WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
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> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
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> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
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> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Stone, 2020 ONCA 448
DATE: 20200706
DOCKET: M51526 (C67905)

Juriansz J.A. (Motion Judge)

BETWEEN

Her Majesty the Queen

Respondent

and

John Paul Stone

Applicant

Margaret Osadet, for the applicant

Lisa Fineberg, for the respondent

Heard: July 3, 2020 by videoconference

Juriansz J.A.:

Overview

[1] On a 19-count indictment, the applicant pled guilty to four offences, including the offences of invitation to sexual touching, contrary to s. 152 (count 7) and sexual interference contrary to s. 151 (count 16), under the *Criminal Code,* R.S.C., 1985, c. C-46. The other two offences were trafficking a substance included in Schedule

1 (methamphetamine), contrary to s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (counts 18 and 19).

[2] The parties filed an Agreed Statement of Facts in relation to the four counts on the understanding the court would hear evidence about disputed facts pursuant to ss. 723 and 724 of the *Code*. The Crown called eight witnesses and the defence called two witnesses. Based on the Agreed Statement of Facts and his findings on the evidence beyond a reasonable doubt, the sentencing judge described the applicant's offences as "a toxic mixture of sustained trafficking in methamphetamine to numerous adults and children, over prolonged periods of time, with clear evidence that the trafficking to children was used as a means of grooming and facilitating sexual abuse in relation to those children".

[3] The sentencing judge imposed a global sentence of six years in custody. He thought it appropriate to impose higher sentences on the trafficking counts than on the sexual counts because "the more pervasive methamphetamine trafficking activity … essentially formed the manipulative platform or tool used by Mr. Stone to enable his perpetration of repetitive sexual misconduct in relation to his numerous young victims." He imposed custodial sentences of three years on each of the trafficking convictions, 20 months on the invitation to sexual touching conviction, and 22 months on the sexual interference conviction. The trafficking sentences were made consecutive to each other because they stemmed from "two non-overlapping periods of trafficking". The sexual counts were made consecutive

to each other “as they occurred at different times and involved different victims”. Each sentence for a sexual conviction was made concurrent to the trafficking conviction in the corresponding time frame. This resulted in a six year global sentence.

[4] The applicant seeks leave to appeal sentence and applies for release pending that appeal.

[5] The Crown did not oppose granting leave to appeal sentence. Leave to appeal sentence is granted.

[6] Counsel for the applicant submits that the sentencing judge did not take into appropriate consideration the prolonged sexual abuse that the applicant had suffered earlier in life, and that all sentences should be concurrent rather than consecutive.

[7] The submission counsel presses most strenuously is that the applicant should be granted release because of the COVID-19 pandemic. She has filed a lengthy affidavit from Dr. Aaron Orkin, an expert epidemiologist, who outlines the risks for the spread of COVID-19 in congregate facilities such as jails. Dr. Orkin sets out data showing that the prevalence of COVID-19 in Ontario correctional institutes is several magnitudes higher than the prevalence in the general population. He does not set out the equivalent data for federal institutions. He explains that jails are in the category of what he terms “not fully voluntary

congregate settings" (NFVCS). He accepts that NFVCS "remain in operation because of their socially essential function". However, he states that from a public health perspective it is preferable to "depopulate and decongregate" these settings rather than resort to secondary mitigation strategies. He points out that "every admission prevented, and every resident discharged or released, is an opportunity to flatten the curve and improve health for the individual involved, other inmates in the facility in question, staff at the facility in question, and the public." Dr. Orkin also foresees a second wave of outbreaks in correctional facilities in the future should mitigation measures be relaxed without reducing populations.

[8] Dr. Orkin acknowledges his perspective is from a "medical and population health perspective" and that "[a] judicial official … deciding whether or not to detain somebody will take various factors into account, and will have to balance public health and individual safety against factors outside of [his] area of expertise in determining what is in the community's best interest."

Analysis

[9] Section 679(4) of the *Code* sets out three criteria of which the applicant must satisfy the court on a balance of probabilities to obtain release pending appeal:

> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
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> (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.

