

CANADA / JUDGMENT

R. v. Skiffington

2024 BCCA 210

COURT

British Columbia Court of Appeal

DECIDED

27 May 2024

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2024 BCCA 210 R. v. Skiffington

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Skiffington,

2024 BCCA 210

Date: 20240527

Docket: CA48752

Between:

Rex

Respondent

And

William Wade Skiffington

Appellant

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On referral of the Minister of Justice for a new appeal from conviction pursuant to s. 696.3(3)(a) (ii) of the Criminal Code in respect of the order of the Supreme Court of British Columbia convicting Mr. Skiffington of second-degree murder, dated

October 21, 2001 (R. v. Skiffington, Vancouver Docket CC01603).

Oral Reasons for Judgment

Counsel for the Appellant:

T.J. Duncan

J.A. Cunningham

(via videoconference)

S.J.D. Smith

Counsel for the Respondent:

M.T. Ainslie, K.C.

M. Richards

M.D. McDonald

Place and Date of Hearing:

Vancouver, British Columbia

May 27, 2024

Place and Date of Judgment:

Vancouver, British Columbia

May 27, 2024

Summary:

The Crown applied to cancel the appellant's bail pending appeal because of new criminal charges, including two counts of breach of the release order. The appellant did not oppose cancellation; however, he sought to be re-released on a new release order with a boundary restriction. The Crown did not oppose re-release. **HELD:** The current release order is cancelled under s. 524 of the Criminal Code. The appellant is re-released on the same terms as previously imposed, plus a boundary restriction.

[1] DEWITT-VAN OOSTEN J.A.: There are two applications before me: (1) the Crown applies under ss. 679(6) and 524(3)(a) and (b) of the Criminal Code, R.S.C. 1985, c. C-46, for cancellation of the appellant's bail pending appeal; and (2) the appellant applies to be re-released on bail with the same terms as previously imposed, plus a boundary restriction.

Background

[2] It is not necessary for the purpose of these applications to set out the entirety of the background to the appeal. A brief synopsis of the chronology will suffice.

- [3] In October 2001, a jury found the appellant guilty of second-degree murder in the shooting death of his then common-law partner, Wanda Martin. The offence occurred in Richmond in 1994. The appellant was sentenced to life imprisonment, with no eligibility for parole until he had served 13 years.
- [4] The appellant appealed his conviction. That appeal was dismissed: 2004 BCCA 291. In its reasons, this Court noted there was no forensic evidence linking the appellant to the place at which Ms. Martin was killed, or to her death. The murder weapon was never found. Instead, the prosecution's case depended predominantly on a tape-recorded conversation that was obtained during an undercover police operation several years after the murder, in which the appellant confessed to the killing: at paras. 5, 10-11.
- [5] In 2013, the appellant sought an extension of time to appeal and leave to appeal this Court's decision to the Supreme Court of Canada. Those applications were denied: [2013] S.C.C.A. No. 291, 2013 CanLII 69860.
- [6] In 2017, the appellant filed an application for ministerial review of his conviction under s. 696.1(1) of the Criminal Code, alleging a miscarriage of justice.
- [7] In January 2019, he was released on bail by a Supreme Court judge pending completion of the ministerial review: 2019 BCSC 178. By this time, the appellant had served more than 17 years of his sentence. Applications for parole had been denied because the appellant refused to take programming that required him to admit he is the individual who committed the murder.
- [8] At the January 2019 bail hearing, the Crown conceded that the application for ministerial review was not frivolous. The judge was satisfied that if released on bail awaiting that review, the appellant would surrender himself into custody in accordance with any terms imposed by that Court. On the whole of the material, the judge concluded that the appellant "ha[d] raised a serious concern about the accuracy of his conviction", and there were "live issue[s]" for consideration in any review of the conviction: at paras. 45, 57, 61. The judge was satisfied that maintaining public confidence in the administration of justice did not necessitate the appellant's continued detention while awaiting the outcome of the ministerial review: at para. 64. The material before him did not show a "history of noncompliance" during the appellant's correctional involvement post-incarceration: at para. 19.
- [9] The Supreme Court released the appellant on a recognizance with one surety and a cash deposit of \$100,000. His father was the surety. The bail order imposed a number of terms, including that the appellant be supervised on bail and that he have no contact with certain named individuals.
- [10] In December 2022, the federal Minister of Justice completed his review and determined there is a reasonable basis to conclude that a miscarriage of justice likely occurred in relation to the 2001 conviction. Consequently, the Minister referred the matter to this Court for a "new appeal": Criminal Code, s. 696.3(3)(a)(ii).

