

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

IN THE MATTER OF:

RICHARD STANLEY ROBERTS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Transcript of the Decision on Judicial Interim Release  
Pending Appeal by The Honourable Justice K. Shaner,  
sitting in Yellowknife, in the Northwest Territories,  
on the 19th day of June, 2017.

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APPEARANCES:

Mr. B. MacPherson: Counsel for the Crown  
Mr. P. Falvo: Agent for the Mr. K. Teskey,  
counsel for the Defence

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

1 THE COURT: Good afternoon,  
2 Mr. MacPherson. Mr. Falvo, you are appearing  
3 as agent for Mr. Teskey today?  
4 MR. FALVO: Yes, that's correct, Your  
5 Honour. I'm here as his agent.  
6 THE COURT: All right, thank you.  
7 Good afternoon, Mr. Roberts.  
8 THE ACCUSED: (NON-VERBAL RESPONSE).  
9 THE COURT: I did have an opportunity  
10 to review the submissions, the supplemental  
11 submissions that both counsel for the Crown  
12 and defence submitted with respect to the reasons  
13 for the denial of the mistrial application, and  
14 of course I did have an opportunity to review  
15 Justice Smallwood's reasons. So having heard  
16 the oral submissions and having read all of  
17 the written submissions and additional materials,  
18 I am now in a position to render a decision,  
19 and reasons therefore, in this application for  
20 judicial interim release pending appeal, which  
21 is brought pursuant to Section 679 of the  
22 Criminal Code.  
23 The appellant, Richard Stanley Roberts,  
24 was convicted of sexual assault and two counts  
25 of uttering threats on June 20th, 2016, following  
26 a judge alone trial in the Supreme Court. He  
27 received a sentence of 42 months in jail, and

1 the sentencing took place on January 25th, 2017.  
2 The Notice of Appeal was filed on March 3rd,  
3 2017, and the appeal has not yet been set down.  
4 However, Mr. Roberts did depose in his affidavit  
5 that his lawyer will be available to argue the  
6 appeal at this Court's sittings in October of  
7 2017.

8 Subsection 679(3) of the Criminal Code sets  
9 out three statutory criteria that an appellant  
10 must satisfy to obtain judicial interim release  
11 pending appeal, and these are as follows: First,  
12 that the appeal is not frivolous; second, that  
13 the appellant will surrender him or herself  
14 into custody in accordance with the terms of  
15 the order; and third, that the appellant's  
16 detention is not necessary in the public  
17 interest.

18 Both counsel at the hearing of this matter  
19 indicated that there is no concern about whether  
20 Mr. Roberts would surrender himself into custody.  
21 So the analysis in this decision focuses on the  
22 first and the third criteria.

23 Turning to the first, two grounds of appeal  
24 are advanced. First, Mr. Roberts argues the  
25 trial judge relied on stereotypes and myths  
26 about how a victim should or will conduct  
27 themselves following a sexual assault or

1 in the course of a sexual assault when she  
2 considered the matter and ultimately rendered  
3 a conviction. This flows from her findings  
4 that it was implausible that the victim would  
5 have initiated all of the sexual activity.

6 The second ground is that the trial judge  
7 erred in denying Mr. Roberts' application to  
8 re-open his case to allow the defence to call  
9 another witness or, alternatively, to declare  
10 a mistrial following the conviction but before  
11 the sentencing.

12 In this case there was no question  
13 that Mr. Roberts and the victim had sexual  
14 intercourse. The case turned on consent,  
15 and thus it turned on witness credibility.  
16 The victim's evidence was that she did not  
17 consent. Mr. Roberts' evidence was that  
18 she did consent and, among other things,  
19 he testified that it was the victim who  
20 initiated the sexual contact.

21 Justice Smallwood rejected Mr. Roberts'  
22 evidence on this point, stating the following,  
23 which is found at pages 12 and 13 of her  
24 decision:

25  
26 On the accused's evidence every  
27 aspect of the sexual contact

1           between the accused and [L.C.]  
2           is instigated by [L.C.] While  
3           that is not impossible, it certainly  
4           seems improbable. [L.C.] goes from  
5           upset, mad and crying, to happy  
6           and giggling in a short period of  
7           time, and then initiates multiple  
8           sexual encounters with the accused,  
9           whom she barely knows. It seems  
10          implausible.

