IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

IN THE MATTER OF:

J.C.

(A YOUNG PERSON)

- v -

HER MAJESTY THE QUEEN

Transcript of the Decision on Bail delivered by The Honourable Justice Smallwood sitting in Yellowknife, in the Northwest Territories, on the 20th day of September, 2017

The information contained herein is prohibited from publication pursuant to s. 110 and 111 of the Youth Criminal Justice Act

APPEARANCES:

Mr. B. Green: Counsel for the Crown

Ms. S. Purser: Counsel for the Accused

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*

This transcript has been altered to protect the identity of the witnesses, victim, or young person pursuant to the direction of the presiding Judge

1 MS. PURSER: Good morning, Your Honour.
2 THE COURT: Good morning.
3 MS. PURSER: If we could open the Court of
4 Appeal for the Northwest Territories. For the
5 record, my name is Stacey Purser appearing in the
6 matter of J.C., and I believe there is still a
7 publication ban.
8 THE COURT: Okay.
9 MS. PURSER: Yeah.
10 THE COURT: All right. The appellant,
11 J.C. -- and I will be using initials throughout
12 the course of this decision -- was tried and
13 convicted in the Youth Justice Court of the
14 Northwest Territories on a charge of sexual
15 assault contrary to section 271 of the
16 *Criminal Code*. The trial was held on June 26th
17 and 27th, 2017, in Yellowknife. The matter was
18 adjourned for sentencing with the preparation of
19 a presentence report.
20 On August 25th, 2017, the young offender was
21 sentenced to a period of imprisonment of 210 days
22 open custody and one year of probation. J.C.
23 filed a Notice of Appeal on September 8, 2017,
24 appealing his conviction.
25 J.C. has now filed a Notice of Motion
26 seeking bail pending his appeal. The Crown is
27 opposed to his release.

Pursuant to section 37 of the *Youth Criminal Justice Act*, an appeal of an indictable offence is conducted in accordance with part 21 of the *Criminal Code* with any modifications required in the circumstances. Section 679 of the *Criminal Code* governs release pending appeal for indictable offences.

Section 679 (3) sets out the criteria that a Court must consider. One, that the appeal is not frivolous; two, the offender will surrender himself into custody in accordance with the terms of the order; and three, the offender's detention is not necessary in the public interest. The appellant must establish that each criteria is met on a balance of probabilities. *R. v. Oland,* 2017 SCC 17, at paragraph 19.

The Notice of Appeal lists the following grounds of appeal. One, that a miscarriage of justice has occurred, as the learned trial judge significantly misapprehended the evidence. Two, that the learned trial judge erred by making unreasonable findings of fact that were not supported by the evidence. Three, that the learned trial judge erred in law by underemphasizing vital pieces of evidence and ignoring or not considering vital pieces of evidence. Four, the learned trial judge erred in

1 failing to correctly articulate or apply the test
2 in the *R. v. W.(D.)* to the inquiry before her by
3 treating the conflicting evidence of the
4 complaint and the accused as a credibility
5 contest. Five, the learned trial judge erred by
6 applying a stricter standard of scrutiny in
7 assessing the credibility of the defence evidence
8 as compared to that of the prosecution. And
9 Number Six, such further and other grounds as
10 counsel may advise and this Honourable Court
11 would permit.
12 During submissions, counsel for the
13 appellant only addressed two grounds of appeal.
14 As such, I am only considering those grounds in
15 this application.
16 First, whether the appellant will surrender
17 himself into custody. The Crown concedes that
18 the appellant would likely surrender himself into
19 custody in accordance with the terms of an order
20 if he was to be released. The offender is 15
21 years old and had no prior criminal record before
22 this conviction. He has no outstanding charges,
23 and it is not alleged that he breached any of the
24 bail conditions he was on when he was on release
25 for this offence.
26 The appellant has proposed to enter into a
27 recognizance with a $1,000 no-cash deposit. His