- [11] The new appeal has not yet been heard. The parties are not ready to file their factums or any fresh evidence applications, or to set a hearing date. Disclosure requests, forensic testing on exhibits in the possession of the police, and other preliminary matters remain ongoing. The file is subject to case management and the parties agree it may be some time before the matter is ready for a hearing on the merits.

Release Pending Appeal

- [12] In December 2022, with the consent of the Crown, the appellant was released on bail pending the new appeal. There was no suggestion of prosecutable non-compliance with the release order issued by the Supreme Court judge. The appellant had been subject to that order for almost four years. The Crown was content with the appellant being released on the same terms that were imposed by the Supreme Court (as amended).

Cancellation Application

- [13] On May 17, 2024, the Crown sought and obtained an arrest warrant from this Court on the basis of circumstances that had arisen in Newfoundland and Labrador, where the appellant lives and is reporting to a bail supervisor.
- [14] Those circumstances are set out in an affidavit sworn by Michael McDonald (a lawyer working in the Crown's office), that was filed with this Court on May 17, 2024. The affidavit indicates that on May 15, 2024, the appellant was arrested in Newfoundland and Labrador and charged with three offences: (1) uttering a threat against someone he is prohibited from having contact with under the terms of his bail (Criminal Code, s. 264.1(1)); and (2) two counts of breach of recognizance (s. 145(5)).
- [15] I understand that the appellant is currently in custody on those charges, awaiting a release hearing in the Provincial Court of Newfoundland and Labrador. The hearing is scheduled for May 28, 2024. The warrant issued by this Court on May 17, 2024 was notionally executed today, while the appellant appeared by video before me. As such, he is also functionally in custody on that warrant.
- [16] Mr. McDonald's affidavit provides a brief synopsis of the circumstances surrounding the new charges. The complainant, Darryl Martin, is the brother of Wanda Martin:

it is alleged that as Mr. Martin was driving his car, he noticed the appellant and pulled into a driveway to allow the appellant to pass. The appellant pulled in behind him. The appellant got out of his car and uttered profanities and threats of violence to Mr. Martin. Mr. Martin also described uttering profanity to the Appellant. [Mr. Martin's son was present and] also provided a statement to police

- [17] There are numerous attachments to Mr. McDonald's affidavit, including material prepared by the Royal Newfoundland Constabulary specific to the May 15, 2024 incident. In that material, the appellant is alleged to have told Mr. Martin that he "was a joke and a nothing".

Moreover, that "if he fucked with him anymore", he would "fucking kill" him. After Mr. Martin told the appellant that he " couldn't believe he threatened to kill [him] because of his current situation", the appellant got into his vehicle. He continued to shout at Mr. Martin, but the latter could not hear what he was saying. Mr. Martin's teenage son has confirmed the fact of a threat, telling the police that the appellant said "I'm going to fucking kill you" as he approached them in their car. He also told the police that in response to the words spoken by the appellant, his father "started laughing saying "you just threatened me"".

- [18] The Crown says the existence of the new charges, including two counts of breach of bail, provides a clear basis for cancelling this Court's release order under both ss. 524(3)(a) and (b) of the Criminal Code. That provision stipulates that a judge or justice shall cancel an existing bail order where they find that:
- (a) the [appellant] has contravened or had been about to contravene the summons, appearance notice, undertaking or release order; or
 - (b) there are reasonable grounds to believe that the [appellant] has committed an indictable offence while being subject to the summons, appearance notice, undertaking or release order.
- [19] The appellant does not oppose cancellation. He accepts that based on the material filed by the Crown, s. 524(3)(b) is properly engaged. The appellant has been charged with three indictable offences in Newfoundland and Labrador, and on that basis, there are " reasonable grounds to believe that [he] has committed an indictable offence while being subject to a release order ".
- [20] The appellant submits, however, that it is not necessary for me to make a finding under s. 524(3)(a) and that I should decline to do so.
- [21] I am satisfied that in the particular circumstances of this case, it is appropriate to cancel the December 2022 release order on the basis of s. 524(3)(b). It is not necessary that I also make a finding under s. 524(3)(a). Cancellation can occur under s. 524(3)(b) alone. The appellant has expressed an intention to challenge the factual allegations that underlie the new charges, including the charged breaches of his bail. The Crown is not seeking to invoke s. 770(1) of the Criminal Code, and as such, a finding under s. 524(3)(a) is not required to facilitate that process. If the Crown does seek to make a s. 770(1) application in the future, it can seek the requisite finding at that time. See, for example, the discussions in *R. v. Parsons* (1997), 124 C.C.C. (3d) 92 (Nfld. C.A.), 1997 CanLII 10870 and *R. v. Dallaire* (2001), 141 O.A.C. 65, 2001 CanLII 24106 at para. 22.
- [22] Having determined it is appropriate to cancel the release order, s. 524(4) of the Criminal Code requires that I order the appellant to be detained in custody unless he can show cause why his detention is not justified under ss. 515(10) and 679(3).
- [23] It is to that issue I now turn.

