NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Tattrie*, 2007 NSCA 41

Date: 20070411
Docket: CAC 276364
Registry: Halifax

Between:

Trevor Miles Tattrie

Appellant/Applicant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Linda Lee Oland
Application Heard:	April 5, 2007, in Halifax, Nova Scotia, In Chambers
Held:	Application for bail pending determination of appeal dismissed.
Counsel:	Michael S. Taylor, for the appellant/applicant Daniel MacRury, Q.C., for the respondent

Decision:

[1] The appellant, Trevor Miles Tattrie, applies under s. 679 of the *Criminal Code* for release pending the determination of his appeal against conviction and sentence. For the reasons which follow, I would dismiss his application.

[2] On August 23, 2006, Mr. Tattrie was convicted of assault using a weapon, namely a metal bar (s. 267(a) of the *Code*); possession of a weapon, namely, that metal bar, for a purpose dangerous to the public peace (s. 88); and breach of a probation order (s. 733.1). He was subject to a conditional sentence order on the date of those offences. On September 26, 2006 he was found in breach of that order. Sentencing for all these offences took place on December 12, 2006. The appellant received 12 months in custody for the assault, and concurrent time of four months on each of the remaining charges. He was ordered to serve the 97 days remaining on his conditional sentence.

[3] The appellant appeals against conviction and seeks leave to appeal against sentence. He asks that the convictions be quashed and a retrial ordered, and that the term of incarceration be reduced. His appeal is set to be heard by this court on June 4, 2007, some two months hence.

[4] In his decision, Provincial Court Judge John G. MacDougall reviewed the circumstances of the offences of assault using a weapon, possession of a weapon, and breach of probation. He was satisfied that there had been two encounters between the appellant and the victim, a Mr. McNutt. First there was a brief fistfight in a driveway, with the appellant immediately taking control, both men falling to the ground, and a number of blows. Mr. McNutt, who clearly got the worse of the encounter, left. Despite the appellant's denial of any second altercation, the judge accepted that shortly afterwards, Mr. Tattrie ran at and beat Mr. McNutt with a metal pipe. In sentencing him, the judge commented that there was no reason, motivation or provocation which would justify that assault.

[5] Section 679(1)(a) of the *Code* provides in part:

> 679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

> (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
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> (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; . . .

[6] Section 679(3) states:

> (3) 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
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> (a) the appeal or application for leave to appeal is not frivolous;
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> (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.

[7] In order to succeed on his bail application, the appellant must establish that all three criteria set out in s. 679(3) have been satisfied. In *R. v. Barry*, [2004] N.S.J. No 392 (NSCA in Chambers), Justice Fichaud described the onus of proof in bail hearings before this court:

> ¶ 8 Mr. Barry has the onus to establish each of the three conditions stated by s. 679(3). The conviction has substituted his initial presumption of innocence with a status quo of guilt. Unlike a pre-trial bail applicant, a convicted appellant "seeks to reverse the status quo by obtaining a reprieve from a court order for his detention following conviction" and, therefore, has the burden to prove the conditions for release pending determination of the appeal: *R. v. Branco* (1993), 87 C.C.C. (3d) 71 (B.C.C.A.), at p. 75 per Finch, J.A.; *R. v. Butler*, 1997 N.S.J. No. 391 at paras. 4-5; *R. v. Ryan*, 2004 N.S.J. No. 332, 2004 NSCA 105 at paras. 2-3.

[8] I have reviewed the decisions on conviction, sentencing, and regarding the breach of the conditional sentence order, the amended notice of appeal, and the affidavit of the appellant. Mr. Tattrie testified in Chambers, and I heard the submissions of his counsel and the Crown.

[9] The Crown acknowledges that Mr. Tattrie's counsel has established that the appellant's appeal and application for leave are not frivolous. I agree. However, I am not persuaded that the appellant would surrender himself into custody were he released pending the determination of his appeal. Nor am I satisfied that his detention would not be in the public interest.

[10] According to his evidence, the 37 year old, single appellant has roots in and connection with Truro and the surrounding area. He has lived and worked there his entire life, and has a brother and friends in Truro. Mr. Tattrie is self-employed. He has a registered computer business and, if released, would seek contracts for his business. The fact that his sentence was not lengthy but only for a year, makes it less likely that he would be tempted to abscond. He does not have a passport.

[11] The appellant was released pending trial. Since August 2005 when the charges which are the subject of the appeal were laid, he has, to his credit, appeared in court on several occasions. Attached to his affidavit was a bail report with a copy of his criminal convictions. He deposed that the majority of the offences shown were property related such as fraud. However, under cross-examination, the appellant acknowledged that his criminal record included numerous violations of court orders. Since 1989, he has been convicted of breaches of probation and of undertakings a dozen times. Most of those breaches have been since 2000. I found it telling in his evidence that, while he disputed whether all of the breaches were valid, there did not appear to be any recognition of the importance of court orders or of compliance with them.

[12] The fact that the appellant's plan for release does not provide for any supervision whatsoever has also caused me significant concern. After all, Mr. Tattrie was bound by the conditions of a conditional sentence order and under probation when he went ahead and committed the offences under appeal. The appellant recognizes the need for treatment for mood disorder, anger management, and other issues. According to his evidence, certain medication and dosages available since his incarceration have changed his situation for the better. However, he did not indicate that firm arrangements for counselling and the like have been put in place to deal with his ongoing difficulties, should he be released, nor did he establish the extent of his improvement.

[13] Having weighed these considerations and, particularly, the frequent breaches of court orders in recent years, I am not persuaded that the appellant would surrender himself into custody if released.

[14] Nor am I persuaded that his detention is not necessary in the public interest. In *R. v. M.W.C.*, [2002] N.S.J. No 461, Justice Saunders stated:

> ¶ 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 **The Queen v. Toor** [2001] B.C.J. No. 305, 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, **The Queen v. Nguyen** (1997), 10 C.R. (5th) 325, wherein McEachern, C.J.B.C., described the meaning that ought to attach to the phrase "necessary in the public interest":
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> > 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] B.C.J. No. 6 at 54), to believe that detention is necessary to maintain public confidence in the administration of justice.
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> ¶ 17 Further, I have considered the comments of Justice Flinn of this court sitting in chambers in December, 2001, in *The Queen v. Desmond* [2001] N.S.J. No. 520, where Flinn, J.A., referred with approval to the remarks of Pugsley, J.A., in *The Queen v. E.R.H.* (1999), 174 N.S.R. (2nd) 298, where in the latter case Justice Pugsley said:
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> > para 24 Public interest includes both the safety of the public and the confidence of the public in the judicial system.
> >
> > para 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).

[15] The public interest includes the safety of the public. In my view, the likelihood of the appellant committing further offences, if released, is a valid concern in this case. I have already described his several breaches of court orders during the past few years. His criminal record is a lengthy one which commenced

in 1989. While most convictions are property related, such as personation with intent, fraud, theft, and damage to property, the appellant also has a record for violence and threats of violence. He was convicted for assault in 1989 and again in 2000, for uttering threats in April 2001, and for assault with a weapon in June 2004. One of the offences under appeal, assault with a weapon, is a violent offence. The fact that his record shows numerous breaches of court orders, that the assault with a weapon was committed even though Mr. Tattrie was then subject to a conditional sentence order and a probation order, and that his plan for release does not call for any supervision are other considerations that lead to my determination that his detention would be in the public interest.

[16] I would dismiss the application for release pending the determination of his appeal.

Oland, J.A.