NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Leblanc*, 2021 NSCA 89

Date: 20211223
Docket: CAC 511483
Registry: Halifax

Between:

Chad Allan Leblanc

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of *Criminal Code*

Judge:	Bourgeois J.A.
Motion Heard:	December 23, 2021, in Halifax, Nova Scotia in Chambers
Written Decision:	January 6, 2022
Held:	Motion for bail pending appeal dismissed
Counsel:	Trevor K.F. McGuigan, for the appellant Mark A. Scott, Q.C., for the respondent

Order restricting publication — sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(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).

Decision:

[1] On December 23, 2021, I heard a motion for bail pending appeal brought by Chad Allan Leblanc. Following trial in the Supreme Court of Nova Scotia, Mr. Leblanc was convicted of sexual assault and sexual interference by Justice Pierre Muise. On November 18, 2021, Mr. Leblanc was sentenced to a term of imprisonment of three years and six months.

[2] Mr. Leblanc has appealed his conviction and made a motion for bail pending appeal pursuant to s. 679 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 and *Nova Scotia Civil Procedure Rule* 91.24. The Crown opposed his release. At the hearing, Mr. Leblanc and his proposed surety, Keira Russell, were cross-examined on their respective affidavits. After hearing submissions from counsel, and considering the evidence before me, I provided brief oral reasons for denying the motion. I promised written reasons to follow. These are my reasons.

Legal Principles

[3] In order for Mr. Leblanc to be released on bail pending determination of his appeal, he must establish, on a balance of probabilities, he meets all criteria set out in s. 679(3) of the *Criminal Code*. It provides:

> (3) In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
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> (a) the appeal … is not frivolous;
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> (b) he will surrender himself into custody in accordance with the terms of the order; and
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> (c) his detention is not necessary in the public interest.

[4] The above provision was recently considered by the Supreme Court of Canada in *R. v. Oland*, 2017 SCC 17. Unlike pre-trial detention, once a conviction has been entered, the presumption of innocence is displaced and s. 11(e) of the *Canadian Charter of Rights of Freedoms*[1] no longer applies. As such, it is the appellant who bears the burden of establishing detention is not warranted (*Oland* at para. 35; *R. v. Al-Rawi*, 2021 NSCA 6 at para. 7).

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[1] Section 11: Any person charged with an offence has the right … (e) not to be denied reasonable bail without just cause.

[5] The first criterion, establishing that the appeal is not frivolous, has been repeatedly recognized as engaging a low-threshold. In *Oland*, Justice Moldaver wrote:

> [20] The first criterion requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not "not frivolous" (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the "not frivolous" test is widely recognized as being a very low bar: see *R. v. Xanthoudakis*, 2016 QCCA 1809, at paras. 4-7 (CanLII); *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132, at para. 38; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444, at paras. 6-8; G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 10-13 to 10-15.

[6] Further, with respect to the second criterion:

> [21] The second criterion requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the [release] order" (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.

[7] It is the third criterion, detention is not necessary in the public interest, which was the focus of the Court in *Oland*. The Court endorsed the continuing applicability of the *Farinacci* framework (*R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.)), in which Justice Arbour (as she then was) opined the public interest criteria consisted of two components: public safety and public confidence in the administration of justice.

[8] Public safety relates to the protection and safety of the public, whereas the public confidence component involves the weighing of two competing interests, the enforceability of judgments and reviewability. In *Oland*, Justice Moldaver warned against viewing public safety and public confidence as necessarily discrete considerations:

> [27] In so concluding, I should not be taken to mean—nor do I understand *Farinacci* to have said—that the public safety component and the public confidence component are to be treated as silos. To be sure, there will be cases where public safety considerations alone are sufficient to warrant a detention order in the public interest. However, as I will explain, where the public safety threshold has been met by an applicant seeking bail pending appeal, residual public safety concerns or the absence of any public safety concerns remain relevant and should be considered in the public confidence analysis.

[9] In considering the enforceability interest, the seriousness of the crime, including the circumstances surrounding the commission of the offence, is central. However, other factors can be taken into account where appropriate. "Public safety concerns that fall short of the substantial risk mark—which would preclude a release order—will remain relevant under the public confidence component" (*Oland* at para. 39).

