

CANADA / JUDGMENT

R. v. Pham

2024 BCCA 297

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 297 R. v. Pham

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pham,

2024 BCCA 297

Date: 20240816

Dockets: CA49722; CA49740

Between:

Rex

Respondent

And

Kien Trung Pham

Applicant

Direction of the Chief Justice on an Application for Review

Pursuant to Section 680 of the Criminal Code of Canada.

Counsel for the Applicant:

E.V. Gottardi, K.C.

S.K. Pringle

Counsel for the Respondent:

S. Manery

Written Submissions of the Applicant Filed:

July 5, 2024

Written Submissions of the Respondent

Filed:

Place and Date of Judgment:

July 10, 2024

Vancouver, British Columbia

August 16, 2024

Summary:

The applicant was convicted of a number of drug trafficking-related and firearms offences. The chambers judge denied his application for bail pending the determination of his conviction appeal. He seeks a direction for a review of the decision of the chambers judge under s. 680 of the Criminal Code.

Held: Application granted. The reasons of the chambers judge were understandably brief but it is arguable she erred in principle by failing to meaningfully consider: (1) whether Mr. Pham's three years of compliance with the terms of his previous release demonstrated he had the ability to be law abiding; and (2) whether the restrictive conditions of bail he proposed would reduce the risk he posed to public safety to an acceptable level.

Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

- [1] The applicant, Kien Trung Pham, seeks a direction for a review of the dismissal of his application for bail pending appeal under s. 680 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [2] On July 31, 2023 and March 4, 2024, Mr. Pham was convicted of a number of drug trafficking-related and firearms offences. Mr. Pham's offences were summarized in the trial judge's reasons for sentence, indexed as 2024 BCSC 467:
- [1] On July 31, 2023, after a lengthy trial on indictment 86452 (the "trial indictment"), I found Mr. Pham guilty of four counts of trafficking in methamphetamine (Counts 1-4), one count each of possession of fentanyl and cocaine for the purpose of trafficking (Counts 5 and 6), two counts of possession of a prohibited firearm with readily accessible ammunition (Counts 8 and 9), and two counts of possession of a firearm without a licence (Counts 10 and 11). My reasons for conviction are indexed at 2023 BCSC 2079.

- [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.
- [3] On March 4, 2024, Mr. Pham was sentenced to a 15-year custodial sentence. That same day, he filed an appeal of his convictions.
- [4] On March 22, 2024, Mr. Pham sought bail pending the determination of his appeal. He proposed to live with his mother and sister in the home they shared in Nanaimo (the "family home"). His mother and sister were prepared to act as sureties with \$300,000 secured against their shared equity in the family home. In oral submissions, Mr. Pham's then counsel invited the chambers judge to "craft whatever conditions you want, to ensure that Mr. Pham is incredibly highly supervised". Counsel proposed house arrest, electronic monitoring and restrictions on Mr. Pham's computer use.
- [5] The chambers judge dismissed Mr. Pham's application, finding that granting bail would not be in the public interest.
- [6] Mr. Pham submits the chambers judge made four material errors in her analysis of the public interest ground for dismissing his application for bail:
1. The chambers judge relied on the "categorical fact" that Mr. Pham had been convicted to conclude he posed a substantial risk of reoffending if released.
 2. The chambers judge misunderstood the role of a surety, speculated Mr. Pham's proposed sureties would be unable to "influence" his conduct and failed to consider whether they would comply with their legal obligation to render him into custody if he did not comply with the terms of his release.

3. The chambers judge failed to consider whether more onerous conditions would reduce the risk Mr. Pham would reoffend below a substantial likelihood.
4. The chambers judge relied on the trial judge's misapprehension of evidence regarding Mr. Pham's criminal history when assessing his safety risk.
- [7] In the alternative, Mr. Pham submits the chambers judge's decision was clearly unwarranted.
- [8] In my respectful view, it is arguable the chambers judge erred in principle in two respects and I am therefore directing that the dismissal of Mr. Pham's bail application be reviewed by a division of the Court under s. 680 of the Code.

The Chambers Judgment

- [9] In unpublished oral reasons, the chambers judge reviewed Mr. Pham's application for bail pending his appeal under s. 679(3) of the Code. That section establishes three criteria a bail applicant must meet in the case of a conviction appeal: (a) the appeal is not frivolous; (b) the applicant will surrender themselves into custody in accordance with the terms of the order; and (c) the applicant's detention is not necessary in the public interest: RFJ at para. 5.

Is the appeal frivolous?

- [10] The Crown conceded the grounds of appeal advanced by Mr. Pham met the "not frivolous" standard. The chambers judge agreed: RFJ at paras. 7-10.

Will Mr. Pham surrender himself as required?

