NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. W.B.G.*, 2023 NSCA 49

Date: 20230707
Docket: CA 524989
Registry: Halifax

Between:

W.B.G.

Appellant

v.

His Majesty the King

Respondent

Section 486.4 and 486.5 of the *Criminal Code of Canada*]

Judge:	Derrick, J.A.
Motion Heard:	July 6, 2023 in Halifax, Nova Scotia in Chambers
Written Decision:	July 7, 2023
Held:	Motion dismissed
Counsel:	Jonathan Cuming, for the appellant Erica Koresawa, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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
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> **(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).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

> **(a)** at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> **(b)** on application made by the victim, the prosecutor or any such witness, make the order.

[…]

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Decision:

Introduction

[1] W.B.G. has appealed his convictions for sexual offences. He applied pursuant to s. 679 of the *Criminal Code* for bail pending appeal. The Crown opposed his release. After a hearing on July 6, 2023, I denied bail with reasons to follow. These are my reasons.

The Trial Judge's Reasons

[2] On December 6, 2022, Justice Pierre Muise of the Supreme Court of Nova Scotia convicted the appellant of two counts each of sexual interference, invitation to sexual touching and sexual exploitation, contrary to sections 151, 152 and 153 of the *Criminal Code*. On June 12, 2023 the trial judge accepted the joint recommendation of counsel and sentenced the appellant to 6 years' incarceration in a federal penitentiary.

[3] There were two witnesses at trial. The complainant, A.S., and S.G., the wife of the appellant, who testified for the defence. The appellant did not testify.

[4] As the trial judge noted, the offences were committed over a five year period when A.S. was aged 11 to 15. He summarized her testimony in his oral reasons for conviction:

> A.S. described multiple incidents of sexual touching, digital penetration of her vagina and anus, as well as reciprocal oral sex during the relevant period of time when she was 11 to 15, working with [W.B.G.] and living with him and his wife over half the time. There is no issue relating to consent, obviously, because of age. There is no dispute that [W.B.G.] was in a position of trust or authority in relation to A.S. There is no dispute he was in his 40s at the time. The only witness for the Crown was A.S. The only witness for [W.B.G.] was his wife [S.G.]. The case depends entirely on the assessment of credibility and reliability of the witnesses.

[5] The trial judge expressed reservations about S.G.'s evidence. He noted S.G. had "plenty of opportunity to plan and engineer her evidence" by reviewing the Crown disclosure and discussing the case with the appellant, including generally what she was going to say. He had explicit concerns about S.G.'s credibility and reliability:

> There were examples of a tendency to exaggerate…to protect [W.B.G.] by diminishing or eliminating opportunity for him to commit some of the alleged acts. As submitted by the Crown, it is not surprising that she would do so. It would naturally arise from her love and affection for [W.B.G.] and understandable desire to keep him out of jail. However, it does cause concern for the reliability of her evidence. As already alluded to, her demeanor changed noticeably from direct examination to cross-examination. [S.G.] was trying to ensure that she could satisfy her conscience that what she told was the truth. However, she did not hesitate to minimize, embellish or exaggerate, add advocacy comments or try to evade certain points within the confines of her truth where that would work to the benefit of [W.B.G.].
>
> In addition, she refused to make reasonable concessions or admissions against interest on key points, as described already. These and the other points noted as detracting from the reliability of her evidence create significant concerns regarding the reliability of some of her evidence, particularly her evidence on points related to what allegedly happened in their bed and what she may have observed in the house.

