

CANADA / JUDGMENT

R. v. Mohsenipour

2020 BCCA 205

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 205 R. v. Mohsenipour COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Mohsenipour, 2020 BCCA 205 Date: 20200608 Dockets: CA45957; CA45961 Docket: CA45957 Between: Regina Respondent And Kasra Mohsenipour Appellant - and - Docket: CA45961 Between: Regina Respondent And Tamim Albashir Appellant Restriction on Publication: A publication ban has been mandatorily imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainants in this matter. This publication ban applies indefinitely unless otherwise ordered. Before: The Honourable Mr. Justice Fitch (In Chambers) On appeal from: Orders of the Supreme Court of British Columbia, dated January 29, 2018 (conviction) (R. v. Albashir, 2018 BCSC 736, Vancouver Docket 27174). Oral Reasons for Judgment Counsel for the Appellant Kasra Mohsenipour (CA45957) (via teleconference): J. Narwal Counsel for the Appellant Tamim Albashir (CA45961) (via teleconference): M.E. Sandford, Q.C. (on May 29, 2020 only) A. Tolliday Counsel for the Respondent (via teleconference): J.A.M. Dickie L.A. Vizsolyi Place and Date of Hearing: Vancouver, British Columbia May 29 and June 3, 2020 Place and Date of Judgment: Vancouver, British Columbia June 8, 2020 Summary: The appellants reapply for bail pending appeal based on a material change in circumstances. Held: Applications granted. The appellants have demonstrated a material change in circumstances due to ongoing delay in the prosecution of the appeals as well as proposed alterations to their release plans, including electronic monitoring and, with respect to one appellant, a newly proposed surety.

[1] FITCH J.A. (via teleconference): The appellants, Tamim Albashir and Kasra Mohsenipour, renew their applications for release pending appeal based on a material change in circumstances.

[2] The appellants applied for release pending appeal in March 2020 but were detained on public interest grounds. In oral reasons for judgment indexed as 2020 BCCA 112 (Chambers), I concluded that both appellants had established they would surrender into custody in accordance with the terms of a release order, and that their appeals surpassed the "not frivolous" threshold of the merit component of the test for bail pending appeal.

- [3] In dismissing the applications, I expressed concern about both the public safety and public confidence components of the public interest criterion set out in s. 679(3)(c) of the Criminal Code, R.S.C. 1985, c. C-46. Among other things, I was not satisfied that the proposed release plans were sufficiently robust to guard against the risk that the appellants would reoffend or seek to interfere with the administration of justice. The context in which this decision was reached was detailed in my earlier judgment, which should be read in conjunction with these reasons.
- [4] A judge hearing a subsequent bail application premised on a material change in circumstances is called upon to determine whether the considerations that animated the dismissal of the earlier application--in this case, public interest considerations--have been adequately addressed or overtaken by new circumstances that shift the evaluation and justify the making of a release order: *R. v. Daniels* (1997), 119 C.C.C. (3d) 413 at para. 21 (Ont. C.A.); *R. v. Baltovich* (2000), 144 C.C.C. (3d) 233 at para. 6 (Rosenberg J.A. in Ont. C.A. Chambers); *R. v. Shevaley*, 2018 BCCA 388 at para. 10 (Groberman J.A. in Chambers).
- [5] In support of the applications, both appellants submit that the considerations set out below constitute a material change in circumstances post-dating their first bail applications that speak directly to the public interest ground:
1. Ongoing delay in the appellate process;
 2. The emergence and spread of the novel coronavirus (COVID-19) in federal correctional centres in British Columbia; and
 3. The addition of privately funded electronic monitoring to the release plans being proposed. On this issue, I have been advised that BC Corrections is not affixing electronic monitoring bracelets to offenders (or accused), nor is it providing any electronic monitoring services during this phase of the current provincial state of emergency. Since the original applications, the appellants have, at their own expense, engaged private companies who are prepared--if release is granted--to attach to them an electronic monitoring bracelet and supply electronic monitoring services. The appellants propose this further condition as a means of supplementing other terms designed to address public safety considerations.
- [6] In addition, Mr. Mohsenipour proposes modifications to his release plan which include an additional surety and an increase in the amount of the promise to pay if he fails to comply with a condition of the release order.
- [7] The Crown concedes that the appellants have demonstrated a material change in circumstances relating to the grounds upon which the applications were previously dismissed. Specifically, the Crown concedes that further delay in the prosecution of these appeals attributable to unresolved disclosure issues pertaining primarily--but not exclusively--to the involvement of James Fisher in the investigation of the offences with which the appellants stand convicted, coupled with the fresh proposals made by the appellants concerning their release plans, tips the balance in favour of reviewability and

justifies an order admitting both appellants to bail pending appeal.

