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CANADA / JUDGMENT

## R. v. Eheler

2020 BCCA 280

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COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 280 R. v. Eheler

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Eheler,

2020 BCCA 280

Date: 20201008

Docket: CA46583

Between:

Regina

Respondent

And

Clayton Archie Eheler

Appellant

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated June 18, 2018 (R. v. Eheler, Chilliwack Docket 62444-1).

Oral Reasons for Judgment

Counsel for the Appellant (via teleconference):

M.A. Nathanson

K. Leslie

H. Parmar, Articled Student

Counsel for the Respondent (via teleconference):

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

September 25, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2020

Summary:

The appellant was convicted of possession of cocaine for the purpose of trafficking. He sought release pending an appeal from conviction. Held: Release granted on a surety bail with electronic monitoring. The appellant has satisfied his onus under s. 679(3) of the Criminal Code.

- [1] DEWITT-VAN OOSTEN J.A.: This is an application for release pending an appeal from conviction.
- [2] Following a trial in the Provincial Court of British Columbia, Mr. Eheler was found guilty in June 2018 of one count of possession of cocaine for the purpose of trafficking (s. 5(2), Controlled Drugs and Substances Act, S.C. 1996, c. 19). In November 2019, he was sentenced to nine years' imprisonment, reduced by 221 days' credit for pre-sentence custody.
- [3] The application for release is governed by s. 679(3) of the Criminal Code, R.S.C. 1985, c. C-46. A three-pronged test applies: (1) the grounds of appeal must not be frivolous; (2) the court must be satisfied the applicant will not flee the jurisdiction and will surrender themselves into custody as required; and (3) detention must not be necessary in the public interest: *R. v. Oland*, 2017 SCC 17.
- [4] Mr. Eheler bears the burden of establishing that he meets these criteria on a balance of probabilities: *Oland* at para. 19. Because of the conviction, he is no longer presumed innocent for the purpose of the analysis.

## Background

- [5] The charge against Mr. Eheler arose out of a drug investigation that targeted more than one suspect. As part of the investigation, police conducted surveillance of a condominium complex in Chilliwack. Mr. Eheler was seen to come and go from the complex. In November 2014, police obtained a search warrant specific to one of the units on the fourth floor. During

the warrant's execution, Mr. Eheler ran from the kitchen area, jumped off the balcony and landed one floor below. He was arrested there. Police found three cell phones in Mr. Eheler's immediate vicinity. Data on one of the phones was being deleted. Police also seized a satchel from Mr. Eheler containing two driver's licenses in his name.

- [6] A large quantity of cocaine was located in the condominium: in excess of 7.8 kilograms of powder cocaine and 1.2 kilograms of crack cocaine. Police found cutting agents, used to dilute powder cocaine, and baking soda, used to make crack cocaine. Some of the powder cocaine was being broken down and weighed. One of the rooms in the unit housed a hydraulic press used for pressing kilogram-size bricks of cocaine. Police also found a gift bag containing seven used cocaine wrappers for kilogram bricks.
- [7] At trial, Mr. Eheler admitted that if the Crown proved he was in possession of the cocaine, as defined at law, it would constitute possession for the purpose of trafficking. As such, the primary issue at trial was whether the Crown proved that Mr. Eheler had knowledge and control of the drugs. The trial judge found that he did.
- [8] After the judge entered the conviction, Mr. Eheler brought an application for a stay of proceedings based on unreasonable delay under s. 11(b) of the Canadian Charter of Rights and Freedoms. The trial judge found a net delay of 29 months and 17 days, which exceeds the presumptive ceiling of 18 months for a trial in the Provincial Court: *R. v. Jordan*, 2016 SCC 27. However, the judge also found exceptional circumstances, including complexity and discrete exceptional events. Ultimately, he concluded that once the exceptional circumstances were accounted for, they reduced the net delay to 17 months and 10 days. This fell below the presumptive ceiling and the judge denied Mr. Eheler's application for a stay of proceedings.
- [9] Mr. Eheler self-identifies as Indigenous and a Gladue report was prepared for sentencing. The report revealed a complicated family dynamic involving "significant dysfunction and unresolved traumas" while Mr. Eheler was a child and young adult. Mr. Eheler's mother struggled with substance abuse. His father had little involvement in his formative years. As a youth, Mr. Eheler was diagnosed as functioning at a low cognitive level and having Conduct Disorder and Attention Deficit Hyperactivity Disorder. In 2007, while involved in criminal conflict with "rivals", I understand that Mr. Eheler was shot multiple times and required hospitalization. He did not finish high school and as an adult, he has worked primarily as a labourer and car salesperson. To his credit, Mr. Eheler has been studying while incarcerated. As I understand it, he may have, or be close to completing, his high school credits.

