

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Finck*, 2005NSCA93

Date: 20050610

Docket: CA 246654

Registry: Halifax

Between:

Lawrence Ross Finck and Carline VandenElsen

Appellants

v.

Her Majesty the Queen

Respondent

Judge(s): The Honourable Justice Jamie W. S. Saunders

Appeal Heard: June 9, 2005, in Halifax, Nova Scotia

Written Judgment: June 10, 2005

Held: Application for release on bail pending appeal dismissed;
further directions given with respect to other applications

Counsel: Lawrence Finck, for both appellants
William Delaney, for the respondent
Edward Gores, for the Attorney General of Nova Scotia

Reasons for judgment:

[1] After a very lengthy trial by jury over which Nova Scotia Supreme Court Justice Robert W. Wright presided, Mr. Finck and Ms. VandenElsen were convicted of several serious offences, the details of which may be found in the record.

[2] The case arose out of a three day stand-off with police during which time the neighbourhood was evacuated and a shot was fired from the Finck residence. At some point during the incident Mr. Fink's mother died.

[3] Following their conviction on May 12, 2005 they filed a joint notice of appeal on May 16 and then on May 25 filed a joint application for release on bail pending the hearing of their appeal. It is to be noted that Justice Wright, upon the conviction of these two individuals, ordered their remand into custody pending sentence, scheduled to take place before him on June 28, 2005.

[4] The application this morning brought by Ms. VandenElsen through her husband Lawrence Ross Finck as agent, and by Mr. Finck on his own behalf, is taken pursuant to **Criminal Code** s. 679(3) which reads:

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.

[5] The applicants have the burden of proving, to my reasonable satisfaction on the balance of probabilities, that all of the conditions I have just outlined in ss. 679(3) have been met.

[6] Having considered the fact (as they insisted be emphasized) that theirs was a single, joint application; the very serious nature of the crimes for which each stands

convicted; that sentencing is less than three weeks away; that Ms. VandenElsen faces a statutory minimum of one year in jail for one of her crimes; the circumstances surrounding these offences; the record before me; their demeanour and attitude in the face of the court; together with the various submissions, I am not at all satisfied that any, let alone all, of those elements have been established. Even if I were to assume that it could be said that any of the stated grounds of appeal is not frivolous, I am not persuaded that either or both of the appellants would surrender themselves into custody in accordance with the terms of any order of this court, nor that the detention of either or both of them is not necessary in the public interest.

[7] For those reasons, the joint application is dismissed.

[8] The remaining two applications before me this morning, that is to set a date or dates regarding a constitutional questions matter, and setting a date or dates for an application pursuant to S. 683 of the **Criminal Code** and/or **Civil Procedure Rule** 65.16 are adjourned without day. In my view they are prematurely taken. They are adjourned without prejudice to the appellants' ability, if so advised, to bring them before the court again when, in accordance with certain directions I will give in a moment, the various issues may be better discerned and each side will understand what the other is trying to do.

[9] First, there's the problem of the transcript. This was a very lengthy trial as I recall. Many weeks of litigation were consumed, including attendant interludes for *voir dices*, firings of legal counsel, and so on. Obviously, by any reasonable measure, preparation of the transcript, in a queue other transcripts from other cases, will take the reporters some time. I understand that. I'm simply going to urge the Public Prosecution Office to use best efforts to see that the transcript from this trial is prepared as quickly as might reasonably be expected. I'm going to suggest that the matter come back before me on September 8, 2005 when I am next in Chambers, or thereafter before any other judge of this court.

[10] Until the transcript is available it is impossible for the appellants to articulate in any meaningful way what they say are proper constitutional questions. Further, it will be impossible for the Crown, either in the name of the province, or the Canadian government, to respond, or even indicate whether they agree there are legitimate constitutional questions to address, or to take steps to strike them out. Similarly, at this early stage, one cannot say whether such questions might or

should become legitimate grounds of appeal, best heard in the context of an appeal. It is to be remembered that a Reference on any constitutional question is not taken at the instance of a prisoner launching an appeal.

[11] So, the bottom line is that best efforts will be made to speed up the preparation of what is surely to be a very lengthy transcript. As soon it is prepared Mr. Finck, you, in the normal course, will get your copy. When you articulate and frame your constitutional questions you are also directed to comply with the reasonable request brought by Mr. Gores, that is that you identify the page and line reference of the transcript which you say is relevant to that constitutional question. If there is more than one page and one line then you will identify all such references for the assistance of the people on the other side of these proceedings, so that upon receipt, they in turn can demand further particulars from you, if so advised.

[12] I will not make any other order under the **Criminal Code** nor make any other order under the **Civil Procedure Rules** until such time as the applications are brought back before this court and until such time as I can hear from counsel for the Crown concerning the status of the transcript.

[13] That won't be before the 8th of September, 2005, when I am next in Chambers, or thereafter before another member of this court.

Saunders, J.A.