NOVA SCOTIA COURT OF APPEAL
Citation: *US v. Thompson*, 2005 NSCA 109

Date: 20050722
Docket: CAC 247301
Registry: Halifax

Between:

The United States of America

Respondent

v.

Kristine Elizabeth Thompson a.k.a. Kristine Elizabeth Munroe
and Kristine Elizabeth Orpin

Applicant

Judge:	Cromwell, J.A.
Application Heard:	July 21, 2005, in Halifax, Nova Scotia, in Chambers
Held:	Application dismissed.
Counsel:	J. Patrick Atherton, for the applicant Monica McQueen, for the respondent

Decision:

[1] This is an application for judicial interim release under the **Extradition Act**, S.C. 1999, c. 18.

[2] The applicant consented to her committal for extradition pursuant to s. 70 of the **Extradition Act**. On the basis of that consent, LeBlanc, J. issued an order for committal under s. 29 of the **Act**. That order directed that the applicant remain in custody in the Central Nova Scotia Correctional Facility until delivered pursuant to the provisions of the **Act** or discharged according to law.

[3] She now applies for what is termed in the notice of application to be a "bail review" under ss. 38(2) and 20(b) of the **Act**. She has filed an affidavit indicating that she consents to her surrender to the United States, but seeks release with a surety in order to have one to three weeks to put her affairs in order prior to going to the United States.

[4] It is common ground that judicial interim release in the applicant's circumstances, that is, a person who has been committed but awaits the Minister's order under s. 40 of the **Act** for surrender to the extradition partner, is governed by s. 20(b) of the **Act**. That subsection in turn incorporates by reference s. 679 of the **Criminal Code**, R.S.C. 1985, c. C-46, the provision dealing with bail pending appeal, with any modifications that the circumstances require.

[5] To succeed under s. 679, the applicant must establish three things: first, that the appeal is not frivolous; second, that she will surrender herself into custody in accordance with the terms of a release order; and third, that her detention is not necessary in the public interest.

[6] Obviously, the first of these requirements must be modified in some way as contemplated in s. 20 of the **Act** in order to be applied to the present circumstances. The applicant is not appealing the order for committal and has consented to the Minister making an order that she be surrendered to the extradition partner. What is to be done with the requirement that the applicant establish that "...the appeal ... is not frivolous"?

[7] Counsel, without citing authority, have proposed two possible modifications of this requirement to meet the circumstances of this application.

[8] Counsel for the applicant says the requirement should be modified by deleting it entirely. This approach is submitted to be appropriate in light of the fact that in these circumstances, the presumption of innocence is operative, unlike in the case of bail pending appeal, and there should, therefore, be no onus on the applicant to show that either the order of committal is arguably erroneous or that there are arguable grounds upon which the Minister could refuse to order surrender. I note that this approach was adopted in the context of an appeal of a committal order by Welsh, J.A. in **The United States of America v. Turner** (2003), 220 Nfld. & P.E.I.R. 312; N.J. No 11 (Q.L.)(N.L.C.A., Chambers) at paras. 5 - 30.

[9] Counsel for the respondent submits that this first requirement should not be jettisoned entirely, but modified so that the applicant has a burden to establish that she has submissions which are not frivolous under s.43 of the **Act** to support a decision by the Minister not to order her surrender. This approach was substantially adopted by Simmons, J.A. in **The Attorney General for Canada v. Raghoonanan** (2003), 63 O.R. (3d) 465 (C.A. Chambers), a decision released about one month after the decision in **Turner**. Justice Simmons rejected the submission that the first requirement should be deleted entirely, holding that the incorporation of s. 679 of the **Criminal Code** by s. 20 of the **Extradition Act** evinces a clear Parliamentary intention that bail not be granted unless the issues raised by an applicant reach a certain threshold: at para. 38. She concluded that the first requirement should be modified to require the applicant to demonstrate that the issues raised in submissions to the Minister with respect to surrender are not frivolous. This approach has also found favour in Quebec: **Rizzuto v. United States of America**, [2004] Q.J. No. 8545 (Q.L.) (C.A. Chambers) at para. 11 approving **Raghoonanan**; **Divito c. Ministre de la justice du Canada**, [2004] J.Q. No. 10729 (Q.L.)(C.A. Chambers) at para. 15; **Reda v. United States of America**, [2005] Q.J. No. 417 (Q.L.) (C.A. Chambers) at para. 5 not following **Turner**; **Chityal v. United States of America** (2004), 189 C.C.C. (3d) 243: Q.J. No. 9290 (Q.L.)(C.A. Chambers). This approach is also supported by the reasoning of Wood, J.A. in **United States of America v. Ross**, (5 July 1993), B.C., CA017111 (C.A. Chambers), cited by the respondent, in which he held that the authority to "modify" as found in s. 19.5(1) of the former **Extradition Act** R.S.C.

