Attorney General of Canada v. Nayally et al., 2012 NWTSC 56

Date: 2012 07 11
Docket: S-1-CR-2012 000018

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

ATTORNEY GENERAL OF CANADA

Applicant

- and –

KARL NAYALLY, LAWRENCE NAYALLY AND WILLIAM DOCTOR

Respondents

MEMORANDUM OF JUDGMENT

I) INTRODUCTION AND BACKGROUND

[1] This Memorandum of Judgment relates to a hearing held on July 9, 2012, pursuant to section 772 of the *Criminal Code*, to determine whether a Recognizance entered into by Karl Nayally should be forfeited.

[2] On May 13, 2010, Mr. Nayally was charged with impaired driving and refusal to provide a breath sample (file #T1CR2010000718). He had a show cause hearing on May 14, 2010, and was ordered detained by a Justice of the Peace.

[3] On August 11, 2010, Mr. Nayally filed a bail review application in this Court pursuant to section 520 of the *Criminal Code* (file #S-1-CR2010000156). He proposed to make a cash deposit and put forward two sureties. One of the reasons set out in Mr. Nayally's affidavit as to why he was seeking release was that he wanted to spend time with his common law spouse, who had been diagnosed with terminal cancer and was believed to have a very short time to live. The hearing proceeded on August 23, 2010. I do not have the benefit of a transcript of

that hearing but the Clerk's notes on the Court file indicate that the Crown did not oppose his application.

[4] Mr. Nayally's application was granted and he was released on a Recognizance that included a number of conditions, including a condition that he not consume alcohol or other intoxicating substances. The Recognizance required a cash deposit of $3,000.00. Two sureties signed the Recognizance and committed an amount of $1,000.00 in support of Mr. Nayally's release, but were not required to make a cash deposit.

[5] On September 28, 2010, Mr. Nayally breached the condition of the Recognizance that required him to abstain from the consumption of alcohol. He was charged with that offence and a number of other offenses the next day (file #T1CR2010001597) and the Recognizance was cancelled. On November 18, 2010, he pleaded guilty to a charge of breach of Recognizance and to a charge of having resisted arrest. By that point he had spent 51 days in pre-trial custody. He was sentenced to time served.

[6] Mr. Nayally has since been sentenced for the impaired driving and refusal to provide a breath sample charges, as well as on some further charges that arose in April 2011 (file #T1CR2011000838). On May 18 2011, he was sentenced to a total of 34 months imprisonment, less 126 days credit for time he spent in pre-trial custody.

II) THE ESTREATMENT PROCEEDINGS

[7] The *Criminal Code* sets out what is to happen when a person who is bound by a Recognizance is found to have failed to comply with its terms. The estreatment process in this Court is triggered by the issuance of a certificate of default in accordance with section 770:

> **770.** (1) Where, in proceedings to which this Act applies, a person who is bound by recognizance does not comply with a condition of the recognizance, a court, justice or provincial court judge having knowledge of the facts shall endorse or cause to be endorsed on the recognizance a certificate in Form 33 setting out
>
> (*a*) the nature of the default;
> (*b*) the reason for the default, if it is known;
> (*c*) whether the ends of justice have been defeated or delayed by reason of the default; and

(*d*) the names and addresses of the principal and sureties.

(2) A recognizance that has been endorsed pursuant to subsection (1) shall be sent to the clerk of the court and shall be kept by him with the records of the court.

(3) A certificate that has been endorsed on a recognizance pursuant to subsection (1) is evidence of the default to which it relates.

(4) Where, in proceedings to which this section applies, the principal or surety has deposited money as security for the performance of a condition of a recognizance, that money shall be sent to the clerk of the court with the defaulted recognizance, to be dealt with in accordance with this Part.

