On appeal from a summary conviction in the Provincial Court on January 17, 2024.

Date: 20240222
Docket: CR 24-01-39806
(Winnipeg Centre)
Indexed as: R. v. Fedoruk
Cited as: 2024 MBKB 31

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Brooke Johnson
	)	for the Crown
respondent,	)	
	)	
-and-	)	
	)	
KEVIN FEDORUK,	)	Saul B. Simmonds, K.C.
	)	for the (appellant) applicant
(appellant) applicant.	)	
	)	Judgment Pronounced:
	)	February 1, 2024
	)	
	)	Judgment Delivered:
	)	February 22, 2024

INNESS J.

INTRODUCTION

[1] I granted the applicant, Mr. Fedoruk, bail pending the hearing of his summary conviction appeal on February 1, 2024 pursuant to s. 816.(1) of the ***Criminal Code***, indicating my reasons would follow.

[2] These are those reasons.

BACKGROUND

[3] Mr. Fedoruk was arrested and charged with a number of child pornography offences on January 27, 2021. The Crown proceeded by way of summary conviction. Mr. Fedoruk pleaded guilty to one count of possession of child pornography (child sexual assault material – "CSAM") on December 1, 2022. On January 17, 2024, the Provincial Court Judge (the "Sentencing Judge") sentenced Mr. Fedoruk to 12 months in jail, followed by two years of supervised probation.

[4] In her Reasons for Sentence of January 17, 2024 ("Reasons for Sentence"), at p. T1, lines 23-37, the Sentencing Judge summarized the facts of the offence as follows:

> In March and July of 2020 the National Child Exploitation Crime Centre received reports of recent uploads of child sexual assault material (or "CSAM") on Snapchat. Police investigation traced the internet activity to an IP address resulting to a business in Steinbach, Manitoba. Mr. Fedoruk was an employee of the business at the time, and it was determined that he was likely responsible.
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> On January 27, 2021, Mr. Fedoruk was arrested for possession of child pornography, and his cell phone was seized. Forensic analysis revealed 97 unique images of CSAM stored on his phone depicting children under the age of 18 years. The sexual content of the images consisted of simple posing, vaginal intercourse, anal intercourse, group sex, extreme posing, and masturbation. The drawings of the girls are all depicted as prepubescent. Fifty-four of the images were cartoon-style characters, 41 of the images were drawings of children, and two were actual photographs. There were no child pornographic videos.

[5] The maximum sentence available on summary conviction for possession of CSAM pursuant to s. 163.1(4)(b) of the ***Code*** is two years less a day of jail. Counsel agreed that the mandatory minimum six months' jail term did not apply as it was previously found to violate s. 12 of the ***Charter*** (***R. v. Nepon***, 2020 MBPC 48 (CanLII)).

[6] At the sentencing, the Crown recommended a sentence of 18 months' jail time, followed by two years of supervised probation. Defence recommended a conditional sentence order ("CSO") followed by a period of supervised probation. The Sentencing Judge found three of the four statutory prerequisites for a CSO (as set out in s. 742.1 of the ***Code***) were met: the offence is not punishable by a minimum term of imprisonment; the appropriate sentence is a term of imprisonment of less than two years; and allowing the offender to serve his sentence in the community would not endanger the community. The real issue was the fourth criterion, that is whether the imposition of a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the ***Code***.

[7] The Sentencing Judge concluded that a CSO would not be sufficiently punitive to reflect the gravity of the offence and would result in a disproportionate sentence. She stated in her reasons that, "*Mr. Fedoruk has made significant strides towards rehabilitation but there is nothing in his background which makes this <u>exceptional</u>*" (Reasons for Sentence, at p. T7, lines 5-6) (emphasis added). She further stated, "*[t]his kind of behaviour must be appropriately denounced and deterred, and in only a few cases will a CSO be sufficiently punitive. This is not one of those cases*" (at p. T7, lines 12-13).

<u>THE APPLICABLE TEST FOR BAIL PENDING SUMMARY CONVICTION APPEAL</u>

[8] Section 816(1) of the ***Code*** affords this Court jurisdiction to grant bail pending a summary conviction appeal, whether from conviction or sentence. It sets out a requirement that an order for bail pending appeal must contain a surrender condition. It

is otherwise silent as to the onus and criteria to be assessed in deciding whether bail should be granted.

[9] Parliament incorporated certain provisions governing indictable appeals into summary conviction appeals pursuant to s. 822(1) of the ***Code***. The bail pending appeal provisions contained in ss. 679(3) and 679(4) were not among them.

