COURT OF APPEAL

Citation: *R.* v. *Dibbs,* 2006 YKCA 03

Date: 20060419
Docket No.: S.C. No.: 05-YU553
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

STEPHEN DIBBS

APPELLANT

Before: Mr. Justice L.F. Gower

Appearances:

Michael Cozens — For the Respondent
Malcolm Campbell — For the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Dibbs has applied to be released from custody pending his sentence appeal. In October 2005, he was convicted after trial of operating a motor vehicle while his blood alcohol was over the legal limit, contrary to s. 253(b) of the *Criminal Code*. On January 17, 2006, he was sentenced to a period of imprisonment of one year, with a credit of 75 days for 50 days spent in pre-trial custody, leaving a remainder of nine and

a half months to be served. He was also prohibited from operating a motor vehicle for a period of five and a half years and placed on probation for a period of one year. He filed his Notice of Appeal on January 31, 2006. The grounds of appeal include the proposition that the trial judge erred by failing to consider the appropriateness of a curative discharge or a conditional sentence. At this hearing for release pending appeal, the appellant's counsel focused on the appropriateness of a curative discharge.

ISSUES

[2] As this is a sentence appeal only, the application for release pending appeal is governed by s. 679(4) of the *Criminal Code*. That sub-section requires the appellant to establish that:

> "(a) The appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody; [and]
>
> . . .
>
> (c) His detention is not necessary in the public interest."

These are the main issues before me.

ANALYSIS

[3] Section 679(4)(b) also requires the appellant to establish that he will surrender himself into custody in accordance with the terms of the release order. However, the respondent Crown did not seriously argue this issue, as the appellant has always attended for his appearances while on release awaiting his trial and sentencing. That was a reasonable and fair concession to make and I am satisfied that the appellant has met his onus on this criterion.

Does the appeal have sufficient merit?

[4] At the hearing before me, Crown counsel referred to my decision in *R.* v. *Collinson*, 2005 YKCA 001. However, that was an application for release pending a conviction appeal under s. 679(3) of the *Criminal Code.* In that situation, the appellant need only establish that the appeal is "not frivolous", which is a low threshold.

[5] The appellant's counsel argued that the threshold for establishing that an appeal has merit on a sentence appeal is even lower than for a conviction appeal. I questioned this submission at the hearing and was subsequently provided with additional authorities by Crown counsel, which indicate that the threshold on a sentence appeal is in fact higher than that for a conviction appeal.

[6] In *R.* v. *Ewanchuk*, 2000 ABCA 303, Berger J.A. of the Alberta Court of Appeal held, at paras. 6 to 8, that "sufficient merit" in s. 679(4) means "arguable merit". That approach was also accepted by O'Leary J.A. in *R.* v. *Colville*, 2004 ABCA 342.

[7] In *R.* v. *J.D.*, [1996] N.S.J. No. 176, Flinn J.A. of the Nova Scotia Court of Appeal, at para. 23, quoted from the *Law of Bail in Canada*, (Toronto: Carswell, 1992) by Gary T. Trotter, and agreed that the onus on an appellant under s. 679(4)(a) of the *Criminal Code* is "much more stringent" than for an appeal against conviction. He also implicitly accepted the following statement from that text:

> " . . . The applicant must demonstrate that the appeal is sufficiently meritorious such that, if the accused is not released from custody, he or she will have already served the sentence as imposed, or what would have been a fit sentence, prior to the hearing of the appeal . . ."

[8] Similarly, in *R.* v. *De Brentani*, 2005 ABCA 301, Costigan J.A. of the Alberta Court of Appeal held, at para. 8, that the test for bail pending a sentence appeal "is more

stringent" than the test for release pending a conviction appeal. Also, in *R.* v. *Smith*, 2005 NSCA 45, J.E. Fichaud J. of the Nova Scotia Court of Appeal, at para. 12, referred to the standard required bys. 679(4)(a) as "a higher threshold" than that required for leave to appeal.

[9] I agree with the foregoing authorities and find 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).

[10] Here, the Crown correctly suggested that I should approach the matter of merit by asking myself whether a panel of this Court hearing the appeal might find that the sentence imposed by the Territorial Court judge was outside the appropriate range. Further, says the Crown, the principle of deference to be applied on such an appellate review would not lead to the conclusion that this sentence was demonstrably unfit.

