IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

HER MAJESTY THE QUEEN	)	***E. A. Wach*** *and*
	)	***K. J. Advent***
	)	*for the Appellant*
Respondent	)	
	)	***J. A. Hyman***
- and -	)	*for the Respondent*
	)	
	)	*Chambers motion heard:*
JARED ROMEO DEVLOO	)	***September 13, 2018***
	)	
	)	*Decision pronounced:*
(Accused) Appellant	)	***October 23, 2018***

MICHEL A. MONNIN JA

[1] The accused seeks judicial interim release (bail) pending the hearing and determination of his appeal.

[2] On October 17, 2017, the accused was convicted after a trial of conspiracy to traffic in cocaine between March 11, 2014 and October 23, 2014. On August 24, 2018, the accused was sentenced to 10 years' incarceration and was fined $212,000 in lieu of forfeiture with three years' incarceration to be served in default.

[3] The accused was originally arrested in December 2014. On August 25, 2015, with the consent of the Crown, the accused was released on bail. He remained out of custody on bail until the time he was sentenced, with the only exception being when he was brought into custody for a curfew

breach allegation in March 2016. That charge was eventually stayed and the accused was again released on bail with consent from the Crown.

[4] The test to be met in order to be released pending an appeal is set out in section 679(3) of the *Criminal Code* (the *Code*). It reads:

> **Circumstances in which appellant may be released**
> **679(3)** In the case of an appeal [against conviction], 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
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> **(a)** the appeal . . . is not frivolous;
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> **(b)** he will surrender himself into custody in accordance with the terms of the order; and
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> **(c)** his detention is not necessary in the public interest.

[5] As I indicated to counsel during the course of the hearing of this application, I was satisfied that the appeal was not frivolous and that based on the accused's bail history, I had little concern that he would surrender himself into custody at the time of the appeal hearing.

[6] I further indicated to counsel that my concerns dealt with the third ground of the test, namely whether or not detention was necessary in the public interest and, more particularly, the issue of the balance to be met between the immediate enforceability of judgments versus their reviewability.

[7] In *R v Oland*, 2017 SCC 17, the issue of release pending appeal was addressed by the Court. In writing for the Court, Moldaver J had the following to say with respect to the third part of the section 679(3) test (at para 25):

> According to Arbour J.A., the enforceability interest reflected the need to respect the general rule of the immediate enforceability of judgments. Reviewability, on the other hand, reflected society's acknowledgement that our justice system is not infallible and that persons who challenge the legality of their convictions should be entitled to a meaningful review process — one which did not require them to serve all or a significant part of a custodial sentence only to find out on appeal that the conviction upon which it was based was unlawful (pp. 47-49).

[8] He continued (at para 37):

> In assessing whether public confidence concerns support a pre-trial detention order under s. 515(10)(c), the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial. So too for bail pending appeal. In considering the public confidence component under s. 679(3)(c), I see no reason why the seriousness of the crime for which a person has been convicted should not play an equal role in assessing the enforceability interest.

[9] And further, with respect to reviewability, he wrote (at paras 40-41, 43-45):

> The remaining factor that Parliament has identified as informing public confidence under s. 515(10)(c) is the strength of the prosecution's case (s. 515(10)(c)(i)). In the appellate context, this translates into the strength of the grounds of appeal — and, as I will explain, in assessing the reviewability interest, the strength of an appeal plays a central role. I say this mindful of the fact that some authorities have expressed concerns about assessing the merits of an appeal beyond the s. 679(3)(a) "not frivolous" criterion: see *R. v. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225, at paras. 31-52; *Parsons* [*R v Parsons*, 1994 CarswellNfld 14 (CA)] at paras. 55-59. With respect, I do not see this as a problem.

In my view, allowing a more pointed consideration of the strength of an appeal for purposes of assessing the reviewability interest does not render the "not frivolous" criterion in s. 679(3)(a) meaningless. On the contrary, the "not frivolous" criterion operates as an initial hurdle that produces a categorical "yes" or "no" answer, allowing for the immediate rejection of a release order in the face of a baseless appeal.

