NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Oliver, 2006 NSCA 83

Date: 20060629
Docket: CAC 265935
Registry: Halifax

Between:

Percy Garfield Oliver

Appellant

v.

Her Majesty The Queen

Respondent

Revised Decision:	The text of the decision has been revised to correct the original version. This revised version was issued on July 12, 2006.
Judge:	The Honourable Justice Elizabeth Roscoe
Application Heard:	June 22, 2006, In Chambers
Held:	Application for leave to appeal is granted and application for release pending appeal is granted.
Counsel:	Brad Sarson, for the appellant James A. Gumpert, Q.C., for the respondent

Decision:

[1] This is an application for leave to appeal and release pending appeal, made pursuant to s. 679(1)(b) of the **Criminal Code**. The appellant plead guilty to sexually assaulting a 12 year old girl and was sentenced by Judge William Digby to two years incarceration on April 11, 2006. The appeal is scheduled to be heard on September 29, 2006.

[2] An agreed statement of facts was filed prior to sentencing. The appellant admitted to having sexual intercourse with a 12 year old friend of his family's on three occasions between February 1, 2004 and December 31, 2004. The appellant was 19 years old at the start of that time frame and turned 20 in October 2004. The girl became pregnant as a result and she subsequently gave birth to a baby boy.

[3] A report of a psychologist filed with the trial judge indicated that the appellant has "...impaired cognitive development showing significant deficits in his intellectual functioning as well as severe limits to acquired knowledge...".

[4] The sentencing judge emphasized the principles of denunciation and deterrence. He said:

> . . . It is my respectful view that strongly deterrent sentences have to be imposed to deter other persons who may be of a mind to take advantage of those younger than themselves, whose age is below the age of consent.
>
> The law has deemed that they need protection. Certainly Parliament has reaffirmed that view with respect to their amendments to the **Criminal Code** dealing with possession of child pornography and it would seem odd to me that if you had a picture of a child having sexual intercourse, you would have a minimum period of incarceration whereas if you actually had intercourse with a child, the same child, you would be possibly not serving a sentence of actual incarceration.
>
> To impose a non-custodial sentence would seem to me to be somewhat illogical and irrational in the circumstances. The message of deterrence and denunciation has to be strong because these are offences that cannot be unwound so to speak. In offences involving property, the property can possibly be returned or the people, through their own efforts, can replace the property. Here you can never get back to the starting point. And I have already addressed that at considerable length.

> It would appear that Mr. Oliver, to some extent, has in some way accepted responsibility for the offence that he has committed. He was cooperative with the police in giving a statement to the authorities. He entered a plea of guilty at an early opportunity. He has been responsible in coming to court on the various occasions. There was one, or possibly two, occasions when he could not come, but they were for understandable reasons.
>
> Mr. Oliver, by attending at appointments with Dr. Linzer has shown, in my view, an interest in understanding his behaviour in a more global sense, his sense of anger and frustration as well as his activities. Having said that, I think emphasis has to be placed on deterrence.
>
> The fact that Mr. Oliver does not have a record of previous criminal convictions, the fact that he may have felt a relationship of some kind with the young lady as opposed to being a complete stranger that he played upon at random, although that is somewhat countered by the fact that he was trusted as a member of the family, I am encouraged by the fact that Mr. Oliver appears to have a conscience, according to Dr. Linzer. I am also taking into account Mr. Oliver's disabilities as they may have played a part in his poor thinking and judgment which resulted in this unfortunate situation.
>
> It is my respectful view that a sentence of two years in a federal penitentiary is appropriate in this case to be followed by a period of one year probation with the conditions . . .

[5] The grounds of appeal are as follows:

1. That the Learned Provincial Court Judge erred in referring to a conditional sentence order as a non-custodial sentence;

2. That the Learned Provincial Court Judge erred by stating that, in light of the legislation which imposes a minimum period of incarceration for the offence of possessing child pornography, to impose a non-custodial sentence in the circumstances of this case would be illogical and irrational, thereby creating a minimum period of incarceration for sex assault; and

3. Such other grounds as may become evidence upon a review of the transcript.

[6] On a sentence appeal, leave to appeal has to be granted before any consideration of release pending appeal: s. 679(1)(b). In order to grant leave to

appeal, I must be satisfied that the grounds of appeal are not frivolous and that they raise arguable issues.