[11] With respect to the rejection of the curative discharge by the sentencing judge, I agree that he had considerable discretion and properly recognized that such discharges are granted sparingly, carefully and only to clearly qualified candidates. He also noted that the benefit of the doubt on such applications goes not to the offender but to public safety. Having said that, this is not simply a question of whether the sentence should have been nine and a half months, or some lesser period of time within the appropriate range. There is no issue of "tinkering" here. Rather, this appeal may determine whether the appellant should remain in jail at all, in the event that a panel of this Court were to find that a curative discharge is the most appropriate and fit sentence.

[12] The circumstances of the offence were indeed serious. The appellant was found to have been demonstrating his pickup truck to a prospective purchaser and was driving

on a rural road at a speed probably in excess of 100 kilometres per hour. He lost control on a curve and the truck was demolished when it went off the road. Both the appellant and his passenger were injured and required hospitalization. The appellant's blood alcohol level was 290 milligrams percent.

[13] On the other hand, at the time of his sentencing, there was a significant amount of evidence to suggest the appellant was a good candidate for a curative discharge. He was 46 years old and admitted to being an alcoholic for the previous 20 years. He had undertaken residential alcohol treatment on four occasions, although none had been successful. His most recent attempt was made in January 2005, but he was asked to withdraw from the program. He had a record of 19 prior convictions, six of which were for drinking and driving offences, two for driving while disqualified and numerous convictions for breaches of probation and release conditions; however, the most recent conviction for drinking and driving was in 1999 and the next most recent related offence was in 1989. There was also a significant gap between May 2000 and September 2004, during which the appellant had no convictions of any kind.

[14] The appellant claimed to have been abstinent since October 2004. He also claimed to be engaged in Alcoholics Anonymous and other addiction counselling. Admittedly, that claim was called into question by the sentencing judge because the appellant's A.A. sponsor testified at the sentencing hearing that he had not seen the appellant in several months and that the appellant had not been attending the Monday night A.A. meetings. On the other hand, the sponsor confirmed that, as far as he knew, the appellant had been sober for over a year. Further, as I understood him, the appellant's counsel explained that one of the reasons for this testimony was that the

appellant had been attending A.A. meetings at other times when his sponsor was not present.

[15] There was also some concern by the sentencing judge about the appellant's meetings with an addictions counsellor at the Alcohol and Drug Services ("ADS") branch of the Yukon Department of Health and Social Services. There was evidence that the appellant had been seeing Rob Roy, a well-known ADS counsellor, until Mr. Roy's retirement in September 2005. It then took some time for the appellant to obtain a new counsellor, but he did so and met with her once prior to the sentencing hearing.

[16] At the hearing of this application, the appellant also indicated through his counsel that he would be willing to abide by a release condition which requires him to attend for alcohol treatment and counselling, including residential treatment if directed by his bail supervisor in consultation with an ADS worker.

[17] At the sentencing hearing, the appellant provided evidence that he was under the care of a physician, Dr. Tadros, who opined in a written report that the appellant would benefit from alcohol treatment and that his prognosis was good. Dr. Tadros also stated that the appellant appeared to be well-motivated and had a good support system. However, the sentencing judge was somewhat sceptical about the weight of the medical report, because it relied almost exclusively on the appellant's self-reporting and made no mention of any liver function testing, as is commonly done to objectively corroborate a claim of sobriety.

[18] On the other hand, the appellant's counsel indicated at the hearing of this application that the appellant had undertaken such liver function tests on December 15, 2005 and January 6, 2006 and that the results of those tests were negative with respect

to alcohol consumption. In addition, with the consent of the Crown and after the hearing of this application, the appellant's counsel filed a further letter from Dr. Tadros dated April 10, 2006. That letter confirmed the negative liver function tests just mentioned. In addition, the letter mentioned that the appellant was seen by Dr. Tadros on December 5, 2005 for urine drug screen testing. This revealed that the appellant had been using benzodiazepine, which I understand to be an ingredient of Valium. The appellant admitted to Dr. Tadros that he had been randomly using an old prescription of Valium to help him sleep. However, Dr. Tadros advised the appellant to stop using the Valium, because it would not help him remain sober. As well, according to the letter, the appellant saw Dr. Tadros on December 19, 2005 for a follow-up consultation to his liver function test on December 15. The appellant further met with Dr. Tadros on January 12, 2006, following the liver function test on January 6. At that follow-up, Dr. Tadros gave the appellant a "standing order form" to have the liver function tests done once a month for a year. Dr. Tadros has not seen the appellant since January 17, 2006, which, of course, was the date he was sentenced.