[8] Once a certificate of default is filed, a forfeiture hearing can be set. Section 771 of the *Code* governs the steps that must be taken to set a hearing, the powers of the Court, and the consequences of a forfeiture order:

771. (1) Where a recognizance has been endorsed with a certificate pursuant to section 770 and has been received by the clerk of the court pursuant to that section,

(*a*) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on his behalf, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and

(*b*) the clerk of the court shall, not less than ten days before the time fixed under paragraph (*a*) for the hearing, send by registered mail, or have served in the manner directed by the court or prescribed by the rules of court, to each principal and surety named in the recognizance, directed to the principal or surety at the address set out in the certificate, a notice requiring the person to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

(2) Where subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

(3) Where, pursuant to subsection (2), a judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

> (3.1) An order made under subsection (2) may be filed with the clerk of the superior court and if an order is filed, the clerk shall issue a writ of *fieri facias* in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any surety resides, carries on business or has property.
>
> (4) Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fieri facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.

[9] In this case, it was several months before anything happened in relation to estreatment proceedings. In fact, it appears nothing at all happened until after Mr. Nayally wrote to the Court registry, on August 5, 2011, asking for the return of the cash deposit. This letter appears to be what set the estreatment proceedings in motion, although even after that, there was considerable delay.

[10] The certificate of default was filed February 28, 2012. This Court then issued notices of hearing to Mr. Nayally and the two sureties. The hearing proceeded on July 9, 2012. Mr. Nayally appeared by videoconference and the two sureties appeared in person. All three represented themselves and gave evidence at the hearing.

1. Mr. Nayally's evidence

[11] Mr. Nayally acknowledges that he breached the terms of his Recognizance. He explained that the reason he consumed alcohol was that he was experiencing a lot of stress because his common law spouse was very ill. He said that he had been complying with the Recognizance but her son brought alcohol into the home and this was when he succumbed to the temptation. His spouse lived longer than her doctors expected, but she did pass away in August 2011.

[12] Mr. Nayally also said that he was advised by his counsel, after he was sentenced on the drinking and driving charges, that if the Crown did not apply for the forfeiture of the cash deposit within 90 days after his sentencing date, the money would be returned to him. This was why he wrote to the Court Registry in August to request the return of the monies. Mr. Nayally, quite candidly, said that had the Crown brought a forfeiture application within those 90 days, he probably would not have contested forfeiture.

[13] On cross-examination Mr. Nayally acknowledged that he is an alcoholic and that he has struggled with this addiction for quite some time. He knew this when he promised not to consume alcohol. He also acknowledged that he has an extensive criminal record and that without a release plan that included the deposit of a large sum of money and sureties, he would have had little hope of being released on bail.

[14] As far as his financial means, Mr. Nayally explained that the cash deposit came from a compensation payment he received in connection with time he spent in residential schools. He acknowledged that this compensation payment involved a lot more money than what he put up as a cash deposit but said that all the money is gone now. Some of it was used to make child support payments; some was used to pay his lawyer; and most of the rest was used on travel, as he and his common law spouse went on several trips to visit family after she got her prognosis. Mr. Nayally also said that he has good work experience and skills in the food industry and he is confident that he will be able to secure employment when he is released.

2. Lawrence Nayally's evidence

[15] Lawrence Nayally is Mr. Nayally's brother. He has a spouse and two children and he does not drink alcohol. He is employed and considers that he makes a good wage.

[16] Lawrence Nayally said that he understood the struggles that his brother has experienced and when he was asked if he would assist him in getting bail he decided he would try to help him. He had never been a surety for anyone before, but he understood what it entailed and realized what the consequences could be if Mr. Nayally breached any of the conditions.

[17] With his family responsibilities, Lawrence Nayally could not be with his brother all the time to monitor his behaviour, but he made a point of going to visit Mr. Nayally every two days during the evenings. On those visits he never saw him consume alcohol or in any other way breach the terms of his release. On his last visit, Mr. Nayally and his common law were arguing when he went to their home. He believes that it may have been later that night that Mr. Nayally drank alcohol, although he was not there when this happened. On his next visit two days later, Lawrence Nayally did not find his brother at home. He became concerned, and shortly after learned about the breach.

