

CANADA / JUDGMENT

R. v. S.B.K.

2022 BCCA 413

COURT

British Columbia Court of Appeal

DECIDED

17 November 2022

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2022 BCCA 413 R. v. S.B.K.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. S.B.K.,

2022 BCCA 413

Date: 20221117

Docket: CA47830

Between:

Rex

Respondent

And

S.B.K.

Appellant

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Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: An order of the Provincial Court of British Columbia, dated

March 23, 2021 (conviction) (R. v. S.B.K., Surrey Docket 234723-1).

Oral Reasons for Judgment

Counsel for the Appellant

(appeared via videoconference

on November 17, 2022):

C. St. Germain

Counsel for the Respondent

(appeared via videoconference

on November 17, 2022):

M. Richards

Place and Date of Hearing:

Vancouver, British Columbia

November 16, 2022

Place and Date of Judgment:

Vancouver, British Columbia

November 17, 2022

Summary:

The appellant has been charged with a breach of her bail pending appeal. The Crown applied to cancel her bail based on the breach, as well as other information of non-compliance. Accepting that the test for cancellation was met, the appellant did not oppose cancellation. However, she sought to be re-released. HELD: the appellant's bail pending appeal is cancelled and her application to be released on a new bail is denied. The appellant shall be detained in custody while awaiting her appeal.

- [1] DEWITT-VAN OOSTEN J.A.: The Crown has brought an application to cancel S.K.'s bail pending appeal pursuant to ss. 524(3)-(4) and 679(6) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and asks that it be replaced with a detention order.
- [2] S.K. is 41 years old and a permanent resident of Canada. She is in custody pursuant to a warrant that was issued by Justice Willcock of this Court on October 14, 2022 for an alleged breach of her release order. She has been criminally charged with a breach under s. 145(5) (a) of the Code. That matter is being prosecuted in the Provincial Court. The Crown has proceeded summarily. The date of the alleged breach is September 16, 2022. S.K. has not had a judicial interim release hearing on the new charge. I understand that the Provincial Court proceeding is awaiting a decision by this Court on the bail pending appeal.

- [3] S.K. was released pending appeal on November 4, 2021. The Crown consented to bail. S.K. was released after paying a \$500 cash deposit. There is no surety.
- [4] As a term of the release order, S.K. was restricted from having contact with her three children (who are 18, 16 and nine years old, respectively). There is an absolute prohibition on contact with the eldest child. For the other two, S.K. is not allowed to have contact unless she has permission from the Ministry of Child and Family Development ("MCFD").
- [5] The MCFD has custody of S.K.'s children. In February 2022, the Provincial Court issued a continuing custody order in respect of all three children, finding that they were "in need of protection". The custody order allows for "reasonable access" with the middle child at the discretion of the MCFD. I understand that at no time since S.K.'s release pending appeal in November 2021 has the MCFD authorized in-person contact.
- [6] S.K.'s appeal from conviction is scheduled for a hearing on December 12, 2022. She appeals from three convictions for violence inflicted against her eldest child. The violence spanned several years, from 2011 to 2018. At the trial in the Provincial Court, the judge found beyond a reasonable doubt that S.K. committed several acts of violence against the victim. The assaults resulted in bodily harm:
- [127] In summary, X.D.'s evidence convinces me beyond a reasonable doubt that S.K. assaulted X.D. regularly between 2011 and 2018 using implements such as broomsticks, the back of knives, knives, mop and broom handles, wooden bed slats, wire cords, her fist, a cell phone and other items that can be characterized as weapons, though not the fist. Further, I find that X.D. sustained injuries arising from those assaults that were not trifling in nature and consequently that she suffered bodily harm.
- [128] The Crown has proven beyond a reasonable doubt that X.D. was, at a minimum, assaulted with a weapon on at least seven occasions and sustained bodily harm as a result of assaults against her both with and without a weapon on at least eight occasions. Those assaults occurred when S.K. threw a small knife at X.D. causing a laceration that required stitches and a resulting scar to X.D.'s forearm, when S.K. threw a large chef's knife at X.D. causing a laceration that required stitches and a resulting scar to X.D.'s left thigh, when S.K. threw a cell phone at X.D.'s head causing a laceration that required stitches to X.D.'s head, when S.K. threw an object at X.D.'s head causing a laceration to X.D.'s head, when S.K. punched X.D. causing her to break her tooth, when S.K. hit X.D.'s hand with a Swiffer mop handle causing a broken pinkie finger, or fifth metacarpal, when S.K. hit X.D. with a jagged metal broomstick, causing a laceration and scar to X.D.'s rear thigh.
- [7] For her offences, S.K. was sentenced cumulatively to just under 12 months' imprisonment, followed by two years probation. The sentences were imposed on September 27, 2021. S.K. served approximately 39 days before she was granted release pending appeal. Accordingly, there are approximately 324 days remaining. Accounting for in-custody remission, she likely has six months or more of imprisonment left to serve.