[19] Returning to the reasons for sentence, the sentencing judge was also concerned that, since being asked to withdraw from a residential alcohol treatment program about one year ago, the appellant had taken no steps to arrange for additional treatment. He had difficulty accepting the appellant's explanation that he wanted to "get the court case behind him before doing so". On the other hand, it must be remembered that the appellant pled not guilty to the drinking and driving charges and the Crown agrees that it would be impermissible of me to draw a negative inference from that fact with respect to the appellant's motivation to successfully rehabilitate himself. Further, although the

sentencing judge was also concerned that the appellant had not taken any apparent action in this regard between his conviction in October 2005 and his sentencing the following January, I also note that, in that period, he claimed to have been attending Alcoholics Anonymous meetings, remaining sober, and arranging to find a new alcohol counsellor.

[20] Finally, the sentencing judge was concerned about the number of offences on the appellant's criminal record for non-compliance with court orders. While I share that concern, it must also be recognized that the appellant has been crime-free since December 2004, when he was sentenced for a breach of recognizance. That corresponds with the period over which he claims to have stopped drinking. Similarly, he has abided by the conditions of his most recent recognizance dated March 9, 2005, without apparent incident.

[21] All these circumstances may well prove to be significant to a panel of this Court, especially when the appellant's recent sobriety is contrasted with his long history as a drinking alcoholic.

[22] While it is true that the appellant's counsel focused his submissions on the prospect of this Court granting the appellant a curative discharge, it is also important to note that the appeal seeks a conditional sentence in the alternative. I acknowledge that the Crown did not address this issue, but I am unable to dispose of this application without recognizing that this ground of appeal also seems to have arguable merit, largely for the same reasons that a curative discharge may ultimately be found to be an appropriate disposition.

Would detention cause unnecessary hardship?

[23] In *Ewanchuk*, cited above, Berger J.A., essentially held at para. 8 that if the grounds of appeal are arguable, then the next question is whether the appellate remedy could be rendered nugatory if judicial interim release were denied. In such circumstances, he continued, “the resulting prejudice and harm is patent.”

[24] The appellant has been in custody since his sentencing on January 17, 2006 and expects to argue this appeal in Whitehorse the week of May 29, 2006. Obviously, if his appeal is successful and he is sentenced to either a curative discharge or a conditional sentence, then he will be released from custody behind bars. If he is detained until the appeal hearing, he will have served in excess of four months in prison. Thus, if the sentence is varied on appeal as sought, he will have served more time in prison than justice requires. In my view, that would cause him unnecessary hardship.

[25] I also note incidentally here, that the appellant voluntarily pays child support to two minor children, which obviously he cannot do if his detention continues.

[26] Finally, I agree to a certain extent with the submissions of his counsel that the appellant’s prospects of obtaining successful curative treatment will be compromised by his continuing detention. For example, the appellant will not be able to demonstrate that he is voluntarily abstaining from alcohol. The Crown also provided evidence of the “temporary absence” policy of the Whitehorse Correctional Centre (“WCC”), where the appellant is presently detained, and while the policy theoretically authorizes temporary absences for alcohol treatment and counselling, there is no guarantee that the appellant would be granted such authorization. Indeed, the assistant superintendent of WCC confirms that Alcohol and Drug Services insists that inmates from WCC have satisfied

their entire sentence before they will work with them in programming. This would obviously compromise the appellant's ability to obtain any interim residential alcohol treatment, as I understand such programs in Whitehorse are arranged through ADS.

[27] In summary, I am satisfied that the appellant has established that his appeal has sufficient merit that, in the circumstances, it would cause him unnecessary hardship if his detention is continued until the hearing of the appeal.

The public interest?

[28] With respect to the question of whether the appellant's detention is necessary in the public interest, Crown counsel referred me to my comments in *R.* v. *Collinson*, cited above. At para. 20, I referred to the public interest criterion in s. 679(3)(c), which is worded identically to s. 679(4)(c). In addition to the strength of the case and the circumstances of the offence, there are several other factors which I must consider in relation to the public interest. Those include:

1. The likelihood of further offences occurring;
2. The appellant's prospects of rehabilitation;
3. The appellant's record and personal circumstances; and
4. The appellant's performance during pre-trial bail.

