*R. v. J.C.,* 2017 NWTCA 8 **A-1-AP-2017-000010**

# 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

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**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.
    1. Pursuant to section 37 of the *Youth Criminal*
    2. *Justice Act*, an appeal of an indictable offence
    3. is conducted in accordance with part 21 of the
    4. *Criminal Code* with any modifications required in
    5. the circumstances. Section 679 of the
    6. *Criminal Code* governs release pending appeal for
    7. indictable offences.
    8. Section 679 (3) sets out the criteria that a
    9. Court must consider. One, that the appeal is not
    10. frivolous; two, the offender will surrender
    11. himself into custody in accordance with the terms
    12. of the order; and three, the offender's detention
    13. is not necessary in the public interest. The
    14. appellant must establish that each criteria is
    15. met on a balance of probabilities. *R. v. Oland,*
    16. 2017 SCC 17, at paragraph 19.
    17. The Notice of Appeal lists the following
    18. grounds of appeal. One, that a miscarriage of
    19. justice has occurred, as the learned trial judge
    20. significantly misapprehended the evidence. Two,
    21. that the learned trial judge erred by making
    22. unreasonable findings of fact that were not
    23. supported by the evidence. Three, that the
    24. learned trial judge erred in law by
    25. underemphasizing vital pieces of evidence and
    26. ignoring or not considering vital pieces of
    27. evidence. Four, the learned trial judge erred in
28. failing to correctly articulate or apply the test
29. in the *R. v. W.(D.)* to the inquiry before her by
30. treating the conflicting evidence of the
31. complaint and the accused as a credibility
32. contest. Five, the learned trial judge erred by
33. applying a stricter standard of scrutiny in
34. assessing the credibility of the defence evidence
35. as compared to that of the prosecution. And
36. Number Six, such further and other grounds as
37. counsel may advise and this Honourable Court
38. would permit.
39. During submissions, counsel for the
40. appellant only addressed two grounds of appeal.
41. As such, I am only considering those grounds in
42. this application.
43. First, whether the appellant will surrender
44. himself into custody. The Crown concedes that
45. the appellant would likely surrender himself into
46. custody in accordance with the terms of an order
47. if he was to be released. The offender is 15
48. years old and had no prior criminal record before
49. this conviction. He has no outstanding charges,
50. and it is not alleged that he breached any of the
51. bail conditions he was on when he was on release
52. for this offence.
53. The appellant has proposed to enter into a
54. recognizance with a $1,000 no-cash deposit. His
55. mother is also prepared to be a surety.
56. The appellant has proposed that he would
57. abide by the following conditions. One, not
58. communicate directly or indirectly with the
59. victim, J.Z. For greater certainty, attendance
60. at the same school or mere presence within the
61. same area or room shall not be interpreted
62. without more to be a breach of this order. Two,
63. not attend at or within one block of the
64. residence of the victim, J.Z. Three, reside at
65. House 415 in Behchoko. And four, attend Grade 10
66. as directed by your teachers at the Chief Jimmy
67. Regional High School -- which I am assuming that
68. is Chief Jimmy Bruneau Regional High School --
69. for the 2017/2018 school year.
70. On this charge, the appellant was released
71. on a promise to appear and an undertaking to a
72. peace officer on June 16th, 2016. He was
73. required to comply with the condition prohibiting
74. contact with the victim, and I am advised that
75. his mother also required him to comply with a
76. curfew while he was on release, although that was
77. not a formal condition. It is not disputed that
78. there were no issues with the appellant's
79. compliance with conditions pending trial.
80. In the circumstances, I am satisfied that
81. the appellant would surrender himself into
82. custody in accordance with the terms of the
83. order, and there are no concerns about his
84. compliance with release conditions.
85. The remaining two factors are in dispute, so
86. my decision will focus on whether the grounds of
87. appeal are frivolous and whether the appellant's
88. detention is necessary in the public interest.
89. Turning first to whether the grounds of
90. appeal are not frivolous. An appellant judge
91. must examine the grounds of appeal and determine
92. that they are not frivolous. In order to meet
93. the not-frivolous requirement, an applicant must
94. only show that the grounds for appeal would not
95. necessarily fail.
