NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Patriquin*****,** 2003 NSCA 89

Date: 20030910
Docket: CAC 205929
Registry: Halifax

Between:

Michael Allan Patriquin

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: **pursuant to ss. 486(3) and (4) of the Criminal Code of Canada.**

Judge: Hamilton, J.A.

Applications Heard: August 28, 2003, in Halifax, Nova Scotia, In Chambers

Held: **Application to amend notice of appeal granted; application for judicial interim release dismissed.**

Counsel: Douglas B. Shatford, for the appellant
James A. Gumpert, Q.C., for the respondent

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Decision:

[1] This application for release pending appeal was made by Michael Allan Patriquin pursuant to s.679 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The ban imposed at trial pursuant to s. 486(3) and (4) of the **Code**, prohibiting publication of any information that could disclose the identity of the complainant or witness, will remain in force and effect.

[2] A preliminary point arose with respect to this application. Mr. Patriquin sought to amend his notice of appeal, in which he appeals his conviction and sentence with respect to the indictable offence of sexual assault pursuant to s.271(1)(a) of the **Criminal Code**, to include an application for leave to appeal his sentences on three summary conviction offences for breach of probation contrary to s. 733.1 of the **Code** and mischief contrary to s.430(4) of the **Code**.

[3] The indictable offence and the summary conviction offences arose out of different fact situations. Mr. Patriquin was convicted of sexual assault after a judge alone trial and pled guilty to the three summary conviction offences. However, Mr. Patriquin was sentenced on the indictable offence and the summary conviction offences at the same time, by the same judge.

[4] Mr. Patriquin wants to appeal all matters to this Court to be dealt with at the same time and to have this bail application apply to all matters. The Crown agreed with this practical approach. The issue arose as to whether this Court has jurisdiction to hear the appeal of the summary conviction matters that would usually be appealed to the Supreme Court, considering the wording of s. 675(1.1) of the **Code**.

[5] I am satisfied this Court has jurisdiction to hear the application for leave to appeal the summary conviction offences at the time it hears the appeal of the indictable offence since the sentencing was done together by the same judge. Accordingly, with the Crown consenting to the amendment, I grant Mr. Patriquin's application to amend his notice of appeal to include an application for leave to appeal his sentences for the summary conviction offences as he requested.

[6] Section 675(1.1) of the **Code** provides as follows:

> **675. (1.1) Summary conviction appeals —** A person may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction or a sentence passed with respect to a summary conviction as if the summary conviction had been a conviction in proceedings by indictment if
>
> (*a*) there has not been an appeal with respect to the summary conviction;
>
> (*b*) the summary conviction offence was tried with an indictable offence; and
>
> (*c*) there is an appeal in respect of the indictable offence.

[7] On the facts in this case the question was whether the indictable offence and the summary conviction offences had been "tried" together. McLachlin J. (as she then was), writing for a unanimous court in **R. v. MacDougall**, [1998] 3 S.C.R. 45**,** engaged in a discussion of whether the right to be "tried" within a reasonable time under s. 11(b) of the *Charter* extends to sentencing proceedings.

[8] Beginning at p. 57, McLachlin J. concluded that to be "tried" for a criminal offence:

> 19 ... means not "brought to trial", but "adjudicated"... Since the "outcome" of a criminal case is not known until the conclusion of sentencing, and since sentencing involves adjudication, it seems reasonable to conclude that "tried" as used in s. 11(b) extends to sentencing."

[9] Although the **MacDougall** case involved specific rights under the *Charter* that do not come into play in the instant case, McLachlin, J. also referred to "pre-*Charter* jurisprudence which suggests that the sentencing process is an integral part of the trial" (at p. 57). She referred in particular to **R. v. Grant**, [1951] 1 K.B. 500 (C.C.A.) and **R. v. Gardiner**, [1982] 2 S.C.R. 368.

[10] In spite of the focus on a *Charter* right in **MacDougall**, the non-*Charter* arguments supporting a broad definition of "tried," as including sentencing, satisfy me that the definition of "tried" in s. 675(1.1) of the **Code** includes sentencing.

[11] The Quebec Court of Appeal in **R. v. Thiboutot** (1999), 143 C.C.C. (3d) 283 (Que. C.A.) considered whether an individual who had only been convicted of summary conviction offences at a trial with three others who were convicted of indictable offences, could appeal to that court. The court held that it had jurisdiction to hear the appeal "in situations where the same facts have given rise to both"(p.287). I do not interpret these words as limiting the application of s. 675(1.1) to appeals arising from the same facts. Rather, I interpret **Thiboutot** as holding that appeals to the court of appeal arising from the fact situation in that case are one example of when s. 675(1.1) can be applied

[12] The bail application itself is made pursuant to s. 679 of the Code. Section 679(3) provides as follows:

> **679(3) Circumstances in which appellant may be released —** 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
>
> (*a*) the appeal or application for leave to appeal is not frivolous;
>
> (*b*) he will surrender himself into custody in accordance with the terms of the order; and
>
> (*c*) his detention

[13] Section 679(3) provides that Mr. Patriquin may be released pending the determination of his appeal if he establishes that the appeal is not frivolous, that he will surrender himself into custody in accordance with the terms of the order, and that his detention is not necessary in the public interest. He has the burden of proof to establish each of the above beyond a reasonable doubt.