New Release Pending Appeal

- [24] The appellant asks to be re-released on bail pending the new appeal.
- [25] His father, Tom Skiffington, has filed an affidavit in support of the application. He has acted as the appellant's surety since January 2019. He is aware of the new charges and confirms that he is prepared to continue in the role of surety. He says previous difficulties have arisen between Mr. Martin and the appellant while the appellant has been on bail. In fact, the appellant's legal counsel wrote to the Royal Newfoundland Constabulary in July 2023 bringing those difficulties to their attention.
- [26] A copy of that email is before me. It alleges " numerous occurrences during the past few years involving [the appellant] and the Martin family", in which one or more members of the Martin family have initiated contact with the appellant. The email asked the police to " take appropriate measures to ensure that public safety is maintained and that the Martins are cautioned that they cannot harass, accost, or threaten [the appellant]".
- [27] I make no assumptions or any findings about the truth of the factual assertions in that email. However, the fact that an email was sent and the Crown has tendered no contradictory evidence is, at the very least, consistent with the appellant's claim made through his counsel that he has been trying to avoid contact and has been transparent about encounters with the Martin family.
- [28] The appellant's father affirms that such is the case and says that at one point, the appellant considered applying for a peace bond against Mr. Martin. He also says that apart from the issues involving Mr. Martin, the appellant has been " completely compliant with his bail conditions". The appellant's father says adding a boundary restriction to a new release order could reduce the risk of encounters between Mr. Martin and the appellant.
- [29] The appellant's bail supervisor, Chris Snow, has also filed an affidavit. He has been acting in the role of supervisor since January 2019. The appellant has been reporting to Mr. Snow as required, has never missed an appointment, and Mr. Snow deposes that he has " never had any concerns about [the appellant's] compliance with his bail". He reports that over the course of the supervision, the appellant and his current partner have informed him of encounters initiated by Mr. Martin in the community, including at the partner's place of residence. Mr. Snow discussed with the appellant the possibility of seeking a peace bond or asking for criminal charges against Mr. Martin. The appellant has declined to pursue those options.
- [30] Mr. Snow continues to view the appellant as an "excellent candidate for bail", notwithstanding the most recent allegations. He agrees that a boundary restriction would minimize the possibility of "chance encounters" with the Martin family. Mr. Snow has crafted a restriction that he considers workable. It has been put before me.

- [31] The appellant did not file an affidavit in support of his application for re-release. As I understand it, the absence of an affidavit is primarily a result of logistical complexities or challenges given his current status. As noted, he appeared in this Court by video. He was affirmed and testified to the various elements that would ordinarily be contained in the affidavit required by R. 19 of the British Columbia Court of Appeal Criminal Appeal Rules, 1986, B.C. Reg. 145/86. This included renewing his commitment to abide by the terms of any new release order. He is aware of the boundary restriction suggested by Mr. Snow and is prepared to abide by it.
- [32] The Crown does not oppose the appellant's re-release. In response to a question from the Court, the Crown said its position would likely not change even if the justice who presides over the bail hearing involving the new charges in Newfoundland and Labrador detains the appellant in custody. (The Crown says all indications are that this is unlikely; however, it accepts that possibility.)
- [33] The Crown accepts that the new appeal is not frivolous (a requirement for release under s. 679(3)(a)). It also accepts that the appellant will surrender himself into custody in accordance with the terms of his release (see s. 679(3)(b)). There is no indication he is a flight risk.
- [34] The Crown acknowledges that the circumstances underlying the new charges are serious. That acknowledgment is well-founded. Although there was no physical violence, the appellant is alleged to have threatened to kill Mr. Martin. Whatever the history between Mr. Martin and the appellant may have been during the time of the bail order, it is the appellant who has the obligation to stay away from Mr. Martin and to refrain from any form of contact with him. Given the nature of the offence for which he awaits an appeal, the Crown aptly describes the appellant's conduct as "gravely concerning". He should not be having any contact, directly or indirectly, with the individuals named in the bail order. The allegations that underlie the new charges have not been tested and the appellant is presumed innocent of them. However, for the purpose of this application, I am entitled to rely on those allegations, even in hearsay form, in deciding whether the appellant should be released: *R. v. Cheung*, 2016 BCCA 221 (Chambers); *R. v. S.B.K.*, 2022 BCCA 413 at para. 37 (Chambers).
- [35] At the same time, the Crown fairly acknowledges that the appellant has been compliant with all other terms of his bail since 2019. The threats allegedly uttered against Mr. Martin appear to be an isolated incident. The appellant's father remains willing to act as a surety. The bail supervisor, who has been supervising the appellant for a considerable period of time, is familiar with his conduct and with his attitude while on bail, and importantly, is an objective party. He has concluded that a boundary restriction will likely protect the safety of Mr. Martin and his family members. Critically, he has concluded it will ameliorate the risk of any further offending.

