
CANADA / JUDGMENT

R. v. Poony

2017 BCCA 310

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 310 R. v. Poony

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Poony,

2017 BCCA 310

Date: 20170901

Docket: CA44694

Between:

Regina

Respondent

And

Sukhdeep Singh Poony

Appellant

Before:

The Honourable Madam Justice Stromberg-Stein

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated November 17, 2016 and March 13, 2017 (R. v. Poony, 2016 BCSC 2476 and 2017 BCSC 1136, New Westminster Docket X075933).

Counsel for the Appellant:

L.D. Myers, Q.C.

J. Allingham

Counsel for the Respondent:

J. Dickie

Place and Date of Hearing:

Vancouver, British Columbia

August 30, 2017

Place and Date of Judgment:

Vancouver, British Columbia

September 1, 2017

Summary:

Application for judicial interim release pending conviction appeal. Held: Application dismissed and order for expedited appeal. The grounds of appeal are not frivolous and the appellant does not pose a flight risk given his strong ties to his family and history of compliance with strict bail conditions. However, the seriousness of the offence means the public interest weighs in favour of denying release.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

[1] Mr. Poony applies for release pending his appeal against conviction for seven offences, namely extortion, uttering a threat, assault with a weapon (firearm), attempted murder, discharging a firearm with intent, possession of a prohibited or restricted firearm and pointing a firearm. The convictions for discharging a firearm and pointing a firearm were conditionally stayed pursuant to *Kienapple v. R.*, [1975] 1 S.C.R. 729. He was convicted on March 13, 2017 following a 20-day trial before Madam Justice Wedge, for reasons indexed at 2017 BCSC 1136. On August 21, 2017, he was sentenced to a global sentence of 11 years. After receiving credit for both his time served on remand and for his time on house arrest, he has eight years of imprisonment to serve. Mr. Poony commenced this appeal and filed this application on August 23, 2017.

[2] The Crown opposes Mr. Poony's release.

Background

[3] Mr. Poony is 32 years old and lives in Surrey, B.C., with his wife, 18-month-old daughter, mother, sister, brother and his brother's wife. He was born in Surrey and has resided at the same address his entire life. He currently works for a family business driving crane trucks and, if released, can continue in this employment. His wife has filed a letter in support of his release, indicating his importance in the family unit. Other than the convictions at issue

in his appeal, Mr. Poony has a dated and unrelated criminal record involving two convictions in 2005 and two convictions in 2003. He has not committed any new substantive offences in the nearly four years that he was on judicial interim release for the offences. He has a \$200,000 surety who has agreed to continue to act in this capacity.

- [4] Mr. Poony was charged in connection with events that took place in two separate incidents on September 13, 2011 and September 28, 2011, although there was conduct in and around these dates that also provided the foundation for the charges. Both incidents involved the complainant, Jaskaran Sandhu, who was murdered some 15 months after these events in an unrelated incident.
- [5] The background to the convictions is straightforward and was summarized by the trial judge at paras. 2 and 3 of her conviction reasons:
- [2] In the first incident, it is alleged that Mr. Poony pointed a firearm at Mr. Sandhu and threatened to kill him. At the time, the two men were travelling in separate vehicles on a major thoroughfare. Mr. Sandhu's evidence was that he noticed he was being followed by a white minivan which eventually pulled up beside his vehicle. He said the driver of the minivan ordered him to pull over, and at the same time pointed a firearm at him. Mr. Sandhu told police the man with the gun in the minivan was a person to whom he referred as "Sukhi".
- [3] The incident on September 28, 2011, occurred at a Mr. Lube in Coquitlam, where Mr. Sandhu was having his car serviced. An individual appeared at the entrance to the service bay where Mr. Sandhu was standing beside his vehicle and fired several shots at Mr. Sandhu from fairly close range. Mr. Sandhu suffered five penetrating wounds and, while serious, none was life threatening. He recovered from those injuries. He gave statements to police on subsequent days in which he identified the man who shot him at the Mr. Lube as Sukhi, ultimately Mr. Poony.
- [6] Mr. Sandhu made a number of statements to police following these incidents. Given his death, these statements were central to the Crown's case. Mr. Sandhu told police that "Sukhi" (a.k.a. Mr. Poony) was pursuing him to recover a debt Mr. Sandhu owed for lost drugs. Mr. Poony began threatening him and then his actions escalated to include his conduct in connection with the two events described above. The key issue at trial was the identity of Mr. Poony as the shooter. Mr. Sandhu said Mr. Poony was the person who both threatened him with a gun on September 13 and then shot him on September 28.

