COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Jacko, 2023 ONCA 38
DATE: 20230118
DOCKET: M53972
(COA-22-CR-0331)

Hoy J.A. (Motion Judge)

BETWEEN

His Majesty the King

Respondent
(Responding Party)

and

Ross Jacko

Appellant
(Applicant)

Bryan Badali, for the applicant

Raoof Zamanifar, for the responding party

Heard: January 13, 2023 by video conference

ENDORSEMENT

[1] After a judge alone trial, the applicant was found guilty of assault causing bodily harm and assault with a weapon. The assault with a weapon charge was stayed pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729. On July 19, 2022, the applicant was sentenced to 3 years' imprisonment, minus 16 months for pre-trial custody, and several ancillary orders were imposed.

[2] He now applies for bail pending the determination of his appeal.

[3] To be granted bail pending appeal, s. 679(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 requires that the applicant establish that (a) the 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. The applicant bears the burden of establishing each of these three considerations on a balance of probabilities: *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 19.

[4] The Crown opposes this application. It concedes that the appeal is not frivolous. However, it argues that the applicant's proposed release plan is inadequate to address flight risk and public safety concerns and, accordingly, that the applicant has not satisfied ss. 679(3)(b) and 679(3)(c) on a balance of probabilities.

Background

[5] The applicant is a 37-year-old Indigenous man from Wiikwemkoong Unceded Territory. The trial judge outlined in his reasons for sentence that the applicant's community struggles with systemic and social economic effects of colonialism, and that the applicant was taken into the custody of the Children's Aid Society twice, experienced physical and sexual violence and addictions in the home as a child, and has himself struggled with addictions. He has been homeless and on Ontario Works.

[6] The issue at trial was whether the applicant acted in self-defence when he struck the complainant in the face with a bar. The trial judge found that the assault was unprovoked.

[7] The applicant argues that the trial judge erred in law (1) by improperly focussing on a single moment in time prior to when the applicant testified the complainant engaged in assaultive conduct in assessing his self-defence claim, and (2) by failing to assess whether a witness' evidence which corroborates his evidence that the complainant engaged in assaultive conduct, and which was not otherwise rejected, raised a reasonable doubt. Legal Aid Ontario has approved funding for his appeal.

[8] The applicant has a lengthy criminal record, including for violent offences. He has 3 convictions for assault simpliciter, 1 conviction for aggravated assault, and 1 conviction for armed robbery. His conviction for aggravated assault was entered in his criminal record on January 8, 2018 – which is approximately 23 months before he was charged with the assault offences giving rise to this conviction and appeal. Between 2004-2018, he accumulated 19 convictions for failing to comply with recognizance and probation orders and failing to appear.

[9] In imposing the sentence, the trial judge found that, without receiving proper counselling and support services, the applicant was a "high risk" to reoffend. The trial judge recommended that he attend at the Thunder Bay Detention and

Treatment Centre so that he might obtain those services. Unfortunately, counsel advise that the applicant was detained at the Sudbury Jail and was transferred to the Central North Correctional Centre recently.

[10] In his unsworn affidavit in support of this application, the applicant states that he has completed two programs with the John Howard Society while in custody at the Sudbury Jail – Understanding Anger and Introduction to Restorative Justice – and is participating in two further programs – Aboriginal Awareness and Relapse Prevention. The applicant completed the Eastern Door Program when previously in custody for aggravated assault.

[11] While the applicant was on release pending trial for these offences, he breached his bail conditions twice. First, he failed to attend his trial. As a result, a warrant for his arrest was issued. He was arrested approximately five months later. In his unsworn affidavit, the applicant says that he did not attend his trial because of a miscommunication with his lawyer.

[12] Second, when he was again released on his own recognizance under the supervision of the Elizabeth Fry Society, he was arrested. He was out past his curfew, in possession of an extended folding knife contrary to the “no weapons” condition of his bail, and in the presence of a person whom his release order prohibited him from contacting or communicating with. As a result, he pled guilty

to possession of a weapon for a dangerous purpose, failure to comply with his release order, and simple possession of cocaine.

The Proposed Release Plan

[13] Counsel for the applicant argues that when the applicant failed to comply with his bail conditions pending trial, he was on release without a surety and that the addition of the two proposed sureties – the applicant's mother and a friend – and the strict release terms proposed sufficiently address the flight and safety risks.

