*P.(D.) v R*, 2019 NWTCA 1 **A-1-AP-2017-000014**

# IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**P.(D.)**

**- v -**

**HER MAJESTY THE QUEEN**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of the Reasons for Judgment delivered by The Honourable Justice K.M. Shaner, sitting in Yellowknife, in the Northwest Territories, on the 17th day of December, 2018.

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**APPEARANCES:**

Mr. E. McIntyre: Counsel for the Appellant

Mr. A. Godfrey: Counsel for the Respondent

**PUBLICATION BAN**

**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**

**These reasons are intended to comply with this publication ban .**

1. THE COURT: So I will start where I
2. usually end, and that is with my decision, and
3. then I will give you the reasons.
4. My decision is that D.P. should be granted
5. judicial interim release pending his appeal.
6. D.P. was convicted of sexual assault in June
7. of 2017 following a jury trial, and then on

8 September 26, 2017, he was sentenced to six and a

1. half years in jail plus six months' credit for
2. presentence custody. He is currently serving his
3. sentence at the North Slave Correctional Centre
4. here in Yellowknife.
5. The evidence regarding the sexual assault
6. was provided at trial by the victim. She
7. testified, among other things, that D.P., who was
8. her stepfather, had intercourse with her in his
9. bedroom while the two of them were alone. She
10. said she was 8 or 9 years old at the time. She
11. also testified that on another occasion, D.P. had
12. her sit in his lap while he watched pornography
13. on the internet and while he masturbated. She
14. said she was sexually assaulted frequently over a
15. number of years. The victim testified about
16. other events as well, but the Crown did not prove
17. they took place in the Northwest Territories and,
18. accordingly, they did not form part of the facts
19. supporting the conviction.
    1. D.P. testified and he denied all of the
    2. allegations.
    3. D.P. has appealed the conviction and he now
    4. applies for release pending the outcome. The
    5. amended notice of appeal was filed October 17th,
    6. 2018. This application falls under 679(3) of the
    7. *Criminal Code*. D.P. is required to establish
    8. that his appeal is not frivolous; that he will
    9. surrender himself as required; and that his
    10. detention pending the appeal is not necessary for
    11. the public interest.
    12. I will turn first to whether the grounds of
    13. appeal are not frivolous.
    14. The Crown conceded, quite fairly, that this
    15. is a low threshold. It does not require the
    16. Court to delve deeply into the strength of the
    17. proposed appeal. Frivolous in this context has
    18. been described "as doomed to fail" or "devoid of
    19. merit", among other terms.
    20. The grounds of appeal in this case are
    21. first, that the trial judge erred in law by not
    22. giving a limiting instruction to the jury
    23. regarding Crown counsel's submission in her
    24. closing argument that the victim should be
    25. believed because she had no motive to lie.
    26. Second, D.P. appeals on the basis that his trial
    27. counsel (not Mr. McIntyre) provided ineffective
20. assistance by failing to contact and interview a
21. potential material witness before the trial
22. happened.
23. With respect to the first ground, Crown
24. counsel said the following during her closing
25. submissions at the trial: (as read)
26. Now, the defence theory in this case is simply that it didn't happen, that
27. [the victim] is lying about the sexual assaults, deliberately,
28. consciously fabricating this. Now, ask yourself why would she do that?
29. Now, defence does not have to prove that the victim had a motive to
30. fabricate this charge, but I ask you to apply your common sense that she
31. would have fabricated a charge against [D.P.] Does it make sense
32. that she would go to the police years after he ceased to be part of her
33. life to make a statement if nothing happened to her? I submit to you
34. that this theory does not make sense.

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1. It was argued on behalf of D.P. in this
2. hearing that this submission was improper and
3. prejudicial and, thus, required instruction from
4. the presiding judge. His counsel points to a
5. number of decisions including the *R. v. Kusk,*

22 1999 ABCA 49 and the *R. v. L.L.,* 2009 96 O.R.

