Date: 2009 02 24
Docket: S-1-CR 2009000009

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRENT ERIC SORENSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] The Appellant, Brent Sorenson, was tried and convicted in the Territorial Court of the Northwest Territories on charges of assault and uttering threats. He also pleaded guilty to a charge of breach of undertaking. The Crown proceeded summarily on all the charges. The Appellant was sentenced to concurrent intermittent jail terms of 90 days for the assault, 60 days for the uttering threats, and 15 days for the breach. He has appealed his convictions on the assault and uttering threats charge, and the sentence imposed on the breach charge. He now applies to be released on bail until his appeal has been heard.

B) ANALYSIS

1. Criteria for release pending appeal in summary conviction proceedings

[2] Unlike what is the case for bail pending appeal in indictable matters, the *Criminal Code* does not set out criteria to be applied on a bail application in the context of a summary conviction appeal. Section 816 merely states that a defendant who has been convicted of a summary conviction offence and who has

appealed shall remain in custody unless the appeal court orders his or her release, and sets out the types of release processes that can be used.

[3] For indictable matters, section 679 of the *Criminal Code* governs applications for bail pending appeal. It sets out specific criteria that an appellant must meet. On a conviction appeal, an appellant must establish that the appeal is not frivolous; that he or she will surrender into custody in accordance with any order made by the appeal court; and that his or her detention is not necessary in the public interest. On sentence appeals, the criteria are very similar, except the first prong of the test is more strict: rather than merely having to show that the appeal is not frivolous, the Appellant must establish that the appeal has sufficient merit that serving the sentence while the appeal is pending would cause unnecessary hardship.

[4] In the absence of legislated criteria governing bail pending appeal in the summary conviction context, courts have considered how these applications should be approached. Some cases suggest that the criteria set out in section 679 apply, but should be interpreted somewhat more liberally than in the indictable context. *R.* v. *Simpson* (1978), 44 C.C.C. (2d) 109 (Ont Co. Ct.); *R.* v. *Dubyk* [1985] S.J. No.95 (Sask.Q.B.); *R.* v. *Kieling* [1988] S.J. No.493 (Sask. Q.B.). Other cases have chosen not to resort to the test set out in section 679. *R.* v. *Follett* [1992] N.J. No.281 (Nfld. S.C.T.D.); *R.* v. *Basha* [2002] N.J. No.347 (Nfld. S.C.T.D.)

[5] It is worthy of note that in cases where section 679 was not applied, the approach adopted nonetheless incorporated considerations similar to those set out in that provision. In *Basha*, the Newfoundland and Labrador Supreme Court described the approach it was adopting in the following way:

> 1. The appellant has the onus to show that he/she should be released pending appeal by:
>
> > (a) putting forth sufficient grounds to show that the appeal is not frivolous;
> >
> > (b) putting forth before the appeal court sufficient evidence to show that he or she will surrender himself or herself as provided by the court's order; and
> >
> > (c) placing before the appeal court the necessary facts for he judge to decide that the appellant's release will not represent a danger to the public and that release pending the determination of the appeal will not be

> detrimental to the reasonable public's confidence in the criminal justice system based on the particular circumstances of the case and of the appellant.
>
> 2. The appeal court shall exercise its discretion to release the accused where possible considering the previously referred to criteria and so as to avoid a situation where the appeal would be rendered nugatory by the appellant's continued detention.
>
> 3. The onus is on the appellant to establish these matters and the onus is on a balance of probabilities.
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> *R.* v. *Basha*, *supra,* at para. 14.

[6] This approach essentially incorporates the section 679 criteria, but also highlights the importance of considering whether the sentence will be served before the appeal can be heard on its merits if bail is denied.

[7] I have not been referred to any case from this jurisdiction that has considered the test to be applied in bail pending appeal in summary conviction matters, nor am I aware of one. In oral submissions, the Respondent referred to *R.* v. *Kingwatsiak* (1976), 31 C.C.C. (2d) 213 (N.W.T.S.C.) as an example of a case where section 679 was used in the summary conviction context. But I have reviewed the decision and the case did not involve a summary conviction offence. The offence was "theft under" and the sentence imposed was 1 year imprisonment, which is more than what could have been imposed had the charge been proceeded with summarily. In addition, the decision is from the Court of Appeal of the Northwest Territories, not this Court. It is clear, then, that the case involved an indictable offence.

[8] As I have already alluded to, section 816 of the *Code* does not set out criteria to be applied in considering a bail pending appeal application. Section 822 specifically incorporates a number of provisions that deal with indictable appeals into the summary conviction appeal procedure. Section 679 is not among the sections included in the list of sections so incorporated. In light of this, in my view, it is difficult to conclude that Parliament intended section 679 to apply directly to the summary conviction appeal process.

