SUPREME COURT OF YUKON

Citation: *R v T.J.H.*, 2022 YKSC 23

Date: 20220422
S.C. No. 22-AP001
Registry: Whitehorse

BETWEEN:

REGINA

RESPONDENT

AND

T.J.H.

APPELLANT

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Before Chief Justice S.M. Duncan

Counsel for the Respondent — Leo Lane

Counsel for the Appellant — David C. Tarnow (by videoconference)

This decision was delivered in the form of Oral Reasons on April 22, 2022. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This is an application under s. 816(1) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*"), for judicial interim release by Mr. T.J.H., pending the determination of his sentence appeal.

[2] Mr. H. pled guilty to two charges of sexual interference, contrary to s. 151 of the *Criminal Code*. The Crown proceeded summarily on both charges. The victim in the first incident was a 10-year-old Indigenous girl. The victim in the second incident was a seven-year-old Indigenous girl. Both incidents occurred in residences of the victims' families or friends where Mr. H. was an invited guest. Mr. H. was intoxicated by alcohol at the time of both offences.

[3] I will first address the preliminary matter of what criteria apply to a release pending a sentence appeal. I will then state the issues in this application and provide my analysis and decision.

Preliminary Matter

[4] Section 816 is silent on the criteria and onus to be applied by the Court in considering bail pending a summary conviction appeal. Some assistance is provided by a decision of Justice Charbonneau (as she was then) from the Supreme Court of the Northwest Territories (*Sorenson v HMTQ*, 2009 NWTSC 11, ("*Sorenson*")) on an application for bail pending a summary conviction and sentence appeal.

[5] In that case, Justice Charbonneau reviews how some courts have suggested that the criteria set out in s. 679 of the *Criminal Code* governing bail pending appeal in indictable matters should be applied to applications for bail pending appeal in summary conviction matters, albeit with a more liberal approach than in the indictable context.

[6] Those criteria in s. 679 are:

a. the appellant must show the appeal has sufficient merit so that serving the sentence while the appeal is pending would cause unnecessary hardship;

b. the appellant will surrender into custody in accordance with any order made by the Court, that is, they are not a flight risk; and

c. the appellant's detention is not necessary in the public interest.

[7] Justice Charbonneau notes that some other courts have expressly rejected the test under s. 679 but the criteria they have substituted in summary conviction appeals are similar to those in s. 679.

[8] Justice Charbonneau concludes that Parliament did not intend s. 679 to apply directly to the summary conviction appeal process, in part because s. 822 incorporates a number of provisions dealing with indictable appeals into the summary conviction appeal procedure, but s. 679 is not one of those included provisions.

[9] However, similar to other courts (*Regina v Simpson*, (1978) 109 CCC (2d) 44 (ON SC); *R v Dubyk*, [1985] 38 Sask R 316 (QB); and *R v Kieling*, [1988] 70 Sask R 102 (QB)), she finds it reasonable to conclude that the principles applicable to bail pending appeal of indictable matters are relevant in summary conviction matters, though s. 679 criteria should be considered along with other criteria specific to the summary conviction context. Those criteria are:

a. the possibility that the sentence could be served before the appeal is heard if bail is not granted, thereby rendering the appeal moot; and

b. generally, summary conviction offences are less serious than indictable offences.

[10] Justice Charbonneau summarizes the following factors to be applied in a flexible matter, not requiring, as in indictable matters, the appellant to show that they meet the

criteria but instead weighing and balancing the factors in determining whether release is appropriate. The factors are:

a. the strength of the appeal;

b. whether the appellant will surrender;

c. the length of the sentence;

d. the seriousness of the offence;

e. public safety considerations; and

f. public interest, including preserving the public's confidence in the administration of justice.

[11] I adopt this approach.

[12] With respect to who bears the onus, it is not disputed that for an application for bail pending a sentence appeal the onus is on the appellant on a balance of probabilities to persuade the Court to release the offender.

Issues

[13] The Crown does not take issue with the appellant surrendering. That is, the Crown did not argue that he is a flight risk, nor did the Crown submit that he is a risk to public safety at this hearing, although I recognize that arguments were made under this factor at the sentencing hearing.

[14] The focus of the arguments on this application is twofold:

(1) whether the appeal has merit; and

(2) whether Mr. H.'s interim release will detrimentally affect the confidence of the public in the administration of justice because it does not adequately

acknowledge the importance of denunciation and deterrence sentencing objectives.

