R. v. Khatib, 2005 NWTCA 02

A-1-AP-2005000001

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

TALAL KHATIB

Transcript of the Oral Reasons for Decision by The Honourable Justice L.F. Gower, at Yellowknife in the Northwest Territories, on Thursday, January 27 A.D., 2005.

APPEARANCES:

Ms. S. Aitken: Counsel for the Crown

Ms. T. Nguyen,

Agent for S. Tarrabain: Counsel for the Accused

Notice of Motion
(Interim Release Pending Appeal)

THE COURT: This is an application by Talal Mohammed Khatib for bail pending appeal. Mr. Khatib was convicted of sexual assault under section 271 of the Criminal Code at a trial before a judge of the Supreme Court of the Northwest Territories sitting alone in Inuvik on December 6, 7 and 8 of 2004. He was sentenced to 18 months' imprisonment.

The Notice of Appeal was filed on January 11th, 2005, along with the notice of this application, an affidavit from Mr. Khatib, and an undertaking from him, stating that he will, if released from custody pending this appeal, surrender himself into custody in accordance with the terms of the order granted. As well, there was an affidavit filed by Chady Moustarah, who was Mr. Khatib's trial counsel. At the outset of this hearing, a transcript of the trial judge's reasons for judgment was also filed. A transcript of the trial itself has been ordered, but is not presently available.

Section 679(3) of the Criminal Code governs here. It requires the appellant to establish: (a) that the appeal is not frivolous; (b) that he will surrender himself into custody in accordance with the terms of the order; and (c) that his detention is not necessary in the public interest.

Dealing first with the question of frivolousness, Vertes J.A. of this Court of Appeal in **R. v. Quitte**,

[1993] N.W.T.J. No. 127, said at paragraph 11 that the Court is not required to determine if any of the arguments to be made have a reasonable chance of success. The Court is only required to satisfy itself that the appeal is not frivolous. It is not a question of raising a doubt, but one of raising an arguable issue. Vertes J.A. similarly said in the case of **Kolausok v. The Queen**, which was filed August 25th, 2004, in file A-1-AP-2004000006, at page 1:

> "The first criterion is that the appeal is not frivolous. This is a low threshold. It is not necessary to show a likelihood of success. It is simply a requirement to show that there are grounds of appeal that are at least arguable. An appeal that is frivolous is one that has no hope of success. This is not synonymous, however, with a little likelihood of success. The threshold is met if there is at least some prospect of success."

In other words, I need not be satisfied that the appeal will succeed, but rather that there is a reasonable possibility that it might succeed.

The seven grounds in the Notice of Appeal are fairly generally worded as the notice was drafted

before the reasons for judgment were received by appellant's counsel.

The appellant's counsel essentially argued four points at this hearing:

1. that the trial judge ought to have recused himself because he presided over a pretrial conference for both this case and a related case involving this appellant;

2. that the trial judge ought to have directed the complainant to be responsive to questions asked in cross-examination;

3. that the trial judge made a **W.D.** error, referring of course to the case of **R. v. W.(D.)**, [1991] 1 SCR 742; and,

4. that the trial judgment contains an inconsistency of logic with respect to the complainant's credibility and reliability.

I will deal with each of these points in turn.

With respect to the recusal issue, trial counsel's affidavit says that the trial judge presided over the pretrial conference on November 19th, 2004, where two different files relating to this appellant were discussed. The current matter is the one alleging a sexual assault against R.K. and the related matter alleges another count of sexual assault against S.T.

The trial judge heard the Crown's summary on both files and the affidavit says that this is problematic

because both matters are very similar in facts. At the outset of the trial, defence counsel made an unsuccessful application for the trial judge to recuse himself from the hearing of the trial.

I am advised that the practice in the Northwest Territories is that judges presiding at pretrial conferences in criminal matters, providing they are not settlement conferences, can and do sit as trial judges in the same matter. That is also the practice in the Yukon, which is the jurisdiction where I normally preside.

