

SUPREME COURT OF QUEENSLAND

CITATION: *Berg v Director of Public Prosecutions (Queensland)* [2012] QCA 62

PARTIES: **VINCENT VICTOR BERG**
(appellant)
v
DIRECTOR OF PUBLIC PROSECUTIONS
(QUEENSLAND)
(respondent)

FILE NO/S: Appeal No 9360 of 2011
MHC No 9 of 2010

DIVISION: Court of Appeal

PROCEEDING: Appeal from the Mental Health Court

ORIGINATING COURT: Mental Health Court at Brisbane

DELIVERED EX TEMPORE ON: 22 March 2012

DELIVERED AT: Brisbane

HEARING DATE: 22 March 2012

JUDGES: Margaret McMurdo P and Chesterman JA and Dalton J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Delivered ex tempore on 22 March 2012:**
Application for an adjournment is refused.

CATCHWORDS: PROCEDURE – COURTS AND JUDGES – GENERALLY – COURTS – ADJOURNMENT – Where appellant sought an adjournment based on ill-health – where Doctor was not made available for questioning and medical certificate provided was in very general terms – where appellant could appear by telephone – where appellant had previously requested that the matter be heard on the papers – where there was no appearance for the appellant at the hearing – whether adjournment should be granted
Re Berg [2011] QMHC, unreported, Ann Lyons J, MHC No 9 of 2010, 27 September 2011, related

COUNSEL: No appearance for the appellant
S P Vasta for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: This is an appeal from a decision of the Mental Health Court on 27 September last year finding that Mr Vincent Berg was not of unsound mind as defined in the *Mental Health Act 2000* (Qld) Schedule 2 at the time of the alleged offences, that Mr Vincent Berg is fit for trial and that proceedings against him are to continue according to law. The appellant, Mr Vincent Berg, filed his appeal from that decision on 14 October 2011.

He was represented below by his son, Mr Andreas Berg, who is not a lawyer but is apparently a PhD student, although I note Mr Vincent Berg himself also made submissions to the Mental Health Court. The appellant has filed a nine page written outline of argument, a list of authorities and a four page reply to the respondent's five page written outline of argument.

On 11 March, Mr Vincent Berg wrote to the Registrar in these terms:

"I have no counsel to represent me at the relevant Court of Appeal hearing.

My financial situation does not allow me to employ a private solicitor as I am a disability support pensioner (mental illness). It is unlikely that Legal Aid Queensland would fund legal representation in the Court of Appeal for this matter.

I am incapable of representing myself in the Court due to an ongoing mental illness (schizophrenia accompanied by depression), and also of spending sufficient time in a crowded courtroom due to agoraphobia in the form of unmotivated fear of crowded places.

Accordingly, pursuant to section 26 of the *Court of Appeal Practice Direction 2* of 2010, I am applying to the Court of Appeal for the leave 'to have a proceeding determined without that party appearing at an oral hearing' when 'a party may present argument solely in writing'."

The Registrar referred that request to the Court and the Court responded to Mr Vincent Berg, through the Registrar, in terms that the appeal would be heard in open Court and Mr Vincent Berg should appear; but if he simply wished to rely on his written submissions, he could do so.

On 20 March this year, Mr Andreas Berg, on behalf of Mr Vincent Berg, wrote to the Registrar in these terms:

"Unfortunately, the Appellant is unable to attend the Court of Appeal hearing of his *Appeal* listed on the 22nd of March 2012 due to medical condition (flu with secondary throat infection – *Medical Certificate* by Dr Robin Alexander is attached).

The Appellant has no professional representative, and his son, carer approved by Centrelink and attorney with enduring power Andreas Berg is unable to appear on his behalf on the 22.03.2012.

Accordingly, the Appellant applies to the Court of Appeal to have relevant hearing delisted and scheduled at a later date suitable for all of the parties.

The Appellant withdraws his application to the Court of Appeal of the 11th of March 2012 for hearing of his *Appeal* by written submissions only as he now considers that his *Appeal* requires oral representation."