[6] After an extensive review of the testimony of A.S. and S.G., the trial judge concluded he did not have a reasonable doubt about the appellant's guilt:

> In my legal career there have been relatively few witnesses who have left me with the impression and confidence that they were being as truthful and accurate as they possibly could be without any concern for whether or not it portrayed them in a negative light. A.S. is one of those few witnesses for the reasons I have discussed at length already. The evidence of [S.G.] and the points argued by [W.B.G.] have not shaken that impression and confidence.
>
> I accept completely the evidence of A.S. regarding sexual acts by [W.B.G.]. There is nothing on the whole of the evidence which raises a reasonable doubt that he committed the offences alleged…

The Grounds of Appeal

[7] The appellant filed a Notice of Appeal on June 27, 2023 listing 11 grounds and seeking an acquittal on all charges or, alternatively, a new trial:

1. The learned Trial Judge erred in finding, as a matter of law, the acts in question had been committed;

2. The convictions were unreasonable and unsupported by the evidence adduced at trial;

3. The learned Trial Judge erred in refusing to allow the many contradictions, gaps, and non-responsive answers and “corrections” of previous evidence of the complainant to impact on the complainant’s credibility and reliability;

4. The learned Trial Judge erred in his assessment of the evidence by applying a different level of scrutiny to the Appellant’s evidence than was applied to that of the Complainant;

5. The learned Trial Judge erred in law in rejecting, or not giving appropriate weight, to all portions of the relevant evidence tendered;

6. The learned Trial Judge erred in law by drawing an adverse inference against the Appellant by reason of him not adducing evidence that the Crown also could have obtained;

7. The learned Trial Judge erred in law by shifting the burden of proof to the Appellant or placing upon the appellant some onus to establish reasonable doubt;

8. The learned Trial Judge erred in failing to apply the principle of reasonable doubt in his consideration of the whole of the evidence before him;

9. The learned Trial Judge’s reasons, as contained in the decision under appeal, are insufficient to permit proper appellate review;

10. The learned Trial Judge erred in law by permitting the complainant to testify as to the impacts the alleged assaults had upon her person and emotional well-being during the trial proper;

11. The learned Trial Judge erred in such other grounds as may appear from the transcript of the evidence and decision of the learned Trial Judge.

[8] The appellant’s appeal is set to be heard on November 30, 2023.

The Appellant's Proposed Release Plan

[9] The appellant's proposed release plan was disclosed in a draft bail order and evidence elicited from him and S.G. on cross-examination by the respondent.

[10] In addition to the standard conditions to keep the peace, attend court as required, and remain in Nova Scotia, the appellant proposed: his wife, S.G., as surety; a residency requirement (the home where he lives with S.G.); maintaining employment; no possession of weapons; weekly reporting by telephone to the RCMP; no illegal drug use (drug use does not to have arisen in the facts of this case); and no direct or indirect contact or communication with the complainant; and adherence to prohibitions[1] relating to public areas, employment or contact with persons under the age of 16.

[11] The bail plan as proposed was deficient in certain respects. Notably, the appellant did not pledge any cash or real property to justify his release. Standard conditions to surrender into custody in advance of the release of the appeal decision and attend court for a review of bail conditions if the appeal hearing is delayed were also not included. That said, both the appellant and S.G. agreed on cross-examination that they could and would put up either cash or property to secure bail and understood the consequences—forfeiture—in the event release conditions were breached.

[12] S.G. also testified she would ensure the appellant surrendered and attended court as required.

[13] The appellant and his wife have been together for 28 years and married for 23. The appellant owns farming and firewood businesses in rural Nova Scotia where he lives. His wife is a full-time employee of the businesses and, in the non-harvesting seasons of the year, works at a day job. There are two additional adults employed full-time and each year, a number of seasonal employees, many of whom are teenagers. The appellant testified to having minimal contact with these casual workers.

[14] Both the appellant and S.G. put long, arduous hours into the farm work which is the almost singular focus of their lives. Their respective responsibilities can, but does not necessarily, involve them being together during the day. For

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[1] Appellant's counsel explained that these provisions in the proposed bail order replicated the order of prohibition imposed at sentencing by the trial judge pursuant to s. 161 of the *Criminal Code*.

example, the appellant travels to other properties he owns for various purposes, including produce deliveries, and on occasion his wife will accompany him. S.G.'s role includes coordinating the seasonal workers on one of the farms primarily and helping out at the farm throughout the year. As I noted, for seven months each year—May through October—she is at her day job with the exception of Thursdays and Sundays and does bookkeeping for the farms in the evenings.

