Court of Appeal File No.: CA48615
Supreme Court File No.: 70994
Chilliwack Registry

COURT OF APPEAL

ON APPEAL FROM THE SENTENCE IMPOSED BY THE HONOURABLE MISTER JUSTICE VERHOEVEN OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED ON THE 12TH DAY OF JANUARY, 2024

BETWEEN:

REX

RESPONDENT

AND:

AMY ELYSIA SORANNO

APPELLANT

APPLICANT'S BAIL MEMORANDUM

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PART I: INTRODUCTION

1. This appeal involves convictions for break and enter and commit an indictable offence and mischief under $5,000, arising out of a protest that took place at a pig farm in Abbotsford. Ms. Soranno was convicted by the Honourable Justice Verhoeven after a 4-week-long trial and sentenced to 30 days imprisonment, to be served intermittently. She applies for judicial interim release pending the determination of her appeal on sentence. The Crown is not opposed to release under specified conditions.

PART II: CRITERIA FOR BAIL PENDING APPEAL

2. Section 679(4) of the *Code* permits a judge of this Court to order Ms. Soranno's release pending the determination of her sentence appeal. Ms. Soranno is required to establish on a balance of probabilities that: (a) the appeal has sufficient merit; (b) leaving her in custody would cause unnecessary hardship; (c) she will surrender himself into custody as required; and (d) her detention is not necessary in the public interest.[1]

A. Sufficient Merit

3. The bar to establish sufficient merit is more stringent than the "not frivolous" standard.[2] However, the standard is met where the appeal has "some hope or prospect of success."[3]

4. Ms. Soranno's sentence appeal asserts that the sentencing judge erred by:

(1) Preventing the Applicant from providing "anything" she had to say in accordance with s 726 of the *Criminal Code*;
(2) Concluding that "the validity of the offenders' beliefs and the moral and environmental issues they raise" were irrelevant in measuring the Applicant's culpability;
(3) Treating an aspect of the offending as an aggravating feature on sentence; and,
(4) Concluding that a conditional sentence was not available because it would not sufficiently promote the principles of denunciation and deterrence.

(i) *The sentencing judge unduly limited pre-sentence submissions*

5. Prior to being sentenced, Ms. Soranno attempted to provide the court with prepared submissions about the events in question, along with her background and motivation for the offending. As Ms. Soranno began to discuss what she had seen at Excelsior Hog Farm, Justice Verhoeven interrupted, stating that her submissions were irrelevant. Justice Verhoeven rejected defence counsel's suggestion that s 726 submissions are unconstrained by relevance and advised

[1] *R v Oland*, 2017 SCC 17 at para 19.
[2] *R v Tuka-Penlap*, 2014 ABCA 269 at para 8; *R v Colyer*, 2023 ABCA 2 at para 6.
[3] *R v Sagoo*, 2009 ABCA 357 at para 9; *R v Beasley*, 2023 BCCA 135.

Ms. Soranno to limit her comments to issues that could actually have an impact on sentence. After a break, Ms. Soranno "reluctant[ly] conclu[ded] that the remainder of her prepared remarks make no sense without the context that she was trying to provide", and ended her submissions.

6. In his decision, Justice Verhoeven classified Ms. Soranno's remarks as irrelevant and politically motivated, stating "the court cannot permit itself to be used as a platform for expression of political views which in and of themselves have no bearing on the court's decision."[4]

7. Justice Verhoeven's decision to cut off Ms. Soranno's submissions was flawed in two ways. First, it ignored the fact that accused persons' statements under s 726 have an independent importance that is not constrained by relevance. As the Quebec Court of Appeal held in *R v Gavin*:[5]

> Since s. 723(1) already provides that the Court must give the accused…the opportunity to make submissions "with respect to any facts relevant to the sentence", we must conclude that s. 726 *requires something else*, since (1) the Court must give the offender the opportunity to say something himself and (2) what the offender says is not limited to the facts relevant to the sentence.

8. Section 726 is not simply about providing relevant information. As this Court held in *R v Rigler*,[6] section 726 serves as "a reminder to the courts and to the public that the accused is a real human being, and not an abstract concept." Giving the accused wide latitude to personally address the court serves a broader function than simply providing the court with relevant information. It fosters transparency and accountability in the justice system and provides the offender with one single opportunity to speak freely about their situation to the court before a sentence is pronounced.

