Wanazah v. H.M.T.Q., 2001 NWTCA 9 Date: 2001 08 14
Docket: A-001-AP-2001000005

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

BETWEEN:

LARRY WANAZAH

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant applies for bail pending appeal after his conviction on charges of sexual assault, sexual assault with a weapon and uttering a threat to cause death. He was convicted after a one day jury trial held on February 7, 2001. Although his notice of appeal was filed very soon after the conviction, his counsel advises that delays in obtaining legal aid approval account for this application not having been brought on until last week, after which it was adjourned until yesterday.

[2] At the jury trial, the victim on the sexual assault charge testified that in approximately 1991, when he was 9 or 10 years old, the Appellant convinced him to go into an area behind the school and there forcibly had anal intercourse with him. The victim on the other two charges testified that in 1991 or 1992, when she was 11 years old, the Appellant had forcible anal intercourse with her in a shack, in the course of which he aimed a pocket knife at her throat and threatened her. The accused, who would have been 15 to 17 years old at the time of the offences, denied that the incidents happened.

[3] The Appellant has appealed both conviction and sentence. As to the conviction appeal, section 679(3) of the *Criminal Code* provides that his release may be ordered if the Appellant establishes that (a) the appeal is not frivolous; (b) he will surrender himself into custody in accordance with the terms of any order made; and (c) his detention is not necessary in the public interest.

[4] I will deal first with whether the Appellant has established that the appeal is not frivolous. Crown counsel did not submit that it was frivolous; she acknowledged that the bar on this part of the test is set fairly low. Essentially, if the grounds are arguable, even if there is a lack of likelihood of success, the appeal is not frivolous.

[5] In this case, the Appellant says that his main ground of appeal arises from the fact that after 12 jurors were chosen, but before they had heard any evidence, the trial judge discharged two of them under s. 644(1) and proceeded with the trial with only 10 jurors. When the Appellant's counsel raised with the trial judge the issue of replacement of the two jurors, the trial judge indicated that he could not replace them since the accused was already in the charge of the jury. The Appellant argues that this was an error of law because s. 644(1.1) does provide a procedure for replacement of jurors where the jury has not yet begun to hear evidence. He says the trial judge erred in not inquiring into whether replacements could be obtained. Thus, the complaint is not that the trial judge exercised his discretion in a certain manner but rather that he erred in not embarking on an inquiry as to whether he should exercise his discretion to replace the discharged jurors. I agree that this ground of appeal is not frivolous.

[6] The other grounds of appeal arise mainly from instructions the trial judge gave counsel about his questioning of witnesses and from what the Appellant says is a lack of instruction given to the jury on such matters as the demeanour of one of the witnesses and various contradictions and weaknesses in the Crown case, which was completely dependent on the testimony of the two now adult witnesses. There is also an allegation that the trial judge failed to explain the theory of the defence to the jury. While these grounds of appeal may not be all that strong, they are at least arguable and particularly in light of my finding as to the ground involving s. 644(1.1), I need not deal with them any further.

[7] As to whether the Appellant will surrender himself into custody, I consider first his criminal record. He is now 27 years old. In 1991 in Youth Court, he was

convicted of failure to appear in court, his only conviction for that offence, as well as some other property offences. He has convictions for property and driving offences in 1993 and 1996. In 1996 he also has a conviction for assault. While on release pending trial on the charges now under appeal and other charges which went to a jury trial, he was convicted in January 2001 of having assaulted his common-law spouse in December 2000 and was sentenced to 14 days in jail. His release was not revoked. The only other jail sentence he has received was for the 1996 assault, for which he was given 21 days intermittent.

[8] Although counsel for the Crown argued that this criminal record should cause the Court concern as to whether the Appellant is able to abide by court orders, I note that the only failure to appear in court was some 10 years ago and there are no convictions for breach of a court order, although the recent assault would have been a *de facto* breach of the process he was on while awaiting his jury trial. Having considered all this, I agree with counsel for the Appellant that there is no history of failing to appear or failing to obey court orders and accordingly, I am satisfied that the Appellant will surrender himself into custody in accordance with the terms of an order for his release.

[9] The Crown's opposition to this application for release is based mainly on the third ground. The Crown's position is that the Appellant has not established that his detention is not necessary in the public interest. She pointed out that the Appellant no longer has the benefit of the presumption of innocence and referred to the seriousness of the offences and the fact that they involved young children and in the one case, the use of a knife and threats. Her argument is that these factors, along with the criminal record and the fact that both counsel acknowledge that the appeal can be heard at the October sittings of the Court some two months from now, militate against release on the third ground.