[15] The appellant and S.G. both testified to their understanding of the proposed bail conditions. The appellant said he would "absolutely" follow the conditions.

[16] S.G. said she understood her role as surety was to ensure none of the release conditions were breached and if they were, to report her husband to the police. She testified that in such an event she was prepared to do so.

[17] S.G. was asked on cross-examination why she was prepared to be the appellant's surety. She responded by saying she believed him to be innocent.

Analysis

[18] Bail on appeal is materially different from bail pre-trial (known as judicial interim release). The appellant no longer enjoys the presumption of innocence that applied at the time of his trial. The entitlement to reasonable bail pre-trial guaranteed by s. 11(e) of the *Canadian Charter of Rights and Freedoms* does not apply in the context of a motion for bail pending appeal. The appellant came before me bearing the burden of establishing, on a balance of probabilities, that he met each of the criteria under s. 679(3) of the *Criminal Code*.[2]

[19] Section 679(3) sets out the three statutory criteria:

> In the case of an appeal [against conviction], 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 ... 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.

[2] *R. v. Oland*, 2017 SCC 17, at para. 19.

(a) Not Frivolous

[20] In opposing bail for the appellant, the Crown did not rely heavily on s. 679(3)(a) and (b). The "not frivolous" criterion is widely acknowledged to be a very low threshold.[3]

[21] In its written submissions, the Crown took issue with each of the grounds of appeal, stating: "Despite the low threshold, the Respondent has reservations as to whether this branch has been met". This is a legitimate comment. The frailties in the grounds of appeal are apparent.

1. Finding the acts in question had been committed.

[22] As the Crown noted, a finding the sexual offences occurred was a finding of fact, attracting a highly deferential standard of review on appeal.

2. Unreasonable verdict unsupported by the evidence.

[23] The trial judge found the complainant credible and reliable. This finding is also subject to a highly deferential standard of review on appeal. Contrary to the appellant's argument that details such as time and location of the offences were "necessary details", they are not essential elements of the offences charged.

3. Failure to find "the many contradictions, gaps, non-responsive answers and "corrections" of previous evidence" impacted A.S.'s credibility and reliability.

[24] On appeal, a trial judge's credibility findings are subject to a highly deferential standard of review. The judge's reasons were focused on a considered examination of A.S.'s testimony and the appellant's submissions for why it could not be relied on. The trial judge rejected these submissions.

4. Application of a different level of scrutiny to the defence evidence than the evidence of the Crown.

[25] In the Crown's submission, the examples advanced by the appellant are not comparable types of scrutiny – A.S. pausing before answering, which the trial judge viewed as an effort to provide clear, complete responses versus the trial

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[3] *Ibid*, at para. 20.

judge's assessment of S.G.'s answers to questions about whether she had witnessed any sexual touching. Uneven scrutiny is an allegation that is assessed with a very high degree of appellate deference.

5. Rejection of, or not giving appropriate weight to, all portions of the relevant evidence.

[26] The trial judge was required to weigh the evidence and determine what he accepted as credible and reliable. The Crown submitted he gave "thorough reasons for rejecting the defence evidence". The judge's approach to his credibility findings is entitled to a high level of deference on appeal.

6. Drawing an adverse inference against the appellant for not adducing evidence the Crown could also have obtained.

[27] This ground of appeal relates to text messages that A.S. deleted and evidence the appellant's phone had been destroyed. The trial judge accepted A.S.'s explanation for deleting the texts and, as the Crown noted, "drew no inference regarding the lack of text messages". The appellant will have to show where a negative inference was drawn by the trial judge. It is not obvious in his reasons.

7. Shifting the burden of proof.

[28] The Crown submitted there is nothing in the trial judge's reasons to indicate he displaced the burden of proof from the Crown to the appellant. Shifting the burden of proof from the Crown to the accused would constitute an error of law. It does not appear the trial judge did so.