11  
12           I will just note at this point that I have  
13          substituted the victim's initials for her name  
14          in that quote because of the publication ban.

15           Justice Smallwood's conclusion followed an  
16          analysis of the evidence of several witnesses,  
17          including Mr. Roberts, the victim, the victim's  
18          partner and a family friend.

19           The circumstances of the second ground of  
20          appeal can be summarized as follows: Just under  
21          two months following the conviction, but before  
22          sentencing, defence counsel obtained a statement  
23          from a neighbour which, in defence counsel's  
24          opinion (and I am referring to defence counsel  
25          at the trial) suggested the victim's relationship  
26          with Mr. Roberts was much closer than how she  
27          had characterized it in her testimony. Thus,

1 in the appellant's counsel's view it cast her  
2 credibility into question.

3 It should be noted that the defence counsel  
4 knew of this witness before the trial, but did  
5 not take a statement from her. He was concerned  
6 about putting her under subpoena and having her  
7 attend and give evidence because he was unsure  
8 of what her testimony would be and whether it  
9 would be helpful. Thus, she was not summonsed  
10 to give evidence. Justice Smallwood denied the  
11 application, indicating, among other things,  
12 that it did not satisfy the criteria set out  
13 in *R. v. Kowall*, 1996 CanLII 411 (ONCA) and  
14 *Palmer v. The Queen* [1980] 1 SCR 759.

15 The Supreme Court of Canada has confirmed  
16 recently in the case of *R. v. Oland*, 2017 SCC  
17 17, that the "not frivolous" test is a very low  
18 bar. It is a threshold requirement which does  
19 not involve an in-depth analysis of the merits  
20 of the appeal. Parenthetically, however, a more  
21 pointed assessment of the strength of the appeal  
22 is required in analyzing the public interest  
23 aspect of the application when the Court gets  
24 to that phase. (*Oland*, paras 40-46).

25 I will address the merits of the appeal  
26 as *Oland* directs when we get to that stage.

27 Among other things, the Supreme Court of

1 Canada in Oland cited R. v. Xanthoudakis, 2016  
2 QCCA 1809. There, at paragraph 5 Justice Bich  
3 summarized descriptions of frivolous from leading  
4 cases on the issue as follows:

5  
6 More recently in R. v. Gill,  
7 Dickson J.A. wrote that "the term  
8 'frivolous' has been described as  
9 'trifling with the Court or wasting  
10 its time, or if the appeal is not  
11 capable of reasoned argument.'  
12 R. v. Dhanda, 2003 BCCA 550 at  
13 para 19; "doomed to failure" or  
14 (devoid of merit); R. v. Stewart,  
15 2001 BCCA 749 at para 5; or having  
16 'no possibility of success.'"  
17 R. v. Hanna [1991] BCJ No 2551  
18 (CA).

19  
20 Having regard to these various descriptions  
21 of frivolous, and bearing in mind the role that  
22 the grounds of appeal play at this stage of the  
23 analysis, I conclude that the grounds of appeal  
24 which Mr. Roberts' appellate counsel intends to  
25 advance are not, on their face, "frivolous" in  
26 the sense that they are devoid of merit or doomed  
27 to fail, and thus, they meet the not frivolous

1 threshold found in Section 679(3) of the Criminal  
2 Code.

3 I will now turn to the bigger question,  
4 which is whether releasing Mr. Roberts would  
5 be contrary to the public interest. As set  
6 out in *Farinacci v. The Queen*, 1993 CarswellOnt  
7 132 (CA) and reiterated in *Oland*, there are two  
8 aspects to the public interest. The first is  
9 public safety, the second is public confidence  
10 in the administration of justice.

11 Concerns about public safety can often  
12 be addressed through a well-structured release  
13 plan supported by appropriate conditions. The  
14 conditions that Mr. Roberts proposes are that  
15 he would reside with his parents and his three  
16 children in his parents' home, which I heard  
17 at the hearing, through the evidence of Kerry  
18 Roberts, is alcohol free. Mr. Roberts would  
19 abide by a curfew. Kerry Roberts, who is his  
20 mother, is prepared to act as a surety with  
21 a cash deposit of \$10,000. Mr. Roberts would  
22 work for his father's company and be supervised  
23 at work by his father or by the company manager.

