

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

R v OLAND 2017 SCC 17

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16486/index.do>

Facts

On July 7, 2011, 69 year-old multi-millionaire Richard Oland's body was found at his office in Saint John, New Brunswick. He had been bludgeoned to death in what a police officer later described as, "one of the bloodiest crime scenes of his career", and had suffered over 40 blunt-force wounds.

Police quickly identified Richard Oland's son, Mr. Dennis Oland as the primary suspect. He was the last person to have seen his father and had visited his office three times the night prior. He was arrested and charged with second degree murder.

was a "contributing member of his community" who posed no future threat and would be able to successfully reintegrate into society.

Mr. Oland immediately appealed the decision. At the same time, he applied under s. 679 of the *Criminal Code of Canada* to be released on bail until the outcome of his appeal.

Procedural History

After a lengthy trial Mr. Oland was convicted second degree murder. He was sentenced to life imprisonment with no chance of parole for 10 years. During sentencing, the trial judge acknowledged that while the crime was "brutal", it resulted from a "spontaneous outburst" based on "a long-standing dysfunctional family dynamic and immense stress", and so it fell closer to manslaughter than to first degree murder on the continuum of moral culpability. Additionally, the trial judge found that Mr. Oland

Criminal Code of Canada

Release pending determination of appeal

679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

- a. in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
- b. in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
- c. in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

(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

- a. the appeal or application for leave to 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.

A judge of the New Brunswick Court of Appeal denied Mr. Oland's request for release on bail pending the determination of his murder conviction appeal. The Chief Justice of New Brunswick directed a three-judge panel of the Court of Appeal to review the appeal judge's decision. On review, the three-judge panel confirmed the appeal judge's decision, denying bail. Mr. Oland appealed from the panel's decision to the Supreme Court of Canada (SCC); however, before the Supreme Court could hear the bail decision appeal, the New Brunswick Court of Appeal allowed Oland's appeal from his murder conviction and ordered a new trial. Consequently, the bail decision appeal was "moot".

Issues

1. Should the SCC hear the case, considering the issues are moot?
2. What factors, particularly in respect of “public confidence in the administration of justice”, must be addressed when an appeal judge considers granting bail pending appeal under s. 679(3) of the *Criminal Code*?
3. What is the standard of review for a court of appeal reviewing the initial appeal judge’s decision (under s.680 of the *Criminal Code*)?
4. How do the approved and necessary factors and review standards apply to Mr. Oland’s application for bail pending appeal?

Decision

The SCC determined that it would hear the appeal even though the appeal was moot at the hearing date, as Mr. Oland had already been released when the New Brunswick Court of Appeal ordered a new trial in his appeal from his murder conviction. The SCC unanimously allowed Mr. Oland’s appeal from the decision of the review panel of the Court of Appeal. The Court held that Court of Appeal was wrong in not intervening in the (original) appeal judge’s decision to deny bail, as that decision was erroneous.

Ratio

Based on the consent of all parties and their submissions that the existing law on applications for bail pending appeal was unclear, the SCC decided to hear the appeal although it was otherwise moot. When determining if someone should be released on

bail pending appeal it is necessary to consider both public safety and public confidence in the administration of justice. Public confidence consists of two competing values: ensuring that the law can be enforced (“enforceability”) and ensuring that incorrect legal decisions can be reviewed (“reviewability”).

To determine bail pending appeal the judge should consider the following factors:

1. The seriousness of the crime;
2. the strength of the grounds of the appeal (ensuring that they are not frivolous);
3. the risk to public safety; and
4. whether the appellant is a flight risk

Reasons

In adopting this approach, the SCC referenced the public confidence considerations for bail decisions made **before** a trial. In *Oland*, however, the Court also expanded on the concepts of enforceability and reviewability: public confidence in the administration of judges has an interest in making sure that the punishment of crimes can be enforced and an interest in ensuring that appeals are available, at minimum, for cases that are not frivolous. The latter interest is assessed on the strength of the appeal, by its plausible legal basis and the appeal’s foundation in the trial record.

Then the SCC described how these factors should be balanced. They held that the factors should be measured through the eyes of a **reasonable person**, described as “someone who is thoughtful, dispassionate, informed of

the circumstances of the case and respectful of society's fundamental values." Thus, to determine if a person should be granted bail pending appeal the judge must determine if public confidence will be eroded by granting bail pending appeal, from the perspective of a reasonable person, knowledgeable about the circumstances of the case. An additional required consideration is the anticipated delay in deciding an appeal, relative to the length of the sentence. The "reviewability" factor is affected when a sentence will be served before the appeal is heard. Despite setting out the required considerations, the SCC indicated "there is no precise formula that can be applied to resolve the balance between enforceability and reviewability."

The court determined that a panel reviewing a decision of a single appeal judge under s. 680(1) should be guided by three principles: deference to the judge's findings of fact, where there is no "palpable and overriding error"; intervention "where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome"; and intervention where it concludes that the decision was clearly unwarranted. In the last two circumstances, the reviewing court may substitute its own decision for the appeal judge's. In applying its substantive reasoning to Mr. Oland's case, the SCC found that the appeal judge did not apply the correct test in his assessment of the strength of Mr. Oland's appeal.

The SCC allowed the appeal and determined that Mr. Oland's release would not undermine public confidence in the administration of justice. The court's decision was based on the appeal judge's original assessment that Mr. Oland presented no safety or flight risks, on the particular facts and circumstances that underpinned his conviction, and on the finding that his grounds for appeal were sufficiently strong. If the appeal had not

been moot, the SCC indicated that it would have ordered Mr. Oland's release pending appeal. Mr. Oland's new trial is scheduled for the fall of 2018 in New Brunswick.

DISCUSSION

1. Which are more difficult to prove: claims of mental injury or physical injury? Why?
2. Which do you think receive more stigma and more sympathy from society?
3. Should they be treated differently under the law? Consider the perspectives of claimants, defendants and insurers as you think about your answer.
4. Why do you think the presumptive ceiling is different for crimes tried in the provincial courts than for those tried in superior courts?
5. How is this ruling from the SCC helpful for other courts in Canada?

