
CANADA / JUDGMENT

R. v. Porisky

2012 BCCA 309

COURT

British Columbia Court of Appeal

DECIDED

12 July 2012

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2012 BCCA 309 R. v. Porisky

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Porisky,

2012 BCCA 309

Date: 20120712

Docket: CA039937

Between:

Regina

Respondent

And

Russell Anthony Porisky

Appellant

(Applicant)

Before:

The Honourable Mr. Justice Chiasson

(In Chambers)

On appeal from: Supreme Court of British Columbia, May 10, 2012

(R. v. Porisky, 2012 BCSC 771, Vancouver Docket No. 25339-8)

Appellant:

Appearing in person

Counsel for the Respondent:

W.P. Riley

Place and Date of Hearing:

Vancouver, British Columbia

July 4, 2012

Place and Date of Judgment:

Vancouver, British Columbia

July 12, 2012

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] This application for judicial interim release considers the effect of the strength of grounds of appeal on the public interest requirement under s. 679(3)(c) of the Criminal Code, R.S.C. 1985, c. C-46 and addresses release in the context of an appeal from sentence and conviction.

Background

- [2] On January 18, 2012, Mr. Porisky was convicted of tax evasion, GST evasion and counselling to commit fraud. On May 10, 2012 he was sentenced to 54 months' incarceration and a fine of \$274,815.00. He appeals his conviction and sentence and seeks judicial interim release.
- [3] Elaine Gould, who is Mr. Porisky's partner, was convicted in the same proceedings of tax evasion. She received a conditional sentence of 6 months, to be served in the parties' residence in Chilliwack, B.C., as well as a fine of \$27,434.56. In appeal CA039936, she appeals her conviction and sentence and seeks a suspension of the conditional sentence.
- [4] The charges arose out of what the trial judge characterized as the parties' "Paradigm view", a keystone of which was the "natural person" theory, whereby they asserted that as natural persons they were exempt from tax obligations. The trial judge also found that Mr. Porisky, operating under the name "The Paradigm Education Group", had counselled fraud by giving seminars and producing materials giving advice on evading tax payment on the basis of his "Paradigm view". Mr. Porisky did not dispute that he had done so, but, it appears, relied on the legitimacy of his theories. These were rejected by the trial judge.

Discussion

- [5] Mr. Porisky has appealed both his conviction and the sentence. The applicable provisions of the Criminal Code are ss. 679(1)(a) and 679(3):
679. (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
- (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
- ...
- (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.
- [6] Prior to the hearing I directed the Crown and Mr. Porisky to *R. v. Ali*, 2008 BCCA 147, 77 B.C.L.R. (4th) 289 and *R. v. Dawydiuk*, 2008 BCCA 243, 256 B.C.A.C. 233. These cases state that where an appellant appeals both conviction and sentence, under s. 679(3) this Court may grant interim release on the basis of either. In reaching my conclusion in *Ali*, I relied on previous decisions of this Court, in particular *R. v. Al-Maliki*, 2003 BCCA 698, 190 B.C.A.C. 304 (in which both the conviction and sentence appeals were considered; although the sentence appeal had merit, the conviction appeal did not; the appellant was not released) and *R. v. Alexander*, 2002 BCCA 203, 53 W.C.B. (2d) 181 (in which there was no merit to the conviction appeal, but the appellant was released because his sentence appeal did have some merit). It may be that this Court will find an occasion to revisit this issue, which is important and engages a consideration of the various elements of s. 679. It also affects this Court's ability to deal with offenders who legitimately seek to pursue conviction appeals with little merit, but who have meritorious sentence appeals. It also may be necessary to consider the issue in the context of the relationship between ss. 679 and 683(5) (see: *R v. Gould*, 2012 BCCA 308).