[14] The Crown opposes the application, but concedes that the appeal is not frivolous. Accordingly, Mr. Patriquin must only establish the remaining two requirements set out in s.679(3).

[15] Mr. Patriquin is 25 years of age and has been represented by counsel throughout. He was sentenced by Judge David E. Cole of the Provincial Court on

August 13, 2003 to a period of 18 months imprisonment followed by two years probation for the indictable offence, and to a period of four months incarceration followed by two years probation for each of the three summary conviction offences, to run concurrently.

[16] His grounds of appeal are as follows:

GROUND OF APPEAL

1. That the learned trial judge erred in law by concluding there was lack of "consent" of the alleged victim pursuant to Section 273.1(2) of the *Criminal Code of Canada* (hereinafter the *"CCC"*).

2. That the learned trial judge erred in law by incorrectly applying the test with respect to whether the Appellant took reasonable steps, in the circumstances, to ascertain that the alleged victim was consenting pursuant to Section 273.2(b) of the *CCC*.

3. That the learned trial judge erred in law by placing undue emphasis on the age of the alleged victim with respect to the age threshold for the defence of consent pursuant to Section 150.1 of the *CCC*, being over fourteen years of age.

4. That the learned trial judge erred in law by incorrectly applying the test with respect to the "capacity" of the alleged victim to consent and the alleged victim's state of intoxication pursuant to Section 273.1(2)(b) of the *CCC*.

5. That the learned trial judge erred in law by misapprehending the evidence as presented at trial.

6. That the learned trial judge erred in law in rejecting or not giving appropriate weight to all or portions parts of the relevant evidence tendered on behalf of the Appellant.

7. That the learned trial judge erred in law in that the learned trial judge's decision was unreasonable, demonstrated bias, and was not supported by a fair and reasonable assessment of all of the evidence.

8. Such other grounds as may appear upon review of the transcript of the decision by the Appellant's legal counsel.

GROUNDS OF APPEAL FOR SENTENCING

9. That the learned trial judge erred during the sentencing of the accused in that the learned trial judge did not demonstrate impartiality, thereby making it possible to apprehend that justice was not done.

10. That the learned trial judge erred during the sentencing of the accused in that the sentence of the accused was harsh and excessive and was not supported by the evidence.

[17] Mr. Patriquin argues that there is no danger that he will not surrender himself into custody if he is granted bail. In support of this he points to the fact he voluntarily appeared in court for his trial on the indictable offence he is presently appealing and once convicted, again voluntarily appeared for his sentencing. He indicates that if he is granted bail he will live with the woman he lived with in a common law relationship for 4 months prior to his incarceration. She has two young children, one of whom he has recently been told is his natural child. His former two employers have filed affidavits indicating they will offer him employment if he is granted bail.

[18] Despite these representations, Mr. Patriquin has not satisfied me that he will not be a flight risk if granted bail. He has twice before left Nova Scotia when he was involved with the criminal justice system and failed to appear in court when required. Once he went to Ontario where he was picked up and found guilty of failing to appear pursuant to s.145(5) of the **Code**. The second time he went to Alberta. This time the jail sentence which has been imposed on Mr. Patriquin is more substantial than any he has faced before and this may influence his judgment. In addition, he is facing a trial on December 4, 2003 on two charges of assault on his former girlfriend and one charge of damage to property. I am not satisfied he has learned his lesson about not trying to avoid court hearings and that he will not try to avoid appearing at the time of his appeal if granted bail.

[19] Having found Mr. Patriquin to be a flight risk, it is not necessary for me to consider the factor set out in s.679(3)(c), whether his detention is not necessary in the public interest. If I had to consider the public interest, Mr. Patriquin's substantial criminal record, including 15 convictions for offences such as assault causing bodily harm, uttering a forged document, impersonation and breach of probation, would cause me concern.

[20] In addition, the nature of the indictable offence Mr. Patriquin has been convicted of as described in the sentencing transcript would be of concern. The transcript discloses the following about the sentencing judge's view as to the nature of the assault:

> "There was one guy standing outside the door not letting people in and there were these two fellows inside performing every little act their little hearts desired it would seem. As I said, something right out of a blue movie."

[21] The victim of Mr. Patriquin's sexual assault was 14 years old at the time and was a virgin prior to the assault. Mr. Patriquin was 24 and had already lived with several women. Full sexual intercourse took place. Both the victim and Mr. Patriquin had been drinking. The sentencing judge stated that the victim was extremely naive and inexperienced, not aware of the type of situation she could get into by going to the location where the offence took place and drinking too much.

[22] For the foregoing reasons, Mr. Patriquin's application for judicial interim release is dismissed.

Hamilton,

J.A.