[10] The Appellant argues that the third ground is satisfied because no evidence has been presented to suggest he is a danger to the public. He takes the position that the offences are not of a horrendous nature and says it should be considered that they are historic offences in that they occurred ten or so years ago. On his behalf it was also pointed out that he was young at the time of the offences and that this was a case where there was no evidence other than that of the two victims. He testified on his own behalf at the trial and denied the allegations.

[11] The offences for which the Appellant was convicted are very serious. However, as has been pointed out in some of the cases counsel referred to on the bail application, I have to bear in mind that the law makes bail pending appeal available on all offences, even violent ones involving children.

[12] The fact that the offences are very serious and of a predatory nature and involve violence to young, vulnerable children militates against release. However, the Appellant's young age at the time of the offences and the fact that he has not been convicted of any sexual or very violent offences in the intervening ten years must also be considered. I do not ignore the assault on his common-law spouse, or the earlier assault on his record, but not having been told any details about them and considering the length of the jail sentences imposed, I infer that they were not among the most serious of assaults. Further, the Appellant has the support of his family, including his common-law spouse, with whom he has reconciled since the assault on her.

[13] On balance, I do not think it would undermine the public's confidence in the administration of justice if the Appellant were to be released pending the hearing of his appeal. As McEachern C.J.B.C. said in *R. v. Nguyen*, [1997] B.C.J. No. 2121 (C.A.), "The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause "ordinary reasonable, fair-minded members of society ... or persons informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case ..., to believe that detention is necessary to maintain public confidence in the administration of justice." Considering that the Appellant has committed no similar offences in the intervening ten years and that, apart from the assault on his spouse, he was on release without incident pending his jury trial, I am satisfied that his detention is not necessary in the public interest notwithstanding the seriousness of the offences of which he has been convicted.

[14] I have considered whether the fact that the appeal can be heard in October should militate against release. However, it seems to me that since the Appellant has established the three grounds in s. 679(3), and considering that the delay in applying for release stems from what I will call "administrative issues", the relative proximity of the appeal sittings should not be determinative against release. There is always, of course, the chance that for some reason the appeal will not proceed in October.

[15] Accordingly, I am satisfied that the Appellant has established that his release is justified and I order that the Appellant be released from custody pending the determination of his appeal upon entering into a recognizance without sureties or cash deposit. The Appellant is in Prince Albert, Saskatchewan, his bail application having been heard by videoconference. He is therefore to be released in Yellowknife, upon entering into the aforesaid recognizance. In addition to the usual statutory conditions that he keep the peace and be of good behaviour, the recognizance will include the following additional conditions:

(a) he will report in person to the R.C.M.P. detachment in Yellowknife within 24 hours of his arrival in Yellowknife and thereafter on every Friday between the hours of 8:00 a.m. and 5:00 p.m.;

(b) he will reside at 223 N'Dilo, Yellowknife, Northwest Territories

(c) he will not leave the Northwest Territories except in the case of a medical emergency;

(d) he will not enter the community of Rae-Edzo;

(e) he will have no contact, directly or indirectly, with the two complainants in the offences under appeal (counsel are to insert their names in the recognizance);

(d) he will surrender himself into custody at the R.C.M.P. detachment in Yellowknife no less than 48 hours prior to the Court of Appeal sittings scheduled for October 10, 2001, to be held in custody until the appeal has been heard and the direction of the Court of Appeal received.

[16] I direct that the formal order and recognizance be drawn up by the Appellant's counsel and approved by Crown counsel prior to entry of the order. Since, in the normal course, the Appellant would have been here in Yellowknife for the hearing of his bail application, he is to be transported to Yellowknife and released here after signing the recognizance before a justice of the peace. If any further provisions are needed in the order to accomplish this, counsel may insert them by agreement or may arrange to speak to me this week.

[17] If the Appellant does not surrender himself into custody prior to the October sittings as required by the recognizance, a warrant will issue for his arrest. I also order that the appeal proceed at the October sittings, subject to any further order of the Court or a Judge thereof.

V.A. Schuler
J.A.

Heard at Yellowknife, Northwest Territories
the 13th day of August, 2001.

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent (Crown): Debra Robinson