[9] I find, however, that it is reasonable to conclude that the principles that govern bail pending appeal in the indictable context are also relevant in deciding bail pending appeal in the summary conviction context. For that reason, the

criteria set out in section 679 are among those that should be considered. At the same time, other factors flowing from the specific nature of summary conviction offenses must be considered as well. For example, sentences for summary conviction offenses are generally shorter than those imposed for indictable offenses. I agree with the suggestion in *Basha* that particular attention should be given to the possibility of the appeal not being heard on its merits before the sentence is fully served if bail is not granted. In addition, summary conviction offenses are generally speaking less serious than indictable offenses. That is a factor to bear in mind in examining public interest considerations.

[10] I conclude that a blend of factors must be considered: whether the appellant will surrender into custody, the strength of the appeal, the length of the sentence, the seriousness of the offence, public safety considerations, as well as other aspects of public interest, such as preserving the public's confidence in the administration of justice. Unlike what is the case with indictable matters, the approach should not, in my view, be one where the appellant is held to demonstrating that he or she meets a fixed set of criteria. Rather, the approach should be more flexible, with the various factors considered and balanced in deciding whether release is appropriate in a given case.

2. Application of principles to circumstances of this case

[11] The Amended Notice of Appeal lists the following grounds of appeal:

> 1. The conviction was unreasonable and cannot be supported by the evidence;
>
> 2. The judgment of the trial judge as to conviction after trial should be set aside on the ground that the trial judge made errors in the assessment of the witnesses' evidence;
>
> 3. The judgment of the trial judge as to conviction after trial should be set aside on the ground that the trial judge erred in his analysis as to the issue of credibility and reasonable doubt;
>
> 4. The judgment of the trial judge should be set aside on the ground that the trial judge erred in law in dismissing the evidence of defence witness, Jolene Hughes, as collateral and not raising a doubt as to the credibility of the complainant;

5. The judge delayed rendering a decision as to the guilt or innocence of the Appellant from the date of trial: October 31, 2008, to the date of conviction and sentencing: January 16, 2009, approximately 2.5 months.

6. The judge erred in not giving the Appellant any credit in the sentence imposed for the s.145(5.1) offence for the time the Appellant remained under conditions of his initial release from his date of trial (October 31, 2008) to his date of sentencing (January 16, 2009), taking into consideration he had no previous record.

7. The sentence imposed for the s.145(5.1) offence to which the Appellant pleaded guilty on his first attendance on the matter was unfit in that custody was not warranted on the facts. The Trial Judge imposed 60 days of custody to be served concurrently to the 90 days sentence he imposed on the 2 matters for which he convicted the Appellant after trial. It is submitted that on the facts of the breach a custodial sentence was overly harsh in that it did not credit the Appellant for his early guilty plea, did not take into consideration that the breach was non violent and amounted to an error in law.

8. Such further grounds as counsel for the Appellant will reveal after reviewing the trial transcript and as this Honourable Court may permit.

[12] Some of these grounds relate to the conviction appeal and others to the sentence appeal. During submissions I asked the Appellant's counsel about ground #5, to clarify whether the Appellant's position was that it was an error of law for the Trial Judge to reserve his decision. Counsel advised that the delay in rendering the judgment was being raised in the context of the sentence appeal, and not as a ground of appeal against conviction. I asked counsel if this meant that grounds #5 and #6 were aimed at the same issue, and she confirmed that they were.

[13] It is important to note that the sentence imposed for the breach charge was not 60 days, as is alleged in ground #7, but 15 days. The Appellant has already served six week-ends of his intermittent sentence. Considering that he surrenders into custody on Fridays and is released on Mondays and that he would ordinarily be credited for 4 days served for each of those week-ends, he has already served the sentence on the breach charge. His application for bail pending appeal, inasmuch as it relates to the sentence appeal, is moot. That being the case, I have considered his bail application only in the context of his appeal from conviction.

[14] The Respondent concedes that the Appellant would likely surrender into custody in accordance with an order of this Court if his application for release were granted. The Respondent also concedes that there are no concerns about his release endangering public safety. The Respondent nonetheless opposes the Appellant's application on the grounds that the appeal is frivolous, and that the Appellant's release, under the circumstances, would undermine the public's confidence in the administration of justice.

[15] The strength of the appeal must be examined in the context of the grounds of appeal against conviction, which are the first four grounds listed in the Amended Notice of Appeal. Those grounds all relate the Trial Judge's assessment of the evidence and of the credibility of witnesses.

