COURT OF APPEAL OF THE YUKON TERRITORY

Citation: *R.* v. *Boya*, 2006 YKCA 08

Date: 20060623
Docket: S.C. No. 05-YU557
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

AND:

CLARENCE DONALD BOYA

Appellant

Before: Mr. Justice L.F. Gower

Appearances:
David McWhinnie — Appearing for the Respondent
Keith Parkkari — Appearing for the Appellant

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral):

Introduction

[2] This is an application for release pending an appeal of the sentence imposed on the appellant, Mr. Boya, in the Territorial Court on February 17, 2006. The appellant had previously been found guilty following a trial of two counts of sexual assault arising on July 30, 2005, in Watson Lake, Yukon Territory. One was upon S.P., who was 13 years old at the time; the other was upon V.A., who was 20 years old. The appellant

also pled guilty to a charge of assault upon one Mr. G. Labine, arising February 15, 2005.

[3] He was sentenced by the Territorial Court judge to 21 months concurrent for each of the sexual assaults and one month consecutive for the common assault, for a total of 22 months. He was given eight months credit for the five months he spent in pre-sentence custody, resulting in a net sentence of 14 months in jail, followed by two years probation. The appellant does not take issue with the one month sentence for the common assault. However, he argues that the global sentence of 21 months for the two sexual assaults, before credit for remand time, was excessive.

[4] This application is governed by s. 679(4) of the *Criminal Code*. Under that subsection, I may consider the issue of the appellant's release if he has been granted leave to appeal pursuant to s. 679(1)(b). Pursuant to s. 675(1)(b) of the *Criminal Code*, leave to appeal against a sentence may be granted by a judge of this Court. The test for leave is that the appeal must not be frivolous and it must have a reasonable chance of success. For the reasons which follow, I am satisfied that the test has been met and I grant leave to appeal.

[5] That takes me back to s. 679(4). Under that subsection I may release the appellant pending the determination of his appeal if he 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 any release order; and

c) His detention is not necessarily in the public interest.

Does the appeal have merit?

[6] I previously held in *R*. v. *Dibbs*, 2006 YKCA 03, that the threshold for establishing the merit of a sentence appeal under s. 679(4)(a) of the *Criminal Code* is higher than that for establishing the merit of a conviction appeal under s. 679(3)(a). In general terms, the appeal should have sufficient or arguable merit. Here, the appellant's counsel says that the trial judge misapprehended the evidence on the sexual assault against S.P. The principal Crown witness on that charge was the appellant's brother-in-law, Keith McLeod.

[7] The transcript of Mr. McLeod's evidence indicates that he remembered S.P. falling asleep on a futon at Mr. McLeod's residence following a drinking party. She was fully clothed at that time. When he later entered the living room, he observed the appellant and S.P., "On the futon together," with a blanket covering them. S.P. had been lying on her back. He pulled the appellant off the futon because, "It just didn't seem right." As I said, S.P. was 13 years old at the time. He noticed S.P.'s pants were down around her ankles, however, he did not notice whether she was wearing anything else under her pants. In any event, he later told S.P. that “I pulled Donny off her that night.” He agreed that the movement on the futon under blanket was, "Pretty non-descript," and that it, "Could have just been someone rolling over."

[8] From that evidence, the trial judge concluded at trial in *R*. v. *Boya*, 2006 YKTC 68, at para. 4:

> Essentially, what Mr. McLeod says was that he was asleep, he awoke to get a drink of water, went out and looked into

> the living room where he saw that the accused, Mr. Boya, who had been sleeping on one couch, had moved over to the futon where Ms. P. was asleep, and was laying on that futon, essentially on top of Ms. P. He rushed down and pulled Mr. Boya off. As he did so, he noted that Ms. P.'s jeans were now down around her ankles.

[9] After convicting the appellant, there was an adjournment to allow for the preparation of a pre-sentence report. At the sentencing, the trial judge set out his findings of fact with respect to the sexual assault on S.P. at *R*. v. *Boya*, 2006 YKTC 22, para. 1, as follows:

> On July 30, 2005, in Watson Lake, Yukon, the offender, Donald Boya, stayed the night at the home of his sister and her partner, a Mr. [McLeod]. A number of other people also spent the night, including S.P., a 14-year-old girl who was very intoxicated and passed out on a couch in the living room of the home. During the night, Mr. Boya assaulted the girl by pulling down her pants and underwear and climbing on top of her. He was surprised by Mr. [McLeod], who pulled him off S.P.

[10] The appellant's counsel says that there is no evidence to support the finding of fact that S.P.'s underwear had been removed or pulled down. He also says there is no evidence to support the finding that the appellant was, "climbing on top of " S.P. While I suppose the trial judge could have made the latter inference from Mr. McLeod's evidence at p. 17 of the transcript, "I told her that I pulled Donny off her that night," I agree with the appellant's counsel that there is no evidence to support the finding that S.P.'s underpants had been removed.

