IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Stich,*
2012 BCSC 706

Date: 20120516
Docket: 91934-KC-3
Registry: Kamloops

Regina

Respondent

v.

Shane Andreas Stich

Appellant

Before: The Honourable Mr. Justice Meiklem

On appeal from the Decision of a Provincial Court Judge dated September 1, 2011, Kamloops Registry, Docket No. 91934

Reasons for Judgment

Counsel for the Crown:	K. Bouchard
Counsel for the Appellant:	K.A. Walker
Place and Date of Hearing:	Kamloops, B.C. February 9, 2012
Place and Date of Judgment:	Kamloops, B.C. May 16, 2012

[1] Mr. Stich appealed a prohibition order under s. 447.1(1)(a) of the *Criminal Code* whereby he was prohibited from owning, having the custody or control of, or residing in the same premises as an animal or a bird.

[2] At the hearing of this appeal, I found no error of principle or law in the sentence imposed by the learned trial judge on the basis of the evidence before her at the time of sentencing. However, I indicated that some of the post-sentencing facts outlined in the submissions on the appeal might well form the basis for modifying the terms of the prohibition imposed in respect of permitting proposed co-residency with the appellant's mother to further his rehabilitation following his completion of a residential addiction treatment program. His mother has a dog and a cat or cats.

[3] The appellant suggested that this court might have inherent jurisdiction to vary the prohibition, or alternatively should consider post-sentencing circumstances under the rubric of fresh evidence. I requested written submissions from counsel on the court's jurisdiction in the circumstances.

[4] I have now received submissions from counsel.

[5] I do not agree with the appellant's submission that counsels' representations, either to this court on the appeal or to the lower court at the time of sentencing, are sufficient to support a finding that the prohibition imposed was demonstrably unfit in the circumstances

[6] I find that the court's jurisdiction in these circumstances is limited to intervening in the event that fresh evidence, properly admitted on the appeal, demonstrates the unfitness of a comprehensive absolute prohibition against residing in the same premises as an animal or bird.

[7] If the appellant wishes to proceed he may apply for the admission of fresh evidence, in which case the following extract from the headnote in *R. v. Levesque*, [2000] 2 S.C.R. 487, 148 C.C.C. (3d) 193 sets out the appropriate considerations for

the application to admit fresh evidence, and for any application by the respondent to challenge and test the fresh evidence:

> The following principles govern the discretion of a court of appeal to admit fresh evidence: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (3) the evidence must be credible in the sense that it is reasonably capable of belief; and (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The discretion conferred on courts of appeal by s. 687(1) of the Criminal Code to consider such evidence "as it thinks fit to require or to receive" on an appeal against sentence is no broader than the discretion conferred by s. 683 of the Criminal Code to receive fresh evidence "where it considers it in the interest of justice" on an appeal. While the rules concerning the sources and types of evidence are more flexible in respect of sentence, the criteria for admitting fresh evidence on appeal are the same, regardless of whether the appeal relates to a verdict or a sentence. A failure to satisfy the criterion of due diligence is not always fatal. Due diligence is not a necessary prerequisite for the admission of fresh evidence on an appeal, but is an important factor in determining whether it is in the interests of justice to admit or exclude fresh evidence.
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> The concepts of admissibility and probative value overlap in the context of the admission of fresh evidence on appeal. It is not sufficient that fresh evidence meet the prerequisite of relevance. It must also be credible and such that it could, when taken with the other evidence adduced at trial, be expected to have affected the result. The probative value of the fresh evidence must, to some degree, be reviewed by a court of appeal when it is determining its admissibility. Where fresh evidence is challenged or where its probative value is in dispute, it should be tested before being admitted. This can be done in a number of ways, such as by filing affidavits in response or by cross-examining the deponent of the affidavit. Where a party wishes to test the fresh evidence, it should make a formal motion to the court of appeal for that purpose. Failure to put fresh evidence to the test is not fatal and does not make it automatically admissible or inadmissible.
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> The strict rules of a trial do not apply to a sentencing hearing. For example, hearsay evidence may be accepted where found to be credible and trustworthy.

[8] If the appellant intends to apply to admit fresh evidence, he shall provide counsel for the Crown with 30 days advance notice of the content of the proposed evidence.

"I.C. Meiklem J."

MEIKLEM J.