Citation: R v Tade, 2020 MBCA 5 Date: 20200120
Docket: AR19-30-09376

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN	)	***A. R. Hodge***
	)	*for the Appellant*
Respondent	)	
	)	***D. C. Sahulka***
- and -	)	*for the Respondent*
	)	
DESELAEGME TADE	)	*Chambers motion heard:*
	)	***December 5, 2019***
(Accused) Appellant	)	
	)	*Decision pronounced:*
	)	***January 20, 2020***

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

MICHEL A. MONNIN JA

[1] The accused seeks judicial interim release pending the hearing of his appeal following a conviction for sexual assault. The sentence imposed on the accused was one of 30 months' incarceration.

[2] The accused raises five grounds of appeal. They are: that the trial judge erred in shifting the burden of proof onto the accused; that she misapplied the credibility test in *R v W(D)* (see [1991] 1 SCR 742); that she drew conclusions based on medical evidence which was not supported by expert evidence; that she accepted medical evidence from a witness that was not qualified as a medical expert, and that she misapprehended the evidence.

[3] The accused was arrested on March 3, 2017, and was released on that day on a promise to appear until the date of his conviction on January 25, 2019. Following conviction, he remained in the community until November 27, 2019, when he was sentenced. From the time of his conviction, the accused was aware that the Crown would be seeking a lengthy jail sentence. He is also presently pending on charges of domestic assault with a trial continuation set for March 2020.

[4] The test to be met in order to be released pending an appeal is set out in section 679(3) of the *Criminal Code* (the *Code*). It reads:

> **Circumstances in which appellant may be released**
> **679(3)** In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> **(a)** the appeal . . . is not frivolous;
>
> **(b)** he will surrender himself into custody in accordance with the terms of the order; and
>
> **(c)** his detention is not necessary in the public interest.

[5] I have no issue with the second leg of the test, which the accused must meet, namely that, if released, he will surrender himself into custody as directed.

[6] The first leg of the test, that the appeal is not frivolous, is somewhat more problematic. The accused argues that his appeal deals with legal errors made by the trial judge, which errors impacted her credibility findings and therefore, her decision does not attract any deference. He argues that his

grounds of appeal are of sufficient strength and merit to meet this leg of the test.

[7] The Crown takes the position that the trial judge committed no errors in law and that the accused simply wants to attack the credibility findings, which are owed deference. The Crown, however, acknowledges that the "not frivolous" test is a "very low bar", but that it is difficult in this case to ascertain whether the test has been met because of the lack of the trial transcripts.

[8] In finding that the accused has in fact met this low threshold, I am mindful of what the Crown stated in its motion brief, namely, "that even if the Applicant's challenges to the Learned Trial Judge's credibility findings are not frivolous, neither are they strong."

[9] This therefore brings me to the third leg of the test, namely, whether the detention of the accused is in the public interest. This involves the weighing of two competing interests: enforceability and reviewability. This matter was canvassed extensively in *R v Oland*, 2017 SCC 17, where Moldaver J provided the following directive (at paras 47-51):

> Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished

> from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.
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> In balancing the tension between enforceability and reviewability, appellate judges should also be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence: *R. v. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), at paras. 41-42. Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful. In such circumstances, however, where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s. 679(10) of the *Code*. While this may not be a perfect solution, it provides a means of preserving the reviewability interest at least to some extent.
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> In the final analysis, there is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual assessment is required. In this regard, I would reject a categorical approach to murder or other serious offences, as proposed by certain interveners. Instead, the principles that I have discussed should be applied uniformly.
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> 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*, at para. 20; *Parsons*, [*R v Parsons* (1994), 117 Nfld & PEIR 69] 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.

[10] In considering this final leg of the test, I have three concerns. The first is the lack of a trial transcript, which might provide a foundation in the record, to substantiate the grounds of appeal that the accused wishes to

advance. The second, which to a degree ties in with the first, is that, although I am satisfied that the grounds are not frivolous, they do appear to be an attack on the judge's credibility findings which are owed deference and lead me to question the strength of the accused's appeal. Finally, I am troubled by the fact that the accused is pending on charges that came about while he was on bail.

[11] In the final analysis, I have not been convinced that the accused's release is in the public interest and that in the circumstances of this case, enforceability trumps reviewability.

[12] Accordingly, I dismiss the accused's application for judicial interim release.

Michel Monnin JA