

CANADA / JUDGMENT

R. v. Bogarh

2018 BCCA 355

COURT

British Columbia Court of Appeal

DECIDED

21 September 2018

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2018 BCCA 355 R. v. Bogarh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Bogarh,

2018 BCCA 355

Date: 20180921

Docket: CA45506

Between:

Regina

Respondent

And

Paramjit Singh Bogarh

Applicant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 517(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of the evidence taken, the information given, or the representations made and the reasons, if any, given or to be given by the justice presiding over the application for judicial interim release (bail).

Direction of the Chief Justice on an Application for Review

Pursuant to Section 680 of the Criminal Code of Canada.

Counsel for the Appellant:

S.R. Chamberlain, Q.C.

Counsel for the Respondent:

A.K.M. Saettler

Written Submissions of the Appellant Filed:

August 13, 2018

Written Submissions of the Respondent Filed:

August 24, 2018

Place and Date of Judgment:

Vancouver, British Columbia

September 21, 2018

Summary:

This is an application under s. 680 of the Criminal Code for a direction for bail review. Held: Application denied. The bail judge's conclusions on flight risk were supported by the circumstances of the case. Considering the deferential standard to be applied on the proposed review, it is not arguable that the judge committed material errors or that the bail decision was clearly unwarranted. The threshold for directing a review is not met.

Reasons for Judgment of the Honourable Chief Justice Bauman:

- [1] Paramjit Bogarh applies for an order under s. 680 of the Criminal Code for the Chief Justice to direct the Court of Appeal to review a bail decision made by the Honourable Mr. Justice Cole on 29 June 2018.
- [2] Publication bans apply to this case under s. 517 of the Criminal Code and for non-disclosure of the three proposed sureties' addresses. The s. 517 ban prohibits the publication, broadcast or transmission in any way of the evidence, information and representations at the bail hearing and the bail judge's reasons. The ban will expire when the trial ends. Until then, reasons for judgment on this review application and any subsequent review decision should not be published.

Background

- [3] On 31 January 2018, Paramjit Bogarh was charged with first degree murder contrary to s. 218(1) of the Criminal Code and with conspiracy to commit murder contrary to s. 423(1)(a) of the Criminal Code. It is alleged that the stabbing death of his wife, Saminder Bogarh, was caused by him and his brother, Narinder Bogarh.
- [4] Because the accused (Paramjit Bogarh), his brother (Narinder Bogarh) and the deceased (Saminder Bogarh) share the same last name, I will refer to each of them by first name to avoid confusion. In doing so, no disrespect is intended.

- [5] On 19 June 2018, Paramjit applied under s. 515 of the Criminal Code for judicial interim release. On 29 June 2018, Justice Cole issued an oral judgment, indexed as 2018 BCSC 1307 but not published pursuant to the s. 517 publication ban.

Summary of Judgment on Appeal

- [6] At the outset of his reasons, the bail judge noted that the offences with which Paramjit is charged are offences listed in s. 469 of the Criminal Code, and, therefore, the onus lies on Paramjit to show that his continued detention is not justified.
- [7] The Crown's position was--and remains--that Paramjit's continued detention is necessary under s. 515(1)(a) of the Criminal Code to ensure his attendance at trial.
- [8] The bail judge recounted the circumstances of the offence in some detail. I would summarize those circumstances as follows.
- [9] Paramjit, who has no criminal record, entered into an arranged marriage with the deceased, Saminder Bogarh, in 1983. The couple lived in Vernon, British Columbia. One son was born in 1984.
- [10] On the night of 31 December 1986, Paramjit called 9-1-1 and said his wife was dead from an apparent stabbing in an upstairs bathroom. Paramjit was arrested and told police that his son, then two years old, had said the perpetrator was a white man. He gave a statement denying any involvement in the murder. He was charged with second degree murder but a stay of proceedings was entered shortly thereafter.
- [11] In 1987, Paramjit moved to California without his son. He remarried in 1990 and resides in California with his wife and a son who was born in 1993.
- [12] Paramjit submitted to the bail judge that:
- a) he is very involved in his business, family life and community in California;
 - b) he has taken no steps to hide his whereabouts, and the RCMP has always had knowledge of his home address;
 - c) he has visited British Columbia twice since the incident;
 - d) he was aware for several years that the RCMP had continued to investigate his wife's death, including by interviewing witnesses in California; and
 - e) the Crown's case "is so weak that it may be dismissed on a no-evidence motion", and that the numerous affidavits alleging he admitted to killing his wife are false.
- [13] The Crown submitted to the bail judge that it has a strong circumstantial case against Paramjit and his brother, Narinder. The bail judge recounted the facts relied on by the Crown, which I will summarize as follows.

