A. v. R., 2015 NWTCA 9

A-1-AP2014000012

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

N.A.

Appellant

- vs. -

HER MAJESTY THE QUEEN

Respondent

Transcript of the Decision on an Application for bail pending appeal by The Honourable Justice L. A. Charbonneau, at Yellowknife in the Northwest Territories, on May 15th A.D., 2015.

APPEARANCES:

Mr. C. Davison: Counsel for the Appellant/Applicant

Ms. K. Lakusta: Counsel for the Respondent

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s. 486.4 of the Criminal Code of Canada

An Order of the Court has been made prohibiting publication, broadcast, or transmission of information contained herein

THE COURT: This is an application for bail pending appeal by the Appellant Mr. A.

The Appellant was convicted by a jury on September 17, 2014 on a two-count Indictment charging him with indecent assault and sexual assault on his son in a timeframe between September 1980 and December 1985. He was sentenced to a term of five and a half years imprisonment for these offences. He has filed a Notice of Appeal of his conviction and sentence on November 14th, 2014.

The Notice of Appeal from conviction alleges two grounds. The first is that the trial Judge erred in not granting a mistrial application following certain comments made by Crown counsel in her closing address. The second is that the trial Judge erred in supplementing her initial jury charge by giving the jury additional instructions on the topic of corroboration.

At the hearing of the application earlier this week, the Appellant's counsel focused his submissions on the error alleged in relation to the comments of Crown counsel in her closing address. He did not focus primarily on the dismissal of the mistrial application

but rather on the sufficiency of the instruction that the trial Judge gave to correct the problem arising from the Crown's closing address. The Appellant's counsel argues that this instruction was not sufficient to fully address the problems and prejudice flowing from the remarks made by Crown counsel.

I should note at the outset that both defence counsel appearing on this application and Crown counsel appearing on this application are counsel who are different than the ones who actually were counsel at trial.

The first thing that I will do is talk about the general principles that govern bail pending appeal applications. Applications for bail pending appeal are governed by Section 679 of the Criminal Code. There is no dispute about the legal principles that apply in these kinds of requests. An Appellant may be granted bail pending appeal if that Appellant establishes three things: First, that the appeal is not frivolous. Second, that the Appellant will surrender himself or herself as required if released. And third, that the Appellant's detention is not required in the public interest.

Here, the Crown concedes that there are no real concerns about the Appellant's surrendering himself into custody if he is released.

On the issue of whether the appeal is frivolous, from the oral submissions I heard on Monday I do not understand the Crown to be forcefully arguing that the appeal is frivolous. The Crown argues that the grounds of appeal are very weak but acknowledges that the threshold to demonstrate that an appeal is not frivolous is quite low. In my view, the Appellant has established that the appeal is not frivolous, and I will just say a few words about why.

This was a jury trial. In her closing address to the jury, the prosecutor made submissions which essentially invited the jury to consider why the complainant would have gone through the process of giving statements to the police, testifying at the preliminary hearing and testifying at the trial if the complaint was not true. This amounted to a suggestion that the fact that the complainant pursued the complaint bolstered or gave more strength to his credibility. As was recognized immediately by the trial Judge,

that was not a proper submission for the prosecutor to make to the jury.

As noted by the Ontario Court of Appeal in R. v. A. (G. R.), 1994 CarswellOnt 120 (C.A.) at paragraph 4, the fact that a complainant pursued the complaint cannot be used to bolster the credibility of that complainant as a witness.

In dismissing the mistrial application, the trial Judge concluded that a specific instruction about what the prosecutor had said could cure the error. Whether that was the correct approach and whether the instruction that she gave was sufficient is not an issue that I can or should address in depth at a bail pending appeal application stage. But in circumstances where counsel has said something erroneous and prejudicial to a jury, it would be difficult to argue that an appeal based on that error is not at least arguable and that is the threshold. Therefore the outcome of this application boils down to the analysis of the third factor, which is whether the public interest requires the continued detention of the Appellant. The meaning of "public interest" has been discussed in the case law.

In R. v. Farinacci (1993) 25 C.R. (4th)

350 (Ont.C.A.), the Supreme Court of Canada was examining the constitutional validity of public interest as one of the factors to be considered in deciding whether bail pending appeal should be granted. In its analysis, the Court explained what the notion of public interest means and how it should be approached. Those principles have been applied in many cases since then and have not substantially been altered.

The concerns relevant to public interest are public safety first and, second, maintaining the public's confidence in the administration of justice.

Maintaining that confidence requires balancing two important principles - the enforceability of judgment and the reviewability of judgments. As the Supreme Court said in Farinacci:

> The "public interest" criterion in Section 679(3)(c) of the Code requires a judicial assessment of the need to review the conviction leading to imprisonment, in which case execution of the sentence may have to be temporarily suspended, and the need to respect the general rule of immediate enforceability of judgments.

