

CANADA / JUDGMENT

R. v. S.A.

2024 BCSC 2042

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 2042 R. v. S.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S.A.,

2024 BCSC 2042

Date: 20240925

Docket: 3412-1

and

3461-1

Registry: Fort St. John

Rex

v.

S.A.

Restriction on publication: A publication ban has been mandatorily imposed pursuant to s. 486.4(1) of the Criminal Code of Canada, restricting the publication, broadcasting, or transmission in any way of the evidence that could identify the complainants, M.S. and F.M. This Publication ban applies indefinitely unless otherwise ordered by the court.

Restriction on Publication: A publication ban has been automatically imposed under s. 110(1) and 111 of the Youth Criminal Justice Act, restricting the publication of information that would identify a young person referred to in this judgment by the initials M.S., F.M. or S.A. This publication ban applies indefinitely, unless the information is published by that young person who is protected by this ban or the court has ordered publication.

Before: The Honourable Justice Brongers

Oral Reasons for Judgment on Bail Review

Counsel for the Crown:

D. Wightman

Counsel for the Accused:

M. Heathman

Place and Date of Hearing:

Fort St. John, B.C.

September 24, 2024

Place and Date of Judgment:

Fort St. John, B.C.

September 25, 2024

[1] THE COURT: The accused, S.A., is before the Supreme Court of British Columbia for a bail review pursuant to s. 520 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] The review is of a decision of a judge of the Provincial Court dated August 22, 2024. The review hearing took place yesterday. I have now had an opportunity to consider the material and submissions presented at the hearing by counsel for S.A. and by counsel for the Crown. This is my judgment following that review.

Background

- [2] S.A. is 17 years old. There is no dispute that S.A. is a "young person" subject to the Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA].
- [3] Prior to S.A.'s detention, S.A. was in the care of the Ministry of Children and Family Development [MCFD]. He resided in a group home in Fort St. John.
- [4] S.A. is charged with two counts of sexual assault contrary to s. 271 of the Code.
- [5] The first count relates to multiple incidents of sexual activity involving a complainant named M.S. They are said to have taken place at S.A.'s uncle's house over the two-week period from December 25, 2023, to January 7, 2024.
- [6] The second count relates to an incident of sexual activity involving S.A. and another complainant, F.M. It is said to have taken place on August 19, 2024, at S.A.'s group home in Fort St. John after S.A. snuck F.M. into the home through a window.
- [7] S.A. was arrested on February 12, 2024, in relation to the incidents that are the subject of the first count, and was released on conditions. Six months later, on August 22, 2024, S.A. was arrested in respect of the incident that is the subject of the second count. A judicial interim

release hearing took place later that day before a judge of the Provincial Court. At issue was whether S.A. should be released pending trial in respect of the second sexual assault charge, and whether S.A.'s bail that was issued in respect of the first sexual assault charge should be revoked.

- [8] At that hearing, the Crown indicated that it had public safety concerns about releasing S.A., but nevertheless proposed conditions should the bail judge find that S.A. should be released. These conditions included the following:
- (1) no-contact and no-go conditions regarding both complainants, with incidental contact orders;
 - (2) reporting;
 - (3) residing at S.A.'s group home subject to a curfew from 8:00 p.m. to 6:00 a.m.;
 - (4) no weapons;
 - (5) not to bring any female person under the age of 18 into S.A.'s home except with the permission of their youth worker; and
 - (6) no contact or communication with any female under the age of 18, except for incidental contact while at school or in other discrete circumstances.
- [9] Counsel for S.A. took the position that his client should be released on essentially the same conditions that the Crown had indicated may be acceptable, with two exceptions. First, he proposed that S.A.'s prohibition on contact with females under 18 should only preclude him from being alone with them, and that S.A.'s curfew should start one hour later, at 9:00 p.m. instead of 8:00 p.m.
- [10] The bail judge issued his decision on the same day he heard counsel's submissions. He ordered that S.A. be detained pursuant to s. 29(2)(b)(ii) of the YCJA. It provides that:
- (2) A youth justice court judge or a justice may order that a young person be detained in custody only if
 - (b) the judge or justice is satisfied, on a balance of probabilities
 - (ii) that detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence
- [11] The judge's reasons reveal that he considered a number of factors in reaching this conclusion, including:
- (1) the circumstances surrounding the alleged offences, both of which involved youth complainants, and which took place at the home of S.A.'s uncle and in S.A.'s group home;

