COURT OF APPEAL FOR YUKON

Citation: *R. v. Joe*
2017 YKCA 1

Date: 20170123
Docket: 16-YU781; 16-YU788

Between:

Regina

Respondent

And

Arthur Frankie Joe

Applicant

Before: The Honourable Madam Justice L.A. Charbonneau
(In Chambers)

On appeal from: an order of the Yukon Territorial Court, dated April 26, 2016 (*R. v. Joe,* Whitehorse Docket No. 14-00459)

Reasons for Judgment

Counsel for the Applicant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon November 17, 2016
Place and Date of Oral Judgment:	Whitehorse, Yukon November 17, 2016
Place and Date of Reasons	Yellowknife, Northwest Territories January 23, 2017

I) INTRODUCTION

[1] On November 17, 2016, I presided over a hearing concerning the Appellant's bail status pending the hearing of his appeals. At the conclusion of the hearing I ordered the Appellant's release on a Recognizance with a number of conditions and said that written Reasons would follow. These are those Reasons.

[2] The Appellant was sentenced on April 22, 2016 for three offenses. The first was a refusal to provide a breath sample that occurred in January 2014. The Appellant pleaded guilty to that offence. The second offence was for having been in the care and control of a motor vehicle while having a concentration of alcohol in his blood that exceeded the legal limit. The events leading to the charge occurred in October 2014. On that charge, the Appellant was found guilty after trial. The third offence was a breach of undertaking which arose from the October 2014 events. The Appellant pleaded guilty to that charge.

[3] The Appellant was sentenced to a global sentence of 43 months imprisonment for the first two charges and to 5 additional days of imprisonment for the breach charge.

[4] The Appellant has appealed his conviction on the care and control charge, and his sentence. He applied for bail pending appeal. After a hearing held on October 5, 2016, Smith J.A. released the Appellant on a Recognizance with a number of conditions, and with his spouse, Doris Martin, acting as a surety. One of the conditions of the Recognizance was that the Appellant not possess or consume alcohol.

II) REVOCATION OF THE OCTOBER 5TH RECOGNIZANCE

[5] On November 15, 2016, the Crown filed a Notice of Hearing for Revocation of Bail. The Notice sets out the following circumstances:

> 1. On Tuesday November 8th 2016, Crown counsel was contacted by the Yukon Court of Appeal Registrar, Sharon Kerr, who notified the Crown that Doris Martin had attended the Registry seeking to be relieved of her responsibilities as a surety named in the recognizance of the Respondent, Arthur Joe.

> 2. No warrant was issued at that time, however Crown counsel notified the RCMP Whitehorse detachment and recommended further investigation to determine Mr. Joe's circumstances and the reasons behind Ms. Martin's decision to revoke her participation in Mr. Joe's recognizance.
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> 3. On Thursday November 10th, at approximately 6:40p.m. the Whitehorse RCMP were called by Ms. Martin to her apartment at #11-606 Main Street, Whitehorse, to respond to her complaint that Mr. Joe was present there, that he was intoxicated and causing a disturbance and that she wanted him removed.
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> 4. RCMP Constables Tower and Vanasse attended the apartment and located Mr. Joe seated hunched-over in the living room. Mr. Joe had flushed cheeks and red glossy eyes. Between Mr. Joe's feet was a 2/3 empty 750 ml bottle of Private Stock sherry which Ms. Martin said belonged to Mr. Joe. The arresting officers formed the opinion that Mr. Joe was intoxicated by alcohol and placed him under arrest.
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> 5. Mr. Joe was unable to stand on his own and required assistance form [sic] the police to do so. Once on his feet Mr. Joe began yelling at the arresting officers and raised his fist to Cst. Vanasse, at which time Mr. Joe was handcuffed and taken under arrest to the Adult Processing Unit where he was provided access to legal counsel.
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> *Notice of Application for Revocation Hearing filed November 15, 2016.*

[6] The Appellant was charged with a breach of recognizance as a result of these events. When the hearing before me proceeded, that charge was still before the Territorial Court and no plea had been entered. However, the Appellant's counsel candidly acknowledged that there did not appear to be a viable defence to that charge. The Appellant effectively conceded that he breached the October 5, 2016 Recognizance and that it should be cancelled. The issue for me to decide was whether the Appellant should be released again on a new Recognizance.

