C.A.C. No. 127548

NOVA SCOTIA COURT OF APPEAL
Cite as R. v. J.D., 1996 NSCA 14

BETWEEN:

J.D.	)	Michael K. Power
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Susan C. Potts
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	May 2nd, 1996
	)	
	)	
	)	Decision Delivered:
	)	May 3rd, 1996
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BEFORE THE HONOURABLE MR. JUSTICE E.J. FLINN IN CHAMBERS

FLINN, J.A.:

The appellant applies for release from custody, under s. 679(1)(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (the **Code**), pending the determination of his sentence appeal .

The requirements for interim release from custody, pending an appeal against sentence only, are quite different than the requirements where the appeal is against conviction.

Firstly, I can only release the appellant from custody if he has been granted leave to appeal.

Section 679(1)(b) of the **Code** provides as follows:

> "679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
>
> (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal;

Civil Procedure Rule 65.18(1), in the section on criminal appeals, provides as follows:

> "65.18. (1) Where an appellant seeks to appeal against sentence only and also seeks his release from custody pending the hearing of the appeal, a Judge shall first hear and determine the application for leave to appeal the sentence."

Therefore, I must first hear, and determine, the application for leave to appeal.

Secondly, in addition to the requirements for establishing that the appellant will surrender himself into custody in accordance with the terms of the order; and that his detention is not necessary in the public interest, the appellant has a much more stringent onus, with respect to the merits of his appeal against sentence only, than he does with respect to an appeal against conviction.

Section 679(4) of the **Code** provides as follows:

"(4) In the case of an appeal referred to in paragraph (1)(b), the

> judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
> (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." {Emphasis added}

Background

On January 15, 1996, the appellant pleaded guilty to charges:

(a) under s. 146(2) of the **Code** for having sexual intercourse with a female under 16 years of age; and

(b) under s. 149 of the **Code** for indecent assault.

The indecent assault offence was occasioned by repeated instances over a period of up to five years, when the victim was between the ages of 10 and 15 years, and included oral sex. The offence of sexual intercourse with a female under 16 was repeated on two occasions at different locations.

The offences were committed some 15 to 20 years ago. The appellant is the uncle of the victim and at times an acting parent of the victim.

On April 26th, 1996, His Honour Judge Crowell sentenced the appellant to a total of 30 months in a federal institution. He was sentenced to six months imprisonment for the indecent assault; and, to run consecutively, 24 months for the more serious offence of sexual intercourse with a female under 16 years of age.

Prior to the imposition of sentence, after making reference to the pre-sentence report, the affidavit of the appellant's employer, the victim impact statement, and other material before him, the trial judge said the following:

> "The viva voce evidence reveals that the accused is in fact a quiet, steady, willing individual, well liked by neighbours and friends.

> And a thoughtful person supportive of family, church and community organizations, such as the fire department. He didn't and doesn't abuse alcohol or drugs. He socializes well and will still be considered by these individuals as a friend. His wife is supportive and forgiving. He stands to lose employment and benefits as well as property and reputation. The accused has expressed remorse to the victim, his family, friends, psychologist and community. He has suffered humiliation through media reports. The offences were committed some fifteen to twenty years ago, the accused being the uncle of the victim and at all times was in a position of trust. As pointed out by the Crown all adults are in a position of trust towards children. The accused, however, was in the position of being at times an acting parent of the victim. At no time since the last contact or offence has the accused taken any action to make a confession, atonement, amends or other conduct regarding the offences committed in private or to help the victim deal with her problems occasioned in full or in part by his commission of these offences.
>
> Fortunately the accused has no criminal record. He has sought counselling and cooperated with the police and as stated is now remorseful. As indicated by defense counsel and the evidence and documentation, he is an individual capable of rehabilitation."

The trial judge then referred to the principles established by this Court in **R. v. Grady** (1973), 5 N.S.R. (2d) 264, that the primary consideration in any sentence is the protection of the public, and the trial judge must consider whether this primary objective can best be obtained by deterrence, rehabilitation of the offender, or a combination of both.

The trial judge then adopted the reasoning of Saunders J. in his recent, and as yet unreported decision **R. v. Donovan**, File No. C.R. 110965 dated March 8th, 1996. In **Donovan** the accused had pleaded guilty to sexual intercourse with a female under the age of 14. Justice Saunders referred to the actions of the accused as cowardly and despicable. He said:

> "By any measure, they are crimes of the most reprehensible sort. They deserve a swift, clear and unequivocal expression of society's abhorrence and denunciation. You breached a position of trust ..... you violated her sexual dignity and her self worth. You robbed her of her childhood and caused untold mental suffering, to say nothing of her sexual and physical degradation."

Justice Saunders then said:

> "To express this community's revulsion and as a warning to others, while at the same time taking into account your old age and the serious infirmities and progressive disease that grips you, I sentence you to imprisonment for a period of three years."

In the matter before me, the trial judge emphasized the need for general deterrence. He said:

> "While a sentence may destroy an accused and be of little help to the victim it may achieve the desired result of stopping others from committing similar offences and thus destroying other lives in such situations. Lengthy or severe sentences achieve the basic function of dealing with general deterrence."

Grounds of Appeal

The appellant's grounds of appeal are as follows:

> "1. The Learned Trial Judge failed to properly consider that the protection of the public could, in this case, be achieved by a combination of deterrence and rehabilitation and unduly emphasized deterrence.
>
> 2. The Learned Trial Judge failed to properly balance the prospects of rehabilitation against those of deterrence.
>
> 3. The Learned Trial Judge failed to give proper consideration to the effects of lengthy incarceration on his job, family and life in general.
>
> 4. That the penalty in fact in the circumstances is harsh and excessive considering the circumstances surrounding the commission of the offences and the circumstances of the Appellant."