[10] The criteria for bail pending appeal from an indictable conviction are set out in s. 679(3) of the ***Code*** as follows:

> **Circumstances in which appellant may be released**
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> **(3)** In the case of an appeal referred to in paragraph (1)(a) or (c), 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 or application for leave to 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.

[11] The criteria for bail pending appeal from an indictable sentence set out in s. 679(4) are the same, except instead of demonstrating that the appeal is "not frivolous" an applicant must show that "*the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody"*.

[12] The jurisprudence supports consideration of the criteria set out in ss. 679(3) and 679(4) of the ***Code***, within the context of the summary conviction proceedings. It is further undisputed that the onus lies on an applicant to establish on a balance of probabilities that an order for bail pending appeal ought to be granted. (See ***R. v. Rivière***, 2019 QCCS 2548 (CanLII), at paras. 18-21; ***R. v. Boudreaux***, 2020 SKQB 92 (CanLII), at para. 25; ***R. v. Gill***, 2010 BCSC 1987 (CanLII),

at paras. 17-19, and 21; ***R. v. T.J.H.*** 2022 YKSC 23 (CanLII), at paras. 7-12; ***R. v. Rodrigues***, 2022 NLSC 145 (CanLII), at paras. 5-14; and ***R. v. M.V.***, 2022 ONSC 3763 (CanLII), at paras. 9-10.)

[13] The differences between summary conviction proceedings and indictable proceedings are relevant to the analysis. Generally, summary conviction proceedings involve less serious offences and result in lower terms of incarceration. I note the finding of Boswell J. in ***R. v. M.V.***, that an 18 months' jail sentence is not within the range of a "*lengthy term*" (at para. 43). Furthermore, leave to appeal from an indictable sentence is required pursuant to s. 675(1)(b) of the ***Code***, whereas leave is not required pursuant to s. 813. Finally, while s. 680 of the ***Code*** affords a statutory right of review, there appears to be no similar review available for decisions on bail pending summary conviction appeals. Relief is restricted to an order expediting the hearing of the appeal pursuant to s. 819(1) of the ***Code***.

ANALYSIS

> Does the appeal have sufficient merit, in the circumstances, such that it would cause unnecessary hardship if detention was ordered?

[14] For the purposes of his application for bail, Mr. Fedoruk relies upon his grounds of appeal alleging errors in the Sentencing Judge's reasons for declining to impose a CSO and in determining the 12 months' jail sentence. While Mr. Fedoruk need only establish sufficient merit in one of the grounds of appeal, I will address all of the ones that were argued before me.

[15] The threshold test for assessing sufficient merit is relatively low (***R. v. Berthelot***, 2015 MBCA 89 (CanLII), at para. 10). That said, I am mindful of the deferential standard

of review that applies to sentence appeals, as articulated in ***R. v. Lacasse***, 2015 SCC 64 (CanLII), at paras. 43, 44, 49-50. I am further aware that a judge's reasons are not to be assessed against a standard of perfection, nor are portions to be parsed and taken out of context.

[16] Upon review of the materials before me, I find there is sufficient merit to the ground of appeal alleging that the Sentencing Judge erred in declining to impose a CSO because it would not sufficiently address the principles of denunciation, deterrence and proportionality in accordance with the decisions of the Supreme Court of Canada in ***R. v. Friesen***, 2020 SCC 9 (CanLII), and ***R. v. Bertrand Marchand***, 2023 SCC 26 (CanLII).

[17] The Sentencing Judge rightly cited the recent decision of ***Bertrand Marchand***, in which the Supreme Court of Canada reaffirmed the important principles earlier articulated in ***Friesen***, with respect to the serious nature of sexual offences committed in relation to children and the inherent harm such offending creates. These offences are serious and treated as such by the courts.

[18] Notwithstanding the recognition of harm and an emphasis on denunciation and deterrence, in my view, the Supreme Court of Canada's decisions in ***Friesen*** and ***Bertrand Marchand*** also emphasize that sentencing remains an individualized approach. The sentences that the Supreme Court of Canada would have imposed on each of the representative offenders in the reasonable hypotheticals considered in ***Bertrand Marchand*** (a 30-day intermittent sentence, at para. 129 and a conditional

discharge, at para. 133) are examples of the wide range of offenders and offending behaviour that sentencing judges encounter.

