

CANADA / JUDGMENT

R. v. Kapoor

2021 BCSC 2516

COURT

Supreme Court of British Columbia

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2021 BCSC 2516 R. v. Kapoor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kapoor,

2021 BCSC 2516

Date: 20211203

Docket: X082028

Registry: New Westminster

Regina

v.

Sapna Kapoor

Before: The Honourable Mr. Justice Blok

Oral Reasons for Sentence

Counsel for the Crown:

W.E. Dawson, Q.C.

Counsel for the Accused:

P. Herrera

(as Agent for B. Movassaghi)

Place and Dates of Hearing:

New Westminster, B.C.

November 15 and

December 3, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 3, 2021

- [1] THE COURT: I am about to give oral reasons for sentence in this matter. Should a transcript be ordered, I reserve the right to edit the transcript to correct any minor errors, to make it more readable, and to put in headings and full citations and matters of that sort. In performing that editing function I will not, of course, change the underlying reasoning or the ultimate result.

I. Introduction

- [2] On January 8, 2021, a jury convicted Sapna Kapoor of attempting to utter a forged passport application, which was Count 1, and Count 2, making a false statement to a passport officer. Today's hearing is for the purpose of sentencing Ms. Kapoor.

II. Procedural History

- [3] This matter has had a long and difficult history which I will summarize briefly. The offences took place in late September and early October 2017. Charges were sworn on March 8, 2018. Four trial dates were arranged. The matter proceeded that fourth time, but the trial, which was scheduled for 10 days before judge and jury, proceeded for a full 22 days. The trial was a very challenging one.
- [4] Ms. Kapoor has been represented by a number of different counsel, five or six, it would appear, but she represented herself at trial. She had counsel on this sentencing hearing.
- [5] Following the verdict, Ms. Kapoor departed Canada to travel to India, where she is from and where her family lives. I emphasize that her release conditions did not prohibit that travel. Her stated reason for leaving was to care for her ailing father. However, from that point onward she maintained she was unable to return to British Columbia for sentencing and this caused adjournments to scheduled sentencing hearings, being those set for May 19 and July 30, 2021, as well as an unsuccessful application by Ms. Kapoor to adjourn a third sentencing date scheduled for November 15, 2021.
- [6] On November 15, 2021, Ms. Kapoor did not attend court for sentencing and Crown proceeded with an application pursuant to s. 475 of the Criminal Code to declare that Ms. Kapoor had absconded. I allowed that application.

- [7] This brings us to today's date. Ms. Kapoor did not attend this sentencing hearing in person, though she wished to monitor the proceedings by telephone. I presume she is still in India. Although she is an absconding offender, I granted her permission to monitor the proceedings in that way.

III. Circumstances of the Offences

- [8] At the time of these offences, Ms. Kapoor had very recently separated from her husband, Sonam Makkar. The relationship was very brief as there was just 16 months between the date of the marriage and the date of separation. They did have a son, who was born in June 2017. The marriage was difficult and fractious. They separated in early September 2017 in highly acrimonious circumstances.
- [9] The evidence shows Ms. Kapoor attended at a passport office in Surrey on September 27, 2017, and presented a passport application for their infant son. That application bore a purported signature of the child's father, Mr. Makkar. The matter had been flagged by an alert system that Mr. Makkar had initiated with Passport Canada, and so the application was not processed in the end, which explains the charge and ultimate conviction for attempting to utter a forged document.
- [10] The verdict of the jury necessarily means that they were satisfied:
1. that Ms. Kapoor attempted to cause the Passport Program to use a passport application;
 2. the application was forged;
 3. Ms. Kapoor knew it was forged; and
 4. Ms. Kapoor presented the application with the intent that the application be used or acted upon as if it were genuine.
- [11] The second offence was committed a few days later. The flagged passport application caused passport officials to make further inquiries. A passport officer performed a parental verification check by phoning Ms. Kapoor, who told the officer that Mr. Makkar was not available, that he had left the country, but he had signed the passport application. That statement was false.
- [12] The verdict of the jury establishes that: Ms. Kapoor made an oral statement to a passport officer that Mr. Makkar signed the application; Ms. Kapoor made the statement for the purpose of procuring a passport for their son; the statement was false; and Ms. Kapoor knew it was false.