Reasons for judgment

Voir Dire #2: Ruling on the Threshold Reliability of Mr. Sandhu's Statements

- [7] The Crown sought to adduce Mr. Sandhu's statements for their truth. It said all of the statements had sufficient guarantees of trustworthiness to be admitted as evidence at trial. It relied heavily on extrinsic evidence tending to corroborate the statements as the basis for

their reliability. Counsel for Mr. Poony conceded that two *res gestae* statements met the test of threshold reliability, but challenged the admissibility of the remaining statements other than one statement made on September 29, 2011. He argued that the inability to test the veracity of the statements was fatal to their admission and there were insufficient indicia of reliability to overcome the dangers arising from the inability to cross-examine on them. He also argued that Mr. Sandhu's background rendered him akin to a *Vetrovec* witness. At the time of the statements, Mr. Sandhu was on judicial interim release for two gun-related offences alleged to have occurred in May 2010.

- [8] In reasons indexed at 2016 BCSC 2476, the trial judge concluded that Mr. Sandhu's statements met the test for threshold reliability. She instructed herself on the governing principles from *R. v. Khelawon*, 2006 SCC 57; *R. v. Blackman*, 2008 SCC 37; and *R. v. Youvarajah*, 2013 SCC 41. She noted that the submissions of Mr. Sandhu's counsel on adequate guarantees of trustworthiness were applicable to the types of statements at issue in *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740 ("KGB"). She found that the circumstances of Mr. Poony's case were more akin to those present in *Khelawon* and *Blackman*.
- [9] Turning to the facts, the trial judge first assessed the statement made by Mr. Sandhu on September 13, 2011. She set out the body of circumstantial evidence that corroborated Mr. Sandhu's statements, and acknowledged a number of weaknesses with the Crown's position, including Mr. Sandhu's earlier attempts to minimize his involvement in previous drug transactions. She highlighted that Mr. Sandhu did not apparently have any reason to falsely point the finger at Mr. Poony. In fact, he was adamant that he did not want to proceed with charges or testify in court. She concluded that there was evidence that would permit the ultimate trier of fact to be in a position to sufficiently assess the statement's worth and determine its truth.
- [10] In her reasons the judge discussed the *Vetrovec* issue. She found that there was no evidence Mr. Sandhu was offered favourable treatment concerning his gun charges. She said it would be a matter she would consider in determining the ultimate reliability of his statements.
- [11] The trial judge found that the email messages provided to police met the threshold reliability standard. She found corroborating evidence for these emails in the evidence of another constable and in cell phone records and texts found on Mr. Poony's phone.
- [12] As it relates to the statements Mr. Sandhu provided on September 28, 2011, she found that there was sufficient independent corroborative evidence related to the day of the shooting to meet the threshold reliability test.
- [13] The judge then dealt with the videotaped photo lineup on September 29, the videotape of the photo lineup, and the K.G.B. statement on September 30. She rejected defence counsel's argument that Mr. Sandhu's identification of Mr. Poony on September 30 was suspect because (a) he failed to select Mr. Poony's photo on September 29 and (b) he was told Mr. Poony's surname by one of the police officers. She held that there was a significant body of independent corroborative evidence to meet the threshold reliability test and that she would

take Mr. Poony's arguments into account in determining the ultimate reliability of the statements.