### Proposed Release Plan

- [10] Mr. Eheler is 38 years old and has been in a 10-year relationship with his current common law partner. He proposes that he live with his father in Chilliwack. His father is prepared to act as a surety, with a \$25,000 cash deposit. Mr. Eheler's former common law partner, Ms.

Morrissey, has also filed an affidavit in this proceeding. They have an 18-year-old daughter. Ms. Morrissey owns a residence valued at \$404,000 and is prepared to act as a surety. Apparently her home is close to the residence of Mr. Eheler's father (about 400 metres away). In light of the minimal distance, Ms. Morrissey deposes that she can assist in supervising Mr. Eheler's conduct in the community.

- [11] In his affidavit, Mr. Eheler says that if released, he intends to work full-time as a forming carpenter for a company in Surrey. His proposed employer has independently confirmed the availability of a position, which involves 40-50 hours per week.
- [12] Crown counsel and Mr. Eheler's lawyer have discussed appropriate terms for a release order in the event this Court sees fit to grant the application. These include bail supervision; a residency requirement; a prohibition on leaving British Columbia; a curfew; and a prohibition on possessing any weapons. Mr. Eheler's proposed residence has been assessed by community corrections authorities as suitable for electronic monitoring. He does not oppose this as a condition of his release should the Court consider it necessary.

### Positions of the Parties

- [13] In support of bail, appellant's counsel contends that: (1) the release plan is more strict than Mr. Eheler's previous bail, with multiple conditions designed to counterbalance any public safety concerns; (2) Mr. Eheler's father and former common law partner are prepared to put their finances and property at risk in support of bail, functioning as an added incentive for compliance; (3) Mr. Eheler understands that if he does not surrender as required, his family and support group will be adversely impacted by his choice and he will likely forfeit the right to advance his appeal; (4) he has strong grounds of appeal and a meaningful review of the verdict is essential to maintaining public confidence in the administration of justice; and (5) Mr. Eheler has a medical condition (severe sleep apnea) that puts him at considerable risk without proper care and, in particular, a risk of significant complications should he contract the coronavirus COVID-19. The latter proposition is supported by a letter from a physician.
- [14] The Crown is opposed to Mr. Eheler's release, even with electronic monitoring. It says that if he obtains bail, there is a substantial possibility Mr. Eheler will not abide by the terms of the release order and he will not surrender himself at the hearing of the appeal. He is said to present a substantial risk of flight, borne out by what the Crown alleges was an attempt to arrange for a false passport while awaiting sentencing before the Provincial Court. The Crown also says public confidence in the administration of justice will be adversely affected by Mr. Eheler's release. He has been convicted of a serious drug offence and has an extensive criminal record, including multiple breaches of court orders. He is said to present an obvious risk to the safety of the public. From the Crown's perspective, Mr. Eheler is advancing grounds of appeal that are not strong and he has not shown that his continued detention is unnecessary within the meaning of s. 679(3) of the Code.

## Discussion

Are the grounds of appeal "not frivolous"?

