NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. S.O.*, 2024 NSCA 73

Date: 20240718
Docket: CAC 533590
Registry: Halifax

Between:

S.O.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: ss. 486.4 and 486.5 of the *Criminal Code of Canada*

Judge:	Bourgeois, J.A.
Motion Heard:	July 18, 2024, in Halifax, Nova Scotia in Chambers
Written Decision:	July 24, 2024
Held:	Motion for bail pending appeal dismissed
Counsel:	Tony Mozvik, K.C., 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

(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

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

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:

[1] On July 18, 2024, I heard a motion for bail pending appeal brought by the appellant, S.O. Following trial in the Supreme Court of Nova Scotia, the appellant was convicted of sexual assault and sexual interference by Justice Patrick J. Murray. On April 25, 2024, the appellant was sentenced to a term of imprisonment of four years for sexual interference.[1]

[2] The appellant has appealed his conviction and the appeal is scheduled to be heard on November 18, 2024. The appellant made a motion for bail pending appeal pursuant to s. 679 of the *Criminal Code*. His proposed release plan included living with his retired mother, who would pay $5,000 into Court and act as surety. The Crown opposed his release.

[3] At the hearing the appellant and his proposed surety were cross-examined on their respective affidavits. After hearing submissions from counsel, and considering the evidence before me, I provided brief oral reasons for denying the motion. I promised written reasons to follow. These are my reasons.

Legal Principles

[4] In order for the appellant to be released on bail pending his appeal, he must establish on a balance of probabilities, he meets all criteria set out in s. 679(3) of the *Criminal Code*. That section provides:

> **Circumstances in which appellant may be released**
> **(3)** 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;
> >
> > **(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.

[1] The sexual assault conviction was stayed by the trial judge in accordance with the principles set out in *R. v. Kienapple* [1975] 1 SCR 729.

[5] The above provision was considered by the Supreme Court of Canada in *R. v. Oland*, 2017 SCC 17. Unlike pre-trial detention, once a conviction has been entered, the presumption of innocence is displaced and s. 11(e) of the *Canadian Charter of Rights of Freedoms*[2] no longer applies. As such, it is the appellant who bears the burden of establishing his detention is not warranted (*Oland* at para. 35; *R. v. Leblanc*, 2021 NSCA 89 at para. 4).

[6] The first criterion, establishing the appeal is not frivolous, has been consistently recognized as engaging a low-threshold. In *Oland*, Justice Moldaver wrote:

> [20] The first criterion requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not "not frivolous" (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the "not frivolous" test is widely recognized as being a very low bar: see *R. v. Xanthoudakis*, 2016 QCCA 1809, at paras. 4-7 (CanLII); *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132, at para. 38; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444, at paras. 6-8; G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 10-13 to 10-15.

[7] Further, with respect to the second criterion, Justice Moldaver explained:

> [21] The second criterion requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the [release] order" (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.

[8] It is the third criterion, detention is not necessary in the public interest, which was the focus of the Court in *Oland*. The Court endorsed the continuing applicability of the *Farinacci* framework[3] in which Justice Arbour opined the public interest criteria consisted of two components: public safety and public confidence in the administration of justice.

[9] Public safety relates to the protection and safety of the public, whereas the public confidence component involves the weighing of two competing interests, the enforceability of judgments and their reviewability. In *Oland*, Justice

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[2] Section 11: Any person charged with an offence has the right … (e) not to be denied reasonable bail without just cause.

[3] *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.).

Moldaver warned against viewing public safety and public confidence as necessarily discrete considerations:

> [27] In so concluding, I should not be taken to mean—nor do I understand *Farinacci* to have said—that the public safety component and the public confidence component are to be treated as silos. To be sure, there will be cases where public safety considerations alone are sufficient to warrant a detention order in the public interest. However, as I will explain, where the public safety threshold has been met by an applicant seeking bail pending appeal, residual public safety concerns or the absence of any public safety concerns remain relevant and should be considered in the public confidence analysis.

[10] In considering the enforceability interest which reflects "the need to respect the general rule of the immediate enforceability of judgments" (*Oland*, at para. 25), the seriousness of the crime, including the circumstances surrounding the commission of the offence, is central. However, other factors can be taken into account where appropriate. "Public safety concerns that fall short of the substantial risk mark—which would preclude a release order—will remain relevant under the public confidence component" (*Oland* at para. 39).

[11] The reviewability component reflects an understanding that the criminal justice system is not free from error, and as such, engages a consideration of the strength of the grounds of appeal. Justice Moldaver explained:

> [45] In the end, appellate judges can be counted on to form their own "preliminary assessment" of the strength of an appeal based upon their knowledge and experience. This assessment, it should be emphasized, is not a matter of guesswork. It will generally be based on material that counsel have provided, including aspects of the record that are pertinent to the grounds of appeal raised, along with relevant authorities. In undertaking this exercise, appellate judges will of course remain mindful that our justice system is not infallible and that a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual's interest in any given case.

