CA 00635

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

MAURICE BOUDREAU

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Application for judicial release pending appeal.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on July 17, 1996

Reasons filed: July 19, 1996

Counsel for the Appellant: Paul A. Bolo

Counsel for the Respondent: Les A. Rose

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REASONS FOR JUDGMENT

1 The appellant applies for judicial release pending his appeal. He was convicted on June 7, 1996, after trial by judge and jury, on a charge of sexual assault. He was sentenced to imprisonment for 3½ years. He has filed a notice of appeal seeking a new trial.

2 Section 679(3) of the Criminal Code provides that:

> ...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.

3 The decision to release is discretionary and the appellant must satisfy each of the three criteria listed.

4 The Crown opposes release. Crown counsel submits, as the primary reason for this opposition, that the appeal is frivolous.

Is the Appeal Frivolous?

5 The notice of appeal sets out three grounds for setting aside the verdict.

1. That there was a miscarriage of justice due to the flagrant incompetence of counsel for the Appellant at trial.

2. That the Appellant's constitutional right to the effective assistance of counsel pursuant to ss. 7, 10(b) and 11(d) of the Canadian Charter of Rights and Freedoms was breached.

3. That the Learned Trial Judge erred in omitting to instruct the jury on the defence of honest but mistaken belief in consent.

6 The first two grounds raise one issue, the competence of the appellant's trial counsel, and most of the argument at the hearing before me was concentrated on it. Fortunately I had the benefit of reading the trial transcript. Unfortunately, I did not have the benefit of trial counsel's opinion of the allegations regarding his competence (something that no doubt will be put before the court when the appeal is heard).

7 With respect to the law relating to allegations of incompetence levelled by convicted persons against their trial counsel, certain general principles can be discerned from recent jurisprudence:

1. An accused who has retained counsel is entitled to the effective assistance of that counsel. The right to the effective assistance of counsel is a constitutionally protected right and is an aspect of an accused's right to a fair trial.

2. An appellant who contends that he or she was denied the effective assistance of counsel must establish the factual basis for this contention.

3. Counsel's performance is to be measured against an objective standard of reasonableness. The proper measure is reasonableness under the prevailing professional norms.

4. Each case must be considered on its own facts. The wisdom of hindsight has no place in this consideration.

5. There is a strong presumption that trial counsel perform adequately and, where strategic or tactical decisions made by counsel are in issue, considerable deference is given to trial counsel's choices.

6. Even if the appellant establishes that counsel provided ineffective or incompetent representation, the appellant must establish prejudice as a consequence of such representation. To establish this, the appellant must show a reasonable probability or a real possibility (the terms being used synonymously) that the result would have been different had it not been for the incompetent representation. The focus at this stage is on the fairness of the trial and the reliability of the verdict.

7. If counsel's incompetence rendered the verdict unreliable or the process unfair, then an appellant has demonstrated that he or she received ineffective assistance resulting in a denial of the right to a fair trial and a miscarriage of justice. Then the appellant is entitled to a new trial.

See: *R. v Silvini* (1991), 68 C.C.C. (3d) 251 (Ont. C.A.); *R. v Strauss* (1995), 100 C.C.C. (3d) 303 (B.C.C.A.); *R. v Joanisse* (1995), 102 C.C.C. (3d) 212 (Ont. C.A.); *R. v B.(L.C.)* (1996), 27 O.R. (3d) 686 (C.A.).

8 Appellant's counsel pointed out numerous extracts from the trial transcript that showed (arguably) a lack of preparation on the part of defence counsel, a lack of anticipation of likely trial issues, a lack of familiarity with fundamental rules of evidence and procedure, and a lack of knowledge respecting current law on the charge. It was submitted to me that, while each example does not alone demonstrate overall incompetence, the cumulative effect of these examples is so grave as to question the fairness of the trial process.

9 Crown counsel submits that, not only is there not one obviously fatal error revealed from the transcript, but the totality of what appear to be errors fails to meet the test of showing prejudice (even if incompetence can be assumed). As Crown counsel accurately points out, the case was essentially a credibility contest. He submits it is sheer speculation to think that the result would have been different had there been a different defence counsel and, in the context of the burden on the appellant, if one has to resort to speculation about the issue then it is a frivolous issue.

10 While I may think, at this preliminary stage, that this ground will not prevail, it is in my opinion at least an arguable ground. The lack of a likelihood of success is not the equivalent of "frivolous": *Latimer v The Queen* (Sask. C.A. No. 6515; November 25, 1994) per Tallis J.A. I think the appellant has a big hurdle to establish the elements of this ground but it is not inconceivable, in law or in fact, that he could do so. The fact that this was essentially a credibility case may mean that a lack of knowledge of the rules of evidence and procedure — the building blocks for structuring the examination and cross-examination of witnesses — may be more critical than if the case rested on some discrete point of law.

