CA 76 004

29 Oct 76 - Application for Release from Custody 2
- Crim Code s. 294(b); s. 608

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Before: The Honourable Mr. Justice C. F. Tallis
(In Chambers)

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

GOO KINGWATSIAK,

Appellant
(Applicant)

Application for release from custody pending the determination of Appeal

Application heard October 22, 1976 at Yellowknife, N.W.T.

Judgment of the Court filed October 29, 1976.

Application dismissed

Reasons for Judgment by:

The Honourable Mr. Justice C. F. Tallis

Counsel on the Hearing:

Mr. T. Boyd for the Crown (Respondent)

Mr. N. Rauf for the Appellant (Applicant)

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BETWEEN;

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- and -

GOO KINGWATSIAK,

Appellant
(Applicant)

Mr. N. Rauf for the Applicant

Mr. T. Boyd for the Crown

REASONS FOR JUDGMENT BY THE HONOURABLE
MR. JUSTICE C. F. TALLIS

This Appellant (Applicant) Goo Kingwatsiak was charged with theft under Two Hundred Dollars ($200.00) contrary to Section 294(b) of the Criminal Code. After a trial presided over by Chief Magistrate F. G. Smith at Frobisher Bay, Northwest Territories on September 1, 1976, he was found guilty of the charge and sentenced to a term of imprisonment for one year.

Kingwatsiak has now appealed in respect of this conviction and has also applied for leave to appeal against sentence. He has applied pursuant to Section 608 of the Criminal Code to be released from custody pending the determination of his appeal.

No application for leave to appeal sentence has been made to me and accordingly the question of leave to appeal sentence and the hearing of such appeal, if leave is granted, will be dealt with by this

Court at the hearing of the Appeal. Accordingly the applicable part of Section 608 with respect to the present application is subsection (3) which reads:

> "608(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."

Under the foregoing subsection, I may order the release of the Applicant pending the determination of his appeal if he establishes the three requirements set out therein.

The grounds of appeal as set forth in the Notice of Appeal are as follows:

> "1. The Crown did not establish beyond a reasonable doubt that the accused had the requisite animus furandi.
>
> 2. The Learned Chief Magistrate erred in law in admitting evidence that the accused had taken the police to the place where the gun that was allegedly stolen was found, without first having held a voir dire to determine that the accused's act in so doing was voluntary, since the accused's act was a non verbal statement tantamount to an incriminating statement or confession.

"3. The sentence imposed was harsh and excessive having regard to all the circumstances of the case."

As I do not have a transcript of the evidence I have no basis upon which to assess the merits of this appeal in relation to ground #1. It is possible that the circumstances of the alleged offence may warrant a consideration of the principles laid down in *R. v. Wudrick* 123 C.C.C. 109. However as to the unavailability of the transcript, it was made clear on this application that Counsel for the Appellant requisitioned the transcript on September 10,1976 but shortly thereafter asked the Court Reporter to defer the preparation of the same pending certain discussions with Crown Counsel as to other outstanding charges against the Appellant. Several days prior to the hearing of this Application on October 22, 1976, the Court Reporter was asked to prepare the transcript. The Court was advised that this transcript will be prepared within three weeks from October 22, 1976.

This Application was opposed by the Crown and it was urged that Ground No. 2 in this Appeal is frivolous. In the light of the judgment of the Supreme Court of Canada in *R. v. Wray* 11 C.R.N.S. 235 I am satisfied that this ground of appeal as stated is without merit.

In support of this Application the Applicant filed an affidavit setting forth the following facts:

" I, Goo Kingwatsiak, of the Settlement of Cape Dorset in the Northwest Territories, presently incarcerated at the Yellowknife Correctional Centre in the City of Yellowknife in the Northwest Territories, MAKE OATH AND SAY AS FOLLOWS:

1. That I am the Applicant herein and save as is hereinafter otherwise expressly stated, have personal knowledge of the matters hereinafter deposed to.