- [15] The appellant is pursuing two grounds of appeal.
- [16] First, he says the judge erred in law by failing to provide reasons for the dismissal of Charter-based arguments that were advanced at trial.
- [17] The appellant sought to challenge the validity of the search warrant executed on the fourth-floor condominium. He also sought to challenge one or more warrantless entries into the building that allowed police to search its common areas, and conduct surveillance. Police also seized CCTV footage and fob records of the building without a warrant. The appellant was denied standing to bring his challenges after a 10-day voir dire specific to that issue. The standing determinations were made in October 2017, "with reasons to follow". No reasons have been made available.
- [18] The Crown has made enquiries of the Provincial Court to determine whether reasons exist and has been told there are no written reasons on file. Counsel agree that reasons were not provided orally, either at the time of the impugned rulings or later in the trial. Relying on cases such as *R. v. Sheppard*, 2002 SCC 26, and *R. v. R.E.M.*, 2008 SCC 51, the appellant says that the absence of reasons prevents his knowing why he was denied standing and deprives him of an opportunity for meaningful appellate review. He says this constitutes reversible error and requires a new trial.
- [19] The appellant's second ground of appeal challenges the s. 11(b) ruling. He says the trial judge wrongly found that this was an exceptional case for purposes of the delay analysis. More than one accused was involved and disclosure was voluminous, but the prosecution was not particularly complex. There was no wiretap evidence, no undercover operation, and no seizures made from any of the accused prior to execution of the warrant. The trial was focused on the lawfulness of the warrant, its execution, and police surveillance evidence. There is nothing unusual or novel about this kind of evidence.
- [20] The appellant contends that the trial judge also erred in characterizing certain events in the prosecution as exceptional events for which the associated delay should not weigh against the Crown. This included, but was not limited to, delay resulting from a conflict of interest involving a lawyer who represented two of the co-accused and had nothing to do with the appellant. The appellant contends that the s. 11(b) application should have succeeded and the judge was wrong to find no infringement of his right. A successful s. 11(b) application results in a stay of proceedings, which is tantamount to an acquittal.
- [21] The Crown acknowledges that the appellant faces a low threshold in showing that his appeal from conviction is not frivolous. A frivolous appeal is one brought for an improper purpose or that has no reasonable prospect of success: *Oland* at paras. 20, 41; *R. v. Mohsenipour*, 2020 BCCA 112 (in Chambers) at para. 3.

- [22] In light of the low bar, the Crown does not contest that the appellant has met his burden under s. 679(3)(a) on the challenge to the s. 11(b) ruling. It says, however, that reasons on the standing voir dire and related issues may still be forthcoming and, as such, it is too early to know whether the appellant's first ground of appeal has any merit.
- [23] On a review of the application material and the authorities referenced by the appellant in support of his appeal, I am satisfied that neither ground of appeal is frivolous within the meaning of s. 679(3)(a).
- [24] Nor do I consider myself precluded from reaching that conclusion on the first ground because of the possibility that written reasons remain forthcoming. Three years have passed since the standing voir dire and the latest word from the Provincial Court is that there are no written reasons on file. I agree with the appellant's counsel that I need to assess Mr. Eheler's application for release based on where things currently stand. In my view, the first criterion for release pending appeal has been met.

Will the appellant surrender himself?

- [25] The Crown expresses significant concern about a risk of flight. After his initial arrest in November 2014, Mr. Eheler was released by police. The drug charge was not sworn until December 2015. Mr. Eheler surrendered himself and was released a second time, with the consent of the Crown. He remained on that bail until June 26, 2019--three and one-half years. The bail consisted of a \$25,000 recognizance without deposit or surety. While Mr. Eheler was subject to the recognizance, the prosecution consented to variations allowing him to travel outside of the country in March 2016, August/September 2016 and April 2017. As I understand it, he returned to Canada each time, as required.
- [26] In July 2019, Mr. Eheler's bail was revoked. This was after he was found guilty of the drug offence and while awaiting sentencing. The revocation resulted from Mr. Eheler's arrest on allegations that he breached his bail and committed new substantive offences.
- [27] Briefly, police became aware that in March 2019, a passport application had been made in the name of Tyler Van Basten, who is Mr. Eheler's cousin. Attached to the application was a photograph of Mr. Eheler. The application was processed, a passport issued, and the passport was picked up on April 9, 2019, by the person who signed as guarantor.
- [28] Police obtained a warrant for Mr. Eheler's residence to search for the passport. He was arrested during its execution. He had a large amount of cash on him and a valid passport in his name. In the residence, police located ammunition for a rifle and shotgun, an instructional sheet for completing a passport, an allegedly false birth certificate in the name of Mr. Eheler, a press similar to the one used for the production of cocaine at the condominium unit, and two prohibited weapons: a flip knife and a switchblade. At the time, Mr. Eheler was prohibited from possessing weapons, firearms or ammunition pursuant to his bail and at least three separate court orders.