Circumstances of the Alleged Breach

- [8] The newly charged breach involved S.K. having in-person contact with her second eldest child at Surrey Memorial Hospital. This child was at the hospital for a tonsillectomy and had been brought there by a youth worker. The child facetimed S.K. from the hospital (I understand this type of contact was allowed by the MCFD, when initiated by the child). In response to the child reaching out, S.K. attended at the hospital and stayed with the child. She was overheard to discuss taking the child home, rather than leaving them at the hospital for pick-up by the youth worker. The youth worker was notified of S.K.'s presence. Upon realizing that hospital staff had become aware that she was prohibited from being in-person with the child, S.K. abruptly left the hospital. CCTV footage confirmed that she had been there.
- [9] After this incident, S.K. was charged with an offence under s. 145(5)(a) of the Criminal Code. The Crown was subsequently made aware of other alleged infractions of the release order. Crown counsel has been informed of the following incidents by a probation officer (bail supervisor) in Surrey's community corrections office. These incidents are said to have started approximately one month after S.K.'s release pending appeal:
- On December 12, 2021, S.K. was seen with one of her children in a car. She "took off";
 - On February 22, 2022, police advised the community corrections office that they get calls "weekly" from one of the children's foster parents about communication between that child and S.K.;
 - On February 24, 2022, S.K. advised a probation officer that she had run into one of her children at the Guildford Mall and the child asked her to pay for some things;
 - On March 25, 2022, S.K. and the second eldest child met at a McDonald's restaurant. The MCFD did not approve of this contact. S.K. is alleged to have hit the child twice;
 - On April 27, 2022, S.K. and this same child went to Walmart. Again, this contact was not approved. S.K. apparently asked the child about their sex life and when S.K. was told that it was none of her business, she started hitting the child, punching them with a fist;
 - On May 10, 2022, the community corrections office was told by the police that they had received "many reports of [S.K. and this same child] having contact";
 - On May 11, 2022, S.K. acknowledged to a probation officer that she had received a call from this child.
- [10] There are no reported physical injuries associated with the March and April 2022 incidents.
- [11] A police report related to the March 25, 2022 incident reveals that it was the child who contacted police and disclosed their interaction with S.K. and the fact of being "hit twice by [S.K.'s] hand". The police spoke to S.K. about the incident. She denied having contact with the child.

- [12] There is also a police report associated with the April 27, 2022 incident. S.K.'s second eldest child told a youth worker that S.K. had "weakly" punched the child four times with a fist. The child had willingly got into S.K.'s car to get a ride to Walmart for shopping. Police checks "showed that there [had] been at least 10 files between [S.K.] and [this same child] related to breach of [a] no-contact condition except with MCFD permission". It is my understanding that S.K. is not licensed to drive.