Appellant's counsel acknowledged in his submissions at this hearing that the trial judge was capable of disabusing himself of anything that he heard in the summary of the companion file involving the complainant S.T. However, he continued to argue that, from the appellant's point of view, there is a risk of a reasonable apprehension that he may have been biased as a result of hearing that information. I see no difference here between what happened in this pretrial conference and the situation where similar fact evidence may be called on a voir dire. There the trial judge hears allegations of other related sexual conduct and may rule that evidence to be inadmissible if it does not meet the test. The trial judge then proceeds to adjudicate the balance of the trial on the main charge, disabusing him/herself of the voir dire

evidence. Consequently I feel confident that this ground could not possibly succeed and, therefore, find it frivolous.

The second ground argued at this hearing was the lack of direction by the trial judge to the complainant to be responsive on cross-examination. In the affidavit of defence trial counsel, he stated that:

> "When it came time to cross-examine Ms. K., she indicated that she does not remember and she does not want to remember. The prior statement that she had given to the Inuvik R.C.M.P. was shown to her and she stated that she did not want to remember."

And it continues at paragraph 5:

> "The learned trial Justice failed to compel the witness to provide answers to defence counsel's questions during cross-examination. Specifically, when the prior statement was put to R.K., she indicated that she does not want to remember."

In the reasons for judgment, the trial judge alludes to this problem at page 6 beginning at line 7:

"The complainant presented herself at this trial as a reluctant or reticent witness. Also, she appeared to be upset, with good reason and understandably, with the repetitive nature of the questions asked of her at this trial. Repetitive questions of course are common in a case like this and so is the reaction of the person being questioned. I do not, in the circumstances of this witness, discount her evidence by reason of her reaction to repetitive questions."

There is no evidence that defence counsel at trial asked the trial judge to direct the complainant, now the victim, to be responsive. Presumably if he had, this would have been stated in his affidavit, which it was not.

The decision of **R. v. Hart**, from the Nova Scotia Court of Appeal in 1999, 135 C.C.C. (3d) page 377, involved an accused who was charged with sexual offences in relation to two boys. One of the complainants was a twelve year old at the time of trial and was unresponsive during portions of the cross-examination. However, defence counsel did not request the trial judge to direct the witness to answer

or take any other step towards securing answers to the questions not answered.

Mr. Justice Cromwell said at page 411 of that judgment:

> "Similarly, there may be steps available to cross-examining counsel to help elicit answers. These include requesting the trial judge to direct the witness to answer or requesting an inquiry as to why the witness is not responding. The trial judge may be justly reluctant to take such steps of his or her own motion because counsel's approach may result from a tactical decision. Where no request for the judge's intervention is made by counsel, this is a factor tending toward a finding that the trial has not become unfair as a result of the unresponsiveness. In this case, no such steps were requested by defence counsel and, in my opinion, the trial judge should not be faulted for failing to intervene more forcefully absent such a request."

Once again, I am satisfied that this ground could not possibly succeed; it is, therefore, frivolous.

The third point argued by appellant's counsel

involves the so-called **W.D.** error. Appellant's counsel submitted that the trial judge erred by comparing the complainant's evidence with that of the appellant in deciding who to believe and that in doing so he missed applying the third step in the now familiar **W.D.** instruction. I paraphrase this instruction, as it might be given to a jury:

1. If they believe the evidence of the accused they must acquit;

2. If they do not believe the evidence of the accused but are left in a reasonable doubt by it they must acquit;

3. If they do not believe and are not left in a reasonable doubt by the evidence of the accused they must consider whether on the basis of the evidence which they do accept they are convinced beyond a reasonable doubt of the guilt of the accused.

I repeat it is appellant counsel's contention that it is the third step which was missed by the trial judge in his analysis.

Briefly reviewing the reasons for judgment, the trial judge began by reviewing the evidence of the then complainant. He then went on to review the evidence of the other Crown witness, E.K., who corroborated certain details provided by the complainant. He found that E.K. was a sincere witness and worthy of belief. He then went on to discuss the evidence of the appellant

and followed that by discussion of the other defence witness, A.C., and found that A.C.'s evidence was not of much assistance because she talked about observations made significantly earlier than the time when the sexual assault occurred.