R. v. Farinacci, supra, paragraph 41.

The factors that are relevant in balancing

these competing needs include the seriousness of the offence that the Appellant was convicted for, the background of the Appellant including the existence of a criminal record, any potential delay in the hearing of the appeal (and this is especially relevant if the sentence will have been served completely by the time that the appeal can be heard) and the relative strength of the ground of appeal. Those factors were identified in the case of R. v. Ussa, 2009 MBCA 71, referred to by the Crown, and I agree with them.

Another question, of course, when considering the issue of maintaining the public's confidence in the administration of justice is to identify which public should be considered. As this Court and others have said on a number of occasions, public perception of the administration of justice should be assessed by considering how an objective reasonable person, fully informed about the facts and the applicable principles of law, will likely view the situation. Examples of this approach being taken in this jurisdiction can be found in the cases of R. v. Larsen, 2011 NWTCA 5 at paragraph 27, and R. v. Marlowe, 2006 NWTCA 5 at paragraph

26.

Coincidentally, just this morning the Supreme Court of Canada released an important decision, R. v. St-Cloud 2015 SCC 27, which did not deal with bail pending appeal but deals with the interpretation of the tertiary ground of detention provided for in Section 515 of the Criminal Code.

Maintaining confidence in the administration of justice is at the heart of that ground for detention so I think the comments that were made in that case are relevant also to the notion of public interest in the context of bail pending appeal because maintaining the confidence of the public in the administration of justice is clearly a component of the public interest branch of the test. The Supreme Court did discuss the meaning of what "public" are we talking about when we speak of this.

At paragraph 72 to 86 of St-Cloud, the Supreme Court reiterated the importance for courts not to base decisions on particularly emotional or excitable members of the public, while at the same time not rendering the term "public" meaningless by imagining those members of the public being people that are as

well versed in the law as lawyers, judges, or professors of law might be. The Court summed up its view at paragraph 80 of the decision, which I will just quote:

> [The person] is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of a case is inaccurate or who disagrees with our society's fundamental values. But he or she is not a legal expert familiar with all the basic principles of the criminal justice system, the elements of criminal offences or the subtleties of criminal intent and of the defences that are available to accused persons.

I do not think this recent discussion alters fundamentally the analysis for the purposes of this case, but it certainly provides additional clarity on what kind of public we should be thinking about when we discuss issues like maintaining the confidence of the public in the justice system. Those are the principles that apply to an application like this one, and I will now turn to the application of those principles in the specific circumstances of this case.

The first factor I have considered is the seriousness of the circumstances of the offences.

The offences that the Appellant was

convicted for were a series of very serious sexual assaults on his son dating back to the years 1982 to 1985. The son's evidence at trial was that the abuse started happening when he was around three or four years old and continued to happen many times over the course of years. He said that the Appellant would give him something to drink, which he now believes was home-brew, which would make him feel dizzy and fall asleep. He would wake up to being sexually assaulted by his father. These acts involved repeated acts of anal intercourse.

It was undisputed at the sentencing hearing that these were very serious sexual assaults and that there were many aggravating factors, such as the young age of the victim, the repeated nature of the acts, the fact that the Appellant gave his victim home-brew, thereby making him even more vulnerable.

The trial Judge, as I have already said, imposed a global sentence of five and a half years (five and a half years on each count to be served concurrently).

The Appellant had been on process between the time he was charged and the time of his conviction.

The second factor that I have examined is the anticipated delay in this appeal being argued. This is not a particularly complex matter and there is no reason to expect a long delay in the appeal being heard. It could likely have been set for the June sittings of this Court but the Appellant's counsel was not available on the date those sittings will take place. In all likelihood, this appeal will proceed at the October sitting of the Court. This is not an inordinate delay, especially considering that the appeal books were filed in April 2015.

The next factor is the Appellant's criminal record.

The Appellant has a criminal record. While the charge under appeal is the most recent entry on the criminal record, it is chronologically the first when considering offence dates. The convictions on the Appellant's record, apart from the one under appeal, are as follows:

On May 13, 1985, he was convicted of two counts of sexual assault and received a jail term of 12 months imprisonment on each to be served concurrently.

On October 19th, 1990, he was convicted of

failing to comply with a recognizance and received a fine.

On April 15th, 1994, he was convicted of sexual assault and sentenced to five and a half years imprisonment. He was also convicted of an assault on that same date and received a jail term of one month concurrent.

On March 13th, 2002, he was convicted again of sexual assault, and his sentence was time served. The record does not indicate how much time he spent on remand before receiving this sentence of time served so it is difficult to gauge the level of seriousness of that particular assault.