96. It is also important to acknowledge that
97. this is a preliminary stage. I have only the
98. reasons for judgment and the Agreed Statements of
99. Facts submitted at trial. The trial transcript
100. has not been completed, and at this stage, it is
101. not my role to engage in a detailed analysis of
102. the issues. I only have to determine whether the
103. grounds of appeal are frivolous on a balance of
104. probabilities.
105. In this case, the grounds of appeal advanced
106. at the hearing are: One, whether the trial judge
107. failed to correctly articulate or apply the test 27 in *R. v. W.(D.)* [1991] 1 SCR 742; and two,
108. whether the trial judge erred in law by
109. underemphasizing vital pieces of evidence and in
110. ignoring or not considering vital pieces of
111. evidence and by doing so subjecting the evidence
112. of the prosecution and the defence to different
113. standards of scrutiny.
114. The first ground relates to the failure of
115. the trial judge to articulate or engage in a
116. *W.(D.)* analysis when assessing the evidence. It
117. appears and counsel confirmed at the hearing that
118. no defence evidence was led at trial. The
119. accused did not testify. Counsel for the
120. appellant argues that the Agreed Statement of
121. Facts filed at the trial constitutes defence
122. evidence and required the trial judge to engage
123. in an assessment of this evidence pursuant to the
124. principles enunciated in *W.(D.).*
125. The second ground of appeal relates to the
126. trial judge's consideration of the evidence about
127. what occurred at the time of the incident.
128. Briefly, the complainant testified that she was
129. asleep and awoke to the accused having sexual
130. intercourse with her. She testified that he got
131. off of her and ran to the bathroom. Following
132. this, she texted her sister who was in another
133. room at her house. The police in the course of
134. the investigation obtained a production order
135. which demonstrated that two texts were sent from
136. the complainant's phone. The first was to an
137. unrelated individual, and the second nine minutes
138. later was to the complainant's sister. The
139. complainant had no memory of sending the first
140. text and no other explanation for the text that
141. was advanced. The trial judge stated that she
142. could not make any findings about who sent that
143. text or how it was sent but that she was
144. satisfied that the complaint was asleep when it
145. was sent.
146. The second ground of appeal relates to the
147. trial judge's assessment of the evidence and
148. credibility of the witnesses, areas in which the
149. trial judge is shown considerable deference by
150. appellate Courts. Deference means that
151. intervention by an appellate Court will be rare
152. in situations when there are findings of
153. credibility. Deference is also shown where the
154. trial judge's reasons show that she considered
155. the applicable legal principles: Inconsistencies
156. in the evidence of the witnesses, and any
157. potential problems with the witnesses' testimony.
158. Where these issues are considered and addressed
159. in the reasons for judgment, and appellate Court
160. will often be cautious of intervening and
161. 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
162. consideration of the proposed release plan as
163. well as the accused's personal circumstances or
164. the offender's personal circumstances.
165. In terms of the plan that has been
166. proposed, J.C. has proposed entering into a
167. recognizance with a $1,000 no-cash deposit. He
168. is willing to have a surety and his mother is
169. prepared to act as a surety; and he is willing to
170. comply with conditions, including not to
171. communicate with the complainant or not to attend
172. her residence, as well as residing at his home
173. with his mother and attending school.
174. Looking at J.C.'s personal
175. circumstances: He is 15 years old, did not have
176. a prior criminal record before this offence, and
177. it is accepted that he complied with his release
178. conditions while awaiting trial on this matter.
179. In the circumstances, I conclude that the public
180. safety risk is low.
181. Turning to public confidence in the
182. administration of justice. Public confidence in
183. the administration of justice requires weighing
184. two competing interests: Enforceability and
185. reviewability. As stated in *Oland* at
186. paragraph 25:
187. The enforceability interest reflected the need to respect the general rule
188. of the immediate enforceability of judgments. Reviewability, on the
189. other hand, reflected society s acknowledgement that our justice
190. system is not infallible and that persons who challenge the legality of
191. their convictions should be entitled to a meaningful review process one
192. which did not require them to serve all or a significant part of a
193. custodial sentence only to find out on appeal that the conviction upon
194. which it was based was unlawful.