The photocopied medical certificate attached to that letter from Dr Robin Alexander at Miami on the Gold Coast was in these terms: "This is to certify that I have today examined Mr Vincent Berg" – and stating Mr Berg's address. "In my opinion, he will be unfit to attend his court case on 22/3/12. Signed" and signature. The Court responded, through the Registrar, in these terms:

"Dear Sir

I advise that at this stage your application for an adjournment has not been granted.

If the reason for your inability to attend in person tomorrow is an inability to travel, the court may consider your request to appear by telephone in order to make your oral submissions.

If you intend to continue with your application for adjournment, you must provide a medical certificate outlining details of your illness and when you would be well enough to appear.

You must also take steps to have Dr Alexandra [sic] available to give evidence by telephone tomorrow at 10.15 am."

At 6 pm last night, the Registrar received a faxed letter from Mr Andreas Berg on behalf of Mr Vincent Berg in these terms:

"Your Honours,

On the 20th of March 2012, we had submitted to the Court of Appeal Registry our application to have the hearing delisted and scheduled at a later date suitable for all the parties due to the Appellant's current illness (flu with secondary throat infection – *Medical Certificate* by Dr Robin Alexander has been provided).

It is commonly known that such illness as flu caused by virus is impossible to predict. Therefore, we were not able to notify the Court of Appeal Registry about the Appellant's current illness causing his incapability of appearing before this Court on the 22nd of March 2012 until the 20th of March 2012.

As the Appellant has no professional representative, and his son, carer approved by Centrelink and attorney with enduring power Andreas Berg is unable to appear on his behalf on the 22.03.2012, the application for adjournment of the hearing has been submitted on the 20th of March 2012.

In response, on the 21st of March 2012, we have received an e-mail from Mr Ian Enright, Deputy Registrar (Civil), Court of Appeal, which we find inappropriate. We have received this e-mail at 5:30pm when Andreas Berg, the Appellant's son, carer approved by Centrelink and attorney with enduring power, came home from his work. Vincent Berg, due to his current illness has spent almost entire day in bed not answering phone calls and door knocking, and not checking e-mail. Also, because of his chronic mental condition, he usually does the same, if Andreas Berg is not at home.

It is commonly expected that, due to humanitarian reasons, a sick person must be left in peace until his/her full recovery. However, Mr Ian Enright demands from Vincent Berg 'to appear by telephone in order to make [his] oral submissions', 'provide a medical certificate outlining details of [his] illness and when [he] would be well enough to appear', and 'take steps to have Dr Alexandra (sic) available to give evidence by telephone tomorrow at 10.15 am.' We consider such demands to a person currently suffering from complicated flu as cruel and inhuman (in particular, taking also into account Vincent Berg's serious chronic mental illness).

Moreover, we have no authority and power to dictate to Dr Robin Alexander what to write in his *Medical Certificate*. Dr Alexander has been provided with all the relevant information about what his *Medical Certificate* has been required for. What to write in such a certificate was entirely his decision which could not be influenced by the Applicant. We submit that if the Court of Appeal is not satisfied with Dr Alexander's *Medical Certificate*, it has all the authority and power to contact this medical practitioner directly.

Furthermore, the Applicant has no authority and power 'to have Dr Alexandra (sic) available to give evidence by telephone tomorrow at 10.15 am'. Firstly, Dr Alexander is usually fully booked to see his patients, and such a very short notice would be unacceptable. Secondly, in such a case, it is up to Dr Alexander to decide whether he wants to fulfil his patient's request or not. However, we submit that, if the Court of Appeal requires having evidence from Dr Alexander, it has all the authority and power to issue a subpoena.

Currently, Vincent Berg is suffering from common flu complicated by throat infection. His condition is presented by increased body temperature, headaches and joints' aches, running nose, light sensitive eye sight, sore throat and inadequate ability for voice conversation. Consequently, we submit that he must not be disturbed until his full recovery, which is expected in 7 to 10 days if condition does not develop any further complications (which are not uncommon in Vincent Berg's age).

