

CANADA / JUDGMENT

R. v. K.H.

2026 ONCA 89

COURT

Court of Appeal for Ontario

DECIDED

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R. v. K.H.

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Judges

Lauwers, Peter D.

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. K.H., 2026 ONCA 89[1]

DATE: 20260206

DOCKET: M56640 (COA-25-CR-1699)

Lauwers J.A. (Motion Judge)

BETWEEN

His Majesty the King

Respondent

and

K.H.

Applicant/Appellant

Julia Kushnir, for the applicant/appellant

Philippe Cowle, for the respondent

Heard: January 28, 2026

REASONS FOR DECISION

- [1] The applicant was convicted of sexual interference and sentenced to 4.5 years. He appeals his conviction and seeks bail pending appeal.
- [2] The applicant faced two charges and was acquitted on the second. The trial judge described the counts in her reasons on findings of fact for the purpose of sentencing, at para. 2:

Count One on the indictment related to incidents that were alleged to have taken place between September 1, 2017 and September 30, 2020, when [the complainant] and her family resided in an apartment on Cosburn Avenue. Count Two related to incidents alleged to have taken place between February 1 and June 30, 2021, when [the complainant] and her family resided at an apartment on Trudelle Avenue.

- [3] The Crown summarizes the factual background in its letter stating the Crown's position on this application:

The applicant was convicted after a trial by jury of sexual interference and sentenced to 4.5 years in prison. The complainant was between the ages of 12 and 14 at the time of the offences. The applicant touched and fondled her breasts, buttocks and vagina with his hand and mouth while she slept in her bed. The applicant also rubbed her buttocks and vaginal area with his penis in other rooms of her apartment when no one was home. The applicant touched the victim sexually on a regular basis during the relevant period.

The offences came to light when the applicant confessed to the complainant's mother that he had engaged in sexual intercourse with the victim and had done "everything" with her when she was 12 to 13 years old. The phone call was recorded and was tendered in evidence. [Footnotes omitted].

- [4] The Notice of Appeal specifies three grounds of appeal:

1. That the trial judge issued an improper corrective instruction in her charge to the jury to disregard the defence theory of the case; namely, that the Appellant's confession to the complainant's mother was an attempt at suicide, analogized to "death by cop", thereby leaving the jury improperly equipped to decide the case according to the law and the evidence (contrary to the Supreme Court's direction in *R. v. Abdullahi*, 2023 SCC 19, at paras. 4, 34-37, and 57, and *R. v. Goforth*, 2022 SCC 25, at paras. 20-22);
2. That the verdicts were inconsistent, given the necessity of finding the whole of the complainant's evidence incredible and/or unreliable in order to acquit on count two, which consisted of essentially identical allegations regarding alleged sexual interference to that in count one, which took place years earlier. The two counts in the Indictment alleged a single, lengthy, continuous period of abuse with a single brief pause;
3. That the motions judge erred in dismissing the Appellant's s. 11(b) application for a stay of proceedings, by fundamentally misapprehending the evidence in two crucial ways:
 - a) by misapprehending the evidence with respect to defence disclosure requests and follow-ups for same, particularly by finding that there were no follow-ups, despite the record very clearly indicating that there were (namely, in the Form 17 from original trial counsel);
 - b) in finding that the Appellant did not raise the issue of delay following the adjournment and setting of new dates in a timely enough fashion (per *R. v. K.J.M.*, 2019 SCC 55), despite the record very clearly indicating that the issue had been raised on at least two prior occasions, some 9 months prior to the newly-scheduled trial dates.

I. The Governing Principles for Bail pending appeal [5] For bail pending a conviction appeal, the applicant must establish the three elements set out in s. 679(3) of the Criminal Code, R.S.C. 1985, c. C-46: (1) that the appeal or application for leave to appeal is not frivolous; (2) that he will surrender himself into custody in accordance with the terms of the order; and (3) that his detention is not necessary in the public interest.

- [6] The Crown argues that the application fails the first and third elements of the test. He submits that the grounds of appeal are frivolous. He also submits that the applicant should remain incarcerated on the third ground alone: that his detention is necessary in the public interest to preserve public confidence in the administration of justice.
- [7] As the Supreme Court noted in *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 41, the "not frivolous" criterion "operates as an initial hurdle" that "allow[s] for the immediate rejection of a release order in the face of a baseless appeal". The court must conduct a preliminary assessment of the strength of the grounds of appeal, based on judicial knowledge and experience: *R. v. Ruthowsky*, 2018 ONCA 552, at para. 15.
- [8] The public interest element in s. 679(3)(c) of the Criminal Code must be tested under the framework set out by this court in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32, [1993] O.J. No. 2627 (C.A.), per Arbour J.A. (as she then was), cited with approval in *Oland*, at paras. 23-26.