- [14] When police attended at the scene of the crime, Paramjit's clothing had blood on it, which he said was from cradling his wife's head. There were no signs of forced entry into the home. Paramjit told police he believed Narinder might have returned to India in the months prior to the killing. Paramjit's jacket pocket contained documents relating to a life insurance policy for both Paramjit and Saminder taken out in February 1986, and a second policy on Saminder taken out in the amount of \$100,000 on 23 December 1986.
- [15] The two-year-old son told police, assisted by a Punjabi interpreter, that his parents "had been fighting upstairs and that his father had been hitting his mother, who was cut" and that no one else was home at the time.
- [16] There was evidence of two earlier incidences of violence and threats by Paramjit to Saminder, and that Paramjit said that "it was better to kill and die, and that dying was better than this life or spending his life in jail".
- [17] On 18 December 1986, Saminder was confirmed to be pregnant.
- [18] On 25 and 26 December 1986, Paramjit and Saminder attended two weddings in the Lower Mainland, with Saminder traveling back to Vernon on 29 December 1986 with relatives.
- [19] After the wedding on 26 December, Paramjit asked other relatives to drop him at a phone booth near the Blue Boy Hotel, saying he would be 5-10 minutes, but when after 20 minutes the relatives returned, they could not locate him and waited a further 30 minutes until they saw him exit the front of the hotel. Paramjit's explanation was that he had been meeting "a guy".
- [20] There was evidence that Narinder was present in British Columbia and stayed at the Blue Boy Hotel 25-28 December 1986, and flew from Vancouver to Kelowna on 28 December 1986. Narinder had booked a flight from Kelowna to Vancouver for 31 December 1986 but did not take the flight.
- [21] After one of the wedding receptions on 28 December 1986, Paramjit got a ride back to Kelowna, apparently to attend work. There was evidence that Paramjit was in Kelowna with Narinder over a period from 28-31 December 1986, including evidence that:
- a) late on 28 December 1986, the police stopped Paramjit in his vehicle and ticketed him for failing to wear a seatbelt;
 - b) he was noted to be with a second East Indian male, believed to be Narinder;
 - c) the brothers--Paramjit giving his name as "Henry Gone"--attended at a Kelowna motel at which Narinder stayed until he checked out on 31 December 1986;
 - d) on 31 December 1986, the brothers attended at a car rental office and traveled to a different location with two car rental employees, and that Narinder rented a vehicle for the afternoon and evening.

- [22] Neither Paramjit nor Narinder informed anyone that Narinder was in town, despite Narinder's significant connections to the wedding attendees and the Vernon relatives.
- [23] Evidence suggested Narinder traveled by bus from Kelowna to Vancouver and made calls to a family in Squamish, who on 2 January 1987 took Narinder to the hospital, where he received surgery to repair a severed tendon in his right hand. Narinder told medical staff he had been cutting vegetables in Seattle when his hand was injured. However, the attending doctor's opinion was that the injury was not consistent with cutting vegetables but with stabbing a knife against something solid in a downward motion.
- [24] Narinder apparently told the family from Squamish that he did not want to attend Saminder's funeral in Vernon for fear that, because of the cut on his hand, the police would arrest him as they had arrested Paramjit. Narinder then traveled from Vancouver to India on 2 January 1987, abandoning "his job, assets and life he had built in Toronto, never to return."
- [25] After the police released Paramjit on 2 January 1987, Paramjit attended at the crime scene with family members. When blood stains on the exterior steps were pointed out, Paramjit said that whoever came outside must have been cut. He then said to look at his hands, which were not cut.
- [26] Evidence showed Paramjit left British Columbia for California in February 1987, telling relatives that he would not return to Canada for five to seven months and that, if the police began to harass him, he would go back to India.
- [27] Police continued to investigate the crime in the subsequent decades. Investigators interviewed a number of witnesses in California in 1999, 2005 and 2016. They gave evidence that Paramjit had admitted to the killing, as follows:
- a) one witness said that, while at a church event in 1996, Paramjit confessed to a number of people present that he had killed his wife in Canada;
 - b) one witness said that he had discussed the rumour of the murder with Paramjit, who asked if it was possible to be forgiven for a mistake; the witness said Paramjit told him he could not admit it to the congregation, and when asked if he did it for the insurance, Paramjit said he did not claim insurance because "she was not loyal to me"; the witness said two years later he heard Paramjit say he had killed his wife;
 - c) two witnesses said that they were at the church event and heard Paramjit say he had killed his wife;
 - d) one witness said that her former husband and Paramjit, both drunk, pushed her out of the house following an assault by the husband, and that Paramjit then said, "Brother I've killed and come, it's been so many years and no-one has even asked me so why are you scared".
- [28] Police also gathered DNA evidence linking blood from Saminder's dress to blood found inside Narinder's rental car. The evidence suggests the DNA belongs to a sibling of Paramjit.

