IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

Respondent

- v -

KELVIN AARON LAFFERTY

Appellant

Transcript of the Bail Pending Appeal Decision delivered by The Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 9th day of November, 2018.

APPEARANCES:

Mr. B. MacPherson:	Counsel for the Crown
Ms. S. Whitecloud-Brass (agent for Ms. N. Langille):	Counsel for the Accused

(Charges under s. 271, 266 of the *Criminal Code*)

THE COURT: The Appellant was found guilty, after a trial in the Territorial Court of the Northwest Territories, of four summary conviction offences: a sexual assault and an assault alleged to have been committed on December 20th, 2016, and two assaults alleged to have been committed earlier that same month. The Appellant was sentenced in November 2017 to 18 months' imprisonment for the December 20th sexual assault; four-and-a-half months consecutive for the December 20th assault; one month concurrent and three months concurrent for the other two assaults. The total sentence imposed adds up to 22-and-a-half months.

The Appellant filed his own Notice of Appeal of conviction and sentence in December 2017. He is now represented by counsel. That counsel filed another Notice of Appeal in October 2018. Counsel also filed this application for bail pending appeal, which was heard last week.

Although technically, the custodial portion of the sentence will run until the fall of 2019, I was advised, at the hearing of the appeal, that the Appellant's current expected release date is March 2nd, 2019. This is because serving prisoners are usually entitled to early release and to serve a portion of their jail term out of

custody.

The Appellant emphasized, at the hearing of the application, that he has already served a large portion of the time he will spend in custody on this sentence and that, unless he is released pending appeal, his appeal, even if ultimately successful, will have been rendered meaningless.

To fully understand this position, it is important to refer to how the Trial Judge chose to address the credit to be given to the Appellant for his pretrial custody. In her decision, she said that, but for the remand time, the total sentence would have been a total of 28 months distributed as follows: 18 months on the sexual assault, 6 months consecutive on the December 20th assault, one month consecutive and three months consecutive on the two other assaults. The Trial Judge said she would give the Appellant five-and-a-half months' credit for his pretrial custody.

It seems clear from this that making the last two sentences concurrent was part of how she chose to achieve this. By doing so, she reduced the overall duration of the sentence by four months because she reduced the sentence on the December 20th assault by one-and-a-half months.

This adds up to the total five-and-a-half months' credit she said she would give for pretrial custody.

The relevance of this, in the context of this application, is that the Appellant asserts that his ground of appeal from conviction on the two early December assault charges have a very high chance of success. He argues that, had he not been convicted of those charges, the sentences for the December 20th events would have had to be reduced by four more months to give effect to the credit for pretrial custody. And, if that were the case, he would now already be eligible for early release or very close to it.

The Crown does not dispute this math or the Appellant's calculation and interpretation of how the Trial Judge proceeded to apply credit for his remand time, but the Crown does oppose the Appellant's application for release and disagrees with the assertion that the grounds of appeal regarding the early December assaults are compelling.

I will provide a brief overview of the trial. This is not a decision on the merits of the appeal, and I will not refer to all of the evidence and submissions that are part of the transcripts that have been filed to date. I will

refer to the evidence in general terms, though, because, under the legal framework that I must apply, the strength of the appeal is relevant; and it is, therefore, unavoidable for me to refer to the evidence and issues, at least in general terms.

A crucial piece of evidence for the Crown at this trial was a sworn out-of-court statement given to the police by B.E., who was the named victim on all four counts. The trial had initially been scheduled to proceed on May 24th. The complainant, although served with a subpoena, did not appear. A warrant was issued for her arrest. That warrant was executed, and she was brought to court on May 26th as the sittings in Behchoko were still ongoing.

On that date, the Appellant fired his counsel; and, because he wanted another counsel to assist him on the matter, the trial was adjourned to July 5 to permit another lawyer to become familiar with the file and assist the Appellant. The complainant was released on a recognizance to appear on the new trial date.

On July 5th, she did not appear. The Crown signalled its intention to proceed without her. The Crown called the investigating officer and, during his evidence, began a voir dire into the

admissibility of the statement that the officer took from B.E.

The evidence considered at the voir dire included the evidence from the police officer who took the statement, the video-recorded statement itself, photographs taken by the officer at the scene where the December 20th events were alleged to have taken place, photos showing B.E.'s injuries at the time the officer dealt with her. I should add that this out-of-court statement was taken on December 20th.