195. In considering public confidence, Courts can
196. consider the factors under section 515(10)(c) and
197. adapt those for the post-conviction context.
198. For enforceability, the seriousness of
199. the crime plays an important role. The
200. seriousness of the crime pursuant to
201. section 515(10)(c) can be determined by
202. considering first the gravity of the offence;
203. secondly, the circumstances surrounding the
204. commission of the offence; and third, the
205. potential length of imprisonment.
206. In considering the seriousness of an
207. offence, the offender was convicted of an
208. indictable sexual assault. The facts as found by
209. the trial judge involved the offender having
210. non-consensual sexual intercourse with a sleeping
211. complaint.
212. Sexual assaults occur far too frequently
213. in this jurisdiction, and sexual assaults on
214. sleeping or unconscious victims are all too
215. common. Adults who commit these types of
216. offences are often sentenced to
217. penitentiary-length terms of imprisonment. J.C.,
218. who was a young offender without a prior criminal
219. record, was sentenced to 210 days of open
220. custody, which must be considered through the
221. *Youth Criminal Justice Act* and its presumption
222. against custody.
223. Sexual assaults of this type are
224. serious. It is not the most serious offence like
225. murder or attempted murder which can often weigh
226. heavily for enforceability over reviewability.
227. For reviewability in the appellate
228. context, the Court considers the strength of the
229. grounds of appeal. Appellate judges form their
230. own preliminarily assessment of the strength of
231. the appeal based upon a review of the record and
232. utilizing their knowledge and experience.
233. The first ground of appeal referred to
234. was the appellant's claim that the trial judge
235. did not articulate or engage in a *W.(D.)* analysis
236. when assessing the evidence. The appellant
237. argues that the Agreed Statement of Facts filed
238. at the trial constitutes defence evidence and
239. required the trial judge to engage in an
240. assessment of this evidence pursuant to *W.(D.)*.
241. The Agreed Statement of Facts stated the
242. 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
243. trial was necessary. If it was intended to
244. establish that the accused claimed the
245. intercourse was consensual, that it was intended
246. to be defence evidence of consent, I fail to see
247. how a trial judge is supposed to evaluate this
248. evidence.
249. Cases of sexual assault in which the
250. defence is one of consent, which it apparently
251. was in this case based on the submissions that I
252. have heard, these cases often come down to the
253. evidence of two people: The complainant and the
254. accused. It becomes an issue of credibility, and
255. I do not know how a trial judge is supposed to
256. assess the credibility and reliability of a piece
257. of paper, a piece of paper that alleges consent.
258. I cannot say that I find this ground of appeal
259. compelling.
260. The second ground of appeal as I stated
261. relates to the trial judge's consideration of the
262. evidence about a text message sent from the
263. complainant's phone during a time in which the
264. trial judge concluded the complainant was asleep.
265. As I stated, I do not have the benefit of the
266. full trial transcript, but the first text was
267. clearly an issue during the trial and how it
268. occurred.
269. 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
270. expectation of the public, including the
271. appellant, that trial judgments will be reviewed
272. for errors, and that where appropriate, an
273. appellate Court will intervene and order a new
274. trial or an acquittal.
275. The appellant is serving a 210 day
276. sentence which is followed by a one-year
277. probation order. His imprisonment for this
278. offence commenced August 25th, 2017, and he has
279. moved quickly to seek his release pending his
280. appeal. I am advised that his appeal could be
281. heard, at the earliest, in the January 2018
282. sittings in the Court of Appeal. At that point,
283. he would have served a significant portion of his
284. custodial sentence.
285. The next Court of Appeal sitting is in
286. October, so that is very short, and it would not
287. be expected that an appeal could be ready, so the
288. following set sittings are in January. The
289. appeal sittings occur four times a year, so that
290. would be the next available one, but by which he
291. would have served a significant portion of his
292. sentence.
