

CANADA / JUDGMENT

R. v. K.F.E.

2024 BCSC 1366

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Supreme Court of British Columbia

DECIDED

11 April 2024

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. K.F.E.,

2024 BCSC 1366

Date: 20240411

Docket: 111395-2; 111395-7

Registry: Kamloops

Regina

v.

K.F.E.

This matter is subject to a publication ban imposed pursuant to

s. 486.4(2.2) of the Criminal Code, R.S.C. 1985, c. C-46.

Before: The Honourable Justice Donegan

Corrected Judgment: The Oral Reasons for Judgment were corrected

at para. 20 on August 1, 2024

Oral Reasons for Judgment on an

Application for Judicial Interim Release

Counsel for the Crown:

A. Janse

Counsel for the Accused:

C. McLaughlin

Place and Date of Trial/Hearing:

Kamloops, B.C.

April 10, 2024

Place and Date of Judgment:

Kamloops, B.C.

April 11, 2024

- [1] THE COURT: This is an application brought by the accused for his judicial interim release, pending his trial on this Indictment. Having had his previous release order revoked pursuant to s. 524 of the Criminal Code, R.S.C. 1985, c. C-46 [Code], he is in a reverse onus situation and must show cause that his detention is not justified under any of the three enumerated grounds contained in s. 515(10) of the Code.
- [2] I will begin with a brief review of K.F.E.'s personal circumstances and proposed release plan. I will then summarize the salient features of the facts concerning the alleged offences, and the history of the accused's various release orders and failures to appear before this court. I will then review the relevant legal principles, before giving my reasons for the decision I have reached.

K.F.E.'s Personal Circumstances and Proposed Release Plan

- [3] K.F.E. will be 40 years old tomorrow, I understand. He has an employment history and is seen by his most recent employer as a hard worker with a positive attitude. He has the support of his parents, who were here yesterday and are here again today, his sister and his new partner. He has two children, a four-year-old daughter, C., and a 12-year-old son, K. C.'s mother is the complainant in this matter. The accused has not seen his daughter, I understand, for about a year now. He sees K. most weekends and pays child support to K.'s mother, at least until his recent incarceration. He has a good relationship with K., and he also has a good relationship with his new partner's adult son.
- [4] The accused has struggled with drug and alcohol addiction, although I do not know the extent or the duration. From the circumstances of the allegations and the information I have been given, it seems that cocaine appears to be one of the substances involved in his life.
- [5] In addition to these criminal proceedings, the accused has been involved with the Ministry of Children and Family Development ("MCFD") and family litigation with the claimant in recent years as well. For roughly the last three years, he has been involved with counselling for family matters, drug and alcohol counselling, and anger and emotional management counselling. He has a good relationship with his current counsellor. He continues that

relationship, finding that he derives benefit from it. He has started to attend more formal meetings with respect to his addiction concerns, specifically Narcotics Anonymous meetings, while he has been in custody. He appears to be committed to maintaining his sobriety.

- [6] The accused did not have a criminal record before these allegations. He now does. On April the 3, 2024, he entered guilty pleas to five offences for failing to comply with release orders under s. 145(5) of the Code. These offences generally relate to the accused having impermissible contact with the complainant, being in [location omitted] when he was not supposed to be, and not complying with curfew. He received sentences ranging from seven to 30 days incarceration for these offences.
- [7] The accused seeks his release on this Indictment. He proposes to be released on what is considered the highest form of bail. His parents have offered to stand surety in the amount of \$3,000, utilizing the funds they have previously deposited in court on other release orders. He also proposes to be placed under electronic monitoring and abide by any conditions the court sees fit, including house arrest. His parents are very supportive of their son and propose to have him live with them in their home in Chase, and to ensure his compliance on bail, should he be released. They have each sworn a surety declaration, which I have reviewed. There is a technical suitability report before the court, which indicates that their home is suitable for that purpose.

Circumstances of the Allegations

- [8] The complainant and the accused were, I understand, in a domestic relationship for several years. They have a daughter together, C. The Crown alleges that starting around April 2020, which is about four years ago, the accused's behaviour became increasingly erratic and paranoid. He came to believe that the couple's decreased level of sexual activity was due to the complainant's use of a vibrator, and that she was hiding this vibrator from him. K.F.E.'s behaviour, it is alleged, escalated to the point where he expressed the belief that the complainant was concealing this vibrator in her vagina and was controlling it through her phone or by other means. This led to a number of alleged incidents where the accused was said to have held the complainant down and forcefully inspected her vagina, including by penetrating her with his fingers. While the first four counts of this Indictment relate to the four events of sexual assault that the complainant identifies by date: April 28, 2020; October 15, 2020; December 27, 2020; and March 8, 2021, the complainant alleges that these vaginal searches happened regularly.
- [9] Police became involved in February 2021, and the accused was ultimately arrested and released by police on an undertaking with conditions, on March 19, 2021. He provided a warned statement to police, in which he made references to the complainant's "implanted vibrator" and that she could control same from her phone.