[15] I will first address the strength of the case and then the public interest factor. I will also consider the factors more specific to summary conviction appeals, that is, the length of the sentence and the seriousness of the offence.

Analysis

Does the appeal have merit?

[16] The grounds set out in the notice of appeal are as follows:

a. the Court erred by not imposing a conditional sentence order;

b. the Court erred in sentencing the appellant before reading and considering the 20-page *Gladue* report and therefore ignored or did not take into account the *Gladue* principles as set out in *R v Gladue*, [1999] 1 SCR 688 ("*Gladue*"); *R v Ipeelee*, 2012 SCC 13 ("*Ipeelee*"); and *R v Sharma*, 2020 ONCA 478;

c. the Court erred in holding that a conditional sentence was not appropriate, as the appellant was from the small community of Pelly Crossing;

d. the sentence was excessive in all the circumstances;

e. the Court erred by ignoring or not giving sufficient weight to considerations regarding the appellant, including lack of any criminal record, early guilty pleas, successful participation in alcohol abuse treatment, strong family support;

f. the Court erred by not following precedent from other Yukon courts, including *R v Pye*, 2019 YKTC 21 ("*Pye*"); *R v DAD*, 2021 YKTC 20

("*DAD*"); and *R v GK*, 2021 YKTC 17 ("*GK*") — in those cases, the Court imposed conditional sentence orders.

[17] The focus of the oral arguments of both counsel was on the Court's alleged failure to read and consider the *Gladue* report and apply *Gladue* principles. The appellant's counsel noted the sentencing judge did not have the *Gladue* report before the sentencing hearing. It was provided to the judge during the hearing before submissions began. Counsel for the appellant, Mr. Tarnow, took the Court through a significant part of it. The transcript of hearing, from the bottom of page 11 to page 14, contains Mr. Tarnow's submissions and quotes from the report. However, Mr. Tarnow did not read the whole 20-page report to the judge.

[18] At the end of counsels' submissions and Mr. H.'s apology, the judge took two pauses and then delivered his decision. He did not reserve or take a recess. Counsel for the appellant argues that this shows he did not read the 20-page *Gladue* report.

[19] Counsel for the Crown notes that the judge said during the sentencing hearing:

> Well, the only document that I have not had a full opportunity to review is the *Gladue* report. I think we can certainly proceed to the submissions, and I'll have an opportunity to review that before I make a decision. [p. 6]

The Crown says this is evidence that he did review the report.

[20] It is difficult to know without evidence of the timing of the two pauses noted in the transcript before the issuance of the reasons for sentence whether the judge did take time to read the *Gladue* report, and whether he may have read some or all of it while Mr. Tarnow was making his fairly detailed submissions, including quotes from the report. Certainly a perception may have been created by the sentencing judge not

reserving or recessing before issuing his decision that he did not thoroughly review the report.

[21] More importantly, though, than whether or not the judge read the report in whole or in part, in addition to hearing Mr. Tarnow's submissions on it, is the assessment of how the judge considered and applied it in determining the sentence.

[22] *Gladue* factors or principles arise from s. 718.2(e) of the *Criminal Code*, described as a remedial section. In sum, this section mandates that a sentencing judge take into consideration:

> [A]ll available sanctions, other than imprisonment, that are reasonable in the circumstances … with particular attention to the circumstances of Aboriginal offenders.

[23] The purpose of s. 718.2(e) is to respond to the problem of disproportionate incarceration of Aboriginal people and to encourage the sentencing judge to apply the principles of restorative justice alongside or in place of other more traditional sentencing principles.

[24] The Supreme Court of Canada in the decision of *Gladue* interpreting s. 718.2(e) stated that judges are required to use a different method of analysis in determining a fit sentence. Judges have a duty in every case involving an Aboriginal offender to consider the unique, systemic, and background factors for Aboriginal offenders that may bear on the culpability of the offender to the extent that they shed light on their level of moral blameworthiness.

> … [C]ourts must take judicial notice of … the history of colonialism, [racism], displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and … higher levels of incarceration for Aboriginal peoples. … (*Ipeelee*, para. 60)

[25] Consideration of these *Gladue* factors is not intended automatically to result in a reduction of sentence or even a different sentence; instead, the factors provide a necessary context for understanding and evaluating case-specific information provided by counsel. This information is presented through the *Gladue* report, in effect, a form of pre-sentence report tailored to the specific circumstances of the Indigenous offender. As noted by the Supreme Court of Canada in *Ipeelee*:

> [60] … [I]t is indispensable to a judge in fulfilling his duties under s. 718.2(e) … .