- (2) the nature of the alleged sexual assault offences involving two young females whom S.A. knew;
 - (3) S.A.'s entitlement to be presumed not guilty of these offences;
 - (4) S.A.'s prior convictions for sexual assault and breach of their youth justice probation order;
 - (5) the substantial likelihood of S.A. reoffending; and
 - (6) the inability of the proposed release conditions to protect the public.
- [12] These considerations led the bail judge to find that S.A. has to be detained in custody while S.A. awaits trial. He also issued a no-contact order in respect of the complainants and a witness.
- [13] S.A. now applies for a review of this detention order. S.A. asks the court to allow this application, to vacate the order, and to authorize S.A. to be released on the same conditions that were proposed by the Crown at the initial hearing on August 22, 2024. The Crown is now wholly opposed to S.A.'s release and urges the court to dismiss this application.
- [14] At the hearing before me, the only new evidence that was presented was a bail review report on S.A. prepared by Marina Read, an MCFD Youth Justice Team Leader, dated September 23, 2024. Ms. Read provided information about S.A. at the initial bail hearing on August 22, 2024. She wrote in her report that her concerns for public safety and the risks posed to the community by S.A. remain unchanged. The report was tendered by counsel for the Crown and no objection was taken to it being entered into evidence by counsel for S.A.

Legal Framework

- [15] The Supreme Court of Canada decision in *R. v. St-Cloud*, 2015 SCC 27 sets out the principles to be applied when adjudicating a bail review application under s. 520 of the Code. It provides that these are not hearings de novo, and that reviewing judges do not have an open-ended discretion to vary the initial decision concerning the detention or release of the accused. Instead, reviewing judges can only exercise their power of review in three situations:
- (1) where there is admissible new evidence, if that evidence shows a material and relevant change in circumstances of the case;
 - (2) where the impugned decision contains an error of law; or
 - (3) where the decision is clearly inappropriate.
- [16] A bail decision will be "clearly inappropriate" if the bail judge gives excessive weight to one relevant factor or insufficient weight to another. However, reviewing judges are not permitted to interfere with the initial decision simply because they would have weighed the relevant factors differently.

The Position of the Accused

- [17] In her submissions before this court, counsel for S.A. argued primarily that this is a case where the decision to detain was clearly inappropriate. This is because of the manner in which the bail judge weighed the relevant factors. In particular, she submits that he gave insufficient weight to S.A.'s proposed release plan, and excessive weight to S.A.'s previous non-compliance with a court order.
- [18] Counsel for S.A. also raises what she calls a "procedural fairness" argument. She says that the bail judge issued a detention order when the Crown did not clearly argue in favour of one. In advancing this position, counsel for S.A. also suggests that the bail judge may have committed two errors of law. The first was to reverse the onus of proof which is always on the Crown as per s. 29(3) of the YCJA. The second was to not inquire into the availability of a "responsible person" pursuant to s. 31(2) of the YCJA.
- [19] For all of these reasons, counsel for S.A. says that her client's application should be allowed.

The Position of the Crown

- [20] Counsel for the Crown's submissions focused on the deference that must be given to the bail judge's conclusions. Counsel argues that there have been no changes in circumstances that might warrant a different decision than the one reached by the bail judge, and that it contains no errors of law. With respect to S.A.'s procedural fairness argument, the Crown says that the parties were always aware that a detention order could be issued, and that counsel for S.A. addressed this possibility before the bail judge.
- [21] As such, counsel for the Crown says that this review application should be denied.

Analysis

- [22] In accordance with the analytical framework set out in *St-Cloud*, the fundamental issue before this court is whether any of the three situations that would justify overturning the detention order of the bail judge are present in this case. I will examine each one in turn.

A. Has There Been a Material Change in Circumstances?

- [23] Counsel for S.A. does not argue that there has been a material and relevant change in the circumstances of this case since the bail hearing took place in the Provincial Court almost exactly one month ago. Furthermore, the only new evidence before this court is the MCFD bail review report. As has been noted, it is also to the effect that S.A.'s circumstances are effectively the same today as they were on August 22, 2024. Accordingly, the detention decision will not be reviewed on the "material changes in circumstances" ground.

B. Is the Detention Decision Tainted by an Error of Law?

- [24] There are two potential errors of law raised by counsel for S.A. in her submissions.