Discussion

- [13] S.K.'s release order pending appeal carried an end date of November 4, 2022. As a result, it has expired and, in that context, it is likely unnecessary for me to address the Crown's application to cancel. Even without the order being cancelled, S.K. is in a position whereby she must re-apply for release pending appeal.
- [14] I am nonetheless satisfied that if it was necessary to do so, the material tendered by the Crown justifies cancellation. S.K. has been charged with violating a specific term of her release order and the Crown has adduced evidence of additional circumstances in which S.K. has allegedly been non-compliant with that same order. Section 524(3) of the Criminal Code (which applies in these circumstances) provides that a judge shall cancel a release order if they find that (a) the [appellant] has contravened a release order; or (b) there are reasonable grounds to believe the [appellant] has committed an indictable offence while subject to a release order.
- [15] In my view, both subsections (a) and (b) are properly engaged in this case. Indeed, S.K. accedes in her written response to the Crown's application that the new charge of breach of bail provides a proper basis for cancellation.
- [16] Whether due to expiry of the release order or cancellation, both scenarios have the effect of placing S.K. in a reverse onus position. To obtain her release, she must satisfy the criteria for release set out in s. 679(3) of the Criminal Code.
- [17] Under the latter provision, bail pending appeal is available where: (1) the grounds of appeal are not frivolous; (2) the applicant will not flee and will surrender themselves in accordance with the terms of an order; and (3) detention is not necessary in the public interest: *R. v. Oland*, 2017 SCC 17 at paras. 19-20.
- [18] Section 679(3)(c) requires that I consider two issues: (1) public safety; and (2) public confidence in the administration of justice. Public confidence is assessed by weighing the interest in enforceability of the Provincial Court verdicts against the interest in reviewability: *Oland* at paras. 22-23. It is generally understood that judgments should be immediately enforced. At the same time, society recognizes that the justice system is not infallible. Accordingly, when assessing bail, the appeal court must be mindful of the fact that persons who seek to challenge the legality of their convictions should be entitled to a meaningful review process that does not require them to serve a substantial part or the whole of their sentence, only to find that the conviction on which that sentence was based

was unlawful: Oland at para. 25.

- [19] Factors for consideration in weighing enforceability against reviewability include the apparent strength of the grounds of appeal, the seriousness of the offences for which the appellant has been convicted, the circumstances surrounding those offences, and the length of sentence imposed.
- [20] The applicant for appeal bail bears the burden of establishing on a balance of probabilities that they meet the criteria for release: Oland at para. 19.
- [21] Judgments from this Court have held that detention is not automatic when an appellant has been charged with a new offence while awaiting their appeal.
- [22] In *R. v. Mehan*, 2016 BCCA 129, for example, Justice Donald identified a number of factors that should guide the analysis. These include (at para. 29):
- a) similarities between the newly charged offence and the index offence;
 - b) whether the appellant is alleged to have directly contravened a specific term of the release order, or the new offence falls outside the terms of the order;
 - c) a record for similar offending, such that the new charge can reasonably be said to form part of a pattern of behaviour;
 - d) the gravity of the new allegations;
 - e) whether there has been difficulty with the appellant's bail compliance; and
 - f) whether allegations of violence underlie the new charge.
- [23] This is not an exhaustive list. The fact of a new charge pending appeal must be "considered contextually and on a practical sense of public safety": *Mehan* at para. 28, emphasis added. See also: *R. v. Joe*, 2017 YKCA 1 at para. 50; *R. v. Czechowski*, 2020 BCCA 237 at paras. 13-16.
- [24] I take no issue with this proposition. However, at the same time, I agree with the comments of Thorburn J.A. in *R. v. J.R.*, 2022 ONCA 152 at para. 31, wherein she held that "extenuating circumstances" may be necessary for an appellant to satisfy their onus in support of release following a cancellation, particularly if the alleged violation of the release order involves illegality that extends beyond the breach. That is what has occurred here. S.K. is alleged to have breached a specific term of her bail pending appeal. There are also allegations, although not charged, of additional contact with her children that involved one or more assaults.
- [25] S.K. says it is not necessary that she be detained in custody. Instead, she proposes a new release plan with a \$5,000 cash bail. This form of bail has been recognized by the Supreme Court to constitute one of the most onerous forms of release under the Criminal Code: *R. v. Antic*, 2017 SCC 27 at para. 4.