- [29] Subsequent to the revocation of bail, Mr. Eheler was charged with fraudulently obtaining a passport and breach of recognizance (in September 2019). In December 2019, he sought bail on the new charges. By this time, he had been sentenced for the drug offences. Bail was denied. The judge hearing the bail application had "obvious primary and secondary ground concerns". From his perspective, a substantial surety bail, house arrest and electronic monitoring could not reduce those concerns to an acceptable level.
- [30] On May 7, 2020, Mr. Eheler pleaded guilty to the breach of bail recognizance. The passport charge was stayed by the Crown. I understand that the passport has never been used and its current whereabouts are unknown. It has been flagged in Canada's police database and with INTERPOL. However, I am told that some countries do not check these databases and, as a result, it is possible for someone to enter another country with a flagged or suspended passport. At his bail hearing on the breach and passport offence, an affidavit was filed indicating that Mr. Eheler's photo was mistakenly submitted during the application process and that upon realizing this fact, the cousin threw the passport into the garbage and has not seen it since. There is no contradictory evidence before me.
- [31] Although there have been gaps in his prior offending, Mr. Eheler has a substantial criminal record dating back to 1995, with over 40 entries. The record contains numerous findings of guilt as a youth, including offences of break and enter, possession of stolen property, assault, robbery and theft. The youth record also contains multiple entries for breach of court order, resisting or obstructing a police officer, and one count of escape from lawful custody. As an adult, Mr. Eheler has convictions for assault, dangerous driving, theft, break and enter, criminal harassment, uttering threats and drug offences, including the conviction at issue in this case. In 2004, Mr. Eheler was convicted of possession for the purpose of trafficking. That offence involved 8.5 kilograms of marihuana. He was 21 years old at the time of sentencing and received a global sentence of 15 months jail.
- [32] I accept that the circumstances surrounding the false passport are suspicious, notwithstanding the cousin's explanation. Mr. Eheler also has a demonstrated history of non-compliance with court orders, including a conviction for breach of bail while awaiting sentencing on this matter. As such, the Crown is right to be concerned about the level of commitment Mr. Eheler may bring to compliance with the terms of any bail. Mr. Eheler has been sentenced to a significant penitentiary term. There is clearly incentive for him to leave the jurisdiction.
- [33] However, I also accept that Mr. Eheler's proposed release plan is more stringent than the one he was subject to prior to his sentencing. There is no indication that Mr. Eheler has ties to another jurisdiction. His family and support system are in British Columbia. When previously allowed to leave the jurisdiction on bail, he returned. Importantly, his father and Ms. Morrissey are both prepared to put themselves at financial risk in support of Mr. Eheler. This will function as an added incentive to comply.

- [34] I appreciate that the Crown has concerns about Ms. Morrissey's capacity to supervise Mr. Eheler and to render him in the event of non-compliance given their history; the fact that her father was a co-accused of Mr. Eheler; and the fact that Ms. Morrissey was listed as a reference on the impugned passport application. However, if Mr. Eheler is released, she will not be the only person with property or money at stake. His father is also a proposed surety, he has no criminal record, and there is nothing before me that suggests he is not suitable for this role. Bail supervision, an enforceable curfew and electronic monitoring will also mitigate the risk of flight. The electronic monitoring suitability assessment lists Mr. Eheler's father and stepmother as "positive supports". I do not know where the passport is; it has been flagged on police databases in the event someone attempts to use it; and the Crown has stayed the passport charges. There may be suspicion, but there is no proved connection between Mr. Eheler and the production or use of that document.
- [35] On the whole, I am satisfied that Mr. Eheler's flight risk can be effectively mitigated through a stringent release order and that Mr. Eheler has satisfied his onus under s. 679(3)(b).

Is the appellant's detention necessary in the public interest?

- [36] In the context of this case, this aspect of the enquiry requires the Court to consider two factors: (1) protection and safety of the public; and (2) public confidence in the administration of justice: Oland at para. 23.
- [37] On the first factor, Mr. Eheler "must establish that [his] detention is not necessary for the protection or safety of the public having regard to all the circumstances including any substantial likelihood that [he] will, if released from custody, commit a criminal offence or interfere with the administration of justice": Mohsenipour at para. 4.
- [38] For the second factor, I am to weigh the interest in enforceability of the guilty verdict against the interest in reviewability: Oland at paras. 22-24. There is a strong public interest in ensuring that judgments be immediately enforced. At the same time, Canadian society recognizes that the justice system is not infallible. As such, in assessing Mr. Eheler's application for release, I must be mindful that persons who seek to challenge the legality of their convictions should be entitled to a meaningful review process that does not require them to serve a substantial part or the whole of their sentence, only to find that the conviction on which that sentence was based was unlawful: Oland at para. 25.
- [39] Factors to consider in the enforceability versus reviewability analysis include the apparent strength of the grounds of appeal, the seriousness of the offence, the circumstances surrounding the offence, and the length of sentence imposed.