[25] The first is that the bail judge failed to impose the burden of proof on the Crown as required by s. 29(3) of the YCJA. The second is that the judge failed to engage in a mandatory inquiry into the availability of a "responsible person" under s. 31(2) of the YCJA. These errors are said to have been committed when the judge issued a detention order even though:

- (1) the Crown was not actively arguing for such an order; and
- (2) because counsel for S.A. was proceeding on the basis that the issue was simply what release conditions should be imposed, not whether S.A. should be detained.

[26] I do not agree with these submissions. This is not a case where both the Crown and the accused were jointly of the view that pre-trial detention was not warranted under s. 29(2) of the YCJA. To the contrary, counsel for the Crown (whom I note parenthetically is not the same counsel who appeared at this review hearing) expressly stated that she was concerned about how to keep the public safe and how to prevent S.A. from continuing to commit sexual offences. Crown counsel also expressly indicated that she was not consenting to the release of S.A., and that she was only proposing release conditions in the eventuality that the bail judge was inclined to make such an order. Her specific words at the hearing were as follows:

So with respect to these files, what the Crown is concerned about is the secondary grounds. How do we keep the public safe, prevent S.A. from continuing offences of this nature. And I -- I don't have a clear idea about how to do all of that. I'm going to give Your Honour the circumstances with respect to the files, and then propose conditions that we think may work, but ultimately the decision about bail is going to have to be in Your Honour's purvey [sic] as I'm not able to do a complete consent release.

[27] Furthermore, after setting out some potentially acceptable release conditions, counsel for the Crown said:

Other than keeping S.A. in custody or putting S.A. on a strict house arrest condition, I don't know what else we could do to keep our community safe.

[28] Similarly, it was apparent that counsel for S.A. (whom I note parenthetically is also not the same counsel who is representing S.A. at this review hearing) was acutely aware of the possibility that a detention order could be issued, and he fairly reminded the Provincial Court of the Crown's onus to justify that the conditions precedent for a detention order are in place. While it is also true that counsel for S.A. said, "I don't understand the Crown to actually be attempting to discharge that onus here," such a vague and unconfirmed statement of the Crown's position by counsel for the accused is not evidence that the Provincial Court judge failed to apply the YCJA properly, particularly when all judges are presumed to be aware of the law. In addition, counsel for S.A. conceded that:

There are secondary ground concerns here from the charged offences combined with [S.A.'s] record.

[29] I am, therefore, not persuaded that the bail judge committed an error of law by failing to appreciate the Crown's statutory onus at the bail hearing, or that S.A. was somehow denied procedural fairness when S.A.'s counsel did have a full opportunity to urge the Provincial Court to release S.A. on conditions, an opportunity that he availed himself of.

[30] With respect to the issue of whether the bail judge erred by not conducting an inquiry pursuant to s. 31(2) of the YCJA, I am also not persuaded that this provision applies in this case. Section 31(2) states:

If a young person would, in the absence of a responsible person, be detained in custody, the youth justice court or the justice shall inquire as to the availability of a responsible person and whether the young person is willing to be placed in that person's care.

[31] In the case at bar, there was never any suggestion that continued detention may be required because of the absence of a responsible person to care for S.A. To the contrary, it was understood that S.A. had been in the care of the MCFD at the Fort St. John group home where S.A. was living, and the release conditions being proposed contemplated that S.A. would continue in that care. As such, there was no need for the bail judge to make an inquiry as to whether some other individual responsible person was available to care for S.A., and whether S.A. would accept being in that person's care.

[32] In sum, I find that the bail judge did not commit any errors of law in issuing his detention decision, and it will not be set aside on that ground.

C. Is the Detention Decision Clearly Inappropriate?

[33] S.A. submits that the bail judge gave insufficient weight to their proposed release plan in three respects:

- (1) by characterizing the aspect of the plan that involved having a group home staff member awake at all times as turning the home into a jail or fortress;
- (2) by disregarding the aspects of the plan that entailed making security improvements such as a window alarm and a security camera; and
- (3) by disregarding the proposed condition that S.A. would be restricted from communicating with girls under the age of 18.

[34] Conversely, S.A. submits that the bail judge gave excessive weight to S.A.'s previous non-compliance with a previous court order, namely, an occasion when S.A. possessed an electronic device while on a probation order that prohibited S.A. from doing so.

