St. John v. R., 2015 NWTSC 57

A-1-AP2015000008

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

MICHAEL ST. JOHN

Appellant/Applicant

- vs. -

HER MAJESTY THE QUEEN

Respondent

Transcript of the Decision on an Application for Bail pending Appeal by The Honourable Justice S. H. Smallwood, at Yellowknife in the Northwest Territories, on September 25th A.D., 2015.

APPEARANCES:

Mr. P. Harte: Counsel for the Appellant/Applicant

Ms. K. Lakusta: Counsel for the Respondent

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

1 THE COURT: The applicant, Michael
2 St. John, was convicted after a trial by a
3 jury of sexual assault and sexual interference
4 and sentenced on August 13th, 2015 to a term
5 of imprisonment of three years.
6 He has appealed his conviction and
7 sentence to the Court of Appeal and is seeking
8 his release pending determination of his
9 appeals. The applicant is seeking his release
10 on a recognizance with a $10,000 cash deposit
11 and a number of conditions. The respondent
12 Crown is opposed to the applicant's release.
13 The issue is whether the applicant has met the
14 requirements of Section 679(3) of the Criminal
15 Code.
16 Section 679 of the Criminal Code governs
17 release pending appeal. Section 679(1)
18 permits a Judge of the Court of Appeal to
19 release an appellant from custody pending
20 determination of his or her appeal where
21 notice of the appeal has been given. The
22 applicant in this case filed his notice of
23 appeal from conviction and sentence on
24 September 9th, 2015.
25 In considering whether the applicant
26 should be released pending his appeal,
27 Section 679(3) of the Criminal Code is

1 applicable and states that a Judge of the
2 Court of Appeal may order that the appellant
3 be released pending the determination of his
4 appeal if the appellant establishes:
5 First, that the appeal or application for
6 leave to appeal is not frivolous;
7 Second, that he will surrender himself
8 into custody in accordance with the terms of
9 the order; and,
10 Thirdly, that his detention is not
11 necessary in the public interest.
12 In this case, the Crown concedes that the
13 appeal is not frivolous and that there is
14 little concern that the applicant will not
15 surrender himself into custody. However, the
16 Crown argues that the detention of the
17 applicant is necessary in the public interest.
18 The grounds of appeal contained in the
19 notice of appeal relate to the use of
20 testimonial aids during the course of the
21 trial.
22 During trial the Crown applied, pursuant
23 to Section 486.2(1), for the use of a screen
24 during the testimony of a witness (the
25 complainant in this case). At issue on appeal
26 is the placement of the screen during the
27 testimony of the complainant and whether

1 another alternative should have been ordered
2 by the Court. The appeal will involve a
3 consideration of Section 486.2(1) and what it
4 means when a witness is permitted to testify
5 "behind a screen or other device that would
6 allow the witness not to see the accused".
7 With respect to the first step as
8 contemplated in Section 679(3) (that the
9 appeal is not frivolous). In that case, the
10 applicant need only establish that the ground
11 of appeal would not necessarily fail in order
12 to establish that the ground of appeal is not
13 frivolous. It is a low threshold to meet and
14 I am satisfied that there is a question to be
15 answered and that the appeal would not
16 necessarily fail. Therefore I am satisfied
17 that the appeal is not frivolous.
18 With respect to the second step, (that the
19 applicant will surrender himself into custody
20 in accordance with the terms of his release)
21 the applicant has no criminal record apart
22 from the convictions from which he appeals.
23 He was on release on this matter and another
24 outstanding matter since February 24th, 2014,
25 until he was placed into custody on being
26 sentenced on this matter. And there is no
27 suggestion that he has ever breached a term of

1 his release or failed to attend court when
2 required to do so on this or any other matter.
3 Therefore I am satisfied that the applicant
4 would surrender himself into custody in
5 accordance with any release conditions that he
6 might be subjected to.
7 The third step is whether it is necessary
8 for the applicant to be detained (whether it
9 is necessary in the public interest).
10 As referred to in the case of R. v. Ussa,
11 a 2014 decision of the Manitoba Court of
12 Appeal, at paragraph 8, the public interest
13 referred to in the third branch of the test,
14 under Section 679(3), is concerned with the
15 protection and safety of the public as well as
16 public confidence in the administration of
17 justice.
18 In order to maintain public confidence, a balance has to be
19 struck between reviewing the conviction that led to the
20 imprisonment for error and enforcing the judgment.
21
22 In that case, a number of factors were
23 listed to be considered in the assessment of
24 reviewability versus enforceability. They are
25 listed at paragraph 9, and they are, first,
26 the seriousness of the offence. Secondly, the
27 background of the applicant, particularly any

1 criminal record. Thirdly, the potential delay
2 of the hearing of the appeal, particularly
3 whether the sentence will expire before the
4 appeal will be heard. And fourthly, the
5 relative strength of the ground or grounds of
6 appeal.
7 It is important to remember that at this
8 point the decision that is being made is
9 whether the applicant is being released
10 pending his appeal being determined. The
11 Court does not have a full record of the trial
12 and any comments made do not prejudge the
13 outcome of the appeal. Counsel have not
14 presented their full argument or filed their
15 facta which would be considered at the appeal
16 itself.
17 With respect to the seriousness of the
18 offence, in the case of Gingras, a BC Court of
19 Appeal from 2012 which is referred to in the
20 notes of Martin's Criminal Code, held that the
21 greater the seriousness of the offence, the
22 stronger the grounds are required to shift the
23 balance from enforceability to reviewability.
24 In this case, the applicant was convicted
25 following a jury trial of sexual assault and
26 sexual interference and sentenced to a term of
27 imprisonment of three years. While I do not