[19] The Supreme Court of Canada has previously confirmed that there are no "categories" of offences for which a CSO cannot be considered (***R. v. Proulx***, 2000 SCC 5 (CanLII), at paras. 81-83). While the Manitoba Court of Appeal in ***R. v. Sinclair***, 2022 MBCA 65 (CanLII), identified a sentencing range of four months to two years for possession of CSAM, the appropriateness of a CSO was not in issue in that case. Furthermore, denunciation and deterrence can be achieved through the imposition of a CSO (***Proulx***, at para. 41; ***Nepon***, at paras. 119-121). Even when there is an emphasis on denunciation and deterrence, sentencing judges retain discretion to afford significant weight to other factors, such as ***Gladue*** factors or rehabilitation, in arriving at a fit and appropriate sentence in accordance with the overall principle of proportionality (***Friesen***, at para. 104).

[20] Where an offence captures a broad range of conduct, the offender's conduct may be less morally blameworthy in some cases (***Friesen***, at para. 91). The Sentencing Judge rightly recognized the lower level of moral culpability arising from the nature of the CSAM possessed in this case. However, there was also evidence of the connection between Mr. Fedoruk's mental health diagnoses, cognitive disabilities and his offending behaviour. (See the reports of Dr. Laurence Ellerby, at p. 25, and Gerry Goertzen, at pp. 16-17, and 22, attached as exhibits A and B to Mr. Fedoruk's affidavit affirmed on January 25, 2024). It is arguable that the Sentencing Judge may not have sufficiently assessed this connection in her determination of Mr. Fedoruk's moral culpability when she

declined to order a CSO (***Friesen***, at para. 91; ***R. v. J.M.O.***, 2017 MBCA 59 (CanLII), at paras. 72-73).

[21] I also find there is sufficient merit with respect to the ground of appeal alleging error in the Sentencing Judge's use of the word "*exceptional*" in the context of her decision to reject a CSO (Reasons for Sentence, at p. T7, line 6). The Crown argued that it is possible the Sentencing Judge used the word in "lay terms" in the context of her earlier comment that few cases result in CSOs. While that may be so, there remains an argument that the Sentencing Judge may have erroneously concluded that she needed to find something "*exceptional*" about the offence or Mr. Fedoruk prior to imposing a CSO.

[22] With respect to the ground of appeal alleging error in the determination of the length of the sentence, there is sufficient merit to the argument that the Sentencing Judge may have overemphasized or underemphasized certain relevant factors and therefore *unreasonably* gave greater weight to one factor over another (***R. v. Nasogaluak***, 2010 SCC 6, at para. 46).

[23] The merits of the appeal are assessed in conjunction with the hardship that may be occasioned through an unjust denial of bail. The length of sentence is an important factor. This does not mean, however, that unnecessary hardship is restricted to an assessment of the length of the sentence that may be served prior to the hearing. Unnecessary hardship may arise from loss of employment or housing, medical concerns or other circumstances.

[24] While the Crown emphasizes the availability of hearing dates as early as May or June of 2024, this would require Mr. Fedoruk to remain in custody for four to five months.

Mr. Fedoruk has a supportive employer who is fully aware of the offence and who is willing to re-employ him and act as a surety. He also has a supportive family. He works on the family farm, assisting his parents. Mr. Fedoruk has no prior criminal record and was assessed as a low risk to re-offend. Further, he has made extensive efforts towards rehabilitation through counselling. I must consider the likelihood that Mr. Fedoruk will be eligible for early release and will have served most, if not all, of his sentence by the appeal hearing date.

[25] Furthermore, while the Crown points to early hearing dates as ameliorative of hardship, this assumes that the Justice who will hear the summary conviction appeal will be in a position to render a decision on the hearing date. Having reviewed the extensive materials filed for the purpose of this hearing, including a psychological risk assessment report prepared by Dr. Ellerby and the Reasons for Sentence, I have concluded the appeal raises significant issues that are arguable enough that a decision on the appeal would likely be reserved. If so, this would further extend Mr. Fedoruk's detention.

[26] I note that in ***R. v. Rule***, 2021 ONCA 499 (CanLII), an individual who was sentenced to 22 months' jail time for multiple child pornography offences was granted bail pending appeal. His grounds of appeal alleged that the sentencing judge erred by failing to impose a CSO in light of his age and ailing health.

[27] Whether any of Mr. Fedoruk's grounds of appeal ultimately succeed is unknown. I am of the opinion, however, that he has met the onus of establishing sufficient merit to his appeal such that if he were to remain in custody until his appeal is heard, unnecessary hardship would result.

Will the applicant surrender himself into custody at the appeal hearing?

[28] The Crown concedes, and I agree, that there are no concerns regarding Mr. Fedoruk appearing in court for his appeal hearing.

Is the applicant's detention necessary in the public interest?