1985, c. E-23 does not permit the Court to re-write the explicit terms of s. 679(3) so as to enact fundamental changes to the substance of that provision. Deleting the requirement entirely would seem to be such a fundamental change to the provision.

[10] If it were necessary for me to decide the point, I would follow the approach of Simmons, J.A. in **Raghoonanan** and hold that in the context of s. 20(b) of the **Extradition Act**, the first requirement of s. 679(3) should be modified so as to require the applicant to establish that she has advanced grounds which are not frivolous upon which the Minister should not order her surrender. The applicant, having consented to her surrender, could not meet this requirement and the application would accordingly be dismissed on that basis.

[11] However, I do not need to rest my decision on that point. I prefer not to express a settled view in relation to it as counsel, while raising the point, did not refer me to most relevant authorities or fully argue it.

[12] I turn then to the second requirement - that the applicant establish that she will surrender herself into custody in accordance with the terms of a release order.

[13] The applicant has filed an affidavit indicating that she wishes to have some time at large prior to leaving for the United States to permit her to put her affairs in order. She proposes that she reside with her daughter and grandchildren on the basis of virtual house arrest except when in the company of her surety.

[14] I also received the oral testimony of the proposed surety, Ms. Phyllis Munroe, the applicant's mother-in-law, who is prepared, along with her husband, to be a surety in the amount of $10,000, a very significant percentage of the equity in their home. She resides about 20 minutes away from the applicant's proposed residence and testified both as to her confidence that the applicant would abide by terms of release and her determination that she would immediately report any breaches to the police. I found Ms. Munroe's evidence to be both sincere and trustworthy and I have no doubt that she would do her very best to fulfil her obligations to the Court as a surety.

[15] The record before me also indicates that the applicant was released on a personal recognizance on the US charges by the United States District Court for the District of Vermont, but failed to appear as she had promised to do for her trial in May of 2002. The applicant has filed and relies on the transcript of the bail

hearing held before Goodfellow, J. prior to the committal order being made and this matter was explored in the applicant's oral testimony at that time. She testified that she had sent doctor's notes to her US lawyer indicating that she was not well enough to travel to Vermont for her trial. The evidence presented on this matter before Justice Goodfellow was, however, unimpressive and he found no excuse for the failure to attend. Nothing further on this subject was placed in evidence before me. I conclude that the applicant's failure to attend court in the United States in breach of her promise to do so is neither excused nor satisfactorily explained in the record before me.

[16] In my opinion, the applicant is a flight risk as demonstrated by her past behaviour.

[17] I consider Ms. Munroe, the proposed surety, to be both honest and well-intentioned. However, she lives some distance away from the applicant and obviously is not in a position to monitor her every move or to even know of her whereabouts on a continuous basis. I do not share Ms. Munroe's confidence that the applicant will surrender herself into custody in accordance with the terms of a release order and Ms. Munroe is not in a position to closely monitor the applicant's activities should she be released.

[18] I conclude that the applicant has not established that she will surrender herself into custody in accordance with any release order that I could make. The application for judicial interim release is, therefore, dismissed.

[19] I have taken into account the letter filed on the applicant's behalf from her American counsel indicating that the likely sentence on conviction in the United States could range from no incarceration to between 10 and 16 months imprisonment. I have noted that the applicant has already been in custody in this country for some four months. I was advised that counsel for the respondent has received assurances that the Minister will deal with this matter in the next two to three weeks and that the surrender should be arranged and completed within that time period. My decision refusing bail is based in part on this understanding of the likely timetable for surrender. I appreciate that both parties have consented to an extension of the 90 day period provided for the Minister's decision to order surrender in s. 40 of the **Act** and that the applicant has only very recently indicated her consent to a surrender order being made. However, it is obviously important

that this matter be dealt with at the first reasonable opportunity and I request that counsel for the respondent relay that to the responsible authorities.

[20] The application is dismissed.

Cromwell, J.A.