- [26] S.K. says she is willing to comply with any conditions considered necessary by this Court, including a house arrest condition. This type of a condition would presumably preclude her from being outside of her home unless for specified purposes, or with the express approval of a bail supervisor. S.K. lives in Abbotsford. I am told that she lives by herself. She has deposed that she is unemployed and receives social assistance. In response to a question from the Court as to how S.K. would manage a \$5,000 deposit given her subsistence income, counsel advised that a friend will provide the funds. There is no affidavit from that individual confirming this fact. I note, as an aside, that the Crown produced a copy of reasons for judgment out of the Supreme Court dated December 2020 in which S.K. appears to have been awarded a personal injury settlement in excess of \$240,000. There is no mention of that fact in the affidavit. The evidence surrounding S.K.'s personal circumstances, including the resources that may be available to her and the necessity of reliance on a friend for the cash deposit, is not clear. As a result, it is difficult to assess what deterrent impact, if any, loss of the deposit in the event of non-compliance would actually have on S.K.
- [27] In support of her argument in favour of release, S.K. says she easily meets the test under s. 679(3)(a) for a non-frivolous appeal. She says there is also no reason to believe that she will leave the jurisdiction or otherwise not surrender herself as required: s. 679(3)(b). Nor, from her perspective, does the material before the court justify a finding that S.K. presents a risk to public safety that cannot be adequately managed through her proposed release plan: s. 679(3)(c). Accordingly, she says it is not necessary to detain her in the public interest and re-releasing her will not cause reasonably informed members of the public to lose confidence in the administration of justice.
- [28] In this regard, S.K. points out that although she has been charged with a breach of her release order, she has not been found guilty of that offence. It is an allegation only. She accepts that the Crown likely has a strong case specific to that breach; however, she is presumed innocent on the new charge until proved guilty. Moreover, S.K. says that this breach, as alleged, was relatively "innocuous". She responded to the fact that her child had been hospitalized and there is no suggestion that she was physically aggressive. She has no criminal convictions for non-compliance with a court order. She was on bail while awaiting her trial in the Provincial Court from July 2019 to September 2021, and there were no recorded allegations of non-compliance.
- [29] With respect to the other incidents of non-compliance alleged by the Crown since November 2021, S.K. emphasizes that these incidents have not resulted in criminal charges, even though there has been police involvement with more than one of them. Nor did these allegations cause a police officer or S.K.'s bail supervisor to apply for a warrant to cancel her release pending appeal. S.K. says the information surrounding these incidents is unclear, the allegations are relatively vague, and they have not been substantiated in any reliable way. There is no indication of statements having been taken from the child complainant. It is hard to know whether some of the allegations actually involve a breach of bail. For

example, one of them is said to have involved S.K. accidentally encountering one of her children at a shopping mall (which means that S.K. did not initiate the contact), and then buying things for them at their request. It is clear that once or twice during the relevant timeframe, S.K. has also advised her probation officer of contact. Yet, no one sought to cancel her bail or to take other forms of action. S.K. says I should give no or limited weight to this additional material. Moreover, a potential inference to draw from it is that whatever the non-compliance may have consisted of, it was not seen as significant enough to warrant intervention.