- [29] The Crown submitted to the bail judge that of all fraudulent passports seized by the Canadian Border Services Agency, fraudulent passports for Indian citizens are the most common.
- [30] The Crown also raised an issue regarding the various names used by Paramjit, including:
- a) Paramjit Singh Bogarh;
 - b) Parmit Sing Bohgunh;
 - c) Param Jit Singh;
 - d) Parmjit Singh;
 - e) Parmit Singh Bojarm;
 - f) Parmit Singh;
 - g) Sardar Parmjeet Singh; and
 - h) Henry Gone.
- [31] The bail judge considered that Paramjit has no strong ties to Canada, remains a citizen of India and apparently tried to protect his brother by telling police he believed Narinder had returned to India prior to the murder. He emphasized the further life insurance policy, noted above; the threats he had made, also noted above; the "extreme lengths" he went to in order to ensure Narinder did not meet any family members prior to the murder; the statement he made about going to India if the police hassled him; and the multiple names that would make it easier to obtain a fraudulent passport.
- [32] The bail judge concluded that the Crown's circumstantial case was strong and the likelihood of Paramjit returning to India "is very high". That being the case, the bail judge was not satisfied that if released from custody Paramjit would attend trial. Paramjit's release was denied.

Positions of the Parties

- [33] Paramjit asks that a division be directed to review the bail judge's decision. He submits that the bail judge erred by:
- a) ignoring the efficacy of the proposed condition of electronic monitoring;
 - b) not considering the efficacy of the proposed conditions of release: house arrest; two sets of sureties in British Columbia for a total of \$1,000,000; cash bail for U.S. \$500,000;
 - c) improperly considering independent acts and statements of Narinder, which are hearsay and inadmissible pursuant to *R. v. Carter*, [1982] 1 S.C.R. 938;
 - d) improperly applying judicial notice in concluding that as an Indian citizen Paramjit was more likely to have access to fraudulent travel documents; and

- e) improperly relying on statistics from the Canadian Border Services Agency showing that the highest incidence of fraudulent passports comes from India.
- [34] Paramjit submits moreover that the bail judge failed to properly assess the weakness of the Crown's case; that the bail judge improperly considered hearsay evidence; and that the bail judge improperly weighed the defence evidence.
- [35] The Crown submits that Paramjit's detention is justified on the primary ground, considering all of the circumstances. The primary ground is made out where detention is necessary to ensure the accused's attendance in court. The Crown submits that the bail judge did not need to consider the tertiary ground, but that detention would have been warranted on the tertiary ground. The tertiary ground is made out where detention is necessary to maintain confidence in the administration of justice.
- [36] In response to Paramjit's specific arguments summarized above at paragraph 33 of this judgment, the Crown submits:
 - a) the bail judge made no error regarding the efficacy of electronic monitoring;
 - b) the bail judge seriously considered the proposed conditions of release, and his rejection of the plan was not so contrary to the facts and law that a reasonable judge could not have made it;
 - c) the bail judge did not assess the Crown's case as stronger than it actually was based on any misunderstanding of the rule in Carter;
 - d) the bail judge did not improperly apply judicial notice regarding the availability of fraudulent travel documents; and
 - e) the statistics about fraudulent Indian passports were relevant to the general availability of fraudulent documents, and thus properly relied on by the bail judge.

Analysis

[37] Section 680(1) of the Criminal Code reads:

680 (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

- (a) vary the decision; or
- (b) substitute such other decision as, in its opinion, should have been made.

[38] The threshold for directing a review is whether it is arguable that the judge committed material errors of fact or law, or whether the impugned decision was clearly unwarranted in the circumstances: *R. v. Oland*, 2017 SCC 17 at para. 64.

[39] If a review is directed, three principles should guide the reviewing court:

First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

[Oland at para. 61.]

[40] Considering the deferential standard of the review, I do not see an arguable case that the bail judge committed material errors, nor do I believe a reviewing court could conclude Paramjit's detention was clearly unwarranted in the circumstances.

[41] There is nothing in the bail judge's reasons to indicate a failure to understand the efficacy of electronic monitoring, nor the efficacy of the proposed release conditions. The bail judge specifically described the proposed conditions (at para. 2), and was clearly aware of those factors when he reached his conclusion about flight risk.

[42] Moreover, I agree with the Crown that the bail judge relied on the primary ground, such that any error based on the rule in Carter, if it existed, had little bearing on the bail judge's decision, as the strength of the case was only one factor considered in assessing Paramjit's flight risk. In any event, it appears that even if the impugned evidence was removed from consideration, there is sufficient independent evidence on which to base a strong, albeit circumstantial, case for the prosecution.

[43] Finally, the bail judge's conclusions regarding the availability of fraudulent travel documents do not appear to be based in error or clearly unwarranted. The Indian passport statistics indicate the availability of fraudulent documents that could assist Paramjit in fleeing. The facts listed by the bail judge provide ample support for his conclusion that Paramjit is a flight risk.

[44] Although another judge might reasonably have reached a different conclusion than the bail judge under s. 515(10)(a) of the Criminal Code, that is not the test.

Disposition

[45] I would decline Paramjit's request for a direction under s. 680.

"The Honourable Chief Justice Bauman"

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