1. (3d) 412, (CA). In the latter, the Ontario Court
2. of Appeal held at paragraph 24 that corrective
3. instruction from the trial judge was required in
4. the circumstances to ensure that the jury did not
5. conclude the complainant was telling the truth
6. based on the accused not demonstrating that there
7. was a motive for her to lie.
8. With respect to the second ground of appeal,
9. D.P. has other children, one of whom is a
10. daughter close in age to the victim who lived in
11. the home where the victim said the sexual
12. assaults occurred. According to the daughter,
13. and to D.P., she lived there for a school year
14. while she was in Grade 4. She shared a bedroom
15. with the victim and the two had a fairly close
16. relationship. The victim recalled only that the
17. daughter stayed there for part of one summer and
18. she testified that she did not share a room with
19. her. D.P. deposes that he told his trial counsel
20. about his daughter living there at the relevant
21. time but that his counsel did not contact her.
22. The daughter confirmed this in her own affidavit.
23. Further, D.P. says he told his lawyer about
24. other people, including his brother, who lived
25. there at the relevant time and he deposes that
26. his counsel did not contact any of them either.
27. In my view, these grounds of appeal are not
28. frivolous, and, accordingly, this portion of the
29. criteria is satisfied.
30. There is little or no issue with respect to
31. the second aspect of the test; that is, that D.P.
32. will surrender himself as required.
    1. D.P. has lived in Yellowknife most of his
    2. life. He has roots here. He was on judicial
    3. interim release pending the trial and he complied
    4. with all of the conditions. He has an unrelated
    5. limited and dated criminal record.
    6. D.P. has proposed conditions for the release
    7. as follows: He will report to probation services
    8. within 48 hours of his release and thereafter he
    9. will report as required; he will have no contact
    10. with the victim and no contact with the victim's
    11. mother; he will provide a $3,000 no-cash deposit;
    12. he will surrender his passport; he will have no
    13. contact with children under the age of 16 without
    14. another adult being present; he will reside at an
    15. address approved by probation services; he will
    16. not reside in any dwelling where children under
    17. the age of 16 reside including his own children;
    18. he will remain in the Northwest Territories
    19. unless he receives prior permission from
    20. probation services or the Court to leave, except
    21. in the event of a medical emergency, in which
    22. case he will inform probation services as soon as
    23. practical; he will appear in court as required,
    24. and he will surrender himself to the Court for
    25. the appeal; and he will undertake to perfect and
    26. have the appeal argued as quickly as possible.
    27. In all of these circumstances, including the
        1. proposed release plan, I am satisfied that D.P.
        2. would not represent a flight risk.
        3. The main issue in this application is the
        4. public interest criteria. D.P.'s counsel
        5. concedes that the offence of which D.P. was
        6. convicted is a serious one. He was convicted
        7. upon evidence that he sexually assaulted a young
        8. girl to whom he stood in place of a parent and
        9. thus there was a serious violation of trust. One
        10. of the events the victim described was what is
        11. known in our law as being a major sexual assault
        12. and that is reflected in the significant sentence
        13. that the trial judge imposed.
        14. D.P.'s counsel has indicated he will not
        15. feasibly be in a position to argue the appeal
        16. before October of 2019. He plans to apply to the
        17. Court of Appeal for a special commissioner to be
        18. appointed under Section 683(1)(e) of the *Criminal*
        19. *Code* with respect to the ineffective assistance
        20. of counsel ground, but he is unable to address
        21. that until the April 2019 sittings due to prior
        22. commitments. I will just pause to note that
        23. Mr. McIntyre did, in fact, file that notice of
        24. motion earlier in these proceedings. If that
        25. application is granted, it will doubtless take
        26. some time for the special commissioner to
        27. complete the inquiry and D.P.'s counsel doubts
33. very much that the matter could proceed in June.
34. All of that means that if D.P.'s appeal is
35. ultimately successful, he will have spent just
36. over two years in jail before the appeal is even
37. argued.
38. There is nothing in the materials before me,
39. nor on the Court's record, to suggest D.P. is to
40. blame for any delay in bringing this matter
41. forward. He filed his own notice of appeal while
42. unrepresented within days of being sentenced.
43. That date was October 10th, 2017. The record of
44. proceedings indicates that D.P. was not
45. represented, nor did he appear at the next list
46. scheduling, which was December 2017. Counsel for
47. the Legal Aid Commission appeared for him at list
48. scheduling in March of 2018 to indicate an
49. opinion was pending. Subsequently, the Court was
50. informed at list scheduling on May 11th, 2018,
51. that Mr. McIntyre, who is D.P.'s current counsel,
52. had been approved as counsel and had become
53. solicitor of record as of September 7th, 2018.
54. The amended notice of appeal was then filed in

