NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Baker*, 2003 NSCA 149

Date: 20031218
Docket: CAC 202595
Registry: Halifax

Between:

Neil James Baker

Appellant/Applicant

v.

Her Majesty The Queen

Respondent

Judge:	Oland, J.A.
Application Heard:	December 18, 2003, in Halifax, Nova Scotia, In Chambers
Written Decision:	December 23, 2003
Held:	Application granted.
Counsel:	Jill A. Lacey, for the appellant Peter Rosinski, for the respondent

Decision: (Orally)

[1] The applicant, Neil James Baker, applies for release pending determination of his appeal pursuant to s. 679 of the *Criminal Code*. His appeal of his convictions for sexual assault (s. 271) and for sexual exploitation (s. 153) was heard on December 3, 2003 and the decision of this court reserved.

[2] As a preliminary matter I would note that the Crown made an argument as to the jurisdiction of a single judge in Chambers to hear a release application where a panel of this court has already heard the appeal. In doing do, it pointed to *Civil Procedure Rule* 62.24(3) and urged that it would be more appropriate for the panel which has greater familiarity with the matter to determine such an application. My understanding from submissions this morning is that the Crown is no longer pressing the matter this morning since the Chambers judge hearing this application had sat on the panel.

[3] I would simply note that s. 679(1) of the *Code* states that "A judge of the court of appeal" may hear and determine an application regarding release from custody pending "the determination of the appeal." In my view an appeal is not determined until the decision is released and consequently a single judge has jurisdiction to hear a s. 679 application. My comments however are not intended to be binding should the Crown or any other party raise this argument in more substantive terms in another proceeding.

[4] I will now turn to the application itself. The criteria for granting release are found in s. 679(3) which reads:

> . . . 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.

[5] The burden is upon the applicant to establish all three requirements on the balance of probabilities and I will deal with each in turn. I have taken into consideration the affidavit evidence filed by or on behalf of the applicant, the testimony in Chambers by him and Brenda Parker, and the written and oral submissions of his counsel and counsel for the Crown.

[6] First, I am satisfied that the appeal is not frivolous. The Crown does not take a contrary position.

[7] Second, I must be persuaded that the applicant will surrender into custody as and when required. The applicant was at large pending and during his trial. The Crown consented to his release from custody pending the hearing of his appeal. On September 4, 2003 he was released on the filing of a recognizance by Brenda Parker for $6,500. without a deposit. In accordance with that consent order the applicant surrendered himself into custody on December 2, 2003, the day before his appeal was heard. He has been in a common-law relationship and residing in Dartmouth for almost three years. I am satisfied that the likelihood of the applicant fleeing and failing to surrender himself into custody is low. As well the Crown acknowledges that this criteria has been met.

[8] Finally, the applicant must show that his detention is not necessary in the public interest. In this regard I am to treat the allegations against him as having been proven and I may take the facts of the offences of which he has been convicted taken into consideration. Involving as they do breaches of trust and a young person, those offences are serious ones. Also the applicant has a criminal record for a similar offence, although it was one which for he was sentenced over a decade ago to 60 days and probation. The Crown has reminded me of other aspects of this case and other facts relating to this applicant which were brought forward at the hearing of his appeal.

[9] I am not convinced that having regard to this applicant and the circumstances of this case, release should be denied because detention is necessary to maintain public confidence in the administration of justice. There is as well no evidence before me that the applicant has conducted himself inappropriately during his releases since initially charged with the offences which are the subject of this appeal.

[10] Accordingly I would grant the application. I would order that the applicant be released pending the determination of this appeal on the conditions submitted by his counsel, which very substantially mirror those on which he was released pending the hearing of his appeal, with one exception. The last condition in the proposed order requires the applicant to surrender himself into custody within 48 hours of the filing of the order of the court. I would ask that he surrender himself into custody within 24 hours of being advised the decision of the court is being released.

Oland, J.A.