1 mother is also prepared to be a surety.
2 The appellant has proposed that he would
3 abide by the following conditions. One, not
4 communicate directly or indirectly with the
5 victim, J.Z. For greater certainty, attendance
6 at the same school or mere presence within the
7 same area or room shall not be interpreted
8 without more to be a breach of this order. Two,
9 not attend at or within one block of the
10 residence of the victim, J.Z. Three, reside at
11 House 415 in Behchoko. And four, attend Grade 10
12 as directed by your teachers at the Chief Jimmy
13 Regional High School -- which I am assuming that
14 is Chief Jimmy Bruneau Regional High School --
15 for the 2017/2018 school year.
16 On this charge, the appellant was released
17 on a promise to appear and an undertaking to a
18 peace officer on June 16th, 2016. He was
19 required to comply with the condition prohibiting
20 contact with the victim, and I am advised that
21 his mother also required him to comply with a
22 curfew while he was on release, although that was
23 not a formal condition. It is not disputed that
24 there were no issues with the appellant's
25 compliance with conditions pending trial.
26 In the circumstances, I am satisfied that
27 the appellant would surrender himself into

1 custody in accordance with the terms of the
2 order, and there are no concerns about his
3 compliance with release conditions.
4 The remaining two factors are in dispute, so
5 my decision will focus on whether the grounds of
6 appeal are frivolous and whether the appellant's
7 detention is necessary in the public interest.
8 Turning first to whether the grounds of
9 appeal are not frivolous. An appellant judge
10 must examine the grounds of appeal and determine
11 that they are not frivolous. In order to meet
12 the not-frivolous requirement, an applicant must
13 only show that the grounds for appeal would not
14 necessarily fail.
15 It is also important to acknowledge that
16 this is a preliminary stage. I have only the
17 reasons for judgment and the Agreed Statements of
18 Facts submitted at trial. The trial transcript
19 has not been completed, and at this stage, it is
20 not my role to engage in a detailed analysis of
21 the issues. I only have to determine whether the
22 grounds of appeal are frivolous on a balance of
23 probabilities.
24 In this case, the grounds of appeal advanced
25 at the hearing are: One, whether the trial judge
26 failed to correctly articulate or apply the test
27 in *R. v. W.(D.)* [1991] 1 SCR 742; and two,

1 whether the trial judge erred in law by
2 underemphasizing vital pieces of evidence and in
3 ignoring or not considering vital pieces of
4 evidence and by doing so subjecting the evidence
5 of the prosecution and the defence to different
6 standards of scrutiny.
7 The first ground relates to the failure of
8 the trial judge to articulate or engage in a
9 *W.(D.)* analysis when assessing the evidence. It
10 appears and counsel confirmed at the hearing that
11 no defence evidence was led at trial. The
12 accused did not testify. Counsel for the
13 appellant argues that the Agreed Statement of
14 Facts filed at the trial constitutes defence
15 evidence and required the trial judge to engage
16 in an assessment of this evidence pursuant to the
17 principles enunciated in *W.(D.).*
18 The second ground of appeal relates to the
19 trial judge's consideration of the evidence about
20 what occurred at the time of the incident.
21 Briefly, the complainant testified that she was
22 asleep and awoke to the accused having sexual
23 intercourse with her. She testified that he got
24 off of her and ran to the bathroom. Following
25 this, she texted her sister who was in another
26 room at her house. The police in the course of
27 the investigation obtained a production order

1 which demonstrated that two texts were sent from
2 the complainant's phone. The first was to an
3 unrelated individual, and the second nine minutes
4 later was to the complainant's sister. The
5 complainant had no memory of sending the first
6 text and no other explanation for the text that
7 was advanced. The trial judge stated that she
8 could not make any findings about who sent that
9 text or how it was sent but that she was
10 satisfied that the complaint was asleep when it
11 was sent.
12 The second ground of appeal relates to the
13 trial judge's assessment of the evidence and
14 credibility of the witnesses, areas in which the
15 trial judge is shown considerable deference by
16 appellate Courts. Deference means that
17 intervention by an appellate Court will be rare
18 in situations when there are findings of
19 credibility. Deference is also shown where the
20 trial judge's reasons show that she considered
21 the applicable legal principles: Inconsistencies
22 in the evidence of the witnesses, and any
23 potential problems with the witnesses' testimony.
24 Where these issues are considered and addressed
25 in the reasons for judgment, and appellate Court
26 will often be cautious of intervening and
27 substituting its own reasoning.

1 As stated by Justice Shaner in *Roberts and*
2 *The Queen,* 2017 NWTCA 5, at page 5:

3 The Supreme Court of Canada has confirmed recently in the case of
4 R. v. Oland, 2017 SCC 17, that the "not frivolous" test is a very low
5 bar. It is a threshold requirement which does not involve an in-depth
6 analysis of the merits of the appeal. Parenthetically, however, a more
7 pointed assessment of the strength of the appeal is required in analyzing
8 the public interest aspect of the application when the Court gets to
9 that phase.