The transcript of B.E.'s statement was filed as part of the Appellant's materials on this application, and I have reviewed it. In that statement, she describes the Appellant beating her up on the day in question; digitally penetrating her vagina with his finger to find out, apparently, if she had been with another man. She also says he bit her on the face on her nose hard enough to cause significant bleeding. She describes using a bed sheet to try to stop this bleeding. During the course of that interview, she also disclosed two other assaults, less serious, that the Appellant committed earlier that month a few weeks before.

The Trial Judge found that the statement met the requirements for admissibility under the

principled exception to the admissibility of hearsay under the legal framework developed by the Supreme Court of Canada. The admissibility of the statement is one of the issues that will have to be decided on this appeal.

As part of its case on the trial, the Crown also filed an Agreed Statement of Facts that covered various communications that had taken place between B.E. and the Crown's office in the several months leading up to the trial. In these communications, B.E. expressed different things at different times about the matter. At times, she said she did not want to proceed and expressed that in different ways. Other times, she said she would cooperate with the Crown but was nervous. At times, she said she lied to the police out of jealousy.

The trial continued. The Defence called a number of witnesses to testify about events surrounding B.E.'s lack of attendance at trial. The Defence then asked for an adjournment and indicated it intended to call B.E. herself. The continuation of this trial was adjourned to a later date; and, on that date, the Defence did call B.E.

In her trial testimony, she recanted entirely from what she had told the police

officer in her video statement. She said she lied about everything because she was jealous and mad at the Appellant.

The Trial Judge rejected B.E.'s in-court testimony. She gave reasons for doing so, which included the implausibility of the account of how she sustained her injury; the fact that she minimized the injury she sustained; and that her description of it was inconsistent with the observations of the police officers, as well as what appeared to be blood at the scene where this was said to have happened.

The Trial Judge concluded that B.E. was clearly lying in her trial evidence; and that conclusion, as I said, was based on the fact that some of the things she testified to were in direct contradiction with other evidence, including photographs and the evidence from the police officer.

The Trial Judge then considered the ultimate reliability of the out-of-court statement and concluded that the statement was reliable. She accepted it as true and found the Appellant guilty on the four charges.

In the Notice of Appeal filed in October, the Appellant challenges his conviction on a number of grounds. He says, first, that the

out-of-court statement should not have been admitted because the Crown failed to establish necessity.

Second, even if necessity was established, he argues that there was no evidence demonstrating threshold reliability on the sworn statement insofar as the two early December assaults were concerned. For that reason, the Appellant argues the statement should not have been admitted to prove those two assaults.

The Appellant further alleges that the verdicts were unreasonable in that the Trial Judge should have been left with a reasonable doubt in the face of two contradictory versions, both under oath, given by B.E. about the December 20 events. The Appellant alleges that the Trial Judge did not sufficiently explain, in her reasons, why she was not left with a reasonable doubt.

The Appellant also challenges the sentences that were imposed. He argues that the Trial Judge erred in imposing consecutive sentences for the two December 20th offences and that, overall, the sentences were unfit.

To succeed on this application, the Appellant must establish, on a balance of probabilities, that the appeal is not frivolous,

that he will surrender himself into custody as directed, and that his detention is not necessary in the public interest.

It is well established in law that, in this context, non-frivolousness is a very low threshold. The Crown concedes this criterion is met. The Crown also concedes that the second criterion is met, and rightfully so, in my view. The Appellant has presented a solid plan that involves sureties. His ties are with this jurisdiction. And I am confident that, if required to surrender himself into custody, he would do so.

What is at issue is the third criterion. I heard this application last week right around the time as I heard a similar application in *R v Betsidea.* Counsel were the same on the two matters.

In both cases, I heard submissions about this part of the legal framework and, in particular, the impact of the Supreme Court of Canada decision in *R. v. Oland* on the analysis of whether an Appellant's detention is necessary in the public interest.

Earlier this afternoon, I outlined my analysis and conclusions on this issue in rendering my decision on *R v Betsidea,* 2018

NWTCA 10. I adopt what I said in that case for the purposes of this case. I am not going to repeat it all. For the more detailed analysis, reference can be made to that decision.