[29] The public interest criteria consists of two components, public safety and public confidence in the administration of justice. Public confidence involves weighing the competing interests of enforceability and reviewability. In ***R. v. Oland***, 2017 SCC 17 (CanLII), a high-profile murder case, the Supreme Court of Canada discussed the public interest test and held, at paras. 29 and 48:

> [29] Fortunately, cases like this tend to be more the exception than the rule. Appellate judges across the country deal with applications for bail pending appeal on a regular basis. Of those, only a fraction are likely to involve the public confidence component. Rarely does this component play a role, much less a central role, in the decision to grant or deny bail pending appeal.
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> . . .
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> [48] Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful.

[30] The Supreme Court of Canada further commented in ***Oland*** that it expects the Crown "*to exercise good judgment in raising public confidence*" concerns only when the offence is "*at the serious end of the scale*" (at para. 29).

[31] Mr. Fedoruk's release does not pose a risk to the safety or protection of the public. The Sentencing Judge found that if he were to serve his sentence in the community the public would not be endangered (Reasons for Sentence, at p. T6). In light of the Supreme Court of Canada's comments in ***Oland*** cited above, I question the applicability

of the public confidence component of the public interest test in the context of this case. In my opinion, it is not engaged.

[32] In the event that I am wrong, I have considered the public interest test. "*A qualitative and contextual analysis is required*" to balance the competing interests of enforceability and reviewability (***Oland***, at para. 49). In the context of this summary conviction appeal, the public interest favours reviewability over enforceability. Mr. Fedoruk does not pose a danger to the public and at least one, if not all, of his grounds of appeal clearly surpass the sufficient merit criterion (***Oland***, at para. 51; ***Rule***, at para. 16). He has established that his detention is not necessary in the public interest.

CONCLUSION ON BAIL PENDING SENTENCE APPEAL

[33] Mr. Fedoruk has met his onus of establishing on a balance of probabilities that he is a candidate for bail pending a summary conviction appeal.

[34] The bail conditions imposed upon Mr. Fedoruk were those suggested by him and are set out in the attached Schedule "A".

_____ J.

Schedule "A"

1. Release order of $3,000 with surety of $5,000;
2. You will surrender yourself by presenting yourself in person no later than 9:30 a.m. on the day of your summary conviction appeal hearing;
3. That you must reside with your parents at their place of residence in the Rural Municipality of Stuartburn, Manitoba;
4. That you will not change residence unless a judge has first given you permission to move to that address;
5. You will not own, possess, or carry any weapon;
6. You will not possess, use, or access a computer system pursuant to s. 342.1(2) of the ***Code*** except in the following circumstances:
    a. For communication with your lawyer relating to these matters;
    b. For internet/online banking or the ordering of essential goods; and
    c. In a medical emergency involving you or a member of your immediate family;
7. You will not possess, use, or access any cell phone or similar device that is capable of accessing the internet or any digital network except in the following circumstances:
    a. For communication with your lawyer relating to these matters;
    b. For internet/online banking or the ordering of essential goods; and
    c. In a medical emergency involving you or a member of your immediate family;

8. You will not possess, use, or access any electronic storage device, data storage device, memory card, or portable media device;
9. You will not possess, use, or access any camera, video camera, digital camera, or device capable of capturing visual images or videos;
10. You will not password protect or possess or use any encryption or computer wiping software or other means or device that could preclude access or a forensic examination of any computer system, cell phone, electronic storage device, date storage device, memory card, or portable media device in your possession or which you can access;
11. You will not use, access, or subscribe to any internet service or digital network, except in the following circumstances:
    a. For communication with your lawyer relating to these matters;
    b. For internet/online banking or the ordering of essential goods; and
    c. In a medical emergency involving you or a member of your immediate family;
12. You will not access any social media websites or apps, including but not limited to Snapchat or file sharing programs;
13. You will not possess, view, or access any pornographic images or videos;
14. You will not enter in or communicate on any electronic bulletin boards, internet chat rooms, telephone chat lines, or telephone sex services;
15. You must not contact, directly or indirectly, including communication by any means, or be in the presence of any person who is under the age of 18, except in

unavoidable public encounters and except for the purposes of having contact and communication with your children except while in the presence of either of your parents or your spouse or any other adult as approved in advance by CFS;

16. You are not to attend at any park or public swimming area where persons under the age of 18 years are present or can reasonably be expected to be present, or a daycare center, school ground, playground, or community centre; and

17. You are not to seek, obtain, or continue employment, or become a volunteer in a capacity that involves being in a position of trust or authority over a person under the age of 18.