24 As I said, Kerry Roberts testified at  
25 the hearing. It was evident to me that she  
26 understands what would be expected of her as a  
27 surety, and in particular, she knows she would



1           have to call the police if Mr. Roberts was in  
2           breach of the release conditions. She would be  
3           supported in her supervision by her husband, and  
4           she would be prepared to stop acting as a surety  
5           if that was necessary.

6           I have no concerns about her suitability  
7           as a surety, but that said, a suitable surety  
8           is not the only requirement. Mr. Roberts  
9           himself has to be prepared to adhere strictly  
10          to the release conditions that are imposed,  
11          otherwise public safety can be compromised.  
12          Unfortunately, I am not confident that  
13          Mr. Roberts will comply with conditions, and  
14          that is based on his conduct while on release  
15          awaiting trial on the matters that are now  
16          the subject of this appeal.

17          Despite similar conditions, that is,  
18          having his father as a surety, a monetary  
19          commitment, albeit \$1,000 dollars and not  
20          \$10,000, and a curfew, Mr. Roberts breached  
21          the general condition that he keep the peace  
22          and be of good behavior on three separate  
23          occasions. Specifically, he was charged  
24          with, and ultimately convicted of, impaired  
25          driving, theft and driving while disqualified.  
26          He also sustained a conviction for breaching  
27          his conditions.

1           I realize that it is not always fair or  
2           just to conclude that when someone has breached  
3           conditions in the past they are destined to  
4           do so in the future. That said, these were  
5           not minor breaches which could be explained  
6           as matters of inadvertence or a failure to  
7           appreciate consequences. They were deliberate  
8           acts which either created risks for, or resulted  
9           in harm to, other members of society. They  
10          occurred on more than one occasion while  
11          Mr. Roberts awaited trial, which is demonstrative  
12          of a disrespectful attitude towards the law and  
13          an unwillingness to comply.

14          I note as well that this was not the  
15          first time Mr. Roberts had been on and failed  
16          to comply with bail conditions. His criminal  
17          record includes a conviction for failing to  
18          comply with conditions sustained in 2010.  
19          Accordingly, I conclude that Mr. Roberts  
20          poses a public safety risk.

21          Sometimes the public safety risk can  
22          be overcome with strong grounds of appeal.  
23          However, I find that granting release would  
24          also undermine public confidence and that the  
25          grounds of appeal are not particularly strong.  
26          I say this for two reasons: First, the facts  
27          found by the trial judge in this case put it

1           squarely in the realm of a serious offence;  
2           and second, as I said, the grounds of appeal,  
3           viewed in light of the record before me, are  
4           weak.

5           As set out in Oland, in analyzing the  
6           public confidence aspect, the Court has to  
7           weigh two competing interests, namely the  
8           interest in the immediate enforceability  
9           of a judgment and society's interest in  
10          ensuring a meaningful review process for  
11          an appellant in an imperfect legal system.

12          Oland also tells us that the factors  
13          identified in Section 515(10)(c) of the  
14          Criminal Code, which inform decisions on  
15          the justification for pre-trial detention  
16          on the public confidence ground, apply, with  
17          modification, to the public confidence analysis  
18          in applications for release pending appeal.

19          The gravity of the offence, the  
20          circumstances of its commission and  
21          the punishment, all of which inform the  
22          seriousness of the offence, are relevant to  
23          the enforceability interest. The remaining  
24          factor, being the strength of the prosecution's  
25          case or, in the case of release pending appeal,  
26          the strength of the grounds of appeal, are  
27          relevant to the reviewability interest.

1           There is no doubt in my mind about the  
2           seriousness. Mr. Roberts was convicted of  
3           sexually assaulting the victim and uttering  
4           threats, and these convictions arose out of  
5           facts which are disturbing. They are that  
6           he forced sexual intercourse upon the victim  
7           and when she tried to push him away he punched  
8           her in the face some five or six times to the  
9           point that she was knocked out. When the victim  
10          regained consciousness Mr. Roberts was still  
11          having intercourse with her. It was a prolonged  
12          and brutal assault and when Mr. Roberts finally  
13          stopped he threatened the victim that if she  
14          told authorities he would burn her house down.  
15          The convictions attracted a sentence of nearly  
16          four years. The seriousness of the crimes weighs  
17          heavily in favour of the enforceability interest.