But to summarize, I do not agree with the Appellant's interpretation of *Oland*. In my view, while that case provided additional clarifications about how to interpret the third criterion that is to be considered on bail pending appeal, it has not transformed the analysis to the point suggested by the Appellant.

The framework, outlined many years ago by the Ontario Court of Appeal in *R. v. Farinacci,* was endorsed in *Oland;* and, under that framework, public interest involves two components: public safety and public confidence. The Court said in *Oland* that these two are not to be treated as silos. The public confidence branch of the test involves a balancing of two competing elements, reviewability and enforceability. It is informed, with the necessary adaptations, by how that concept operates in the context of pretrial bail when the tertiary ground is raised.

On the public safety analysis, the seriousness of the offence is a factor and so is the criminal record when there is one.

As for the public confidence branch, *Oland*

clarified the role that the strength of the appeal plays when examining it. The question that must be asked is whether the grounds of appeal clearly surpass the non-frivolous threshold.

I reject, for the reasons I gave in *R v Betsidea*, that the public confidence branch of the test is engaged only in the most serious cases, such as murder. The framework applies to all offences. All of these things must be carefully considered and weighed.

I now turn to the application of this framework to the circumstances of this case. Dealing first with the public safety branch of the test, the Appellant has argued that his release pending appeal does not raise any public safety concerns, pointing out that, one way or another, he will be released in the spring, which is not that far away.

With the greatest of respect, if this was a proper consideration when analyzing public safety, anyone serving a sentence that is not extremely lengthy would almost automatically be released on bail pending appeal. That is not my understanding of how the framework is supposed to work.

The Appellant's criminal record is relevant

to public safety. This is not an innocuous record. He has a conviction for aggravated assault, where B.E. was the victim. On that occasion, he injured her very seriously by biting her nose. She required surgery to repair the damage done. The sentence imposed was 21 months followed by probation for two years, which included a no-contact condition with respect to her. That probation order was in effect in December 2016, and he has now been convicted of four additional crimes of violence against her, including two very serious ones.

The Appellant has other convictions for crimes of violence, including three convictions for violence on other women. He has a number of convictions for breach of court orders.

Another consideration, when examining public safety, is the seriousness of the offence. In *Oland,* the Supreme Court said that, in considering that fact, the appellate court have the benefit of the Trial Judge's assessment of the seriousness of the matter and should not repeat that exercise.

The Trial Judge, in this case, clearly found the December 20th incidents to be serious, as is reflected in the sentence she imposed. It is difficult to disagree even if I was to reweigh

this aspect. The sexual assault was extremely intrusive. A sexual assault that involves digital penetration is not a minor sexual assault. Those types of allegations are sometimes proceeded with by Indictment.

Proceeding summarily reduces the jeopardy of an accused and has procedural effects, but it does not fundamentally change the nature of the alleged behaviour. The apparent reason behind the conduct, to determine if B.E. had been intimate with someone else, is aggravating.

As for the assault, by biting her face, that is serious to begin with, but it is rendered even more serious given the context and the 2015 conviction for aggravated assault on her, which involved similar conduct, albeit, with far more serious consequences.

Admittedly, the two earlier assaults were not, standing alone, as serious; but, in the overall context of the other incidents and the criminal record, they are not insignificant either. They are part of a pattern of violent behaviour in the context of a domestic relationship.

In my view, there are public safety concerns that emerge from this. That the release plan is solid enough to ensure that the Appellant will

not flee and will surrender himself in custody is one thing. That it can ensure that the public and B.E. will be safe because the Appellant will comply with his release terms is quite another, given his track record for lack of compliance with court orders. I would add that, given the other convictions for assaultive behaviour against other women, B.E.'s safety is not the sole consideration under the public safety branch of the test. The Appellant has taken steps to address some of his issues while in custody, and that is a very positive thing; but it does not, in and of itself, eliminate public safety concerns.

Turning to the public confidence branch of the test, this requires consideration of reviewability and enforceability. For reasons that I am not aware of, this appeal has been pending for a long time. That is very unfortunate. This appeal is not overly complex. The procedural history of the trial was a bit convoluted, that much is true, but the transcripts are not lengthy. This appeal could probably be heard in half a day, a day at most. The Court could have accommodated it much earlier this year if it had been ready to proceed.

Unfortunately, the Appellant's counsel has

now left the jurisdiction; but hopefully, if other counsel are assigned quickly, there is no reason this could not be heard before the end of this year.