Gary T. Trotter, now a Justice of the Court of Appeal for Ontario, reached a similar conclusion in his article "Bail Pending Appeal: The Strength of the Appeal and the Public Interest Criterion" (2001) 45 C.R. (5th) 267, where he explained:

> . . . realistically, most cases do not raise strong claims regarding the public interest, at least not beyond the general concern that all criminal judgments ought to be enforced. . . . However, when an offence is serious, as with murder cases, such that public concern about enforceability is ignited, there should be a more probing inquiry into the chances of success on appeal. It is in this context that the balancing required by *Farinacci* [*R v Farinacci*, 1993 CarswellOnt 132 (CA)] requires some assessment of the merits, separate from the question of whether the appeal is frivolous or not. (Footnotes omitted; p. 270.)

In conducting a more pointed assessment of the strength of an appeal, appellate judges will examine the grounds identified in the notice of appeal with an eye to their general legal plausibility and their foundation in the record. For purposes of this assessment, they will look to see if the grounds of appeal clearly surpass the minimal standard required to meet the "not frivolous" criterion. In my view, categories and grading schemes should be avoided. Phrases such as "a prospect of success", "a moderate prospect of success", or "a realistic prospect of success" are generally not helpful. Often, they amount to little more than wordsmithing. Worse yet, they are liable to devolve into a set of complex rules that appellate judges will be obliged to apply in assessing the category into which a particular appeal falls.

In the end, appellate judges can be counted on to form their own "preliminary assessment" of the strength of an appeal based upon their knowledge and experience. This assessment, it should be emphasized, is not a matter of guesswork. It will generally be

> based on material that counsel have provided, including aspects of the record that are pertinent to the grounds of appeal raised, along with relevant authorities. In undertaking this exercise, appellate judges will of course remain mindful that our justice system is not infallible and that a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual's interest in any given case.
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> [footnotes omitted]

[10] Finally, he provides the following directives in balancing these criteria (at paras 47-51):

> Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.
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> In balancing the tension between enforceability and reviewability, appellate judges should also be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence: *R. v. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), at paras. 41-42. Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful. In such circumstances, however, where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s. 679(10) of the *Code*. While this may not be a perfect solution, it provides a means of preserving the reviewability interest at least to some extent.

> In the final analysis, there is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual assessment is required. In this regard, I would reject a categorical approach to murder or other serious offences, as proposed by certain interveners. Instead, the principles that I have discussed should be applied uniformly.
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> That said, where the applicant has been convicted of murder or some other very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety or flight concerns and/or the grounds of appeal appear to be weak: *R. v. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312 (B.C. C.A.), at para. 38; *Baltovich*, at para. 20; *Parsons*, at para. 44.
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> On the other hand, where public safety or flight concerns are negligible, and where the grounds of appeal clearly surpass the "not frivolous" criterion, the public interest in reviewability may well overshadow the enforceability interest, even in the case of murder or other very serious offences.

[11] The accused focussed his argument with respect to reviewability versus enforceability primarily on the strength of his grounds of appeal and the complexity of the case itself. He further argued that, even if the transcripts of the trial are presently available because they were requested for closing arguments before the trial judge, there will still be an extended period of time required to prepare the appellate materials.

[12] In reply, the Crown relies on the strong findings of fact made by the trial judge and argues that, even though the accused's case might not be frivolous, his case on appeal remains a weak one.

[13] The offences for which the accused has been found guilty are serious and the sentence imposed is substantial. The matter of delay in advancing this

appeal has been substantially lessened by the fact that the transcripts of the trial proceedings have already been prepared. I also accept the Crown's argument that, although not frivolous, the accused's grounds of appeal could prove to be difficult to advance successfully. These factors lead me to conclude that, in the circumstances of this case, the public interest is better served if the accused remains in custody.

[14] Accordingly, his application for judicial interim release pending appeal is denied.

Monnin JA