He also questioned her credibility by commenting that he had difficulty understanding how A.C. would remember a specific incident on the date of the sexual assault.

He then returned to assess the evidence of the complainant. He followed that by an assessment of the evidence of the accused and said at page 8, line 9:

> "Quite simply I do not believe his evidence, nor does it raise any doubt or cause me to have any doubt about the essential part of the complainant's evidence concerning an assault.
>
> Considering all of the evidence, I am satisfied beyond a reasonable doubt that Talal Khatib assaulted Ms. K. by removing part of her clothing while she was passed out from intoxication and laying down on top of her partially naked body."

I find that the trial judge effectively paraphrased the essential content of the **W.D.** steps in instructing

himself on the issue of reasonable doubt. Of course, it is not necessary that he use any precise or exact language, providing he does not misdirect himself. Accordingly, I feel confident that this particular ground of appeal could not possibly succeed and it is, therefore, frivolous.

I turn to the last point argued by appellant's counsel in this hearing. That is, that the trial judge was logically inconsistent of his analysis of the complainant's credibility. I repeat that defence counsel at trial said in his affidavit that when he cross-examined Ms. K. she indicated she did not remember and did not want to remember. When the prior statement that she had given to the RCMP was shown to her she said that she did not want to remember.

The reasons for judgment confirmed that Ms. K. did recall making one or more statements to the police on September 17th or 18th (September 17 being the date of the offence), but that she did not recall at trial the contents of the statements she gave to the police. Incidentally, appellant's counsel advised me that at least one of those statements was a KGB type of statement.

At page 7 of the reasons for judgment, the trial judge said this:

"I am satisfied that she genuinely does not

> remember the things that she says she does not remember either because of her intoxication at the time or because of the emotional trauma associated with the events immediately following the assault, for example the statements made to police. I am equally satisfied that she does remember the key or core part of her evidence regarding the assault."

I am not aware how defence counsel at trial dealt with this issue. It is not apparent from the reasons for judgment or from the affidavit material or any other material on the file, and appellant's counsel in this hearing was unable to assist me further in that regard. Presumably defence counsel at trial could have sought to have the complainant acknowledge that she did indeed make the statements to the police by referring to her signature or some other means such as if a tape of the statement was made. Then defence counsel could theoretically have put the previous inconsistent statements to the complainant, assuming they were inconsistent, and asked her if they were true regardless of whether she remembered providing the content of those statements.

But all this is speculation and it appears this procedure was not followed by defence counsel at trial

since it is not referred to in any fashion in the reasons for judgment.

However, when the trial judge said that he was satisfied that the complainant genuinely does not remember the things that she says she does not remember, he appears to be referring to the content of the statements to the police, which in turn presumably includes sufficient detail of the occurrence of the sexual assault to support the laying of the charge. Therefore, if the complainant testified at trial about those details in direct examination, and then on cross-examination said that she did not remember the details she provided to the police, which were presumably the same or similar, then there is a potential inconsistency in her evidence. This logically may have impacted the reliability of her evidence. The trial judge did not address this potential inconsistency and on its face it appears that the reasons for judgment may indeed lack the type of logical critical analysis sought by the appellant's counsel. Therefore, I cannot say that this particular ground of appeal could not possibly succeed and consequently it is not frivolous.

I turn now to the second requirement for release and that is the issue of flight risk. The affidavit of the appellant says that he was born in 1952; he has lived in Canada since 1980. He became a citizen in

1983. He has a Master's degree in Economics. He moved to Inuvik in 1985 to accept the professorship of the college there. For the last four years he has resided in Inuvik where he lives in a home alone.

He has been married to one Marie Lavoi for the last 13 years. The couple have six children. The wife and children reside in Alberta where the eldest child of 19 is attending medical school and the youngest is five years of age.

Mr. Khatib says that he manages three businesses in Inuvik and if he is released he will be continuing that employment. He says he has no criminal record. There is no suggestion that there were any problems with Mr. Khatib during his period of pretrial release, which was on a promise to appear. Ms. Lavoi, I am told, is prepared to act as a surety. Mr. Khatib has indicated through his counsel that he is prepared to deposit $7,500 in cash as part of any release order.