2. That on the 1st day of September A.D. 1976, I was convicted, after a plea of not guilty, by His Worship Chief Magistrate F. G. Smith at the Village of Frobisher Bay in the Northwest Territories of a charge of theft under Two Hundred Dollars ($200.00) contrary to S. 294(b) of the Criminal Code, and I was thereupon sentenced by the said Chief Magistrate F. G. Smith to a one year term of imprisonment.

3. That I am presently incarcerated at the Yellowknife Correctional Centre in the Northwest Territories.

4. That I am 21 years old having been born on the 16th day of July A.D. 1955 at Cape Dorset in the Northwest Territories.

5. That I am unmarried, and except as is hereinafter stated, have lived all my life in Cape Dorset in the Northwest Territories with my parents.

6. That, if released, I undertake to surrender myself into custody in accordance with the terms of any order of release.

7. That, if released, I would return to live in Cape Dorset with my parents and assist my father in the operation of his taxi business and his pool hall business.

8. That, until November, 1973, I was at school in Frobisher Bay.

"9. That, in November 1973, I returned to Cape Dorset where I was mainly occupied in assisting my father in the operation of his pool hall business; I remained in Cape Dorset until September 1974.

10. That in September 1974, I was incarcerated at the Baffin Region Correctional Centre.

11. That in November 1974 I was incarcerated at the Yellowknife Correctional Centre where I remained incarcerated until about the 30th day of September 1975 when I was transferred to the Baffin Region Correctional Centre in Frobisher Bay.

12. I was released on parole from the Baffin Region Correctional Centre on the 27th day of October A.D. 1975 when I returned home to Cape Dorset and worked mostly with my father.

13. I am informed and do verily believe that a Notice of Appeal against Conviction and Sentence in respect of the charge referred to in paragraph 2 hereof preceding was filed in the Office of the Deputy Registrar of the Court of Appeal of the Northwest Territories on my behalf on the 23rd day of September A.D. 1976.

14. I am informed by my counsel and do verily believe that I have good grounds of appeal against both conviction and sentence and that the appeal is not frivilous.

15. Now shown to me and marked Exhibit "A" to this my Affidavit is what I am informed is a true copy of the Notice of Appeal that has been filed on my behalf as stated in paragraph 13 hereof preceding.

16. Now shown to me and marked Exhibit "B" to this my Affidavit is what I am informed is a true copy of my criminal record as provided by the Clerk of the Magistrate's Court in the City of Yellowknife to my counsel.

"17. I do not believe that my continued detention is necessary in the public interest in view of the fact that none of the offences of which I have been convicted or to which I have pleaded guilty involved serious harm.

18. This Affidavit is made in good faith in support of an application pursuant to S. 608(1) of the Criminal Code of Canada for an Order releasing me pending the determination of my appeal to this Honourable Court, and for no improper purpose."

The previous record of the Applicant as exhibited to his affidavit is as follows:

"I, A. C. Milton, Clerk of the Magistrate's Court in the City of Yellowknife in the Northwest Territories hereby certify that it appears from an examination of the records of the said Magistrate's Court that Goo Kingwatsiak born July 16, 1955 has been convicted of the following offences contrary to Federal Statutes.

4.4.73	S. 33(1)(b) J.D.A.	$152.00, in default 10 days
5.3.74	S. 387(4) C.C.	$50.00, in default 14 days
5.3.74	S. 387(4) C.C.	$50.00, in default 14 days consecutive
5.6.74	S. 387(3)(b) C.C.	6 weeks in jail
26.9.74	S. 387(1) C.C.	3 months concurrent
4.11.74	S. 306(1)(a) C.C.	15 months consecutive
4.11.74	S. 295 C.C.	1 month consecutive
4.11.74	S. 306(1)(b)	15 months consecutive
4.11.74	S. 133(1)(b)	One Year Imprisonment
1.9.76	S. 294(b)	One Year Imprisonment "

The question of the availability of the transcript has been discussed.