- [10] Counts 5, 6, 7, 8, and 9 on this Indictment relate to events that are alleged to have occurred a few months later, while K.F.E. was bound by this police undertaking. The Crown alleges that on July 26, 2021, the accused convinced the complainant to bring C. to spend some time with him at a beach. They hung out together for a few hours as a family, before the complainant returned home with C. It is alleged that K.F.E. then began texting her, asking to come over. Ultimately, she relented and said that K.F.E. could come to say good night to C. The Crown alleges that while there, the accused became agitated because he felt it was taking the victim too long to put the child to bed. The complainant then spent some time with the accused downstairs, where he consumed alcohol and cocaine. She used cocaine, as well, before going to bed with C. around midnight.
- [11] The Crown alleges that the accused became even more agitated at this. He ripped the blankets off the complainant and C. and turned on the light, causing C. to wake up. He is alleged to have pinned the complainant and the child down in the bed, for several minutes, while searching the complainant's vaginal area for the imagined vibrator. C. began crying. The complainant was able to push the accused off them, pick C. up, and leave the bedroom with her. The accused is then alleged to have assaulted the victim by hurting her hand while trying to take the phone away. The child was saying, "No, Daddy. No." The accused is then alleged to have followed the complainant around the house, preventing her from leaving, while ranting about this vibrator.
- [12] I am told a home security video captured part of this interaction. On the video, the complainant is seen holding the child throughout, and the child is visibly upset. I am told the accused can be seen putting his head by the complainant's groin area and can be heard talking about the vibrator. The three come in and out of camera range and, at one point, while out of camera range, it is alleged that the accused confined the complainant in a corner and penetrated her vagina with his fingers while saying, "Where is it?" The event is alleged to have ended when the complainant was able to escape the house, go around the house, while the accused was outside looking for her, and lock him outside. K.F.E. sent her several text messages, including ones indicating that he was chased by the police.
- [13] Arising from this alleged incident, K.F.E. has been charged in Counts 5 and 6 with failing to comply with conditions of the undertaking by which he was bound, by having contact with the complainant and by going to a place where she may be found. He has also been charged in Counts 7, 8, and 9, with assaulting his daughter, as well as sexually assaulting and confining the complainant.
- [14] Police arrested K.F.E. on that day, July 26, 2021. He gave another warned statement, where I am told he again referred to the complainant refusing to have sex with him, and reiterated his beliefs about her having a concealed vibrator. Rather than bring him before the court, police inexplicably chose to release him again that day, on an undertaking with conditions.

- [15] Counts 10, 11, 12, and 13 relate to allegations that the accused failed to comply with this particular undertaking, on August 14 and 16, 2021. On both of those days, K.F.E. is alleged to have had contact with the complainant and to have gone to a place where she may be found, contrary to his release order. Both allegations involved the accused yelling and swearing at the complainant. The accused was arrested on August 16, 2021, and this time he was brought before the court.
- [16] The next day, August 17, 2021, the accused was released by Judge Burdett on a release order, with a number of conditions, with a promise to pay in the amount of \$1,000. No deposit or surety was required.
- [17] Other allegations led to the accused being before the court again, for another bail hearing, on September 2, 2021. On this day, Judge Bennett released K.F.E. on a release order with a number of conditions, this time requiring a \$2,000 cash deposit, but without any surety. I am advised that K.F.E.'s parents paid this cash deposit, and their son was then released.
- [18] Count 14 on the Indictment relates to an allegation that K.F.E. did not comply with a condition of this particular release order, in that he consumed drugs on November 29, 2021. The Crown alleges here that the accused was required, in the family proceedings, to be tested for substances and that he tested positive for cocaine on that day.
- [19] Counts 15 and 16 relate to allegations that the accused did not comply with his release order again by having contact with the complainant on both April 21 and April 23, 2022. Both allegations involve the accused yelling at the complainant, the latter of which is captured, at least in part, on video.
- [20] These breach allegations brought K.F.E. back into custody yet again. On April 26, 2022, after another contested bail hearing, Judge Phillips released K.F.E. on a release order with a number of conditions. This time, he was released with a \$3,000 deposit and one surety, [name omitted]. The additional \$1,000 deposit was again posted by his parents, I am told. K.F.E. was again released.
- [21] K.F.E. was arrested and released again by Judge Dickey on June 10, 2022, on the same terms, and most of the same conditions, with some variations.
- [22] In July 2022, the Crown amalgamated all of the charges, which required another release order. Judge Armstrong cancelled all of his other bail and imposed this release order, on the same terms as the previous one, on July 19, 2022.
- [23] K.F.E. continued to breach this release order thereafter.
- [24] On July 14, 2023, K.F.E. was back in custody on multiple breach allegations. After another contested bail hearing, Judge Rogers released K.F.E., with less onerous conditions and a different surety with whom he was required to reside in Kelowna. His surety, at that time, was someone named M.J., who I am told is either his friend or perhaps a girlfriend. K.F.E. has subsequently pled guilty to some of those breach allegations, the ones that were before

