**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. Pinkney*, 2017 NSCA 93

**Date:** 20171102
**Docket:** CAC 467220
**Registry:** Halifax

**Between:**

Kevin William Pinkney

Appellant

v.

Her Majesty the Queen

Respondent

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| **Judge:** | Van den Eynden, J.A. |
| **Motion Heard and Dismissed:** | November 2, 2017, in Halifax, Nova Scotia in Chambers |
| **Written Reasons:** | January 19, 2018 |
| **Counsel:** | Michael K. Power, Q.C., for the appellant<br>Mark Scott, Q.C., for the respondent |

**Decision:**

## Introduction

[1] Mr. Pinkney was convicted of aggravated assault and breach of recognizance contrary to s. 268(2) and s. 145(3) of the *Criminal Code*. He was sentenced to two years less a day on the s. 268(2) conviction, less remand time, and 15 days concurrent on the breach.

[2] He appealed against both conviction and sentence on the s. 268(2) charge. The appeal hearing is set for April 9, 2018. Earlier appeal dates were offered, but declined.

[3] Mr. Pinkney applied for judicial release pending appeal. I heard and dismissed the motion on November 2, 2017, with reasons to follow. These are my reasons.

## Background

*Circumstances of the offence*

[4] Around 11:00 p.m. on February 17, 2016, Mr. Pinkney and his son paid their neighbour, Thelma Holland, an unexpected visit. She knew Mr. Pinkney and his son. Each were at a different entrance to her home, rattling her doors. Ms. Holland lived alone. She was afraid, and called her neighbour, Donald Hannam, for help. He told her to call 911, which she did. Mr. Hannam then promptly went to her aide.

[5] At the time, Mr. Pinkney was not on good terms with Mr. Hannam and Ms. Holland. The bad blood, in part, pertained to complaints made against Mr. Pinkney that he was operating a puppy mill. According to Mr. Hannam, about three weeks earlier Mr. Pinkney grabbed him by the throat and threatened his life.

[6] While en route to Ms. Holland's home, which was only a short walk away, Mr. Hannam picked up a stick, also referred to as a shovel handle. As he approached Mr. Pinkney and his son he told them to leave. An altercation ensued. Mr. Hannam ended up getting badly beaten. His injuries included serious lacerations to his head, which required dozens of stitches and staples to close.

[7] The defence theory was that Mr. Hannam was the aggressor and anything Mr. Pinkney and/or his son did was in self-defence. Further, Mr. Pinkney did not wound or maim or endanger Mr. Hannam. Rather, Mr. Pinkney's son (a youth at the time) did, as it was his son who repeatedly struck Mr. Hannam with the stick.

[8] In a detailed oral decision, the trial judge explained why he rejected Mr. Pinkney's evidence and accepted the evidence of Crown witnesses Ms. Holland and Mr. Hannam.

[9] Mr. Hannam testified that after he told Mr. Pinkney and his son to leave Ms. Holland's property, Mr. Pinkney made a run at him. To protect himself, Mr. Hannam took a swing at and hit Mr. Pinkney with the stick. Mr. Pinkney then tackled Mr. Hannam by his feet, pulled him to the ground, and proceeded to punch/hit him. His son got the stick out of Mr. Hannam's hands. Mr. Pinkney started screaming at his son to "Hit him (Mr. Hannam)" and "Fucking kill him."

[10] Mr. Pinkney's son proceeded to repeatedly strike Mr. Hannam with the stick. Mr. Hannam testified that he got into a fetal position to try to protect his organs, but Mr. Pinkney kicked him in various places. Mr. Hannam said he asked them to stop and told them the RCMP were on their way, but the beating continued for a bit longer. Mr. Pinkney and his son left the scene before the police arrived.

[11] Mr. Pinkney was also charged with attempted murder (s. 239(b)); however, he was acquitted on this charge. I note that the Notice of Appeal and affidavits filed in support of the release motion incorrectly stated Mr. Pinkney was convicted of attempted murder. Corrections to these documents were made on the record during the hearing.

[12] Mr. Pinkney plead guilty to the s. 145(3) charge. The operative conditions required him to confine himself to his home unless in the accompaniment of his surety. He breached this condition.

