COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bowman, 2024 ONCA 313
DATE: 20240424
DOCKET: M55011 (COA-24-CR-0378)

Lauwers J.A. (Motions Judge)

BETWEEN

His Majesty the King

Respondent/Responding Party

and

Douglas Bowman

Appellant/Applicant

Lakin Afolabi, for the applicant

Amy Rose, for the respondent

Heard: April 23, 2024

REASONS FOR DECISION

[1] The applicant was convicted of two counts of indecent assault and was sentenced to four years concurrent. He appeals against conviction and seeks bail pending appeal. The Notice of Appeal specifies four grounds of appeal:

> The trial judge:
>
> 1. erred in considering the complainants' lack of embellishment to be an enhancement of their credibility;
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> 2. erred by applying uneven standards of scrutiny to the evidence called by the accused when compared to the Crown's evidence;

3. erred by not providing sufficient reasons including with regard to his rejection of defence evidence; and

4. erred by rendering an unreasonable verdict, particularly by making clearly wrong findings that contradicted previous findings that he had made.

[2] The applicant has abided by the conditions of his release since January 2022. He is 78 years old and is in failing health. He has mobility issues.

[3] I deny bail pending appeal for the following reasons.

A. THE GOVERNING PRINCIPLES

[4] For bail pending a conviction appeal, the applicant must establish the three elements set out in s. 679(3) of the *Criminal Code*, R.S.C. 1985, c. C-46: (1) that the appeal or application for leave to appeal is not frivolous; (2) that he will surrender himself into custody in accordance with the terms of the order; and (3) that his detention is not necessary in the public interest.

[5] The Crown submits that the applicant should remain incarcerated on the third ground: that his detention is necessary in the public interest on the basis of public confidence in the administration of justice.

[6] I set out the governing principles at length in *R. v. J.B.*, 2023 ONCA 264. As the Supreme Court observed in *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at paras. 23-26, the public interest element must be tested under the framework set out by this court in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32, (Ont. C.A.), per

Arbour J.A. (as she then was). I am obliged to weigh the factors of reviewability and enforceability.

B. THE PRINCIPLES APPLIED

[7] I now turn to the three elements set out in s. 679(3) of the *Criminal Code*.

(1) The appeal or application for leave to appeal is not frivolous

[8] The not frivolous test "is widely recognized as being a very low bar": *Oland*, at para. 20. The Crown concedes, and I am satisfied, that the appeal is not frivolous.

(2) The applicant will surrender into custody in accordance with the terms of the order

[9] I am satisfied that the applicant will surrender into custody in accordance with the terms of his release, as he did before sentencing.

(3) The applicant's detention is necessary in the public interest

[10] Under s. 679(3)(c), there are two components to consider: public safety and public confidence in the administration of justice: *Farinacci*, at para. 41. Only the second component, public confidence, is engaged in this application. Consideration of the public confidence component involves striking the balance between enforceability and reviewability.

(a) Enforceability

[11] With respect to enforceability, "[p]ublic confidence in the administration of justice requires that judgments be enforced": *Farinacci*, at para. 42. In this case, there are several factors that weigh in favour of enforceability and against the release of the applicant.

[12] As noted in *Oland*, the seriousness of the crime figures in the assessment of the enforceability interest. This court has identified sexual offences relating to children as being on the higher end of the gravity spectrum in the context of bail pending appeal applications: *R. v. J.B.*, 2023 ONCA 264 at para. 17, citing *R. v. M.S.*, 2022 ONCA 348, at para. 15; see also *R. v. C.M.*, 2023 ONCA 700, at para. 5; *R. v. G.B.*, 2023 ONCA 621, at para. 10; and *R. v. J.C.*, 2023 ONCA 617, at para. 6.