9. In any event, Ms. Soranno's planned comments *were* relevant. Her intention was to provide a foundation to explain her motivations, which was critical to measuring her moral culpability. The sentencing judge ultimately found she had no remorse for her actions and treated her accordingly. Yet her remarks were cut off before she could have provided some idea of whether this was true. As Ms. Soranno explained, her comments built upon one another to tell a story and she could not simply cut out the parts Justice Verhoeven deemed to be irrelevant. The judge's actions were unnecessarily condescending and dismissive, and impeded her right to give evidence.

10. Ms. Soranno was not using illegal speech, spewing hatred or speaking ill of the court. As a consequence, there was no principled reason to censor her submissions, and by doing so the

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[4] *R v Soranno*, 2022 BCSC 1795 at paras 45-46.
[5] *R v Gavin*, 2009 QCCA 1 at para 17 [Emphasis Added].
[6] *R v Rigler*, 2013 BCCA 117 at para 19.

sentencing judge prevented her from sharing relevant circumstances with the court. Moreover, this dismissive action impacted upon her dignity by forbidding her from presenting her version of events to the Court before being sentenced, even if it would not have made a difference to the punishment imposed. As the Supreme Court held in *R v Bissonette*,[7] "the foundations of our criminal justice system, require respect for the inherent worth of every individual, including the vilest of criminals."

(ii) *Validity of Beliefs were not Irrelevant*

11. In assessing Ms. Soranno's moral blameworthiness, the sentencing judge concluded that "the validity of the offenders' beliefs and the moral and environmental issues they raise are not issues for this court. Those issues are for the political forum.[8]"

12. In reality, the validity of Ms. Soranno's beliefs, and her commitment to them was very much a matter for the court to consider. It is well established that the illegal pursuit of a noble cause *can* reduce a person's sentence in the same way as pursuit of an odious cause can increase it. The Supreme Court has endorsed this approach. In *R v Zazulak*,[9] the Court held that "[c]ompelling evidence dealing with the good but misguided motive of the accused should ... undoubtedly count positively in his favour towards sentence". Similarly, in *R v Lawrence*,[10] the Alberta Court of Queen's Bench reduced an otherwise appropriate sentence and imposed a conditional discharge upon an environmental activist, noting that "[a]s ill-conceived as his actions were they were born out of concern for the [environment]".

(iii) *The sentencing judge misidentified a neutral factor as aggravating*

13. Justice Verhoeven found as aggravating the fact that Ms. Soranno's actions interfered with the farm's operations "for the day". This cannot be an *aggravating* feature of the offending, as the interference with farm operations was the exact conduct that she was being punished for. It is well-established that the completion of core elements of an offence cannot constitute an aggravating factor in sentencing. As the Newfoundland and Labrador Court of Appeal stated in *R v Johnston*:[11]

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[7] *R v Bissonette*, 2022 SCC 23 at para 87.
[8] *R v Soranno*, 2022 BCSC 1795 at para 4.
[9] *R v Zazuluk*, [1994] 2 SCR 5 at para 4. See also *R v SD*, 2022 BCSC 2302.
[10] *R v Lawrence* (1992), 74 CCC (3d) 495 at 504 (Alta QB).
[11] *R v Johnston*, 2011 NLCA 56 at para 19. See also *R v Porisky*, 2012 BCSC 771 at para 22; *R v PMM*, 2019 BCPC 276 at para 72; *R v JM*, 2019 BCPC 235 at para 80.
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> Since the nature of the offence itself is patently the same in every case, the nature, in and of itself, cannot be said to be aggravating. If it were, the nature of the offence would be aggravating in every case. It is not. Instead, the nature of the offence is reflected in minimum and maximum sentences set by Parliament, and ranges of sentences outlined in jurisprudence.

(iv) *Failure to Consider a Conditional Sentence*

14. The sentencing judge gave virtually no consideration to a conditional sentence after concluding that the Applicant's "behaviour must be denounced and deterred in the most emphatic of terms".[12] Beyond stressing the importance of these principles, the sentencing judge provided no other explanation of why a conditional sentence would be inappropriate.[13]

15. This approach failed to treat the conditional sentence regime correctly, and bypassed altogether s 718.2(e), which mandates that all available sanctions other than imprisonment be considered first. The sentencing judge ignored the fact that conditional sentences can meet core sentencing objectives, especially where "the public is made aware of the severity of these sentences".[14] As this Court held in *R v Dahl*,[15] "where a CSO is of significant length and contains sufficiently restrictive and onerous conditions, a CSO may effectively serve principles of deterrence and denunciation".

