NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. West***, 2006 NSCA 123

Date: 20061115
Docket: CAC 264962
Registry: Halifax

Between:

William Fenwick West

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judges: Chief Justice Michael MacDonald, in Chambers

Application Heard: Application Proceeded by way of Written Submissions

Held: Section 680 *Criminal Code* application (for bail review) is dismissed.

Counsel: James J. White, for the applicant/appellant
Kenneth W.F. Fiske, Q.C., for the respondent

Decision:

[1] In April of this year, the appellant, William Fenwick West, was sentenced to a ten-year prison term for robbery and related offences. His conviction appeal and application for leave to appeal his sentence will be heard by this court in six months' time. This summer, my colleague, Justice Hamilton refused Mr. West's application for bail pending appeal (see **R. v. West**, 2006 NSCA 103). Now under s. 680 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, Mr West has asked me, as chief justice, to have this decision reviewed by another member of the court. For the reasons that follow, I deny this request.

Background:

[2] On February 10, 2006, Justice C. Richard Coughlan of the Nova Scotia Supreme Court convicted Mr. West and on April 6, 2006 sentenced him to a prison term just days short of ten years.

[3] On April 13, 2006, Mr. West filed with this court his notice of conviction appeal and leave application to appeal sentence. His appeal is scheduled to be heard on May 17, 2007.

[4] Mr. West applied for bail on July 17, 2006 and appeared before Justice Hamilton on August 10, 2006. She concluded that Mr. West failed to meet two of the three statutory criteria for release. Specifically, she was concerned about, (i) his risk of flight, and (ii) the public interest component:

> [12] Pursuant to s.679 (3) of the **Criminal Code** R.S., c. C-34, s.1, a judge of the court of appeal may release an appellant from custody pending determination of his appeal if the appellant satisfies the judge on a balance of probability that (a) the appeal is not frivolous; (b) that he will surrender himself into custody in accordance with the terms of the order; and (c) that his detention is not necessary in the public interest.
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> [13] ... With respect to the first criterion, for the purpose of this application I accept the position of Mr. West and the Crown that his appeal is not frivolous.
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> [14] With respect to the second criterion, Mr. West has not satisfied me that he will surrender himself into custody if I release him. Mr. West appeared when required when he was released pending his appeal of his first convictions relating

to the Mahone Bay robbery. However, the circumstances now are different. This is his second conviction with respect to the same robbery. He is imminently facing a trial with respect to another robbery where he is aware that the Crown is intending to introduce DNA evidence that it will argue places him at the scene. He is also facing another trial on the threat and intimidation charges relating to his retrial.

...

[17] Nor has Mr. West satisfied me that his detention is not necessary in the public interest.

[18] The question of what meaning ought to be attached to the phrase "necessary in the public interest" was addressed in **R v. M.W.C.** (2002), 210 N.S.R. (2d) 29:

> [16] In arriving at my conclusion I have paid particular attention to a number of cases, including the decision of the British Columbia Court of Appeal in **R. v. Toor (S.S.)**, [2001] B.C.J. No. 305, 148 B.C.A.C. 299; 243 W.A.C. 299 (C.A.), a decision of Justice Prowse, sitting in chambers. In the course of her remarks, she referred to the comments of Chief Justice McEachern in an earlier case, **R. v. Nguyen (T.T.)** (1997), 113 B.C.A.C. 56; 184 W.A.C. 56; 10 C.R. (5th) 325 (C.A.), wherein McEachern, C.J.B.C., described the meaning that ought to attach to the phrase "necessary in the public interest":
>
> > 'The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause 'ordinary reasonable, fair-minded members of society' (per O'Grady at 4 [p. 139 C.C.C.]), or persons informed about the philosophy of the legislative provisions, **Charter** values and the actual circumstances of the case (per **R. v. K.(K.)**, [1997] at 54), to believe that detention is necessary to maintain public confidence in the administration of justice.'
>
> [17] Further, I have considered the comments of Justice Flinn of this court sitting in chambers in December, 2001, in **R. v. Desmond (R.H.)**, [2001] N.S.J. No. 520; 199 N.S.R. (2d) 296; 623 A.P.R. 296 (C.A.), where Flinn, J.A., referred with approval to the remarks of Pugsley, J.A., in **R. v.**