III) THE APPELLANT'S APPLICATION FOR RELEASE

1. The Appellant's present circumstances and release plan

[7] The Appellant's counsel explained some of the things that happened after the Appellant was released by Smith J.A., and in particular, the circumstances that appear to have triggered his relapse into drinking.

[8] The Appellant's plan had been to spend most of his time working at a property he owns, situated a half hour outside of Whitehorse. He is building a cabin and a

camp on that property, with a view of eventually running a healing camp for residential school survivors. At the time of his release, his intention was to go there and continue his work, and also pursue some of his artistic activities there. At that point, the Appellant believed he could maintain sobriety and deal with his personal issues on his own.

[9] Unfortunately, when he arrived at his property, he discovered that the cabin had been broken into and some of the materials and equipment stored on the site had been stolen. This, obviously, was distressing to him. The Appellant identifies this as the cause of his relapse.

[10] According to his counsel, the Appellant now realizes that he needs significant help to address his issues, including his addiction to alcohol, and he is prepared to take the necessary steps to access that help. The Appellant wants to attend the Tsow-Tun-Le-Lum Substance Abuse Treatment Centre in British Columbia. Counsel advised that there are people in the community who are willing to assist and support the Appellant in his efforts.

[11] The Crown did not insist on having the information presented by counsel confirmed by the Appellant under oath. I took this to mean that as far as the Appellant's circumstances, the things that his counsel told the Court were not particularly controversial.

[12] In addition to the information put forward by his counsel, the Appellant called two witnesses at the hearing. The first was Mark Stevens, who is employed with the Kwanlin Dun First Nation as a Justice Support Worker. Mr. Stevens wrote the Gladue report prepared for the Appellant's sentencing. The second was Ms. Martin.

[13] Mr. Stevens is familiar with the Tsow-Tun-Le-Lum centre. He explained that the screening process that applicants must go through before they can be admitted to the facility is very rigorous. A person seeking to be admitted to that center must demonstrate a strong level of commitment and the screening process involves a number of interviews. Mr. Stevens explained that the staff at the Kwanlin Dun Health

Centre assist people who are going through this application and screening process. These services are available to the Appellant even though he is not a member of the Kwanlin Dun First Nation.

[14] Mr. Stevens also testified about other counselling services and supports that would be available to the Appellant through the Jackson Lake Wellness Treatment Facility. That is a local treatment center that offers residential treatment at some points during the year. There is no residential treatment program running at this time but the facility has an outreach team of service providers who, according to Mr. Stevens, are highly qualified to assist individuals who are trying to address issues of trauma and serious addiction. That resource would be available to the Appellant between his release and his admission to Tsow-Tun-Le-Lum.

[15] Mr. Stevens was cross-examined about the Appellant's overall attitude towards the justice system. He agrees that the Appellant has a defiant attitude towards the "white" justice system. Mr. Stevens acknowledged writing in the Gladue report that the Appellant has a "deep-rooted hatred of police and justice system". It was suggested to Mr. Stevens that the Appellant does not respect the court or the justice system. Mr. Stevens answered that he would not go that far, but that he thinks the Appellant considers that the justice system is not flexible enough or rehabilitative enough. Mr. Stevens added that he does not find the Appellant's attitude or views difficult to understand, given some of his life experiences, including those at residential school.

[16] Ms. Martin testified about why she asked to be relieved of her responsibilities as a surety, and why she was now saying she was prepared to act in that capacity for the Appellant again.

[17] I understood from Ms. Martin’s evidence that the main reason why she reported the Appellant's actions was that she became concerned about the effect that heavy drinking could have on his health because he is a diabetic. She was also concerned about the possibility of being evicted from her apartment because the owners do not tolerate intoxicated people coming in and out of the building.

[18] Ms. Martin said that she was prepared to be a surety for the Appellant again if he pursues treatment. She testified about his artistic abilities, how he has supported her financially, and how he has helped her, in the past, to maintain her own sobriety.

