NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. S.F.M.*, 2022 NSCA 65

Date: 20221031
Docket: CAC 513675
Registry: Halifax

Between:

S.F.M.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	Farrar J.A.
Motion Heard:	October 27, 2022, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Jonathan T. Hughes, for the appellant Mark A. Scott, K.C., for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Decision:

Introduction

[1] The applicant, S.F.M., made a second application for bail pending appeal following trial, conviction, and sentencing for sexual assault and assault against his wife S.K. He was convicted on July 6, 2021. His original application was heard on April 28, 2022 by Justice Anne S. Derrick. Justice Derrick dismissed the motion and filed written reasons for doing so on May 4, 2022 (2022 NSCA 37). In her reasons she reviewed in detail the circumstances leading to Mr. M.'s convictions in some detail. It is not necessary to repeat that background to dispose of this application.

[2] After a hearing in chambers, I dismissed the application with reasons to follow. These are my reasons.

The Evidence

[3] The evidence in support of this application for release is virtually identical to the evidence before Justice Derrick with minor exceptions. Mr. Ma, a proposed surety on the original application and on this application, has moved from Hubley to the Clayton Park area of Halifax and says he would be closer to the applicant's residence on Brunswick Street for the purpose of ensuring he complies with his conditions of release. The second proposed surety on the original application is not being put forward as a surety on this application. Instead, Mr. M.'s mother, who resides in Quebec, has agreed to be a surety and pledge $20,000 in cash to secure Mr. M.'s release. The original two sureties had each pledged $5,000 to secure Mr. M.'s release.

[4] Arguably, there is potentially another difference in that Mr. M.'s release plan now includes a curfew where the original plan did not. However, when Mr. M.'s counsel was questioned about imposing a curfew before Justice Derrick he indicated that if a curfew was imposed Mr. M. would abide by it. So the issue of a curfew was before the original judge and is not really new.

[5] As he did before Justice Derrick, Mr. M. spoke emotionally about his older daughter A. from his first marriage. A. is the subject of a *Children and Family Services Act* proceeding. In his original application, Mr. M. testified that he wants to obtain custody of A. He is still hoping to get custody, but if he is unable to do so he is looking for a family placement. Although Mr. M. expressed concerns that

his daughter may be adopted if he is not released, he testified that there has been no permanent care order sought by the Minister at this time. So adoption is not imminent. Although the circumstances of Mr. M.'s daughter are unfortunate, they were ongoing at the time of the original application and are continuing.

Analysis

[6] This Court has jurisdiction to entertain a second application for bail if the applicant can establish a material change in circumstances since the original application (*R. v. Daniels*, 103 O.A.C. 369).

[7] In *R. v. Baltovich*, 131 O.A.C. 29, the Ontario Court of Appeal explained that a material change in circumstances is one that has the potential to cause the judge hearing the subsequent application to alter the original assessment of the statutory factors in s. 679(3) of the *Criminal Code*:

> [6] […] In my view, a judge hearing a subsequent "original" application only has jurisdiction to deal with the application on the merits if he or she is satisfied that there has been a material change in circumstances. A material change in circumstances, for this purpose, would require additional information that could lead the judge hearing the application to alter the assessment of one or more of the statutory factors set out in s. 679(3), namely, (a) whether the appeal is frivolous; (b) whether the applicant will surrender into custody in accordance with the terms of the release order; and (c) whether the applicant's detention is necessary in the public interest. If there is a material change in circumstances, the judge must then consider all of the statutory grounds and must be satisfied that the applicant has met the onus in s. 679(3).

[8] The second application is for bail and not a review. As a starting point, the parties must accept the correctness of the decision of the first judge. Again, *R. v. Baltovich* explains how a second application is to be approached:

> [7] Since a Daniels application is not a review, the parties must accept the correctness of the decision of the first judge. **In my view, this means that the parties and the judge hearing the subsequent application accept that on the basis of the material that was before the first judge, the decision was correct.** Nevertheless, assuming the material change in circumstances threshold has been met, the judge's reasons on the initial application will be of assistance in determining whether the case is a proper one for release. For example, if the judge in refusing release expressed concern only about one particular factor, and that concern has been addressed on the subsequent application, this will be of assistance in deciding that the applicant has met the test in s. 679(3).

[Emphasis added.]

[9] Section 679(3) of the *Criminal Code* sets out the factors to be considered on a bail application:

> **Circumstances in which appellant may be released**
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> **(3)** In the case of an appeal referred to in paragraph (1)(a) or (c), 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
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> **(a)** the appeal or application for leave to appeal is not frivolous;
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> **(b)** he will surrender himself into custody in accordance with the terms of the order; and
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> **(c)** his detention is not necessary in the public interest.