> **E.R.H.** (1999), 174 N.S.R. (2d) 298, 532 A.P.R. 298 (C.A.), where in the latter case Justice Pugsley said:
>
> > '¶ 24 Public interest includes both the safety of the public and the confidence of the public in the judicial system.
> >
> > ¶ 25 Any action that may detrimentally affect public confidence and respect is contrary to the public interest (**R. v. Demyen** (1975), 26 C.C.C. (2d) 324).'
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> [19] In assessing whether Mr. West's release is necessary in the public interest, I must weigh the values of reviewability, the need to review the convictions leading to imprisonment (which may require a temporary suspension of the sentence), and the need to respect the general rule of immediate enforceability of judgments; see **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 47-48 (Ont. C.A.).
>
> [20] The offences that Mr. West has been convicted of are serious and Mr. West has received a lengthy prison sentence, almost ten years. His criminal record, though dated, relates to similar offences. The charges he is facing relate to charges for a similar offence and charges relating to his retrial for the Mahone Bay robbery. On both outstanding charges Mr. West has been committed to stand trial following a preliminary inquiry. On the robbery charge he knows the Crown intends to introduce DNA evidence putting him at the scene of the crime. The trials are presently set to begin prior to the appeal hearing.

[5] Mr. West applied for the s. 680 review to me as chief justice on October 11, 2006. I directed that the application proceed by way of written submissions, which have now been filed.

Analysis:

[6] Section 680 establishes my jurisdiction to direct a review:

> 680. (1) **Review by court of appeal** — A decision made by a judge under section 522 or subsection 524(4) or (5) or *a decision made by a judge of the court of appeal* under section 261 or 679 *may, on the direction of the chief justice* or acting chief justice of the court of appeal, *be reviewed by that court* and that court may, if it does not confirm the decision,
>
> > (a) vary the decision; or

> (b) substitute such other decision as, in its opinion, should have been made.
>
> (2) **Single judge acting** — *On consent of the parties, the powers of the court of appeal under subsection (1) may be exercised by a judge of that court.*
>
> (3) **Enforcement of decision** — A decision as varied or substituted under this section shall have effect and may be enforced in all respects as though it were the decision originally made.
>
> [Emphasis added.]

[7] Recently in **R. v. Finck** , 2005 NSCA 146, I considered my role as chief justice in a s. 680 application. Essentially, a review should be directed unless it would offer no hope of success.

> [7] This provision directs a two-step process. As a first step, I must decide whether or not to direct a review. Should I so direct, the second step would involve the actual review by a panel of the court.
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> [8] In **R. v. Wood (J.D.)** (1999), 181 N.S.R. (2d) 193, my predecessor, Glube, C.J., explained:
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> > ¶ 9 Following an application for release pending appeal pursuant to section 679(1) of the **Criminal Code**, Justice Cromwell issued a written decision on October 19, 1999, granting the release with conditions, pending Mr. Wood's appeal scheduled to be heard January 26, 2000. The original order is dated October 20, 1999 and an amended order changing several of the conditions is dated October 26, 1999. On the same date as the amended order, the Crown applied for a review under s. 680(1) of the **Code**.
> >
> > > s. 680(1) A decision made by a judge under section ... 679 may, on the direction of the Chief Justice ... of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,
> > >
> > > (a) vary the decision; or
> > >
> > > (b) substitute such other decision as, in its opinion, should have been made.