8. Failure to apply the principle of reasonable doubt to the whole of the evidence.

[29] The Crown noted the trial judge identified and applied the principle of reasonable doubt. This appears to be borne out by the trial judge's reasons. He said, *inter alia*: "Therefore, the issue is whether the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt". He concluded his analysis by finding: "There is nothing on the whole of the evidence which raises a reasonable doubt that [the appellant] committed the offences alleged…"

9. Insufficient reasons.

[30] In the Crown's submission:

> …the Applicant is able to detail a list of alleged errors in the trial judge's reasons. This, in itself, belies the suggestion that the reasons are insufficient to understand why he was convicted or to permit meaningful appellate review.

[31] It does not seem the appellant has had any difficulty identifying why the trial judge found him guilty. The trial judge's reasons appear sufficient to enable review by this Court.

10. Permitting A.S. to testify to the impacts of the alleged assaults "on her person and emotional well-being" during the trial.

[32] At the bail hearing, counsel for the appellant, Mr. Cuming, argued the trial judge accepted that A.S.'s memory deficits were due to her having been sexually assaulted by the appellant. Mr. Cuming said this amounted to a finding the offences had been committed before the trial judge had concluded his credibility assessment.

[33] It is important to note what the trial judge said:

> …A.S. testified about the impacts of the sexual activity that she described. One of those impacts was that she sometimes has trouble remembering things because her brain will sometimes block things out. Sometimes she remembers things at different times. That is also a factor to consider in assessing her evidence, particularly where she remembered evidence she had not previously remembered.

[34] The Crown observed there is no evidence the trial judge's reasoning was compromised by A.S.'s memory evidence. As the judge said, evidence about A.S.'s memory needed to be considered in his credibility analysis. This was the proper approach.

[35] Despite its articulated reservations, the Crown allowed that the "not frivolous" hurdle may have been cleared:

> The Respondent appreciates that the Applicant may not have fully canvassed the record nor fully articulated the errors he will raise with the trial judge's decision. As such, this Court may find that, given the low threshold, at least one ground may meet the "not frivolous" standard.

[36] Addressing the “not frivolous” question does not conclude my consideration of the grounds of appeal. I am required to take them into account in the final aspect of my analysis when I assess the s. 679(3)(c) public interest component.

(b) Surrender into Custody

[37] The Crown has not opposed the appellant’s release on the basis he is a flight risk and would abscond before his appeal. The Crown acknowledged facts salient to this aspect of the analysis: the appellant has no prior criminal record; was compliant with release conditions imposed in 2019; and has strong connections to the community through family and work.

[38] The fact that an appellant has received a significant penitentiary sentence can give rise to concerns about the potential for flight. The appellant was sentenced to 6 years in prison. Even with amplified conditions, such as cash or property pledges, the supervisory aspect of the appellant’s bail plan is not water tight. The evidence at the bail hearing disclosed the extent to which the appellant, of necessity, has to be mobile to attend to his farming and firewood businesses. S.G. has her own responsibilities that are not compatible with discharging a consistent supervisory role. Asked on cross-examination about her contact with the appellant when they are both working on the farm, S.G. said they try to have lunch and supper together and may encounter each other in the course of the day.

[39] The Crown also raised concerns about S.G.’s suitability as a surety given the emotional and financial inter-dependence with the appellant. As Mr. Cuming pointed out, these are not unprecedented features of a surety/bailee relationship. The more pressing concern in my view is the limited supervision S.G. can realistically provide and how that factors into the public interest aspect I am required to consider.

[40] I do not find there is a risk the appellant would slip the traces and disappear. Nor do I think it is likely he would violate bail conditions. As Mr. Cuming noted, the appellant attended for all his previous court appearances without fail and abided by pre-sentence release conditions.

(c) The Public Interest Criterion

[41] This motion for bail fundamentally turned on the public interest component of s. 679(3). In the Crown’s submission this was the real issue. I agree. And of the

two considerations—public safety and public confidence in the administration of justice—the critical issue was public confidence.