I am satisfied that these and other conditions will ensure that Mr. Khatib will surrender himself into custody in accordance with the term of any order of this court.

I turn now to the third requirement for release and that is the issue of public interest. The Crown's main point here, as I understand it, is that there is a problem with the public perception. They submit that a fair-minded member of the public in Inuvik would be

troubled by the appellant's release after being found guilty on one charge of sexual assault, particularly when he has another charge of sexual assault in Inuvik coming to trial April 26th of this year.

On the other hand, the appellant is presumed innocent of the second charge which is pending trial. He is only presumed to be guilty of the offence being appealed from. While that offence is serious, in a relative way it is less serious than other forms of sexual assault such as forced intercourse, oral or anal sex, or other degrading conduct or conduct involving gratuitous violence.

As was stated in the **Kolausok** case in considering the public interest issue, the court has to consider the competing dictates of the enforceability and reviewability of judgments. Those terms were referred to in **R. v. Crockett**, [2001] B.C.J. No. 2575, a decision of Finch J.A., as he then was, of the British Columbia Court of Appeal:

> "... 'enforceability' means the immediate execution of the sentence so that the public may have confidence that convicted persons actually serve the sentence imposed. 'Reviewability' is the need for judgments to be reviewed, and any error corrected, so that the public may have confidence that only

those lawfully convicted are deprived of their liberty."

Here I take into account the fact that there is no prior criminal record alleged against the appellant, the fact that he was released on bail prior to the trial and apparently adhered to all the conditions of his release, the fact that he has ties in the community of Inuvik and has significant business commitments there, the fact that he is prepared to make a significant cash deposit, and the fact that his wife is prepared to sign as a surety for him. Further, I expect that any concerns that the victim R.K. may have about the appellant's release can be addressed by including appropriate terms in the order.

In summary, I am satisfied that it is not necessary to detain the appellant in the public interest. I, therefore, direct that the appellant be released from custody pending the determination of his appeal, upon entering into a recognizance in the amount of $7500 bail with cash deposit, and also subject to Marie Lavoi signing as surety.

In addition to the usual statutory conditions, that the appellant keep the peace and be of good behaviour, and attend at the time and place fixed by this court for the hearing of his appeal, I direct the following additional conditions be included in his

recognizance:

(a) he shall reside in the Town of Inuvik in the Northwest Territories;

(b) he shall report in person to the RCMP detachment in Inuvik every Friday between the hours of 9 a.m. and 4 p.m.;

(c) he shall have no contact directly or indirectly with R.K. or any member of her family;

(d) he is not to approach within 50 metres of R.K.'s residence or place of employment;

(e) he is not to consume or possess any alcoholic or intoxicating substances;

(f) he is required to submit such samples of his breath as suitable for analysis upon a police officer making a demand for the same if said police officer has reasonable and probable grounds to believe that he has been consuming alcoholic substances or intoxicating substances;

(g) he is not allowed to enter the premises of any bar, tavern, pub, lounge or liquor store licenced to sell alcohol under the Liquor Act;

(h) he is not allowed to supply or provide liquor to any person under the age of 19 years;

(i) he shall surrender himself into custody at the RCMP detachment in Inuvik no less than 48 hours prior to the scheduled time for the hearing of his appeal, and he is to be held in custody until the appeal has

been heard and the direction of the Court of Appeal received. If the appellant does not surrender himself into custody as required, a warrant for his arrest will issue forthwith.

Once the cash bail is deposited and the recognizance is signed by the appellant and his surety, he may be released.

Is there anything I have omitted, from either counsel?

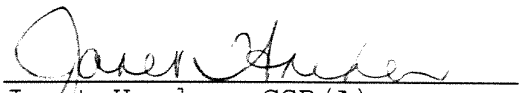
MS. AITKEN: No, My Lord.

MS. NGUYEN: No, Your Honour, thank you.

THE COURT: Thank you.

(AT WHICH TIME THE PROCEEDINGS CONCLUDED)

Certified correct to the best of my skill and ability,



Janet Harder, CSR(A)
Court Reporter