COURT OF APPEAL OF THE YUKON TERRITORY

Citation: *R. v. Collinson*, 2005 YKCA 001

Date: 20050218
Docket No.: CA 04-YU527
Registry: Whitehorse

Between:

REGINA

RESPONDENT

And

TYLER COLLINSON

APPELLANT

Appearances:
John W. Phelps — For the Respondent
David St. Pierre — For the Appellant

Before: Mr. Justice L.F. Gower

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for bail pending appeal. The appellant was convicted following a trial in the Territorial Court of possession of cocaine for the purposes of trafficking (s. 5(2) *Controlled Drugs and Substances Act*) and possession of money the appellant knew was obtained by the commission of an indictable offence in Canada (s. 354 *Criminal Code*). A third charge of simple possession of cocaine was conditionally stayed because it would have offended the rule against multiple convictions. The appellant also pled guilty to a fourth charge of breaching his recognizance (s. 145(3) *Criminal Code)*, which is relevant, but not the subject of this appeal.

[2] The trial and sentencing took place on December 6, 2004. The appellant received a global sentence of one year in prison. Specifically, he was sentenced to one year on the section 5(2) charge and one year on the section 354 charge, to be served concurrently. He also received a 10-year firearms prohibition. The Notice of Appeal was filed on January 5, 2005.

ANALYSIS

[3] On an application such as this I am governed by section 679 of the *Criminal Code*. Section 679(3) authorizes a judge of this Court to release the appellant pending the determination of his appeal if he establishes that:

(a) the appeal is not frivolous;

(b) he will surrender himself into custody in accordance with the terms of the order for release; and

(c) his detention is not necessary in the public interest.

Frivolous Appeal?

[4] The first criterion is a low threshold. The appellant is not required to show that his appeal will succeed, only that it might. An appeal is considered frivolous if it can be said with confidence that it could not possibly succeed. As stated by Vertes J.A. in *Kolausok* v. *H.M.T.Q.*, 2004 NWTCA 1, at paragraph 3:

> … This is a low threshold. It is not necessary to show a likelihood of success. It is simply a requirement to show that there are grounds of appeal that are at least arguable. An appeal that is frivolous is one that has no hope of success. This is not synonymous, however, with a little likelihood of success. The threshold is met if there is at least some prospect of success.

[5] Here the appellant's counsel focussed on two main points. First, that the trial judge drew an unreasonable inference from his findings of fact in support of his

conclusion that there was evidence beyond a reasonable doubt that the appellant possessed cocaine for the purposes of trafficking.

[6] The amount of cocaine was just under 11 grams. The trial judge concluded at paragraphs 12 through 16 of his reasons for judgment that the following facts all pointed “inexorably” to the conclusion that the appellant possessed cocaine for the purposes of trafficking:

- the cocaine was individually packaged into “decks”,
- each deck contained just under a gram,
- the appellant was found in a “high trafficking location”,
- he also possessed a considerable quantity of money.

[7] Appellant’s counsel argued that someone found in such a high trafficking location in possession of cocaine is just as likely to be a recent buyer as a seller. Further, given that the amount of cocaine involved is relatively small, it is not inconceivable that a purchaser might purchase and possess 11 such decks. He submits that there was no evidence whether it would have been easier for the appellant to purchase the 11 grams in one or more larger quantities or packages. Further, there was no expert evidence called by the Crown to support the inference that the possession of 11 one-gram decks inevitably pointed to the possessor being a seller rather than a purchaser. In other words, appellant’s counsel says that this evidence is equivocal and the appellant should have been given the benefit of any doubt about it.

[8] The second point argued by appellant’s counsel is that the trial judge once again drew an unreasonable inference from the facts supporting the conviction for the proceeds of crime offence. As an officer of the court, he advised me that the money in

question was approximately $800.00, which I accept, given that a transcript was not available for this application.

[9] The trial judge, at paragraph 18, listed the facts in support of this conclusion:

> I repeat, the manner in which the money was stored, the various denominations, the fact that I accepted as a fact that it was contained in various pockets. The accused had no source of income that he could identify.