293. In conclusion, there are factors that
294. are in favour of releasing the appellant pending
295. his appeal being decided. The risk to public
296. safety is low, the offender is 15 years old with
297. no prior criminal record, and he was compliant
298. with his previous release conditions. The plan
299. proposed by the appellant satisfies me that he
300. would surrender himself into custody if required
301. to do so. The offence is also serious, although
302. not the most serious offence. Of the two grounds
303. of appeal referred to before me, one appears
304. viable, although it is an area where trial judges
305. have been traditionally shown deference by
306. appellate Courts. And if not granted release,
307. there is a risk that J.C. could have served his
308. sentence before his appeal had been heard.
309. In the circumstances, I am of the view
310. that it would not adversely affect the public's
311. confidence in the administration of justice to
312. grant the appellant bail pending his appeal.
313. The appellant will be released on a
314. recognizance with a $1,000 no-cash deposit. His
315. mother will be a surety. She will be required to
316. sign the Acknowledgement of Surety form and have
317. that submitted to the Court.
318. The appellant will be subject to the
319. following conditions: That he keep the peace and
320. be of good behaviour.
321. He will have no contact directly or
322. indirectly with the complainant with following
323. exceptions: That is for attendance at the same
324. school and that the mere presence within the same
325. area or room which is under the supervision of a
326. responsible adult shall not be considered without
327. more to be a breach of this order.
328. He is not to attend at or be within one
329. block of the residence of the complainant. He is
330. to reside at House 415 in Behchoko. He is to
331. obey the rules of the house, including compliance
332. with any curfews that might be set; and he is to
333. attend Chief Jimmy Bruneau High School as
334. directed by his teachers.
335. Counsel, is there anything else?
336. MS. PURSER: Yes.
337. THE COURT: Ms. Purser?
338. MS. PURSER: What amount of cash or no-cash
339. would you like the surety to be in?
340. THE COURT: Sorry?
341. MS. PURSER: What amount of cash or no-cash
342. would you like the surety to be in? Perhaps
343. 1,000 no-cash as well and a 1,000 no-cash
344. recognizance?
345. THE COURT: Thank you. Mr. Green, do you
346. have any submissions on that?
347. MR. GREEN: Certainly no cash, and 500 to
348. 1,000 is fine. If I could just have a moment to
349. discuss one last issue with my friend, though.
350. THE COURT: Certainly.
351. MS. PURSER: I believe if it pleases the
352. Court that my friend and I are content to leave
353. out the condition -- I know it was suggested by
354. myself -- that he attend Grade 10. I do not
355. think it is going to be an issue. He is going to
356. go anyways. But should a problem arise -- I do
357. not know if he feels more comfortable being home
358. schooled. I know there was significant anxiety
359. about him and the complainant being in the same
360. area. Just to not -- to use my friend's words,
361. not turn truancy into a criminal offence and to
362. leave the options open. I think it will fall --
363. would reasonably fall under obey the rules of the
364. house. If mom says you have to go to school, you
365. have to go to school.
366. THE COURT: Okay. Mr. Green, do you have
367. any submissions?
368. MR. GREEN: I agree, Your Honour. I had
369. understood the condition to be sort of designed
370. to impose some structure on Mr. C., and I
371. understand that desire but as I -- and I
372. apologize for not bringing this up earlier. It
373. only occurred to me as I was listening to the
374. reasons. But as I did say to my friend, I am a
375. bit concerned about turning truancy into a breach
376. issue, and for the Crown's purposes, I don't
377. think that it's a necessary condition, so I'd
378. suggest we just leave it out.
379. THE COURT: Okay.
380. MS. PURSER: I thank my friend, and I'll
381. have that order typed up right away, and I'll
382. return momentarily.
383. THE COURT: So that last condition will be
384. removed. That is fine. And so for the surety,
385. it will be a $500 no-cash deposit. Okay. Is
386. there anything else, counsel?
387. MS. PURSER: No, thank you. I'll return
388. shortly with that order.
389. THE COURT: Thank you. We'll adjourn.

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# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 25th day of October, 2017. 10
8. Certified Pursuant to Rule 723
9. of the Rules of Court 13

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1. Karissa Irvine, CSR(A)
2. Court Reporter

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