

CANADA / JUDGMENT

R. v. Pham

2024 BCCA 366

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 366 R. v. Pham

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pham,

2024 BCCA 366

Date: 20241105

Dockets: CA49722; CA49740

Between:

Rex

Respondent

And

Kien Trung Pham

Applicant

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Before:

The Honourable Justice Dickson

The Honourable Justice Winteringham

The Honourable Justice Riley

On appeal from: Orders of the Supreme Court of British Columbia, dated July 31, 2023 (conviction) and March 4, 2024 (sentence) (R. v. Pham, 2023 BCSC 2079 and 2024 BCSC 467, Nanaimo Docket 86452-2).

- and -

On appeal from: Orders of the Supreme Court of British Columbia, dated January 16, 2024 (conviction) and March 4, 2024 (sentence) (R. v. Pham, 2024 BCSC 467, Nanaimo Docket 87674-2).

Counsel for the Applicant:

T.C. Paisana

S.K. Pringle

Counsel for the Respondent:

S. Manery

Place and Date of Hearing:

Vancouver, British Columbia

September 19, 2024

Place and Date of Judgment:

Vancouver, British Columbia

November 5, 2024

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Justice Dickson

The Honourable Justice Riley

Summary:

The applicant was convicted of multiple drug trafficking and firearms offences and sentenced to 15 years imprisonment. He appealed the convictions and sentence. A judge in chambers dismissed the applicant's application for release pending appeal. Pursuant to s. 680 of the Criminal Code, the Chief Justice directed a review of the chambers judge's decision, concluding the applicant had met the "arguable" threshold on two bases, that the chambers judge erred: (1) by failing to meaningfully consider the applicant's three years of bail compliance; and (2) by

failing to consider whether the applicant's proposed restrictive release conditions reduced the risk he posed to public safety to an acceptable level.

Held: Review application dismissed and chambers judge's order confirmed. Regarding the first ground, the chambers judge considered the applicant's bail compliance but was not satisfied his bail history countered the other significant and compelling factors at play. Regarding the second ground, the chambers judge considered the applicant's release plan and all that it entailed. After applying the correct legal principles, the chambers judge concluded it would not attenuate the risk to public safety. She committed no legal error when she reached this conclusion.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

- [1] Section 680 of the Criminal Code, R.S.C. 1985, c. C-46 provides that this Court may review certain bail decisions at the direction of the Chief Justice. If the Chief Justice directs a review, as he did here, s. 680 allows a division of this Court to vary or substitute a bail decision made by a judge of this Court.
- [2] On March 22, 2024, the applicant brought an application for release pending appeal, pursuant to s. 679 of the Criminal Code. A judge sitting in chambers dismissed the applicant's application, finding his release was not in the public interest due to public safety and enforceability issues (*R. v. Pham*, (22 March 2024), CA49722, CA49740). The applicant applied for a review of the chamber judge's decision pursuant to s. 680.
- [3] On August 16, 2024, Chief Justice Marchand directed a review of the chambers judge's decision before a division of this Court: *R. v. Pham*, 2024 BCCA 297. Chief Justice Marchand was satisfied that two of the errors alleged by the applicant met the "arguable" threshold in that the chambers judge erred in principle by failing: (1) to meaningfully consider the applicant's three years of bail compliance; and (2) to consider whether the applicant's proposed restrictive release conditions reduced the risk he posed to public safety to an acceptable level.
- [4] The applicant submits that a proper consideration of these factors should tilt toward release even though he has been convicted of serious offences and faces a lengthy prison sentence if his appeals are unsuccessful. To support his position, the applicant emphasized that he was on a release order for three years, demonstrated compliance with the terms of his release, and showed he could reside safely in the community.
- [5] The Crown respondent says otherwise and takes the position that the release application should be dismissed. The Crown contends that the applicant has failed to demonstrate that the chambers judge committed any material error in fact or law or that the decision to deny bail was clearly unwarranted in the circumstances. The Crown submits that releasing the applicant to live at his family home, as proposed, would not adequately address the risk to the public if he continues to coordinate the distribution of drugs or the risk of gun violence.