*Criminal Record*

[13] Mr. Pinkney has a lengthy criminal record, which includes prior convictions for violent offences. His record also indicates several breaches and failures to attend. His criminal record reveals the following convictions under *the Criminal Code* and *Controlled Drugs and Substances Act*:

1978 – Driving while impaired s.234

1984 – Assault causing bodily harm s. 245

1985 – Mischief to private property s. 387(4)(b)

1988 – Impaired driving s. 237(b)

1989 – Theft under $5000 s. 334(b); Operate motor vehicle while disqualified s.259(4)(a)

1990 – Assault s. 266; Assault s. 266; Failure to comply with recognizance (being at large) s. 145(3); Resist arrest/obstructs peace office s.129(a); Mischief s. 430(4); Breach of probation s. 740(1); Beach of probation s.740(1); Theft s. 334

1991 – Breach of probation s. 740(1)

1992 – Failure to attend court as directed s. 145(2)(b)

1994 – Assault s. 266; Escape/being at large s. 145

1995 – Escape/being at large s. 145

1996 – Abduction s. 283; Abduction s. 283; Abduction s. 283

1999 - Driving over 80 MGS s. 253(b); Driving over 80 MGS s. 253(b); Theft under $5000 s. 334(b); Possession of a schedule substance s. 4(1) CDS

2000 – Driving over 80 MGS s. 253(b); Driving while disqualified, s. 259(4)

2001 – Possession for purposes of trafficking s. 5(2) CDSA

2002 – Failure to comply with undertaking s.145(3); Assault s.266(b)

2003 – Driving over 80 MGS s. 253(b); failure to comply with probation order s. 733.1(1)

2007 Assault s. 266; Possession of Firearm or ammunition contrary to prohibition order s. 117.01(1)

2016 – Aggravated assault s. 268(2) (offence under appeal); Breach of recognizance s. 145(3)

[14] The offence under appeal and the 2003 and 2007 offences were committed while Mr. Pinkney had outstanding warrants for the charges noted in the years 2000 and 2001. On April 25, 2016, Mr. Pinkney pled guilty and was sentenced to these long outstanding charges.

[15] Mr. Pinkney received periods of incarceration for some of the above prior offences. As noted in the following paragraph, the trial judge referred to five prior assault convictions. It appears from the CPIC report filed by the Crown, together with the JEIN report, there were six prior assault convictions. On this motion, nothing turned on whether there were five or six, I simply point out the discrepancy from the records before me and what the trial judge said.

[16] Respecting Mr. Pinkney's propensity to act in a violent manner, the trial judge said this during the sentence hearing:

> …There are five prior assault convictions on his record which speak to an underlying issue with regard to resort to violence when things do not go his way, and do speak to the presence of an ongoing anger management difficulty. Mr. Pinkney has demonstrated, now in his sixth assault conviction, that he is capable of acting out in violence and being a violent person.
>
> I appreciate it that most of the sentences of assault resulted in periods a probation and could perhaps be described as minor acts of violence but when one faces the Court for the sixth time regarding assault behavior, there has to be a recognition that there is a problem dealing with his emotions and dealing with the way in which he responds to upset by responding in a violent manner.

[17] At the time his release motion was heard, Mr. Pinkney and his common-law partner and proposed surety, Quintessa Taylor, were facing several animal cruelty charges under the *Animal Protection Act*. They are only charged and are presumed innocent.

*Evidence at this motion hearing and release plan*

[18] Both Mr. Pinkney and his proposed surety filed affidavit evidence and were cross-examined by the Crown.

[19] Mr. Pinkney's release plan was to reside at home with his common-law spouse acting as a surety. She proposed the sum of $15,000.00 secured by real property. Mr. Pinkney was prepared to make a $2000 non-cash pledge. Mr. Pinkney and Ms. Taylor have been together for about ten years. They have three young children ages 2, 6 and 9. She is a stay-at-home mom. All three children were present with her in Court. Also residing in the home is Mr. Pinkney's son from another relationship who was involved in the incident leading to the s.268(2) charge now under appeal.

[20] Ms. Taylor was aware that Mr. Pinkney had a criminal record but not aware of the extent. She did not ask him about his record, nor did she seem to care much about this. She was not aware of the outstanding warrant for the charges he plead guilty to on April 15, 2016 (see ¶ 14).

