
CANADA / JUDGMENT

R. v. Czechowski

2021 BCCA 19

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 19 R. v. Czechowski

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Czechowski,

2021 BCCA 19

Date: 20210108

Docket: CA45999

Between:

Regina

Respondent

And

Jeremy Robert Czechowski

Appellant

Restriction on publication: A publication ban has been imposed under ss. 486.4(1) and 486.4(2) of the Criminal Code restricting publication, broadcasting or transmission in any way of any information that could identify the complainant or a witness. This publication ban applies indefinitely unless otherwise ordered.

Restriction on publication: Pursuant to s. 16(4) of the Sex Offender Information and Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information

relating to a person is collected under SOIRA.

Before:

The Honourable Madam Justice Saunders

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
May 16, 2018 (R. v. Czechowski, 2018 BCSC 1646, Kelowna Docket 84432-2).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

M.A. Nathanson

Counsel for the Respondent

(via teleconference):

M. Vojvodic

Place and Date of Hearing:

Vancouver, British Columbia

January 4, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 8, 2021

Summary:

Application for bail pending disposition of the applicant's application for leave to appeal from conviction to the Supreme Court of Canada. The application is opposed by the Crown on the basis the applicant has not established that his detention is not necessary in the public interest (s. 679(3)(c) of the Criminal Code). The proposed grounds of appeal relate to this court's application of the curative proviso in s. 686(1)(b)(iii) where two serious errors of law have been identified. Held: Application allowed on terms. The components of the s. 679(3)(c) criterion are public safety and public confidence in the administration of justice. The public confidence component balances enforceability versus reviewability. Given the degree of arguability of the proposed grounds of appeal and their possible national import, the proposed leave to appeal application has sufficient potential to weigh in favour of release. That potential, combined with the ability of strict terms of release to address public safety issues and the character of the proposed appeal as an initial review of the issues raised, favours release pending determination of the leave

application.

- [1] SAUNDERS J.A.: Mr. Czechowski applies pursuant to s. 679(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46 for judicial interim release (bail) pending his s. 691 application for leave to appeal his convictions to the Supreme Court of Canada. He was convicted at trial by judge alone on May 16, 2018 of four offences arising from a sexual encounter between himself and the complainant in February 2016: sexual assault causing bodily harm, unlawful confinement, attempting to choke or suffocate or strangle, and uttering threats. On April 5, 2019, he was sentenced on these offences to five years' incarceration, in total.
- [2] The applicant appealed his convictions to this court. Pending his appeal, he was given judicial interim release, as he had between the time of his conviction and sentencing, and indeed time before his conviction. In August 2020, while this court's decision on his conviction appeals was reserved, the Crown applied to revoke his bail because he had been charged with uttering threats in an unrelated incident. Mr. Justice Butler dismissed that application in reasons indexed at 2020 BCCA 237, but imposed more restrictive terms of release.
- [3] The applicant's conviction appeal was dismissed on October 13, 2020, by reasons indexed as 2020 BCCA 277.
- [4] The issues at trial related to consent in respect of sexual activity between the applicant and the complainant. The judge accepted the complainant's testimony that she had not consented to any of the sexual activity and found, in the alternative, that she had no capacity to consent in any event. In so finding, the judge relied upon expert evidence from a medical doctor about the complainant's memory and referred to the doctor's evidence of a prior consistent statement made by the complainant at the hospital. The trial record included a body of evidence of physical injuries sustained by the complainant in the encounter, and words said by her in communications between the police and the complainant shortly after she left the residence.
- [5] Before this court, the applicant raised seven grounds of appeal. This court found that the trial judge had made two serious errors of law, the first in admitting and relying on expert evidence from a physician that went beyond the physician's expertise, and the second in considering the complainant's prior consistent statement to the physician. This court then considered the application of the curative proviso under s. 686(1)(b)(iii) of the Criminal Code in the circumstances of the two errors of law identified. This court held that evidence of the injuries to the complainant, the doctor's assessment of the injuries, and the complainant's interactions with police immediately after the incident were inconsistent with consensual sex and in conclusion found that circumstantial evidence against the applicant "overwhelmingly established non-consent" apart from the complainant's testimony. It dismissed the appeal on the basis conviction would be inevitable upon a retrial.