23 October of 2018.

1. The strength of the appeal is highly
2. relevant to the public interest criteria and
3. although it is not my role in this context to
4. prejudge the merits, a more pointed assessment of
5. the grounds of appeal is mandated than what is
6. called for in determining if the appeal is
7. frivolous.
8. As indicated, the first ground of appeal is
9. whether the presiding judge ought to have
10. provided a corrective instruction in respect to
11. the Crown's final jury submissions in which,
12. again, the jury was asked to consider why the
13. victim would not be telling the truth. That does
14. not involve questions about factual findings. It
15. is a question of law and, accordingly, it does
16. not attract the same standard of deference as
17. would be attracted if the appellant was asking to
18. appeal on the basis of factual findings. It is
19. fairly cut and dried.
20. The case law bears out that this sort of
21. suggestion with respect to why a complainant
22. would lie, whether it arises during witness
23. examination or in jury submissions, is
24. problematic. The reason is this: The jury is
25. easily left with the impression that the
26. complainant must be telling the truth because
27. there is no motive to lie. It may subtly shift
28. the burden of proof to the accused and these
29. things take on a particular importance where, as
30. in this case, witness credibility plays such a
31. prominent role.
    1. As the Court of Appeal of Alberta stated in
    2. *Kusk* at paragraph 13:
    3. To a person untrained in law and evidence, these false trains of
    4. reasoning are highly meretricious. Once that poison is injected into his
    5. or her brain, there is probably no antidote.

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1. Whether in the context of the entirety of
2. the jury instructions there was a need for such
3. instruction and, if so, what the content of that
4. instruction ought to have been is certainly a
5. question to be examined and answered by the Court
6. of Appeal. For the purpose of this application,
7. however, the record discloses no objection by
8. defence counsel nor a corrective instruction, and
9. thus, in my view, there is a valid question about
10. whether that instruction needed to be given to
11. ensure trial fairness. In other words, I find
12. this ground of appeal sufficiently strong and I
13. find that it certainly surpasses the
14. not-frivolous test.
15. The facts supporting the second ground of
16. appeal -- that is, whether trial counsel was
17. ineffective -- are at this point straightforward.
18. D.P. told his lawyer about witnesses who had
19. lived in the same residence during parts of the
20. relevant time period, and those people included
21. his brother and his daughter. According to his
22. daughter, D.P.'s lawyer never contacted her. She
23. also deposes that she shared a room with the
24. victim for a year.
25. It will be up to D.P. to demonstrate that
26. his trial lawyer's conduct fell below the
27. standard of a reasonable professional and
28. resulted in a miscarriage of justice. I expect
29. that the commission, if appointed, will shed more
30. light on this. At this point, however, the
31. evidence suggests that this ground of appeal is
32. also reasonably strong, and certainly, again, it
33. surpasses the not-frivolous test.
34. It is true that this is a very serious case.
35. It is a very ugly case. It involved the sexual
36. assault of a young girl by a person who no longer
37. has the benefit of the presumption of innocence.
38. Nevertheless, even taking all of this into
39. account, it is my view that a reasonable
40. person -- that is, someone who is thoughtful,
41. dispassionate, informed of the circumstances of
42. the case and respectful of our society's
43. fundamental values -- would conclude that D.P. is
44. putting forth reasonable grounds for an appeal.
45. It would quite possibly undermine public
46. confidence if he was to continue to be
47. incarcerated only to be found to have been denied
48. a fair process some two years into an
49. incarceratory sentence.
50. Accordingly, I will release D.P. on the
51. terms that I indicated earlier.

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# 8 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 7th day of January, 2019.

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1. Certified Pursuant to Rule 723
2. of the Rules of Court

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1. Kim Cloutier
2. Court Reporter

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