[10] The trial judge then acknowledged, at paragraph 19, that the appellant testified that the money in question came from his parents. However, he went on to conclude;

> … but in my view remittance money from home would not have arrived in small bills and had it so arrived it would not have been stuffed in various pockets and in short, again if one looks at the whole of the circumstances, there is only one conclusion that can reasonably be drawn and that is that the money was obtained by crime.

[11] Appellant's counsel says that it was unfair of the trial judge to conclude that the appellant had no identifiable source of income, when in fact he had testified that he had received money from his parents. More importantly, he argues that there was no evidence about how the money was provided to the appellant by his parents. Without knowing how the money was transferred, appellant's counsel says that the inference drawn by the trial judge at paragraph 19 does not make any sense. The appellant did not testify that his parents sent him the money in the form of bills in the mail. Therefore, an alternative and equally likely inference is that the appellant received that money by some other form of conveyance, such as a bank draft or electronic transfer of funds. As a result, the appellant might have withdrawn cash money from the bank following such a transfer, used a portion and ultimately have ended up in the situation of having a number of bills in various denominations in various pockets, without any inexorable inference that this money was obtained by crime. Thus, appellant's counsel says that this

evidence is also equivocal and the appellant should have been given the benefit of the doubt.

[12] Crown counsel points out that the trial judge properly considered all of the evidence as a whole in drawing his conclusions for each of these two charges. He says that there was further evidence of the paper money being folded in a particular fashion, which the RCMP investigator said was consistent with cases of drug trafficking he had been involved with. Countering this point, appellant's counsel says that there was no expert evidence on this point, and there should have been.

[13] In any event, although it appears the trial judge properly considered the whole of the circumstances for each charge, I am persuaded that the two points raised by appellant's counsel and discussed above are at least fairly arguable. If the underpinnings for the conclusions of the trial judge on each offence can be successfully challenged when this appeal is fully argued, then it could lead to those convictions being overturned. Accordingly, I am satisfied that the appellant has established that the appeal is not frivolous.

Will appellant comply with release order?

[14] I next turn to the second criterion which is that the appellant will surrender himself into custody if released pursuant to an order of this Court. Here, appellant counsel's main argument is that since he has established this is not a frivolous appeal (indeed, he suggested the grounds are strong) the interests of justice require his client's release now, rather than following a hearing of the appeal. He submits that the pre-sentence custody combined with time served to date is the equivalent of an eight-month sentence. Therefore, if the appellant's current arguments had been successful at trial, and had the

appellant only been convicted of simple possession of cocaine, he would likely have been released by now. Whereas, his release date with statutory remission is not until April 6, 2005. As a result, his continued detention will render his right of appeal futile or nugatory, in the event the appeal from conviction is granted.

[15] Further, appellant's counsel says his client deposed in his affidavit that he has a place to stay in Whitehorse pending the appeal and intends to look for employment. As I understand him, he also submitted that the appellant's previous problems in complying with his bail conditions were not significant. However, when I pressed him about the fact that one of the previous breaches involved cocaine use while awaiting trial for these charges, he conceded this was significant.

[16] Crown counsel submits that the appellant says little or nothing in his affidavit to give this Court confidence that he will surrender himself into custody if released. The Crown argued that there is virtually no evidence of the appellant's ties to the community of Whitehorse. His affidavit refers to his intention to reside with one Suzanne Cooper, but provides no additional information as to Ms. Cooper's circumstances or background. Further, in earlier bail assessment reports prepared while awaiting trial on these charges, the appellant referred alternately to a girlfriend and another couple with whom he intended to reside. However, those people are not mentioned in his current affidavit. There is also evidence in the bail assessment reports that the appellant has not been employed since arriving in Whitehorse on November 5, 2003. This plus the appellant's conduct while on release on these charges, resulting in two breaches of recognizance, point to a likelihood that his primary source of income has been from selling narcotics. And the appellant's references in his affidavit to an intention to "seek employment and/or

attend classes" is not particularized in any respect. He does not say what employment he is seeking or what education he is pursuing.