Reasons for Conviction

- [14] At trial, Mr. Poony agreed that the evidence established the specific intent of the shooter required for attempted murder. He focused his defence on the issue of identity.
- [15] Following her ruling on threshold reliability, the trial judge had to assess the ultimate reliability of Mr. Sandhu's statements to determine whether they were worthy of belief in the context of all of the evidence at trial. She did so in the course of her reasons for judgment indexed at 2017 BCSC 1136.
- [16] The judge began her analysis by noting that no one other than Mr. Sandhu positively identified Mr. Poony as the person who shot him at the Mr. Lube and there were no other witnesses to the earlier threat with the gun. This meant circumstantial evidence took on a significant role in the case. She instructed herself on the law as outlined in *R. v. Villaroman*, 2016 SCC 33 (regarding circumstantial evidence), *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.) (regarding identification evidence), *R. v. Khela*, 2009 SCC 4 (regarding unsavory witnesses) and *R. v. Paul*, 2011 BCCA 46 (regarding motive).
- [17] She then turned to the evidence. In assessing Mr. Sandhu's statement to police following the September 13 incident, she used admitted facts and text messages and calls between the two men to corroborate Mr. Sandhu's account. Phone records showed that the two men communicated a great deal in and around that time. The judge also relied on observations by police officers who attended Mr. Sandhu's 9-1-1 call to establish Mr. Sandhu's fear. Other officers were involved in recording the content of text messages received from Mr. Poony (who was known to Mr. Sandhu as "Sukhi"). The judge concluded:
- [52] I agree with the submission of the Crown that this evidence corroborates its position that Mr. Sandhu knew Mr. Poony and would be able to identify him, and corroborates the nature of the relationship between Mr. Sandhu and Mr. Poony, which establishes a motive for Mr. Poony to harm Mr. Sandhu.
- [18] Turning to the events of September 28, the trial judge had the benefit of surveillance videos from the Mr. Lube. She also outlined two statements from witnesses that were admitted as *res gestae* in which Mr. Sandhu identified "Sukhi" as the person who shot him. In audio-recorded statements taken by police at the hospital later that day Mr. Sandhu again identified the shooter as "Sukhi". The trial judge outlined the body of circumstantial evidence submitted by the Crown, which included discovery of a tracking device on the undercarriage of Mr. Sandhu's vehicle. The judge found that Mr. Poony activated the tracking device and paid for its electronic subscription based on several pieces of circumstantial evidence found in Mr. Poony's residence.

- [19] A number of witnesses observed the getaway vehicle to be an SUV, which was later identified as a vehicle rented from Enterprise ostensibly by Mr. Poony's known associate with whom he had regular contact, including on the day of the shooting. Mr. Poony's fingerprints were located in and on the vehicle, which was seized by the police. The Enterprise employee to whom the car was returned identified Mr. Poony, albeit with some hesitation, from a photopack lineup as the person who returned the vehicle on September 28. The judge found this identification was a minor piece of evidence tying Mr. Poony to the vehicle and its return to Enterprise.
- [20] The judge also relied on surveillance videos from other nearby businesses and cell tower evidence that provided information about Mr. Poony's general whereabouts around the time of the shooting. She noted that the Mr. Lube surveillance video established that Mr. Sandhu was "mere metres" from the shooter and appeared to have looked toward the shooter while being shot. She found this provided some corroboration of Mr. Sandhu's identification evidence.
- [21] The judge acknowledged that Mr. Sandhu did not make a selection from a photopack lineup that included Mr. Poony the day after the shooting. But she noted that on the following day, in the course of a videotaped KGB statement, he again repeated that he knew the shooter and it was "Sukhi". She found that his reluctance to identify Mr. Poony the day after the shooting was "amply explained in the circumstances".
- [22] The judge found that the eyewitness identification evidence did not rule out Mr. Poony as the shooter and driver of the rental vehicle. However, she found that the circumstantial evidence tying Mr. Poony to the rental vehicle was far more compelling. She said it was "difficult to imagine more definitive evidence".
- [23] As it relates to Mr. Sandhu's credibility, the judge cautioned herself concerning Mr. Sandhu's evidence and assumed he fell within the category of a Vetrovec witness, but found "ample independent evidence" corroborating his statements to police in which he identified Mr. Poony. She also emphasized the absence of a motive to point the finger at Mr. Poony. She concluded:
- [90] On the basis of all of the foregoing, I am satisfied of the ultimate reliability of Mr. Sandhu's evidence and I am prepared to accept that evidence.
- [91] All of the circumstantial evidence significantly corroborates the Crown's case. None of the circumstantial evidence detracts from it. The only detractions occurred with Mr. Sandhu's hesitations about cooperating, and I have already indicated that, in my view, they do not detract from the overall reliability.
- [24] The judge then went through each of the counts and convicted Mr. Poony on all counts.

