Citation: R v NBT, 2023 MBCA 1
Date: 20230109
Docket: AR22-30-09797

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***J. F. Rogala*** *and*
	)	***M. R. Schwartz***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***M. S. Bright*** *and*
	)	***D. N. Queau-Guzzi***
- and -	)	*for the Respondent*
	)	
N. B. T.	)	*Chambers motion heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***December 22, 2022***
	)	
	)	*Written reasons:*
	)	***January 9, 2023***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim(s) or witness(es) (see section 486.4 of the *Criminal Code*).

MONNIN JA

[1] The accused has appealed his conviction before a judge alone on one count of sexual interference for which he received a six-year sentence. Pending his appeal, he sought judicial interim release pursuant to section 679(1)(a) of the *Criminal Code*. After hearing submissions, I dismissed the application with brief reasons to follow. These are those reasons.

[2] At trial, the Crown led evidence from the accused's daughter (the victim) that, at the age of 12, she awoke to find the accused taking inappropriate photographs of her. She left the home immediately after calling her mother at work and was picked up by her maternal aunt and uncle shortly after. She did not return to the home until some weeks later, after a lock had been placed on her bedroom door at the direction of her maternal grandfather. She testified that, prior to this incident, she had been sexually abused by the accused a number of times, but had feigned sleep and had not reported any of this to her mother. The uncle was called to confirm the fact that he was involved in picking up the victim on the night in question.

[3] The accused testified, acknowledging that an incident occurred where the victim was picked up in the middle of the night but denied allegations of inappropriate conduct on his part and indicated that the victim had refused to indicate what the problem was. The mother testified to the same effect.

[4] The trial judge's decision, after conducting a *W(D)* analysis (see *R v W(D)*, [1991] 1 SCR 742), was that she did not find the accused's evidence believable, nor the mother's. She found frailties in the victim's testimony but did not believe it went to the core of her evidence, while she found what she considered to be inconsistencies in the evidence of the parents and aspects of it which she did not believe made logical sense.

[5] The grounds for appeal are twofold: (1) that the trial judge applied uneven scrutiny to the evidence of the accused and his wife as compared to that of the victim; and (2) the verdict was unreasonable as the trial judge failed

to properly consider the evidence of the accused and his wife in light of the family dynamics and the Filipino culture in which they lived.

[6] The parties agree that the accused has met the first two criteria for a successful application for release, namely, that he has raised grounds that establish that the application is not frivolous and that there is no concern that the accused will surrender himself into custody when necessary.

[7] As to the third criteria, that the detention is not necessary in the public interest, there is no serious concern that the accused will re-offend. However, the Crown raises the argument that the tension between enforceability and reviewability favours enforceability on the facts of this case as the grounds of appeal are, in its submission, "just beyond frivolous".

[8] The leading case, as discussed before me, is *R v Oland*, 2017 SCC 17, which draws upon the previous case of *R v Farinacci* (1993), 86 CCC (3d) 32 (Ont CA), to provide guidance on how an appellate judge should consider whether detention is necessary in the public interest. After reviewing the principles with respect to the enforceability and reviewability interests, Moldaver J, for the Court, in discussing the final balancing, stated as follows (at paras 50-51):

> 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, at para. 38; *Baltovich* [*R v Baltovich* (2000), 144 CCC (3d) 233 (Ont CA in chambers)], at para. 20; *Parsons* [*R v Parsons*, 1994 CarswellNfld 14 (CA)], at para. 44.

> 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.

[9] As I indicated briefly at the hearing of the application, given the seriousness of the offence, the strong evidentiary findings against the accused and this Court's pronouncements on the difficulty of successfully appealing on at least one of the grounds advanced by the accused, I concluded that, on the facts of this case, reviewability did not have a strong hand. I was also taken by the comments of Jackson JA in *R v LSR*, 2008 SKCA 77 (in chambers), where, on a similar application, she stated that a short period of release, back into a small community, which may very well end in reincarceration, will have a negative impact on the public's confidence in the administration of justice. For these reasons, the accused has not persuaded me that his detention pending appeal is not in the public interest.

[10] I accordingly dismissed the application but set the matter down for a hearing in the next few months, along with guidelines to the parties on the filing of material.

Monnin JA