[14] Both sureties undertake to ensure that the applicant is aware of what his surrender date is, which counsel submits will eliminate the risk of inadvertent failure to surrender for his appeal. And the proposed bail terms require him to live with the friend and not leave her residence except in the company of his surety or for medical emergencies. The friend is unemployed and on Ontario Works. She is willing to pledge $2000 as security for the applicant's release. His mother is unemployed and on the Ontario Disability Support Program. She is also prepared to pledge $2000. These are significant amounts for both proposed sureties.

[15] The applicant's friend successfully acted as surety for another person some ten years ago. However, she has no known history of successfully supervising the applicant. The applicant previously violated a bail order while living with his mother,

who was his surety. He left the residence while his mother was sleeping and was involved in a car crash.

[16] Further, the friend's circumstances have changed since she last acted as a surety. While home full time, she is now a single mother of three children, the youngest of whom are 4 and 1 years of age. She cannot supervise the applicant 24 hours a day. The applicant's mother lives approximately 170 km away from his friend's residence and cannot realistically help her supervise the applicant.

Section 679(3)(b): Surrender Into Custody

[17] I agree that the sureties will address the risk of inadvertent non-attendance at his appeal. However, given the applicant's history of failing to comply with a release order even when he had a surety, and the limitations on the sureties' ability to supervise him, I am not satisfied that he would probably surrender himself in accordance with the terms of the proposed release order.

Section 679(3)(c): The Public Interest

[18] Determining whether an applicant's detention is not necessary in the public interest involves consideration of two components: public safety and public confidence in the administration of justice: *R. v. Farinacci* (1993), 109 D.L.R. (4th) 97 (Ont. C.A.), at pp. 47-48; *Oland*, at paras. 23-26.

[19] To be denied bail for public safety considerations: (i) an individual must pose a "substantial likelihood" of committing an offence or interfering with the

administration of justice; (ii) the "substantial likelihood" must endanger the "protection or safety of the public"; and (iii) the individual's detention must be "necessary" for public safety*: R. v. Stojanovski*, 2020 ONCA 285, at para. 18; *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 737; *Oland*, at para. 24. Public safety considerations alone can justify refusing bail in the public interest: *Oland*, at para. 39; R*. v. Bailey*, 2021 ONCA 3, at para. 15; *R. v. J.R.*, 2022 ONCA 152, at para. 20.

[20] The public confidence in the administration of justice component requires weighing two competing interests: the need to respect the general rule of the immediate enforceability of judgments and providing persons who challenge the legality of their convictions with a meaningful review process: *Farinacci*, at pp. 47-49; *Oland*, at paras. 24-26. The strength of the appeal plays a central role in assessing the reviewability interest: *Oland*, at para. 40.

[21] The Crown argues that, even with the proposed release plan, public safety concerns in this case amount to a substantial risk and, in and of themselves, preclude a release order. The applicant submits that he is not required to establish that there is no risk and that the proposed release plan reduces the risk to an acceptable level.

[22] Public safety concerns that fall short of the substantial risk mark – which would preclude a release order – remain relevant in assessing the enforceability

interest under the public confidence component and can tip the scale in favour of detention. *Oland*, at para. 39.

[23] Here, the applicant's grounds of appeal clearly surpass the minimal standard required to meet the "not frivolous" criterion and the applicant is eligible for statutory release on August 30, 2023. There is a risk that the applicant will have served all or a large part of his sentence by the time his appeal can be heard and decided.

[24] However, turning to the enforceability interest, the offence involved violence. I am not satisfied that the risk profile found by the trial judge has been meaningfully attenuated since the time of sentencing. I accept that the applicant remains at a high risk to re-offend. Even with the proposed release plan, if the public safety concern does not amount to a "substantial risk", it is nonetheless significant and there are flight risk concerns.

[25] Having conducted a preliminary assessment of the strength of the appeal, and balancing the strength of the appeal, the seriousness of the offence, public safety and flight risks, and the likely delay in deciding the appeal, I conclude that the enforceability interest overshadows the reviewability interest. The public confidence in the administration of justice would be undermined by the release of the applicant on bail in these circumstances. In so concluding, I have had regard

to the fact that the applicant is Indigenous, and to his very difficult personal antecedents.

Disposition

[26] Accordingly, this application is dismissed.

[27] The draft release order submitted by the applicant provided that the appeal would be perfected by no later than March 3, 2023. I order that the appeal be perfected by no later than such date and that the hearing of the appeal be expedited, to be heard as soon as reasonably possible after the appeal is perfected.

"Alexandra Hoy J.A."