(1) Section 679(4)(a)

[10] The legal test of “unnecessary hardship” under s. 679(4)(a) depends on the likelihood the applicant would spend more time in custody than his sentence is ultimately determined to be, considering the merits of the appeal: *R. v. Hassan*, 2017 ONCA 1008, at para. 33.

[11] I see little merit in the appeal. The sentencing judge discussed at length “the reality that [the applicant] himself is the victim of devastating prolonged and horrific sexual abuse”. It was up to him to weigh that circumstance. As well, there is no error in principle in the sentencing judge’s reasons for imposing consecutive sentences for the trafficking offences and for the sexual offences. The applicant supplied methamphetamine to 17 different identifiable individuals over two distinct time periods, two of whom were the complainants in the *Criminal Code* offences. The applicant concedes that the global sentence was within the sentencing range for those offences.

[12] In my view, there is little prospect that the appeal will result in the appellant spending more time in custody than his sentence is ultimately determined to be. My view is that the appeal, even if successful, would be determined before the term he must ultimately serve has expired.

(2) Section 679(4)(b)

[13] The Crown pointed out that in 2017 the applicant had been charged with failing to attend court and that the charge was withdrawn when he pled guilty to other charges. However, she did not press the application of s. 679(4)(b). I am satisfied that the applicant has met his onus on this ground.

(3) Section 679(4)(c)

[14] It is in the public interest that the spread of COVD-19 in correctional institutions be minimized. The current COVID-19 pandemic is a factor that is to be considered in assessing the public interest criterion: *R. v. Omitiran*, 2020 ONCA 261, at para. 26; *R. v. Jesso*, 2020 ONCA 280, at para. 36.

[15] That said, the primary responsibility for the safety of inmates in federal correctional institutions lies with the federal government and Corrections Canada. The applicant points out that the Honourable Bill Blair, Minister of Public Safety and Emergency Preparedness, on March 31, 2020, recommended that the Superintendent of Prisons and the Head of the Parole Board consider releasing inmates. The Superintendent and the Parole Board may have resort to special powers to grant early parole to inmates whose release will not pose an undue risk to the public.

[16] In contrast to the comprehensive perspective Corrections Canada may take, the focus of a court is necessarily solely on the individual case before it and the administration of the law (in this case, s. 679(4) of the *Criminal Code*).

[17] The fact is that the applicant has been sentenced to six years in custody in a federal penitentiary. Being on release for a few months now will not change the fact he must serve his sentence and may be serving it during the second wave of COVID-19 that Dr. Orkin foresees, should it occur.

[18] In this case, the applicant is in custody at Bath Institution where no inmate has tested positive to date. The applicant is diabetic and a former smoker and says he is especially vulnerable to the virus. He attributes his high sugar levels to being incarcerated. The Crown has introduced evidence that he has consistently been purchasing from the canteen a high number of products high in carbohydrates such as pop, cookies, swiss rolls, and Fudgee-O cookies. The evidence does not satisfy me the applicant's high sugar levels are attributable to his incarceration.

[19] If, in the future, there is an outbreak of COVID-19 at Bath Institution, it will up to the prison authorities to take appropriate measures to ensure the health and safety of those who are incarcerated or work in the institution, as well as of the general public.

[20] In this individual case, the applicant has not satisfied me that his detention is not necessary in the public interest. In addition to the considerations noted

above, the evidence shows that the applicant has previously breached recognizances, breaches that involved the use of drugs, access to a computer and the Internet and child pornography. Troubling is the sentencing judge's finding the applicant has no insight into his sexual preference for prepubescent and pubescent individuals. His plan of release is weak, proposing his spouse as surety, and that he be released to live with her. As noted, the applicant has committed offences while on bail before, albeit not with his spouse as surety. The acts for which he has been sentenced are serious crimes against children.

Disposition

[21] Having considered all the applicant's submissions including those relating to COVID-19, I am not satisfied the test for granting release pending appeal is met. The application for release pending the appeal is dismissed. I order the preparation of the transcripts, if necessary, and the appeal to be expedited. The parties may arrange an expedited date with the Court's Appeal Scheduling Unit.

"R.G. Juriansz J.A."