In its written materials on this application, the Crown has provided some particulars, though, about those convictions, and the Appellant has not taken issue with those particulars.

The 1985 convictions involved acts of forced intercourse against his 14-year-old stepsister. The 1995 conviction pertained to a series of forced intercourse involving threats and intimidation against his 13-year-old stepdaughter. And the 2001 conviction related to the sexual assault of his 17-year-old stepdaughter while she was

sleeping.

The next factor I have considered is the Appellant's pending charge - one that has not yet gone to trial.

The Appellant faces another charge of sexual assault. He was released on process on that matter as well. Unlike the matter under appeal and the entries on the criminal record, the allegations that resulted in that charge are not historical; in other words, they do not date back to the '80s or '90s.

The charge that the Appellant is awaiting trial on relates to a series of events alleged to have occurred in November 2012 while the Appellant was awaiting trial on the matter presently on appeal. The complainant is the Appellant's 16-year-old step-granddaughter. The allegations are that he wanted to have sex with her, she refused, and that he punched her a number of times causing her to fall and then had forced intercourse with her.

The trial for that matter had been scheduled to proceed in February of 2015 but was adjourned when the defence counsel on that matter discovered that he had a conflict of interest and could no longer represent the Appellant. New counsel has been assigned and

a new trial date is expected to be set once counsel provide their dates of availability.

The next factor to consider is the release plan itself.

The Appellant has filed an affidavit in support of his release application. He proposes to be released on a recognizance with conditions. He has proposed some conditions but indicated that he would be prepared to comply with any conditions the Court chooses to impose. He is prepared to deposit $500 in cash which, I accept, in his situation represents a serious financial commitment. No sureties are being offered.

While the Appellant deposes that he is prepared to abide by any terms that the Court might impose, including a curfew, he is not at this stage able to identify a specific address where he would reside. Matters are rendered complicated for him in that respect because he has lost his housing in his home community in Ulukhaktok after he was taken into custody. There is a shortage of houses there, and the process for him to obtain new housing cannot be undertaken while he is in custody; or unless, as I understand it, he knows he would be released if he had an address to provide.

And this is why his counsel has approached this matter by making the application now; and if he is successful in convincing the Court at least in principle, that the Appellant should be released, then he could move forward with specific steps to identify a place for the Appellant to live. As of now, it is unclear whether the Appellant would go back to live in Ulukhaktok or would instead live somewhere in Yellowknife.

The next factors that I have considered have to do with the Appellant's age and his medical issues.

The Appellant is now 68 years old. His affidavit talks about various medical problems that he has had and still has.

He had heart surgery in 2001 and has a pacemaker. He deposes that his heart continues to get weaker and that because of this he had not worked for several years prior to his incarceration. He also deposes that he suffered a head injury about two years ago, that this is affecting his memory and balance and that it has become worse since his incarceration. The fact that he suffers from vertigo was referred to at his sentencing hearing so it is not a new problem but in the

affidavit, as I have just said, he deposes that this has become worse in the recent past.

There are various medical reports and documents that are attached to his affidavit. Without those documents being interpreted and explained by a medical expert, it is a little difficult to know exactly what to make of them. It does seem clear, and I accept, that problems, such as lesions on the Appellant's brain, have been identified and there is no reason to not accept the Appellant's evidence in the affidavit about some of how the problems manifest themselves. But at this stage there does not appear to be a clear diagnosis or prognosis on his condition.

All of these circumstances and factors that I have just been talking about must be taken into account in deciding whether the Appellant's detention is required or not required in the public interest.

Going back to the various factors that were mentioned in the Ussa case which I referred to, and find quite helpful, this is not a case where the delay in the appeal being heard can be characterized as unreasonable or inordinate. It is certainly not a case where the appeal will be rendered somewhat moot by

reason of the sentence having been completely served by the time the appeal is heard - far from it.

The seriousness of the crime for which the Appellant has been convicted is beyond dispute.

The criminal record of the Appellant also raises significant concerns. While the convictions are dated, they demonstrate a disturbing pattern of serious sexual abuse of young family members, at times involving extraneous violence, threats, and intimidation.

The pending charge is also of concern from the point of view of public safety. Of course on that matter, unlike the matter under appeal and the matters reflected in the criminal record, the Appellant still benefits from the presumption of innocence. But pending charges, especially when the allegations are serious, are a factor that Courts take into account when dealing with pre-trial bail. It would make no sense for them not to have some bearing or relevance in dealing with an application for bail pending appeal. In this regard, I agree with the conclusion reached by the Ontario Court of Appeal in

R. v. Louangrath, 2014 ONCA 880 referred to by the Crown.

The factors that relate to the timing within which the appeal will be heard, the circumstances of the offence which form the subject matter of the appeal, the criminal record of the Appellant, and the fact that he faces another charge, are all factors that tend to favor enforceability over reviewability.