[17] Crown points out that the appellant was initially arrested on June 23, 2004, for the offences under appeal. On July 29th, he was released on a recognizance. A little over two weeks later, on August 16, 2004, he was charged and arrested for two breach of recognizance counts. He eventually plead guilty to one of those counts and admitted testing positive for consumption of cocaine. He was subsequently released a second time on September 24th, only to be arrested and charged yet again with a further breach of recognizance on October 12, 2004. The circumstances of that breach were that he was found in downtown Whitehorse five minutes before his curfew in possession of a cell phone, contrary to his release conditions. That was the charge he ultimately plead guilty to at his trial on December 6th, and the Crown submits, not surprisingly, that cell phones are known tools of the trade for drug traffickers.

[18] The Crown also emphasizes the appellant's criminal record, which includes a total of 13 convictions from 1997 through September 2004. Those convictions include three drug related possession charges in 2001, as well as two breaches of recognizance.

[19] I agree with the Crown that there is a significant concern about what the appellant plans to do upon his release and whether he will submit himself into custody prior to the appeal hearing. Given the appellant's poor performance during pre-trial bail, I am not satisfied that he has established the second criterion under section 679(3)(b) of the *Criminal Code*.

Public Interest?

[20] Although it is not strictly necessary to go further and deal with the third criterion since all three must be established, I will touch upon it briefly. Here, the appellant must show that his detention is not necessary in the public interest. Crown counsel correctly submitted that the points he argued under the second criterion are also applicable to this issue. Also, appellant's counsel acknowledged that his main concern under the second criterion - about the appellant's right of appeal being rendered futile - is only one of several factors which I must consider in relation to the public interest. Those include:

1. the strength of the case on appeal;
2. the nature and circumstances of the offence;
3. the likelihood of further offences occurring;
4. the appellant's prospects of rehabilitation;
5. the appellant's record and personal circumstances; and
6. the appellant's performance during pre-trial bail.

[21] Appellant's counsel argued that Whitehorse is a relatively small city and is well policed by the RCMP. Therefore, he says there is a higher probability that any breach by the appellant would be detected by the police. Accordingly, this should effectively serve as a deterrent against any further breaches by the appellant, which in turn would satisfy the Court's concerns regarding the public interest. On the other hand, counsel concedes that the appellant was not particularly deterred by this circumstance when he previously breached his bail pending trial on two separate occasions.

[22] Indeed, the appellant's criminal record and his performance while on bail prior to trial tend to indicate a likelihood of further breaches, and thus further offences, occurring.

[23] In *Kolausok*, cited above, Vertes J.A. recognized that under this third criterion, the Court must consider “the competing dictates of the enforceability and reviewability of judgments”. These terms are defined further in *R.* v. *Crockett*, 2001 BCCA 707, at paragraph 22, where Finch J.A., as he then was, said:

> … “enforceability” means the immediate execution of the sentence so that the public may have confidence that convicted persons actually serve the sentence imposed. “Reviewability” is the need for judgments to be reviewed, and any error corrected, so that the public may have confidence that only those lawfully convicted are deprived of their liberty.

[24] At this stage, the presumption of innocence is displaced by a presumption of guilt. And, while the public interest does not always require the detention of the person convicted of an offence pending appeal, this must be balanced against the public’s confidence in the administration of justice and the risk to society if the appellant is released. Admittedly, very strong grounds of appeal may tip the scale in favour of reviewability. However, I have not found that to be the case here. Although I have concluded that the grounds of appeal are not frivolous, that is not the same as saying that the appellant has a strong case and is likely to succeed.

[25] For all these reasons, I am not satisfied that the appellant has met his onus on the third criterion.

CONCLUSION

[26] In summary, the appellant has failed to establish two of the three criteria necessary to justify his release. The application is therefore dismissed.

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GOWER J.A.