[12] In balancing the two competing 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" (*Oland* at para. 47).

Analysis

The grounds of appeal are not frivolous

[13] In his Notice of Appeal, the appellant raises the following grounds of appeal:

> 1. That the verdict was an unreasonable verdict with insufficient reasons provided.
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> 2. That the Learned Trial Judge misapprehended the evidence.
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> 3. That the Learned Trial Judge misapplied the established legal principles for assessing the credibility of witnesses. The Learned Trial Judge erroneously held the credibility of the Appellant to a higher standard than that of the Complainant.
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> 4. That the Learned Trial Judge misapplied the principles of *R v. WD.* [1991] 1 SCR 742 in connection to the testimony of the Appellant. The Learned Trial Judge erroneously made his decision based on whether he believed the Appellant or the Complainant, rather than whether there was a reasonable doubt raised by the evidence.
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> 5. That the Learned Trial Judge failed to provide sufficient reasons for discounting evidence that would have established a reasonable doubt.
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> 6. Such other grounds as may appear from a review of the record, and which this Honourable Court may permit.

[14] The Crown concedes the grounds pled are not frivolous and meet the low threshold required by s. 679(3)(a). I agree. However, I will return to the strength of the grounds in light of the trial judge's reasons and the record when considering the public interest criterion.

The appellant will surrender himself into custody

[15] This criterion considers whether the appellant is a flight risk. The Crown acknowledges the appellant adhered to his previous release conditions and has familial connections within the Province.

[16] I am satisfied the appellant is not a flight risk and would surrender himself into custody should bail pending appeal be granted.

Detention is not necessary in the public interest

[17] The Crown opposed the appellant's release on the public interest criterion, and asserted that neither the public safety or public confidence components were met. I agree.

i) Public safety

[18] The public safety component assesses whether the risks inherent in the appellant's release into the community can be appropriately managed. Here, the terms of his proposed release must be considered in light of the nature of the offence that was committed.

[19] The appellant was convicted of sexual offences against his 15 year old cousin. At the time of the offences, the appellant was 30 years of age. The trial judge found that the instances of sexual touching, including oral and vagina intercourse, took place when the complainant was alone with him in the appellant's home. The appellant was found to have engaged in non-consensual sexual activity with the complainant on at least three occasions. She was vulnerable and having difficulties with her living circumstances, and had been staying with the appellant and his partner to assist with babysitting their children. The sexual offending was opportunistic.

[20] After having heard and considered the evidence of the appellant and his proposed surety, I am not satisfied the release plan being proposed is adequate to protect the public in the circumstances. In particular, several aspects of the evidence left me with concerns regarding whether the appellant would abide by the terms of release, the level of supervision the surety could provide, and whether she would report any breaches she became aware of.

[21] The appellant has a number of outstanding criminal charges, including one charge of sexual assault with a weapon contrary to s. 272(2); two additional charges of sexual assault contrary to s. 271; a charge of sexual interference to s. 151(A); two charges of publishing or distributing intimate images without consent contrary to s. 162.1(1)(B); and a charge of assault causing bodily harm contrary to s. 267(B). From the dates of the alleged offences, it would appear that the charges arise from separate incidents. The appellant did not disclose the

existence of these criminal charges in his affidavit, nor did his counsel in their written submissions.

[22] I do note that in her affidavit sworn July 11, 2024, the proposed surety referenced her knowledge of the appellant having outstanding criminal charges, however, her evidence in that regard was vague. She simply swore:

> 9. THAT I understand that the Appellant has outstanding criminal charges which are to be tried in Sydney, Nova Scotia.

[23] The appellant benefits from the presumption of innocence in relation to the outstanding charges. However, in assessing both the public safety and confidence components of the third criterion, the existence of outstanding allegations of criminal behaviour is highly relevant. In *R. v. C.L.*, 2018 ONCA 470, Trotter, J.A. highlighted the significance of an applicant's failure to disclose outstanding criminal charges:

