C.A.C. No. 109264

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

VERNON MALONEY Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Mark T. Knox for the Appellant M. Andre Arseneau for the Respondent Appeal Heard: September 30, 1994 Judgment Delivered: October 6, 1994

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,
IN CHAMBERS

PUGSLEY, J.A.: **(In Chambers)**

Vernon Maloney applies to be released from custody pursuant to s. 679(1) of the **Criminal Code** pending the determination of his appeal.

He was convicted of sexual assault pursuant to s. 271(1)(a) of the **Code** on May 6, 1994, and on September 22, 1994 was sentenced to two years imprisonment.

He appeals from conviction, and also seeks leave to appeal from sentence, and if leave is granted, appeals from the sentence imposed. The appeal has been set down for hearing on December 6, 1994.

Mr. Maloney is presently forty-six years of age and in support of his application, filed an affidavit deposing in part:

> 2. **That** on April 29, 1993 I was charged with a sexual assault against one Madeline Layden, said to have occurred on the 28th day of April, 1993.
>
> 3. **That** I have been a contractor for 26 years. I am a licensed general contractor, and my company is known as Vernon Maloney's General Contracting.
>
> 4. **That** I reside in Brentwood, County of Colchester, and have lived with my spouse for the past ten (10) years, Ms. Cathy MacCulloch. We have three children, ages, 17, 16 and 10 who reside with us. I am the sole bread winner of the family at the present time.
>
> 5. **That** I was released from the custody of the R.C.M.P. on April 29, 1993 on an undertaking, requiring me to return to Court on May 6, 1993 and thereafter as required. The sole condition included in the undertaking, aside from attending Court, and a condition to keep the peace and be of good behaviour, was to "have no contact with Madeline Ann Layden directly or indirectly".
>
> 6. **That** I have attended Court on each and every occasion and I have complied with all conditions of this undertaking. A true copy is attached hereto to this my Affidavit and marked Exhibit "A".

7. **That** I do not have a related criminal record.

8. **That** I do currently have two (2) contracting jobs in progress. The first job involves a warehouse in the Truro area, scheduled to start on September 26, 1994.

9. **That** the other job that I am currently involved in is a home in Beaverbrook. The contract has been signed and work is scheduled to commence on October 1, 1994.

10. **That** because I am the owner of my company, I do not have the benefit of unemployment insurance benefits during the winter season. I always attempt to and typically find employment throughout the year. I expect that the home in Beaverbrook will be "closed in" by the time winter arrives, and that I will be quite busy during the winter months doing the inside work on this home.

11. **That** I will comply with each and every condition which may be imposed by this Honourable Court as a result of my release.

12. **That** I also understand, and will faithfully comply, with the condition that I surrender myself to the custody of the Colchester County Correctional Centre at 6:00 o'clock in the evening on the day prior to the hearing of my appeal.

His counsel, as well, filed an affidavit with the Court which provides in part as follows:

5. **That** I have considered the evidence presented at the trial and I am of the opinion that the grounds of appeal as set out in the Notice of Appeal are not frivolous.

6. **That** having regard to the nature of the offence; the fact that the Appellant was released pending his trial and sentencing; the fact the Applicant is a resident of the County of Colchester area; and that he has a wife and children and is self-employed and employs other people in the vicinity; it is my respectful submission that it is not necessary in the public interest for the continued detention of the Applicant prior to his appeal.

The grounds of appeal are as follows:

1. That the verdict is unreasonable or unsafe and cannot be supported on the evidence at trial;

2. That the learned trial judge erred by refusing to hear new evidence discovered following the verdict but before the sentence was rendered;

3. That the learned trial judge erred in both stating and applying the proper burden of proof;

4. That the learned trial judge erred, and exceeded his jurisdiction, in assessing the frailties of police officers in general for making notes and preparing statements;

5. That the learned trial judge imposed a sentence which was harsh and excessive and not consistent with the proper principals of sentencing;

Mr. Maloney and the complainant, after drinking earlier in the evening, left the complainant's apartment at 11:00 p.m., in Mr. Maloney's car to visit a bootlegger. Mr. Maloney stopped the car on a deserted road and became sexually aggressive. When the complainant attempted to leave the car, he restrained her, tearing her clothing and continued the sexual assault at the side of the road. At the commencement of penetration, she was hit on the side of the head, lost consciousness and later awoke to find that she was alone on the road. She was wearing only her pants and one sock. Sometime thereafter Mr. Maloney returned to the scene and drove her back to her apartment.

She was examined by a doctor approximately 12 hours later and he found multiple bruises, scratches and abrasions all over her body, a bruise on her left forehead, and bruising and swelling of her sexual organs.

