NOVA SCOTIA COURT OF APPEAL
Citation: R. v. MacCulloch , 2010 NSCA 31

Date: 20100409
Docket: CAC 325633
Registry: Halifax

Between:

Patricia B. MacCulloch

Applicant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Oland

Application Heard: April 1, 2010, in Chambers

Held: Motion for stay of the driving prohibition pending the disposition of the appeal is granted with a condition.

Counsel: Patricia B. MacCulloch, the appellant in person
Kenneth W.F. Fiske, Q.C., for the respondent

Decision:

[1] The appellant, Mrs. Patricia MacCulloch, made motions in Chambers to set down her appeal for hearing and for a stay of a driving prohibition and the suspension of the payment of a fine. For the reasons which follow, I would grant a stay but impose a condition. It is not necessary that I deal with the suspension of the fine.

[2] Chief Judge Curran of the Provincial Court found Mrs. MacCulloch not guilty of driving while impaired but guilty of refusing, without reasonable excuse, to comply with the demand by a peace officer to provide a breath sample. On August 13, 2009 the judge sentenced her to a one-year driving prohibition and a $1,000 fine to be paid by August 5, 2010.

[3] Mrs. MacCulloch appealed to the Summary Conviction Appeal Court and sought a stay. On September 17, 2007 Justice Simon MacDonald granted a stay pending the summary appeal. Mrs. MacCulloch's appeal to the Summary Conviction Appeal Court was dismissed by Justice Arthur W.D. Pickup on February 4, 2010. His decision is reported as 2010 NSSC 48.

[4] Mrs. MacCulloch's appeal of that dismissal has been set down for hearing two months hence, on June 8, 2010. She seeks a stay of the driving prohibition and of the fine payment pending the disposition of her appeal.

[5] No sworn affidavit in support of her motions was provided by Mrs. MacCulloch who represented herself in Chambers, as she had throughout the earlier proceedings. However, Mrs. MacCulloch had filed considerable material setting out her grounds of appeal, her personal situation and her arguments for a stay and fine suspension. On behalf of the Crown, Mr. Fiske indicated that, in this case, the Crown was not raising nor concerned by the lack of a formal affidavit. Accordingly, I proceeded on the basis of the written material in the file, including the Crown's written submissions on the motions, and the oral arguments of the parties.

[6] The provision of the *Criminal Code* which governs stays of driving prohibition orders is s. 261 which provides that:

> . . . a judge of the court being appealed to may direct that any prohibition order . . . shall, on any conditions that the judge . . . imposes, be stayed pending the final disposition of the appeal or until otherwise ordered by that court.

The criteria to be met were set out in *R. v. J.* (1987), 66 Nfld. & P.E.I.R. 84 (P.E.I.S.C.) which was followed in *R. v. Murray*, (1994), 134 N.S.R. (2d) 393 (N.S.C.A.). There, in ¶ 10, Pugsley, J.A. in Chambers stated that the burden rests upon the appellant to satisfy the court that:

> (a) the appeal is not frivolous;
>
> (b) continuation of the driving prohibition pending appeal is not necessary in the public interest; and
>
> (c) to grant the stay would not detrimentally affect the confidence of the public in the effective enforcement and administration of criminal law . . .

[7] In Chambers, Mrs. MacCulloch passionately emphasized her personal circumstances, the real hardships imposed by the driving prohibition, and her view that that prohibition had unfairly denied her the basic necessities of life. She described herself as a 75 year old person living on a low, fixed income in North West Cove, outside of Hubbards. According to Mrs. MacCulloch, her home is not on a bus route, there is no taxi service, and she is a half hour's drive from any food store and the mail and an hour's drive from medical services. These assertions were accepted by Chief Judge Curran. In his decision which was quoted in Justice Pickup's decision at ¶ 36, Chief Judge Curran observed, with regard to the impact of a driving prohibition or the loss of her licence on Mrs. MacCulloch:

> Now there is no doubt about those things being extremely significant. They would be significant to anybody. But I accept they are even more significant to someone who lives in rural areas, nowhere near bus services and really nowhere near other services, for that matter ...

