Citation: R v ETH, 2026 MBCA 4
Date: 20260116

IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N**:*

	)	***K. L. Bueti, K.C.** and*
	)	***S. Lozinski***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***M. E. Lavitt***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard and*
E. T. H.	)	*Decision pronounced:*
	)	***December 31, 2025***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***January 16, 2026***

NOTICE OF RESTRICTION ON PUBLICATION: An order has been made in accordance with section 486.5(1) of the *Criminal Code*, RSC 1985, c C-46, directing that any information that could identify a victim or witness in this proceeding shall not be published, broadcast or transmitted in any way.

EDMOND JA

Introduction

[1] After a trial in Provincial Court, the appellant was convicted on February 24, 2025 of aggravated assault. He was ultimately sentenced to eighteen months' imprisonment. He has filed a notice of appeal and has moved for judicial interim release (JIR) from custody pending the hearing of his appeal.

[2] At the hearing, I allowed the motion for JIR on certain conditions with reasons to follow. These are those reasons.

Background

[3] At trial, the Crown called two witnesses: the victim (K.M.) and Constable Daniel Abraham (Cst. Abraham). The defence called the appellant and a woman (A.S.R.). The witnesses testified regarding an incident that occurred in an apartment suite (the suite) occupied by A.S.R. and leased by the appellant. The appellant and K.M. gave diametrically opposed evidence about what transpired during the incident. K.M. testified that he was in the suite when the appellant arrived, was unexpectedly assaulted by the appellant, suffered serious injuries and was taken by ambulance to the hospital. On the other hand, the appellant testified that he attended at the suite to see A.S.R. and, when he let himself in, K.M. aggressively attacked him, causing him to act in self-defence. As a result, one of the key issues at trial was credibility.

[4] Both K.M. and the appellant testified that they were romantically involved with A.S.R. and that there was an overlap in the relationships. K.M. testified that he was nearing the end of his relationship with A.S.R. but that he still wanted to make it work.

[5] I do not intend to review the details of the incident between K.M. and the appellant. That will be required when the matter is heard on appeal and, accordingly, I must be circumspect in the review of evidence that is disputed. It is not disputed that Cst. Abraham was dispatched to an assault call and, upon arrival in the suite, K.M. was found on the floor in the living room, leaning against the wall. His face was bloody. His ears were bloody and swollen. Blood was on the floor and there were bloody paper towels around

him. Cst. Abraham called for an ambulance and K.M. was taken to the Health Sciences Centre where he was treated for:

- facial fracturing with significant facial bruising and swelling;
- right auricular hematoma and bleeding from the right ear;
- acute left-sided facial bone fractures; and
- marked enlargement of the right jaw muscle related to edema and hematoma.

[6] As a result of the incident, the appellant testified that he sustained the following injuries:

- bruising and redness to his neck, including a visible thumbprint;
- scratches all over his neck;
- bruising and swelling to his torso;
- his back was torn up from being on the carpet;
- bleeding cuts to his neck and shoulder area that he assumed would have left blood in the apartment; and
- welts around his head and face, particularly on the temple.

[7] Since defence evidence was called, the trial judge identified credibility as the central issue and instructed herself on the *W(D)* test (see *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC)).

[8] The trial judge did not believe the appellant's evidence that he was attacked when he entered the suite and that he was only defending himself. She gave numerous reasons for that finding.

[9] One of the reasons given by the trial judge was that she rejected the evidence of both the appellant and A.S.R. concerning the appellant's injuries, and found that they had colluded in giving their testimony.

[10] After reviewing the evidence, the trial judge concluded:

> Both witnesses [the appellant and A.S.R.] gave the same details and used the exact same words and phrasing. It is unbelievable that their recollections would be so closely aligned. In contrast, when asked about her conversation with [K.M.] immediately following the incident, [A.S.R.] gave minimal details and only said that he was upset with her and that he told her he had just got into a fight with [the appellant]. When asked whether [K.M.] said he was attacked, she said she could not recall. No other details of that conversation were given.
>
> The testimony about the conversation between [the appellant] and [A.S.R.] is contrived and lacks credibility. It provides a convenient explanation as to why [the appellant] would not have reported the incident to police. I do not believe this evidence.

[11] The trial judge was satisfied beyond a reasonable doubt that the appellant committed aggravated assault on K.M. She rejected the appellant's submission that he acted in self-defence.