[18] Asked if he would post bail for Mr. Nayally again, after a brief hesitation, Lawrence Nayally said that he would, because he is his brother. He added that he would only do so if he felt that his brother was taking serious steps to address his issues. Lawrence Nayally was asked if he thought his brother was addressing those issues now, and he answered that based on the conversations he has had with him, he thinks that he is really trying.

3. William Doctor's evidence

[19] Mr. Doctor's evidence was brief. He said he did not think Mr. Nayally would drink once he signed the Recognizance. He was told that he did not have to put up any money, and that all he had to do was sign the paper.

[20] He took no steps to monitor Mr. Nayally's behaviour. He never went to visit him at his home. He saw him from time to time but this appears to have been only by chance, when he happened to come across him every once in a while around town, and not as a result of any effort on his part to monitor Mr. Nayally's compliance with the Recognizance.

[21] Based on Mr. Doctor's evidence I conclude that he never truly acted as a surety. He appears to have thought his only role was to sign the release document for his friend. This evidence is difficult to reconcile with the affidavit that Mr. Doctor swore on August 6, 2010, and that was filed as part of the bail review application. It is to the effect that Mr. Doctor is aware of the responsibilities of a surety, and understands that it includes ensuring that Mr. Nayally complies with the terms of his Recognizance.

[22] The affidavit also has, as an exhibit, an Acknowledgement of Surety form completed and signed by Mr. Doctor. This form is required to be completed, pursuant to a Practice Direction issued by this Court on February 17, 2010, when a person is being proposed as a surety. For ease of reference, I have attached a copy of the form to this Memorandum of Judgment. The purpose of having this form completed by proposed sureties is to ensure that they are aware of their role and obligations. Mr. Doctor swore, in his affidavit, that he had read this form and understood it.

[23] I do not know whether Mr. Doctor did not read the form carefully, whether he read it and did not understand it, even though he deposed that he did, or whether he did understand his responsibilities but chose to ignore them. Either way, his approach to this is a good example of why Courts must be concerned about

upholding the integrity of the bail system. A surety who considers his or her task done when the release document is signed is no surety at all.

III) ANALYSIS

[24] The Crown seeks the forfeiture of the full amount of cash that was deposited and full forfeiture with respect to Mr. Doctor. The Crown acknowledges that Lawrence Nayally made efforts to ensure compliance with the Recognizance and that in his case, full, or even partial forfeiture, may not be appropriate.

[25] Section 771 provides very little guidance to courts as far as the criteria that are to be used in making decisions about forfeiture of a recognizance. Paragraph 771(2) simply states that "the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture to the recognizance that he considers proper". There is very little case law from the Northwest Territories that has interpreted this provision.

[26] As I noted in *R.* v. *Alookee* 2011 NWTSC 11, some guidance can be drawn from *R.* v. *Horvarth* 2009 ONCA 732. In that case, the Ontario Court of Appeal examined in depth the considerations to be applied in forfeiture proceedings against sureties. In my view, some of those considerations are also relevant to the forfeiture of a cash deposit made by or on behalf of the accused.

[27] A forfeiture hearing is an opportunity for the person who was bound by the Recognizance and the sureties to be relieved from forfeiture. The onus is on these persons to show that they should be relieved from forfeiture. Trotter, *The Law of Bail in Canada,* 3rd edition, p. 13-15; *R.* v. *Horvarth*, para. 27; *R.* v. *Alokee*, para. 24.

[28] In *Horvarth,* one of the issues was whether the degree of fault or diligence of the surety is a relevant factor to consider on a forfeiture application. The Court concluded that it is. *R.* v. *Horvarth*, paras 28-50. The Court went on to give examples of other factors that could be relevant:

> [51] (...) I do not think it is helpful or even possible to develop an exhaustive list of the factors that the judge should take into account in exercising this discretion. Further, not all factors will be of equal relevancy or weight in all cases. A review of the cases does, however, show that there are categories of factors that