[19] On cross-examination Ms. Martin acknowledged that she was aware that the Appellant was consuming alcohol for some time before she decided to take action. She said that once she realized the Appellant was drinking again, she told him he was not supposed to drink. The Appellant, according to her, responded that he was aware of that. She was asked if she told him she would turn him in. She said that she did not at first, but eventually mentioned to him a couple of times that she might have to. She says he did not take her seriously.

[20] Ms. Martin acknowledged that the Appellant tends to get aggressive when he drinks, mostly against law and authority. But she maintained that he was not aggressive towards her during this last period when he was drinking, and that she had not been concerned for her safety.

2. The position of the parties

[21] The Appellant argues that his detention pending the hearing of his appeal is not necessary. He asks to be released on a further Recognizance, with Ms. Martin acting once again as a surety, and with conditions geared towards supporting his efforts to access treatment and counselling for his alcohol addiction and other issues.

[22] The Appellant argues that despite the events that led to the cancellation of the October 5th Recognizance, the previous release plan was a success because Ms. Martin eventually did contact the authorities to report the breach. This, he argues, shows that she is willing and able to discharge her responsibilities as a surety.

[23] The Crown opposes the Appellant's release. It argues that effectively, the proposed release plan is the same as the one advanced in October. The Crown takes issue with the Appellant's position that this plan was a success. The Crown

argues that on the contrary, Ms. Martin's response to the Appellant's blatant breach of his Recognizance demonstrates that she is not strong enough to act as a reliable surety for him. The Crown notes that the Appellant's criminal record includes convictions for assaults on Ms. Martin.

[24] The Crown further argues that in all the circumstances, and given the Appellant's extensive criminal record for drinking and driving offenses, releasing him again under these circumstances would severely undermine the public's confidence in the administration of justice.

IV) ANALYSIS

1. Legal Framework

[25] Section 679 of the *Criminal Code* sets out the circumstances when an appellant may be released pending the hearing or his or her appeal. The test to be met depends on whether the appeal is from conviction or from sentence:

> 679. (...)
>
> (3) In the case of [a conviction appeal], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> (a) the appeal or application for leave to appeal is not frivolous;
>
> (b) he will surrender himself into custody in accordance with the terms of the order; and
>
> (c) his detention is not necessary in the public interest.
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> (4) In the case of [a sentence appeal], the judge of the court of appeal may order that the appellant be released pending the hearing of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
>
> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
>
> (b) he will surrender himself into custody in accordance with the terms of the order; and
>
> (c) his detention is not necessary in the public interest.
>
> (...)

Criminal Code, R.S.C. 1985, c. C-46, Subsections 679(3) and (4).

[26] Section 525 of the *Criminal Code* is also relevant to the Appellant's application. Subsections 525(5) and (6) deal, in the context of pre-trial bail, with the issuance of an arrest warrant, or the arrest without a warrant, of a person who is believed, on reasonable grounds, to have breached a term of release. Subsection 525(7) addresses the powers of the court after such a person has been arrested:

> 525 (...)
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> (7) A judge before whom an accused is taken pursuant to a warrant issued under subsection (5) or pursuant to subsection (6) may, where the accused shows cause why his detention in custody is not justified within the meaning of subsection 515(10), order that the accused be released on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions, described in subsection 515(4), as the judge considers desirable.
>
> (...)
>
> *Criminal Code, supra,* Subsection 525(7).

[27] Section 679 incorporates these provisions, by reference, to the bail pending appeal context:

> 679 (...)
>
> (6) The provisions of subsections 525(5), (6) and (7) apply with such modifications as the circumstances require to a person who has been released from custody under (...) this section.
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> *Criminal Code, supra,* Subsection 679(6).

[28] It was suggested at the hearing that the Appellant's current application for release should be analyzed in light of the three grounds for detention set out at subsection 515(10) of the *Criminal Code*, because of the reference to that provision in subsection 525(7). With the greatest of respect, I disagree with this interpretation of how subsection 525(7) operates in the context of bail pending appeal.

[29] The grounds for detention set out at subsection 515(10) apply in the context of pre-trial bail. Section 525 is part of the statutory scheme that deals with pre-trial bail. It makes sense that following a revocation of bail at the pre-trial stage, the

decision as to whether an accused should be released again would be based on an examination of the grounds for detention that are set out at Subsection 515(10).