16. After rejecting the possibility of a discharge, the sentencing judge moved swiftly to his conclusion that incarceration was required. As was the case in *R v Wournell*,[16] he "homed in on denunciation and deterrence as the governing principles for the appellant's sentence. He viewed their objectives as only achievable through the appellant's imprisonment in a carceral institution. He did not engage in an assessment of the statutory requirements for a conditional sentence and whether they were met in the circumstances of this case."

B. Unnecessary Hardship

17. The normal test for "unnecessary hardship" requires the applicant to establish that the appeal has sufficient merit that, if judicial interim release is not granted, they will have spent more time in custody than subsequently determined to be fit.[17]

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[12] *R v Soranno*, 2022 BCSC 1795 at para 89.
[13] *R v Soranno*, 2022 BCSC 1795 at paras 148-150.
[14] *R v Proulx*, 2000 SCC 5 at para 107.
[15] *R v Dahl*, 2023 BCCA 336 at para 69.
[16] *R v Wournell*, 2023 NSCA 53 at para 56.
[17] *R v Wessel*, 2023 ABCA 331 at para 8; *R v Beasley*, 2023 BCCA 135 at para 38.

18. In this case, the criterion is easily met. The Applicant's sentence is of an extremely short duration. It would be impossible to hear the appeal before the sentence would be served, rendering the appeal moot.

B. The Applicant Will Surrender Herself Into Custody as Required

19. The Applicant was arrested in April of 2019 and released on an undertaking. She remained out of custody until sentencing. She subsequently received judicial interim release pending the hearing of her conviction appeal in November 2023. She has never breached a condition of her release or failed to appear for court and has no prior criminal record.[18] She swore an affidavit as part of her appeal against conviction setting out her circumstances and personal history, including a promise to turn herself into custody when required. This Court should have no concerns that she will not surrender herself as required.

C. The Applicant's Detention is not Necessary in the Public Interest

20. The public interest criterion consists of two components: public safety and public confidence in the administration of justice.[19] There is no basis upon which to find that the Applicant poses a substantial public safety risk. She has no prior criminal record and has been on bail for many years without incident. The proposed release conditions adequately address any public safety concerns that may remain.

21. Public confidence normally involves a weighing of two competing interests: enforceability and reviewability.[20] Nonetheless, where an appeal from sentence is concerned, the public confidence test plays little role. As Wakeling JA stated in *R v Watts*,[21] the "fairly onerous" test set out in s 679(4)(a), already does enough work to screen out those who are not entitled to bail. This means "that an applicant who is not a flight risk under s. 679(4)(b) or a threat to the safety of the community under s. 679(4)(c) is entitled to bail if his or her appeal has a moderate chance of success – the likelihood of success for each side is comparable."

22. In any event, enforceability is primarily concerned with the seriousness of the offence,[22] although the absence of any lingering public safety or flight risk concerns also attenuates the

[18] In October of 2021 the Applicant was arrested on charges of conspiring to commit and counsel a break and enter, in relation to a protest. Those charges have resolved by way of a common law peace bond.
[19] *R v Oland*, 2017 SCC 17 at para 26.
[20] *R v Oland*, 2017 SCC 17 at para 24
[21] *R v Watts*, 2016 ABCA 139 at para 73. See also *R v Smith*, 2017 SKCA 81 at para 105.
[22] *R v Oland*, 2017 SCC 17 at para 29.

enforceability interest.[23] The Applicant's sentence is for only 30 days imprisonment. As Kirker JA has noted, "[t]he length of sentence tells us something about the seriousness of the... crime. If, [in cases with short sentences], enforceability outweighed reviewability, the reviewability interest would, for practical purposes, be meaningless."[24]

23. The key consideration under reviewability is the strength of the grounds of appeal.[25] As outlined above, there are compelling grounds of appeal weighing in favour of release. In summary, there are compelling grounds of appeal here, and good cause to believe the trial judge erred in his approach to sentencing. A reasonable member of the public would conclude that reviewability outweighs enforceability, and Ms. Soranno should be released.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2024.

Peter Sankoff
Counsel for the Applicant

[23] *R v Oland*, 2017 SCC 17 at para 39.
[24] *R v Mitchell*, 2022 ABCA 151 at para 19.
[25] *R v Oland*, 2017 SCC 17 at para 40.

TABLE OF AUTHORITIES