<u>NOVA SCOTIA COURT OF APPEAL</u>
Citation: *R. v. Rahman*, 2013 NSCA 128

Date: 20131113
Docket: CA 406301
Registry: Halifax

Between:

Ashiqur Rahman

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Chief Justice J. Michael MacDonald
Motion Heard:	Proceeded by way of written submissions
Held:	Section 680 of the *Criminal Code* motion for bail review is dismissed
Counsel:	Appellant, in person Mark Scott, for the respondent

Decision:

[1] In a decision released last week [2013 NSCA 125], my colleague, Justice Joel E. Fichaud denied the appellant Ashiqur Rahman's second motion for interim release pending appeal. The first motion was heard and dismissed by my colleague, Justice Peter M. S. Bryson, back in August of this year [2013 NSCA 93]. As was the case with Bryson J.A., I am asked, as Chief Justice, to direct a review of Fichaud J.A.'s decision.

[2] My authority to grant this relief is found in the *Criminal Code*:

> 680. (1) 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.

[3] As I noted in my review of Bryson J.A.'s decision, should a proposed review have potential merit, I would be inclined to direct it. See **R. v. Finck**, 2005 NSCA 146, and **R. v. West**, 2006 NSCA 123.

[4] Here Fichaud J.A. correctly acknowledged that, to be successful, Mr. Rahman would have to establish a material change in circumstances since his initial August motion:

> ¶7 I accept that I have the authority to consider a second motion for interim release, despite that an earlier motion has been dismissed by another judge. As a preliminary matter, before considering the second motion, the second judge should be satisfied it is in the interests of justice that he hear it instead of referring the motion to the judge who dealt with the first motion. Then, on the second motion's merits, the applicant should establish that there has been a material change of circumstances from those presented on his earlier motion. That standard would require evidence of a pivotal circumstance that, in Mr. Rahman's case, either was not before Justice Bryson, or was not considered and which, upon consideration, would fundamentally alter the analysis of one of the factors under

> s. 679(3). Subject to those considerations, the mere submission of embellished evidence or refined argument is not a material change of circumstance, and the earlier decision is taken as correct. *R. v. Knockwood*, 2009 NSCA 87 (chambers) per Beveridge, J.A.. *R. v. Daniels* (1997), 119 C.C.C. (3d) 413 (O.C.A.), per Doherty, J.A. for the Court. *R. v. Baltovich* (2000), 131 O.A.C. 29 (chambers) per Rosenberg, J.A.. *United States of America v. Ibrahim*, 2013 BCCA 165 (chambers) per Garson, J.A.. *United States of America v. Ibrahim*, 2013 BCCA 360 (chambers) per Levine, J.A..

[5] Fichaud J.A. then correctly concluded that Mr. Rahman failed to highlight any material change since his last motion:

> ¶9 I am not satisfied that Mr. Rahman has offered any material change of circumstance.
>
> ¶10] Mr. Rahman first submits that the earlier decision of Justice Bryson under s. 679(3), and its reiteration by the Chief Justice under s. 680, are just wrong in law on a stand-alone basis. That is an attempted appeal, outside my authority, and isn't a submission of material change of circumstance. For what it's worth, I agree with the reasons in those decisions.
>
> ¶11 Mr. Rahman's suggested material change of circumstance is this. He has presented his Correctional Plan, dated with a signature by his Parole Officer, Ms. Marise Leger, on September 18, 2013. The Plan states that his "FPE", or full parole eligibility date, is January 6, 2014. The Plan states:
>
> > … At the present time, there is an active Deportation Order in this case. Mr. RAHMAN does not have any release plans in Canada as he does want to be deported to his own country of Bangladesh.
>
> ¶12 From this, Mr. Rahman's asserts that the Federal Government wants to release him on January 6, 2014 and "send me home" – *i.e.* to Bangladesh - which is fine with Mr. Rahman. Mr. Rahman submits that, if this will happen anyway in two months, there is no point to his continued incarceration in the meantime.
>
> ¶13 The first difficulty with Mr. Rahman's submission is his assumption that he will be paroled in January 2014. Whether Mr. Rahman is paroled is a matter for the Parole Board of Canada, based on the appropriate factors derived from the Board's governing legislation. I have no basis to project what the Parole Board will decide for Mr. Rahman. Neither can I assume that, if Mr. Rahman received interim release under s. 679 in November 2013, his full parole eligibility date would remain as January 6, 2014.
>
> ¶14 More pointedly, interim release pending appeal under s. 679 is not a preview of a parole ruling. Different criteria apply to s. 679 than to parole. An

> appellant against conviction has the onus to show the existence of each of the three criteria in s. 679(3). His conviction has replaced his initial presumption of innocence with a status quo of guilt, that he has the burden to oust by establishing the statutory conditions for interim release. *R. v. MacIntosh*, 2010 NSCA 77, para 6, and cases there cited.
>
> ¶15 One such condition, in s. 679(3)(b), is that Mr. Rahman "will surrender himself into custody in accordance with the terms of the order" for interim release. A standard condition of an interim release order is that the individual, who enjoys interim release, will surrender at the time of the appeal hearing to ensure that, if his appeal fails, he will complete his term of incarceration. Justice Bryson was not satisfied that Mr. Rahman would so surrender.
>
> ¶16 The material submitted by Mr. Rahman for the current motion, if anything, confirms Justice Bryson's concern. Clearly Mr. Rahman would prefer to be in Bangladesh than in Canada. The Correctional Plan says "he does want to be deported to his own country of Bangladesh", a sentiment that was apparent at the hearing of this motion. I have no confidence that, after an interim release, Mr. Rahman would contest any deportation order so that he could surrender at the time of his appeal hearing in this Court. To the contrary, it appears more likely that Mr. Rahman would welcome his deportation, before any scheduled hearing of this appeal. In that event, the interim release would have served as a mechanism for Mr. Rahman to avoid completing the incarceration required before he reaches any full parole eligibility date.

[6] As with my first review, Fichaud J.A.'s decision leaves nothing to question. A review would again be futile. The request is therefore denied.

MacDonald, C.J.N.S.