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Nunavut assault appeal judge decides jury conviction outweighs compurgation

By **John L. Hill**

Law360 Canada (October 11, 2024, 10:58 AM EDT) -- A jury found Inuk Mosesie Ikkidluak guilty of three counts of sexual assault on the same complainant on three separate occasions. He asked to be granted bail while he appealed the conviction and sentence imposed.

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Justice Jack Watson of the Nunavut Court of Appeal heard his application for judicial interim release, and an oral decision to dismiss the application was delivered on Aug. 9, 2024 (*R. v. Ikkidluak*, 2024 NUCA 7).

As expected in such applications, Justice Watson looked to the three circumstances listed in s. 679(3) of the *Criminal Code* to determine if the person should be released: (a) that the appeal or the application for leave to appeal is not frivolous, (b) that the convicted person will surrender himself into custody under the terms of the order; and (c) that the detention is not necessary in the public interest.

The judge accepted that counsel for Ikkidluak had made a case for the second of these criteria. Justice Watson was not concerned that Ikkidluak would fail to surrender himself into custody. He had named many community members offering to act as sureties to monitor his conduct and guarantee his compliance with the terms of a release order. However, with respect to the first criterion, Justice Watson was more cautious. He was critical of the defence argument that the trial judge erred in refusing the accused to call witnesses to speak to the nature of the relationship they observed between the accused and the complainant. He likened such evidence to "compurgation."

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Compurgation was used in the Middle Ages to decide that someone accused of committing a crime was not guilty if several of their friends or neighbours made formal statements saying they were not guilty. It was a way to absolve suggested misdeeds of clergy. The judge said there were numerous Supreme Court of Canada decisions standing for the proposition that we no longer make generic beliefs that if a person is interested in somebody and the relationship seems close, consent to sexual activity is implied. He cited *R. v. Ewanchuk*, [1999] 1 SCR 330, *R. v. Barton*, 2019 SCC 33, and *R. v. Kruk,* 2024 SCC 7.

The ultimate deciding factor in denying bail was based on public interest. Even though it may not shock the community were Ikkidluak to be granted appeal bail, the fact that a jury convicted him must take precedence over the fact that he has obtained considerable support in the community. The judge cites *R. v. Oland*, 2017 SCC 17, as authority for the proposition that the public interest lies in the need to enforce the judgment of a properly selected jury. The judgment fails to detail why confidence in the judicial system would be eroded if Ikkidluak returned to his community pending the appeal. If granting bail when a jury has determined guilt would put the administration of justice into disrepute, one may wonder if appeal bail should ever be granted when a jury has made a finding of guilt.

Justice Watson's 19-paragraph judgment also fails to consider the unique circumstances of an Inuit person convicted of a crime and whether these considerations are applicable in determining whether appeal bail should be granted. The judge seems to lack insight into the conditions to which Ikkidluak will be sent. He takes comfort that he will be transferred to "an Indigenous-sensitive institution in Ontario, and it is not like he is going to go into a Spermax or something of that kind."

There are no federal penitentiaries in Nunavut. Those sentenced to more than two years will be transported to Beaver Creek Medium Institution (formerly Fenbrook Institution). That facility has a Tupiq program for Inuit convicted of sexual offences and a carving shack where incarcerated Inuit can congregate and carve soapstone. Still, it lacks a cultural environment where such people can thrive and return as productive members of their communities.

Inuit arriving at this southern Ontario prison are unaccustomed to seeing such things as trees and consuming a diet considered normal by people who are not Inuit. They rarely have visits or calls from family and support groups from the north. Even the weather exacts a toll as it is seen as extremely hot even in winter. There are concessions to Indigenous culture: sweat lodges, sweet grass ceremonies, Elders and healing programs. Still, these programs and services are based upon, or only include First Nations culture and do not take into consideration the unique cultural differences between Indigenous populations.

Government sources acknowledge that the attachment to Inuit culture diminishes during incarceration. In contrast, Inuit attachment to First Nations culture increases, no doubt, because of greater access to First Nations than Inuit culture in federal institutions. This is unhelpful when most Inuit expect to return to Inuit communities upon release. Incarceration weakens their cultural links.

Judges and counsel for both defence and prosecution have little training or experience with what happens to an accused once sentenced. Our law schools, by and large, offer no training in prison law. While our courts are sensitive in sentencing to adhere to *Gladue* principles, it is unfortunate that the same cultural sensitivity goes unnoticed in routine procedures such as bail.

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