Appeal

[25] Mr. Poony filed a notice of appeal and an application for release pending appeal on August 23, 2017. He raises the following grounds of appeal:

1. The judge erred in finding that Mr. Sandhu's statements met the test for threshold reliability;
2. If the statements did meet the test for threshold reliability, the judge nevertheless erred in concluding that they also met the test for ultimate reliability; and
3. the judge erred in concluding that the Crown proved Mr. Poony's identity beyond a reasonable doubt.

[26] On appeal, he seeks to have his convictions quashed and acquittals entered or, alternatively, a new trial.

Application for release pending appeal

[27] Section 679(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, provides that a justice may release an appellant from custody pending appeal against conviction. The criteria are contained in s. 679(3):

- (3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
 - (a) the appeal or application for leave to 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.

[28] The applicant bears the onus of establishing that each criterion is satisfied on a balance of probabilities: *R. v. Oland*, 2017 SCC 17 at para. 19. Mr. Poony submits that the key issue in his case is the public interest and says his appeal is sufficiently meritorious that reviewability should trump enforceability such that detention is not necessary in the public interest. The Crown argues Mr. Poony's detention is required in the public interest.

Merits

[29] The appeal must not be frivolous. This is recognized as being a very low bar: *Oland* at para. 20. In *United States of America v. Bennett*, 2014 BCCA 159 at para. 14 (Chambers), Mr. Justice Frankel set out the various ways in which this phrase has been defined, including "wasting the time of the Court" and "doomed to failure".

- [30] Mr. Poony relies on the recent decision in *R. v. Bradshaw*, 2017 SCC 35 for the principles governing when a judge can rely on corroborative evidence to establish threshold reliability and says the witness there is analogous to Mr. Sandhu. He argues, as he did in the court below, that Mr. Sandhu was akin to a Vetovec witness and points to weaknesses in a number of pieces of corroborating evidence, which could not have been used to bolster the reliability of the statements.
- [31] Mr. Poony submits that this clearly establishes that his appeal is not frivolous.
- [32] The Crown argues that Mr. Poony's grounds of appeal are very weak. It says Mr. Poony has not alleged that the trial judge made any palpable and overriding errors in her findings of fact or that she erred in her application of the legal principles. He appears to simply disagree with the verdict and makes the same arguments that were already considered by the trial judge. The Crown says his reliance on *Bradshaw* is misplaced. Unlike the case at bar, the corroborative evidence in *Bradshaw* did not assist the trier of fact with testing whether or not Mr. Bradshaw had been involved in the murder. The Crown says that case does not assist Mr. Poony because the corroborative evidence provided a strong basis on which to test the veracity of Mr. Sandhu's hearsay statement that he recognized Mr. Poony as the person who shot him.
- [33] Mr. Poony's reliance on *Bradshaw* may be misplaced. In that case, the Vetovec witness was an accomplice who had a motive to blame Mr. Bradshaw. He had also previously given inconsistent statements about Mr. Bradshaw's participation in the murders. This was not the case with Mr. Sandhu. The trial judge provided a number of reasons why she was satisfied of Mr. Sandhu's sincerity and truthfulness as well as the accuracy of his perception. Further, the trial judge's reasons demonstrate that she was meticulous in identifying the particular items of independent corroborative evidence on which she relied to assess the threshold and ultimate reliability of Mr. Sandhu's statements.
- [34] Nevertheless, I cannot say that Mr. Poony's appeal is "doomed to failure". His appeal raises complex issues concerning the admissibility of hearsay evidence and I would hold that he has met the low merits threshold.