[7] The Crown has conceded and I am satisfied that the appellant has established that he raises at least an arguable issue that the sentencing judge erred in considering that since there was a minimum sentence for possession of child pornography that it was illogical and irrational to impose a non-custodial sentence in this case, and, therefore, I will grant leave to appeal.

[8] Section 679(4) provides that the appellant may be released pending appeal if he establishes the three conditions: (a) that the appeal has sufficient merit and that in the circumstances it would cause unnecessary hardship if he were detained in custody; (b) that he will surrender himself into custody in accordance with the release order; and (c) that his detention is not necessary in the public interest.

[9] The appellant filed an affidavit and testified at the bail hearing. He indicated that he was prepared to abide by the conditions of release including that he live with his mother and be subject to house arrest except while working, attending a medical appointment or meeting with his lawyer. He said that he had been subject to harassment, threats and assaults from other prisoners while in prison which including being shaved, burned and stabbed with pens and plastic knives. He did not report the incidents because he was told that if he did he would be killed. He had not yet been assigned to any program for sexual offenders.

[10] The appellant’s mother also testified indicating that her son was welcome to live with her and that she would make sure that he obeyed the terms of release. She was sure that he would comply, but if he did not, she would call the RCMP. She indicated that she was quite sure that her son would be hired on at the fish plant where she works and that she would then be able to keep an eye on him at all times. She is prepared to act as a surety if her son is released.

[11] The Crown is opposed to the release of the appellant submitting mainly in relation to the public interest factor that it was a serious offence, and if the appellant were not supervised on a full time basis, it would be difficult to ensure compliance with the terms of release. It was emphasized that the appellant did not seem to be restrained from committing the offence even though he knew it was wrong and that he had not yet received any treatment for his sexual deviancy.

[12] After considering the remarks of the trial judge and the submissions of counsel, I am satisfied that the appeal is not frivolous and that the appellant would, if released, surrender himself into custody as directed in the release order. The main issue is whether the appellant has discharged the onus of establishing that his detention is not necessary in the public interest.

[13] Whether it is in the public interest involves consideration of both public safety and public confidence in the administration of justice. I must be concerned with the possibility of whether the appellant might re-offend if released and also whether, in light of the seriousness of the offence, involving intercourse with a child, informed fair-minded members of the community would think it reasonable to release the appellant at this stage of the criminal process.

[14] I am, in the circumstances of this case, prepared to release the appellant from custody pending the determination of this appeal because I am persuaded that his detention is not necessary in the public interest. The circumstances of this case which persuade me to grant the application for release, in spite of the reprehensible nature of the crime of which the appellant admits, are the following:
There is no evidence to suggest the public will be at risk if the appellant is released. He has no previous criminal record. I think he now understands the seriousness of his offence and the severe consequences of his actions. He was released from custody after the charges were laid for more than a year and fully complied with the conditions of release. He will reside with his mother, and I am persuaded that she will ensure his compliance with the conditions.

[15] The appeal has been set for hearing on September 29, 2006. If the appellant continues to serve the sentence in custody, by the time his appeal can be heard, he would have served almost six months. If the sentence is reduced on appeal to less than the six months or modified in accordance with other sentencing options such as a conditional sentence, he may have served more time in prison than justice requires. In my view, given the conditions he has been subjected to in prison, which are possibly intensified due to his diminished intellectual capacity, that would be unnecessary hardship. I will, therefore, grant bail pending the appeal.

[16] The terms of the release are:

1. THAT he keep the peace and be of good behaviour;

2. THAT he remain in the territorial jurisdiction of the Province of Nova Scotia and reside at ...[removed by editor];

3. THAT he have no contact, direct or indirect, or communication with A.L., except through a lawyer;

4. THAT he not be on or near any residence of A.L.;

5. THAT he shall remain within his residence at all times except for the purposes of attending at his place of employment, medical appointments, and meetings with his lawyer and travelling directly to and from these exceptions;

6. THAT he have no contact with females under the age of 16;

7. THAT he shall not possess or consume alcohol or non-prescription drugs;

8. THAT he not have in his possession at any time any firearm, ammunition, explosive substance or other offensive weapon; and

9. THAT he surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia, within twenty-four (24) hours of being notified that the judgment of this Court is to be released; in the event the appeal is sooner dismissed, quashed or abandoned, he surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility within twenty-four (24) hours of the filing with the Registrar of this Court of the Order dismissing or quashing the appeal or the notice of abandonment of the appeal, as the case may be.

Roscoe, J.A.