the court that day. Specifically, he has pled guilty to failing to comply with his release order between January 1 and April 30, 2023, as well as between January 4 and January 16, 2023. These are two of the convictions I referred to earlier.

- [25] Following this July 14, 2023 release order, K.F.E.'s compliance on bail became even worse. He has now pled guilty to failing to comply with this bail order on three other occasions in 2023; specifically on September 23; October 6; and between November 29 and December 19. Although he was far away and no longer having contact with the complainant contrary to his release order, he was not living with his surety as required. He was working at a location where he did not have permission to work at and, after November 29, 2023, he stopped reporting to his bail supervisor and essentially went AWOL.
- [26] The first warrant relating to these breach allegations issued on November 17, 2023. At this point, K.F.E. was still in touch with his bail supervisor as he was required to do. He was directed by his bail supervisor to report in person to the bail office on November 29. He did not. Rather, he reported by telephone. On the phone, he was advised about the warrant for his arrest and was directed to turn himself in. Instead of doing so, K.F.E. chose to go off the radar and stop reporting. Another warrant issued for the December breach allegation on December 27, 2023. Police went to great lengths to try to find K.F.E. in order to execute these two warrants, but their efforts were to no avail.
- [27] Meanwhile, K.F.E.'s counsel at that time was working very hard on his behalf. His counsel prepared two pre-trial applications and five days of court time were set aside for them to be heard the week of January 15, 2024. As the two applications involved both the complainant and the MCFD, these parties each retained counsel and prepared response materials. All four counsel, that is the Crown, K.F.E.'s counsel, counsel for the complainant, and counsel for the MCFD prepared for the hearing to be held the week of January 15, 2024. All four counsel attended the morning these applications were set to commence.
- [28] K.F.E. was very aware he was required to attend court for his pre-trial applications commencing on January 15. He actually swore an affidavit in support of his applications, not long before this date. He also told his employer, a few days before this court appearance, or what was to be this court appearance, that he had court on January 15. He even contacted his counsel the morning of January 15, 2024 to say that he was on his way to court and was intending to turn himself in on his outstanding warrants. That day, we all waited, and we waited, even into the afternoon. K.F.E. knew that we were waiting, but he chose not to attend. He absconded. I issued an unendorsed warrant for his arrest for his failure to attend court as required by law.
- [29] At this point, that is January 15, 2024, three warrants were outstanding for the arrest of K.F.E. On that day, his prior counsel understandably applied to be removed as counsel of record. I granted the application. I also dismissed the accused's two pre-trial applications for want of prosecution.

- [30] With his February 5 trial date rapidly approaching, many witnesses under subpoena for that trial date, and eight days of court time set aside for it, police again made efforts to find the accused, but they could not. K.F.E.'s surety claimed to have no knowledge about his whereabouts. She told police that he had not been living with her, as his release order required, for months.
- [31] K.F.E. knew these warrants existed, but he chose to remain in hiding. Witnesses remained notified for trial. Court and counsels' time remained reserved for trial. I was alerted to the Crown's intention to perhaps try to conduct the trial in K.F.E.'s absence, if he failed to attend court for his trial on February 5.
- [32] K.F.E. knew his trial was scheduled to start on February 5. I reached this conclusion for many reasons, which I will now outline.
- [33] On February 1, 2024, K.F.E. left messages at the Crown counsel office indicating that he knew he had court on February 5 at 10 a.m. He left phone numbers where he could be reached, his father's phone number and another phone number. He was also in contact with Ms. McLaughlin's office, his anticipated new counsel, around this time as well, indicating that he wished to retain her for his upcoming trial.
- [34] Ms. McLaughlin attended court, as did, if memory serves, Mr. McNamee, as well, on February 5 at 10 a.m. They appeared only as friends of the court at that stage, expecting to see K.F.E. personally at court. He was not there. I stood court down until 11 a.m. for counsel to make efforts to determine his whereabouts. This proved futile. I nevertheless gave him a further opportunity to attend court, and stood down until 2 p.m. At that time, the Crown relayed that she had been informed by Ms. McLaughlin that K.F.E. had been in contact with her and that Ms. McLaughlin had advised him that if he did not turn himself in by 4 p.m. that day, pursuant to the warrant, that she would not represent him.
- [35] I stood court down again until 3 p.m., to give K.F.E. more time to come to court. He was advised, through counsel, that he had to be here by 3 p.m., but he did not attend.
- [36] At 3 p.m., the Crown commenced an application to proceed with the trial in the absence of the accused. This is a rare application. During the course of the hearing, I concluded, on one of the questions that I had to resolve on the application, that K.F.E. had absconded. There is no question that he had. As the application was nearing its conclusion, the Crown became aware that the accused had turned himself into custody. He had turned himself in to custody not in Kamloops, but in Kelowna. His processing and transportation to Kamloops required the trial to be adjourned to the following morning.