## Protection and Safety of the Public

- [40] The Crown argues that Mr. Eheler presents a substantial risk to public safety in light of his criminal record, the seriousness of the drug offence for which he now stands convicted, and the circumstances surrounding his breach of bail while awaiting sentencing. The Crown says that if he is released, there is a substantial likelihood Mr. Eheler will reoffend.
- [41] The Crown's position is not without merit. Mr. Eheler is only 38 years old, but has amassed a considerable history of offending, both as a youth and as an adult. His record includes offences of violence. In the past, the existence of court orders intended to manage his conduct while in the community and reduce his public safety risk have had limited impact. The circumstances surrounding the breach of bail to which Mr. Eheler pleaded guilty in March 2020 weigh heavily with me. Although subject to bail and awaiting sentencing on a serious drug charge, Mr. Eheler was found to have ammunition and prohibited weapons in his residence. That conduct evinces an abject disregard for court orders or, at the very least, a troubling indifference.
- [42] I agree with the Crown that on the face of it, Mr. Eheler will present an ongoing risk to the safety of the public if released from custody. However, as with his risk of flight, I am satisfied that those concerns can be managed through a stringent surety release that includes bail supervision, a curfew and electronic monitoring. As the appellant aptly points out, a recognizance with sureties is recognized as "one of the most onerous forms of release": *R. v. Antic*, 2017 SCC 27. This form of bail was not previously in place. I also note that despite Mr. Eheler's history of non-compliance, there have also been periods during which he has not been in breach, including a period of at least three and one-half years before the bail offence that arose in the spring of 2019. I cannot ignore that fact in the analysis.

## Public Confidence in the Administration of Justice

- [43] There is no question that Mr. Eheler has been convicted of a serious offence. Cocaine is a Schedule I substance under the Controlled Drugs and Substances Act. The amount of drugs involved was substantial, amounting to almost 10 kilograms. As the Crown has pointed out, cocaine is a "hard and addictive drug". Standing alone, the seriousness of the offence weighs strongly in favour of enforceability.
- [44] In sentencing Mr. Eheler, the judge accepted that the drugs and drug paraphernalia seen by police when searching the Chilliwack condominium were consistent with a "wholesale [drug] operation at the kilogram level". If sold, the quantity of cocaine located in the unit was worth anywhere from \$456,000 to \$913,000, depending on how it was packaged. The offence was obviously motivated by profit and involved a sophisticated operation.
- [45] The judge found that Mr. Eheler was a "trusted" member of the group responsible for the trafficking and "closely involved in the operation ongoing in [the unit]". He accessed the unit using a fob on multiple occasions. A key located near him when arrested operated a deadbolt lock to the unit. He was seen transporting brick-shaped objects into the building.

Those objects were similar in size, shape and colour to the bricks of cocaine located during the search. In my view, the judge's findings about the nature of the drug operation and Mr. Eheler's level of involvement also weigh strongly in favour of enforceability.

- [46] Nine years' imprisonment is a significant sentence. It is a good indication of society's abhorrence of the type of offending for which Mr. Eheler has been convicted. Given the length of sentence, there is little chance that Mr. Eheler will serve the bulk of it prior to the resolution of his appeal from conviction. The transcripts, appeal books and appellant's factum have been filed. Hearing dates of January 25 and 26, 2021, have been secured. That is less than four months away. It is a relevant factor for consideration in the s. 679(3)(c) analysis.
- [47] However, Mr. Eheler has shown considerable strength to his ground of appeal involving the absence of reasons on the standing issues and, in my view, this factor weighs heavily in favour of reviewability. On the face of it, the ability to challenge the November 2014 warrant, search of the common areas and seizure of building-related information was material to making full answer and defence. As I understand it, the warrant was challenged by Mr. Eheler's co-accused and upheld; however, Mr. Eheler was deprived of the opportunity to participate in that challenge, to test the evidence, or to advance an argument to the contrary. No reasons have been made available. There is nothing before me, at present, that indicates that the situation is likely to change. Sheppard makes it clear that deficiencies in reasons for judgment that prevent meaningful appellate review of the correctness of a judicial decision will constitute an error of law (at para. 28). In this case, there is a complete absence of reasons on material issues raised at trial. Although it will be up to a division to decide the merits of the complaints advanced by the appellant, in my view, this ground of appeal is not insignificant. See, for example, *R. v. Sahdev*, 2017 ONCA 900 at paras. 33-34, 44.
- [48] I appreciate the Crown's position that the absence of reasons does not automatically lead to an order for a new trial given the "functional" approach taken on review: *R. v. May*, 2009 BCCA 161 at para. 8; *R. v. Porter*, 2007 BCCA 39. However, the Crown has not shown, for the purpose of this application, how the record would meet that test.
- [49] It is more difficult to gauge the strength of Mr. Eheler's second ground of appeal, recognizing that an appellate assessment of a s. 11(b) ruling involves three different standards of review. This includes a "high level of deference" applied to a judge's attributions of responsibility for delay, which the appellant complains about in this case: *R. v. Pipping*, 2020 BCCA 104 at paras. 92, 94. However, the Crown has acknowledged that this ground of appeal is not frivolous and, as such, the need for reviewability of the s. 11(b) ruling cannot be dismissed.
- [50] The public confidence component of the test for bail pending appeal is measured "through the eyes of a reasonable member of the public -- someone who is thoughtful, dispassionate, informed of the circumstances of the case, and respectful of society's fundamental values, including those that speak to collective and individual interests": *Mohsenipour* at para. 8.