[10] Derrick J.A.'s reasons for refusing Mr. M.'s original bail application do not rely on the first two criteria under s. 679(3); she found the application failed on the public interest analysis. I reproduce Justice Derrick's comprehensive reasons on that issue:

> [33] I am not placing much emphasis on the first two criteria under s. 679(3). I deal with the issue of whether the appeal is frivolous within the public interest analysis. As for the issue of Mr. M. establishing he would surrender himself into custody as required by s. 679(3)(b), I acknowledge he was wholly compliant with his judicial interim release conditions. While it is not irrelevant that he is now subject to serving a penitentiary sentence which the Crown is seeking to have increased by way of a cross-appeal, there is nothing else to suggest an incentive not to surrender himself into custody. His breaches from September 2012, for which he received a conditional discharge, are stale. His release plan, however, lacks a sufficiently robust monitoring component. His sureties are unable to offer the supervision that would be required for release on bail pending appeal.
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> [34] Where Mr. M.'s request for bail falls is at the public interest hurdle, s. 679(3)(c).
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> [35] The public interest criteria has two components: public safety and public confidence in the administration of justice. The determination by Justice Arbour of the Ontario Court of Appeal in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32, that the "public interest" is comprised of these two considerations remains "good law" (*Oland*, at para. 26).
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> [36] I have scrutinized Mr. M.'s application for bail through the lens that is the public confidence factor. That is not to say public safety is irrelevant here. Mr. M. was described by the trial judge in his sentencing decision as lacking insight into his crimes. And although the Crown did not express a concern that Mr. M. would

> fail to surrender himself in advance of his appeal, as would be required by a release order, his release plan, with the deficiencies I have described, would not serve to maintain public confidence in the administration of justice.
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> [37] The public confidence component involves "the weighing of two competing interests: enforceability and reviewability" (*Oland*, at para. 24). The enforceability component reflects "the need to respect the general rule of the immediate enforceability of judgments" (*Oland*, at para. 25). In other words, it is expected Mr. M. will be held to account by continuing to serve the sentence imposed on him. The reviewability component reflects a recognition that our criminal justice system is not fail-safe and that appellants challenging the legality of their convictions "should be entitled to a meaningful review process ..." (*Oland*, at para. 25).
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> […]
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> [39] The reviewability interest is assessed in relation to the strength of the appeal (*Oland*, at para. 40). My examination of this component of the public confidence aspect of the public interest test has been limited to a review of the trial judge's decision and Mr. M.'s Notice of Appeal. That restricts somewhat the "preliminary assessment" to be made of the strength of Mr. M.'s appeal (*Oland*, at para. 45). However, I do have the benefit of the trial judge's comprehensive reasons in convicting and then sentencing Mr. M.
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> […]
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> [41] Mr. M.'s grounds of appeal are weak. It appears to me on the basis of what I have reviewed – the trial judge's reasons – that the Crown is positioned to put forward a strong case in support of Mr. M.'s convictions. I say this in the context of deciding Mr. M.'s bail application: the merits of his appeal will, of course, be ultimately determined by the panel who hears his appeal.
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> […]
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> [49] There is a final balancing to be done of the enforceability and reviewability factors. There is "no precise formula that can be applied to resolve the balance". It is a nuanced exercise that requires "[a] qualitative and contextual assessment" (*Oland*, at para. 49). Where the applicant has been convicted of a "very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety ... concerns" (at para. 50). In Mr. M.'s case, the public interest in enforceability overwhelms the reviewability interest. I find his detention is necessary in the public interest.

Has there been a material change in circumstances since the original application?

[11] Mr. M., on this application, says that the material change in circumstances is the delay caused by the adjournment of this appeal. This appeal was originally

scheduled to be heard on October 12, 2022, but because of difficulties obtaining the trial transcript it was adjourned to January 23, 2023.

[12] Alternatively, Mr. M. argues the "significantly enhanced proposed plan for Mr. M. is sufficient to demonstrate a material change in circumstances".

The Adjournment Delay

[13] The adjournment resulted in an unforeseen delay of just over three months. The applicant relies on *R. v. Baltovich* in support of his position that this delay can justify a material change in circumstances.

[14] I agree that in certain circumstances a delay in having an appeal heard may constitute a material change in circumstances which would require a fresh look at granting bail.

[15] In *Baltovich*, the first bail hearing contemplated an appeal hearing in six months. However, because of defence counsel's pursuit of fresh evidence, the hearing of the appeal was delayed for eight years and at the time of the second bail hearing the appeal was not likely to be heard for another year. As well, in *Baltovich*, there were new grounds of appeal which were highly arguable. In those circumstances, the judge hearing the second application found there was a material change in circumstances.