IV. Victim Impact

- [13] Mr. Makkar provided a victim impact statement. To summarize it very briefly, he said he has lived in constant fear that Ms. Kapoor might try to abduct their child back to India, a country which is not a signatory to the Hague Convention. He notes Ms. Kapoor has shown little respect for Canadian courts and Canadian laws, including violating her release conditions, and she has conducted herself in many other unscrupulous ways that have heightened his concern that she will abduct their child.

V. Circumstances of the Offender

- [14] Ms. Kapoor is 44 years old. She was born in India and is an Indian national. She is well educated, having earned a master's degree in business administration, and from about 2013 to perhaps 2017 or 2018, she worked with an international business consulting firm as a software consultant. In the latter part of that employment, she was located in the United States.
- [15] Her counsel informs the court that Ms. Kapoor is currently not working. She is said to be caring for her sick father.
- [16] Counsel said these proceedings have impacted Ms. Kapoor greatly as she has lost her job and lost her immigration status. Counsel also says that Ms. Kapoor suffers from depression and anxiety.

VI. Positions of Crown and Defence

A. Crown

- [17] At this sentencing hearing, the Crown led evidence from Mr. Makkar in order to prove certain matters the Crown regards as aggravating circumstances. These included what Mr. Makkar said were false reports by Ms. Kapoor to police that he had assaulted her at or around the time of separation, which resulted in a denial of his parental access to their child for a considerable time, as well as two later allegations by Ms. Kapoor made in 2020 that he had assaulted their son, which similarly caused him to be investigated by both the police and the Ministry of Child and Family Development.
- [18] Finally, Mr. Makkar noted emails, or an email, which revealed that in February 2018, Ms. Kapoor appealed to the local Indian consulate for permission to travel to India without a passport for the child because of various matters she perceived as injustices that were preventing her from getting a passport by traditional means.
- [19] Turning to the Crown's sentencing submissions proper, the Crown submits that an appropriate sentence would be from six to 12 months in jail, plus three years' probation, with probation conditions crafted to minimize the risk of unauthorized removal of the child from Canada.

- [20] In the event that the Court finds a conditional sentence order to be appropriate, something the Crown opposes, the Crown suggests a one-year conditional sentence order ("CSO") with some punitive conditions, plus the same three years' probation.
- [21] The Crown referred to certain circumstances that it alleges are aggravating. These include the following:
1. the offences involved a concerted attempt to get a passport for an infant son, a child that would not be able to alert authorities; and
 2. the accused is a mature person, 40 years old at the time of the offences, and so she was not a young, inexperienced adult who made just a single minor misrepresentation.
- [22] On that point, Crown noted that Ms. Kapoor has been a world traveller, being born in India and working both there and in the United States. Crown alleges Ms. Kapoor was familiar with the strict immigration rules in Canada and elsewhere, and the need for honesty in immigration matters. The Crown says that, in any event, the need for honesty in completing the passport was certainly brought to her attention in several parts of the passport application itself. Finally, on the matter of her personal characteristics, the Crown says Ms. Kapoor is an intelligent, educated woman who is an IT specialist, who worked for an international company.
- [23] Continuing with the list of aggravating factors alleged by the Crown, Crown says, next, there was significant planning and organization involved and this was not an impulsive act on the sudden.
- [24] Crown says that Ms. Kapoor was trying to circumvent and defeat the family court process for obtaining an order to permit the issuance of her child's passport to her. Crown says Ms. Kapoor knowingly engaged in a deceit and fraud, as she clearly knew Mr. Makkar would not consent to her obtaining a passport for the child.
- [25] Crown submits that Ms. Kapoor engaged in numerous acts of deceit, including - and this is a list of items that essentially include the various other false aspects of the passport application: telephone numbers; the involvement of a guarantor who the Crown says never came to B.C. and Ms. Kapoor did not go to the guarantor's apparent location in Ontario; the false statements made to the passport officer in that telephone check; and finally, in letters to Passport Canada officials, Ms. Kapoor claimed she needed the passport for work when, in fact, her intention was to take the child to India.
- [26] Crown refers to the criminal allegations of assault she made against Mr. Makkar in September 2017, which Crown observes were acknowledged by Ms. Kapoor in a discussion with her friend as being false and having been made up to force her husband to sign the passport, all of which had a serious effect on Mr. Makkar.