10 Recognizing that the threshold is not a high
11 one and noting Justice Shaner's comments in
12 *Roberts*, as well as at page 6, regarding the
13 grounds of appeal, I am satisfied on a balance of
14 probabilities that the grounds of appeal that
15 J.C. intends to pursue are not prime facie
16 frivolous. I cannot say they are doomed to fail
17 or have no possibility of success.

18 Turning to whether detention is not
19 necessary in the public interest. The issue of
20 whether it is in the public interest to detain
21 J.C. Public interest in the bail pending appeal
22 context consists of two components: Public
23 safety and public confidence in the
24 administration of justice.

25 Public safety is essentially the
26 secondary ground referred to in section 515(10).
27 An assessment of public safety requires a

1 consideration of the proposed release plan as
2 well as the accused's personal circumstances or
3 the offender's personal circumstances.
4 In terms of the plan that has been
5 proposed, J.C. has proposed entering into a
6 recognizance with a $1,000 no-cash deposit. He
7 is willing to have a surety and his mother is
8 prepared to act as a surety; and he is willing to
9 comply with conditions, including not to
10 communicate with the complainant or not to attend
11 her residence, as well as residing at his home
12 with his mother and attending school.
13 Looking at J.C.'s personal
14 circumstances: He is 15 years old, did not have
15 a prior criminal record before this offence, and
16 it is accepted that he complied with his release
17 conditions while awaiting trial on this matter.
18 In the circumstances, I conclude that the public
19 safety risk is low.
20 Turning to public confidence in the
21 administration of justice. Public confidence in
22 the administration of justice requires weighing
23 two competing interests: Enforceability and
24 reviewability. As stated in *Oland* at
25 paragraph 25:
26 The enforceability interest reflected
the need to respect the general rule
27 of the immediate enforceability of
judgments. Reviewability, on the

1 other hand, reflected society s acknowledgement that our justice
2 system is not infallible and that persons who challenge the legality of
3 their convictions should be entitled to a meaningful review process one
4 which did not require them to serve all or a significant part of a
5 custodial sentence only to find out on appeal that the conviction upon
6 which it was based was unlawful.

7 In considering public confidence, Courts can
8 consider the factors under section 515(10)(c) and
9 adapt those for the post-conviction context.
10 For enforceability, the seriousness of
11 the crime plays an important role. The
12 seriousness of the crime pursuant to
13 section 515(10)(c) can be determined by
14 considering first the gravity of the offence;
15 secondly, the circumstances surrounding the
16 commission of the offence; and third, the
17 potential length of imprisonment.
18 In considering the seriousness of an
19 offence, the offender was convicted of an
20 indictable sexual assault. The facts as found by
21 the trial judge involved the offender having
22 non-consensual sexual intercourse with a sleeping
23 complaint.
24 Sexual assaults occur far too frequently
25 in this jurisdiction, and sexual assaults on
26 sleeping or unconscious victims are all too
27 common. Adults who commit these types of

1 offences are often sentenced to
2 penitentiary-length terms of imprisonment. J.C.,
3 who was a young offender without a prior criminal
4 record, was sentenced to 210 days of open
5 custody, which must be considered through the
6 *Youth Criminal Justice Act* and its presumption
7 against custody.
8 Sexual assaults of this type are
9 serious. It is not the most serious offence like
10 murder or attempted murder which can often weigh
11 heavily for enforceability over reviewability.
12 For reviewability in the appellate
13 context, the Court considers the strength of the
14 grounds of appeal. Appellate judges form their
15 own preliminarily assessment of the strength of
16 the appeal based upon a review of the record and
17 utilizing their knowledge and experience.
18 The first ground of appeal referred to
19 was the appellant's claim that the trial judge
20 did not articulate or engage in a *W.(D.)* analysis
21 when assessing the evidence. The appellant
22 argues that the Agreed Statement of Facts filed
23 at the trial constitutes defence evidence and
24 required the trial judge to engage in an
25 assessment of this evidence pursuant to *W.(D.)*.
26 The Agreed Statement of Facts stated the
27 following at paragraph 6:

1 J.C. provided a fully-informed and voluntary statement in which he
2 admitted to having sexual intercourse with J.Z. but alleged it was
3 consensual.