[26] The application of *Gladue* principles in s. 718.2(e) must be done alongside of the application of other sentencing principles and objectives in determining a fit sentence. A judge must take into account the circumstances of the offence, the offender, the victim, and the community.

> … [T]the more violent and serious the offence the more likely it is as a practical reality that the [sentences] for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing (*Gladue*, p. 730).

In other words, a sentencing judge must consider the *Gladue* factors discussed above, among other things, when determining a fit sentence.

[27] As the Court of Appeal for British Columbia wrote in *R v JLM*, 2017 BCCA 258, at para. 38, a judge must give tangible effect to an offender's Aboriginal heritage when crafting a sentence. To fail to consider these *Gladue* factors is a legal error that may lead to a disproportionate sentence (*Ipeelee*, para. 87). Once a judge has considered these factors, a fit sentence is still in their discretion. Again, as the Court of Appeal for British Columbia noted in the 2015 decision of *R v Elliott*, 2015 BCCA 295:

> [17] … *Gladue* does not impose a particular result; it imposes a particular process. …

[28] Before going further, I want to acknowledge the constraints upon me in this application process. This is not an appeal. The issues have not been fully argued. I am limited to a preliminary assessment of the strength of the case as it appears at this stage for the purpose of bail pending appeal. At its highest, the question is whether there is sufficient merit to the appeal that it would cause a hardship if bail were not granted, including possibly rendering the appeal moot. As noted in *Sorenson*, though, this factor is to be applied flexibly and not as a strict condition.

[29] I also recognize the legal constraints on me in deciding interim release pending a sentence appeal. These constraints are that sentencing decisions are owed significant deference because they are fact specific and highly discretionary.

[30] I accept that in a sentence appeal there is no presumption of innocence that weighs in favour of the appellant. The convictions have been entered, and this is one of the reasons why the onus is on the appellant to persuade the judge to release him or her.

[31] Acknowledging these constraints here, there is an arguable case, in my view, on the merits that the sentencing judge did not consider the *Gladue* factors and principles as required by the Supreme Court of Canada through their statements in *Gladue* and *Ipeelee*. His main reference to the *Gladue* factors in his reasons was at para. 14 of his decision, where he says as follows:

> I have the benefit of a very thorough *Gladue* Report which details many of the circumstances of the background of T.J.H. and how his heredity and upbringing have been impacted by the residential school system and details how it has very specifically impacted the living conditions that T.J.H. was raised in and in which he, to some extent, still resides.

[32] It is unclear what the judge means by the general term “living conditions”. It is fair to say that the *Gladue* report addresses much more than the residential school system and its impact on the living conditions that Mr. H. was raised in and in which he still resides.

[33] From the judge’s reasons, it is not clear whether he considered:

a. the specific history of Mr. H.’s family;

b. Mr. H.’s parents’ alcoholism when he was a child resulting in physical and emotional abuse and neglect, including such things as the community members finding him and his siblings wandering the streets;

c. his being placed in temporary care and foster care, and the negative treatment he received there;

d. his difficulties in school resulting from cognitive issues, behaviour problems, and absences;

e. his sexual molestation by uncles while he was a child;

f. his witness to abuse of his mother by his father; and

g. his difficulty in finding employment.

[34] There is no indication that the judge considered whether any of the *Gladue* factors affected Mr. H.’s moral blameworthiness with respect to these offences. Instead, the judge in his reasons discussed: the victim impact statements; how one of the victim’s mothers sees the system protecting his rights — that is, the offender’s rights and not the victim’s rights; the concern in the community about him; the age of the victims; and the inappropriateness of a conditional sentence because it is impractical in

his living conditions and it would not send the right message of deterrence and denunciation for these types of offences.

[35] Of course, I am not disagreeing with the appropriateness of the judge considering these factors. The concern is that the *Gladue* factors were not balanced against the factors related to denunciation and deterrence. In other words, there is a meritorious argument that the judge did not weigh the *Gladue* factors in this case in determining his sentence. It may not have affected his decision in the end, but the appellant has a decent argument that the judge's apparent failure to engage in the process mandated by the Supreme Court of Canada of considering the *Gladue* factors-systemic, background, and personal to the appellant and their potential effect on the appellant's moral blameworthiness with respect to these offences was an error in principle.