In the commentary following s. 680, it states in part:

> ... The procedure involves two steps. An *application* is made to the chief justice or acting chief justice of the court of appeal for a *direction* that the decision be reviewed by the court of appeal. If the direction is refused, no review will be held ... [**Tremeear's Criminal Code**, The 2000 Annotated, p. 1002.]

[9] At this initial step, my role is limited. I should direct a review unless the appellants would have no hope of success on a review of the record. Again, I refer to a decision of Glube, C.J., this time in **R. v. Sanchez**, [1998] N.S.J. No. 415:

> ¶ 40 The case of **R. v. Moore** (1979), 49 C.C.C. (2d) 78 (N.S.S.C.A.D.) deals with whether or not to order a review. MacKeigan, C.J.N.S. stated the basis for his decision as follows:
>
> > I conceive that I should direct a review under s. 608.1 [now 680] if, in my view, the appeal Court, properly applying the law, could possibly conclude that the application for release should have been allowed. I should, on the other hand, probably refuse review only if the applicant would have no hope of success on a review of the record. [p. 79]
>
> ¶ 41 *Thus a review should be ordered unless the accused or the Crown has no hope of success on the record.*

[Emphasis added.]

[8] In this present case, it is clear to me that Justice Hamilton committed no error and that any review of this decision on its merits would stand no hope of success. Justice Hamilton carefully addressed the three relevant criteria and had concerns with two of them. Nothing in her decision reflects error. In fact Mr. West concedes that Justice Hamilton committed no error in denying bail. Instead in his written submissions he states that new facts are now available and ought to be considered:

> ... It is not submitted that Justice Hamilton committed any overriding error in her decision, but merely that several new facts are now available for review, and that this may affect the decision. It is respectfully submitted that given this new evidence, there would be at least a "hope of success on the record" should your lordship decide to direct a review.

[9] Essentially what Mr. West seeks is a reconsideration of the issue in light of what he feels are new compelling circumstances. For example, he asks me to consider new affidavit evidence confirming that Mr. West has a job waiting for him should he be released and that his proposed sureties would carefully monitor his activities.

[10] While I would make no comment on the chance of success, based upon these alleged changes there would be nothing to prevent Mr. West from re-applying for release under s. 679 of the **Code**. For example, in **R. v. Daniels** (1997), 119 C.C.C. (3d) 413, Doherty, J.A. of the Ontario Court of Appeal noted:

> ¶ 31 In my opinion, the fact that s. 680 creates an appellate jurisdiction which can be expanded to consider changes in circumstances does not assist in determining whether s. 679 contemplates a second bail application based on changed circumstances. *Section 680 clearly provides the only means by which the correctness of a decision made under s. 679 can be challenged. It does not foreclose a second application under s. 679 where the correctness of the first decision is conceded, but it alleged that the circumstances have changed.*
>
> [Emphasis added.]

See also **R. v. C.V.S.**, [2003] N.B.J. No. 4 (N.B.C.A.).

[11] In fact such a process may be more efficient than this s.680 application upon which Mr. West has embarked. For example, Finch, C.J.B.C. in **Seifert v. Italy**, [2003] B.C.J. No. 2573 (B.C.C.A.) observed:

> ¶ 15 I have not, however, been persuaded that such a review is the best course to follow. *It remains open to the appellant to apply again under s. 679 before the same or another chambers judge to consider the issues now raised by the amended notice of appeal. Such a course appears to me to be more appropriate than a review of the present order. A fresh application under s. 679 to a single judge will be faster and less expensive than a review.* It will make better use of judicial resources. It will enable counsel to develop more focussed submissions

> identifying those parts of the impugned rulings of the extradition judge alleged to be in error. And, in the event that such a second application is unsuccessful, it still permits a further application under s. 680 for a direction to review.
>
> [Emphasis added.]

[12] Thus, in conclusion, a review of Justice Hamilton's decision would offer no hope of success. However Mr. West may have other options available to him.

[13] For all these reasons, I dismiss his s. 680 application for review.

MacDonald, C.J.N.S.