

IN THE COURT OF APPEAL FOR THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

RAYMOND THOMAS GRANT

NARISSA SOMJI

For the Crown

GORDON COFFIN

For the Defence

**MEMORANDUM OF RULING
DELIVERED FROM THE BENCH**

[1] HUDSON J. (Oral): There are some problems, and the learned trial judge himself says, which I find of some concern, "I am satisfied that Raymond Grant still presents a danger to the safety of the community. He has not come to grips with his alcohol problem. This results in a moderate risk that he will re-offend."

[2] I look at the report and it says that he is not a high risk, and it goes on to say that there are things which tend to elevate, to a moderate level -- this is not referred to in full by the learned trial judge. I am not here in appeal from the learned trial judge, but I am here sitting as an independent tribunal, determining the issues here.

[3] Now, dealing first with sub-rule 679. 3 (c), as to whether it has been established that his detention is necessary, and it's on a balance of probabilities, that it is not necessary in the public interest that he be detained pending his appeal. This is an historical sexual assault. He has been released pending trial. He has been released after a conviction pending sentence. Then, as Crown says, there are new facts. Well, there are not only new facts; there are new interpretations of facts. Is it necessary? Has it been established that it is not necessary?

[4] Defence makes the point that if it is liquor, if it is alcohol problems, that could be taken care of in the terms of release. Are there circumstances which cannot be controlled by the conditions of a release order and, therefore, making it necessary in the public interest that he be detained? He has the support of some extended family.

[5] I am satisfied that, for the reasons given, that this is an historical matter, and that while he certainly cannot assert to a crime-free life subsequent to the incidents, nonetheless, he has successfully completed some extensive release conditions, leading me to believe that there has been established that it is not necessary, and that is so recognizing that the trial judge's assertion is based on the new interpretation of evidence and perhaps some new scientific evidence. But taking the broad picture and taking the fact that his obligation is only to establish on a balance of probabilities, I am left with the conclusion that he has succeeded on sub-rule (c).

[6] With sub-rule (a), that is to say, has he established that the appeal is not frivolous? Well, he has shown that. He zeroes in on -- I do not know how long the trial took, but one of the aspects was the admission of similar fact evidence. He has indicated what that evidence was, what the trial judge's view of it was, and he says that was an error to admit that.

[7] The question is, does he have to show authorities for saying that that was an error in law? It is not what it says. It says he has to show that it is not frivolous, this appeal is not frivolous; he is not appealing for some esoteric basis unrelated to the evidence or the law in question. It is clear that the view of similar fact evidence is frequently a successful ground of appeal if it had been admitted without regard to all the attendant law and with emphasis on particular aspects of it which may be found to be unfair.

[8] In the same way, at the trial, the trial judge's consideration of the similar facts in determining the guilt of the accused also is not a frivolous matter and I cannot say that he is required here in showing, on a balance of probabilities, that this is not a frivolous matter to go into chapter and verse as to where it fits into judicial error, as might be found by the Court of Appeal in due course - this Court.

[9] In all the circumstances, therefore, I am satisfied that the accused has made out that which he must. He will be released on conditions, and the conditions, of course, will be that he keep the peace and be of good behaviour. I know the standard procedure would be that I should not release somebody on a condition that

is impossible, but it seems to me that he should abstain from the use of alcohol.

[10] MR. COFFIN: I believe that he can -- well, he will make every effort and I will explain to him that --

[11] THE COURT: And he will provide a sample of his breath or blood at the request of a peace officer. Go on.

[12] MS. SOMJI: Yes, Your Honour, I request that he be released on the same conditions that he was previously on. Keep the peace and be of good behaviour.

[13] THE COURT: Yes.

[14] MS. SOMJI: Report to court as and when required to do so.

[15] THE COURT: I will do that now, I think; should I not? I mean, we have apparently - and I think it is a good thing - a fix-date hearing for the Court of Appeal for the next session. I do not know if his material is going to make it for that.

[16] MS. SOMJI: Well, the appeal books have not yet been filed, Your Honour.

[17] THE COURT: Yes, well, nonetheless, he could have it extended if there is good reason why the appeal is not ready.

[18] MR. COFFIN: Yes.

[19] THE COURT: But I think he should report then to the Whitehorse Regional Correctional Centre the night before the -- well, no. He can come to the court, I think, on the date of setting it for hearing. Do you have that date, Madam Clerk? I saw it.

[20] THE CLERK: No, My Lord, I don't.

[21] THE COURT: I saw it somewhere yesterday. It is fixed. It is in late May, I think.

[22] MS. SOMJI: Your Honour, I would also suggest that he be on the same conditions he was on before.

[23] THE COURT: Yes. Do I have those here?

[24] MS. SOMJI: You should have. I can provide you a copy of the undertaking, but they include that he report –

[25] THE COURT: Wait a minute, I should have them here

somewhere

[26] MS. SOMJI: Madam Clerk, would you like my copy?

[27] THE COURT: All right, that will speed it up. Yes, here. Do you have any problem with that? All right, he has got to come before me.

[28] MR. COFFIN: Yes. I -- no, I see absolutely no difficulty with any of those terms, My Lord.

[29] THE COURT: All right. Is there a need for you to keep a daily or weekly any track of it? Should he report to a bail supervisor or adult services?

[30] MS. SOMJI: I would ask, Your Honour, that the same conditions apply as before.