[36] Examples of the approach of considering or analysing the *Gladue* factors in a sentencing hearing are provided by the three Yukon cases referenced by counsel for the appellant: *Pye; DAD; GK;* as well as *R v RS,* 2021 ONSC 2263 ("*RS*"), at Tab 10 of the appellant's authorities, a decision of the Ontario Superior Court of Justice.

Is continued detention in the public interest?

[37] The second issue for discussion is whether the continued detention of Mr. H. is in the public interest. More specifically, what is the effect of a judicial interim release of Mr. H. at this time on the public's confidence in the administration of justice?

[38] The Crown argues that a release of Mr. H. into the community now will show a disregard for the important sentencing principles of denunciation and deterrence, especially in this case. They point to s. 718.01 of the *Criminal Code*, which, in cases of

offences involving the abuse of minor children, requires the Court to give the sentencing objectives of denunciation and deterrence primary consideration.

[39] They also rely on s. 718.04, which requires the Court to give primary consideration to the objectives of denunciation and deterrence in imposing a sentence for an offence involving an abuse of a person who is vulnerable, including because the person is Indigenous and female.

[40] Finally, the Crown relies on s. 718.2(a)(ii.1) and (iii), which provide that the aggravating factors in sentencing an offender include where the offender abused a person under age 18 and abused a position of trust.

[41] The Crown says that all of these factors existed here and point to the importance of the denunciation and deterrence objective.

[42] Following the decision of *R v Friesen*, 2020 SCC 9, the Crown says a judicial interim release pending appeal after a conviction of two offences of sexual interference with 10- and seven-year-old Indigenous girls is a failure to give sufficient emphasis to the statutory directions to prioritize denunciation and deterrence. Here, given the very real fears, anger, and concerns expressed through the victim impact statements from the victims' mothers of releasing Mr. H. into the community now, would send the wrong message.

[43] *R v Farinacci*, [1993] 109 DLR (4th) 97 determined that the public confidence in the administration of justice involved the weighing of two competing interests: enforceability and reviewability.

[44] As described in para. 25 of *R v Oland*, 2017 SCC 17, referring to *Farinacci*:

> … [T]he enforceability interest reflected the need to respect the general rule of the immediate enforceability of

> judgments. Reviewability … reflected society's acknowledgement that our justice system is not infallible and … 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.

[45] This framework was endorsed by the Supreme Court of Canada in *Oland*. The Court in *Oland* held at para. 37 that the more serious the offence, the greater the risk that public confidence in the administration of justice will be undermined if the offender is released on bail pending appeal. The Court also said in assessing reviewability that it is important to consider the strength of an appeal especially where the offence is serious.

[46] The final balancing of the tension between enforceability and reviewability must be done by measuring public confidence through the eyes of a reasonable member of the public, that is, thoughtful, dispassionate, informed of the circumstances of the case, and respectful of society's fundamental values.

[47] I recognize these offences are very serious because of the age of the victims, as the sentencing judge emphasized, and their indigeneity. It is no wonder the victims' families are upset. They and their still very young children have to live with the trauma caused to them by the thoughtless, self-serving, abusive actions of Mr. H. I can appreciate why they have difficulty seeing him in the community and why it appears to them that he has all the rights and they have none.

[48] It is important, though, to recognize that Mr. H. has not been free since he has been in the community on bail. The imposition of conditions on an accused or convicted person are significant limitations on them and can result in a lonely, isolated, depressing existence, a constant reminder of their transgressions. As noted by the courts in *Pye*

and *RS*, the objective of denunciation and deterrence may still be achieved by a non-custodial sentence.

[49] Denunciation is intended to signal society's abhorrence for certain offences, such as sexual offence against a child (*Pye*). Deterrence is intended to send a clear message to the offender and others that, for example, a sexual offence against children will not be tolerated in the hopes that this will prevent or deter similar conduct in future.

[50] The Crown is of the view that only jail can serve to meet these objectives. Other courts, such as in *Pye*, *RS*, and *R v Hagen*, 2021 BCCA 68 (*"Hagen"*), have disagreed, noting a criminal record and stigma from the public nature of criminal proceedings, especially in a small community, can have both a deterrent and a denunciatory effect.