(b) Reviewability

[13] As the court in *Oland* notes, "in assessing the reviewability interest, the strength of an appeal plays a central role": at para. 40. While the grounds of appeal are arguable, in my view they do not "clearly surpass the minimal standard required to meet the 'not frivolous' criterion" (emphasis added): *Oland*, at para. 44. The grounds of appeal are very weak.

The Strength of the Appeal

[14] I now assess each of the errors to which the applicant pointed.

(1) The trial judge "erred in considering the complainants' lack of embellishment to be an enhancement of their credibility"

[15] This was the applicant's main ground of appeal. Counsel points to the trial judge's reasons:

> For the reasons that follow, I am satisfied beyond a reasonable doubt, of the guilt of Mr. Bowman on both charges. I find that MV and CW were credible witnesses who testified in a straightforward and honest fashion. Neither of them, in my view, took the opportunity to embellish or exaggerate their evidence. [Emphasis added.]

[16] The trial judge went on to recount parts of the complainants' testimony that he regarded as unembellished. Specifically, there was the evidence of CW, who "alleged that Mr. Bowman touched her vagina under her clothing on multiple occasions, but never once suggested that he digitally penetrated her." The other example concerned the evidence of MV, who described the assaults on her, but "[a]t no time, did she allege penile penetration." Counsel asserts that the trial judge impermissibly used the observation about the lack of embellishment in order to bolster the credibility of the complainants, contrary to this court's decision in *R. v Alisaleh*, 2020 ONCA 597, at para. 16.

[17] There are several weaknesses in this submission. First, this was not a credibility case. The applicant did not testify. The evidence of the complainants was tested on the basis of reliability in light of the long passage of time, about 50

years, since the assaults, and possible tainting by counselling after the police statements were given.

[18] Second, the trial judge was satisfied as to both the credibility and reliability of their accounts for several reasons: the complainants "testified in a straightforward and honest fashion"; they "candidly acknowledged that their memories were impacted by the passage of time"; and "[b]oth witnesses also recalled details that were not significantly challenged in cross-examination." Some of those details went to descriptions of physical locations.

[19] There is no merit to this ground of appeal.

[20] I address the next two issues together since counsel interwove them in submissions.

(2) The trial judge "erred by applying uneven standards of scrutiny to the evidence called by the accused when compared to the Crown's evidence" and (3) "by not providing sufficient reasons including with regard to his rejection of defence evidence"

[21] The applicant notes that the trial judge did not refer to *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397, and seems not to have taken the defence evidence into account. It is not necessary for trial judges to cite *W.(D.)* by rote. The question is whether the necessary balanced scrutiny was present, in substance and tone.

[22] I disagree. The essence of *W.(D.)* comes out clearly in this statement by the trial judge, which also rejects the assertion that the complainants did not babysit the applicant's children – the claimed lack of opportunity:

> I have also considered the evidence that Mr. Bowman's wife and daughter. [*sic*.] This, together with the other items already discussed, does not leave me with a reasonable doubt. Mrs. Bowman initially stated that she would never have had either child babysit her children, only to later tell the Court that:
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> > It's possible when the kids were older if we were going out in the evening, which we didn't do very often, I think [MV] babysat.
>
> Shortly, thereafter, she stated:
>
> > And as I stated, when we went out a couple of times in the evening, I can – I'm sure that [MV] babysat. …
>
> She ended her evidence on this point by acknowledging the possibility that both CW and MV could have been babysitting her children without her knowledge during the relevant times.

[23] According to the Supreme Court, the uneven scrutiny ground is a "notoriously difficult argument to prove" because it engages the trial judge's credibility and reliability findings, which are owed a very high degree of deference on appeal: *R. v. G.F.*, 2021 SCC 20, 163 O.R. (3d) 480, at para. 99. As this court noted: "appellate courts invariably view this argument with skepticism", viewing it as "a thinly veneered invitation" to "re-try the case on an arid, printed record": *R. v. Radcliffe*, 2017 ONCA 176, 347 C.C.C. (3d) 3, at para. 23, leave to appeal ref'd, [2017] S.C.C.A. No. 294.