[11] There is no dispute about the trial judge's finding regarding the other sexual assault on V.A. In that instance, after the appellant had been pulled off the futon, he apparently went into another bedroom where V.A. was sleeping and fondled her

breasts. V.A. was 20 years old at the time. She awoke, jumped up and the appellant left the room. The appellant's counsel says that both sexual assaults are in the nature of touching type assaults and should not have been compared with the sentencing precedents for sexual assaults involving full intercourse. He noted that the trial judge referred to the case of *R*. v. *G.C.S,* [1998] Y.J. No. 77, in support of the Crown's submission that the range of sentence facing the appellant was 18 to 24 months in jail.

[12] *G.C.S.* was a case involving an 18-year-old offender and a 16-year-old victim. The victim was passed out from excessive drinking and the offender forced sexual intercourse on her while she was unconscious. The offender had a prior criminal record, including an offence of assault. He was on probation at the time of the offence. He pleaded guilty and exhibited some remorse. He had been in custody for four and one half months prior to the sentencing. The Yukon Court of Appeal reduced the sentence from a term of imprisonment of two years less a day to 16 months imprisonment. The Court also referred in that case to a number of Yukon sentencing precedents with circumstances described at para. 6 as, "reasonably similar to the circumstances of the sexual assault in this case," that is, sexual intercourse. Of the eight case authorities referred to by the Court of Appeal, five resulted in jail sentences of 12 months, one of 15 months, one of 16 months jail and one of two years less a day. In addition, variable periods of probation were usually applied.

[13] The appellant's counsel submitted at the sentencing that the appropriate global sentence should have been in the range of 12 to 14 months in jail, before credit for remand time. He makes the same submission on this application. Therefore, if a sentence in that range had been imposed, after eight months credit for remand time, the

appellant would have received a net sentence of between four and six months. He has already served in excess of four months and therefore, says the appellant's counsel, he would be currently eligible for release.

[14] As for the timing of the appeal proceedings and the likely date for the hearing of this appeal, the appellant's counsel informs me that, through no fault of the appellant, he was not formally retained until May 1, 2006. To be clear, the notice of appeal was filed within time, however, I gather that there was some bureaucratic delay in confirming the retainer of the appellant's counsel. Further delay was necessitated because the appellant's counsel, due to other case commitments, was unable to deal with this matter until after the middle of June 2006. Most unfortunately, that meant that the appellant's case could not be heard when the Yukon Court of Appeal was last sitting in Whitehorse around the end of May 2006. As a result, the earliest possible date that this appeal could be heard would be some time in September 2006, in Vancouver.

[15] All this is to say that should the appellant be successful, if he is detained until the appeal is heard, his right of appeal will be rendered futile or nugatory. That in turn, I find, would cause the appellant unnecessary hardship. As I held in *R*. v. *Dibbs*, cited above, if the denial of bail will render the appeal remedy nugatory, the resulting prejudice and harm is obvious.

Will the appellant surrender himself?

[16] I next turn to whether the appellant will surrender himself into custody if released. He has sworn an affidavit proposing that he would do so prior to the hearing of this appeal. In that affidavit he also deposed to the fact that he has applied for and has

been accepted to the Yukon Adult Resource Centre operated by the Salvation Army in Whitehorse (the “ARC"). Attached to that affidavit is written confirmation from Mr. R.S. Sessford of the ARC confirming that the appellant is, "an acceptable candidate for residency," as of June 15, 2006. I take judicial notice of the fact that the ARC is essentially a halfway house facility which has strict rules regarding the comings and goings of its residents, including the provision of random samples of bodily substances for the purpose of detecting alcohol and drug consumption.

[17] The appellant also deposed that he has been taking some traditional aboriginal spiritual counselling while in custody and that he is prepared to continue doing so if released. He further swore that he is prepared to attend AA meetings, abstain from alcohol and report to a bail supervisor. Finally, he says that he is prepared to comply with all the terms of his probation order if they are incorporated into a recognizance, as well as conditions requiring him to provide random samples of bodily substances for the purpose of detecting alcohol or drug consumption.

[18] The biggest single issue in this application is the impact of Mr. Boya's criminal record, which both counsel accurately referred to as horrendous. It includes 11 assault convictions of various kinds, although, notably, no prior sexual assault convictions. It also includes 17 convictions for breaching court orders, as well as a condition for resisting arrest and one for escaping lawful custody. By my calculation, there are a total of 51 convictions over the period from 1982 to 2004. However, there is a significant gap in the appellant's criminal record from December 6, 2001, when he was convicted for a breach of probation order, to September 3, 2004, when he was convicted for assault on a peace officer.

[19] I am informed by his counsel that the reason for the gap is that the appellant moved to reside with some family relations in the community of Fort Ware in northern British Columbia. While there, the appellant was apparently able to maintain his sobriety and become involved with more traditional aboriginal pursuits. The appellant's counsel submits that Mr. Boya responds well when he is in a structured and controlled environment. He says it is only as a result of returning to the Town of Watson Lake that the appellant again became involved with alcohol abuse, which led to his conviction in 2004, as well as the assault in February 2005, and the sexual assaults in July 2005.