> the courts regularly take into account, including: the amount of the recognizance; the circumstances under which the surety entered into the recognizance, especially whether there was any duress or coercion; the surety's diligence; the surety's means; any significant change in the surety's financial position after the recognizance was entered into and especially after the breach; the surety's post-breach conduct, especially attempts to assist the authorities in locating the accused; and the relationship between the accused and the surety

[29] I would add to this that the nature of the breach is also a factor. If the breach has serious consequences, it is all the more reason for the Court to be concerned about the bail system being undermined. For example, if a person who is bound by a recognizance fails to appear at their trial, such that resources are wasted and witnesses are inconvenienced, the concern about upholding the bail process through forfeiture is highlighted. The same is true if the breach is associated with further criminal activity.

[30] Here, the breach was not a failure to attend Court. It did not result in any inconvenience to witnesses or to a delay in the proceedings. However, it was committed a relatively short time after the Recognizance was entered into. It also led to an incident that required the police being called, as Mr. Nayally was convicted for having resisted arrest on the same day as the day he consumed alcohol.

[31] In my view, the central consideration in this matter is the importance of upholding the bail system. This is sometimes referred to as upholding the "pull of bail". It must be made clear to anyone offering a cash deposit in support of an application for release that there will be consequences in the event that the conditions are not complied with, beyond the possibility of facing a breach charge. The same applies to the sureties: it must be made clear to anyone agreeing to act as a surety that it is a serious commitment, and one that can potentially carry serious consequences in the event of a breach. Without such consequences, having accused persons enter into Recognizances and having people sign on to act as sureties is meaningless, and seriously undermines the bail system as a whole.

[32] Decisions as to bail are a crucial step in the criminal justice process. At that stage, an important consideration is the presumption of innocence, which carries with it the notion that people who are charged but have not been found guilty should not be deprived of their freedom while they are awaiting trial, unless there

are compelling reasons to do so. This is why the right for every accused person not to be denied reasonable bail without just cause is enshrined in the *Canadian Charter of Rights and Freedoms*.

[33] The bail provisions in the *Criminal Code* are based on these fundamental principles. They take into account the wide range of situations that the bail system must address, and contemplate varying degrees of structure and controls being in place for those awaiting trial. A release on a Recognizance with sureties and with a cash deposit is the most stringent type of process provided for in the *Code*.

[34] As Mr. Nayally acknowledged, given his criminal record, he would have had very little chance of success on his bail application without a release plan that involved sureties and a significant cash deposit. The Court was satisfied that those safeguards were sufficient to ensure that the public would not be put at risk if Mr. Nayally was released. In the end, those safeguards proved to be insufficient to prevent a breach. In my view, it would seriously undermine the bail system if there were no consequences, as far as his bail is concerned, to this having happened.

[35] Mr. Nayally testified about the stresses and pressures that he was under because of his common law spouse's illness. I do not doubt that her being afflicted with a terminal illness and given such a short time to live would have made it very difficult for both of them to cope. However, his spouse's health issues were also central to his application for release. It would undermine the bail system if special or unusual circumstances that are used as the basis for the application for release are later also used as a reason not to order forfeiture when there has been a breach.

[36] The second reason why Mr. Nayally opposes forfeiture is that he was under the understanding that unless the Crown applied for forfeiture of the monies within 90 days, the money would be returned. Whatever discussions took place between Mr. Nayally and his counsel on this issue is between them. But neither the *Criminal Code* nor the *Rules of Court* in this jurisdiction provide a time limit for forfeiture applications to be brought. To the extent that Mr. Nayally believed otherwise, he was mistaken. This mistake is not, in itself, a basis to order the monies returned to him, any more that Mr. Doctor's mistake as to the extent of his obligations and jeopardy is a basis for not ordering forfeiture against him.

[37] I recognize, however, that there was a significant delay in these proceedings being advanced. The passage of time is not a bar to forfeiture proceedings, but it is a factor that I think can, in certain circumstances, have a bearing on the Court's

ultimate decision. I have taken into account that before Mr. Nayally requested the return of the monies, the Crown had not taken any steps to advance these proceedings.

[38] With respect to the sureties, this is not a case where there is any suggestion that they encouraged the breach, contributed to it in any way, or assisted Mr. Nayally in attempting to evade its consequences. The main consideration as far as they are concerned is the extent to which they attempted to ensure compliance with Mr. Nayally's release terms.

[39] On that basis, I conclude that there should be no forfeiture order against Lawrence Nayally. I am satisfied, based on his testimony, that he took his responsibilities as a surety seriously. To his credit, he was trying to help his brother. He made a point of checking on him regularly. He appears to be a very responsible and empathetic individual. It is not in the best interests of the administration of justice to discourage such persons from agreeing to act by sureties by adopting an approach, on forfeiture hearings, that does not take into account efforts they have made to ensure that the accused person complies with his or her promise to the Court.

[40] I agree with the Crown, however, that Mr. Doctor's situation is different. I do not doubt that his intentions were good in that he wanted to help his friend at a difficult time. But given that he swore an affidavit where he specifically acknowledged his responsibilities and the obligations of a surety, I have some difficulty with his testimony that he was under the understanding that his responsibility was limited to signing the release document.

[41] Mr. Doctor's financial means must be considered. In his affidavit, he deposed that he had had steady employment for about 13 years. At the estreatment hearing Mr. Doctor did not provide any information about his current financial situation, and he was not asked about it in cross-examination either. The lack of information about his current means is of concern. This is particularly so because the passage of time since then (almost 2 years) is such that there is a greater risk of his situation having changed.

[42] Taking all these factors into account, on balance, I have concluded that it is necessary that there be a forfeiture order in this case to uphold the integrity of the bail system. However, having regard to the whole of the circumstances, I have decided that full forfeiture is not necessary to achieve this objective.

IV) CONCLUSION

[43] For those reasons, I order the following:

1. With respect to the cash deposit, there will be a Forfeiture Order in an amount of $2,000.00; I direct that the remaining $1,000.00 be returned to Karl Nayally;

2. With respect to William Doctor, there will be a Forfeiture Order in an amount of $500.00;

3. With respect to Lawrence Nayally, there will be no Forfeiture Order

L.A. Charbonneau
J.S.C.

Dated this 11th day of July 2012.

Counsel for the Applicant: C. Punter
Respondents represented themselves: K. Nayally, L. Nayally, W. Doctor

FORM "A"

ACKNOWLEDGMENT BY SURETY

Name: _____ (name of surety)

I understand that _____ (the accused) has been charged with the following criminal offence(s):

(list of charges) _____

_____

I am asking to be (the accused's) surety. I understand that this means I am responsible for his/her behaviour once he/she is released from jail, until the charges are concluded. I understand that I do not have to be a surety. It is my free choice to make this promise and take on these obligations.

RESPONSIBILITIES OF A SURETY

I understand that by becoming a surety, I am guaranteeing to the Court that (the accused) will:

A. Come to court as required;
B. Obey all of the conditions of his/her bail; and
C. Not commit any criminal offences while on bail.

OBLIGATIONS OF A SURETY and CONSEQUENCES OF BREACH

I understand that I am promising to pay the **full amount** of the bail $_____ , if _____ (the accused) does not attend court as required or if he/she does not comply strictly with the terms of bail or if he/she commits an offence while on bail.

I understand that it is my responsibility to prevent any of these things from happening but that if they do happen, I may be ordered to forfeit the total amount of the bail, being $_____, or a part of it.

IF I WANT TO STOP BEING A SURETY

I understand that I may ask to be removed as a surety at any time by either either (a) writing to the court, or (b) contacting my local police detachment.

Dated at _____, in the Northwest Territories, this ____ day of _____, 20____.

_____.
(Name of Surety)

S-1-CR-2012 000018

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Applicant

- and –

KARL NAYALLY, LAWRENCE NAYALLY AND WILLIAM DOCTOR

Respondents

MEMORANDUM OF JUDGMENT
THE HONOURABLE JUSTICE L.A. CHARBONNEAU