[24] Counsel points to two instances. First, CW said she was on the back of the applicant's dirt bike for a ride to the cottage. Defence counsel, relying on Mr. Bowman's wife's testimony, challenged this claim as unlikely because the bike had a single seat and the exhaust was so high it would have burned a passenger. The trial judge mentioned this inconsistency but did not resolve it.

[25] This form of parsing is precisely what the Supreme Court warned against in *G.F.*, at para. 69 and *R. v. Kruk*, 2024 SCC 7, at para. 101. The context for the mention of the motorcycle is within the trial judge's summations of the defence position:

> The defence also points to external inconsistencies between their evidence and that of Mr. Bowman's wife and daughter with respect to the accuracy of the complaints' account of their access to the Bowman pool, whether they babysat for the Bowmans as they claim, whether they ever attended the Bowman's family cottage in the circumstances described by them and whether the one complainant ever travelled on the back of Mr. Bowman's motorcycle to the family cottage.

[26] In response, the trial judge confirmed the accuracy of the complainant's recollection of the style of the motorcycle and a detailed recall of the cottage layout. He said:

> Both witnesses also recalled details that were not significantly challenged in cross-examination. For example, MV was able to give a very detailed description of the Bowman residence, including the bedroom of Mr. and Mrs. Bowman and that of their child… Perhaps more significantly, she was able to give a detailed description of the cottage she first attended with Mr. and

> Mrs. Bowman. She described this as an older cottage belonging to the family of Ms. Bowman. She recalled Ms. Bowman's parents being present. She's distinguished this from the newer cottage that she said she attended in a subsequent year.

[27] In short, the alleged inconsistencies fell away in the face of the quality of the complainants' evidence. The related argument that the reasons are inadequate because the trial judge did not address the motorcycle trip particularly has no merit. The reasons are detailed and amply justify and explain the conviction. The sexual assault while on the motorcycle ride adds little if anything to the surfeit of assaults and the lack of resolution subtracts nothing.

(4) The trial judge "erred by rendering an unreasonable verdict, particularly by making clearly wrong findings that contradicted previous findings that he had made."

[28] Counsel points to this statement in the trial judge's reasons: "There is no credible evidence before the Court that [the complainants] colluded with each other or that their memories were otherwise impacted by external factors." Counsel argues that this statement conflicts with the following statement: "While both acknowledge remembering additional details as a result of counselling, the counselling itself could not have impacted their disclosure to the police, given that in both cases it had commenced after they gave their statements."

[29] Counsel points out that counselling happened after the complainants gave statements to the police and did give rise to “additional details”, so it did influence their memories. He asserts that this is an arguable contradiction.

[30] This submission has no merit. The convictions rested substantially on the consistency between the complainants’ police statements and their testimony. The trial judge noted: “Details that they could not recall, in my view, were readily explained by the fact that they were adult witnesses testifying about events that occurred decades ago.” Most tellingly, the trial judge noted: “It does not appear that any of those added details went to the substance of the touching alleged in this case.” In the context, the additional details were not material and there is no contradiction.

C. DISPOSITION

[31] The applicant’s appeal is weak and does not “clearly surpass” the minimal standard required to meet the ‘not frivolous' criterion, as required by *Oland*. By contrast, the Crown’s side in this appeal is strong.

[32] Given the seriousness of the crime, as reflected in the sentence, the interest in enforceability is strong. The interest in reviewability is weak.

[33] The balance of the competing interests of enforceability and reviewability in this case come down in favour of enforceability. A reasonable member of the public, informed of the seriousness of the conviction and the weakness of the

grounds for appeal would lose confidence in the administration of justice if the applicant were released pending appeal.

[34] I find that the detention of the applicant is necessary in the public interest and dismiss the application for bail pending appeal.

“P. Lauwers J.A.”