious consideration to whether I should simply adjourn the hearing of Mr. Gao's appeal and direct that he obtain an unsealing order, or alternatively whether I should make such an order on the Court's own motion, but in the end I have decided that this would not be a just and appropriate course of action to take for a number of reasons.
- [11] This matter has now been before the Supreme Court on three separate occasions, taking up valuable court time and resources, and Mr. Gao has been told on multiple occasions what he needs to do and how he can go about doing it, but he has obstinately refused to do so. Not only has he not obtained the transcript, and that is one issue, but he has also refused to take the steps necessary to convert his appeal into a properly constituted application for prerogative relief.
- [12] I conclude that Mr. Gao is either unwilling or uninterested in remaining focused on the task of properly advancing his case. He has, rather, diverted his efforts and his energy toward launching unjustified and completely unproductive attacks on the integrity of others involved in the process, including Crown counsel, the Provincial Court administration, and the transcription company. For whatever reason, Mr. Gao has chosen to put his energy into attacking those individuals and institutions, rather than on taking the steps necessary to bring this proceeding into compliance with the procedural rules. I have no confidence that he would do so in the future if given further opportunity.
- [13] To conclude, firstly, I find that the appeal is not properly constituted and is brought without jurisdiction and, secondly, I find that the appellant has not complied with the Rules and that the non-compliance has unjustifiably delayed and frustrated the process. On that basis, I would dismiss the appeal, both for lack of jurisdiction and for non-compliance with the Rules.
- [14] That concludes my ruling and, with that, the appeal is dismissed.
- [15] It should be noted that in preparing the written reasons in this matter, the Court has, on its own motion, amended the style of cause in two respects. First, while the notice of appeal identifies the appellant as "Rex, I Tiegung Gao, am a private prosecutor", the reference to His Majesty the King has been deleted, because the appeal was not brought by the Crown, but rather by a private prosecutor. Second, the notice of appeal identifies the five accused as the respondents, listing their full names. That is not appropriate because: (i) the Provincial

Court judge declined to issue process, (ii) the process hearing was in camera, and (iii) under s. 507.1(5), the information is "deemed never to have been laid" unless the informant commences proceedings to compel the Provincial Court judge to issue process within six months of the refusal. For all of these reasons, the Court has amended the style of cause to refer only to the initials of the accused. The neutral citation for the case will be Re Gao, 2023 BCSC 109.

"Riley J."

- [1] Although the Prothonotary's judgment does not use the terms "frivolous" or "vexatious", it includes a finding that Mr. Gao "has made repeated and unfounded allegations of deceitful conduct against the defendant and its counsel". In the result, it can fairly be said that the Prothonotary characterized Mr. Gao's proceeding as "frivolous".

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