[51] As the Supreme Court of Canada said in *R v Proulx*, 2000 SCC 5:

> 81 … [I]t would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences. …

Sentencing is individualized and the judge needs to have discretion in establishing a fit sentence.

[52] I agree with the Court in *Hagen* that this case is "close to the line" in weighing enforceability and reviewability because of the seriousness of the offences. However, taking into account the reasonable person's view of the case, that is, dispassionate, thoughtful, informed of all the circumstances, and respectful of society's values, I am of the view that a judicial interim release pending appeal for Mr. H. will not diminish that confidence.

[53] The public has an interest in judgments being reviewed and errors corrected. This is part of what maintains confidence in the administration of justice. There is a real concern here that the judge erred by not properly considering, weighing, and balancing

the *Gladue* factors against the other important sentencing objectives of denunciation and deterrence before determining the sentence.

Summary conviction appeal considerations

[54] I want to address two more factors listed by Justice Charbonneau in *Sorenson* related to summary conviction appeals.

[55] First, the length of sentence. There is some risk that if the appellant were not released on bail pending appeal, he may have completed much of his sentence before the appeal is heard.

[56] I note the Crown has appealed two of the Yukon decisions that Mr. Tarnow has referred to the Court in this matter, that is, *DAD* and *GK*. Both appeals were filed in June of 2021 and, as far as I know, they have not yet been scheduled to be heard, almost 11 months later.

[57] I note here there is some risk that even if Mr. H. were successful in his appeal, without bail, the appeal could be moot. By contrast, if he is unsuccessful, even if out on bail, he will be returned to custody and the message of denunciation and deterrence as argued by the Crown will be sent.

[58] As noted by the Crown, most of the materials for the appeal have now been filed for the purpose of this application. There should be no reason to delay the hearing of this appeal. It should be able to be scheduled within weeks or months, and certainly not delayed for a year. I encourage both parties to cooperate and set it down for hearing sooner rather than later.

[59] The second summary conviction appeal consideration is the seriousness of the offence. Usually, summary conviction offences are less serious. Here, while the

offences are sexual interference, not sexual assault, they are at the high end of seriousness for a summary conviction offence. I do not give this factor much weight.

Conclusion

[60] To conclude, the appellant's appeal has merit. He does not pose a flight risk, as demonstrated by his full compliance with conditions while out on bail, and his appeal may be rendered moot or almost moot if he is not released and is successful on appeal.

[61] I conclude that reviewability outweighs enforceability, although I acknowledge the effect that Mr. H.'s presence in the community may have upon the victims and their families. For this reason, I will be ordering strict conditions, including house arrest.

[62] I order that Mr. H. be released upon his entering into a recognizance in the amount of $5,000, no deposit, with one surety (his sister O. H.), on the following conditions:

1. Keep the peace and be of good behavior.
2. Appear before the court when required to do so by the court.
3. Report to the bail supervisor within two working days and thereafter, when and in the manner directed by the bail supervisor.
4. Not communicate directly or indirectly, with H.M., O.B. or S.J.
5. Not attend within 50 metres of H.M., O.B. or S.J.'s place of residence, school, employment or education or any other place they may reasonably be expected to be, except with the prior written permission of the bail supervisor.
6. Notify the bail supervisor of any change of address, employment or occupation.

7. Not enter within 50 metres of any school, playground or place that reasonably might have people under the age of 16, except with the prior written permission of the bail supervisor.

8. Not be in contact or communication with any minor under the age of 16, except with the prior written permission of the bail supervisor in consultation with Family and Children's Services.

9. Reside at [redacted], Yukon, as long as you are not in the same room as E.J. unless there is direct line of sight supervision of you and E.J. by M.H. or another adult. The supervisor must not be under the influence of alcohol or non-prescription drugs or except as otherwise directed by the bail supervisor.

10. Remain inside the residence at all times, except with the prior written permission of the bail supervisor and except for the purpose of employment, which can include work at Victoria Gold Mine, including travel directly to and directly from the place of employment. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition.

11. Attend and actively participate in all assessments, counselling or treatment programs as directed and complete them to the satisfaction of the bail supervisor.

12. Abstain from the use of alcohol and non-prescription drugs.

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DUNCAN C.J.