> [13] The new criminal charges should have been disclosed. Judges of this court rely heavily on the trustworthiness of affidavits sworn in support of bail pending appeal applications. **They are expected to be both accurate and complete.**
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> [14] Crown counsel routinely conduct criminal history inquiries to ensure the accuracy of the information that is placed before judges deciding bail pending appeal applications. **However, this does not relieve bail applicants and their proposed sureties of the obligation to be candid and comprehensive.** In this case, had it not been for the Crown's diligence, I would have been misled in an important way. I stop short of concluding that there was a deliberate attempt to mislead me. However, in the absence of an explanation, the person who swears or affirms an affidavit must bear responsibility for its contents.
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> [15] Outstanding criminal charges are important for bail purposes, especially those that point to bail compliance issues. In the pre-trial context, s. 518(1)(c)(ii) of the *Criminal Code* permits the prosecutor to lead evidence of outstanding charges. Depending on the circumstances, an individual charged with fresh offences while on bail may face a reverse onus at his or her bail hearing: see s. 515(6)(a)(i) and *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91. Charges under ss. 145(2) to (5) always result in a reverse onus situation: s. 515(6)(c).
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> [16] I appreciate that at this stage the appellant is presumed innocent of the two new charges. **However, that does not detract from their relevance and importance to bail pending appeal**. Dealing with a similar situation in *R. v. Lengelo* (4 October 2011), M40503/C54249 (Ont. C.A.), Doherty J.A. said: "It is

> difficult to think of anything that would be more relevant on a bail application than the existence of outstanding charges coupled with a failure to appear."
>
> [17] The new charges, combined with the appellant's failure to mention them in his affidavits (not to mention his assertion that for several years he lived at an address contrary to his bail conditions at the time), undermine any faith I can place in the appellant's promise in his affidavit that, "I will obey any conditions placed upon me by this Court while I am in the community."
>
> [Emphasis added]

[24] In cross-examination, the appellant was asked to confirm the nature of the outstanding charges. I found his evidence to be evasive and purposefully vague. He testified he was advised of the charges by police in April 2023, but said he had no idea of the details of the charges because the police had only given him a jumbled rundown of the allegations. The appellant asserted he has not been provided with any further disclosure in relation to the nature of the charges, notwithstanding that a preliminary inquiry is scheduled in August, 2024. The appellant's evidence in this regard is not credible.

[25] Other concerning oversights in the evidence in support of the motion were elicited on cross-examination. In both her affidavit and Surety Declaration, the proposed surety described herself as being "retired". As the plan was for the appellant to reside with her, her employment status was obviously relevant to her availability to supervise the appellant's adherence to any conditions imposed. However, it appears that since July 2023, the proposed surety has been working significant hours at a local business. She anticipates continuing to work Tuesdays through Fridays from 10 a.m. to 6 p.m. This lack of detail in the proposed surety's affidavit is concerning especially given its impact on her ability to supervise the appellant's proposed release.

[26] In her affidavit and Surety Declaration, the proposed surety indicated she was prepared to pay a deposit of $5,000 into Court to secure the appellant's release. Such a promise has two effects: first, it is intended to prompt the surety to report any breaches of the terms of release in fear of losing their property; secondly, it is intended to bind the conscience of the appellant and ensure compliance so that the property of the surety is not forfeited. For many people, the loss of $5,000 would be a serious consequence of a failure to abide by the terms of release.

[27] However, in cross-examination, it became clear that the surety was not depositing $5,000 of her own resources, but rather, only $2,500. The balance was being paid from funds held by the appellant. The surety also testified that she did not regard $2,500 as being an overly significant amount of money. Given the purposes of a surety's pledge, the discrepancy is concerning. The proposed surety also testified that she wished to have the appellant released because she has a number of health concerns and requires his assistance.

[28] Based on the evidence, I am not satisfied the proposed surety can adequately monitor the appellant's release, nor am I confident she would report any breaches. The appellant has failed to meet the public safety component. I could end my analysis here, but I will go on to consider the second aspect of the public interest criterion.

ii) Public confidence

[29] As explained earlier, the public confidence component balances two competing interests: enforceability and reviewability. Here, the enforceability component is strengthened because:

- The offence is a serious one in which a child's sexual integrity was violated by someone she trusted;
- The release plan proposed by the appellant, especially in light of his pending charges, is inadequate; and
- The appeal will be heard expeditiously.

[30] The reviewability interest engages a consideration of the strength of the appeal. An appeal that is strongly meritorious on its face may serve to overcome enforceability considerations.

[31] Although I have previously concluded the appeal is not frivolous, I am of the view the grounds of appeal are of questionable strength. I have had the opportunity to review the record, submissions and reasons for conviction. The grounds of appeal challenge the trial judge's credibility findings, alleged an uneven scrutiny of the evidence and the sufficiency of his reasons. These grounds are difficult to establish on appeal, and although a panel of this Court will ultimately

decide, I see no obvious concerns or errors which would justify appellate intervention.

[32] Here, enforceability outweighs reviewability. I am satisfied a reasonable member of the public "who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values" would be of the view that the appellant's release pending the hearing of his appeal is not in the public interest.

Conclusion

[33] For the reasons noted above, I dismiss the motion for bail pending appeal.

Bourgeois, J.A.