Conviction appeal

- [7] The judge noted a number of cases in which arguments similar to Mr. Porisky's were made and failed: *R. v. Klundert* (No. 2), 2008 ONCA 767; leave to appeal to the Supreme Court of Canada refused ([2008] S.C.C.A. No. 522); *R. v. Sydel*, 2006 BCPC 346; *R. v. Turnnir*, 2006 BCPC 460; *R. v. Amell*, 2010 SKPC 107; *Kennedy v. Canada* (Customs and Revenue Agency), [2000] O.J. No. 3313, 2000 D.T.C. 6524 (Ont. S.C.J.). Although not strictly binding on me, I would add

this Court's decisions in *R. v. David Lindsay*, 2006 BCCA 150, 265 D.L.R. (4th) 193 and *R. v. Lindsay*, 2011 BCCA 99, 302 B.C.A.C. 76.

- [8] At para. 68, the trial judge stated that there was "no legal merit to any of Mr. Porisky's arguments". Having reviewed the judge's reasons for judgment and Mr. Porisky's written submissions and having listened to his oral submissions, I agree with the trial judge. In my view, the appeal from conviction is without merit; in the language of s. 679(3)(a), it is frivolous.
- [9] I shall say little more about the merits of the conviction appeal other than to note that the grounds of appeal all appear to flow back to the "natural person theory", or "Paradigm view", as it was described by the trial judge. It may be that Mr. Porisky will be able to show a division of this Court that this is not so or that even if it is, that is not fatal to his appeal. My conclusion does not in any way suggest how a division of this Court with the benefit of a full record and complete submissions will decide this appeal.
- [10] It is not necessary for me to consider the other criteria under s. 679(3), but an argument was made that if the grounds of appeal were not frivolous, but merely weak, that fact should not tell against release when the court is considering the third, or tertiary, criterion. There is some authority that may suggest this proposition (*R. v. B.S.B.*, 2008 BCCA 483, 263 B.C.A.C. 51 at para. 25; *R. v. Bath*, 2012 BCCA 221 at para. 24). It derives from the comment in *B.S.B.* by Madam Justice Smith that "an inference against the appellant cannot be fairly drawn on the basis of a finding that the grounds of appeal are weak" (para. 25).
- [11] In *R. v. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312, Madam Justice Ryan stated at para. 35:
- ... the strength of the interest of reviewability must primarily be measured by examining the likelihood of the success of the appeal. Very strong grounds will tip the scale in favour of reviewability.
- [12] In my view, it follows that the absence of strong grounds will not do so. That is, weak grounds may tend to favour enforceability. That certainly was the approach taken by Madam Justice Prowse in *R. v. Dhesi*, 2012 BCCA 9, 314 B.C.A.C. 301 at para. 15.
- [13] This Court in *R. v. Ruffolo*, 2011 BCCA 359, 309 B.C.A.C. 247, on the hearing of a review application by a division of the Court, a division that included Ryan and D. Smith J.J.A, stated at para. 25:

In her reasons for judgment, the chambers judge alluded to the principles of enforceability and reviewability as set out in [*R. v. Farinacci* (1993), 86 C.C.C. (3d) 32] and *Mapara* but failed to give effect to the weakness of the grounds of appeal as an aspect of those principles, instead relying solely on her conclusion that the appellant posed no danger to the public. In our view, this was insufficient. The fact that Ms. Ruffolo may not be a danger to the public addresses only part of the public interest. The strength of the grounds of appeal is a significant part of the analysis. In this Court, the appellant stands convicted as a person who committed the cold and calculated murder of her husband. In those circumstances, if her grounds of appeal, though arguable, are weak,

then in spite of the fact that she may not pose a danger to other members of the public, the principle of enforceability must prevail, and Ms. Ruffolo should not be admitted to bail pending her appeal.

- [14] In *R. v. Schiel*, 2011 BCCA 160, [2011] G.S.T.C. 60, Ryan J.A. concluded at para. 20 that notwithstanding the weakness of the grounds of appeal, "all of the other factors weigh in favour of release".
- [15] Taking into account the weakness of an appellant's grounds of appeal does not involve drawing an inference against him or her, although his or her interests may be affected adversely. It is the public interest that is being considered. Reviewability and enforceability are both in the public interest. Strong grounds of appeal tend to support reviewability; weak grounds tend otherwise.
- [16] In my view, it is clear that the strength or weakness of the grounds of appeal is a factor that must be taken into account when considering the public interest factor on an application for judicial interim release. Strong grounds will favour reviewability, that is, release; weak grounds will favour enforcement, that is, rejection of the application. Seldom will this factor be determinative in and of itself; it is an aspect of considering whether detention is necessary in the public interest.
- [17] I refuse to order the interim release of Mr. Porisky based on his conviction appeal.