- [6] In his application for leave to appeal to the Supreme Court of Canada, the applicant contends that this court has "watered down" the standard applicable in application of the curative proviso, contrary to jurisprudence of the Supreme Court of Canada such as *R. v. Sarrazin*, 2011 SCC 54 and *R. v. Van*, 2009 SCC 22.
- [7] He says that this court selectively looked to evidence that supported the Crown's case and ignored evidence capable of raising a reasonable doubt, diminishing the high standard for application of the curative proviso and he refers to jurisprudence from other provinces that he says has rejected the use of the proviso in similar circumstances. Further, the applicant contends that this court reversed the onus of proof, contrary to ss. 7 and 11(d) of the Charter and that the results violate his right to a jury trial under s. 11(h) of the Charter.
- [8] Section 679(3) sets out the criteria that must be established by an applicant to obtain judicial interim release:
- (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
- (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.
- [9] Each of these three criteria must be met on a balance of probabilities: *R. v. Oland*, 2017 SCC 17 at para. 17.
- [10] On this application, the applicant says that he has met all three criteria.
- [11] The Crown agrees that the applicant has met the first two criteria, but says that the applicant has not established that his detention is not necessary in the public interest. In particular on the third criterion, the Crown says that application for leave to appeal is fundamentally flawed because it seeks to undermine jurisprudence from the Supreme Court of Canada wherein the curative proviso has been applied to sustain convictions based on a subset of the evidence adduced at trial, and that the applicant has not raised any issues of national importance.
- [12] I will address the three criteria separately - the first two in short compass.
- [13] It is accepted that the merits assessment of the first criterion, whether the application is frivolous, is a low bar. On a leave application the merits will include consideration of whether the proposed appeal could be of national importance: *R. v. Pires*, 2004 BCCA 91. This is in the context, however, of the low bar.
- [14] In light of the low bar and the articulated proposed grounds of appeal, I am satisfied that the applicant has met this first criterion.

- [15] The second criterion engages the likelihood that the applicant will surrender himself into custody in accordance with the terms of the order. I agree that on the materials before us, there is ample evidence to satisfy this criterion.
- [16] The real question before me is whether the applicant has satisfied the third criterion: has he established that his detention while he awaits the decision in his leave application is not necessary in the public interest.
- [17] There are two components to the third criterion, public safety and public confidence in the administration of justice: Oland at para. 23. The Crown says that the public safety consideration weighs against release because he has been charged with uttering threats that necessitated a further tightening of his bail conditions before this court dismissed his conviction appeal.
- [18] I recognize this concern but note that the charge of uttering threats is still in early stages of the trial process, and Justice Butler considered the tightened bail conditions sufficiently met the public safety risk that charge indicated. There is no evidence of a failure to meet the tightened conditions. While this feature is troubling, in light of the history in this court on the prior applications I cannot say, by itself, it is determinative.
- [19] This application therefore comes down to a question of public confidence in the administration of justice. In Oland, the Supreme Court of Canada said, at para. 47, concerning public confidence:
- [47] ... 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.
- [20] The question of public confidence in turn engages two competing interests which must be balanced, the enforceability interest and the reviewability interest.
- [21] In *R. v. Boima*, unreported, (5 November 2018), Vancouver CA44501 (B.C.C.A.), Madam Justice Dickson described enforceability and reviewability in these terms:
- [21] Enforceability relates to the public interest in the enforcement of judgments and in denying bail to a person convicted of a serious offence. It captures the gravity of the offence, the circumstances surrounding the commission of the offence and the potential length of imprisonment: Oland at para. 38. The fact that an appellate court upheld a guilty verdict means that the pendulum swings towards enforceability and away from bail pending further review: *R. v. Drabinsky*, 2011 ONCA 647 at para. 10 (Doherty J.A. in Chambers).