[12] In his amended notice of appeal, the appellant appeals his conviction on the following grounds:

1. That the trial judge erred in law by making a finding of fact for which there was no evidence; namely, that there was collusion

between the appellant and A.S.R., as such a finding directly resulted in the rejection of the credibility of the appellant.

2. That the trial judge erred in law by failing to consider all relevant evidence that supported the appellant's self-defence claim, including evidence of harassment and threats made by K.M. to the appellant prior to the incident.

[13] The appellant was granted JIR pending his trial and while awaiting sentencing. There is no evidence that he has violated any of the terms of his JIR. He has attended all court dates. After his conviction and prior to sentencing, the Crown did not make an application for the appellant to be brought into custody. Risk assessments were completed prior to sentencing where both the probation officer and a clinical psychologist found the appellant to present a very low risk to reoffend generally.

[14] The appellant resides in Winnipeg and owns and operates an automotive business with five employees. He has two children.

[15] The appellant's mother provided an affidavit indicating that she is prepared to act as a surety in the amount of $50,000 to support the JIR motion pending appeal. She is prepared to reside with the appellant and supervise him.

[16] The appellant offered to make a cash deposit of $10,000.

Applicable Law

[17] The test for JIR pending appeal is not in dispute and is set out in section 679(3) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*]. The appellant has the burden of proving on a balance of probabilities that JIR should be granted (see *Regina v Ponak and Gunn*, [1972] 4 WWR 316, 1972 CanLII 1540 (BCCA)). Section 679(3) of the *Code* provides that an appellant must establish that:

Circumstances in which appellant may be released **679(3) . . .**	**Circonstances dans lesquelles l'appelant peut être mis en liberté** **679(3) . . .**
(a) the appeal or application for leave to appeal is not frivolous;	**a)** que l'appel ou la demande d'autorisation d'appel n'est pas futile;
(b) he will surrender himself into custody in accordance with the terms of the order; and	**b)** qu'il se livrera en conformité avec les termes de l'ordonnance;
(c) his detention is not necessary in the public interest.	**c)** que sa détention n'est pas nécessaire dans l'intérêt public.

See also *R v Oland*, 2017 SCC 17 at para 19 [*Oland*].

[18] The "public interest" criterion has two components. The first is that of public safety; the second is the need to maintain public confidence in the administration of justice (see *ibid* at para 23; *R v Oddleifson (JN)*, 2010 MBCA 78 at para 15 [*Oddleifson*]).

[19] The Crown takes no issue with the appellant's undertaking to surrender himself into custody in accordance with the terms of the JIR. However, the Crown challenges that the other two criteria have been met.

[20] The "not frivolous" criterion was described in *Oddleifson* as follows at para 10:

> Although the burden is on the accused to establish upon a balance of probabilities that the appeal is not frivolous, that threshold is a low one. He must only establish that his appeal is not doomed to fail, but has some arguable basis. See *R. v. Ilina (L.)*, 2003 MBCA 27, 170 Man.R. (2d) 292 at para. 7 (Steel J.A.); *R. v. Le (T.D.)*, 2009 MBCA 35, at paras. 13, 14 (Freedman J.A.). Upon consideration, I am satisfied that the accused has met this criterion (s. 679(3)(*b*)).

See also *Oland* at para 20.

[21] As noted above, the second component of the public interest criterion involves a consideration of the public confidence in the administration of justice and requires the weighing of two competing interests: enforceability and reviewability. In the context of JIR pending appeal, the reviewability interest is concerned with preventing a potentially meritorious appeal from becoming meaningless by virtue of the appellant serving a significant portion of their sentence only to have their conviction set aside on appeal.

[22] The enforceability interest is based on the principle that court orders—in this case, the appellant's conviction and sentence—should be enforced and enforced in a timely manner.

[23] The public interest criterion is especially important in cases where an accused has been convicted of a very serious offence. In *Oddleifson*, this Court explained the two components as follows at para 15:

> The first component, public safety, requires an assessment as to whether if released, the accused is likely to become involved in criminal activity and/or reoffend. The second component, the need to maintain public confidence in the administration of justice, requires that I consider and balance the competing principles of enforceability and reviewability of the judgment which now exists in respect of the accused.

[24] In *Oland*, the Supreme Court of Canada held that the public confidence analysis should be informed by the factors set out in section 515(10)(c) of the *Code* relating to the assessment of whether a detention order is required where a person is charged with an offence and include (1) the apparent strength of the prosecution's case; (2) the gravity of the offence; (3) the circumstances surrounding the commission of the offence, including whether a firearm was used; and (4) the length of the penalty to which the accused would be liable (see *Oland* at paras 31-36).

