

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. MacLean*, 2013 NSCA 108

Date: 20130926
Docket: CAC 418159
Registry: Halifax

Between:

James Kenneth MacLean

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Motion Heard: September 26, 2013, in Halifax, Nova Scotia, in Chambers

Written Release September 30, 2013

Held: Motion for interim release, pending appeal, granted with conditions.

Counsel: James Kenneth MacLean, Appellant in Person
Timothy O'Leary, for the Respondent

Decision:

[1] On May 3, 2013 and June 26, 2013, respectively, after a trial, Judge Whalen of the Provincial Court convicted and sentenced Mr. James MacLean for break and enter, possession of a break-in instrument, failure to comply with a condition and breach of recognizance. The sentences were concurrent and totalled one year incarceration, less credit for 55 days in remand custody, for a net of ten months and six days custody going forward, to be followed by fifteen months' probation.

[2] I will summarize the facts from the trial judge's oral decision. Mr. MacLean and Ms. Jennifer MacRae had a relationship that included sexual conduct. Mr. MacLean had recently paid for tires to be placed on Ms. MacRae's car. On December 7, 2012, Mr. MacLean was angry because, the night before, Ms. MacRae had not come to his house to have sex. On the morning of December 7, Mr. MacLean went to Ms. MacRae's mobile home, entered, yelled at her and pulled her hair. Then he left. He placed angry voicemails on her phone. He returned to her mobile home and had another angry exchange. On this occasion, Ms. MacRae saw that he had a screwdriver in his pocket. The judge found that Mr. MacLean was "jealous and outraged because in his mind he was entitled to, or expecting, sex after paying for Ms. MacRae's tires."

[3] Mr. MacLean has appealed to the Court of Appeal from his conviction and sentence.

[4] Mr. MacLean seeks interim release, under s. 679 of the *Criminal Code*, pending the determination of his appeal. I heard the motion on September 26, 2013. Mr. MacLean appeared, unrepresented. Mr. MacLean's proposed surety, his father John MacLean, also appeared. After the hearing, I ruled that I would order Mr. MacLean's interim release, subject to house arrest on conditions. On September 26, I signed the Order for release, that specifies those conditions, James MacLean and his father as surety signed the Recognizance, and John MacLean signed the Affidavit of Justification.

[5] These are my reasons for the interim release.

[6] Section 679(1)(a) of the *Criminal Code* says:

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,

- (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;

Section 679(3) states the three prerequisites for release under s. 679(1)(a):

Circumstances in which appellant may be released

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), 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 or application for leave to 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.

[7] Mr. MacLean has the onus to establish each of the three conditions. His conviction has replaced his initial presumption of innocence with a status quo of guilt, which he has the burden to oust by proving the statutory conditions for interim release. *R. v. MacIntosh*, 2010 NSCA 77, para 6 and authorities there cited.

[8] The Crown acknowledges that, for the purpose of s. 679(3)(a), the appeal is not frivolous. From the limited material available to me, I agree. There is a low hurdle to establish that the appeal is not frivolous. The applicant for interim release should show that there is a rational ground that evokes the possibility that the appeal may be allowed: *R. v. J.P.*, 2013 ONCA 505, para 5, and authorities there cited. In my view, this is shown, and I need say no more about the merits.

[9] The Crown also acknowledges that the prospect of surrender under s. 679(3)(b) does not pose an obstacle to Mr. MacLean's interim release. I agree. Mr. MacLean has not missed court appearances. He has a home in Port Hawkesbury and connections in that community. His conditions, that I will order, will include house arrest.

[10] The remaining prerequisite is that Mr. MacLean's detention, pending the appeal, "is not necessary in the public interest". In *R. v. Ryan*, 2004 NSCA 105, Justice Cromwell discussed the balancing test under s. 679(3)(c):

[21] I agree with former Chief Justice McEachern when he wrote in *R. v. Nugyen* (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in different contexts:

In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.

(Emphasis in *Ryan* Decision)

[22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clamour is used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.

[23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 at 48:

Public confidence in the administration of justice requires that judgments be enforced. ... On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.

[24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:

Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.

[11] Mr. MacLean has a prior criminal record, though most of it is not recent. The Crown submits that there are reasons for concern that Mr. MacLean will reoffend. The Crown cites Mr. MacLean's angry lack of self-control on the day of the offence under appeal. The Crown submits that it is for Mr. MacLean to propose conditions that would alleviate any concern that a member of the public might suffer from a similar episode during a period of interim release.