The delay raises reviewability concerns because the Appellant has served several months of his sentence, and his anticipated release date is in March. An Appellant who appears to have a strong chance of success on an appeal should not be forced to serve his or her entire sentence before having an opportunity to challenge the trial decision. That is detrimental for the public's confidence in the administration of justice. This is why the strength of the appeal takes on particular importance. If an Appellant appears to have a strong chance of success on the appeal, concerns about reviewability become even more pressing. They are less pressing when the grounds of appeal appear weak.

The distinction was made during submissions about enforceability and immediate enforceability. The Appellant's counsel noted that the Appellant's release pending appeal does not jeopardize enforceability per se because, if his appeal fails, the sentence will be enforced as he will have to return to custody to serve the rest of it.

Again, with respect, under that line of reasoning, there would never be any reason to be concerned about enforceability at the bail pending appeal stage. It is usually the case that, if an appeal fails and a person has been granted bail pending appeal, the balance of the sentence has to be served. Although it is true that sometimes, if there has been a long passage of time, appellate courts may be reluctant to order an offender to return to custody if that offender has been at large for a period of time.

So, with respect for the contrary view, I think, when one speaks of enforceability concerns in the context of bail pending appeal, it has to mean continued immediate enforceability; otherwise, it would rarely have any impact in the analysis.

As far as the strength of the appeal, it is not my role to determine the merits of the appeal, but I am required, by the directions in *Oland,* to take a closer, more pointed look at the grounds.

Dealing first with the admissibility of the sworn statement: On the issue of whether the statement was admissible, the standard of review will be correctness, but a deferential standard of review will apply to the Trial Judge's factual

findings that underlay her ultimate decision on admissibility.

In the decision on the voir dire, the Trial Judge explained why she concluded that necessity was made out. She went over the facts that were known to her; the procedural history of the matter; B.E.'s earlier failure to attend; the issuance of the witness warrant; her arrest; and her failure to return, despite being bound by a recognizance to return to testify at the July trial date.

The Trial Judge also addressed the issue of the Crown not having sought a second witness warrant. The failure, by the Crown, to ask for a second witness warrant is not determinative because necessity refers to the unavailability of the evidence, not just the unavailability of the witness.

The Trial Judge concluded that B.E. did not want to be found, that her testimony was not available to the Crown. That assessment will be given deference on appeal. In fact, the unfolding of events demonstrated that the Trial Judge's assessment was entirely correct.

B.E. eventually did make herself available to the Defence and testified that her earlier statement was false. So, had a witness warrant

been obtained, executed, and had B.E. been brought before the Court in July and called by the Crown, the result might have been the same. The Crown would have had to make a KGB application and seek to use her out-of-court statement for its truth. The narrative of events that B.E. provided in her statement to police was simply not available to the Crown at this trial.

I am of the view that the ground of appeal based on errors in the assessment of necessity does not clearly surpass the non-frivolous threshold. The other ground dealing with the admissibility of the statement, as far as proving the earlier assaults, is very interesting. I am not convinced it is as compelling as the Appellant says it is.

In effect the Appellant argues that, in considering threshold reliability on the statement, the Trial Judge was required to examine that issue separately for each of the offences disclosed by the statement.

The Appellant concedes that there was evidence that corroborated the statement with respect to the December 20th incident and does not raise any threshold reliability concerns in that regard. But he argues that, as there was no corroboration and few details about the earlier

assaults, threshold reliability was not established and that those parts of the statement should not have been admissible.

The Appellant has not provided any case law that supports the notion that threshold reliability must be approached in this piecemeal manner, as opposed to looking at the statement as a whole. I am not aware of any case where a threshold reliability has been analyzed in this fashion. This was not raised in any way at trial. Counsel appear to have treated the issue at trial as a threshold reliability of the statement as a whole without any attempt to distinguish between the different allegations in it.

For my part, it seems to me that, once the Trial Judge was satisfied that the statement met the threshold reliability requirements and could be admitted to be considered for its truth, that made all aspects of the statement admissible, except if there were parts of it that were otherwise inadmissible, because the principled exception to the inadmissibility of hearsay cannot be used as a vehicle to introduce evidence that would otherwise be inadmissible. So the absence of corroborative evidence about the earlier assaults, in my view, would be relevant

to ultimate reliability only.

