Docket No.: CAC 163767
Date: 20000514

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. L.D.M., 2000 NSCA 79]

BETWEEN:

L. D. M.

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

DECISION

Counsel:	Terry M. Nickerson, for the applicant Ken Fiske, Q.C., for the respondent
Application Heard:	June 14, 2000
Decision Delivered:	June 14, 2000

BEFORE THE HONOURABLE JUSTICE ELIZABETH ROSCOE
IN CHAMBERS

ROSCOE , J.A. (In Chambers) (Orally):

[1] This is an application for release pending the appeal, made pursuant to s. 679 of the **Criminal Code**.

[2] The appellant was convicted by Associate Chief Justice MacDonald at Shelburne on January 20th and 27th on counts of sexual assault on B. M. (his former wife), contrary to s. 271(1) of the **Criminal Code**, assault on B. M. contrary to s. 266 of the **Code**, uttering a death threat to B. M. contrary to s. 264.1(1) of the **Code** and pointing a firearm at B. M. contrary to s. 86.1 of the **Code** (two counts).

[3] The appellant was sentenced to a total of four years on those five offences, two years for the sexual assault, six months consecutive for the assault, six months concurrent on uttering a death threat, one year consecutive on the first pointing a firearm, and six months consecutive on the second pointing a firearm.

[4] The appellant is appealing his conviction on one of the pointing a firearm charges, but not appealing the other four convictions and he also appeals the total sentence of four years. Counsel agree that in those circumstances s. 679.1(b) and 679.4 are applicable.

[5] In his notice of appeal the appellant sets out the grounds of appeal as follows:

1. It is respectfully submitted that the learned Trial Judge erred as a matter of law in that the Appellant's right to make full answer and defence and right to a fair hearing, pursuant to Sections 7 and 11 (d) of the Canadian Charter of Rights and Freedoms, was infringed. The Appellant submits that he was not afforded the opportunity to prepare for the case which was presented by the Crown against him, in that having met the case by the Crown in establishing an alibi for the 24th day of June, 1998 on which, the Crown's main witness had alleged the Appellant had committed the offence of Pointing a Firearm, contrary to Section 86 (1) of the Criminal Code of Canada, the learned Trial Judge concluded that the offence had occurred on the 26th day of June, 1998, a day on which the accused did not have an alibi, contrary to the testimony of the complainant for the Crown.

2. It is respectfully submitted that the learned Trial Judge erred as a matter of mixed law and fact in that by concluding that the accused had committed an offence on the 26th day of June, 1998, when the Crown had adduced evidence that the offence had occurred on the 24th day of June, 1998, he did rule incorrectly on the evidence presented at trial, which bore directly on the issue of guilt or innocense and also failed to appreciate the effect of this evidence on the issues of credibility and reasonable doubt as they related to the complainant. It is, therefore, respectfully submitted that the conclusions reached by the learned Trial Judge were unreasonable and were unsupported by the evidence adduced at trial.

3. It is respectfully submitted that the learned Trial Judge erred in that he failed to apply the principles of consistency and totality in sentencing the Appellant, as expressed in Section 718.2 (b) and (c) of the Criminal Code of Canada.

4. Such other grounds of appeal as may become apparent upon review of the transcript and file.

[6] On a sentence appeal, leave has to be granted, according s. 679.1(b), before I can go on to consider whether or not the appellant should be released. In order to grant leave to appeal sentence, I must be satisfied that the grounds of appeal are not frivolous and that they raise arguable issues.

[7] I am not positive that that section has to be complied with in this case, because it says “against sentence only” and I guess it is, with respect to sentence only for the four charges or convictions that are not being appealed, but because of my uncertainty about that, I’m going to grant leave to appeal. I don’t want to deny the bail on that ground in case it might not be even applicable when there is a conviction appeal at the same time, and I haven’t had a chance to research that.

[8] In any event, moving to s. 679(4). That provides that the appellant may be released pending appeal if he establishes that:

1. the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;

2. he will surrender himself into custody in accordance with the terms of the order; and

3. his detention is not necessary in the public interest.

[9] As noted during the submissions, at this stage of the proceeding, the appellant no longer has the benefit of the presumption of innocence. The Crown is opposed to the release of the appellant, submitting in relation to the first and third factors, that there is not sufficient merit in the appeal and on the grounds that it is not in the public interest to release the appellant.

[10] The second factor is not of too much concern, that is, that he will surrender himself into custody in accordance with the terms of the order.

[11] As to the first factor, while I share the Crown's skepticism that the sentence appeal would be successful to the point of reducing the sentence to a conditional sentence, I am prepared to accept that it is possible that the sentence could be reduced to such an extent that Mr. M. would serve longer than is required at this stage of his sentence if the appeal is successful. The main issue though, in my mind, is the question of the public interest and whether or not the appellant has established that his detention is not necessary in the public interest. Whether it is in the public interest involves the consideration of both public safety and public confidence in the administration of justice. I must be concerned with the possibility of whether the appellant might reoffend if released, and also whether in light of the violence involved in these offences and the use of firearms, that informed fair minded members of the community would think it reasonable to release the appellant at this stage of the criminal process, that is, after he has been found guilty.

[12] In cases of spousal assault and family violence there is also the apprehension about and concern for physical safety of the victim of the crimes, and I note in the pre-sentence report, the very last sentence:

> "The victim of these offences indicated she was very fearful of the accused due to his explosive personality, and also his fascination with guns".

[13] Taking all of these matters into consideration, including the submissions of counsel, I am not satisfied that the appellant's detention is not necessary in the public interest. I am not convinced that the public safety concerns arising from the circumstances of these offences and this offender would be adequately addressed if he

were released.

[14] For these reasons, the application is dismissed.

Roscoe, J.A.