Analysis and Decision

[25] The Crown submits that JIR should be denied on two grounds: (1) the appeal is frivolous, and (2) the appellant's continued detention is necessary to maintain public confidence in the administration of justice.

[26] The appellant submits that the trial judge's finding of collusion is fundamentally flawed and that the trial judge erred by failing to consider all relevant evidence supporting his self-defence submission.

[27] In assessing the strength of the appeal, it is important to emphasize that the burden on the appellant is on a balance of probabilities and not proof beyond a reasonable doubt. Further, the threshold that an appeal is not frivolous is a low one. It is only necessary to establish that the appeal is not doomed to fail and has at least some arguable basis.

[28] While I agree the grounds of appeal take issue with credibility findings made by the trial judge, and those findings are owed considerable deference on appeal, the fact that the appellant has an uphill battle does not mean that he fails to meet the not frivolous test.

[29] The more difficult assessment is the public interest criterion, which, as discussed in *Oland*, involves the two primary interests: public safety and public confidence in the administration of justice.

[30] On my review of the evidence, and given that the appellant has not breached any conditions of release in the past, as well as being assessed as a very low risk to reoffend, I am satisfied that his release does not raise a significant risk to public safety.

[31] The Crown submits that public confidence would be undermined by the release of the appellant after he was found guilty and the offence was serious enough to warrant a jail sentence. In other words, enforceability outweighs the reviewability interest.

[32] The appellant submits that he raises meritorious grounds of appeal and the reviewability interest outweighs the interest of enforceability. He says, since public safety is not an issue, he should be released pending appeal.

[33] After weighing all of the evidence, I am satisfied that the appeal is not frivolous. I have concluded that the reviewability interest narrowly outweighs the enforceability interest in this case. I am mindful that I must consider that public confidence is to be measured through the eyes of a reasonable member of the public as opposed to "uninformed public opinion" (*Oland* at para 47).

[34] The offence of aggravated assault is a serious offence and the circumstances of the offence resulted in significant injuries sustained by K.M. However, the circumstances of the appellant establish that he is not a significant risk to public safety or to reoffend if he is released pending appeal. He has been on JIR since 2023 prior to being incarcerated and he has not breached the conditions of his release. As indicated earlier, he owns and operates his own automotive business and is a single parent with two children living with him in Winnipeg.

[35] I also considered the delay in hearing the appeal relative to the length of the sentence. This appeal can probably be scheduled to be heard during the winter/spring term and, therefore, the delay will not be undue before the appeal is heard. It is highly unlikely that the appellant will have served his sentence before the appeal will be heard, thus rendering it nugatory. Entitlement to bail is strongest when denial of bail would render the appeal nugatory. I considered that the appellant will have served a significant portion of his sentence if the appeal is not heard by the end of June 2026. Counsel were directed to file their materials to perfect the appeal in accordance with the timelines and the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R.

[36] While this is a close call, I am persuaded that a reasonable member of the public would not believe that maintaining public confidence in the administration of justice requires that the appellant remain incarcerated pending his appeal. I place considerable emphasis on the appellant's track record while on JIR, as well as the reasonable bail plan proposed.

[37] In the result, the motion for JIR is allowed, subject to the appellant's promise to pay in the sum of $10,000, one named surety in the sum of $50,000 and the conditions outlined in the JIR order dated December 31, 2025 that can be summarized as follows:

1. keep the peace and be of good behaviour;

2. live at a specified address;

3. not change his address unless there is prior approval from the Court or Crown;

4. not contact K.M. in person or communicate with him by telephone, mail or email or in any other way or have another person communicate with them for him;

5. stay at least 200 meters away from K.M.'s home, workplace, school or place of worship;

6. not own, possess or carry any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance;

7. not own, possess or carry any weapon;

8. abide by a curfew from 10:00 p.m. to 6:00 a.m. and remain at the specified address during those times with the only exception being to attend to a medical emergency for himself or for his family members;

9. come to the door of his home and answer the telephone if the Winnipeg Police Service or their designate conducts a curfew check; and

10. attend personally in Court at the hearing of his appeal, report to the Clerk of the Court no later than ten minutes before the scheduled hearing and as further directed.

Edmond JA