In summary, although the appellate court will no doubt have the benefit of much more detailed submissions and more in-depth consideration of this issue at the hearing of the appeal itself, at this stage, I do not find this ground compelling. For that reason, I do not find the whole issue of how the credit for the remand time was dealt with to be significant for the purposes of this application.

Before I turn to the other grounds of appeal, I would note that, in this case, because B.E. ultimately did testify at this trial, one of the main concerns about admitting out-of-court statements was not present. The trier of fact did have the opportunity to hear directly from her about the events and assess her credibility.

The Appellant's unreasonable verdict ground appears to be based on the premise that the Trial Judge should necessarily have had a reasonable doubt because she was faced with two conflicting sworn versions of events from the same witness. This, in my respectful view, is a flawed argument because that is always the case when a KGB application is successful. Whether in the context of a domestic violence or otherwise, the KGB procedure necessarily means that a witness'

in-court testimony contradicts an earlier sworn statement. There would be little point for the law to have the KGB legal framework if out-of-court statements admitted in a recantation situation, in all cases, could not form the basis for a conviction.

The Trial Judge had the benefit of seeing both the statement and the in-court testimony. She found one lacked credibility and the other was convincing. She considered the corroborative evidence of the police officer, including the evidence of the injuries observed at the time the statement was taken and observations made at the scene. She considered the overall context, that this was occurring in the context of a domestic relationship.

The Appellant challenges, and it is his right, the Trial Judge's assessment of this evidence. He will be asking the appellate court to reweigh the evidence. These types of challenges to a Trial Judge's assessment of credibility are reviewed on a very deferential standard. This, in my view, is not a strong ground of appeal, and it does not clearly surpass the non-frivolousness threshold.

With respect to sufficiency of reasons, the Trial Judge went into a detailed analysis of

B.E.'s testimony. She explained why she rejected it. She also went into a detailed analysis of the sworn statement, the evidence about the circumstances leading up to and during these convoluted proceedings. The Appellant disagrees with the Trial Judge's conclusions, obviously, but, in my view, stands on very shaky ground on a sufficiency of reasons argument. The reasoning path of the Trial Judge in this case is clear. By the time all the evidence had been called, the central issue for the Trial Judge was the conflict between B.E.'s in-court testimony and B.E.'s out-of-court statement. The Trial Judge addressed both.

In my view, a ground of appeal based on sufficiency of reasons, if not squarely frivolous, is barely over the bar, at least considering the materials before me at this time.

As for the sentence appeal, if the conviction appeal fails, given the very high deferential standard of review that applies on appeal, the Appellant's criminal record and the overall circumstances, in my view, it has minimal chances of success.

I am not satisfied that the Appellant should be released. He has not satisfied me that his detention is not necessary in the public

interest. What needs to happen on this case is this appeal needs to be heard.

Summary conviction appeals can be scheduled fairly easily in this Court. I am not in a position to give specific directions because of the change in representation for the Appellant. I will say, again, that, if it has not been done already, it is imperative that this matter be reassigned immediately. I am prepared to hold the Crown to tight filing deadlines with a view of ensuring that this matter be heard as quickly as possible. It should be heard before the end of this year. It really should have been heard by now. There is no reason why a summary conviction appeal cannot be heard on a much more timely basis. I will not say more about this because again, I do not know the reasons why this one took so long; but, since a similar issue arose in the *Betsidea*, matter, I will simply say that I hope that whatever processes are at play will be looked at so that, in conviction appeals, especially summary conviction ones, but conviction appeals in general, can be heard more quickly.

And I will say one last thing similar to what I said on the earlier case: Given my obligation to examine, to an extent, the strength

of the appeal and given the comments that I have made, I will not hear this appeal, so that again, the Appellant has the benefit of someone who, a) has not expressed views on this; and, b) can consider the matter completely afresh.

I really hope, counsel, that materials can be filed and that we can get this on before the Christmas closure, under all the circumstances. But I will say no more because I am not in a position to impose anything on someone who is not here.

THE COURT CLERK: Thank you. All rise. Court is now adjourned.

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing transcribed pages are a complete and accurate transcript of the digitally recorded proceedings taken herein to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 5th day of December, 2018.

Certified Pursuant to Rule 723
Of the Rules of Court

Janet Belma, CSR(A), B.Ed.
Court Transcriber