The Crown says that the applicant's continued detention is necessary because the public confidence in the administration of justice requires that enforceability of his 15-year jail sentence for international methamphetamine trafficking and firearms offences prevails over the review of his sentence.

[6] For the reasons set out below, I would confirm the chambers judge's decision.

Background

Conviction and Sentence

- [7] On July 31, 2023, the applicant was convicted of multiple drug trafficking and firearms offences in a judge-alone trial in Supreme Court: *R. v. Pham*, 2023 BCSC 2079. The trial judge found the applicant "to be the principal and directing mind of a mid to upper-level drug trafficking operation dealing in methamphetamine, fentanyl, and cocaine". In his reasons for sentence (*R. v. Pham*, 2024 BCSC 467 ("RFS")), the judge summarized the offences:
- [2] I found Mr. Pham to be the principal and directing mind of a mid- to upper-level drug trafficking operation dealing in methamphetamine, fentanyl, and cocaine. Counts 1-4 have to do with shipments of methamphetamine dispatched via courier on May 6, 15, 17 and 23, 2019, all of them destined for New Zealand, amounting to 7.5 kilograms in total. Counts 5 and 6 refer to fentanyl and cocaine in amounts of approximately 6 ounces and 28 grams, respectively. These substances were found on May 24, 2019, during the warranted search of an apartment on Summerhill Place here in Nanaimo that I concluded had been rented and used by Mr. Pham exclusively for the purpose of operating his narcotics trafficking business. Counts 8-11 refer to firearms and ammunition found in the course of the same search.
- [3] At Mr. Pham's sentencing hearing, I also dealt with Nanaimo indictment 87674, which alleges four counts of possession of a firearm while prohibited. These relate to the same firearms referred to in Counts 8-11 of the trial indictment, and the same circumstances concerning their location and seizure by the RCMP. Mr. Pham entered not guilty pleas to these counts, but invited me to convict him of all four on the basis of my findings of fact on the trial indictment. He is the subject of two lifetime prohibitions from possessing prohibited weapons, the first imposed in Ontario in 2004, the second in Quebec in 2008. At the time of his present offences, he continued to be bound by the 2008 Quebec prohibition order from possessing firearms other than prohibited or restricted firearms.
- [8] On March 4, 2024, the judge sentenced the applicant to 15 years imprisonment.

Legal Framework - s. 680 Review

[9] The relevant language in s. 680 read:

680 (1) a decision made by a judge of the court of appeal under section 679 may be reviewed by that court and [if granted leave] that court may, if it does not confirm the decision,

- (a) vary the decision; or
 - (b) substitute another decision that, in its opinion, should have been made.
- [10] Section 680 sets out a two-stage process. At the first stage, the Chief Justice (or his designate) decides whether to direct a review of the order made by the chambers judge. If a review is directed, the matter proceeds to the second stage, where a division of the Court (or if the parties agree, a single judge) reviews the chambers judge's order.
- [11] In *R. v. Oland*, 2017 SCC 17, a case involving a s. 680 review of a bail pending appeal decision, Justice Moldaver described the scope of the review:
- [61] Ultimately, in my view, a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles. First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied the judge erred in law or in principle and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.
- [12] To the extent the s. 680 review alleges errors by the chambers judge, the review is, in effect, an appeal of the chamber judge's order: *R. v. Jaser*, 2020 ONCA 606 at para. 43.
- [13] Therefore, the order is to be reviewed for a material error in law or principle and for palpable and overriding factual error. The review also allows for intervention where the reviewing division concludes that the decision was clearly unwarranted. In *Jaser* at para. 44, Justice Doherty commented that he saw "no distinction between a reasonableness inquiry and a review to determine whether a decision was 'clearly unwarranted': see *R. v. M. (K.)* (2017), 137 O.R. (3d) 721, [2017] O.J. No. 5432, 2017 ONCA 805, at para. 33".