- [8] In support of these applications, the appellants filed a substantial volume of material relating to the enhanced risks associated with the spread of COVID-19 in federal custodial institutions. While I acknowledge that this is a factor that can properly be taken into account in considering the public interest criterion, the weight to be assigned to this factor is very much case-dependent.
- [9] I am persuaded that the appellants have demonstrated a material change in circumstances post-dating the dismissal of their first applications. The material change is rooted in two things: (1) ongoing delay in having their appeals heard; and (2) proposed alterations to their release plans.
- [10] As a result, I need not definitively resolve whether our current knowledge of the risks associated with the spread of the virus in federal correctional institutions constitutes a material change in circumstances that justifies an order admitting these two appellants to bail pending appeal. I will say only that I am doubtful that a change in circumstances has occurred since the applications were dismissed in March, let alone a change material to the grounds upon which the applications failed at first instance. I note, in this regard, that the state of emergency was declared in this province on March 18, 2020, about two weeks before the bail applications were dismissed. Further, the appellants have been convicted of very serious offences involving the sexual exploitation and abuse of women in the sex trade, one of whom was underage. They no longer have the benefit of the presumption of innocence. There was no compelling evidence before me that either appellant has a particular susceptibility to the virus, and there was no evidence before me that the virus is currently active in the institution at which they are housed.
- [11] As I said in my reasons on the appellants' first bail applications, delay is a factor judges must keep in mind in determining whether the public interest in reviewability outweighs the public interest in enforceability and tips the balance in favour of a release order. I am now satisfied that further significant delay will be occasioned before these appeals can be heard. Mr. Albashir has been in custody since his arrest in April 2016. Mr. Mohsenipour has been in custody since his arrest in September 2016. It is now clear that these appeals are unlikely to be heard before the appellants pass their full parole eligibility dates. The delay does not lie at their feet. As was observed in *R. v. Oland*, 2017 SCC 17 at para. 48, "[w]here it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful."
- [12] In addition to the impact of ongoing delay in the prosecution of these appeals, both appellants have proposed more robust release plans to address public safety concerns.

- [13] As noted, both appellants have agreed to engage private companies to facilitate the electronic monitoring of them while on release. While electronic monitoring is not a panacea, it does add a degree of confidence that the appellants will abide by the terms of a release order, or be detected--most particularly if they violate what amounts to a house arrest term I am imposing as part of these orders.
- [14] With respect to Mr. Mohsenipour, my public safety concerns have also been alleviated to some extent by the return of his father to British Columbia and by his father's preparedness to act as surety for his son. When Mr. Mohsenipour's application came before me in March, his father was in Iran. His mother was the proposed surety. For reasons that are addressed in my earlier judgment (at paras. 46, 115-117 and 140), I was not prepared to name Mr. Mohsenipour's mother as a surety and no other surety was proposed. While I continue to have concerns about the ability of Mr. Mohsenipour's (and Mr. Albashir's) parents to exercise effective control over their sons, I have more confidence that Mr. Mohsenipour's father will be able to faithfully discharge the obligations of a surety.
- [15] In light of the further delays that will be occasioned in the hearing of these appeals and the revised release plans proposed by both appellants to address my public safety concerns, I am satisfied that a material change in circumstances has been shown to have taken place and that release orders should now be granted.
- [16] Accordingly, and unless they are detained for some cause other than the sentences that are the subject of the offences under appeal, the appellants shall be released from custody pending the determination of their conviction appeals upon each appellant entering into a release order with a promise to pay \$250,000 if they fail to comply with a condition of the order. In the case of Mr. Mohsenipour, there will be one surety: namely, H.M. In the case of Mr. Albashir, there will be two sureties: namely, A.A. and K.N.
- [17] The terms of release with respect to each appellant are onerous but necessary in the public interest.
- [18] Although I have concluded that there has been a material change in circumstances justifying the release of both appellants on bail pending appeal, this was, for reasons which should be apparent from my earlier judgment, a "close call." The appellants should govern themselves with knowledge that they will be monitored closely and that any established breach of these release orders will likely be dealt with severely. "The Honourable Mr. Justice Fitch"

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