4 The trial judge did not refer to this evidence in
5 her reasons for judgment and does not appear to
6 have engaged in a *W.(D.)* analysis.

7 The parties disagree on the nature of this
8 evidence. The appellant argues that this
9 statement was intended to be accepted for the
10 truth of its contents and thus required the trial
11 judge to consider the defence evidence pursuant
12 to the principles enunciated by the Supreme Court
13 of Canada in *W.(D.)*.

14 The Crown disagrees and claims that this
15 admission was intended to establish the
16 voluntariness of the accused's statement for
17 cross-examination purposes if the accused chose
18 to testify.

19 I do not have the full trial transcript
20 before me, and there is no evidence before me of
21 the purpose of the admission beyond the admission
22 itself. However, I find it difficult to envision
23 how a trial judge is supposed to assess this
24 evidence. If it is admitted for its highest
25 purpose, that the sexual intercourse was
26 consensual, it conclusively establishes the main
27 issue on the trial, and one would wonder why a

1 trial was necessary. If it was intended to
2 establish that the accused claimed the
3 intercourse was consensual, that it was intended
4 to be defence evidence of consent, I fail to see
5 how a trial judge is supposed to evaluate this
6 evidence.
7 Cases of sexual assault in which the
8 defence is one of consent, which it apparently
9 was in this case based on the submissions that I
10 have heard, these cases often come down to the
11 evidence of two people: The complainant and the
12 accused. It becomes an issue of credibility, and
13 I do not know how a trial judge is supposed to
14 assess the credibility and reliability of a piece
15 of paper, a piece of paper that alleges consent.
16 I cannot say that I find this ground of appeal
17 compelling.
18 The second ground of appeal as I stated
19 relates to the trial judge's consideration of the
20 evidence about a text message sent from the
21 complainant's phone during a time in which the
22 trial judge concluded the complainant was asleep.
23 As I stated, I do not have the benefit of the
24 full trial transcript, but the first text was
25 clearly an issue during the trial and how it
26 occurred.
27 The trial judge put her mind to the

1 question and was not able to come to a conclusion
2 regarding who sent the text or how it was sent.
3 The trial judge's conclusion was that the
4 complaint was asleep when it was sent. So while
5 the first text message is unexplained and
6 problematic, the trial judge's consideration of
7 this evidence relates to the assessment of the
8 evidence and credibility of the witnesses, areas
9 as I mentioned in which the trial judge is shown
10 deference by the appellate Courts.
11 In the final balancing of these factors,
12 public confidence has to be measured through the
13 eyes of a reasonable member of the public. As
14 well, the anticipated delay in deciding an appeal
15 relative to the length of the sentence also has
16 to be taken into consideration. Where it appears
17 that all, or a significant portion, of the
18 sentence will be served before the appeal can be
19 heard and decided, bail takes on a greater
20 significance if the reviewability interest is to
21 remain meaningful. *Oland* at paragraph 48.
22 The public's confidence in the criminal
23 process must be considered, and a part of that is
24 the public's expectation that people who commit
25 offences and are sentenced to periods of
26 imprisonment will actually serve their sentences.
27 This must be balanced against the legitimate

1 expectation of the public, including the
2 appellant, that trial judgments will be reviewed
3 for errors, and that where appropriate, an
4 appellate Court will intervene and order a new
5 trial or an acquittal.
6 The appellant is serving a 210 day
7 sentence which is followed by a one-year
8 probation order. His imprisonment for this
9 offence commenced August 25th, 2017, and he has
10 moved quickly to seek his release pending his
11 appeal. I am advised that his appeal could be
12 heard, at the earliest, in the January 2018
13 sittings in the Court of Appeal. At that point,
14 he would have served a significant portion of his
15 custodial sentence.
16 The next Court of Appeal sitting is in
17 October, so that is very short, and it would not
18 be expected that an appeal could be ready, so the
19 following set sittings are in January. The
20 appeal sittings occur four times a year, so that
21 would be the next available one, but by which he
22 would have served a significant portion of his
23 sentence.
24 In conclusion, there are factors that
25 are in favour of releasing the appellant pending
26 his appeal being decided. The risk to public
27 safety is low, the offender is 15 years old with

