CA 00645

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

BETWEEN:

ERIC PAUL GARGAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Application for release pending appeal.

Heard at Yellowknife on April 23, 1997

Memorandum of Judgment filed: April 28, 1997

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Adrian Wright
Counsel for the Respondent: Margo Nightingale

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MEMORANDUM OF JUDGMENT

The applicant (whom I will refer to as the "Appellant") was convicted by a jury in September of 1996 of sexually assaulting his estranged wife.

The Crown has appealed the three and a half year sentence imposed at trial. The Appellant has filed a Notice of Cross-Appeal from his conviction.

The Appellant seeks judicial interim release pending the appeal.

Section 679(3) of the **Criminal Code** provides

that I may release the Appellant if he 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;

(c) his detention is not necessary in the public interest.

It is to be noted that the Court has a discretion whether to order release and that the Appellant bears the onus of satisfying the three criteria listed.

The Crown takes the position that the Appellant has not satisfied the first and third criteria. There is no suggestion that the Appellant would not surrender himself for the appeal.

In her evidence at trial, the complainant testified that the Appellant had come into the room where she was lying on the bed and had sexual intercourse with her despite her protests. Hers was the only evidence of sexual assault. The Appellant denied that any sexual activity took place. The issue at trial was credibility.

The sole ground of appeal advanced involves

fresh evidence. It consists of an affidavit of Mr. Sinclair, a lawyer practising with counsel for the Appellant. Mr. Sinclair deposes to certain things said by the complainant in a meeting that she had with counsel for the Appellant on March 14, 1997. She recounted a somewhat different version of events than she had testified to at trial. Most importantly, she said that she had only recently dealt with the effects of childhood sexual abuse and that on the occasion of the events giving rise to the sexual assault charge, she thought that the Appellant was her former abuser coming to get her again. She said that the Appellant was not trying to have sex with her. She also referred to the fact that, as she testified at trial, she was in bed and very sick and in pain at the time of the events. She was also on medication, although there is no suggestion that the medication affected her ability to perceive what was happening.

Counsel for the Appellant advised that he was unable to obtain an affidavit from the complainant.

On receipt of information that the complainant had made the statements referred to above, the Crown asked the R.C.M.P. to obtain a statement from her. The affidavit of Constable Robitaille indicates that he met with the complainant on April 22, 1997 and asked her to provide a statement. She asked him if she could be charged and he explained that if she gave him a false statement

or gave a false statement in court she could be charged with various criminal offences. The complainant then contacted a lawyer and after speaking with him in private she declined to provide a statement to Constable Robitaille.

The Supreme Court of Canada set out the test for the admission of fresh evidence in *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193. That test may be summarized as follows:

1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;

2) the evidence must be relevant in that it bears on a decisive or potentially decisive issue in the trial;

3) the evidence must be credible in the sense that it is reasonably capable of belief; and

4) the evidence must be such that if believed, it could reasonably, when taken with the other evidence at trial, be expected to have affected the result.

In the circumstances of this case, the first and second requirements of the test can likely be satisfied: the evidence did not come to light until after the trial and clearly is relevant. The third and fourth requirements will, in my view, turn on what is presented to the Court of Appeal in support of the

application. For example, in *R. v. H.H.* (1996), 110 Man R. (2d) 288 (C.A.), the Court of Appeal heard *viva voce* evidence from a complainant who recanted her evidence at trial. In the result, a new trial was ordered. In *R. v. M.* (M.L.) (1992), 78 C.C.C. (3d) 318 (N.S.C.A.) (reversed on other grounds: (1994), 89 C.C.C. (3d) 96 (S.C.C.)), the Court of Appeal had both a letter from the complainant to the police in which she recanted her evidence at trial and the *viva voce* evidence of the complainant, who testified that the letter was written under pressure from the accused. In the result, the Court of Appeal dismissed the application on the ground that the letter lacked credibility and the *viva voce* evidence could not have affected the result of the trial.

Counsel for the Appellant argues that I should not, on this application, be concerned with the credibility of the complainant's recantation. He argues that the fact that she made the recantation is in itself significant and sufficient to satisfy the requirement that the appeal is not frivolous, i.e. that it is arguable. Counsel for the Respondent points out that the evidence before me is hearsay and that there should be direct evidence from the complainant in order properly to assess the matter.