- [30] S.K. argues that with the proposed release plan, re-releasing her on bail pending appeal would not cause a reasonably informed member of the public, fully apprised of the relevant circumstances, to lose confidence in the administration of justice. A \$5,000 cash deposit will function as a strong incentive to comply with the terms of her bail and house arrest will sufficiently mitigate any risk re-offending. Moreover, if she is denied release, she may end up serving a significant portion of her sentence before the appeal from conviction is resolved. The enforceability versus reviewability analysis, from her perspective, weighs in her favour.
- [31] Having reviewed the materials and after hearing submissions, I am satisfied S.K. should be detained in custody while awaiting her appeal. The hearing is less than one month away.
- [32] I accept that the appeal from conviction is not frivolous. The requirements of s. 679(3)(a) were met when S.K. was first granted release with the consent of the Crown. Nothing has substantively changed since then. Indeed, S.K. has now filed her factum in the appeal, laying out several grounds of appeal with specific reference to portions of the trial judge's reasons and the evidentiary record. These grounds include: reversing the burden of proof; misapprehending evidence; impermissible reasoning; and improperly using a prior consistent statement to bolster the complainant's credibility. I have reviewed the reasons for conviction. Although I do not consider S.K.'s appeal to be strong given the trial judge's comprehensive review of the evidence, findings of fact and assessment of credibility, I cannot say it is doomed to fail.
- [33] I also accept there is no risk of flight in this case and that if she is released, S.K. will likely surrender herself into custody as required: s. 679(3)(b). Crown counsel has expressed no concern about the potential for S.K. to leave the jurisdiction.
- [34] However, I do have serious concerns about whether S.K. will abide by the terms of any new release order. In particular, I have serious concerns about whether she will refrain from contact with her children--either by initiating contact, or in responding to one of them reaching out to her by meeting with them in-person.

- [35] S.K. has been criminally charged with violating the no-contact provision of her order. She accepts the Crown has a strong case for a breach. Based on the additional infractions alleged by the Crown, there are also reasonable grounds to believe that she has violated this Court's order on more than one occasion since November 2021.
- [36] S.K. takes issue with the reliability of the evidence surrounding those allegations, but does not deny them in her affidavit. Nor has she offered any evidence of extenuating circumstances to explain them. The information provided by the Crown includes admissions by S.K. of having contact. The police say they spoke to her on at least one occasion about allegations of a breach. She said she was aware of the allegation. It cannot be, coming into the revocation hearing, that she was unaware of concerns having arisen during her bail. And yet, she has offered no explanatory context or details to attenuate the otherwise adverse inferences that logically flow from the incidents tendered by the Crown, individually or in their cumulative effect. S.K. bears the onus in her application for release.
- [37] In *R. v. Cheung*, 2016 BCCA 221 at para. 70, it was noted that in the absence of a "clear and unequivocal dispute or challenge to a particular allegation or circumstances", the court is entitled in a bail hearing to rely on information adduced by the Crown, without the necessity of the Crown calling evidence in support or testing the reliability of that evidence through a testimonial process. I accept that the Court should be wary of information that, on its face, gives rise to obvious credibility or reliability concerns, but the information in this case--although in hearsay form and general in nature--emanates from community corrections personnel and police reports. In the circumstances, I am prepared to treat it at face value.
- [38] The no-contact term was not an insignificant term of S.K.'s bail. In fact, it was the most critical term of the release order. Given the grave nature of the offences for which she has been convicted (multiple assaults that resulted in physical injury requiring medical intervention and treatment), and the fact that they were committed against a dependent child, the no-contact term was critical to preventing S.K. from re-offending in a like manner and, importantly, for protecting the safety of her children while she was in the community awaiting her appeal. A second order is also in place restricting S.K.'s contact with her children. That order reflects a judicial finding that all three of S.K.'s children require protection from her. It cannot be, in these circumstances, that S.K. would not have appreciated the importance of respecting this aspect of her release order.
- [39] In the March 25, 2022 police report that forms part of the Crown's material, an officer notes that when S.K. was spoken to about the allegation raised therein, she denied having contact with the involved child. Moreover, she said she "did not want to get in contact with [that child] because it gets her in trouble and that she is trying to stay out of jail". She understood the consequences of a breach. But, it is alleged that contact with that same child continued after March 2022, in contravention of the order.