[16] The Crown has referred me to the case of *R. v. Ledesma,* 2020 ABCA 194. In that case, the appellant's original application for release pending appeal was denied. Mr. Ledesma's appeal was originally scheduled to be heard on April 8, 2020. It was adjourned until November 12, 2020. The accused brought a second application five months later on the grounds that the delay constituted a material change in circumstances after bail had been denied. In that case, the court found that the additional seven month delay in hearing the appeal was not material (¶16-21).

[17] In *R. v. Oland*, 2017 SCC 17, the Supreme Court explained that when balancing the tension between enforceability and reviewability appellate courts should be mindful of the anticipated delays in deciding an appeal relative to the length of sentence (¶48).

[18] Mr. M. was sentenced on March 2, 2022. His Notice of Appeal was filed on March 24, 2022. His appeal is scheduled to be heard on January 23, 2023, ten

months after the Notice of Appeal was filed. Mr. M. was sentenced to three years and three months in prison. By the time the appeal is heard, Mr. M. will have served less than a third of his sentence. Having regard to the length of Mr. M.'s sentence and the delay of just a little over three months in the hearing of his appeal, I do not find these circumstances constitute a material change that calls into question the earlier bail decision.

The New Release Plan

[19] In Mr. M.'s original release plan, he proposed two sureties each of whom would pledge $5,000 to secure his release. Mr. Ma was also a surety in the original application. As noted earlier, he lived in Hubley at that time and has now moved to the Clayton Park area of Halifax. The other proposed surety lived in the city, but not on the peninsula. She worked in the downtown core. Justice Derrick's concern was not with the amount being pledged by the proposed sureties or with the character of the individuals—her concern was with the ability of the sureties to monitor Mr. M.:

> [22] Neither surety was offering to have Mr. M. live with them. They each intended to keep tabs on his whereabouts by regular cell phone calls. They indicated they trusted Mr. M. to be honest with them about his whereabouts and activities. The friend who knew Mr. M. from attending Nova Scotia Community College said he had developed the skill of being able to tell by a person's tone in a telephone conversation or text message that they were not being truthful. His confidence in this regard was not reassuring.
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> [23] The proposed sureties each acknowledged a limited ability to check on Mr. M. in person. One lives in Hubley, some distance outside of metropolitan Halifax. He works at home other than on Tuesdays and Wednesdays when he goes to his office in downtown Halifax. The other proposed surety lives in the city but not on the peninsula. She works in the downtown core, although not exclusively, as her job also takes her to different locations in the city. In short, the proposed sureties do not live in close proximity to Mr. M. or even in his neighbourhood. During the day, they are both employed. Their principle means of communication with Mr. M. would be by cell phone and text messaging.
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> […]
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> [33] […] His release plan, however, lacks a sufficiently robust monitoring component. His sureties are unable to offer the supervision that would be required for release on bail pending appeal.

[20] I am not satisfied the changes to the release plan constitute a material change. In particular, Mr. Ma's more proximate residence to Mr. M. (as the Crown

pointed out, it is only a seven minute shorter drive than Hubley) adds nothing to the deficiencies identified by Justice Derrick in the original application. Monitoring is still intended to be done mainly by use of cellphone communication. If anything, the present proposed plan is less robust. In the previous plan, one of the sureties worked in the downtown core where Mr. M. proposed to live and would be able to check on him during the work day. Mr. M.'s mother lives in Quebec and is not in a position to monitor him in person at all.

[21] The $10,000 pledged on the original application was not an issue in refusing bail. The added security of $20,000 from Mr. M.'s mother does not alleviate the monitoring concern.

[22] Further, Justice Derrick's reasoning does not rely solely on the lack of supervision. In discussing the public interest, she considered the release plan, but focused on the strength of Mr. M.'s appeal. There are no new grounds of appeal that have been raised, and Mr. M.'s circumstances have not changed. Mr. M.'s present application does not provide any new information which would cause me to reassess her consideration of the public interest factor.

[23] A second bail application is not a rehearing of the original application or an opportunity to shore up evidence or arguments that were available in the original application in the hope that a different judge might come to a different conclusion. The appellant must demonstrate a material change in circumstance between the two applications. Mr. M. has failed to do so (*R. v. D'Agostino*, 1998 ABCA 202, ¶23, 24).

Conclusion

[24] I am not satisfied that there have been a material change in circumstances that would justify my re-evaluating bail pending appeal. The application is dismissed.

Farrar J.A.