- [37] The following morning, with K.F.E. now in attendance in custody, I revoked his release order and acceded to the defence request for an adjournment of the trial, in order to give his new counsel time to properly prepare. I did so, despite my finding that the accused had shown no respect for the orderly and expeditious administration of justice, and despite my finding that he had not been diligent in attending to his responsibilities to the court, as required by law.
- [38] K.F.E. has now retained Ms. McLaughlin and Mr. McNamee. They have brought, on his behalf, one pre-trial application that is scheduled to be heard today and tomorrow. The trial has now been rescheduled for this July, a relatively short period of time from now, for a period of eight days. While in custody, he has entered guilty pleas, as I have indicated, to some outstanding breach matters.

Analysis: Has the Accused Shown Cause?

- [39] In general terms, pursuant to s. 515(10) of the Code, detention of an accused is only justified if one or more of the following circumstances is established:

- 1 Detention is necessary to ensure the accused's attendance in court;
- 2 Detention is necessary for the protection or safety of the public; or
- 3 Detention is necessary to maintain confidence in the administration of justice.

- [40] The Crown submits that the accused's application fails on all three grounds.

- [41] In *R. v. Antic*, 2017 SCC 27, the Supreme Court of Canada outlined the principles and guidelines the court should adhere to when applying the bail provisions in a contested hearing. Of course, some of these principles have now been codified. These principles include that:

- a) Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail;
- b) Section 11(e) of the Charter guarantees both the right not to be denied bail without just cause, and the right to bail on reasonable terms;
- c) Save for exceptions, an unconditional release order is the default position when granting release;
- d) The "ladder principle", as it is called, articulates the manner in which alternative forms of release are to be imposed. Release is favoured at the earliest reasonable opportunity and having regard to the statutory criteria for detention on the least onerous grounds. This principle must be adhered to strictly;

- e) Each rung of the ladder of the types of release set out in s. 515(2) must be considered individually, and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, the court instructs us that it is an error of law to order a more restrictive form of release without justifying the decision to reject the less onerous one. Of course, this principle is now codified in s. 515(2.01);
 - f) A release order with sureties is considered one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate;
 - g) It is not necessary to impose cash bail if accused persons or their sureties have reasonable assets. A release order with sureties is functionally equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2)(d) or (e), cash bail should be relied on only in exceptional circumstances in which a release order with sureties is unavailable;
 - h) If cash bail is ordered, the amount should not be set so high that it effectively amounts to a detention order. It must be no higher than necessary to satisfy the concerns that would otherwise warrant detention and be proportionate to the means of the accused and the circumstances of the case;
 - i) Terms of release imposed may only be imposed to the extent they are necessary to address concerns related to the statutory criteria for detention, and to ensure that the accused can be released. They must not be imposed to change an accused's behaviour or to punish an accused.
- [42] Section 493.1 of the Code requires that I give primary consideration to the release of the accused at the earliest opportunity, and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practical for the accused to comply with.
- [43] The principles of restraint and review were emphasized again, as Ms. McLaughlin touched on, in *R. v. Zora*, 2020 SCC 14, including the requirement that any conditions of bail must be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the accused's risks, in terms of the statutory grounds for detention: para. 6.
- [44] Informed by all of these principles and with this overall approach in mind, I turn now to the accused's application for release. I will start with the primary ground.

