CANADA / JUDGMENT

R. v. Berar

2009 BCCA 472

COURT	DECIDED
British Columbia Court of Appeal	29 October 2009

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2009 BCCA 472 R. v. Berar COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Berar, 2009 BCCA 472 Date: 20091029 Docket: CA037226 Between: Regina Respondent And John Harjinder Berar Appellant Before: The Honourable Mr. Justice Smith (In Chambers) On appeal from: Provincial Court of British Columbia, January 5, 2009, (R. v. Marchand & Berar, 27887-1) Counsel for the Appellant: J. Saulnier Counsel for the Respondent: J. Duncan Place and Date of Hearing: Vancouver, British Columbia October 22, 2009 Place and Date of Judgment: Vancouver, British Columbia October 29, 2009 Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] On January 5, 2009, following a three-day trial before the Honourable Judge K.J. Walker in the Provincial Court at Prince George, John Harjinder Berar was convicted of unlawful confinement contrary to s. 279(2) of the Criminal Code. On February 16, 2009 he was sentenced to two and one half years in prison after receiving credit of one year for pre-trial custody. He seeks an order pursuant to s. 679 of the Code for his release from custody pending determination of his conviction appeal.

[2] Since the presumption of innocence no longer applies, Mr. Berar bears the onus of establishing that he ought to be released pending appeal. The criteria for release are set out in s. 679(3) of the Code:

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes 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.

[3] The Crown concedes Mr. Berar meets the first criterion but opposes his release on the basis that he is unable to satisfy the second and third criteria.

[4] Mr. Berar, who is 42 years old, has a lengthy and generally unremitting criminal history that encompasses virtually his entire adult life. Between 1982 and March 2008, he had, by my count, 30 previous convictions. His record includes convictions for crimes involving violence, property offences, drug possession, and drug trafficking. He also has several convictions for failure to comply with recognizances, one on May 9, 2007 for failure to attend court, and two for breaching conditional sentence orders, on July 18, 2007 and March 28, 2008.

[5] The last two convictions require further explanation. On May 9, 2007, Mr. Berar was sentenced in Alberta to a fine for failure to attend court, concurrent conditional sentences of 6 months each for mischief and taking a motor vehicle without consent, and a concurrent conditional sentence of 18 months for a conviction of robbery. He first breached the conditional sentences on June 11, 2007 and as a result, on July 18, 2007, in Prince George, he was sentenced to a custodial term of 30 days. A second breach occurred on March 12, 2008 when he committed the offence of which he now stands convicted while he remained bound by the 18-months Alberta conditional sentence order. As a result of this second breach, on March 28, 2008, the conditional sentence was converted to a custodial sentence of 223 days, which expired on October 8, 2009, while he was in custody awaiting trial on this offence.

[6] Mr. Berar deposes he is a Canadian citizen and is not a citizen of any other country. He says his passport has expired and he has no plans nor any need to travel outside of Canada. He says he owns a house in Prince George with his mother, who is retired, and has lived there with her since May 2006. He deposes further that, if released, he plans to live with his mother and his nephew at that address. He says he formerly worked as a logging truck operator and intends to continue that line of work. He says he recently passed a medical examination that will permit him to renew his class 1 truck drivers' licence. He says his mother and his sister, with whom he has a close relationship, are willing to act as sureties for him.

[7] Mr. Berar attributes his criminal record in large part to a crack cocaine addiction. He deposes that he has completed drug treatment and violence prevention programs while in custody and is still active in the Substance Abuse Management Program. He deposes further that he has discussed a release plan with his drug and alcohol counsellor, which includes living with his mother and nephew, immediately obtaining work, seeing a drug and alcohol counsellor, attending Alcoholics and Narcotics Anonymous meetings, and attending church. He says he would abide by any conditions that might be imposed on him if released pending appeal.

[8] Mr. Berar filed a letter from a person, who describes himself as the owner of a contracting company, who says Mr. Berar was previously an employee and that he would consider Mr. Berar for employment again if there were work available driving a truck or in the shop. He also filed an affidavit of his sister, who deposes she is married, has no criminal record, and has had steady employment for 15 years with the same employer, a financial institution. She says she has assets of about $5,000.00 in cash and would stand surety for Mr. Berar. She says

she is aware of his previous convictions and his "struggles with drug addiction". She deposes further that she has discussed these matters with him while he has been in custody and says he has discussed his plans with her.

[9] On the basis of this evidence, counsel for Mr. Berar submits he will surrender himself into custody in accordance with the terms of a release order.

[10] The Crown filed an affidavit sworn by Geoffrey G.R. McDonald, Crown counsel in the Prince George Crown Counsel Office, who had conduct of the proceedings arising out of Mr. Berar's June 11, 2007 breach of the conditional sentence orders imposed in Alberta. Mr. McDonald deposes as follows. Mr. Berar was arrested and was brought before the Honourable Judge Brecknell on June 25, 2007. He persuaded Judge Brecknell to release him on bail on the basis of his statements that he had failed to attend the Conditional Sentence Supervisor's office on June 11, 2007 because he was in hospital, that he had been in frequent telephone contact with his supervisor, and that he was a logging truck operator and that if he was not released immediately he would lose his work and his logging truck would be seized. In granting bail, Judge Brecknell ordered Mr. Berar to appear on June 28, 2007 with medical records in hand to confirm he had been hospitalized on June 11, 2007. In the meantime, Mr. McDonald investigated the first two of Mr. Berar's statements and concluded they were false. Mr. Berar failed to appear on June 28, 2007 as directed and was arrested later that day in the downtown area of Prince George following a foot-chase in which he attempted to escape the police. Then, at the hearing on July 18, 2007, Mr. Berar admitted his breach of the conditional sentence order and, as a term of an agreement that Mr. McDonald would not seek to terminate the entire conditional sentence order, he admitted that he had deliberately misled the court on June 25, 2007 in order to obtain his release on bail.

[11] Counsel for the crown submits that Mr. Berar's past actions demonstrate that no confidence can be placed in his assurances that he would surrender himself into custody in accordance with the terms of a release order. I agree. Mr. Berar's application is based entirely on his evidence without any significant confirmatory evidence. If his evidence of his rehabilitative progress and his future intentions is true, that is laudable and it is to be hoped that he will follow through in due course, overcome his drug addiction, and renounce his life of crime. However, he has failed to establish to my satisfaction that he would surrender himself into custody in accordance with an order for his release pending appeal, if I should make such an order.

[12] Given that conclusion, it is not necessary to address counsel's submissions as to the public interest criterion for release.

[13] The application for release pending appeal is dismissed. "The Honourable Mr. Justice Smith"

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