Sentence appeal

- [18] I am unable to conclude that Mr. Porisky's sentence appeal is frivolous. A sentence of four and one-half years for these offences is significant and warrants consideration by this Court. Mr. Porisky seeks to challenge the finding of guilt on the counselling charge on legal grounds. If he were successful, a significant reduction in this sentence might be possible. I do not consider this likely because if his conduct was not legal, advising and teaching others how to proceed as he did certainly has the appearance of counselling the commission of illegal conduct.
- [19] Whether he should be released in the context of his sentence appeal turns on a consideration of the public interest. Although I consider that Mr. Porisky's sentence appeal is not frivolous, I do not consider it to be strong. Crown counsel points out that the sentence was based in part on sentences imposed on other offenders who did not pay taxes in circumstances somewhat similar to those in this case. In addition, the offences for which Mr. Porisky was convicted are serious. The sentencing judge found that the amount of the tax evaded totalled nearly \$1.2 million. Although he did not accept the Crown's position that the amount of the fraud committed as a result of Mr. Porisky's counselling was \$11 million, he found "that the amount of tax evaded from the counselling ... had to have been substantial".

- [20] The Crown asserts that if this Court were to intervene it would be unlikely to impose a sentence of less than two years in jail, which means that a conditional sentence could not be possible. This latter factor is relevant because an objective of granting release is the desire to avoid having offenders serve longer sentences than a fit sentence. On the basis that this appeal should be dealt with within a year and taking into account the fact that Mr. Porisky's conviction appeal is unlikely to be successful, I do not think that risk is of concern in this case.
- [21] As noted in *Ali* and as is consistent with *Al-Maliki*, the strength of the conviction appeal is a relevant factor to take into account when assessing the public interest.
- [22] I take into account the fact that Mr. Porisky has no previous criminal record, that he has a family that wants his participation and that, being self-represented, preparing his appeal in jail is more difficult. The latter factor has less weight on this application than it might on an application to appoint counsel.
- [23] Considering all of these factors, I conclude that enforceability outweighs reviewability in the circumstances of this case. The sentence appeal is weak; the conviction appeal is without merit; the offences were serious; any reduction of sentence is unlikely to result in a conditional sentence.
- [24] I refuse to order Mr. Porisky's release based on his sentence appeal and dismiss Mr. Porisky's application for judicial interim release.

Suspension of the fine

- [25] The sentencing judge ordered Mr. Porisky to pay a fine of \$274,815. He applies under s. 683(5) (a) to suspend payment of the fine. The Crown takes no position on the application other than to note that the fine was mandatory and the conviction appeal has no merit.
- [26] Mr. Porisky is incarcerated. While he has assets, he has no significant income. In my view, it is appropriate in the interests of justice to suspend payment of the fine pending the disposition of this appeal and I so order.

Additional comment

- [27] In my view, it is essential that this appeal be prosecuted with dispatch. Mr. Porisky asserts that the guidance of this Court is desirable so that those who think as he does will know the boundaries of what legally they can do. I agree with that.
- [28] Mr. Porisky believes that he will be able to file the transcripts and appeal books by mid-August. I direct that he do so by August 17, 2012. In addition, I direct that he file his factum by October 19, 2012. If he is able to file his factum before that date, that would be all the better. I urge the Crown to file its factum as soon as possible and, in any event, by December 14, 2012, but recognize that at this stage of the proceeding it is difficult to know whether that is realistic. My hope is that this appeal would be heard early in 2013. Either party should feel

free to apply for further directions. If such an application were to occur, any judge considering the management of this appeal is, of course, completely free to provide whatever direction he or she then considers to be appropriate.

"The Honourable Mr. Justice Chiasson"

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Prepared on 29 October 2026 · Esheria