- [27] Crown says that it is an aggravating circumstance that she was so determined to take her son to India that she sought permission to do so from the Indian consulate without a passport for the child.
- [28] Finally, the Crown says it is an aggravating factor or circumstance that Ms. Kapoor made subsequent false statements to the RCMP alleging that Mr. Makkar had assaulted their son, which subjected Mr. Makkar to further investigations of the type I have already described.
- [29] The Crown said the only mitigating circumstance is the fact that Ms. Kapoor has no criminal record.
- [30] The Crown also referred to the following cases:
- R. v. Farhan, 2013 ONCJ 768 [Farhan];
 - R. v. Kirpichova, 2015 ONCA 621;
 - R. v. Consiglio, [2005] Q.J. No. 11711 (Que. S.C.);
 - R. v. Ping, [1988] B.C.J. No. 2261 (B.C.C.A. Chambers) [Ping];
 - R. v. Franklin, [1993] B.C.J. No. 1928 (B.C.C.A.) [Franklin];
 - R. v. Fawaz, [2010] B.C.J. No. 530 (B.C.S.C.) [Fawaz];
 - R. v. Chartier, [2007] O.J. No. 3969 (Ont. C.A.);
 - R. v. Allen, [2017] O.J. No. 240 (Ont. C.A.) [Allen]; and
 - two cases on the effect of immigration considerations at sentencing, R. v. Li, [2017] B.C.J. No. 2683 (B.C.C.A.), and Tran v. Canada (Public Safety), [2017] 2 S.C.R. 289.
- [31] From those cases, the Crown noted that courts have emphasized the importance of maintaining the integrity of Canada's passport system and the serious nature of passport offences. The Crown also emphasized those factors here and notes that Ms. Kapoor's culpability is very high.
- [32] The Crown argues that the most pressing sentencing factors here are deterrence, both specific and general. The Crown says that when taken together with Ms. Kapoor's lack of insight and remorse, the fact that she takes no responsibility for her actions but instead blames others, and her disregard of the authority of the Court as demonstrated throughout the trial of this matter, the Crown argues that a CSO is not appropriate here.

B. The Defence

- [33] Defence counsel was somewhat hampered in her role by the limited opportunity to take instructions from Ms. Kapoor. Nonetheless, counsel submits that it would be appropriate for Ms. Kapoor to serve her sentence in the community. Counsel argues that the offences here were not violent and Ms. Kapoor has no criminal record, and so jail is simply not necessary. With strict terms, a CSO can fulfil all necessary sentencing objectives.
- [34] Counsel also noted that collateral immigration consequences should be taken into account.
- [35] Counsel relayed Ms. Kapoor's own statement that she did not commit these offences for monetary gain, but instead she was consumed by her motherly love for her son in proceeding as she did.
- [36] Ms. Kapoor addressed the Court when invited to do so. Ms. Kapoor noted the unfair and, she says, unfounded assumption that she had intended to abduct their child. She noted that she has been subject to bail conditions for three years and in that time there have been no incidents of child removal.
- [37] She also referred to a court decision from 2018 in what I presume was her family litigation where, according to her, a judge found in her favour on, I assume, any abduction risk.

VII. Discussion

A. Principles of Sentencing

- [38] The Criminal Code sets out a number of general sentencing principles. Section 718 sets out the fundamental purposes of sentencing being:

718 to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

- [39] Other sections of the Criminal Code declare the following fundamental sentencing principles:

- a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender;
- a sentence should be increased or reduced to account for any aggravating or mitigating circumstances of the offence or the offender;
- where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and finally,
- all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

[40] As for the maximum sentences available, the maximum sentence on Count 1, which is attempting to cause the passport office to use a passport application, knowing it to be forged, the maximum sentence is five years by operation of s. 463 of the Criminal Code, which is the provision dealing with attempts.

[41] The maximum sentence on Count 2, making a knowingly false statement to a passport officer, is two years.

[42] While the Crown does not argue that these maximum sentences are engaged in this case, these maximums do demonstrate the seriousness with which Parliament views these types of offences.

B. Aggravating and Mitigating Circumstances

[43] I agree with the Crown that Ms. Kapoor's offending involved substantial planning and implementation. These offences were not the result of momentary lapses of judgment. In this regard, I note that at one point Ms. Kapoor enlisted the aid of an unknown male to impersonate Mr. Makkar, which male returned the message left by a passport officer and, speaking as Mr. Makkar, purported to confirm that he, "Mr. Makkar", had signed the application. This element of planning and implementation is an aggravating factor.

[44] It is also an aggravating factor that Ms. Kapoor submitted this forged passport application for an infant against the express wishes of the father, the other parent, for the purposes of removing the child from this jurisdiction.