[42] The determination by Justice Arbour of the Ontario Court of Appeal in *R. v. Farinacci* [4] that the "public interest" is comprised of these two considerations remains "good law".[5]

[43] The public confidence component involves "the weighing of two competing interests: enforceability and reviewability".[6] The enforceability component reflects "the need to respect the general rule of the immediate enforceability of judgments". In other words, it is expected the appellant 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…"[7]

[44] In *Oland*, the Supreme Court of Canada directed appellate judges considering motions for bail to apply the factors relevant to the public confidence criteria in pre-trial release. These factors are: the apparent strength of the Crown's case; the gravity of the offence; the circumstances surrounding the commission of the offence, including whether a firearm was used; and the potential length of imprisonment.[8]

[45] A significant factor that weighs against the appellant's release is the gravity of his offences, relating as they do to sexual offending against a child. The appellant's sentence reflects the emphasis placed by the Supreme Court of Canada on sexual offences against children:

> …sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences

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[4] (1993), 86 C.C.C. (3d) 32.
[5] *Supra* note 2, at para. 26.
[6] *Ibid*, at para. 24.
[7] *Ibid*, at para. 25.
[8] *Ibid*, at paras. 31-32.

> must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.[9]

[46] In his sentencing decision, the trial judge reviewed *R. v. Friesen* in considerable detail, referencing its discussion of the broad range of harms occasioned by sexual offending against children: harms to "personal autonomy, bodily integrity, sexual integrity, dignity and equality" and to "parents, caregivers, family members,…the communities in which the children live and to society as a whole".[10]

[47] The Supreme Court has directed sentencing courts to,

> …recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.[11]

[48] Another significantly disadvantaging factor for the appellant's aspirations for release is the strength of the Crown's case. This is the context in which the appellant's grounds of appeal are again factored into the bail analysis. I discussed the grounds earlier, in paragraphs 21-34 of these reasons.

[49] The appellant is entitled to a fair hearing of his allegations of error. They will be viewed through the fresh eyes of the panel assigned to the appeal. The panel will have the benefit of the trial transcript I do not have. That panel will not include me as I have been obliged to form an opinion about the appellant's grounds of appeal. In my opinion they are weak. They predominantly seek to challenge findings of fact and credibility the trial judge supported by a detailed analysis that explained his reasoning. The respondent will make a forceful argument about the applicability of a highly deferential standard of review.

<u>The Final Balancing</u>

[50] Bail pending appeal requires a "final balancing" of the enforceability and reviewability aspects of the public confidence factor. The "final balancing" must

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[9] *R. v. Friesen*, 2020 SCC 9, at para. 5.
[10] *Ibid*, at paras. 51, 63 and 64.
[11] *Ibid*, at para. 76.

calibrate public confidence as viewed by reasonable, well-informed members of the public The Supreme Court of Canada in *Oland* offered guidance on the approach to be taken:

> Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.[12]

[51] Assessing the public confidence component of the public interest criterion is a nuanced exercise. There is "no precise formula" for resolving the balancing exercise. "A qualitative and contextual assessment is required".[13] The public interest in enforceability "will be high" and will "often outweigh the reviewability interest" where an appellant has been convicted on a very serious crime and "the grounds of appeal appear to be weak".[14]

[52] The public confidence factor weighed heavily in my final assessment of whether the appellant met his onus for bail pending appeal. In the final analysis, the balance tipped against his release.

[53] The appellant has failed to satisfy the public interest component of s. 679(3):

- He has been convicted of very serious offences.
- A significant penitentiary sentence was imposed.
- The grounds of appeal are weak.
- The bail plan is inadequate.

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[12] *Supra* note 2, at para. 47.
[13] *Ibid*, at para. 49.
[14] *Ibid*, at para. 50.

[54] In this case, enforceability outweighs reviewability. I am satisfied a thoughtful, dispassionate member of the public informed of the circumstances of the case and respectful of society's fundamental values would view the appellant's detention pending his appeal as necessary in the public interest.

Conclusion

[55] As I indicated at the conclusion of the appellant's bail hearing, his motion for bail pending appeal is denied.

Derrick, J.A.