[35] I do not accept that these targeted criticisms of the reasons for judgment of the bail judge demonstrate that his decision was clearly inappropriate. In order to assess the reasons fairly, they must be read holistically and not surgically.

- [36] To that end, I will read out the portion of the bail judge's reasons that deal with the proposed release plan conditions and the likelihood that S.A. would obey them. They are at paras. 5, 6, 8, and 10 to 13 of the reasons for decision:
5. The caselaw with regards to a Crown's secondary concerns is well-known to counsel, but for the benefit of [S.A.], there are four tests I must consider. The first, is it likely that you would commit an offence if released without conditions or if released immediately. Given your criminal record, S.A., and the allegations - the first is alleged to have occurred in late December, early January - December 2023, early January 2024, the second alleged to have occurred on the 18th or 19th of August of this year while, I am told, you were under release conditions in regards to the first allegation. So I find, yes, that first test is met. It is likely.
 6. The second test I must consider is, is that likelihood a substantial likelihood. Again, noting the second alleged offence has occurred in your group home where you live under the supervision of a ministry-employed supervisor, where you lived under curfew conditions, and while you were living under the release order from a previous allegation. So I do find it a substantial likelihood that you would reoffend.
 8. The last issue that I must consider, is whether there are conditions that I can impose that would reduce this concern for the public's safety to an acceptable level. The Crown, somewhat surprisingly, has essentially taken no position, suggesting release conditions that you have no contact with the purported complainants in these matters, minimize your contact with other young females, and live under a curfew, which I am advised you currently live under anyways, with slightly reduced hours.
- ...
10. I have considered the conditions proposed by the Crown and counsel. I do not find either suggestions would meet my -- would in my view, adequately protect the public. A curfew is utterly insufficient. I am mindful, as a young person who has not finished high school that it would ultimately be in your best interests to have educational opportunities, but those are available by distance, of which you have been made available, and I am told you have not availed yourself.
 11. Now, under s. 29 of the Youth Criminal Justice Act, subsection 2, I may order that a young person be detained in custody only if you have been charged with s. 29(2)(a)(i) a serious offence. That applies here. You have now been charged with two serious offences. I find it also meets s. 29(2)(a)(ii) that there is a history involving a pattern, both of standing charges and findings of guilt.
 12. I must find, pursuant to s. 29(2)(b)(ii), that detention is necessary for the protection or safety of the public, including any victim or witness. Given what I have been informed regarding the status of the youth home that you are living in, S.A., a window that is disassembled and obviously could be easily breached, a custodian who, as a single custodian, sleeps in the evening when it is alleged the second matter occurred, and although I am advised by the

youth worker that steps will be taken to have a youth worker on and awake at all times, that essentially is turning a youth home into a jail, into a fortress, which it is not designed to do.

13. I therefore find that, pursuant to 29(2)(b)(ii), detention is necessary for the protection of the public. I have considered whether house arrest would be sufficient, but given the youth facility that you are living in, I do not find so. Given your history of disregarding court orders, including a conviction for possessing an electronic device to court order, I do not find you would obey any reasonable condition that I would impose on you, S.A.
- [37] These reasons do not demonstrate that the weighing exercise conducted by the bail judge was done in a clearly inappropriate manner, particularly when it is recognized that these are oral reasons given on the day of the hearing itself. It is trite law that a standard of perfection is not applied by reviewing courts when assessing first-instance reasons. In my view, counsel for S.A. is asking this court to parse portions of the bail judge's reasons in a search for error, and is effectively urging this court to weigh the factors that were considered at first instance differently. This, I cannot do.
- [38] Instead, I am satisfied that the bail judge was aware of the salient details of the proposed release plan, which he carefully considered before concluding that they were inadequate to address the significant public safety concern posed by S.A. This is wholly understandable given that sexual assault of young persons is a particularly serious offence, no matter the age of the perpetrator. I am also not persuaded that the bail judge was wrong to consider a conviction for breaching a probation order as indicative of S.A.'s inability to abide by court orders just because the breach related to a prohibition on possessing electronic devices, especially given its relative recency.
- [39] In sum, as I do not find the bail judge's assessment of the relevant factors to be clearly inappropriate. I cannot interfere with the detention decision on this ground either.

Conclusion

For all of these reasons, I am not persuaded that any of the situations identified by the Supreme Court of Canada in *St-Cloud* are present in this case. Further to the court's authority under s. 520(7)(d) of the Code, S.A.'s application is dismissed.

"Brongers J."

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