- [9] Under s. 679(3)(c) of the Criminal Code, there are two components to consider: public safety and public confidence in the administration of justice: Oland, at para. 23; Farinacci, at paras. 41-44. Within the public confidence component, I am obliged to weigh the factors of reviewability and enforceability. As Arbour J.A. wrote in Farinacci, at para. 41:

The concerns reflecting public interest, as expressed in the case law, relate both to the protection and safety of the public and to the need to maintain a balance between the competing dictates of enforceability and reviewability. It is the need to maintain that balance which is expressed by reference to the public image of the criminal law, or the public confidence in the administration of justice.

- [10] In striking the balance between enforceability and reviewability, “appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public”, being “someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society’s fundamental values”: Oland, at para. 47, citing R. v. St-Cloud, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80.

II. The Principles Applied 1. Do the grounds of appeal meet the minimal standard required to meet the “not frivolous” criterion? [11] I assess each of the three grounds of appeal.

- [12] The first ground is best captured by counsel for the applicant’s statement in the Notice of Application:

The Applicant’s first ground of appeal is that the trial judge issued an improper corrective instruction in her charge to the jury to disregard the defence theory of the case; namely, that the Appellant’s confession to the complainant’s mother was an attempt at suicide, analogized to “death by cop”, thereby leaving the jury improperly equipped to decide the case according to the law and the evidence[.] [Footnote omitted].

- [13] The correcting instruction was this:

In her closing yesterday, counsel for [K.H.] made reference to the expression “suicide by cop” and suggested that this case is no different. There is no evidence before you about what constitutes suicide by cop and when that may happen. I instruct you to decide the case on the evidence before you in this case. You must not speculate as to whether this is an analogous situation.

- [14] In my view, the instruction did not tell the jury to “disregard the defence theory of the case”. That theory was, as the trial judge set out at para. 33 of her reasons on findings of fact, that the applicant “falsely confessed to having sexual intercourse with [the complainant] to incite [her mother] to kill him.” That theory was fully explained to the jury by the defence. The use of the “death by cop” analogy was inappropriate and rested on no evidence as to what it meant.

- [15] The trial judge’s correcting instruction did not take the primary defence away from the jury. This ground has no merit.

[16] The second ground of appeal is that the verdicts were inconsistent and therefore unreasonable. Counsel argues:

The Applicant's second ground of appeal is that the verdicts were inconsistent, given the necessity of finding the whole of the complainant's evidence incredible and/or unreliable in order to acquit on count two, which consisted of essentially identical allegations regarding alleged sexual interference to that in count one, which had occurred years earlier. The two counts in the Indictment allege a single, lengthy, continuous period of abuse with a single brief pause. [Footnote omitted].

[17] With respect, this misdescribes the counts. As the trial judge noted in her reasons on findings of fact, at para. 2:

Count One on the indictment related to incidents that were alleged to have taken place between September 1, 2017 and September 30, 2020, when [the complainant] and her family resided in an apartment on Cosburn Avenue. Count Two related to incidents alleged to have taken place between February 1 and June 30, 2021, when [the complainant] and her family resided at an apartment on Trudelle Avenue.

[18] In the date range of the first count, on which the applicant was convicted, the complainant was between 11 and 14 years of age. The applicant's confession to the complainant's mother was that when the complainant was 12-13 years of age they had done "everything". In the date range of the second count, on which the applicant was acquitted, the complainant was 15 years of age. The differences between the two counts are manifest. It was open to the jury to reach different conclusions, having likely been given the standard jury instruction that it could do so. This ground of appeal is very weak.

[19] The applicant's third ground of appeal is that the motion judge erred in dismissing his s. 11(b) Charter application for a stay of proceedings based on delay. Counsel argues that the motion judge erred in two ways:

- a) by misapprehending the evidence with respect to defence disclosure requests and follow-ups for same, particularly by finding that there were no follow-ups, despite the record very clearly indicating that there were (namely, in the Form 17 from original trial counsel);
- b) in finding that the Appellant did not raise the issue of delay following the adjournment and setting of new dates in a timely enough fashion (per *R. v. K.J.M.*, 2019 SCC 55), despite the record very clearly indicating that the issue had been raised on at least two prior occasions, some 9 months prior to the newly-scheduled trial dates.

[20] The motion judge's reasons are detailed and comprehensive. The overall delay was described in para. 4 of the s. 11(b) reasons:

The trial is now set to proceed on October 28, 2024, and expected to conclude by November 7, 2024. That date would be 34 months and 25 days after the arrest of the applicant. It would be 32 months and 23 days after the Information was sworn.