11 For these reasons I conclude that the appellant has met the first requirement with respect to this ground of appeal. With respect to the other ground of appeal, that the trial judge erred by not instructing the jury on the defence of honest but mistaken belief in consent, I can be brief given my conclusion on the first ground.

12 At trial, defence counsel at first argued that the judge should charge the jury on mistaken belief in addition to consent or no consent. After considering the matter, and after indicating that she had also reviewed the then recent decision from the Supreme Court of Canada in *R. v Livermore* (1995), 102 C.C.C. (3d) 212, the learned trial judge told counsel that she did not find an air of reality in the evidence upon which to charge the jury on mistaken belief. Defence counsel then conceded that there was no basis on which to so instruct the jury indicating that he too had reviewed *Livermore* and, as a result, agreed with the trial judge's assessment of the evidence. Appellant's counsel now says that it was incumbent on the trial judge to instruct the jury on mistaken belief having regard to the alternative theories presented by the Crown. Those were either non-consent or consent induced by threats or exercise of authority.

13 In my view the case appears to be one of consent or no consent. For mistaken belief to apply there would have to be, as in *Livermore*, some realistic evidentiary basis upon which the jury could conclude that what happened was a third version between what the complainant said and what the accused said happened. I do not, however, say that there cannot be an argument made on this point. After all, the latest pronouncement on this topic from a panel of this Court supports the possibility of such an argument even when defence counsel expressly repudiates it: *Esau v The Queen* (N.W.T.C.A. No. 566; June 4, 1996). Accordingly I also find that this ground is not frivolous.

Will the Appellant Surrender Himself?

14 The Crown does not seriously question the likelihood that the appellant will surrender himself for the appeal. He was on pre-trial release and travelled outside of the jurisdiction several times without incident. In my view the second requirement of s.679(3) is met.

Is Detention Required in the Public Interest?

15 In applications for release following conviction, the appellant no longer enjoys the presumption of innocence. Rather the verdict is presumed correct. Accordingly the public interest test requires the judge to balance the need for enforcement of judgments with the right to a fair review. Public safety and the public's perception of the administration of justice, the likelihood of success and the length of delay, are all factors to consider in weighing the public interest: *R. v Farinacci* (1993), 86 C.C.C. (3d) 2 (Ont. C.A.).

16 The likelihood of success on this appeal may not appear to me at this stage to be great but there is at least an arguable case. The appeal could be heard in a few months so there would be no inordinate delay or it may be delayed since appellant's counsel informs me that there may be a need to gather supporting material for a fresh evidence application.

17 The appellant is 51 years old. This is his first criminal conviction. He has a lengthy history of steady employment. He has family based in Winnipeg with whom he can

reside. He would therefore be far away from the community where the crime took place and from where the victim now lives. His plan is to resume employment in Winnipeg so he can raise funds to finance his appeal.

18 There is obviously no set list of factors that will satisfy this requirement. Each case will depend on its own particular circumstances. In this case I am satisfied that it will not be detrimental to the public's confidence in the justice system, nor to the public's safety, to release the appellant, on conditions, until his appeal.

19 I direct that the appellant be released from custody pending the determination of his appeal upon entering into a recognizance in Form 32 without sureties or cash deposit. In addition to the usual statutory conditions that the appellant keep the peace and be of good behaviour and attend at the time and place fixed by the Court for the hearing of his appeal, I direct that the following additional conditions be included in his recognizance:

(a) he shall within 24 hours of release travel to Winnipeg, Manitoba, and reside there at 730 Flora Avenue;

(b) he shall report in person to the R.C.M.P. detachment in Winnipeg:

  (i) within 24 hours of his arrival in Winnipeg;

  (ii) each Friday of every week between the hours of 9:00 a.m. and 4:00 p.m.; and

  (iii) at least 24 hours prior to his departure from Winnipeg in compliance of the surrender provisions of this order;

(c) he shall surrender himself into custody at the R.C.M.P. detachment in Yellowknife no less than 48 hours prior to the scheduled time for the hearing of his appeal, to be held in custody until the appeal has been heard and the direction of the Court of Appeal received; and

(d) he shall deposit his passport with the Registrar of this Court to be held pending the determination of his appeal.

20 I direct appellant's counsel to prepare a formal order and the form of recognizance. Crown counsel's approval as to form and content of both documents should be obtained. After the order is entered the appellant may sign the recognizance in the presence of a justice of the peace. To facilitate execution of the recognizance, the formal order can include a provision for the removal of the appellant from custody and his transport to the court house at a specific time and date for the purpose of attending before a justice of the peace to sign the recognizance. The provision may include a term that once the recognizance is signed the appellant is released from custody.

21 In the event that the appellant does not surrender himself into custody in accordance with the condition of his recognizance, a warrant for his arrest will issue forthwith.

J.Z. Vertes
J.A.

Dated at Yellowknife, Northwest Territories
this 19th day of July, 1996.

Counsel for the Appellant: Paul A. Bolo

Counsel for the Respondent: Les A. Rose

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