The trial judge found her evidence to be credible and worthy of belief. The trial judge rejected the evidence of Mr. Maloney who had testified that only consensual sexual intercourse had occurred.

Apart from a few driving convictions, Mr. Maloney's criminal record reveals a conviction for obstruction of a peace officer in 1971 pursuant to s. 110 of the **Criminal Code** for which he was sentenced to six months in jail, a conviction in August of 1991 for fraud over $1,000.00 contrary to s. 380(1)(a) of the **Code** for which he was fined $275.00, and a conviction in September of 1991 for breach of s. 104(1)(b) of the **Unemployment Insurance Act** for which he was given a probationary sentence for one year together with 100 hours of community service work.

Under the provisions of s. 679(3) of the **Code**, the burden is on Mr. Maloney to satisfy the Court on a balance of probabilities that:

(a) his appeal is not frivolous, and

(b) he will surrender himself into custody in accordance with the terms of the Order;

(c) his detention is not necessary in the public interest.

The Crown submits that the grounds for appeal are "frivolous" and further that Mr. Maloney has not established that his detention is not "necessary in the public interest".

Mr. Maloney's counsel stressed that the main ground of appeal was item No. 2, namely that the trial judge "erred by refusing to hear new evidence discovered following the verdict but before the sentence was rendered".

Counsel advised that after Mr. Maloney's conviction in May of 1994, but before sentence, two individuals approached Mr. Maloney stating that the complainant told them that she only complained to the police in the hope of extracting money from Mr. Maloney.

Mr. Maloney's counsel made a motion to the Court for the admission of new evidence which was rejected by the trial judge, who apparently suggested that the appropriate procedure, would be, in the event of an appeal, for an application to be made to introduce fresh evidence before the Court of Appeal.

No affidavit evidence was tendered from the two individuals. Crown counsel stresses that the general representations made by Mr. Maloney's counsel do not satisfy the fresh evidence test set out in **R. v. Palmer** (1979), 50 C.C.C. (2d) 192 (S.C.C.).

The burden on Mr. Maloney of this application, however, is to establish that the grounds of appeal are not frivolous, that is, they are not trifling or lacking seriousness (Concise Oxford Dictionary) 1990.

I have reviewed the decision of the Provincial Court judge in the light of all grounds of appeal, and I conclude that there are some grounds, although weak, which raise arguable issues.

The Crown acknowledges that Mr. Maloney has satisfied the burden under s. 679(3)(b).

In considering the burden imposed under s. 679(3)(c), the following issues, in my opinion, are particularly germane to this application:

(l) the circumstances of the offence;

(2) the merit of the grounds of appeal;

(3) the date of the hearing of the appeal.

It is patent that no presumption of innocence applies and hence this application is viewed on different principles than an application for bail before trial. Here the trial judge's conclusions constitute "a legal conclusive finding of guilt. Like an acquittal, it is enforceable unless and until reversed. After a conviction, there is no presumption left, one way or the other. There is an enforceable finding of guilt", (**R. v. Farinacci** (1994), 86 C.C.C. (3d) 32 at 37 Ont. C.A.).

With respect to the circumstances of this offence, all sexual acts are acts of violence, but this assault was of a particularly callous nature. The complainant was left, unconscious, on the side of a deserted road at l:00 a.m., dressed in only her pants and a sock and suffering from "multiple bruises, scratches and abrasions all over her body". She was not capable of looking after herself. It is of some mitigation that Mr. Maloney returned a short while after the assault to pick up the complainant and return her to her residence.

The grounds of appeal as I have noted, while arguable, are not strong.

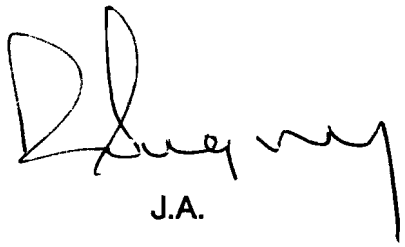
Mr. Maloney was sentenced on September 22, 1994 to two years in jail. His appeal will be heard on December 6, 1994. If successful the appeal will bring a meaningful, and not an "illusory" result.

Abuse of women is a matter of great public concern.

The abuse determined by the trial judge to have occurred in this case and Mr. Maloney's disdain for the complainant's condition thereafter is particularly alarming.

Public confidence in the administration of justice, in my view, would be shaken if Mr. Maloney were granted bail in these circumstances.

I am not satisfied that Mr. Maloney's detention is not necessary in the public's interest and accordingly the application is denied.



J.A.

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- and -

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Respondent

REASONS FOR JUDGMENT BY:

PUGSLEY, J.A.
(In Chambers)