Chambers Judge's Decision

- [14] Before the chambers judge, the applicant presented a release plan that included two sureties (his mother and sister) promising a sum of \$300,000, electrically monitored house arrest, and restrictions on his internet use.
- [15] The chambers judge started with a summary of the offences and highlighted aspects of the trial judge's sentencing reasons. She then set out, correctly, the legal framework governing the bail decision:
- [5] In the case of a conviction appeal, s. 679(3) of the Criminal Code sets out the criteria the appellant has to meet on an application for release on bail pending appeal, namely:
- (a) his appeal is not frivolous;
 - (b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.

[16] The chambers judge, citing paras. 23-25 of Oland, set out the public interest criterion and its two components: the protection and safety of the public and the maintenance of public confidence in the administration of justice. The chambers judge went on to note that the public confidence component involves weighing two competing interests: (1) enforceability--the need to respect the general rule of the immediate enforceability of judgments; and (2) reviewability--that persons who challenge the legality of their convictions should be entitled to a meaningful review process that does not require them to serve any part of a custodial sentence based on an unlawful conviction: at para. 6.

[17] The chambers judge examined each of the s. 679(3) criterion. With respect to the nature and strength of the appeal, the chambers judge considered the following grounds of appeal raised by the applicant, namely that the trial judge erred: (1) in holding that the applicant did not have standing to allege a breach of his privacy rights with respect to packages seized by the police from the courier; (2) in holding the Loomis Express employees were not acting as state agents; and (3) in failing to exclude evidence from cell phones pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [Charter]: at para 7.

[18] Here, the chambers judge acknowledged the appeal was in its infancy and that she did not have the benefit of the voir dire reasons for judgment relating to the first two issues advanced on the appeal. Nevertheless, for the purpose of the bail application, the chambers judge found that the " grounds of appeal [met] the 'not frivolous' standard ": at para. 10.

[19] Next, the chambers judge considered whether the applicant would surrender himself as required. Here, she considered that the applicant:

- a) had connections to the community where he proposed to reside, but also an inconsistent history regarding obeying court orders: at para. 11;
- b) in his favour, was released on bail in September 2020 and demonstrated compliance for three years, including after his conviction, and importantly, after sentencing submissions were made in support of what was expected to be a significant sentence: at para. 12;
- c) proposed to live with his mother and sister in their home in Nanaimo where he had lived since he and his family came to Canada as refugees when he was 14 years old and that he had connections to the Nanaimo community where he had lived and worked in the past: at para. 13;
- d) proposed his mother and sister would act as sureties and were prepared to pledge \$300,000 (His sister has a "responsible job" where she could work from home and would soon be on maternity leave so could supervise the applicant and his mother was retired and had a dated criminal record): at para. 13;
- e) does not have a passport: at para 14;