Accordingly, we do confirm that Vincent Berg is incapable of appearing before the Court of Appeal on the 22nd of March 2012 either in person or by phone. We do confirm our application to have the relevant hearing adjourned until later date suitable for all parties."

The Registrar responded on behalf of the Court in these terms:

"Good Morning Mr Berg,

I have referred your email, received last night, to the Court. The court requires your appearance today, if not in person, then by phone this morning at 10:15am. As the matter is listed to commence at that time you are required to phone the court room on (07) 3247 9231 at 10:10am.

As previously advised, the Court also requires you to arrange with your doctor his appearance by phone so that he can advise the court as to your medical condition.

Please acknowledge receipt of this email."

I am told that there has not been an acknowledgment of receipt of the email and shortly before Court commenced this morning Registry staff attempted to telephone Mr Vincent Berg on the telephone number provided to the Court and there was no answer.

...

THE PRESIDENT: This matter has a very long history. The charges with which the Mental Health Court decision is concerned are alleged to have occurred between June 1999 and June 2004. The long history of the delay in the hearing of these matters to date is set out in a decision below. See *Re Berg* [2011] QMHC at paragraph 4.

Neither Mr Vincent Berg or Mr Andreas Berg, who has represented him in the past, is present this morning for the hearing, either in person or by telephone. Mr Vincent Berg's doctor is not available for cross-examination as requested by the respondent by telephone. If the appellant's application for an adjournment today were granted, the matter would be unlikely to receive a listing for some months.

The appellant has put in extensive written submissions and until the Court indicated that the matter should be heard in open Court and not on the written submissions was content to have his appeal determined on the written submissions. There is some evidence before the Court today that Mr Vincent Berg may not be well enough to appear before the Court today but a photocopied medical certificate in such general terms is far from compelling. The subsequent unsworn assertions from Mr Andreas Berg are not evidence. I can see no significant disadvantage at all to the appellant if the appeal proceeds today on his written submissions. Nothing has been placed before the Court to indicate what more needs to be said orally by the appellant who, in any case, could have appeared by telephone link or

could have been represented by his son, Mr Andreas Berg, with leave of the Court. As I have stated, Mr Andreas Berg has appeared for Mr Vincent Berg in the past.

The compelling reason against granting the adjournment is the great age of the charges brought against Mr Vincent Berg which this appeal concerns. That is a weighty factor against the granting of the adjournment. The interests of justice, of those of the alleged victims of those charges, of the community and, indeed, of the appellant require that the charges be determined as soon as possible after this grave delay.

For those reasons, I would refuse the adjournment and continue to hear the appeal today on the written submissions of the appellant.

CHESTERMAN JA: I agree that the appeal should proceed on the papers and that the application for an adjournment be refused for the reasons given by the President.

DALTON J: I agree with the course proposed by the President and her reasons for that course.

THE PRESIDENT: The application for an adjournment is refused. That is the order of the Court.

I should also note that the appellant made a written submission strongly objecting to the respondent's list of authorities received on 19 March. He says:

"In the Respondent's *Outline of Submissions* dated the 08th of December 2011, there is no mention of this material and no reference to this material at all. Therefore, the Appellant is not able to understand how this material is related to this case.

The Respondent has not provided any arguments of how reference to listed authorities can help in understanding whether s 268(1) of the *Mental Health Act 2000 (Qld)* was violated and whether crucial facts were overlooked resulting in the Mental Health Court decision that the Appellant 'is fit for trial'. Thus, the Appellant considers that the Respondent's *List of Authorities* is not related to the grounds of the *Appeal*. Accordingly, this Respondent's *List of Authorities* is strongly objected.

The Appellants submits that his *Appeal* should be considered by the Court of Appeal within its grounds only."

...

THE PRESIDENT: The Court will deal with that matter when it determines the appeal on the papers.

...

THE PRESIDENT: I add to my reasons for refusing the adjournment that the matter has been listed for hearing today for some time. ... The Court will consider its decision in this matter and give its orders and reasons in due course.