At the hearing of this application the following additional facts were presented by agreement of both Counsel:

(1) The Applicant is presently facing two additional charges in an indictment on which the trial is to be heard at the Frobisher Bay sittings of the Supreme Court of the Northwest Territories commencing on November 2nd, 1976. The indictment is as follows:

> " GOO KINGWATSIAK stands charged that he on or about the 14th. day of July A.D., 1976, at Frobisher Bay in the Northwest Territories
>
> COUNT 1. did without lawful authority forcibly seize Pootoogoo NOAH and Pudloo MATHEWSIE contrary to Section 247 (2) of the Criminal Code.
>
> COUNT 2. did without lawful excuse point a firearm, to wit a Smith and Wesson revolver at Pootoogoo NOAH and Pudloo MATHEWSIE contrary to Section 86 (a) of the Criminal Code."

(2) The accused's father is presently in hospital at Montreal taking tests to determine if he has a duodenal ulcer. He has been in hospital for approximately two weeks.

Counsel for the Crown in opposing this Application pointed out that the Applicant has a previous conviction for being unlawfully at large under Section 133(1)(b) of the Criminal Code.

In this particular case I am not satisfied that the Applicant has established that this appeal is not frivolous. The

facts were not dealt with in argument. I do however feel that he will probably surrender himself into custody in accordance with any order I may make.

A further problem arises as to whether or not he has established that his detention is not necessary in the public interest.

In my opinion, in the determination of what may constitute public interest Parliament intended to give to the judge a wide and unfettered discretion. I will not attempt to define with particularity what constitutes public interest because this would only restrict the unfettered discretion which Parliament intended to confer. In my view public interest should be given a comprehensive meaning. The circumstances of each case must be examined to determine whether or not the public interest requires the prisoner's detention.

I believe that the effective enforcement and administration of criminal law in this jurisdiction can only be achieved if the Courts, judges, police officers and law enforcement agencies have and maintain the confidence and respect of the public. Any action which may detrimentally affect that confidence would be contrary to the public interest.

In my opinion the release of a prisoner convicted of a criminal offence involving a person who has a number of previous criminal convictions is a matter of real concern to the public.

The public does not take the same view with respect to the release of a convicted person as compared to the release of an accused who is awaiting trial. In the latter case the accused is presumed to be innocent while in the former he is a convicted criminal.

As already stated, I am not satisfied that the Applicant has established that this Appeal is not frivolous. In addition, after giving careful consideration to this matter I must conclude that the Appellant has not established that his detention is not necessary in the public interest.

The Application to be released is therefore dismissed.

During the course of argument on this Application I directed the attention of Counsel to Section 608(10) and indicated that in my opinion the ends of justice would be served by giving directions in order to expedite the hearing of the Applicant's Appeal. Section 608(10) provides as follows:

> "608. (10) A judge of the court of appeal, where upon the application of an appellant he does not make an order under subsection (5) or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada upon application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be."

In view of the fact that the transcript will be available within three weeks from October 22, 1976, I have arranged

with the Chief Justice of this Court to have this Appeal set down for hearing at the sittings of this Court to be held in Calgary, Alberta commencing on November 29th, 1976. Counsel will be expected to argue the appeal at this sittings and if the accused desires to be present at the hearing of his appeal, the Crown can make the necessary arrangements to have him in attendance.

Dated at Yellowknife in the Northwest Territories this 28th day of October, A.D. 1976.

C. F. Tallis

C. F. Tallis, J.S.C.

NO. 267

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BETWEEN;

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Respondent

- and -

GOO KINGWATSIAK,

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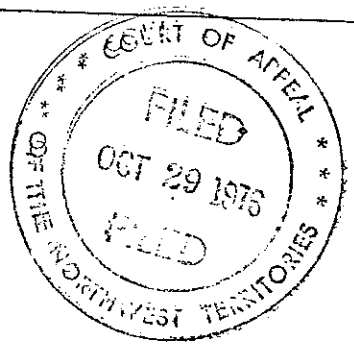

REASONS FOR JUDGMENT BY THE HONOURABLE MR. JUSTICE C. F. TALLIS