Date: 2006 07 25
Docket: A-1-AP-2005000041

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

BETWEEN:

RAYMOND MARLOWE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] On September 1, 2005, the appellant was convicted, by a jury, of the offence of rape (as it used to be called) committed in 1975 in the community of Lutsel K'e (or Snowdrift as it was called at the time). On November 15, 2005, he was sentenced to a period of imprisonment of three years. He has appealed both the conviction and sentence. He now applies for bail pending appeal.

[2] Section 679 of the *Criminal Code* sets out the conditions under which a judge of the Court of Appeal may release an appellant from custody pending the determination of an appeal from conviction. The appellant must establish that:

(a) the appeal is not frivolous;

(b) he will surrender himself into custody in accordance with the terms of any release order; and,

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

[3] In this case, the Crown does not contest the second of these criteria. It does, however, contend that the grounds of appeal are without merit and that detention is necessary in the public interest.

Grounds of Appeal:

[4] The appellant advances seven grounds of appeal against conviction. Some will require a review of the trial judge's discretionary decision-making, such as the refusal to order a change of venue. Others will require an examination and assessment of the evidence by the panel hearing the appeal to decide whether, on the totality of the evidence, a properly instructed jury, acting reasonably, could have convicted. Obviously such an intensive evaluation of the trial record cannot be done on a bail application.

[5] The first criterion for bail, however, does not require the appellant to show that each ground of appeal is not frivolous. It is enough if there is one ground of appeal that is at least arguable. This is a low threshold. It is not necessary to show a strong likelihood of success.

[6] The principal ground of appeal advanced by the appellant relates to a ruling made, not by the trial judge who presided when the conviction was entered, but by the judge who presided at an earlier trial which ended with a hung jury. To properly understand the issue, it is necessary to set out the history of these proceedings.

[7] The accused was charged, along with four others, on September 6, 2002. The offence charged occurred in 1975. There were delays in holding the preliminary inquiry but eventually the accused, and his co-accused, were put on trial before Richard J. of this court and a jury on September 20, 2004. Prior to that trial, the accused had brought a motion before Richard J. seeking to quash his committal on the ground that the court lacked jurisdiction to try him since, at the time of the offence, he was 15 years old and therefore subject to the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. Alternatively, he sought a declaration that the proceedings against him were contrary to his right to equality before the law as protected by the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms*.

[8] Richard J. dismissed the application citing the fact that in 1975 the *Juvenile Delinquents Act* had not been proclaimed in force in Snowdrift and had not yet been proclaimed in force throughout all of the Northwest Territories. Therefore, in 1975, the appellant's status for criminal law purposes would have been as an adult and the exclusive jurisdiction of the juvenile court had no application. He also held that equality rights challenges cannot be based on provincial or territorialdifferences in the

application of federal law. His reasons for judgment can be found at [2004] N.W.T.J. No. 47 (QL).

[9] This ruling was not appealed. It is highly debatable that it could have been appealed outside of an appeal of the trial proceedings before Richard J. But that trial ended in a mistrial when the jury could not reach a verdict.

[10] The second trial proceeded before Schuler J. and a jury and it is that jury's verdict that the appellant wishes to set aside. However, he also seeks to challenge the ruling made by Richard J. on the jurisdictional issue. That issue was never raised before Schuler J. at the second trial. This then raises a procedural issue as well as a substantive one.

[11] On the substantive issue, appellant's counsel submitted that the reasons of Richard J. failed to address a secondary argument premised on the provisions of the *Young Offenders Act*, R.S.C. 1985, c. Y-1. That Act was still in force at the time that the charge was laid against the appellant. That Act provided for the exclusive jurisdiction of the youth court in respectof any offencealleged to have been committed by a person when he was a "young person": s.5(1). By that Act, a "young person" was anyone under 18. It also contained a transitional provision which provided,in s. 79(4), as follows:

> (4) Any person who, before the coming into force of this Act, while he was a young person committed an offence in respect of which no proceedings were commenced before the coming into force of this Act may be dealt with under this Act as if the offence occurred after the coming into force of this Act.

[12] Case law interpreted this section as meaning that the person's status was to be determined as if the offence occurred "immediately after the coming into force of this Act": *R.* v. *McDonald* (1985), 51 O.R. (2d) 745 (C.A.); and see *R.* v. *E.K.*, [2000] N.W.T.J. No. 1 (S.C.). As of April 2, 1984, being "immediately after the coming into force of this Act", the appellant would, arguably, have been considereda young person if that interpretation means that he must be viewed as if he were 15 years old (the age when the offence was committed).

[13] The Crown points out that the principle that appliesis that the proper jurisdiction of the court is to be determined by the appellant's status at the time of the commission of the offence. If he was an "adult" according to the law at the time of the offence, then there is no jurisdiction issue.