[10] The reviewability interest engages a consideration of the strength of the grounds of appeal. Justice Moldaver explained:

> [45] In the end, appellate judges can be counted on to form their own "preliminary assessment" of the strength of an appeal based upon their knowledge and experience. This assessment, it should be emphasized, is not a matter of guesswork. It will generally be based on material that counsel have provided, including aspects of the record that are pertinent to the grounds of appeal raised, along with relevant authorities. In undertaking this exercise, appellate judges will of course remain mindful that our justice system is not infallible and that a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual's interest in any given case.

[11] In balancing the two competing factors, appellate judges "should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values" (*Oland* at para. 47).

Analysis

The appeal is not frivolous

[12] In his Notice of Appeal, Mr. Leblanc sets out the following grounds of appeal:

1. The Trial Judge applied different standards of scrutiny to the evidence of the Defence and the evidence of the Crown;
2. The Trial Judge erred by overemphasizing demeanour evidence in assessing the complainant's credibility;
3. The Trial Judge erred by employing speculative reasoning to assess credibility;

4. The Trial Judge erred by misapprehending evidence in assessing the Appellant's credibility; and

5. Any other such grounds that may appear from a review of the complete record.

[13] Notwithstanding the argument of the Crown to the contrary, I am satisfied upon review of the judge's reasons that Mr. Leblanc has established on a balance of probabilities the appeal is not frivolous. I will return to the strength of the grounds, however, when considering the public interest criterion.

Mr. Leblanc will surrender himself into custody

[14] This criterion looks at whether Mr. Leblanc is a flight risk. That is, if he is released pending appeal, will he remain in the jurisdiction and surrender into custody when directed.

[15] As will be discussed later, I have concerns with Mr. Leblanc's evidence and his proposed release plan. However, I am satisfied on a balance of probabilities that if released, he would remain within the Province. I note in particular his strong connections, both familial and economic, to the area.

Detention is not necessary in the public interest

[16] In assessing the third criterion, I will start with a review of the evidence adduced on the motion. As noted earlier, both Mr. Leblanc and Ms. Russell filed affidavits in support of the motion and were cross-examined thereon. Mr. Leblanc's affidavit was not lengthy. He noted his residential address, and that he lives with Ms. Russell. They "have been together for approximately 13 months". Mr. Leblanc asserts he owns his own business and has no other criminal record. He promises to abide by the terms of his release and turn himself into custody.

[17] In the course of his cross-examination, it became apparent Mr. Leblanc has three outstanding criminal charges. One is in relation to a charge of assault against his former spouse, and two others relate to breaches of undertakings. Although Mr. Leblanc benefits from the presumption of innocence in relation to the above matters, it is concerning he did not reference these matters in his affidavit. Further, he did not provide an explanation for not including reference to these charges in his affidavit.

[18] In his oral submissions, Mr. Leblanc's counsel submitted these pending charges should have no bearing on my consideration of his motion for bail. I disagree and view this omission as troublesome. A similar lack of disclosure was considered by Trotter J.A. in *R. v. C.L*, 2018 ONCA 470 where an appellant was seeking bail pending appeal of a sexual assault conviction:

> [10] While the appellant was on bail pending his trial, and later while pending his sentencing, he was charged on two separate occasions with breaching his recognizance, contrary to s. 145(3) of the *Criminal Code*. These charges remain outstanding. Both breaches related to a condition that specified where the appellant could live. The appellant did not mention these outstanding charges in his bail pending appeal affidavit. Neither did his proposed surety (his wife). Crown counsel uncovered this information. As a result, the appellant and his proposed surety swore new affidavits. A further proposed surety (the appellant's mother) was added. In his new affidavit, the appellant gave some details about the new charges. However, he offered no explanation for the omission of this information in his first affidavit.

[19] Justice Trotter explained the significance of the appellant's failure to mention his outstanding charges as follows:

> [13] The new criminal charges should have been disclosed. Judges of this court rely heavily on the trustworthiness of affidavits sworn in support of bail pending appeal applications. They are expected to be both accurate and complete.
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> [14] Crown counsel routinely conduct criminal history inquiries to ensure the accuracy of the information that is placed before judges deciding bail pending appeal applications. However, this does not relieve bail applicants and their proposed sureties of the obligation to be candid and comprehensive. In this case, had it not been for the Crown's diligence, I would have been misled in an important way. I stop short of concluding that there was a deliberate attempt to mislead me. However, in the absence of an explanation, the person who swears or affirms an affidavit must bear responsibility for its contents.
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> [15] Outstanding criminal charges are important for bail purposes, especially those that point to bail compliance issues. In the pre-trial context, s. 518(1)(c)(ii) of the *Criminal Code* permits the prosecutor to lead evidence of outstanding charges. Depending on the circumstances, an individual charged with fresh offences while on bail may face a reverse onus at his or her bail hearing: see s. 515(6)(a)(i) and *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91. Charges under ss. 145(2) to (5) always result in a reverse onus situation: s. 515(6)(c).
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> [16] I appreciate that at this stage the appellant is presumed innocent of the two new charges. However, that does not detract from their relevance and importance to bail pending appeal. Dealing with a similar situation in *R. v. Lengelo* (4

> October 2011), M40503/C54249 (Ont. C.A.), Doherty J.A. said: "It is difficult to think of anything that would be more relevant on a bail application than the existence of outstanding charges coupled with a failure to appear."
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> [17] The new charges, combined with the appellant's failure to mention them in his affidavits (not to mention his assertion that for several years he lived at an address contrary to his bail conditions at the time), undermine any faith I can place in the appellant's promise in his affidavit that, "I will obey any conditions placed upon me by this Court while I am in the community."

[20] In addition to the unresolved charges, it was also established through cross-examination that in July 2021, Mr. Leblanc travelled to Alberta, notwithstanding him being subject to an undertaking to remain within the Province of Nova Scotia.

[21] When pressed on cross-examination, Mr. Leblanc explained this troubling behaviour by either asserting he was not aware of the undertakings, or minimizing the nature of his behaviour. From his testimony, I was left with a concern that Mr. Leblanc may not abide by terms of release that he views as unimportant or inconvenient. Given the seriousness of the offence for which he was convicted, this raises concern with respect to public safety.

[22] The evidence of proposed surety Ms. Russell raises similar concern. Her initial affidavit also did not reference Mr. Leblanc's outstanding charges, although she was aware of the incidents giving rise thereto. Further, she testified she did not attend the trial or sentencing hearings, nor did she read the judge's decision, or understand Mr. Leblanc had been found to be lacking in credibility. When questioned about the breach charge arising from Mr. Leblanc attending at his former wife's home, Ms. Russell, who was also present, minimized the occurrence, asserting all Mr. Leblanc wanted to do was to give his son a birthday present. Although again recognizing the presumption of innocence, there does not appear to be a factual dispute Mr. Leblanc attended at the home, or that he was bound by an undertaking to refrain from being at that location. It is notable this occurred after Mr. Leblanc had been convicted of a serious offence.

[23] Ms. Russell is entirely financially dependent upon Mr. Leblanc. She has chosen not to familiarize herself with the trial and sentencing decisions. She has accompanied him when allegedly failing to abide by terms of an undertaking. In light of these concerns, I am not satisfied Ms. Russell would report Mr. Leblanc in the event he failed to comply with the terms of his release on bail.

[24] Given the above concerns, and considering the seriousness of the offence—one which involved sexual violence perpetrated against a child over a period of four years—the public safety component has not been met. I could end my analysis here, but I will go on to consider the second aspect of the public interest criterion.

[25] With respect to the public confidence component, I am satisfied the enforceability factor outweighs reviewability. In reaching this conclusion I observe:

- the offence is a serious one in which a child's sexual integrity was violated numerous times over a period of years by someone she trusted;
- the release plan proposed by Mr. Leblanc, especially in light of his pending charges, is weak;
- the grounds of appeal, when considered in light of the judge's detailed reasons and strong credibility findings, are not strong; and
- although the appeal hearing is not scheduled until September 2022, and I am mindful Mr. Leblanc's sentence is three and a half years, the timing was dictated by his counsel's estimate of when the trial transcript could be obtained and an appeal book filed. Should Mr. McGuigan be able to expedite obtaining the trial transcript, re-scheduling the appeal for an earlier date remains a possibility.

[26] In the circumstances, I am satisfied a reasonable member of the public, "who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values" would be of the view that Mr. Leblanc's release pending appeal is not in the public interest.

Conclusion

[27] For the reasons noted above, I dismiss the motion for bail pending appeal.

Bourgeois J.A.