- f) has " a previous and now dated history of non-compliance with court orders, which includes four convictions for breach of recognizance and the four convictions under appeal for possession of a firearm while prohibited": at para. 15; and
 - g) has ties to Montreal, where his wife and daughters live: at para. 16.
- [20] The chambers judge referred to the Crown's submission that the applicant is at risk of leaving to go to Montreal but found " this could be potentially managed by imposing strict conditions on him": at para. 17.
- [21] It is evident from her reasons that the chambers judge focused on the third criterion, whether the applicant's detention was necessary in the public interest. She started this part of her analysis by considering whether the applicant's release would pose a risk to public safety. On this point, the applicant stressed " that his proven ability to cooperate and respect bail terms over the past years while awaiting trial and then while awaiting sentencing, supports the conclusion that he is not at risk of committing further offences": at para. 20. The applicant submitted that his sureties would attenuate any risk to public safety. In response, the Crown submitted that the seriousness and scale of the drug offences indicate that the applicant posed a real risk to public safety if released.
- [22] In her consideration of public safety, the chambers judge reviewed the trial judge's comments (RFS at para. 11) about the applicant's criminal record. The trial judge referred to the applicant's criminal record for narcotics offences, noting the following:
- a) On June 25, 2004, the applicant received a 15 month conditional sentence order for production of a Schedule 11 substance;
 - b) On September 25, 2008, the applicant received a two-year jail sentence for the same offence; and
 - c) The applicant had previous convictions for production of a Schedule I substance, theft of power, and failures to comply with a recognizance and driving while prohibited.
- [23] The chambers judge took note of the applicant's criminal history, referencing the trial judge's conclusion at sentencing that, "[t]he evidence taken at trial combined with his criminal record suggests that [the applicant] has been engaged in the illicit drug trade for many years": at para. 23, citing RFS at para. 11.
- [24] In addition to his criminal history, the chambers judge considered the scale and sophistication of the applicant's drug operation, again referring to the RFS (at paras. 13-15). In particular, the chambers judge noted the trial judge's comments about the risk of harm the applicant posed to others:
- [16] In addition to providing his customers with the wherewithal to seriously harm or kill themselves, Mr. Pham exposed other tenants at Summerhill Place to both the risk of harm from incidental contact with highly-toxic substances, and the risk of violence, including through the use of the firearms seized from his apartment. The interrelationship between

hard-drug trafficking and violence is well known, and I found as a fact that Mr. Pham acquired and kept the firearms in his apartment for the purpose, amongst others perhaps, of protecting his business from his competitors. It does not require much imagination to conjure a scenario in which the other residents of Summerhill Place, and innocent members of the public, might have been caught in a violent crossfire. He also exposed the people handling his packages dispatched by a courier, and the peace officers who intercepted them, to toxic contamination and ill-health.

- [25] The applicant submitted that the risk to public safety would be attenuated if he lived at his family's residence, supported by his mother and sister's significant posting of surety. However, the chambers judge found, "[a]t a minimum, the findings of the trial judge support the conclusion that [the applicant] had a close connection with the [residence] while engaged in running his drug operation": at para. 27. In reaching her conclusion that the applicant's release posed a risk to public safety (at para. 29), the chambers judge wrote:
- [28] Given the judge's findings as to the circumstances of the offences and [the applicant's] conduct, including the degree of sophistication and size of his illegal drug operation, and the number and types of weapons he had in his possession, I am not satisfied that conditions can be put in place to attenuate his risk to public safety if he was to live in the [residence]. It is not a complete answer to say he did not prove a danger while awaiting trial. Given this history, I have concluded that his release would raise public safety issues of the kind expressed by the judge at para. 16 of the RFS. I have no reason not to accept the good faith and intentions of his sureties who wish to help their family member, but I do not have confidence that even with strict conditions, they will have the influence over him that is necessary to protect the public.
- [26] The chambers judge next turned to the criterion of public confidence in the administration of justice, setting out the two competing interests that needed to be considered: enforceability and reviewability.
- [27] Regarding enforceability, the chambers judge referred to the seriousness of the offence--including the gravity, circumstances, and length of imprisonment--and the public interest in a person convicted of such an offence being denied bail. Here, the chambers judge referred back to the RFS and the trial judge's comments about overall risk to the public (and innocent bystanders), including the risk of violence through the use of firearms and the dangers inherent in transporting the toxic substances.
- [28] Next, the chambers judge assessed the reviewability interest and examined each of the grounds of appeal asserted by the applicant. She reviewed some of the jurisprudence governing the grounds of appeal and concluded that "the appellant has some merit to his grounds of appeal": at para. 44.

[29] However, after balancing all of the factors, the chambers judge found " the public safety and enforceability issues here are of greater weight" than the merits of the applicant's appeal and concluded that " the [applicant's] release is not in the public interest.": at para. 44. In reaching this conclusion, the chambers judge referred to:

- a) the grounds of appeal, finding them to be meritorious;
- b) the reasons for sentence, recognizing that enforceability relates to the public interest in a person convicted of a serious offence being denied bail; and
- c) the seriousness of the offence, including the gravity of the offence, the circumstances surrounding the commission of the offences, and the potential length of imprisonment.