Primary Ground

- [45] Section 515(10)(a) of the Code is aimed at ensuring the attendance of the accused at court. Issues that are commonly considered under this ground for continued detention include, but are not limited to: the nature of the offence and potential penalty; the strength of the evidence against the accused; the accused's ties to the community; the accused's record of compliance with court orders on previous occasions; and, the accused's behaviour prior to apprehension, in other words whether there is evidence of flight.
- [46] As a bail decision does not present a judge with an all or nothing choice between detention and absolute freedom, the s. 515(10)(a) analysis requires me to assess whether ensuring the attendance of the accused at trial can be achieved by an effective plan of supervision, involving an appropriate release order with conditions.
- [47] The circumstances of this case, including the accused's behaviour since the alleged offences, give me no confidence that K.F.E. would attend court if released on any conditions, or on any release plan. The nature of the offences alleged, particularly the violent offences, are clearly very serious, with the potential for a significant jail sentence. The accused's jeopardy is very high.
- [48] I would characterize the Crown's case, as it has been presented at this stage, bearing in mind that it is untested, as relatively strong. It not only relies on the complainant's evidence, but it also relies on the video recording related to one of the violent allegations, as well as two warned statements where the accused is said to have acknowledged some key features of the allegations.
- [49] I recognize that the accused has ties to the community, particularly through his very supportive parents, his sister, and his new partner. These supports, while I accept they are genuine, can give the court no comfort that this accused would comply with conditions and attend court as required, under any release plan. The accused's parents had deposited significant cash amounts to secure their son's release in the past. They have always been a support for him, but their support unfortunately could not positively influence their son's behaviour.
- [50] Similarly, [his partner's] support, while I accept it is genuine as well, can give the court no comfort either. She has been in the accused's life since May 2023. In her letter, from just earlier this week, she writes that the accused has been very open and transparent with her about all that was, and is, happening in his life. She writes that the two of them have spent most weekends together since they met. If this is true, and I have no reason to doubt that it is, then K.F.E. must have been open and transparent with her about his warrants, breaches, the absconding, all of it. While she too may be a valuable community support for K.F.E., her presence in his life also did nothing to positively influence his behaviour to have K.F.E. attend to his court responsibilities.

- [51] As the Crown argues, K.F.E. has demonstrated that he will do what he wants, despite all of the efforts, the sacrifices, and the love that has been shown by those that care about him.
- [52] The accused did not have a criminal record before these charges arose, but his dealings with the court and his compliance on bail since these charges arose demonstrate that he has no ability to comply with court orders. He breached his release order five times, as he pled guilty to, over extended periods of time. He is alleged to have breached court release orders a further nine times, as set out in this Indictment. He is alleged to have committed further serious substantive offences, while on release.
- [53] K.F.E. has not been charged with failure to appear in court, at least I have not been advised that that is the case, but I have been witness to his deliberately not attending court on two occasions. Not only did he deliberately not attend court on these occasions, he misled his counsel, both his former counsel and his current counsel, and thus the court, about his intention to appear when this was clearly not the case.
- [54] The accused has been given every opportunity, for three years, to comply with release conditions and to attend court when required by law. Although consistently breaching court orders and being arrested on allegations of further breaches and substantive crimes, every judge so far has released K.F.E. with release orders progressively moving up the Antic ladder, to the very highest forms of release, on very onerous conditions. His promises now that he will comply, again, with the most onerous form of release, on any conditions, and will attend court as required, ring very hollow indeed.
- [55] No form of release, not even the highest form of release, including sureties, a cash deposit, onerous conditions, including electronic monitoring, could ensure the attendance of this accused at his trial, in all of these circumstances. I am satisfied that his detention is necessary to ensure his attendance in court in order to be dealt with according to law. In other words, K.F.E. has failed to meet his onus on the primary ground.

Secondary and Tertiary Grounds

- [56] If it were necessary to go further, I would also find that K.F.E.'s detention is necessary for the protection or safety of the public, and to maintain confidence in the administration of justice.
- [57] For all the reasons I have explained, I find there is a substantial likelihood of K.F.E. offending if released on bail, and that no release plan could adequately prevent or reduce the danger he poses to public safety to an acceptable level. He has demonstrated that he is not capable of complying with court conditions.

- [58] I also find, considering the enumerated factors in s. 515(10)(c) and the principles outlined by the Supreme Court of Canada in *R. v. St-Cloud*, 2015 SCC 27 that a reasonable person properly informed about the philosophy of legislative provisions, Charter values, and the circumstances of this case, would have their confidence undermined in the administration of justice if I declined to order detention in this case, where it is so clearly justified.
- [59] Overall, the accused has failed to discharge his onus of showing cause why his detention in custody is not justified or necessary under s. 515(10) of the Code, despite his counsel's very able submissions. I order him detained.

"S.A. Donegan J."

DONEGAN J.

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