Leave to Appeal

In my opinion the appellant's appeal is not frivolous, and his grounds of appeal raise arguable issues. That is the extent to which I have to be satisfied in order to grant leave to appeal, and I will grant leave to appeal.

Disposition of the Application

As I have indicated, under s. 679(4) of the **Code**, the onus is on the appellant to establish that:

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

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

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

Counsel for the Crown is satisfied, as am I, that the appellant has established requirements (ii) and (iii).

It is requirement (i) that has given me some difficulty. Counsel has not referred me to any cases where this first requirement has received judicial consideration, nor have I been able to find any.

The following is from **The Law of Bail in Canada**, Trotter, Carswell 1992, at p. 269-270:

> Section 679(4)(a) of the *Criminal Code* requires the applicant to demonstrate that the appeal has sufficient merit such that detention in custody pending the appeal would cause "unnecessary hardship". The Ouimet Committee discussed the intimate link between merit and hardship in the following passage:
>
> > In the view of the Committee, it would not be sufficient for the applicant to show that his appeal is not frivolous, but he should be required to show not only that there are substantial grounds to be argued, but that refusal of bail might work a prejudice to him by virtue of the length of time that would elapse before his appeal could be heard.
>
> Thus, the standard established in s. 679(4)(a) of the *Criminal Code* is much more stringent than the test for leave to appeal.
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> In simple terms, the thrust of this criterion is to preserve the integrity of the appellate process by attempting to prevent sentence appeals from becoming moot with the passage of time. However, the application of this criterion varies with the facts of each case

> and the demands on the appellate court in question. The applicant must demonstrate that the appeal is sufficiently meritorious such that, if the accused is not released from custody, he or she will have already served the sentence as imposed, or what would have been a fit sentence, prior to the hearing of the appeal. It prevents the applicant from serving more time in custody than that which is subsequently determined to be appropriate in the sense, there is an unavoidable speculative dimension to the application of this criterion."

Counsel for the Crown opposes the appellant's interim release, on the ground that the trial judge's sentence was fit and proper; and, therefore, the appeal does not have merit. She refers to the position of this Court on sentence appeals; namely, that if a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. She further argues that even if there was some merit to the appeal, the best that the appellant can hope for is a reduction in his period of incarceration. This is not a case, counsel argues, where if the appellant is not released, then by the time his appeal is heard, he will already have served what is determined to be a fit sentence. Hence, there is no "unnecessary hardship" within the meaning of s. 679(4) of the **Code**.

The relief which the appellant seeks in his sentence appeal is that his sentence should be reduced to an intermittent sentence, so that the appellant can continue in his employment. He claims there is merit to this position, and if the appellant is not released from custody he will suffer the undue hardship of losing his job which he has held for 20 years. Counsel for the appellant rests his argument, with respect to the merits of the appeal, on the decisions of this Court in **R. v. R.H.S.** (1994), 126 N.S.R. (2d) 392 and **R. v. W.M.D.** (1992), 110 N.S.R. (2d) 329. Both of these cases involved sexual offences against children. In each case a period of incarceration was replaced by this Court with an intermittent sentence. I have reviewed both of these cases in some detail, as did the trial judge. In both of these cases the offences were far less serious than the offences to which

the appellant has pleaded guilty. Further, in each of the two cases referred to there is not the psychological trauma to the victim, as there is to the victim in this matter before me, and which is so graphically described in her victim impact statement.

I agree, substantially, with the Crown's position in this matter. The appellant has not satisfied the onus which is upon him to establish that his appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody. In coming to this conclusion I have considered the serious nature of the offences here, the remarks of the trial judge, which accompanied his sentence, and the general reluctance of this Court to interfere with such a sentence unless it is clearly excessive or based on wrong principles. The appellant has not satisfied me that his appeal is sufficiently meritorious that, by the time his appeal is heard, he will likely already have served what is determined to be a fit sentence, and thereby suffer undue hardship if he is not released. I am, therefore, not prepared to release the appellant pending the hearing of his appeal.

I did indicate to counsel, during the hearing of this application, that if I determined not to grant interim release to the appellant that I would be prepared to set this appeal down to be heard on an expedited basis.

In **R. v. Aydon**, [1989] B.C.J. 1252, Taggart J.A. indicated the procedure which the British Columbia Court of Appeal follows in these matters. Mr. Justice Taggart, as a Chambers judge, was dealing with an application for interim release pending the hearing of a sentence appeal. The appellant in that case was sentenced to two years imprisonment, to be followed by two years probation, after pleading guilty to indecent assault on a stepdaughter. The offence had occurred a number of years ago. Taggart J.A. said:

> "It is, generally speaking, the practice of the Court not to release appellants appealing sentences in cases like that present one. It is virtually certain, in this case, that the most that can be expected when the appeal is heard is a reduction in the sentence from the 2 year level. A period of incarceration, in the circumstances of this

case, is almost inevitable.

> Accordingly, the general practice of the Court is that a release is not ordered but an expedited hearing of the appeal is directed."

I do not suggest that this Court adopt that practice in all applications for interim release pending appeal against sentence; however, it is appropriate in the matter before me.

I will therefore dismiss the appellant's application for interim release pending the hearing of this appeal. As I have indicated to counsel I am prepared to set this appeal down for hearing, on an expedited basis, either in regular Chambers on Thursday, May 9th, 1996, or before hand by way of telephone conference, which counsel for the appellant may arrange.

Flinn, J.A.

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