[20] While I do have clear concerns about the risk to the public and whether the appellant will surrender himself into custody in accordance with the terms of any release order I may make, I am prepared to give the appellant full credit for the lengthy period of sobriety following his last conviction for violating a court order in December 2001. I note that he has had no subsequent convictions for violating court orders, although I recognize that he was technically in breach of his probation order when he assaulted Mr. Labine in February 2005.

[21] Nevertheless, it is not proposed that the appellant simply be released to the street with no surrounding structure. Rather, he asks to be released to the ARC, which is a recognized facility with clear house rules and attentive staff who regularly monitor the residents. It is my understanding that there is little or no tolerance for breaches of those rules, which in turn would include compliance with the terms of any release order that a resident may be on.

[22] In addition, Whitehorse is not such a large city that someone of the appellant's notoriety would long escape the detention or detection by the Royal Canadian Mounted Police, if the appellant should unwisely violate the terms of his release. Thus, I am satisfied that the second condition has been met.

Public interest

[23] I now turn to the third condition, which is whether the appellant's detention is necessary in the public interest. Here, I must consider a variety of criteria including:

a) The strength of the case on appeal, which I find to be relatively strong;

b) The nature of the offences, which are the subject of the appeal;

c) Whether the continued detention will result in making the right of appeal futile;

d) The likely delay until the hearing of the appeal, and;

e) The appellant's criminal record and other personal circumstances, including those referred to in his affidavit.

I am also aware here that the presumption of innocence has been displaced by a presumption of guilt. However, the public interest does not always require that a convicted person be detained pending appeal. If that were the case there would be no meaning behind s. 679(4). If his appeal fails, then the appellant will be returned to custody to serve the balance of his sentence.

[24] Crown counsel relied on the case of *R*. v. *Collinson*, 2005 YKCA 01, as being similar to the case at bar. There, I denied an application for release pending appeal of drug-related convictions, notwithstanding that I had found the appeal was not frivolous.

I was concerned principally with whether the appellant would comply with the release order and whether it was in the public interest to release him. Mr. Collinson had a criminal record totalling 13 convictions from 1997 through to 2004, including three drug-related charges in 2001 and two breaches of recognizance. However, more importantly, the appellant was released on a recognizance following his initial arrest. About two weeks later he was charged and arrested for two breaches of recognizance counts. He pled guilty to one of those counts and admitted testing positive for consumption of cocaine. He was subsequently released a second time a few weeks later, only to be arrested and charged, yet again, with a further breach of recognizance. All of the alleged breaches, and the ones he pled guilty to, were related to the substantive drug offences which were the subject of the appeal. Further, I did not find that the appellant in that case had very strong grounds of appeal. For those reasons, I would distinguish *Collinson*.

[25] In summary, I find that the public interest can be satisfied by releasing the appellant on appropriately strict conditions. Mr. Boya, please stand. I order your release pending the determination of your appeal on a recognizance in the amount of $1,000 without deposit and upon the following conditions, which require you to:

1. Report immediately to the bail supervisor after your release and in the manner directed by the bail supervisor.
2. Abstain absolutely from the possession, consumption and purchase of alcohol and non-prescription drugs and submit to a breath or bodily fluids test upon demand by a peace officer or bail supervisor

or staff person at the ARC who has reason to suspect that you have failed to comply with this condition.

3. Not attend at or be within 25 metres of any business whose primary purpose is the sale of alcohol.
4. Reside at the ARC or such other place as approved by the bail supervisor. Do not change that residence without prior written permission of the bail supervisor and abide by the rules of that residence.
5. Attend an Alcoholics Anonymous meeting daily, unless you have obtained prior written permission to the contrary from your bail supervisor or a staff member at the ARC.
6. Keep the peace and be of good behaviour.
7. Appear before this Court when required to do so by the Court;
8. Remain within the jurisdiction of the Court, unless with the prior written permission of your bail supervisor.
9. Notify your bail supervisor in advance of any change in name or address or any change of employment or occupation.
10. Have no contact directly or indirectly with V.A. and S.P.
11. Attend and participate in such assessment, counselling and treatment as directed by your bail supervisor, including but not limited to, sex offender treatment and residential alcohol and drug treatment.
12. Attend for such other assessment, treatment and counselling as may be directed by your bail supervisor.

13. Surrender yourself into the custody of the RCMP in Whitehorse in a sober condition not less than 24 hours before the hearing of this appeal.

[26] Counsel, is there anything that I have omitted?

[27] MR. PARKKARI: I don't believe so, My Lord.

[28] MR. MCWHINNIE: I don't believe so, My Lord.

[29] THE COURT: Thank you.

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GOWER J.