Surrender into custody

- [35] The applicant must also show that he will surrender himself into custody in accordance with the terms of the release order. Previous compliance with bail conditions is one consideration: *R. v. Dhanda*, 2003 BCCA 550 at para. 26 (Chambers). Also relevant is the appellant's history of attending court and complying with court orders; and his age, health, employment and housing status, family circumstances, and criminal record: *Italy v. Seifert*, 2007 BCCA 420 at para. 21 (Chambers); *R. v. Schiel*, 2011 BCCA 160 (Chambers).

- [36] Mr. Poony points out that he was on bail for nearly four years prior to sentencing during which time he committed no new substantive offences. He attended court for sentencing despite the certainty that a lengthy term of imprisonment would be imposed. He says s. 679(3)(b) is a non-factor and he will surrender himself into custody.
- [37] The Crown agrees that Mr. Poony performed adequately on his strict \$200,000 surety bail. It notes that there was one breach for failure to report, but the Crown subsequently stayed that charge because Mr. Poony had properly reported to the bail supervisor for several months by the time of trial.
- [38] Mr. Poony's performance on bail for nearly four years and his \$200,000 surety satisfy me that he would surrender into custody as required by the order.

Public interest

- [39] I turn then to the key criterion in this application. The public interest criterion consists of two components: public safety and public confidence in the administration of justice: Oland at para. 23, citing *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.). The two components are not independent silos and the absence of public safety concerns may be relevant to the public confidence analysis: Oland at para. 27.
- [40] Public confidence involves balancing the competing principles of enforceability and reviewability: Oland at para. 24. In Oland, the Court relied on the factors enumerated in s. 515(10)(c) of the Criminal Code to assess the public confidence aspect. Although tailored to the pre-trial context, a corollary form of the interest underlying each factor exists in the appellate context, such that these same factors, with any appropriate modifications to reflect the post-conviction context, should be accounted for in determining how release pending appeal is likely to affect public confidence in the administration of justice: Oland at paras. 31-32, 36. These factors are:
- a) the apparent strength of the case,
 - b) the gravity of the offence,
 - c) the circumstances surrounding the commission of the offence, and
 - d) the potential for a lengthy term of imprisonment.
- [41] One modification to these factors in the appellate context is that the presumption of innocence no longer applies following conviction: Oland at para. 35. Public confidence is to be measured through the eyes of a reasonable member of the public, being one who is thoughtful, dispassionate, informed by the circumstances of the case, and respectful of society's fundamental values: Oland at para. 47.