[21] For his role in the attack on Mr. Hannam, Mr. Pinkney's son pled guilty to assault causing bodily harm. At the time of this hearing, he had not been sentenced and apparently voiced his intention to retract his guilty plea.

[22] The proposed surety for Mr. Pinkney is also the surety for his son. She has acted in that capacity for some time. Neither Ms. Taylor nor Mr. Pinkney disclosed this in their respective affidavits filed in support of this motion. While Ms. Taylor has been acting as his surety, Mr. Pinkney's son was charged with uttering threats and breach of recognizance. Although he is presumed innocent, these charges were not disclosed in their affidavits. This information came out in cross-examination, and the Crown filed records to confirm.

[23] Similarly, neither Mr. Pinkney nor Ms. Taylor disclosed their outstanding animal cruelty charges in their affidavits. The Crown elicited this through cross-examination; however, in fairness, the charges against Mr. Pinkney were apparent in his JEIN report filed with his motion materials.

[24] Ms. Taylor provided no evidence or assurances respecting her ability to exercise any degree of control or supervision over Mr. Pinkney. Respecting her step-son and her role as his surety, although aware of his numerous court appointments, she indicated she usually stays out of the courthouse.

[25] In his affidavit, Mr. Pinkney stated:

> I was released upon conditions with a surety who rendered. I was then remanded back into custody. I was again released… upon conditions and abided by those without incident.

Omitted from his affidavit was the fact that he was charged and convicted of a breach of recognizance. When cross-examined on this point, although he acknowledged the breach and conviction, Mr. Pinkney appeared to be dismissive of his breach. The same can be said when the Crown cross-examined him about his lengthy criminal record.

[26] In submissions, the Crown contended that Mr. Pinkney was not as candid as he should have been in his affidavit evidence and under cross-examination he resisted answering many simple questions and was at times argumentative and evasive. That is a fair statement.

[27] In support of his release motion, Mr. Pinkney raised his medical condition. He suffers from glaucoma. He said his eyesight is deteriorating, and he must pursue surgery as soon as possible to save his eyesight. Mr. Pinkney maintained that prisons are not equipped to handle visually impaired prisoners and claimed his continued incarceration will cause him further serious medical problems. However,

sufficient evidence to support such a contention was lacking. Apart from the complaint, there was little evidence respecting efforts Mr. Pinkney made to ensure he received necessary medical attention while incarcerated. There was no evidence to suggest medical attention, including access to surgery, was being denied.

**Law and analysis**

[28] As Mr. Pinkney appeals against both conviction and sentence, the following provisions of the *Criminal Code* govern his request for release:

> s. 679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
>
> > (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;…
>
> (3) In the case of an appeal referred to in paragraph (1)(a) …, the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> > (a) the appeal or application for leave to appeal is not frivolous;
> >
> > (b) he will surrender himself into custody in accordance with the terms of the order; and
> >
> > (c) his detention is not necessary in the public interest.

[29] Mr. Pinkney bears the burden of proving, on a balance of probabilities, the requirements of subsection 679(3). As Justice Fichaud said in *R. v. Barry*, 2004 NSCA 126:

> [8] …The conviction has substituted his initial presumption of innocence with a status quo of guilt. Unlike a pre-trial bail applicant, a convicted appellant "seeks to reverse the status quo by obtaining a reprieve from a court order for his detention following conviction" and, therefore, has the burden to prove the conditions for release pending determination of the appeal: (citations omitted).

*Is the appeal frivolous?*

[30] Mr. Pinkney argued that the grounds of appeal set out in his Notice of Appeal are not frivolous. However, apart from simply making that statement, not much more was offered in support.

[31] The Crown argued that Mr. Pinkney's grounds do not meet the required modest threshold. The Crown said they raise no arguable point. Although that

argument is persuasive, I leave the ultimate assessment of merit to the panel. However, I have assessed the strength of the grounds based on the available record and submissions and have taken their considerable frailties into consideration. Although the grounds of appeal are problematic, as I will explain, Mr. Pinkney's motion ultimately fails under the public interest consideration (s.679(3)).