[14] I do not know how strenuously this argument was put to Richard J. since I do not have the submissions that were placed before him. But, in any event, it is not for me to resolve this issue. It is enough to say that it is at least arguable.

[15] The procedural issue arises because of the application of the rule against collateral attack. That rule holds that a court order, made by a court having jurisdiction to make it, may not be attacked in proceedings other than those whose specificobject is the reversal, variation or nullification of the order or judgment: *R.* v. *Litchfield*, [1993] 4 S.C.R. 333. The ruling respecting jurisdiction was not made by the judge who presided at the trial that is the subject of this appeal. The trial was not a proceeding in which the specific object was the reversal, variation or nullification of the ruling. Therefore, the Crown submits that the Court of Appeal has no jurisdiction to review or reverse it.

[16] Appellant's counsel argued, however, that it is a matter that can properly be reviewed since it goes directly to the jurisdiction of the court to try the appellant. If there was no jurisdiction then the trial before Schuler J. was a nullity and it would be unfair to allow the verdict to stand.

[17] Again, whatever I may think of these arguments is irrelevant,but there is at least an arguable issue. Therefore the appeal is not frivolous. These matters should be decided by the panel hearing the appeal.

Public Interest:

[18] The public interest criterion requires consideration of (1) the protection and safety of the public, and (2) the maintenance of the public's confidence in the administration of justice. Crown counsel quite properly pointed out that the court, in considering these points, has to consider the competing dictates of the enforceablility and reviewability of judgments. This includes a consideration of the merits of the appeal, which the Crown said are marginal at best, as well as the appellant's statutory right of appeal and the availability of release pending appeal. Taking into account all of the circumstances, I am satisfied that detention is not necessary in the public interest.

[19] The appellant is 46 years old. He has the support of his common-law spouse and many members of his community. He has been a life-long resident of Lutsel K'e, a small aboriginal community on the east arm of Great Slave Lake. While he has a

criminal record most of it is dated. More significantly, he was on pre-trial releasefrom when he was charged in September, 2002, until he was sentenced in November, 2005. There is no evidence that he did not comply with the conditions of that release.

[20] The public's perception of the administration of justice should be based on the views likely to be held by the objective, reasonable person, fully informed of the facts and applicable principles of law. Having regard to the fact that the offence for which the appellant was convicted occurred over 35 years ago, and the low risk to the public posed by the appellant, as well as the fact that the victim of this offencelives outsideof the jurisdiction, thereby, minimizing the risk of contact, I do not think the fair-minded person's confidence in the justice system would be underminedshould the appellantbe released pending the hearing of his appeal.

[21] I therefore direct that the appellant be released from custody pending the determination of his appeal upon his entering into a recognizance of bail in the amount of $1,000.00 with cash deposit. There will be one surety, his spouse Arlene Chauvin. 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 for the hearing of his appeal, I direct that the following additional conditions be included in his recognizance:

(a) he shall reside in the community of Lutsel K'e, in the Northwest Territories, at the residence occupied by him and Ms. Chauvin;

(b) he is not to leave the community of Lutsel K'e except in accordance with the terms of this order;

(c) he shall report in person to the Royal Canadian Mounted Police in Lutsel K'e every Monday and Friday between the hours of 9 a.m. and 4 p.m.;

(d) he shall have no contact, direct or indirect, with the victim (whose name is to be inserted into the order) nor any member of her family;

(e) he is not to consume or possess any alcoholic or intoxicating substances;

(f) he is not allowed to enter the premises of any bar, tavern, pub, lounge or liquor store licensed to sell alcoholunder the *Liquor Act*, or any private residence where liquor is being consumed;

(g) he is required to submit such samples of his breath as suitable for analysis upon a police officer making a demand for the same if the said police officer has reasonable and probable grounds to believe that he has been consuming alcoholic substances;

(h) he is to surrender forthwith to the RCMP in Lutsel K'e all firearms and ammunition in his possession or control, or in his residence,to be held by them pending the determination of the appeal;

(i) he shall surrender himself into custodyat the RCMP detachmentin Yellowknife no less than 48 hours prior to the scheduled time for the hearing of his appeal, and he is to be held in custody until the appeal has been heard and the direction of the Court of Appeal received. If the appellant does not surrender himself into custody as required, a warrant for his arrest will issue forthwith.

[22] I direct counsel to prepare the necessary documentation in consultation with the Clerk of the Court. The recognizance may be signed before any Justice of the Peace.

J.Z. Vertes
J.S.C.

Dated this 25th day of July 2006.

Counsel for the Appellant: Hugh R. Latimer

Counsel for the Respondent: Shelley Tkatch

A-1-AP-2005000041

IN THE COURT OF APPEAL OF THE
NORTHWEST TERRITORIES

BETWEEN:

RAYMOND MARLOWE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES