NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Sweet, 2006 NSCA 141

Date: 20061221
Docket: CAC 275198
Registry: Halifax

Between:

Peter Allen Sweet

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Elizabeth Roscoe
Application Heard:	December 21, 2006, in Halifax, Nova Scotia, In Chambers
Held:	Application for leave to appeal is granted; Application for release pending appeal is dismissed.
Counsel:	Brian V. Vardigans, for the appellant Daniel A. MacRury, Q.C., for the respondent

Decision:

[1] This is an application for release pending an appeal of sentence made pursuant to s. 679(1)(b) of the **Criminal Code**. The appellant pled guilty to assaulting his wife, threatening to cause her death and careless use of a firearm. He was sentenced on November 15, 2006, by Provincial Court Judge Claudine MacDonald, to a total of 10 months incarceration in addition to one month spent on remand, plus two years probation.

[2] In her oral decision on sentencing, Judge MacDonald summarized the circumstances of the offence as follows:

> As a starting point the circumstances of the offences - I'm not going to go into them in a whole lot of detail - except to really summarize them and say that what happened was that Mr. Sweet while under the influence of alcohol and significantly intoxicated, assaulted his wife. The assault involved him putting his arms around her throat. He also threatened to kill her and her family if she were to leave him and then not only that but during this incident Mr. Sweet grabbed the railings off a bannister, as I understand it, he was waving those around, there was some damage to property that was committed as well, although he wasn't charged with that, is not being sentenced for that, but as part of the overall circumstances of the offences that's what took place. How this came to an end was by Mr. Sweet getting a high-powered rifle, locking himself in a garage and it ended with the firearm being discharged into the ceiling.
>
> As I recall the facts the victim in the matter, Juanita Sweet, in fact called Mr. Sweet's mother to have her come over to try and help out while the incident was taking place

[3] Judge MacDonald determined that denunciation and deterrence were the appropriate sentencing principles to emphasize. She found that given the circumstances of the offence, a conditional sentence would not be consistent with the purposes and principles of sentencing. In her view, until Mr. Sweet had received treatment for his addictions to alcohol and cocaine and had the benefit of counselling, it was not safe to have him serve his sentence in the community. In this respect she stated:

> . . . Next, the Court would have to be satisfied that for Mr. Sweet to serve his sentence in the community it would not endanger the safety of the community. I can ... I can say that insofar as that part of the test goes, I am not prepared to say

that I am satisfied that Mr. Sweet could serve his sentence in the community without endangering the safety of the community. And the reasons why I'm not prepared to say that, is that this ... these offences that happened, there is such an element of ... of not only of actual violence, but potential for even more violence. The fact that it was an alcohol-fuelled rage, I think it's really that ... the most accurate way to describe it, with the anger being directed at, at his spouse, that Mr. Sweet is appearing before the Court and although he has family support and some community support and although it's his wife's plan to reconcile with him, the fact of matter is that the nature of this offence being so unpredictable and, as I said, not only the actual violence that took place, but the potential for even more violence clearly existed, that I just cannot say that I'm satisfied that ... that for him to serve his sentence in the community would not endanger the safety of the community, specifically his spouse.

The factors that were at play when his offence happened, those factors are still there now. There's the cocaine [addiction], there's the issues with respect to alcohol abuse, there are the unresolved issues of a personal nature that are going to have to be dealt with and it's only when those issues are dealt with ... only when that happens that somebody would be in a position to say "Well, yes, I'm satisfied here that Mr. Sweet can serve his sentence in the community and that it's not going to endanger the safety of the community".

[4] The grounds of appeal are as follows:

1. That the learned trial Judge erred in law and principle when she failed to address deterrence and denunciation in the context of the findings in **Proulx** as opposed to imposing a jail sentence.

2. Contrary to s. 718 and s. 718.1 the sentence imposed by the trial Judge was not proportionate to the gravity of the offences given the circumstances of the Appellant, including the absence of a criminal record prior to the offence date and the change in circumstances thereafter, at the time of sentence.

3. That the learned trial Judge misapplied the evidence and thereby failed to recognize the import of the Crown's withdrawal of the s. 88, possession of a weapon for a purpose dangerous to the public peace charge. This misapprehension resulted in the Appellant being sentenced as if the weapon's charge was an extension of the threat and assault charge when they were distinct entities.

4. That the learned trial Judge erred in law when she found, without current evidence to support it, that the Appellant at the time of sentence presented a present risk/danger to the community.

[5] The appeal has been scheduled to be heard on February 9, 2007, seven weeks from now.

[6] On a sentence appeal, leave to appeal has to be granted before any consideration of release pending appeal. (s. 679 (1)(b)) In order to grant leave to appeal, I must be satisfied that the grounds of appeal are not frivolous and that they raise arguable issues. On this point, the appellant says that the sentencing judge erred in over-emphasizing denunciation and general deterrence given the lack of a previous record and a positive pre-sentence report and did not give adequate consideration to the possibility that a conditional sentence could meet those sentencing principles. Without conceding that there is an arguable issue on appeal, Crown counsel made few submissions on the question of leave.

[7] In consideration of **R. v. Proulx**, [2000] S.C.J. No. 6 (Q.L.) and the appellant's lack of a record, I am satisfied that the appellant has raised at least an arguable issue that the sentencing judge erred and, therefore, I will grant leave to appeal.

[8] Next I have to consider s. 679(4) of the **Criminal Code** which provides that the appellant may be released pending appeal if he establishes the three conditions: (a) that the appeal has sufficient merit and that, in the circumstances, it would cause unnecessary hardship if he was detained in custody; (b) that he will surrender himself into custody in accordance with the release order; and (c) that his detention is not necessary in the public interest.

[9] At this stage of the proceeding the appellant no longer has the benefit of the presumption of innocence. As noted by Justice Fichaud in **R. v. Smith**, 2005 NSCA 45:

> [11] . . . The conviction has substituted the initial presumption of innocence with a status quo of guilt. Unlike a pre-trial bail applicant, a convicted appellant who seeks bail pending appeal has the burden to prove the conditions for release: **R. v. Barry**, 2004 NSCA 126, at ¶ 8, and cases cited.

[10] In his affidavit the appellant indicates that he has arranged for a Narcotics Anonymous sponsor when he is released to assist him with his addictions, that he will reside with his parents under house arrest except for attending at his

employment, that he has several prospects for employment and that he will not consume alcohol or illegal drugs. He presented a certificate indicating that while incarcerated he completed a course entitled “Substance Abuse Education” and numerous letters of support from family and friends.

[11] On cross examination, he acknowledged that he has not yet arranged for any specific treatment or counselling programs upon release. He said though that he will be able to see his family doctor immediately after his release in order to be referred to the appropriate programs and says he will do everything recommended.

[12] The Crown is opposed to the release of the appellant submitting mainly in relation to the public interest factor that until Mr. Sweet has been treated for his substance abuse and received anger management counselling that his wife and children are at risk of serious harm.

[13] After considering the remarks of the trial judge and the submissions of counsel, I am satisfied that the appeal is not frivolous and that the appellant would, if released, surrender himself into custody as directed in the release order.

[14] The main issue is whether the appellant has discharged the onus of establishing that his detention is not necessary in the public interest. Whether it is in the public interest involves 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 re-offend if released and also whether, in light of the violence involved in the offences, his drug addiction and his obvious problem with anger management, informed fair-minded members of the community would think it reasonable to release the appellant at this stage of the criminal process. In this situation of family violence, I am worried about the physical safety of Mr. Sweet’s wife. This concern is heightened immensely by the comments of psychiatrist Dr. Grainne Neilson who assessed Mr. Sweet while on remand to determine fitness to stand trial and criminal responsibility:

> 3. There is no indication that Mr. Sweet was suffering from any psychiatric condition at the time of the offences that would account for his offence behaviour, other than severe substance intoxication, reported by him to be alcohol. He neither volunteered nor displayed any signs or symptoms of psychiatric illness during the current assessment. The most likely explanation for his offence behaviour relates to anger management issues and substance misuse.

> 4. Mr. Sweet has a number of risk factors for ongoing domestic violence including guns present within the home, substance abuse, previous threats of violence towards his wife and himself, previous violence towards wife while she was pregnant, recent relationship problems, personality issues related to anger/impulsivity/behavioural instability, and minimization of spousal assault history. In addition, there are young children within the family home who were present at the time of the offences. These factors should be taken into account with regard to any release conditions.

[15] I recognize the “catch 22" pointed out by Mr. Vardigans that no treatment is available in the institution. However, more definite plans for a specific treatment and counselling program could have been arranged for commencement upon his release. The court could have been provided with some information about what is available in the community and when Mr. Sweet could be likely placed in contact with professional help for his significant problems.

[16] Taking into account all of these considerations, I am not satisfied that the appellant's detention is not necessary in the public interest. The evidence does not satisfy me that public safety concerns arising from the circumstances of this offence and this offender would be adequately addressed if he were released. Furthermore, given the evidence before me, his release would tend to undermine public confidence in the administration of justice.

[17] For these reasons the application is dismissed.

Roscoe, J.A.