[32] In addition to the trial judge's decision on conviction and sentence, the transcript of the evidence and pre-sentence report was available to me and reviewed. I turn to review the specific grounds.

*Ground one: The learned trial judge erred in law in deciding the Crown had proven beyond a reasonable doubt that the accused aided and abetted the aggravated assault.*

[33] Based on the record, it became clear during the trial that it was Mr. Pinkney's son who repeatedly struck the victim with the stick. The basis upon which Mr. Pinkney was found to be a party to the offence of aggravated assault was a finding that he held the victim on the ground and encouraged/directed his son to beat the victim with the stick. At trial, although counsel put forward their defence theory (¶ 7), counsel told the trial judge that if he accepted Mr. Hannam's version of events then Mr. Pinkney would be guilty as a party. However, defence counsel went on to argue that the extent of Mr. Pinkney's jeopardy should only be assault causing bodily harm, not aggravated assault. He contended, that because Mr. Pinkney's son plead guilty to a lesser offence, Mr. Pinkney could not be a party to a more serious offence. No authority was provided for this proposition.

[34] The trial judge swiftly rejected this argument. He stated:

> … I'm perfectly satisfied that in circumstances, there can be a plea to assault causing bodily harm and another individual who is a party to the same events could be guilty of a more serious crime of aggravated assault if in fact the prerequisites of aggravated assault are proven beyond a reasonable doubt.

[35] Based on the evidence he accepted, the trial judge was so satisfied.

[36] In the Crown's written and oral submissions during this motion, it noted that the law is well settled on the point that Mr. Pinkney's jeopardy is not limited by his son's guilty plea to a lesser offence. The Crown noted that the resultant injuries, whether constituting bodily harm or wounding, maiming or endangering, are matters of fact for the trial judge to determine, regardless of the extent of the plea

entered by Mr. Pinkney's son, and noted the intent requirement is the same under either offence.

[37] On this motion, the Crown referred Mr. Pinkney's counsel (who was the same counsel at trial) to these authorities: *R. v. Huard*, 2013 ONCA 650; Ewaschuk, *Criminal Pleadings and Practice in Canada* and *R. v. Harder*, [1956] S.C.R. 489. Notwithstanding his acknowledgement of these authorities, Mr. Pinkney's counsel submitted to me, with no authority, that the extent of Mr. Pinkney's jeopardy was (or should be) the offence to which his son plead guilty.

[38] In addition, during his oral submissions on this motion, counsel for Mr. Pinkney introduced an additional argument to try and prop up this ground. Although not argued at trial, he asserted that the Crown failed to prove Mr. Pinkney's requisite knowledge of his son's (the principal) intent. Just how that perceived failure occurred was not clearly articulated. However, because of this perceived error, counsel thought his acknowledgement to the trial judge in ¶ 33 (that if he accepted Mr. Hannam's version of events then Mr. Pinkney would be guilty) was incorrect. And, if so, Mr. Pinkney should not suffer for his error. In response, the Crown referred to the record and the findings of the trial judge respecting the required elements of the offence. It is difficult to see any arguable point under this ground.

*Ground two: The learned trial judge erred in law in interpreting the defence theory, i.e. that the accused played no role in the incident.*

[39] The record is clear. The trial judge understood the defence theory. He made clear reference to it and explained why he rejected it. It is difficult to see any arguable point under this ground.

*Grounds three and four:*

*The learned trial judge erred in law in the consideration of the evidence specifically: (a) The place the parties fell;(b)The concept of time as being a relevant factor;(c)The importance of little inconsistencies; (d) Looking for a credible explanation of blood location.*

*The learned trial judge erred in ultimately concluding a review of the evidence proves the Crown version of events.*

[40] Although framed as an error "in law" these two grounds appear to target questions of fact or mixed fact and law for which leave would be required. Weighing the evidence, finding facts, and assessing credibility are the domain of the trial judge. The standard of appellate review is deferential. Given the divergent description of events between the Crown and Defence witnesses, credibility was a central issue. The trial judge instructed himself on the "*W.(D.)*" caution and proceeded to review Mr. Pinkney's evidence and explain why he found it internally inconsistent, inconsistent with his son's evidence and with that of the Crown witnesses and police photos. The judge was fulfilling his duty to provide reasons.