[8] Mrs. MacCulloch's conviction for refusal to provide a breath sample is her first offence of any kind under the criminal law. As noted earlier, this septuagenarian was found <u>not</u> guilty of driving while impaired. She has no prior driving record. She has never been convicted of speeding, careless or impaired driving, or failing or (except the instance which is the subject of her appeal) refusing a breath demand. In these circumstances, I am persuaded that public

safety would not be a concern if her driving privileges were restored pending her appeal.

[9] Mrs. MacCulloch lives in a fishing village which is not near any public transportation or taxi service. According to Mrs. MacCulloch, many of the occupants in her village are residents only on a seasonal basis. It seems impractical for her to continuously try to find someone to drive her and to rely on his or her kindness and availability. She does not appear to have the financial means to hire someone to act as her driver. Mrs. MacCulloch needs to be able to obtain food, to to send and receive the post, to do her banking, and to receive medical attention. All of these are a half-hour or an hour's drive from her home.

[10] In my opinion, Mrs. MacCulloch has met the burden of demonstrating that continuation of the driving prohibition pending appeal is not necessary in the public interest, and that granting a stay for two months would not detrimentally affect the confidence of the public in the effective enforcement and administration of criminal law. The Crown agrees that her motion for a stay meets both (b) or (c) of the criteria set out in *Murray, supra*.

[11] I turn then to (a) of those criteria, namely, whether Mrs. MacCulloch has shown that the appeal is not frivolous. This is a low threshold. There is no indication that the appeal has been launched for any reason other than succeeding on appeal, so it is not frivolous in that sense. I must also consider whether the appeal is frivolous in the sense of having so little chance of success that it was frivolous to bring it. This requires me to review the materials available to me, including the Notice of Appeal and the decision under appeal.

[12] Attached to the Notice of Appeal are several pages on which Mrs. MacCulloch has set out some 20 grounds. Where she is self-represented, they are not set out in the usual legal fashion nor with the clarity which a trained lawyer might have done. It is difficult to extract the precise grounds of appeal. However, several appear to detail failure by Summary Conviction Appeal Court judge to take into account abuse of power and omissions by the police officer who had made the breath demand, failure to take into account certain evidence, error in regard to alleged contraventions of the *Charter*, and prejudice or bias. I observe that Mrs. MacCulloch does not simply toss out broad allegations but provides specifics as to where and how, in her view, the judge erred.

[13] The materials before me as the Chambers judge are limited. A careful review of the transcripts of the earlier proceedings may reveal material which supports the grounds that Mrs. MacCulloch has raised in her Notice of Appeal. These, of course, will be contained in the appeal book available to the panel of judges which hears the merits of the appeal, and such a review will be done by that panel. While some of the grounds as set out in the Notice of Appeal may appear weak, I am not able to say with confidence from the material before me that Mrs. MacCulloch's appeal has so little chance of success that it is frivolous and does not meet the threshold.

[14] In reviewing the materials before me, I noted a possible miscommunication or misunderstanding. As mentioned earlier, the decision of Chief Judge Curran was stayed pending appeal before the Summary Conviction Appeal Court. However, it appears from correspondence between Mrs. MacCulloch and the Motor Vehicles Department subsequent to the granting of the stay that that stay may not have come to the Department's attention or that she did not appreciate its import. In any event, after that stay, Mrs. MacCulloch sought permission from that Department to drive in order to get her groceries and was denied. It seems then that, because according to that correspondence that she could not legally do so, Mrs. MacCulloch may not have driven during that intervening period. If so, by the time her appeal is heard in two months' time, ten months will have elapsed from the time that Chief Judge Curran imposed the one year suspension of her driving privileges.

[15] For these reasons, and in these particular circumstances, I would grant the motion for a stay of the driving prohibition pending the disposition of the appeal to be heard on June 8, 2010. I would impose this condition: if the appeal is not heard on June 8, 2010 or any adjourned date set by a judge or by this court, then this stay will end on June 8, 2010 or such adjourned date.

[16] Mrs. MacCulloch was also fined $1,000 to be paid by August 5, 2010. The power of a judge of this court to suspend payment of a fine is provided by s. 683(5)(a) of the *Code*. The appeal is scheduled to be heard this June. Since it is likely judgment will be rendered prior to August 5, 2010, I do not need to deal with her motion for suspension of the fine.

Oland, J.A.