[12] I agree with the Crown's concern. But, in my view, it is possible to fashion strict terms that would alleviate the concern. The terms would include house arrest, subject to exceptions, rather than the mere curfew proposed by Mr. MacLean. Those terms, in my view, are the following:

James MacLean would be released on a recognizance in the amount of \$5,000, to be signed by his father, John Kenneth MacLean, as surety, and secured further by James MacLean's pledge of the properties owned by James MacLean at 591 Crandall Road, Port Hawkesbury, Nova Scotia, and the adjoining lot, requiring him to comply with the following conditions, *i.e.* that James MacLean do the following:

1. He shall attend at court as required by the court according to law;
2. He shall keep the peace and be of good behaviour;
3. He shall reside at 591 Crandall Road, Port Hawkesbury, Nova Scotia;
4. He shall remain in his residence at all times except for:
 - (a) employment with Walker's Electrical Construction and Maintenance of Creignish, Nova Scotia;
 - (b) a medical emergency;

- (c) a regularly scheduled legal appointment;
 - (d) a regularly scheduled medical appointment;
 - (e) a regularly scheduled court appearance;
 - (f) to attend to his personal needs, for a duration not exceeding five hours, on Saturdays, which five hours shall be between 12:00 noon and 6:00 p.m.; and
 - (g) to work in the yard on his properties at 591 Crandall Road, Port Hawkesbury, Nova Scotia;
5. Should he leave his residence for any of the exceptions listed, except in the case of employment, he is to proceed by the most direct route to and from such places, and prior to leaving shall notify the Port Hawkesbury detachment of the RCMP (625-2220) that he will be leaving his residence;
6. He shall present himself at the door of his residence within five minutes of a knock on the door or a telephone call by the police at any time that he is not out of the residence as permitted by the exceptions listed above;
7. He is not to possess or apply for a Canadian passport;
8. He shall not permit anyone, other than his father, John Kenneth MacLean, to live or stay overnight at his residence at 591 Crandall Road, Port Hawkesbury, Nova Scotia, for any reason;
9. He shall not consume, use or possess any alcohol, and there will be no alcohol in his residence at 591 Crandall Road, Port Hawkesbury, Nova Scotia;
10. He shall not use or possess drugs, except for medical marijuana by prescription;
11. He will not leave Nova Scotia for any reason;

12. He will have no direct or indirect contact or communication with Jennifer MacRae;

13. He will not be within 100 meters of any place of employment or residence of Jennifer MacRae that is known to him;

14. He will provide the Crown and the Court with his cell phone number and keep it with him at all times, and provide the Crown with the telephone number of any other phone that he subsequently obtains;

15. He will surrender into the custody of the keeper of the Cape Breton Correctional Facility at Sydney, Nova Scotia, by one o'clock in the afternoon of the day preceding the day on which the appeal will be heard, and he will be advised at least 24 hours before the time by which he must surrender into custody, in the event the appeal is sooner dismissed, quashed or abandoned;

16. He will surrender into the custody of the keeper of the Cape Breton Correctional Facility at Sydney, Nova Scotia, within 24 hours of the filing with the Registrar of this Court of the Order dismissing or quashing the appeal or the notice of abandonment of the appeal, as the case may be;

17. He will surrender into the custody of the keeper of the Cape Breton Correctional Facility at Sydney, Nova Scotia, by one o'clock in the afternoon of the day preceding the day in which the appeal decision will be released and he will be advised at least 24 hours before the time by which he must surrender into custody.

Further:

18. Mr. MacLean's interim release is conditional upon the appeal proceeding on the date to be scheduled for the hearing of this appeal, and if any such date is changed, this order for interim release may be reviewed in Chambers by a Judge of this Court;

19. The named surety, John Kenneth MacLean, must also enter into the recognizance, and John Kenneth MacLean is to promise to pay \$5,000 to secure the performance of these conditions.

[13] In my view, these conditions will reasonably address concern that, during his interim release, Mr. MacLean's potential misconduct could detrimentally affect the public interest under s. 679(3)(c).

[14] Accordingly, further to ss. 679(1)(a) and 679(3) of the *Criminal Code*, I have signed the Order that Mr. MacLean be released from custody, pending the determination of his appeal against conviction, subject to the conditions stated above in paragraph 12.

Fichaud, J.A.