[41] These grounds say little about how the judge erred, just that he did. Oral submissions on behalf of Mr. Pinkney shed no further light. It is difficult to see any arguable point under these grounds.

*The fifth and last ground of appeal: The learned trial judge (sic) in sentencing in the circumstances of the case.*

[42] As written in the Notice of Appeal the ground does not state the judge "erred" or how. However, in his oral submissions, counsel for Mr. Pinkney said this ground is tied to the argument that the only possible guilty verdict was assault causing bodily harm not aggravated assault because of his son's guilty plea to this lesser offence. As this submission is contrary to what appears to be well settled law, I see no arguable point.

[43] I reiterate that the panel will ultimately assess the merit of any grounds that are pursued; however, I will later return to the frailties of the grounds in my assessment of the public interest component.

*Will Mr. Pinkney surrender himself into custody?*

[44] Ms. Pinkney's record shows historic failures to attend, breaches and warrants that were outstanding for some time. Further, he committed offences while warrants were outstanding. His prior surety surrendered and Mr. Pinkney plead guilty to a breach of his recognizance. That noted, when he was released after his bail was revoked there is no evidence of further breaches or a failure to attend court when required. Although, I have some concern with Mr. Pinkney's ability to respect and comply with conditions, I see any risk of failure to surrender as low.

*The public interest*

[45] Mr. Pinkney has failed to establish, as required under s. 679(3)(c), that his detention is not necessary in the public interest.

[46] In coming to this conclusion, I am mindful of and have considered the twin principles of reviewability of conviction and the enforceability of a judgment. These principles tend to conflict and must be balanced in the public interest. Public confidence in the administration of justice requires that judgments be enforced. Yet, public confidence in the administration of justice also requires that judgments be reviewed and errors be corrected. Liberty interests are at stake and bail can ensure that convicted persons will not serve sentences for convictions not properly entered against them (see *R. v. Ryan*, 2004 NSCA 105; *R. v. Nugyen* (1997), 119 C.C.C. (3d) 269). Also, the public interest criterion is not a means by which public hostility or uproar is used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.

[47] Factors that weigh against Mr. Pinkney's motion are:

(a) The offence was serious and violent.

(b) The grounds of appeal are very weak at best. That is a generous assessment.

(c) His extensive criminal record is of concern, including the numerous prior assault convictions. There is an element of concern for public safety.

(d) Having had the opportunity to hear and observe Mr. Pinkney's answers to reasonable questions by the Crown, he was at times evasive and not fully forthcoming. As noted, both Mr. Pinkney and Ms. Taylor omitted what I would consider relevant evidence from their respective affidavits. Their lack of candor was of some concern.

(e) Mr. Pinkney's release plan is weak. Ms. Taylor is the surety for Mr. Pinkney's son. Ms. Taylor also has the responsibility of caring for her three young children. There is much on her plate without adding the responsibility of acting as a second surety. The Crown pointed out, correctly in my view, that a court should be cautious about approving a surety who is already acting for another person. As noted in Gary

> Trotter, *The Law of Bail in Canada*, 3rd ed, (Toronto: Carswell, 2010) at 7-21:
>
> > …a person who is already a surety for one accused should probably not be allowed to enter into another recognizance in respect of another accused person, as this may create a burden that a single person cannot effectively bear.
>
> Also, both Ms. Taylor and Mr. Pinkney are co-accused in the animal cruelty charges and Mr. Pinkney's son was charged with uttering threats and breach of probation while Ms. Taylor was acting as his surety. They are all presumed innocent of these outstanding charges; however, these are minor factors none the less. Furthermore, Ms. Taylor provided no evidence of her ability to supervise or assert any degree of control over Mr. Pinkney. In short, good intentions aside, I have no confidence that the proposed surety will be able to effectively carry out her responsibilities.

[48] Taken together, these factors, in my view, would cause ordinary and reasonable fair-minded members of society informed of legislative provisions, *Charter* values and the circumstances of this case to believe that detention is necessary to maintain public confidence in the administration of justice. In these circumstances, enforceability trumps reviewability.

**Conclusion**

[49] The motion is dismissed.

Van den Eynden, J.A.