[30] In the end result, the chambers judge dismissed the application for bail.

Issues on review

[31] The applicant alleges the chambers judge erred in principle in two ways: (1) failing to "meaningfully consider" whether the applicant's three years of compliance with the terms of his previous release demonstrated he had the ability to be law-abiding; and (2) failing to turn her mind to whether restrictive conditions of bail would reduce any public safety risk to an acceptable level, instead only considering the sufficiency of the proposed sureties.

Standard of Review

[32] The parties agree with the standard of review as stated above; that is, s. 680 provides a division of this Court may review a bail pending appeal decision at the direction of the Chief Justice and may vary the decision or substitute its own decision. The division owes deference to the chambers judge's factual findings but it can intervene if the chambers judge made a material error in principle or in law, or if the decision was clearly unwarranted.

- (1) Did the chambers judge err in principle by failing to consider the applicant's bail compliance?

[33] There is no dispute that following his arrest and before his conviction, the applicant resided in the community, bound by an undertaking, for over three years without any allegation of unlawful behaviour. The applicant submits that his impeccable bail performance should have been a substantial factor when the chambers judge assessed his suitability for release, particularly in light of the proposed stringent conditions. The applicant asserts that the chambers judge's consideration of this important factor was cursory and that she failed to address the critical issue: " why a public safety risk that was effectively managed for over three years under a mere police undertaking could not similarly be managed under the much more stringent bail conditions proposed".

- [34] I start by noting the obvious--bail pending appeal is different from bail pre-trial. The applicant no longer enjoys the presumption of innocence as he did at the time of his trial. Section 11(e) of the Charter no longer applies, as reflected in the fact that a person who has been convicted and sentenced bears the burden of establishing, on a balance of probabilities, that release would satisfy each of the s. 679(3) criteria set out above.
- [35] In my view, the chambers judge did not give short shrift to the applicant's history of bail compliance. On the contrary, she recognized that his bail compliance was a factor in his "favour", noting that he attended court when required to do so, even after he had been convicted of serious offences and was likely facing a "significant multi-year sentence": at para. 12.
- [36] However, after considering his compliance, the chambers judge moved on to examine other significant concerns, including those identified by the trial judge; in particular, the applicant's criminal history, and "more importantly", the trial judge's findings about the scale and sophistication of the applicant's drug operation: at para. 24. It was only after the chambers judge had considered all of the factors at play that she concluded that his bail compliance was "not a complete answer to say he did not prove a danger while awaiting trial": at para. 28.
- [37] The applicant says the chambers judge "failed to meaningfully consider" the applicant's compliance with bail terms pending trial. I do not agree that the chambers judge committed any reviewable error in her assessment of applicant's history of compliance. The chambers judge's reasons, when read functionally, contextually, and in light of the live issues and the record before her, make clear that she fully considered this factor. She simply did not find that his compliance sufficiently answered the other pressing and compelling concerns.
- [38] I would not accede to this ground.
- (2) Did the chambers judge err in principle by failing to consider whether restrictive conditions of bail would reduce any public safety risk?
- [39] On this point, the applicant contends the chambers judge's focus was too narrow. That is, the chambers judge erred because she only considered the viability of a surety release and not the stringent "house arrest" conditions also proposed, including electronic monitoring and internet use restrictions. The applicant submitted that the safety issues identified by the trial judge (at para. 16 of the RFS) were focused on the location of the drug trafficking operation--an apartment rented by the applicant--and not on the family residence. The applicant submits that public safety concerns are essentially eliminated by confining him to the family residence "around the clock", placing him under the supervision of the sureties, and adding electronic monitoring and internet prohibitions to further restrict and monitor his activities.

