

CANADA / JUDGMENT

# R. v. Donald

2008 BCCA 316

## COURT

British Columbia Court of Appeal

## DECIDED

1 August 2008

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2008 BCCA 316 R. v. Donald COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Donald, 2008 BCCA 316 Date: 20080801 Docket: CA035623 Between: Regina Respondent And Michael Donald Appellant Before: The Honourable Madam Justice Saunders (In Chambers) M. Donald Appearing In Person J. Duncan Counsel for the Respondent (Crown) Place and Date of Hearing: Vancouver, British Columbia July 17, 2008 Place and Date of Judgment: Vancouver, British Columbia August 1, 2008 Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] Mr. Donald applies pursuant to s. 684 of the Criminal Code, R.S.C. 1985, c. C-46, for an order that counsel be assigned on his behalf.
- [2] Mr. Donald was convicted by a jury on June 2, 2007 of aggravated assault and assault causing bodily harm. He was sentenced on December 3, 2007 to a global term of incarceration of nine years. With appropriate credit for time served the sentence to be served was 32 months.
- [3] Mr. Donald filed a notice of appeal against both conviction and sentence on December 17, 2007. He has since been refused counsel by the Legal Services Society.
- [4] The charges concern an incident in September 2004 at a pub in Port Coquitlam, British Columbia. In his reasons for sentence, the trial judge found that the evidence established that Mr. Donald had confronted one victim after hearing him question why Mr. Donald's minor daughter was present in the pub. Mr. Donald smashed a beer mug or glass across the victim's face, causing injury. In addition, he punched the second victim who had intervened to help the first victim.
- [5] Mr. Donald testified at trial. The defence theory was that the first victim struck the first blow and the smashing of the glass against the victim's face and neck was a reflex action.
- [6] The grounds of appeal include a challenge to the admission of correspondence to a third party; a challenge to the cross-examination of Mr. Donald; a challenge to the manner in which the defence theory was put to the jury; a challenge to the manner in which eyewitness evidence was addressed in the charge to the jury; and an allegation that the verdict of assault causing bodily harm is unreasonable and cannot be supported by the evidence.

- [7] At the hearing of this application, Mr. Donald also contended that the charge in general was unfair, replete with factual error, and lacking balance.
- [8] I have before me a substantial body of information, including material filed by Mr. Donald after the hearing of the application. The late filed material has not altered the disposition of this application and these reasons for judgment were prepared before it was received.
- [9] The material before me includes the letter from the Legal Services Society to the effect that, in the opinion of the reviewing lawyer, the appeal does not meet the criteria for funding assistance, that is, his opinion on the information before him is that there is no reasonable prospect of success on the conviction or sentence appeal.
- [10] Section 684(1) provides: 684(1) A court of appeal or a judge of that court may assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
- [11] It is clear from the material that Mr. Donald lacks the means to obtain assistance of counsel and he has been denied legal aid. The question is whether it is in the interests of justice that he should have legal assistance on either of his appeals.
- [12] The purpose of s. 684 was described by Madam Justice Ryan in *R. v. Barton*, 2001 BCCA 477 at para. 7: One of the fundamental principles upon which our legal system operates is the right of each side in a legal dispute to be heard. The Court is impressed with the duty to fully hear and consider both sides and to render a considered judgment as to the proper disposition of the case. A hearing will not be fair if either of the two sides cannot be properly heard. A person is properly imprisoned when he is serving a sentence that he truly deserves having had the opportunity to put his position before the Court.
- [13] Madam Justice Southin, in *R. v. Mills*, 1999 BCCA 269 at para. 13, 122 B.C.A.C. 157, observed that: "Interests of justice", as that phrase is used in s. 684, is not a term which admits of closed categories.
- [14] The factors often considered in determining whether the interests of justice favour the application include factors such as the points to be argued on appeal; the complexity of the case; the level of education of the accused and his competency to advance his appeal; whether the assistance of counsel is necessary in order to marshal the evidence and make the argument; the nature and extent of the penalty imposed; and the merits of the appeal: *R. v. Aiwekhoe*, 2000 BCCA 287, 139 B.C.A.C. 158; *R. v. Madrusan*, 2004 BCCA 194.
- [15] As to the merits of the proposed appeal, I adopt the observation of Madam Justice Rowles in *R. v. Butler*, 2006 BCCA 476, 231 B.C.A.C. 303, that the factors the court considers when determining whether counsel ought to be appointed, are not the same criteria the Legal Services Society applies under its statutory mandate. The merits on an appeal are not always able to be discerned with clarity at the time of an application for the appointment of

counsel. However, as set out by Doherty J.A. in *R. v. Bernardo* (1997), 105 O.A.C. 244, 121 C.C.C. (3d) 123 at para.22, the merits inquiry need not go any further than determining whether the appeal is an arguable one. Given the nature of the issues raised and the volume of the materials before me, I cannot conclude that the appeal is not arguable.

- [16] On consideration of the grounds of appeal and the submissions made by Mr. Donald to the court, I have come to the view that Mr. Donald is not in a position to argue the appeal on his own, nor to marshal the evidence and the arguments. Further, Mr. Donald is facing a substantial sentence considering his pre-sentence custody in addition to the sentence imposed.
- [17] I am of the view that the appointment of counsel on Mr. Donald's conviction appeal is in the interests of justice. In my view, however, it is premature to deal with the application in respect of the sentence appeal. A sentence appeal follows, and is conducted separately from, a conviction appeal. Accordingly, I would adjourn the application for appointment of counsel for the sentence appeal.
- [18] I therefore allow the application by Mr. Donald to the extent of appointing counsel to assist him on his conviction appeal to this Court, and adjourn his application for appointment of counsel on his sentence appeal. "The Honourable Madam Justice Saunders"

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Prepared on 29 October 2026 · Esheria