[16] During oral submissions, the Appellant's counsel conceded that the Trial Judge demonstrated an awareness of the relevant principles of law that deal with how the requirement for proof beyond a reasonable doubt relates to the assessment of credibility. What the Appellant takes issue with is how the Trial Judge applied those principles to the evidence, and the conclusions that he reached.

[17] The Appellant also concedes that the Trial Judge thoroughly reviewed the evidence in his Reasons for Judgment and did not overlook any key aspect of the evidence. Again, it is the Trial Judge's analysis and opinion about the evidence, and the conclusions that he reached, that the Appellant takes issue with.

[18] Appellate courts must show considerable deference to a trier of facts' assessment of evidence and of the credibility of witnesses. Appellate courts must not re-try the case on the basis of the transcript, and must recognize the unique advantage that the trier of facts has in assessing the evidence of witnesses. *R.* v. *Biniaris* [2000] 1 S.C.R. 381; *R.* v. *M.(E.)* (2008), 235 C.C.C. (3d) 290 (S.C.C.).

[19] In light of these principles, appellate interference with findings of credibility made at trial should be rare. This is especially so, in cases heard by a judge sitting alone, where the Reasons for Judgment show that the Trial Judge was alive to applicable legal principles, the contradictions in the evidence, and the potential problems with the witnesses' testimony.

[20] I recognize that I do not, at this stage, have the benefit of full submissions on the various grounds of appeal. It is not for the Court disposing of a bail pending

appeal application to engage in a detailed analysis of the issues: that is the task of the Court that hears the appeal on its merits, with the benefit of detailed written submissions supplemented by oral argument on the various points raised. But in assessing the strength of the appeal, I must consider that because of the nature of the issues he raises in this appeal, the Appellant will face a high standard of review. I also cannot ignore that in his Reasons, the Trial Judge accurately referred to the applicable legal principles; addressed the contradictions in the evidence; explained why he accepted the evidence of the complainant and why he rejected the evidence of the accused; and explained why he found other evidence not determinative. Based on those factors, I conclude that the Appellant's case on appeal is not compelling.

[21] I must also consider whether the Appellant's release would be detrimental to the public's perception and confidence in the administration of justice. In assessing this factor, I note that the Appellant's jail term is being served intermittently. As it is, he spends more time at large than in jail, and while he is at large, he is bound by conditions that in some respects are less restrictive than those that he faced before he was convicted. For example, there are no restrictions on his alcohol consumption during the week, and he is not under any condition not to contact the complainant. The Appellant argues that under such circumstances, it would not undermine the public's confidence in the administration of justice for him to stop serving his sentence on week-ends until his appeal is dealt with.

[22] Weighing against these considerations, however, is the fact that the charges that the Appellant was convicted for were serious, as far as summary conviction offenses go. They occurred in the domestic context. There were several incidents, and some were protracted. The Sentencing Judge, who heard the evidence, viewed these as serious offences; so much so that he had been contemplating a sentence in the range of six months imprisonment before he heard that the Crown's position, which was for a shorter period of custody.

[23] I also take into account that because the sentence is being served intermittently, the interference with the Appellant's freedom is tempered considerably from what it would be if he was serving the jail term on a continuous basis. In addition, this is not a situation where the sentence will inevitably be served before the appeal is heard on its merits, and render the appeal nugatory. There is no reason why this appeal could not be heard in the very near future. The transcript of the proceedings has been filed, and it is not particularly lengthy. The

issues raised by the appeal are not overly complex. This Court sits every week in Yellowknife and time could relatively easily be set aside for this matter to be heard in relatively short order.

[24] I understand from counsel's submissions that the challenges in having this appeal heard quickly stems from other commitments in her schedule. But counsel's schedules cannot be a determinative factor on an application for release pending appeal. Counsel who argues an appeal does not necessarily have to be the same counsel who ran the trial.

[25] In the final analysis, I recognize that certain factors militate in favor of granting the Appellant's application. The Respondent acknowledges that the Appellant does not pose a threat to public safety and that he would abide by a Court order requiring him to surrender into custody. The Appellant's mother has testified that she is willing to be a surety for him, and I have no difficulty accepting that she understands the role of a surety and would take that role seriously. However, given the nature of the offenses and their seriousness, and since I am of the view that the grounds of appeal are not compelling, I conclude that it would be detrimental to the public's confidence in the administration of justice to suspend the enforceability of the Appellant's sentence.

[26] For those reasons, the application is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
24th day of February 2009

Counsel for the Appellant: Kelly Payne
Counsel for the Respondent: Shelley Tkatch

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