[30] But bail pending appeal engages different considerations, and is governed by different factors, as noted above at Paragraph 25. In my view, it would be incongruous to have the factors set out at section 679 apply at an appellant's initial application for bail pending appeal, and then, in the event of a breach, revert to the pre-trial bail framework in deciding whether that appellant should be released again pending the hearing of the appeal.

[31] Subsection 679(6) incorporates subsection 525(7) by reference, but the wording of the provision includes an important *caveat*: subsection 525(7) applies "with such modifications as the circumstances require". In my view, one modification that the circumstances require is that in deciding whether an appellant can be released again, the factors to be considered are those set out at subsections 679(3) and 679(4) as opposed to the grounds listed at subsection 515(10).

2. Application of legal framework to the facts

[32] Smith J.A. concluded, on October 5, 2016, that the Appellant met the conditions for release pending appeal, having regard to the factors set out at section 679 of the Criminal Code. The issue on this application is whether he still does. The answer to that question requires careful consideration of the circumstances that were before Smith J.A., and of what has transpired since then.

[33] Many of the factors to be considered on this application were known to Smith J.A. when she made her decision. For example, the Appellant's criminal record, his numerous convictions for drinking and driving offenses, and his convictions for assault on Ms. Martin, were all before Smith J.A. So was the information about the Appellant's hostile attitude towards the police, authority, and the justice system. These things were outlined in the Gladue report authored by Mr. Stevens, which was part of the record on the initial application for release.

[34] As well, this Court's decision in *R. v. Donnessey* [1990] Y.J. No.138, which the Crown referred to in submissions before me, was brought to Smith J.A.'s attention.

[35] Despite these things, Smith J.A. concluded that it was appropriate to release the Appellant on a recognizance with Ms. Martin as a surety. As I see it, the only issue on the present application is whether the intervening events justify arriving at a different conclusion, having regard to the factors set out at section 679.

[36] The first factor pertains to the Appellant surrendering himself into custody. The events that occurred since Smith J.A.'s decision have no bearing on that factor.

[37] The second factor relates to the merits of the appeal. This factor was addressed in some detail by Smith J.A.

[38] Although she did not go as far as to characterize the conviction appeal as being frivolous, she did not consider it to be a strong one:

> Mr. Joe appeals his conviction for the October 2014 s. 253(b) offence on the grounds that the verdict was unreasonable. He maintains his innocence and that he was not the driver. However, in my limited assessment as a chambers judge, his appeal from conviction is not a strong one. There appears to be evidence to support the judge's finding that Mr. Joe was in care and control of his vehicle while having a blood alcohol reading of over .08. The judge articulated reasons why he rejected Mr. Joe and his friend Ms. O'Brien's evidence that he was not driving. The key finding of fact by the judge on this issue came from the testimony of the police officer who attended the scene. The officer said that when he told Mr. Joe that Ms. O'Brien had advised him that he had been driving, Mr. Joe responded "ah shit". The judge accepted this evidence.
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> *Oral Reasons for Judgment dated October 5, 2016, para 11.*

[39] However, she did not view the sentence appeal in the same light

> Mr. Joe also appeals his sentence. In my assessment he stands on much firmer ground in that appeal. He submits that the judge erred in principle in numerous respects and those errors caused the judge to impose an unfit sentence.
>
> (...)
>
> *Oral Reasons for Judgment dated October 5, 2016, para 12.*

[40] She referred to the Appellant's background, as outlined in the Gladue report prepared for the sentencing. She then said:

> As can be seen from this short review of Mr. Joe's background, there are significant Gladue factors related to his offending. While some were acknowledged by the judge, they appear to have been given little or no weight in determining the extent of Mr. Joe's moral blameworthiness for the offence. It would seem that Mr. Joe's lengthy criminal record, which includes at least 12 prior-related offenses and four driving offenses while disqualified, overwhelmed the judge's analysis.
>
> (...)
>
> In my view Mr. Joe has an arguable sentence appeal that has a reasonable chance of success.
>
> (...)
>
> *Oral Reasons for Judgment dated October 5, 2016, paras 16 and 19.*

[41] The events that led to the revocation of the Appellant's bail have no bearing on the assessment of the merits of his appeal.