[29] The public interest criterion involves two general considerations: first, the protection and safety of the public; and second, the maintenance of the public's confidence in the administration of justice. The reasons supporting my conclusions that the appellant will surrender himself into custody if ordered and that his appeal has sufficient merit also support the conclusion that there is no significant public safety

concern, especially if appropriately strict conditions are imposed upon the appellant's release.

[30] The question of public confidence in the administration of justice involves the competing dictates of the enforceability of the sentence, and the need for reviewability of judgments for possible error. The former favours the immediate execution of a sentence, so that the public can be confident that convicted persons actually serve the sentences imposed upon them. The latter relates to the public's confidence that only those lawfully sentenced are deprived of their liberty.

[31] I am also aware that the presumption of innocence is here displaced by a presumption of guilt. On the other hand, the public interest does not always require the detention of a person convicted of an offence pending appeal. If that were the case, there would be no meaning to s. 679(4). Here, I am reminded of the words of McEachern C.J.B.C. of the British Columbia Court of Appeal in *R.* v. *K.K.* (1997), 113 C.C.C. (3d) 52 at 55:

> "But it cannot have been the intention of Parliament that the public interest always requires immediate detention pending an appeal of a person convicted of an offence for which a custodial sentence has been imposed. If such were the case, there would be no provision for release after conviction . . . "

And further:

> ". . . The real public interest is to ensure, as best can be done, that those who commit these kinds of offences, now or in the past, will ultimately be appropriately punished for what they have done. Viewed this way, with the certainty of punishment assured, it makes little difference to the public interest if a person who is not a present risk, is made to account for his conduct immediately upon conviction or after the final determination of the appeal process. As is often said, justice grinds slowly, but it grinds on to the end." (emphasis added)

[32] Similarly, McEachern C.J.B.C. also said in *R.* v. *Nguyen* (1997), 119 C.C.C. (3d) 269, at para. 25, albeit in the context of s. 679(3):

> "Some members of society, of course, will think everyone convicted and sentenced to prison should be detained until their appeal is allowed. The clear language of s. 679(3) demonstrates that such is not the law in Canada. Parliament has imposed a positive duty upon the court which judges cannot avoid. Experience tells us, as reasonable members of society already know, that most persons on bail do not commit further crimes or fail to appear, although even one breach is too many. When decisions about bail are made with the public in mind, it must be a public which has accurate knowledge of the law, the nature of the risk Parliament anticipated, the actual circumstances of the accused, and the facts of the case."

[33] In the result, I find that the public interest can be satisfied by releasing the appellant on appropriately strict conditions, many of which have been suggested by the appellant himself.

CONCLUSION

[34] I order that the appellant be released pending the determination of his appeal on a recognizance in the amount of $1,000, without deposit, and upon the following conditions, which require him to:

1. Report immediately to the bail supervisor thereafter as 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 who has reason to suspect that he has failed to comply with this condition. (I note that, at the hearing of this application, the appellant specifically consented to such a clause.)
3. Not attend any business whose primary purpose is the sale of alcohol.
4. No contact directly or indirectly with Tim Geoghagen.
5. Reside at 7 Prospector Road, Whitehorse, Yukon Territory or such other place as approved by the bail supervisor and not change that residence without the prior written permission of the bail supervisor.

6. Identify to the bail supervisor a group of support people including his Alcohol and Drug Services counsellor, his physician and his A.A. sponsor.
7. Maintain contact with the persons identified in his support group.
8. Attend for monthly liver function tests as directed by his physician or the bail supervisor.
9. Attend for alcohol treatment, including residential alcohol treatment if directed by the bail supervisor in consultation with an Alcohol and Drug Services worker.
10. Attend Alcoholics Anonymous meetings not less than five times each week.
11. Abide by a curfew from 10:00 p.m. to 6:00 a.m., during which time he is to remain in his residence.
12. Present himself at the door of his residence and answer his telephone for the purpose of responding to curfew checks by the bail supervisor or the RCMPolice.
13. Attend court as directed.
14. Sign consent forms to allow the bail supervisor to obtain information from his physician and his Alcohol and Drug Services worker.
15. Surrender himself into the custody of the RCMPolice in a sober condition not less than 24 hours before the hearing of the within appeal.

_____
GOWER J.