1 no prior criminal record, and he was compliant
2 with his previous release conditions. The plan
3 proposed by the appellant satisfies me that he
4 would surrender himself into custody if required
5 to do so. The offence is also serious, although
6 not the most serious offence. Of the two grounds
7 of appeal referred to before me, one appears
8 viable, although it is an area where trial judges
9 have been traditionally shown deference by
10 appellate Courts. And if not granted release,
11 there is a risk that J.C. could have served his
12 sentence before his appeal had been heard.
13 In the circumstances, I am of the view
14 that it would not adversely affect the public's
15 confidence in the administration of justice to
16 grant the appellant bail pending his appeal.
17 The appellant will be released on a
18 recognizance with a $1,000 no-cash deposit. His
19 mother will be a surety. She will be required to
20 sign the Acknowledgement of Surety form and have
21 that submitted to the Court.
22 The appellant will be subject to the
23 following conditions: That he keep the peace and
24 be of good behaviour.
25 He will have no contact directly or
26 indirectly with the complainant with following
27 exceptions: That is for attendance at the same

1 school and that the mere presence within the same
2 area or room which is under the supervision of a
3 responsible adult shall not be considered without
4 more to be a breach of this order.
5 He is not to attend at or be within one
6 block of the residence of the complainant. He is
7 to reside at House 415 in Behchoko. He is to
8 obey the rules of the house, including compliance
9 with any curfews that might be set; and he is to
10 attend Chief Jimmy Bruneau High School as
11 directed by his teachers.
12 Counsel, is there anything else?
13 MS. PURSER: Yes.
14 THE COURT: Ms. Purser?
15 MS. PURSER: What amount of cash or no-cash
16 would you like the surety to be in?
17 THE COURT: Sorry?
18 MS. PURSER: What amount of cash or no-cash
19 would you like the surety to be in? Perhaps
20 1,000 no-cash as well and a 1,000 no-cash
21 recognizance?
22 THE COURT: Thank you. Mr. Green, do you
23 have any submissions on that?
24 MR. GREEN: Certainly no cash, and 500 to
25 1,000 is fine. If I could just have a moment to
26 discuss one last issue with my friend, though.
27 THE COURT: Certainly.

1 MS. PURSER: I believe if it pleases the
2 Court that my friend and I are content to leave
3 out the condition -- I know it was suggested by
4 myself -- that he attend Grade 10. I do not
5 think it is going to be an issue. He is going to
6 go anyways. But should a problem arise -- I do
7 not know if he feels more comfortable being home
8 schooled. I know there was significant anxiety
9 about him and the complainant being in the same
10 area. Just to not -- to use my friend's words,
11 not turn truancy into a criminal offence and to
12 leave the options open. I think it will fall --
13 would reasonably fall under obey the rules of the
14 house. If mom says you have to go to school, you
15 have to go to school.
16 THE COURT: Okay. Mr. Green, do you have
17 any submissions?
18 MR. GREEN: I agree, Your Honour. I had
19 understood the condition to be sort of designed
20 to impose some structure on Mr. C., and I
21 understand that desire but as I -- and I
22 apologize for not bringing this up earlier. It
23 only occurred to me as I was listening to the
24 reasons. But as I did say to my friend, I am a
25 bit concerned about turning truancy into a breach
26 issue, and for the Crown's purposes, I don't
27 think that it's a necessary condition, so I'd

1 suggest we just leave it out.

2 THE COURT: Okay.

3 MS. PURSER: I thank my friend, and I'll

4 have that order typed up right away, and I'll

5 return momentarily.

6 THE COURT: So that last condition will be

7 removed. That is fine. And so for the surety,

8 it will be a $500 no-cash deposit. Okay. Is

9 there anything else, counsel?

10 MS. PURSER: No, thank you. I'll return

11 shortly with that order.

12 THE COURT: Thank you. We'll adjourn.

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1 **CERTIFICATE OF TRANSCRIPT**

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3 I, the undersigned, hereby certify that the
4 foregoing pages are a complete and accurate
5 transcript of the proceedings taken down by me in
6 shorthand and transcribed from my shorthand notes
7 to the best of my skill and ability.
8 Dated at the City of Edmonton, Province of
9 Alberta, this 25th day of October, 2017.
10
11 Certified Pursuant to Rule 723
12 of the Rules of Court
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16 Karissa Irvine
17 Karissa Irvine, CSR(A)
18 Court Reporter
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