[31] THE COURT: All right. I have no objection to that. Right. Residing? Where do you propose? His family residence or Ross River?

[32] MS. SOMJI: Well, he has indicated that he is prepared to reside either at his parents' place or - in his affidavit - or with his wife and children. On the previous recognizance, Your Honour, he was allowed to have contact with

his own -- he was not allowed to have contact with any children less than 14 except his own. If Your Honour is of the view that the new information provided in the pre-sentence report and the psych assessment does not pose any risk to his own children, then you can maintain that clause. Alternatively, you can have him reside, as he's suggested in his affidavit as an alternative, with his parents in Ross River.

[33] MR. COFFIN: Yes, in Ross River. My only comment about that, My Lord, is I agree either place would be appropriate --

[34] THE COURT: It is pretty hard to control his drinking in Ross River, perhaps.

[35] MR. COFFIN: And much -- if there's a requirement of reporting, then it would have to be by phone from Ross River because there isn't a bail supervisor in Ross River.

[36] THE COURT: Okay.

[37] MR. COFFIN: So -- but I'm content with either one.

[38] MS. SOMJI: Anyways, if the Court is satisfied that there is no risk to his own children, those are the conditions that he was on before.

[39] THE COURT: Those will continue, yes.

[40] MS. SOMJI: Then he can continue to live with his spouse, if that's agreeable to her, and –

[41] THE COURT: He will report to a bail supervisor weekly and thereafter as directed. Within a week of his release and thereafter as directed by the bail supervisor.

[42] MS. SOMJI: That is satisfactory, Your Honour.

[43] THE COURT: He will reside at -- what is the address? On Range Road?

[44] MS. SOMJI: Well, Your Honour, it would be perhaps preferable to have him reside as directed by the bail supervisor, and if there are issues --

[45] THE COURT: Well, I have to get him started, don't I?

[46] MR. COFFIN: Yes.

[47] THE COURT: He will initially reside at --

[48] MR. COFFIN: Number 70 - 986 Range Road.

[49] THE COURT: 70 - 986. I don't know that the bail supervisor -- I am concerned that his control on his drinking would be better achieved in this address than in Ross River, if there is a need.

[50] MR. COFFIN: Yes, that's fine.

[51] THE COURT: Ms. Somji?

[52] MS. SOMJI: That's fine, Your Honour.

[53] THE COURT: All right.

[54] MS. SOMJI: The Crown would like the no contact conditions to remain.

[55] THE COURT: Absolutely.

[56] MS. SOMJI: Your Honour has indicated an abstention clause.

[57] THE COURT: Yes.

[58] MS. SOMJI: And I think Your Honour has also addressed

[59] THE COURT: How old is he? He is 45 or something?
Anyhow, I think it is useful that he have a curfew.

[60] MS. SOMJI: That's fine, Your Honour.

[61] THE COURT: Nine o'clock.

[62] MS. SOMJI: Until what time in the morning?

[63] THE COURT: Until seven o'clock.

[64] MR. COFFIN: I'm sorry. Nine until seven?

[65] THE COURT: Yes.

[66] MR. COFFIN: Thank you.

[67] MS. SOMJI: And also, Your Honour, the Crown would
request that the no contact with children less than 14, except your own, unless in the
company of an adult, remain.

[68] THE COURT: I agree with that, yes.

[69] Now, you can arrange for me to release him?

[70] MR. COFFIN: Yes, My Lord.

[71] THE COURT: Tomorrow, would it be?

[72] MR. COFFIN: Yes. Well, I may be able to --

[73] THE COURT: I am busy. What I am getting at is I have other matters. If you can get it before 4:30 --

[74] MR. COFFIN: It's just a matter of preparing a document, My Lord.

[75] MS. SOMJI: I believe, Your Honour, if you can indicate what the terms of the undertaking would be, it would simply be a matter of him signing that document, and that could be done --

[76] MR. COFFIN: And will this be in the form of an undertaking to a justice, My Lord, or a recognizance with a surety or an amount? How do you foresee that? Previously it was an undertaking.

[77] THE COURT: It was an undertaking? Impress on him that it will be a recognizance; \$1000, no deposit.

[78] MS. SOMJI: That's satisfactory, Your Honour.

[79] THE COURT: Yes, I just re-read the section. He does not need to appear before me. So the conditions are as indicated previously. He will report to a bail supervisor forthwith on his release and thereafter as required to do. He will return to court on the day for the speaking to the list of the next sitting of the Court of Appeal in Whitehorse. He will abstain from consumption of alcohol or restricted drugs and substances.

[80] MS. SOMJI: I believe the term often used, Your Honour, is non-prescription drugs.

[81] THE COURT: Yes. All right, non-prescription drugs. He will provide a breath sample or blood sample on request of an R.C.M.P., and he will reside at the address on Range Road. Items 4 -- 5 and 6 of the previous recognizance or undertaking apply as well.

[82] MS. SOMJI: Just -- did Your Honour address the curfew?

[83] THE COURT: There will be a curfew of ten o'clock to seven o'clock.

[84] MS. SOMJI: Ten to seven? And, Your Honour, the attendance at court on speaking of the list, perhaps it should also say, "and thereafter as directed by this Court."

[85] THE COURT: Yes, and please attend to the trial coordinator's office to see what that date is.

HUDSON J.