- [51] Applying that lens to the circumstances before me, I am of the view that the interest in enforceability--although strong--is outweighed by the interest in reviewability, particularly in light of the strength of the first ground of appeal and the availability of a stringent surety bail, with a cash deposit and electronic monitoring to counterbalance public safety concerns.
- [52] In reaching this conclusion, I have also taken into account the fact that in 2018 Mr. Eheler was diagnosed with severe sleep apnea. He has provided a letter from a physician indicating that he requires specialized equipment to effectively manage this risk. Mr. Eheler deposes that despite his requests for same, he has not received access to that equipment while incarcerated.
- [53] The Crown questions the credibility of the assertion that Mr. Eheler's requests have gone unanswered, based on its own correspondence with the custodial facility in question; however, it does appear that--for whatever reason--Mr. Eheler presently does not have access to what he needs. The physician's letter speaks to various health risks associated with the apnea diagnosis, including a risk of sudden death, heart attack and acute respiratory failure. The letter also states that the COVID-19 pandemic presents significant risk for Mr. Eheler. Enquiries made of the custodial facility at which he is housed reveal that he has already once tested positive for COVID and recovered. There is no information before me ruling out the possibility of a second infection. Correspondence with the facility also details the steps taken to minimize the risk of infection in the institution. However, I am satisfied in the circumstances of this case that Mr. Eheler's particular health vulnerabilities support his application for release. They are not dispositive, but certainly relevant to the analysis.
- [54] In support of its position on the application, the Crown referred me to two decisions that it says are apt because release was denied on public protection grounds in light of criminal records for violence and histories of interfering with the administration of justice: *R. v. Lohrer*, 2003 BCCA 161, and *R. v. Wattley*, 2004 BCCA 471.
- [55] I have reviewed those cases. No two cases will ever be exactly alike and, as is to be expected, there are distinguishing features. *Lohrer* involved circumstances of premeditated and significant violence directly perpetrated against two individuals. The appellant in that case had a substantial criminal history, convictions for "subverting" the administration of justice and, importantly, he did not have bail pending his trial for which he was able to demonstrate compliance for a substantial period (at paras. 12-13). In *Wattley*, the appellant was also convicted of personal violence. There was material before the Court showing that he had a lengthy criminal record for violence and "about two-thirds of the offences on [that] record were committed while he was serving a community sentence for a previous offence" (at para. 17).

[56] I appreciate the point made by the Crown with reference to these cases, namely, that public safety risks, particularly in light of a demonstrated history of violent or other forms of serious offending, can tip the scale in favour of continued detention under the public confidence analysis. However, whether that should be the case requires an individualized assessment in the context of an appellant's counterbalancing features. I do not find that it tips the scale here.

## Disposition

[57] For the reasons provided, I am satisfied that Mr. Eheler has met the test for release pending his appeal from conviction under s. 679(3) of the Criminal Code.

[58] Accordingly, I order that the appellant, unless he is detained for some cause other than the conviction and sentence in this case, be released from custody pending the determination of his appeal from conviction upon his entering into a release order with a promise to pay \$100,000, two sureties and a \$25,000 cash deposit. The terms and conditions of the release order shall be as provided to the Court by counsel at the hearing of the application, with the following additional conditions:

- This release order and its terms, including the daily curfew, will be electronically supervised.
- The appellant shall comply with all the rules of electronic supervision and the electronic supervision regulations, including the wearing of and care for the electronic supervision equipment.

"The Honourable Madam Justice DeWitt-Van Oosten"

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