[45] Further, this was done at a time Ms. Kapoor had recently filed court applications in family court seeking authority to obtain a passport, meaning that her offending was intended to circumvent or thwart the court process. This, too, is aggravating.

- [46] The Crown has referred to various other misbehaviour on Ms. Kapoor's part said to be aggravating, including making false criminal reports of assault against Mr. Makkar which had very adverse effects on him, but I conclude that these are allegations of other uncharged criminal acts that have not been proven in court and, in any event, are not directly related to these offences.
- [47] Crown argued that these matters show an ongoing pattern of deceit and of blaming everyone but herself. I would observe that the latter trait is evident from the trial itself, as her defence essentially consisted of allegations that Mr. Makkar was an abusive man who, through sinister, controlling, and indeed Machiavellian behaviour, orchestrated events to bring about these charges.
- [48] For these reasons, I do not find the latter matters alleged by the Crown to be aggravating circumstances as such, although they do provide important context for the offences and the offender.

VIII. Analysis

- [49] I begin with a brief analysis of the cases cited by the Crown. The Crown said the case closest on point is Farhan, where an 18-month sentence was imposed for obtaining passports using forged documents and for possessing eight forged passports. It was said that the offender had these documents, or acquired these documents, in an effort to retrieve his children, who were with his separated spouse in Kuwait and which spouse had legal custody pursuant to a Kuwaiti court order.
- [50] I agree there are some factual similarities in this case, but the number of forged documents in that case and the lengthy period of the offending over many months, it would appear, or some months at least, distinguish it from the present. The offender in that case appears to have used many forged documents to create numerous false identities and to obtain multiple forged passports through multiple applications, including the submitting of false affidavits.
- [51] The court in that case also noted the significant aggravating factor that the offender had misled the court in important respects. In that case, the intention to abduct children seems clear. In the case at bar, the issue is instead of the risk that there could have been an abducted child.
- [52] The cases I find most useful of those cited by the Crown are: Ping, where a six-month jail sentence was imposed for obtaining passports for the offender's family and himself, I assume, using false identification documents; Franklin, where a four-month jail sentence was imposed for obtaining a passport under a false name, although I note there was a guilty plea involved there; Fawaz, where a 10-month sentence was imposed for using a false passport several times; and Allen, where a six-month conditional sentence was imposed where the offender used a false passport to make multiple trips to the United States. I note that Allen also involved a guilty plea on the part of the offender. The range reflected in those

cases is four to 10 months, with a conditional sentence imposed on one occasion involving a guilty plea.

[53] I turn briefly to the subject of immigration consequences for the offender. There are immigration consequences or at least potential immigration consequences in this case that are properly taken into account here. I note that two sections of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA], are potentially engaged, the first being s. 36(1)(a), which says:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

[54] Section 64 of the IRPA provides as follows:

64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months

[55] So those are the parameters set out in the IRPA.

[56] This brings me to the question of a conditional sentence. I accept that conditional sentences can fulfil the objectives of denunciation and deterrence in appropriate cases, particularly when there are restrictive or punitive conditions imposed. However, like some of the authorities referred to by the Crown, I view an attempt to obtain a passport using forged documents and subsequently lying about it to a passport officer as very serious offences, and they are rendered more serious by the context in which these offences took place in this case. That context includes the certain knowledge by Ms. Kapoor that a passport for the child was against the other parent's wishes. I agree that it is important to protect the integrity of our passport system, and so general deterrence is a very important factor here.

[57] As for Ms. Kapoor specifically, I note that she is unremorseful, which is not an aggravating factor, I hasten to add, but this, together with her other attributes, leads me to conclude that she is unlikely to comply with the conditions of a CSO. The fact that she was non-compliant, defiant, and at times essentially ungovernable during the trial reinforces this view.