- [40] The applicant relies on *R. v. Hadani*, 1999 BCCA 334 and *R. v. Bhullar*, 2005 BCCA 409 to support his submission that the chambers judge needed to consider whether the conditions he proposed would adequately attenuate any risk. The applicant suggests the chambers judge needed to explain why these onerous conditions could not reduce any risk to an acceptable level. However, the cases on which the applicant relies are s. 680 reviews for two accused charged with murder. The presumption of innocence not being displaced, the reviewing courts granted release orders. *Hadani* and *Bhullar* must be considered in that light.
- [41] It is my opinion that the chambers judge said much more about the proposed release plan and public safety than the applicant suggests. The applicant is correct that the chambers judge referred to the location of the drug trafficking operation and the public safety risks attendant there. However, the chambers judge went further and considered the risks associated with the family home. She included in her analysis the trial judge's conclusion that, "[a]t a minimum [the applicant] had a close connection with the [residence] while engaged in running his operation": at para. 27. The chambers judge was mindful of the factual findings made at trial and factored those into her assessment of whether the risk could be attenuated by the proposed conditions. She concluded the conditions could not "attenuate his risk to public safety" after considering the role of the sureties and the "strict conditions" proposed: at para. 28.
- [42] Again, with respect to public safety, the chambers judge specifically took into account the applicant's criminal history, the public safety risks as found by the trial judge, and the circumstances and locations of the offences. She also considered the applicant's conduct, including the "degree of sophistication and size of his illegal drug operation, and the number and types of weapons he had in his possession": at para. 28.
- [43] In my view, the chambers judge considered, in detail, the conditions proposed by the applicant. She simply did not accept the applicant's submission that what was proposed could attenuate the risk to public safety. The chambers judge correctly set out the legal principles governing her analysis and examined carefully the proposed bail plan. She considered whether the proposed plan would attenuate the risk to public safety and decided it would not. She committed no error in coming to this conclusion.
- [44] Overall, the applicant took the position that the chambers judge committed errors in her assessment of public safety and that, when account is taken of these errors, the balance of enforceability and reviewability tips in favour of his release. As I have stated, the chambers judge's reasons do not reveal the errors alleged. In this case, the reviewability interest reflects the need to respect the general rule of the immediate enforceability of judgments (*Oland* at para. 25) and the expectation that the applicant will be accountable for the offences by serving the sentence imposed on him. The other interest that must be taken into account is that the applicant should be entitled to a meaningful review process: *Oland* at para. 25.

- [45] Before us, the applicant spent some time demonstrating the strength of the grounds of the appeal. However, as stated above, the chambers judge's focus was not on whether the grounds were meritorious. Rather, she assumed that they were. With respect to the strength of the appeal, she agreed that "the [applicant] has some merit to his grounds of appeal": at para. 44. As evident in her reasons, the chambers judge focused the bulk of her analysis on the public interest factor. The Court in Oland held, "[i]n the final analysis, there is no precise formula that can be applied to resolve the balance": at para. 49. Rather, it is a nuanced exercise that requires a qualitative and contextual assessment: Oland at para. 49. Where the applicant has been convicted of a "very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety concerns": Oland at para. 50.
- [46] In the case at bar, it would be an understatement to say that the chambers judge had "lingering" public safety concerns. Reading the reasons as a whole, the chambers judge had ongoing and unresolved concerns about serious risks to public safety. The applicant was convicted of very serious drug and firearms offences, warranting a 15-year jail term. Given his prior criminal history and the fact that his convictions included the breach of a prior firearms prohibition, the magnitude of the risk to the community was substantial. It included but was not limited to the risks to the safety of the community posed by those who traffic in dangerous and highly addictive illicit drugs. In these circumstances, it is understandable that the chambers judge found the public interest in enforceability to outweigh the interest in reviewability.
- [47] In the end, the chambers judge concluded that the public safety concerns related to enforceability overwhelmed the reviewability interest. In my view, she was very much alive to the specific issues raised by the applicant in this review and factored those considerations into her analysis. She committed no error in her assessment of the proposed bail plan and public safety.

Disposition

- [48] I would confirm the chambers judge's decision that the applicant's release is not in the public interest.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Riley"

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