The merit of the appeal is another factor to consider. A ground of appeal that is very very strong will favor reviewability over enforceability and, conversely, reviewability is not as strongly favored or engaged if a ground of appeal appears very weak.

Judges sitting on bail pending appeal applications must be very careful in approaching this factor. Full arguments have not been presented in support of the Crown and defence's respective positions. But in assessing the public interest, the fact remains, as counsel have recognized, that the merit of the appeal is a factor that the Court must consider.

The issue on this appeal, it appears, will primarily be the sufficiency of the

instruction that was given by the trial Judge. The trial Judge did refer to the prosecutor's impugned submissions specifically in her charge and she did tell the jury that they should entirely disregard those impugned submissions. That was a strong instruction and whether it was strong enough to encompass the full breadth of the potential prejudicial impact of the Crown's comments will be for a full panel of the Court to decide. I will simply say that at first blush this does not strike me as the most compelling of cases for the Appellant. And although admittedly not determinative, I note as well that the trial Judge herself raised the issue after the closing addresses of counsel, invited submissions on how the error could be cured, and before charging the jury discussed what she proposed to tell the jury. I also note that trial counsel did not raise any issue about the sufficiency of the instruction after it was given.

To be fair, the defence was very clear in its trial position, even after the charge, that no instruction could cure this error. This was said in the context of the mistrial application, and it was reiterated when the

trial Judge invited comments about the charge. But if, as counsel now representing the Appellant argued on this application, the core issue to be advanced on appeal is the sufficiency of what the trial Judge said, the fact that counsel did not ask for any additional instructions at the time may be a factor. I agree with defence counsel that it would not be the determinative factor but it could somewhat weaken the Appellant's argument on appeal.

To the extent of the trial Judge's refusal to grant a mistrial may also be challenged in this appeal, it is also an issue on which the Appellant is likely to face somewhat of an uphill battle given the highly deferential standard of review that applies to the exercise of the trial Judge's discretion in that area as was noted in Lamirande 2002 MBCA 41 Chiasson 2009 ONCA 789 cases, referred to by the Crown.

There are circumstances, and I have given this careful thought, where evidence about an Appellant's medical condition might weigh significantly in favour of release. There may be situations where both public safety concerns and concerns about maintaining

confidence in the administration of justice would be alleviated in the face of evidence about an Appellant's health issue (even when dealing with an application for bail pending appeal) where the underlying offence was serious.

Here, the evidence about the Appellant's health issues is not particularly clear. There is no evidence that he is not getting the medical treatment that he needs while in custody or that being out of custody would give him access to more treatment, better treatment, or a more effective treatment.

I find it useful to go back once again to the Farinacci case and, in particular, to some of the hypotheticals referred to by the Supreme Court of Canada in that case when discussing the competing notions of reviewability and enforceability. For example, at paragraph 42 the Court said:

> Public confidence in the administration of justice requires that judgments be enforced. The public interest may require that a person convicted of a very serious offence, particularly a repeat offender who is advancing grounds of appeal that are arguable but weak, be denied bail. In such a case, the grounds favoring enforceability need not yield to the grounds favoring reviewability.

In my view, that hypothetical has many features in common with this case. Although, as I have said I am not characterizing the merit of the appeal as weak, I simply think it is not very very strong.

The Court then contrasted this hypothetical with another hypothetical, which is at the other end of the spectrum, and said

> Public confidence would be shaken if a youthful first-offender, sentenced to a few months imprisonment for a property offence, was compelled to serve his entire sentence before having an opportunity to challenge the conviction on appeal.

Now that hypothetical has nothing in common with the present case.

The Court also underscored the significance of the delay in the appeal being heard in balancing the reviewability against the enforceability. The Court said:

> Entitlement to bail is the strongest when denial of bail would render the appeal nugatory for all practical purposes.

As mentioned already, in this case that is not the situation.

On the whole, I find there are several factors in this case that strongly weigh in favor of enforceability of the decision under

appeal. And that the factors that would favor reviewability, or suspending the effect of that decision while it is being reviewed, are not sufficient to outweigh those factors that favor enforceability.

I do conclude that the release of the Appellant pending appeal would raise both public safety concerns and concerns about the public's confidence in the administration of justice. I am of the view that a fair-minded, reasonable, well-informed, thoughtful member of the public would lose confidence in the administration of justice if the Appellant (who has a significant criminal record for sexual violence, who has been convicted by a jury for very serious sexual assaults against a very young child, albeit many years ago, and who is awaiting trial on allegations of having more recently committed a further serious sexual assault) were to be released pending the hearing of his appeal. For those reasons, the application for bail pending appeal is dismissed.

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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Lois Hewitt,
Court Reporter