[42] The third factor to be considered is the public interest. The Appellant's failure to comply with the conditions imposed by Smith J.A., and the lack of prompt action on the part of his surety, are relevant to this criterion.

[43] In dealing with public interest, Smith J.A. said:

> This criterion requires a balancing the principle of reviewability with that of enforceability. In my view Mr. Joe's appeal from conviction is not sufficiently strong to tip the scales in favour of reviewability of that conviction. Reviewability of his sentence, however, is a different matter. It includes consideration of (i) the likelihood of further offenses occurring; (ii) Mr. Joe's prospects of rehabilitation; (iii) his criminal record and personal circumstances; (iv) his performance during pre-trial bail. I must also consider that if Mr. Joe is not granted bail he may spend more time in custody than what may be ultimately determined to be a fit sentence on appeal.
>
> Mr. Joe has now been incarcerated effectively for 28 months since his detention on the second offenses. In my view, there is merit to his sentence appeal. I am concerned that if he is denied bail he may spend more time in custody than what a division of this Court might determine to be a fit sentence.
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> *Oral Reasons for Judgment dated October 5, 2016, paras 21-22.*

[44] Public interest has two elements: the protection and safety of the public, and the maintenance of the public's confidence in the administration of justice.

Maintaining public confidence in the administration of justice involves a balancing between the enforceability of judgments and their reviewability. And when considering the public perception of the administration of justice, what matters are the views likely to be held by well-informed, fair-minded reasonable persons who represent community values. *R. v. Lohrer*, 2003 BCCA 161, paras 6-8.

[45] It is apparent from Smith J.A.'s comments that she was concerned that if the Appellant was not released, he would spend more time in custody than what his ultimate sentence might be varied to by a division of this Court. She concluded that under the circumstances, concerns about reviewability outweighed those about enforceability. The issue is whether the intervening events are such that enforceability now outweighs reviewability, when considering whether the Appellant's detention is necessary in the public interest.

[46] I do not agree with the Appellant's assertion that the October 5th release plan can be characterized as a success. Ms. Martin did eventually report to the authorities that the Appellant was not complying with his bail conditions. But she did not do this promptly. This was contrary to what she had promised to do and was required to do. Moreover, on her own evidence, when she reported the breaches, it was out of concern for the Appellant's health, and concern that his drinking could lead to an eviction from their apartment. His disobedience of this Court's order and her responsibilities as a surety do not appear to have been at the forefront of her concerns.

[47] On the other hand, this was Ms. Martin's first time being a surety. She eventually did contact the Registrar, and later the police, about the Appellant's behaviour. It is not as though she did nothing.

[48] An important component of the release plan now being proposed is for the Appellant to take steps to access a residential alcohol treatment program at the Tsow-Tun-Le-Lum Substance Abuse Treatment Centre. I heard conflicting information as to what a realistic timeline might be for this to happen. Crown counsel indicated that his understanding was that there will be a waiting period of several

months, even if the Appellant meets all the screening requirements and is accepted into the program. The Appellant's counsel said that this case has drawn attention in some circles and that this may assist the Appellant's application process to be fast tracked. The bottom line is that at the time of the hearing, there was no evidence either way, and no certainty as to when the Appellant might be able to start this residential treatment program.

[49] But whether it takes two months or four months or six months for the Appellant to actually attend the treatment center is not determinative. No one is suggesting that he can be released directly to this treatment center.

[50] The factors set out in *R. v. Mehan*, 2016 BCCA 129, para 29, are helpful in assessing the impact that the Appellant's breach of the October Recognizance has on whether his further release would be contrary to the public interest. These factors include: whether the breach is in the same class as the offence that is the subject-matter of the appeal; whether the circumstances of the breach involve a direct contravention of a specific term of release; whether the appellant has a criminal record for similar offenses as the breach; the gravity of the allegations on the breach; whether there has been difficulty with bail compliance; and whether the breach involves an allegation of violence.

[51] The offence the Appellant committed while on release was not a drinking and driving related offence, although I agree that given his criminal record, non-compliance with the no-alcohol condition raises public safety concerns. That condition was an important component of the release plan.