1 have the full details of the offences for
2 which the applicant was convicted, I
3 understand that they involve multiple sexual
4 assaults over a lengthy period of time on a
5 child for which the applicant was in a
6 position of trust.
7 I am satisfied that the offence is a
8 serious one. It involved the sexual abuse of
9 a child by a person who was in a position of
10 trust and the applicant has received a
11 significant term of imprisonment.
12 With respect to the background of the
13 applicant, the applicant, as previously
14 stated, has no prior criminal record before
15 being convicted of these offences. He does
16 have another outstanding charge which is
17 scheduled for trial in November of this year.
18 However, that charge arose around the same
19 time as the matters which are before me today.
20 And there is nothing otherwise in the
21 background of the applicant which raises any
22 specific concerns with respect to that factor.
23 With respect to the potential delay in the
24 hearing of the appeal, the applicant's appeal
25 is not yet ready to be heard. And as I
26 stated, the appeal books have not been filed
27 and the factums have not been filed by either

1 party. The Court of Appeal sits four times a
2 year in Yellowknife. They sit next in October
3 and, following that, sit again in January,
4 April, and June of 2016.
5 It is apparent that this matter cannot be
6 heard in October. The next available date
7 would be January of 2016. Counsel for the
8 applicant advises the Court that he is not
9 available in January so unless the applicant
10 were to retain new counsel, the earliest his
11 appeal could be heard would be April of 2016.
12 Balanced against this is a sentence that
13 was imposed for these offences, which was a
14 significant one, one of three years
15 imprisonment. It appears to me that the
16 appeal could easily be heard before the
17 sentence imposed would expire so that there is
18 little risk that the sentence would expire
19 before the appeal could be heard.
20 With respect to the relative strength of
21 the appeal, the appeal itself relates to
22 Section 486.2(1) of the Criminal Code which
23 states that the Judge shall, on application of
24 the prosecutor, the witness, who is under the
25 age of 18 years, order that the witness
26 testify outside the courtroom or behind a
27 screen or other device that would allow the

1 witness not to see the accused unless the
2 Judge or Justice is of the opinion that the
3 order would interfere with the proper
4 administration of justice.
5 The issue in this case is the placement of
6 the screen which was placed in front of the
7 accused during the trial.
8 There have been excerpts of transcripts
9 filed which demonstrate the discussion that
10 was had between counsel and the trial Judge
11 regarding the application itself and then
12 subsequently the placement of the screen.
13 The initial discussion relating to the
14 placement of the screen was that it would
15 ensure that the witness did not have to see
16 the accused during her testimony but also
17 ensuring that the view of the witness with
18 respect to counsel or the jury was not
19 obscured. Ultimately when the screen was
20 placed, it was placed in front of the
21 accused - something that was different than
22 earlier contemplated as there is a reference
23 to the screen being wheeled in on a trolley.
24 Ultimately it was placed on a table in front
25 of the accused.
26 Counsel for the applicant raised concerns
27 at trial with respect to this placement. It

1 was clear from the discussions that the trial
2 Judge's concerns were the placement of the
3 screen so that it obscured the witness's view
4 of the applicant while at the same time
5 ensuring that counsel and the jury could see
6 and also hear the witness while testifying.
7 Subsequent discussions relating to the
8 placement of the screen also seem to reflect
9 this concern. Counsel for the applicant
10 raised the placement of the screen again (once
11 the screen had been placed in front of the
12 applicant) and at that time the discussion
13 related around the drawing -- that the screen
14 would draw attention to the applicant in the
15 courtroom and also that communication with his
16 client was also of concern. The trial Judge
17 confirmed with counsel that he was able to
18 communicate with the applicant although it was
19 less convenient than if the screen was not
20 present.
21 Also during trial, the trial Judge advised
22 the jury when the witness testified, and later
23 again during the jury charge, about the screen
24 and advised the jury that it was a testimonial
25 aid used to help facilitate the evidence of
26 child witnesses and was something that was
27 allowed by the Criminal Code.

1 She also clearly advised the jury that the
2 use of the screen had no bearing on the guilt
3 or innocence of the applicant and also clearly
4 that it had no bearing on the credibility of
5 the witness. So the issue on appeal will
6 involve a consideration of Section 486.2(1)
7 and the use of testimonial aids in the
8 courtroom, as well as the placement of those
9 testimonial aids.
10 The importance of ensuring that witnesses
11 are able to provide their testimony in a
12 courtroom has been the subject of amendments
13 to the Criminal Code, and as recently as 2014.
14 It is considered in the public interest to
15 take steps to ensure that matters reach the
16 courtroom and decisions regarding criminal
17 charges are made in the courtroom - that
18 accused persons receive a fair trial on the
19 merits while at the same time ensuring that
20 witnesses are able to provide their evidence
21 before the trier of fact.
22 Obviously my role is not to determine the
23 outcome of the appeal, simply to consider the
24 relative strength of the appeal based on the
25 arguments that have been presented to me by
26 counsel. By the time of the appeal, counsel
27 will have the benefit of the full transcript

1 of the trial and present full arguments on the
2 issue. But in my view, the relative strength
3 of the appeal is not as strong given some of
4 the factors that I have referred to and the
5 arguments that have been presented by counsel
6 in argument the other day.
7 In the circumstances, given the
8 seriousness of the offence, the sentence of
9 imprisonment that was imposed, the
10 availability of a hearing date (albeit not the
11 soonest date) all tend toward the public
12 interest being in the enforceability of the
13 sentence that was imposed after trial rather
14 than reviewability of the decision.
15 Therefore, I am dismissing the applicant's
16 application.
17 If there is nothing else, counsel, we will
18 adjourn.
19 (ADJOURNED)
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2 Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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9 Lois Hewitt,
Court Reporter

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