

CANADA / JUDGMENT

R. v. Kergan

2007 BCCA 56

COURT

British Columbia Court of Appeal

DECIDED

31 January 2007

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2007 BCCA 56 R. v. Kergan COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Kergan, 2007 BCCA 56 Date: 20070131 Docket: CA33299 Between: Regina Respondent And Darcy Alphonse Kergan Appellant Before: The Honourable Madam Justice Rowles The Honourable Mr. Justice Donald The Honourable Mr. Justice Chiasson D. A. Kergan In Person, Appellant W.J.S. Bell Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 12 December, 2006 Place and Date of Judgment: Vancouver, British Columbia 31 January, 2007 Written Reasons by the Court Reasons for Judgment of the Court:

- [1] This matter comes before us under Rule 13(3) of the British Columbia Court of Appeal Criminal Appeal Rules, 1986, B.C. Reg. 145/86.
- [2] On 3 May 2005, Darcy Alphonse Kergan was convicted in the provincial court of five offences including breaking and entering, driving while prohibited and dangerous driving. The offence date was 4 October 2004. The issue at trial was the identity of the offender. Mr. Kergan testified and denied that he was the perpetrator. His testimony was disbelieved. The judge's reasons may be found at 2005 BCPC 193.
- [3] After sentence was imposed on 10 May 2005, Mr. Kergan filed both a conviction and sentence appeal.
- [4] Mr. Kergan's application for legal aid to prosecute his appeal was refused based on an assessment of its merits. On 28 November 2005, an application brought by Mr. Kergan under s. 684 of the Criminal Code, R.S.C., 1985. c. C-46, for the appointment of counsel was dismissed by Lowry J.A. in part on the ground that the appeal appeared to have little prospect of success. Lowry J.A. noted that the case was not one of complexity and that "[i]t is a case of simple facts which Mr. Kergan has demonstrated this morning he is well able to articulate."
- [5] Steps were not taken by Mr Kergan to pursue his conviction appeal and under Rule 13(3) of the Criminal Appeal Rules, the Registrar referred the matter to a judge in chambers. Rule 13 provides, in part: 13 (1) Where the appellant fails to
 - (a) diligently pursue his appeal, or

- (b) comply with these rules, the respondent may apply to the court or, on an appeal where leave is required, to a justice, for an order that the appeal be dismissed.
 - (2) On an application under subrule (1) or a reference under subrule (3),
 - (a) the court may dismiss the appeal or make any other order it considers just, or
 - (b) where the appeal required leave and leave has not yet been granted, the court or a justice may dismiss the appeal or make any other order that is considered just.
 - (3) Where the registrar considers that the appellant has failed to diligently pursue the appeal or has failed to comply with these rules, he may refer the matter to the court or a justice.
- [6] On three occasions Rule 13(3) references came on for hearing in chambers and on each occasion Mr. Kergan was told that he needed transcripts in order to proceed with his conviction appeal. On 21 September 2006, which was the fourth occasion the Rule 13(3) reference came on in chambers, Kirkpatrick J.A. concluded that "because of the long standing nature of the delays in this case and Mr. Kergan's inability to advise me today that there is any plan in place to pursue his appeal (other than his request for a further s. 684 application), it would be prudent to refer this case to a division of the Court for consideration as to whether Mr. Kergan's appeal should be dismissed for want of prosecution."
- [7] This is a case in which a transcript is essential for the appeal to be argued. The Legal Services Society declined to fund the appeal, which would include the cost of the transcript, because the appeal did not meet the requirements the Society imposes and Mr. Kergan's application under s. 684 of the Criminal Code was dismissed. When he appeared before us, Mr. Kergan expressed his wish to pursue his conviction appeal, in part through the introduction of fresh evidence, but he did not or could not put forward any concrete plan to obtain the needed transcript.
- [8] In the circumstances, we are all of the view that there is no possibility of an effective appeal being heard and this court has no alternative but to dismiss the conviction appeal for want of prosecution. "The Honourable Madam Justice Rowles" "The Honourable Mr. Justice Donald" "The Honourable Mr. Justice Chiasson"

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