[21] The motion judge's conclusion on the net delay was set out in paras. 39-40 of the s. 11(b) reasons:

The total time from February 15, 2022 to November 27, 2024 is 996 days. The additional 50 days for the delay in swearing the Information leaves a total of 1,046 days. From 1,046 days, 270 days must be deducted for the time attributable to the defence until the anticipated completion of the new trial date. That leaves a net delay of 25.86 months.

The net delay of 25.86 months is less than the Jordan ceiling, which is 30 months. As mentioned, where the delay is below the ceiling, a stay will be rare and granted only in the clearest of cases: Jordan, at paras. 82-83. This is not one of those rare cases.

[22] The applicant's first argument concerns delay in Crown disclosure. The motion judge rejected that complaint, noting at para. 37:

The initial disclosure to counsel in June 2022 referred to the existence of a video and other potential evidence. There was no specific follow-up by the defence to seek production of those items before further disclosure by the Crown in May 2023. The record reveals that counsel worked in a cooperative and professional manner to complete the outstanding disclosure. There is no reason to doubt that the Crown would have followed up in a timely way on a follow-up request if it had been made in a timely fashion long before the first trial date in May 2023. [Emphasis added.]

[23] It was not obviously unfair for the motion judge not to hold this delay against the Crown. The Form 17 notation was not about the disclosure that caused the adjournment.

[24] The second misapprehension alleged by the applicant concerns his efforts at first instance to vindicate his s. 11(b) rights.

[25] The motion judge found that:

[25] ... On May 27, 2024, the parties attended a JPT to confirm the admissions and issues for trial. Counsel for the applicant raised the issue of s.11(b) of the Charter for the first time.

...

[36] The applicant did not specifically raise concerns about the trial delay until over a year after the first trial date. If the concern had been raised earlier, the court and Crown may have been able to accommodate an earlier trial.

[26] The applicant's claim of misapprehension rests on email correspondence between defence counsel and the Crown dated January 24 and February 14, 2024. Defence counsel said that she and the Crown had "discussed the possibility of canvassing the court for an earlier trial" and she told the Crown she wanted to see what availability the court had in August and September. This exchange took place six months after the trial dates were confirmed and included no mention of s. 11(b) of the Charter. The suggestion that the motion judge misapprehended the record is not made out.

- [27] The applicant's third ground of appeal, that the motion judge erred in dismissing his s. 11(b) Charter application for a stay of proceedings based on delay, is very weak.
2. Is the applicant's detention necessary in the public interest? [28] As noted earlier, under s. 679(3)(c) of the Criminal Code, there are two components to consider: public safety and public confidence in the administration of justice. The Crown concedes that only the second component, public confidence, is engaged in this application. Consideration of the public confidence component involves striking the balance between enforceability and reviewability.
- a. Enforceability
- [29] With respect to enforceability, "[p]ublic confidence in the administration of justice requires that judgments be enforced": Farinacci, at para. 42. In this case, the enforceability interest is strong, which weighs against the applicant's release.
- [30] The seriousness of the crime figures in the assessment of the enforceability interest: Oland, at para. 37. This is undoubtedly a very serious offence. This court has identified sexual offences relating to children as being on the higher end of the gravity spectrum in the context of bail pending appeal applications: R. v. J.B., 2023 ONCA 264, at para. 17, citing R. v. M.S., 2022 ONCA 348, at para. 15; see also R. v. C.M., 2023 ONCA 700, at para. 5; R. v. G.B., 2023 ONCA 621, at para. 10; and R. v. J.C., 2023 ONCA 617, at para. 6.
- b. Reviewability
- [31] As the court in Oland notes, "in assessing the reviewability interest, the strength of an appeal plays a central role": at para. 40. The assessment of the strength of the appeal is "more pointed" than the analysis of the "not frivolous" criterion above: at para. 41. Justice Moldaver explained, at para. 44:

In conducting a more pointed assessment of the strength of an appeal, appellate judges will examine the grounds identified in the notice of appeal with an eye to their general legal plausibility and their foundation in the record. For purposes of this assessment, they will look to see if the grounds of appeal clearly surpass the minimal standard required to meet the "not frivolous" criterion. [Emphasis added.]

- [32] The grounds of appeal are quite weak and do not, for the reasons set out above, "clearly surpass" the "not frivolous" criterion.

III. Disposition [33] I take the perspective of a reasonable member of the public, one who is thoughtful, dispassionate, informed of the circumstances of the case, and respectful of society's fundamental values. In this case, the seriousness of the crimes and weakness of the grounds of appeal elevate the enforceability concern over the reviewability concern.

- [34] Bail is denied.

"P. Lauwers J.A."

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- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
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