18                 In Oland, at paragraph 44, the Court  
19                 indicated that the strength of an appeal plays  
20                 a central role in assessing the reviewability  
21                 interest, and accordingly, this is where the  
22                 "more pointed" assessment is warranted.

23                 While I found that the two grounds of appeal  
24                 met the "not frivolous" threshold for the purpose  
25                 of moving on and considering the public interest  
26                 criterion, they do not go much further than that.  
27                 This opinion is, of course, qualified, and it is

1 a preliminary assessment, limited to what is on  
2 the record before me and without the benefit of  
3 a full hearing with argument.

4 Justice Smallwood denied the application  
5 for the mistrial because the requirements in  
6 Palmer and Kowall were not met. She found  
7 that the defence counsel knew of the witness's  
8 existence and he had her name. Defence counsel  
9 made a tactical decision not to call the witness.  
10 Justice Smallwood also explained that what was  
11 before her in the application did not allow  
12 her to assess the proposed evidence against  
13 the Palmer criteria and, although the appellant  
14 submitted in his supplemental brief that she  
15 did not provide sufficient reasons for reaching  
16 that conclusion, it is clear from the context  
17 that she did. She clearly identified the  
18 deficiencies she found and cited judicial  
19 authority on the foundation required for a  
20 proper assessment.

21 Justice Smallwood also concluded that  
22 the proposed evidence would not have affected  
23 the result in any event, noting that the  
24 relationship between the victim and her spouse,  
25 and Mr. Roberts and his partner, was just one  
26 of many factors taken into account in assessing  
27 credibility. This is borne out in the reasons

1           for conviction. Justice Smallwood analyzed the  
2           evidence of each of the witnesses and was aware  
3           of and articulated the frailties and strengths  
4           of the evidence of each, including a number  
5           of inconsistencies in the victim's evidence.  
6           But, as she noted in her reasons for denying  
7           the mistrial application, which is found at  
8           page 15 of her decision, and as is clear from  
9           her reasons for conviction, her conclusions about  
10          what happened between the victim and Mr. Roberts  
11          on the night in question were not based on the  
12          closeness of the relationship between them.

13                 Based on what is before me I conclude that  
14          this ground of appeal is weak. Similarly, I do  
15          not find that the other ground of appeal, i.e.  
16          that Justice Smallwood relied on stereotypes  
17          and myths about how sexual assault victims  
18          should behave, is particularly compelling.  
19          Again, read in context, the conclusion she  
20          reached was not rooted in a stereotype, but  
21          rather, it appears to be a logical and rational  
22          conclusion based on the evidence that was before  
23          her. She cited evidence from the victim, the  
24          victim's husband, and another Crown witness  
25          about how the victim was feeling and her  
26          outward demeanor.

27                 One Crown witness, whose initials are M.S.,

1 observed the victim was crying, upset and mad,  
2 which was apparently precipitated by having had  
3 an argument with her husband and him leaving  
4 the house with the children and M.S. As Crown  
5 Counsel pointed out, Mr. Roberts' version of  
6 what happened, that the victim greeted him at  
7 the door, giggling and happy, and invited him  
8 in and initiated multiple sexual encounters,  
9 is highly inconsistent with that narrative.

10 Although Mr. Roberts' appeal has not been  
11 scheduled he did indicate that his lawyer, as  
12 I said, would be available to argue the appeal  
13 at this Court's next sittings in October, and  
14 accordingly, any concern about delay in bringing  
15 the appeal forward is not at the forefront.

16 In my view, the reviewability interest does  
17 not overcome the enforceability interest, nor the  
18 public safety concerns I have cited, and thus,  
19 in all of the circumstances the application  
20 for release pending appeal is denied.

21 -----

22  
23 Certified to be a true and  
24 accurate transcript, pursuant  
25 to Rules 723 and 724 of the  
26 Supreme Court Rules.

27 \_\_\_\_\_  
Joel Bowker  
Court Reporter