- [42] Enforceability relates to the public interest in a person convicted of a serious offence being denied bail. Accordingly, the seriousness of the offence for which the applicant was convicted plays an important role in assessing the enforceability interest. The seriousness of the offence is captured in s. 515(10)(c) through consideration of the gravity and circumstances of the offence, and the potential length of imprisonment: Oland at paras. 37-39.
- [43] On the other hand, reviewability relates to the public interest in judgments being reviewed and errors corrected: *R. v. Mapara*, 2001 BCCA 508 at paras. 32, 34. It is informed by the strength of the grounds of appeal: Oland at para. 40. The appellate justice should examine the grounds of appeal identified in the notice of appeal with a view to their general legal plausibility and foundation in the record, and should form a preliminary assessment of the strength of the grounds of appeal to see if they "clearly surpass the minimal standard required to meet the 'not frivolous' criterion": Oland at para. 44. This analysis of the strength of an appeal is more pointed than the initial hurdle under s. 679(3)(a). However, not every offence is serious enough to require this assessment. Rather, it is only in the context of serious offences likely to provoke a concern about public confidence. In other cases, there is no need to go beyond the "not frivolous" threshold: Oland at para. 29, citing *R. v. Gingras*; *R. v. Porisky*, 2012 BCCA 467 at para. 47 ("*Porisky*").
- [44] In the final balancing between enforceability and reviewability, the judge on appellate review should be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence. Where it appears that all or a significant portion of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance: Oland at para. 48, citing *R. v. Baltovich* (2000), 47 O.R. (3d) 761 at paras. 41-42 (C.A.).
- [45] Mr. Poony acknowledges the seriousness of his offences but cites other cases where offenders have been released after being convicted of drug and weapon offences that attracted lengthy sentences. He argues that public safety and flight concerns are negligible and that his appeal clearly surpasses the not frivolous threshold such that the public interest in reviewability far surpasses the enforceability interest. He argues that a reasonable member of the public would view his detention as bringing the administration of justice into disrepute.
- [46] The Crown submits that enforceability outweighs reviewability because the appeal can take place quickly, the grounds of appeal are not strong, and the offences are serious. Mr. Poony's attempted murder of Mr. Sandhu in a brazen, day-time shooting requires a consideration of the public confidence component of s. 679(3)(c). His conduct endangered innocent members of the public. The Crown points out that Mr. Poony has caused significant delays in the preliminary inquiry and trial proceedings leading to this point. The Crown also notes that Mr. Poony's sentence is lengthy with eight years remaining to be served.

- [47] In the event that this Court concludes Mr. Poony can be released, the Crown says the terms should be at least as stringent as those required at trial, and that the appeal should be heard with strict compliance to the filing deadlines. The surrender date should be no later than the end of June 2018.
- [48] In my view, the seriousness of this case requires consideration of whether the merits of the appeal go beyond the "not frivolous" threshold. While I am far from convinced that the trial judge made any errors as alleged, the complexity of the issues the judge faced in determining the threshold and ultimate reliability of Mr. Sandhu's statements weighs in favour of reviewability.
- [49] On the other hand, the length of his sentence means that it cannot be said that he stands to have served a significant portion of his sentence by the time his appeal is heard. Denying him bail would not, therefore, diminish the significance of the reviewability interest: Oland at para. 48.
- [50] I agree with the Crown that there are a number of factors weighing in favour of enforceability. There is no doubt that these were serious offences, which trigger significant concern for public safety. The lives of innocent members of the public were threatened and Mr. Poony engaged in conduct that escalated from threats and intimidation, to stalking his victim with a tracking device, to attempting to kill Mr. Sandhu in broad daylight in a very public place. These offences are "at the serious end of the scale": Oland at para. 29, citing Porisky at para. 47.
- [51] This said, there are no indicators that he is a flight risk. He has strong ties to his family and a business. He has complied with strict bail conditions over nearly four years and he has a substantial surety. These factors attenuate the enforceability interest.
- [52] However, weighing the cumulative effect of all the matters I must consider tips the scale in favour of detention. In my view, enforceability outweighs reviewability in the circumstances.

Conclusion

- [53] Evaluating public confidence through the eyes of a reasonable member of the public, I would hold that Mr. Poony should not be released on bail pending appeal. His application is dismissed.
- [54] If he follows all the relevant timelines, this appeal can be heard by April 2018. However, I would order that there be an expedited appeal given the significant delays in the proceedings below. I am advised that a one day appeal can be accommodated as early as December 11, 2017. I leave it to the parties to set an early appeal date.

"The Honourable Madam Justice Stromberg-Stein"

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