- [58] I add that she seems to have no insight into her criminal behaviour and she does not acknowledge what she has done or the harm she has done, and instead she blames others, particularly Mr. Makkar. She claims to have acted out of motherly love and that there was no risk of child abduction, but she has failed to recognize that her conduct reasonably gave rise to those very fears.
- [59] In these circumstances, I conclude that only actual jail time would meet the sentencing objective of specific deterrence.
- [60] I have given careful thought to the length of sentence and I have given particular consideration to possible collateral immigration effects. Ms. Kapoor may already have done irreparable damage to her future immigration status, but I am satisfied I can impose a sentence that meets all sentencing objectives here without creating potential immigration consequences.
- [61] Accordingly, Ms. Kapoor, I sentence you to a jail term of six months less a day, or 179 days, followed by a three year probation order.
- [62] As the offences are essentially part of the same offending, the sentences will be the same for each count and they will be concurrent.
- [63] I turn now to the conditions of probation, which will be, if I did not say -- yes, I did say, three years' probation. I regret that I did not have time to review these in detail, but I am going to just pause in my reasons for sentence to ask defence counsel, in particular, whether there were any specific comments that she wished to make on these terms. Do you wish a few minutes?
- [64] CNSL P. HERRERA: Mr. Justice, the only condition I have submissions on is the reporting condition. Mainly that it would be too onerous for Ms. Kapoor to have in-person reporting once a month and then weekly reporting by telephone, when the underlying behaviour is not the type of offence, such as an intimate partner violence offence, where reporting would facilitate counselling or anything like that. I would submit that the reporting condition does not have any real function in relation to the other proposed conditions by my learned friend.
- [65] THE COURT: Any comment?
- [66] CNSL W. DAWSON: Yes. That condition was there to ensure that the bail super -- not the bail super, the probation officer knows that she is in fact in Canada, and that can be done by having her attend once a month in person, and then for the remaining three weeks to report by telephone. I don't think that's unduly onerous in the circumstances.
- [67] THE COURT: All right. The conditions will be as follows, beginning with the compulsory conditions.
- [68] By way of preamble, Ms. Kapoor, you must comply with the conditions of this probation order for a period of 36 months. The conditions of the order are:

1. You must keep the peace and be of good behaviour;
2. You must appear before the court when required to do so by the court;
3. You will provide your address and telephone number and not change either of those without the written permission of your probation officer;
4. You shall remain in British Columbia unless you have the written permission of your probation officer;
5. You are not to remove, or permit any other person to remove Ivaan Makkar from British Columbia or Canada;
6. You are not to take the child, Ivaan Makkar, in a vehicle or permit any other person to take the child in a vehicle more than 50 kilometres from your residence;
7. You are not to apply for any passport or travel documentation in Canada or India for the child, Ivaan Makkar;
8. You are not to be in possession of any identification documents, passports, travel documents, driver's licences, birth certificates, social insurance numbers or invoices in a name other than Sapna Kapoor or the legal name of the child, Ivaan Makkar;
9. You are to report to your probation officer 14 days in advance of any plans to travel outside of British Columbia and provide the address and telephone number of your travel destination, the duration of your trip, and the purpose of your travel, supported by proof of airline tickets, itinerary, and hotel bookings or any other documentation requested by your probation officer;
10. You are not to attend within a two-kilometre radius of the Vancouver International Airport or within 100 metres of the Canada-U.S. border when the child, Ivaan Makkar, is in your custody or care;
11. You will deposit your passport with your probation officer within 48 hours after the commencement of probation. The passport shall remain in the custody of the probation officer, except for authorized travel, and will be provided 48 hours prior to departure upon confirmation that the child, Ivaan Makkar, is with his father, Sonam Makkar. You must return your passport to the probation officer within 24 hours of returning to Canada. You will not have custody or care of the child, Ivaan Makkar, during any periods that you are in possession of your passport; and finally
12. You will carry with you and produce a copy of this probation order to a Canadian immigration official prior to leaving Canada.

[69] And those conclude the conditions.

[70] Normally there would be a process for processing an offender for the sentencing and the probation terms, but essentially this matter is -- I just remind everyone that this matter is proceeding as a sentencing in absentia and Ms. Kapoor is merely monitoring the proceedings with my permission.

[71] I believe that concludes everything. Is there anything that arises, Ms. Dawson?

[72] CNSL W. DAWSON: No, thank you, Mr. Justice.

[73] CNSL P. HERRERA: Mr. Justice, just the victim fine surcharge. I would make submissions for the court to consider waiving it, considering she has no current employment and in Canada has no prospect for future employment.

[74] THE COURT: I am going to order it waived in these circumstances.

[75] CNSL P. HERRERA: Thank you, Mr. Justice.

[76] THE COURT: Thank you for raising that. All right, that concludes this matter. Thank you very much.

[Note: The matter was recalled to Court on December 8, 2021 to add the following reporting condition, which had been inadvertently omitted:

You must report in person to a probation officer within two business days after your release from custody. Thereafter, you must report as directed by your probation officer, who may allow reporting by telephone, except that your reporting shall be at least once a month in person.]

"Blok J."

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