- [40] As such, I have no confidence that if released, S.K. will comply with the terms of a new order that prohibits contact. The potential loss of a \$500 cash deposit has not deterred her since November 2021. A house arrest condition, although certainly more onerous than what was in place on her prior order, has diminished value in a case of allegedly repeated violations without someone else in the home, a surety, or some other form of close monitoring being in place. As correctly noted by S.K.'s counsel, a condition can be built-in for an occasional check-in by police or S.K.'s bail supervisor; however, she has already been the subject of bail supervision and regular contact with the community corrections office, and that does not appear to have made a difference.
- [41] Most importantly, I have serious public safety concerns under s. 679(3)(c). As noted in *R. v. Greer*, 2021 BCCA 148 at paras. 42-43, where an applicant poses a substantial risk to public safety if released, that factor, standing alone, may be sufficient to warrant detention in the public interest. See also: *Oland* at paras. 27-30.
- [42] Not only does the Crown allege multiple infractions of the no-contact provision since S.K.'s release, two of those infractions involve allegations of physical aggression against the child with whom she was having contact. In her written submissions, S.K. acknowledges that an allegation of breach of bail involving allegations of violence is appropriately characterized as being on the "grave end of the scale". I appreciate that the allegations have not been proved. Moreover, there is no indication of physical (as opposed to psychological) injury. However, physical aggression in response to conflict arising in her relationship with one of her children is consistent with the type of behaviour found to have existed by the trial judge, and which led to S.K.'s convictions.
- [43] Applying the Mehan factors to the bail analysis in this case, S.K.'s new offence involves a direct contravention of her release order. There is also evidence that while otherwise in breach of that order, she engaged in conduct that is similar in type to the offences that form the subject matter of the appeal--aggression against one of her children. The alleged repeated bail infractions are not only serious, but reveal that she has been struggling with court-ordered compliance since at least December 2021. The fact that a second court order was put in place restricting her contact with her children in February 2022, such that she was subject to two protective orders, increases the gravity of the alleged non-compliance.
- [44] I have been told by the Crown that the child to whom the breach of bail relates is afraid for their safety. I have no reason to doubt that assertion. I am satisfied that as it presently stands, S.K. presents a substantial risk of re-offending and that the re-offending carries with it a realistic potential of assault, even with the proposed release plan.
- [45] S.K.'s appeal is scheduled for hearing less than a month from now. If denied release, she will not serve the entirety of her sentence before that appeal proceeds. In the circumstances of this particular case, there is a strong interest in enforceability and it outweighs the interest in reviewability. I am also satisfied that if I released S.K. in the face of multiple allegations of non-compliance, some of which are said to have involved conduct similar in nature to that

for which she has been convicted, public confidence in the administration of justice would be adversely affected. I say this fully appreciating that the principle of restraint properly informs the bail analysis and persons should not be detained in custody while awaiting their appeal if a less restrictive form of bail will satisfy the public interest.

[46] Depending on the circumstances in existence at the time of S.K.'s appeal, or delay that may ensue from a reserved judgment, S.K. may be able to re-apply for bail pending appeal based on a material change. That is up to her. For now, S.K. has not persuaded me that her detention is not necessary in the public interest.

Disposition

[47] For the reasons provided, S.K.'s release order dated November 4, 2021, if not already considered expired, is hereby cancelled and she is ordered detained in custody.

[48] Pursuant to s. 679(3) of the Criminal Code, I order that S.K. be detained in custody while awaiting the hearing of her appeal from conviction.

[49] Finally, pursuant to s. 770 of the Criminal Code, I direct that the release order of November 4, 2021 be marked as cancelled, with reference to these reasons, for the purpose of a possible forfeiture application under s. 771.

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 27 October 2026 · Esheria