- [11] The chambers judge found Mr. Pham had connections to the community in British Columbia where he proposed to reside if released on bail. The Crown was concerned he was at risk of going to Montreal where his wife and daughter live, but accepted the risk could be managed by imposing strict conditions: RFJ at paras. 11, 16-17.
- [12] The chambers judge noted Mr. Pham has an inconsistent history of obeying court orders. He has four dated convictions for breach of recognizance and four convictions (now under appeal) for possession of a firearm while prohibited. On the other hand, Mr. Pham complied with bail conditions for three years and willingly surrendered to court in relation to the matters now under appeal: RFJ at paras. 12, 15.
- [13] Although the chambers judge did not make an express finding, it does not appear she was concerned Mr. Pham would not surrender himself as required.

Is Mr. Pham's detention necessary in the public interest?

- [14] Determination of the public interest under s. 679(3)(c) involves a consideration of both public safety and public confidence in the administration of justice. Assessing public confidence in the administration of justice involves weighing the competing interests of the enforceability and the reviewability of judgments: RFJ at para. 6, citing *R. v. Oland*, 2017 SCC 17 at paras. 23-25.
- [15] The chambers judge found Mr. Pham posed a risk to public safety because of the circumstances of the offences and his 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." In coming to this conclusion, she relied on para. 16 of the reasons for sentence, where the trial judge concluded Mr. Pham was a danger to his neighbours as a result of the risk of incidental contact with highly-toxic substances and the risk of violence he posed: RFJ at paras. 20-29.
- [16] The chambers judge noted Mr. Pham had a close connection with the family home while engaged in running a significant drug operation: RFJ at para. 27. Further, the chambers judge found the risk to public safety posed by Mr. Pham could not be attenuated by imposing strict conditions and having his mother and sister act as sureties: RFJ at para. 28.
- [17] The chambers judge also considered the interests of enforceability and reviewability in preserving public confidence in the administration of justice.
- [18] The chambers judge noted enforceability refers to the public interest in denying bail to a person convicted of a serious offence, and requires a consideration of the gravity of the offence, the circumstances surrounding the commission of the offence, and the potential length of imprisonment. She then referenced the passages from the trial judge's reasons for sentence that supported her public safety findings: RFJ at para. 31.
- [19] The chambers judge next turned to the reviewability interest. The chambers judge noted the strength of the grounds of appeal play a central role in this assessment. After reviewing the three grounds of appeal raised by Mr. Pham, she concluded they had some merit. Despite this finding, in the chambers judge's view, public safety and enforceability issues were of greater weight. As a result, she concluded Mr. Pham's release was not in the public interest and dismissed his application for bail: RFJ at paras. 33-44.

Standard of Review

- [20] Under s. 680 of the Code, the Chief Justice may direct that a bail decision made by a single judge sitting in chambers be reviewed by a division of the Court.
- [21] In *R. v. Poony*, 2017 BCCA 447, Chief Justice Bauman set out the approach I must take to the task of determining whether to direct such a review:

- [22] In deciding whether to direct a review, I must consider "whether it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision, or that the impugned decision was clearly unwarranted in the circumstances": Oland at para. 64. This test takes into account the standard of review to be applied by a division of this Court on a review hearing: Oland at para. 55.
- [23] Any review of the chambers judge's decision must be guided by the following principles (Oland at para. 61):
1. Absent palpable and overriding error, the review panel must show deference to the judge's findings of fact;
 2. The review panel may intervene and substitute its decisions for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome; and
 3. 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.
- [22] On the last point, a decision cannot be found to be unwarranted "simply because a different judge or judges may come to a different balancing result". Rather, a decision will be "clearly unwarranted" only where it is arguable that no reasonable chambers judge would make the same decision: Poony at paras. 29-30.

Analysis

- [23] The question before me is whether it is arguable the chambers judge committed material errors of fact or law in arriving at her decision, or that her decision was clearly unwarranted in the circumstances: Oland at para. 64.
- [24] In my respectful view, several of the errors alleged by Mr. Pham are not arguable.
- [25] First, it is clear the chambers judge did not rely only on the "categorical fact" of Mr. Pham's convictions to conclude he posed a risk to public safety. In fact, she relied heavily on the specific circumstances of Mr. Pham's offences, including the nature of the risks posed by the illicit drug trade to the community. These were proper considerations: see e.g., *R. v. Fuhr*, 2017 ABCA 266 at para. 53, citing *R. v. Rhyason*, 2006 ABCA 120 at para. 15.
- [26] Second, the chambers judge did not misunderstand the role of a surety. It was entirely appropriate for the chambers judge to consider not only whether Mr. Pham's proposed sureties would render him into custody in the event of his non-compliance but also whether they would be able to "influence" his behaviour in the community. As put by this Court in *R. v. Patko*, 2005 BCCA 183 at para. 22, one of the roles of a surety "is to ensure the good behaviour of the accused while on bail".