[52] It is also of concern that the Appellant breached his no-drinking condition so soon after he was released. In deciding to release the Appellant, Smith J.A. noted that he had "demonstrated an ability to follow the path of sobriety". She included a no-alcohol condition in the terms of release, presumably, because she was of the view that this was required to meet public interest concerns.

[53] One can empathize with the setback the Appellant experienced when he discovered that his cabin was broken into and some of his equipment was stolen. Still, he breached a condition that was a key component of his release plan.

[54] On the other hand, the Appellant did not commit another substantive offence while intoxicated. There is no evidence that he was violent or threatened public safety after he began consuming alcohol in contravention of his Recognizance. He was defiant with the arresting officers, but there is no allegation that he resisted them in any significant way.

[55] I agree that a no-drinking condition has to be part of the Appellant's release plan. Drinking alcohol is not, in and of itself, a crime. But the Appellant's long-standing pattern of choosing to drive motor vehicles when he is intoxicated gives rise to public safety concerns. Those concerns must be addressed meaningfully.

[56] It must be recognized, as part of the overall analysis, that the Appellant will eventually be released from custody, whether it is sooner, as a result of a successful sentence appeal, or later, at the expiration of the sentence that was imposed at trial. Addressing his addiction issues is an essential component not only of his own rehabilitation, but also of what is needed to protect the public against the commission of further offenses when he regains his freedom.

[57] That being so, the sooner the Appellant can access residential alcohol treatment, the better. The evidence I heard on the application suggests that here are people who are willing and able to assist him in initiating that process now. That opportunity, in my view, ought to be seized.

[58] Ultimately, the best manner for the public to be protected is if the Appellant is able to take control over his drinking and begin to address the many issues that he has in his life. He has demonstrated an ability to not drink for extended periods of time in the past, which establishes that he is capable of doing this.

[59] I am satisfied that it remains possible to release the Appellant on terms that will ensure that the public is protected and the confidence of the public in the

administration of justice is maintained. But the release terms have to be stringent and structured.

[60] The terms of release must, among other things, place an onus on the Appellant to follow through meaningfully on his stated commitment to take all the necessary steps to access residential alcohol treatment as soon as possible.

[61] In addition, the terms of release must include controls to ensure that any failure to comply with his release terms will be detected and reported to this Court promptly.

[62] One of the ways to do this is by having a surety. Ms. Martin is willing to act in that capacity again. She has testified that she now understands that she must report any breach of any of the release conditions immediately.

[63] Ms. Martin sat through the November 17, 2016 hearing. She heard the concerns that were expressed about her failure to act immediately when the Appellant stopped complying with his release terms. Whatever the case was before, this Court is entitled to expect that Ms. Martin now fully understands her responsibilities as a surety and what is at stake for her if she does not honour those responsibilities. Reporting her husband for breaching his release terms may be difficult, but that is what she is undertaking to do by agreeing to be his surety.

[64] However, given what has transpired to date, a reasonably well informed and fair-minded member of the public would have legitimate concerns if this Court were to rely only on Ms. Martin to supervise the Appellant and monitor his compliance with his release terms. Given what happened after he was released the first time, there needs to be more.

[65] The only way to achieve the level of monitoring that is required, in my view, is for the Appellant to report daily to his bail supervisor. This is a cumbersome requirement but it is necessary to ensure that this time, this Court's order is complied with and that if it is not, something will be done about it immediately.

[66] As far as the Appellant pursuing treatment, Mr. Stevens has testified that he is prepared to assist in this process. Mr. Stevens is very familiar with the Appellant. I am satisfied that he can assist him in accessing the treatment he most definitely needs in order to address his issues. I am also satisfied that both Mr. Stevens and the bail supervisor will act immediately if they get any indication that the Appellant is not complying with his release terms.

V) CONCLUSION

[67] Those were my reasons for ordering that the Appellant could be released again pending the hearing of his appeal, on the conditions listed in the Recognizance that he entered into at the conclusion of the proceedings on November 17, 2016. That Recognizance is part of the Court record and I see no need to repeat them here.

The Honourable Madam Justice L.A. Charbonneau