- [36] The appellant has principled arguments to advance in support of his appeal. He has been granted a review because the Minister of Justice determined there is a reasonable basis to believe there has been a miscarriage of justice. The admissibility of the central evidence against the appellant at his trial, his confession during the undercover operation, was not assessed in the manner that the law now requires because of recognized frailties (see *R. v. Hart*, 2014 SCC 52). The appellant has served 17 years in prison, well beyond his parole eligibility date. The primary reason for not obtaining parole has been his assertion of innocence, consistent with the application for ministerial review.
- [37] In the whole of these circumstances, the Crown accepts that the appellant's detention is not necessary in the public interest.
- [38] Having considered the s. 679(3) criteria for bail pending appeal in the particular context of this case, the analytical factors set out in case authorities such as *R. v. Mehan*, 2016 BCCA 129 (Chambers), and the material before me, I have reached the same conclusion.
- [39] I appreciate that the fact of new charges is upsetting for Wanda Martin's family and that they find these circumstances difficult. Nothing I say here is intended, in any way, to minimize or diminish their concerns.
- [40] However, the new appeal is not frivolous. I am satisfied the appellant will surrender himself into custody in accordance with the terms of any order that I make today. Finally, I do not consider detention to be necessary in the public interest. It appears that the only public safety risk that has arisen since the appellant was released on bail, his conduct towards Mr. Martin, can be sufficiently mitigated and managed with the proposed boundary restriction.
- [41] Given what has occurred since May 15, 2024, the appellant can be under no misapprehension that if he fails to comply with the terms of his bail, there will be consequences, including the potential for new substantive charges and cancellation. That message has been brought home to him. Finally, the interest in enforceability does not clearly outweigh the interest in reviewability in this case, such that to re-release the appellant would detrimentally impact public confidence in the administration of justice.
- [42] The law is clear that the assessment of whether an appellant's detention is necessary in the public interest is "to be measured through the eyes of a reasonable member of the public someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values": *R. v. Oland*, 2017 SCC 17 at para. 47, citing *R. v. St-Cloud*, 2015 SCC 27 at paras. 74-80.
- [43] Applying this standard, and in light of the Crown's position, I am satisfied it is appropriate to re-release the appellant while awaiting his appeal.

Disposition

- [44] Accordingly, I hereby cancel the December 2022 release order.

[45] I order that the appellant be re-released on a new release order pursuant to s. 679(3) of the Criminal Code. There shall be one surety and a \$100,000 cash deposit. The terms of the new release order shall be the same as the December 2022 order, with this additional condition:

The Appellant shall not attend the shoreline between Manuels River and Topsail Beach, and the towns of Topsail, Newfoundland, and Chamberlains, Newfoundland, and he shall not drive on Hwy 60 between Topsail Pond Road and Manuels Access Road. Without limiting the foregoing, the Appellant shall not attend in the area bounded by:

West - the Manuels River;

North - the shoreline of the ocean;

East - Hwy 60 to where Hwy 60 intersects with Topsail Pond Road and continues into Three Island Pond Road;

South - Hwy 2 (for greater clarity, the Appellant shall be permitted to travel on Hwy 2 but shall not enter the area north of Hwy 2).

[46] At this point, the appellant remains in custody on the new charges out of Newfoundland and Labrador. Whether he is released on those matters is for that jurisdiction to determine.

"The Honourable Madam Justice DeWitt-Van Oosten"

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