- [22] Reviewability relates to the public interest in the review and correction of errors in judgments: *R. v. Mapara*, 2001 BCCA 508 at para. 32. In the appellate context, the strength of the case factor translates into the strength of the grounds of appeal and informs reviewability: *Oland* at para. 40. Using their experience and knowledge, judges should form a preliminary assessment of the strength of the grounds of appeal to see if they "clearly surpass the not frivolous standard": *Oland* at paras. 44-45.
- [22] In respect of enforceability, the Supreme Court of Canada in *Oland* said:
- [37] In assessing whether public confidence concerns support a pre-trial detention order under s. 515(10)(c), the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial. So too for bail pending appeal. In considering the public confidence component under s. 679(3)(c), I see no reason why the seriousness of the crime for which a person has been convicted should not play an equal role in assessing the enforceability interest.
- [38] With that in mind, I return to s. 515(10)(c), where Parliament has set out three factors by which the seriousness of a crime may be determined: the gravity of the offence, the circumstances surrounding the commission of the offence, and the potential length of imprisonment (s. 515(10)(c)(ii), (iii) and (iv)). In my view, these factors are readily transferable to s. 679(3)(c) -- the only difference being that, unlike the pre-trial context, an appeal judge will generally have the trial judge's reasons for sentence in which the three factors going to the seriousness of the crime will have been addressed. As a rule, the appeal judge need not repeat this exercise.
- [39] I pause here to note that while the seriousness of the crime for which the offender has been convicted will play an important role in assessing the enforceability interest, other factors should also be taken into account where appropriate. For example, 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 and can, in some cases, tip the scale in favour of detention: *R. v. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193, at para. 15; *R. v. Roussin*, 2011 MBCA 103, 275 Man. R. (2d) 46, at para. 34. The same holds true for lingering flight risks that do not rise to the substantial risk level under s. 679(3)(b). By the same token, the absence of flight or public safety risks will attenuate the enforceability interest.

[Emphasis added.]

- [23] In respect of the reviewability interest, the strength of the appeal or application for leave to appeal is important, beyond the "not frivolous" standard of the first criterion in s. 679(3): see *Oland* at para. 44; *R. v. Porisky*, 2012 BCCA 467; *R. v. Mapara*, 2001 BCCA 508. Here also the level of the legal proceedings is significant.

- [24] In *Drabinsky*, Justice Doherty considered an application for judicial interim release of an applicant sentenced to five years' incarceration on two counts of fraud who had applied to the Supreme Court of Canada for leave to appeal from conviction. All grounds of appeal had been rejected by the appellate court. In dismissing the application for judicial interim release, Justice Doherty gave priority to the enforceability interest in recognition that the grounds of appeal advanced had already been reviewed and rejected on appeal and there was no further right to an appeal. Last, he considered that the length of sentence in that case meant that there would still be a large remainder of the sentence to be served after the leave application was determined.
- [25] A different result obtained in *Boima*. In *Boima*, Madam Justice Dickson observed that the applicant's application for leave to appeal amounted to an attempt "to push beyond the current boundaries of the law". She then observed that sometimes boundaries are pushed successfully, and that the length of sentence imposed in the case before her meant that almost all of the sentence would have been served before the leave application would be known. This latter factor weighed strongly in her view that, combined with the absence of a flight risk and the absence of a concern for public safety, the reviewability interest outweighed the enforceability interest.
- [26] The case before me is between the circumstances of *Boima* and those of *Drabinsky*. Unlike *Boima*, the applicant will not have served all or nearly all of the sentence by the time the leave application is decided. And unlike *Drabinsky*, not all of the applicant's grounds of appeal were rejected by this court. Indeed, unlike *Drabinsky*, in this case two serious errors of law were found before this court applied the curative proviso. By definition the application of the curative proviso, the focus of the applicant's leave application, has not been the subject of appellate review.
- [27] I consider that the reviewability interest here has more force in the circumstances of this application than was the case in *Drabinsky* as this case is more akin to the situation of an appellant advancing his first appeal. As to the merits of the application for leave to appeal, there is difficulty inherent for a justice of this court determining the degree of likelihood that leave to appeal will be granted from a judgment of this court. What I can say is that the grounds of appeal appear to have some substance beyond the non-frivolous standard, and engage issues that the Supreme Court of Canada could consider are of national importance. While I would not dip my toe into predicting the outcome of the application for leave, what I know of the application for leave to appeal suggests it is a real step beyond one "doomed to fail".
- [28] I recognize that the offences of which the applicant has been convicted are ones of serious interference with a person. Yet the seriousness of an offence does not preclude bail. Indeed *Mapara* is a case in which the applicant obtained bail although he had been convicted of first degree murder.

[29] On balance, considering the nature of the challenge to this court's order, I conclude that the reviewability interest marginally outweighs the enforceability interest, and that in the circumstances presented, the applicant has met the requirement of demonstrating that his detention pending determination of his application to the Supreme Court of Canada is not necessary in the public interest, provided that the public safety concerns may be addressed through restrictive terms similar to those imposed by Justice Butler.

[30] I would allow the application on terms.

[Discussion establishing terms (a) through (r).]

"The Honourable Madam Justice Saunders"

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