- [27] Third, the chambers judge did not fail to consider whether Mr. Pham's proposed sureties would render him into custody in the event he did not comply with his bail. Both swore affidavits that they would do so and the chambers judge expressly stated she "[had] no reason not to accept [their] good faith and intentions": RFJ at para. 28.
- [28] Fourth, *R. v. Schooner*, 2013 BCCA 40 at paras. 17-19, does not support Mr. Pham's submission that "mere allegations of charges never proven" should be given little weight in bail hearings. *Schooner* was a sentence appeal and stands for the proposition that "[i]n the absence of a formal hearing, it is an error in principle for a judge to resolve a conflict on the facts alleged at sentencing to the detriment of the offender without an evidentiary basis for doing so": *Schooner* at para. 17 (emphasis added).
- [29] In any event, accepting Mr. Pham's proposition for the sake of argument, the record does not support the conclusion the chambers judge erred as alleged. Mr. Pham takes issue with para. 23 of the chambers judge's reasons for judgment, where she cited the following passage from para. 11 of the trial judge's reasons for sentence:

Mr. Pham has a criminal record including prior convictions for narcotics offences. He received a 15-month conditional sentence order on June 25, 2004, for production of a Schedule II substance, and a two-year jail sentence on September 25, 2008 for the same offence. He also has previous convictions for production of a Schedule I substance, theft of power, failures to comply with a recognizance and driving while prohibited. He claims to have had some history of employment in the legitimate economy, but the details are spare. The evidence taken at trial combined with his criminal record suggest that Mr. Pham has been engaged in the illicit drug trade for many years.

[Emphasis added.]

- [30] Mr. Pham argues this passage shows the chambers judge "appears to adopt the sentencing judge's erroneous assumption Mr. Pham's 'sparse' history of legitimate employment means that he has been engaged in the illicit drug trade for many years." I disagree.
- [31] While the trial judge noted the lack of detail to support Mr. Pham's claims of "some history in the legitimate economy", he expressly based his finding that Mr. Pham "ha[d] been engaged in the drug trade for many years" on "[t]he evidence at trial combined with his criminal record". In other words, the trial judge did not base his finding regarding Mr. Pham's long-term attachment to the illicit drug trade on the lack of detail provided by Mr. Pham regarding his participation in the legitimate economy.
- [32] Perhaps even more to the point, there is no suggestion in the chambers judge's reasons for judgment that she placed much, if any, weight on "mere allegations of charges never proven". Her analysis was instead focused on "the judge's findings as to the circumstances of the offences and Mr. Pham's conduct": RFJ at para. 28. She made no specific mention of the trial judge's comment regarding the lack of detail to support Mr. Pham's claims of legitimate employment.

- [33] In addition, in my view, it is not arguable the chambers judge's decision to dismiss Mr. Pham's application for bail was clearly unwarranted. In light of his prior record, the seriousness of his offences and the risk to the public posed by the illicit drug trade, it cannot be said that no reasonable judge would make the same decision.
- [34] While a number of the errors alleged by Mr. Pham do not meet the "arguable" threshold, in my respectful view, two do.
- [35] The chambers judge's reasons for judgment were understandably brief. On review, they will be read functionally, contextually, and in light of the live issues and the record before her: *R. v. G.F.*, 2021 SCC 20 at paras. 69-70. Further, the chambers judge will be presumed to know the law and will not be expected to have expounded on features of the criminal law that were not in controversy: *G.F.* at para. 74. Finally, in the case of any ambiguities, interpretations consistent with a correct application of the law will be preferred: *G.F.* at paras. 78-79.
- [36] Nevertheless, in my view, it is arguable the chambers judge erred in principle in two ways.
- [37] There is no question the chambers judge concluded Mr. Pham posed a risk to public safety and that no conditions of bail could adequately attenuate that risk. The arguable issues are whether she erred in principle by failing to meaningfully consider: (1) whether Mr. Pham's three years of compliance with the terms of his previous release demonstrated he had the ability to be law abiding; and (2) whether the restrictive conditions of bail he proposed would reduce the risk he posed to public safety to an acceptable level.
- [38] The Crown points out that Mr. Pham makes no submission regarding the chambers judge's conclusion that enforceability issues were of greater weight than reviewability issues. The Crown submits Mr. Pham's request for a review must therefore be dismissed. I disagree. The judge expressly concluded it was the combination of public safety concerns and enforceability issues that together outweighed reviewability issues. If the judge erred in principle with respect to her public safety analysis, it is arguable that following a proper consideration of public safety issues, the scales may tip in favour of release on onerous conditions.

Disposition

- [39] I grant Mr. Pham's application and direct that the dismissal of his bail application be reviewed by a division of the Court under s. 680 of the Code.

"The Honourable Chief Justice Marchand"

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