Clearly this is not a case where the trial record reveals a basis upon which to assess the merits of the appeal, as is the case where the ground of appeal involves an allegation that the trial judge erred in admitting

evidence or erred in excluding evidence or erred in the instructions given to the jury.

In this case, the merits of the appeal will depend on whether the fresh evidence application is successful, which will in turn depend on the evidence put before the Court of Appeal and particularly, in my view, on whether the complainant maintains her recantation.

The fact that the complainant would not provide an affidavit to counsel or give a statement to the Constable suggests to me that she may not be firm in her recantation, although in her dealings with the Constable she may have acted on the advice of counsel. This does not amount to a case where she has recanted the recantation.

In all the circumstances, I cannot say that the appeal is frivolous. Nor can I say at this stage that it is likely to succeed, but, as pointed out in *Boudreau v. The Queen* (N.W.T.C.A. July 19, 1996, No. CA00635) even lack of likelihood of success does not render the appeal frivolous.

There being no issue that the Appellant will surrender himself for the appeal, I turn now to the third aspect of s. 679(3): is the Appellant's detention necessary in the public interest?

Counsel for the Appellant submits that it is safe to release the Appellant and points out that he was on release for several months prior to his trial.

Counsel for the Respondent bases her opposition to his release on several factors: there was contact by the Appellant with the complainant before the trial when he was on an undertaking with a condition that he not have contact with her; there was evidence at the trial that he attempted to interfere with her as a witness before trial by questioning why she had charged him; there is an indication in both the Victim Impact Statement filed with the trial court on sentencing and an affidavit from the Respondent's Victim Witness Assistant that some members of the Appellant's family put pressure on the complainant and threatened or intimidated her prior to the trial. One of those family members is the sister the Appellant proposes to reside with should he be released. Counsel for the Respondent raised the concern that the complainant's recantation may be the result of family pressure.

In the statements made by the complainant as related in Mr. Sinclair's affidavit, there is no reference to family pressure, although of course one might not expect her to say anything even if she was being pressured, considering that it was the Appellant's lawyer to whom she made the recantation.

The only related reference is that she said she had not talked to the Appellant about getting back together.

The Appellant is 33 years old. He proposes to work or attend an education program if he is released. He has a criminal record of seven offences, the most recent of which is an assault on the same complainant, of which he was convicted in 1994.

In my view, this is a troubling case. It is difficult to accept that the public interest is served by keeping incarcerated a person who has been convicted on the evidence of a witness who subsequently recants that evidence. On the other hand, I bear in mind the cautionary note sounded in *Palmer and Palmer*, *supra*, when the Supreme Court of Canada was discussing the discretion Parliament has given the Court of Appeal to consider fresh evidence:

> The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice.

The Court was, of course, referring to the

fresh evidence application and not an application for bail pending appeal. But in my view for the same reasons a cautious approach should be taken on this application.

Here I have evidence that the Appellant had contact with the complainant before the trial despite being on an undertaking not to do so, that he said things to her that made her feel guilty about charging him, that he spoke to her about why she had charged him and that his family put pressure on her not to proceed with the charge. The complainant meets with the Appellant's lawyer and recants her evidence. She will not provide him with a written or sworn recantation. When asked to provide a statement to the police about her recantation, she indicates a concern about whether she could be charged and then, after legal advice, declines to provide a statement. I have no way of assessing the status of her recantation at this point or what she will say if subpoenaed to testify.

I am not satisfied in these circumstances that it would be in the public interest to release the Appellant. I am advised that the appeal can proceed in June so there is not a question of a great delay before this matter can be heard. In my view the public interest is best served by the fresh evidence application and the appeal proceeding at the June sittings of this Court.

The application is dismissed. I thank counsel for their submissions in this matter.

V.A. Schuler,

J.A.

Dated at Yellowknife, NT
this 28th day of April 1997

Counsel for the Appellant: Adrian Wright
Consel for the Respondent; Margo Nightingale