19990709 C.A.C. No.154251

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Barrett, 1999 NSCA 16

BETWEEN:

THOMAS BARRETT	)	
applicant/appellant	)	Anne S. Derrick for the applicant/appellant
- and -	)	
HER MAJESTY THE QUEEN	)	Robert C. Hagell for the respondent
respondent	)	
	)	Application Heard: July 8, 1999
	)	Decision Delivered: July 9, 1999

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY
IN CHAMBERS

Pugsley, J.A. (in Chambers):

[1] This is an application for release pending appeal pursuant to s. 679(3) of the **Criminal Code**, R.S.C. 1985, c-46.

[2] The Crown opposes the application.

[3] The appellant/applicant, Thomas Barrett, was tried in December, 1998, with a co-accused, Lowell Campbell, of robbery and related charges. On December 11, 1998, Mr. Barrett was found guilty by a jury of robbery under s. 344, but acquitted of wearing a mask under s. 351. Mr. Campbell was also convicted of robbery and in addition was convicted of possession of a restricted weapon without a permit.

[4] On January 29, 1999, both Mr. Barrett and Mr. Campbell were sentenced by Justice Cacchione of the Supreme Court to ten years in prison. Both Mr. Barrett and Mr. Campbell are appealing their convictions and sentences. The appeals are scheduled to be heard in Halifax on November 12, 1999.

[5] The notice of appeal filed on behalf of Mr. Barrett advances the following grounds:

- the verdict should be set aside pursuant to s. 686(1)(a)(i) of the **Code** on the ground that it is unreasonable or cannot be supported by the evidence;

- the sentence imposed on Mr. Barrett should be reduced on the grounds that the trial judge made an error in principle and/or on the grounds that the sentence was excessive having regard to all the circumstances.

[6] Section 679(3) of the **Code** provides that the appellant 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.

[7] The sentencing remarks of Justice Cacchione, delivered on January 29, 1999, set out the relevant parts of the offence:

> It is obvious from the verdicts returned that the jury accepted the Crown's theory that both accused were fully involved in the commission of the offence either as principal offender or as aider and abetter. The finding of not guilty on the Section 351 charge, however, does pose problems. I indicated that it is problematic in that it seems to mean that the Crown did not prove to the jury's satisfaction that it was Mr. Barrett who entered the store wearing a mask and committed the robbery. Now it is obvious that Mr. Campbell could not have been the person who entered the store since he is of African Canadian decent *(sic)* and Miss Hogan, the store clerk, was quite clear in her description of the perpetrator as being a [C]aucasian male. There is, however, evidence which establishes that both Campbell and Barrett were together the entire evening of May 5th, 1996, both before and after the robbery. And there is evidence as well that they were together the next day when they attended the residence of Mr. Drake telling him at that time that his gun had been thrown away and that he ought to make up a story because the police would certainly be by . . . it is noteworthy to point out that neither accused testified in their defence.
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> . . .
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> What is clear from the evidence and it is undisputed is that Ms. Hogan was a clerk in a convenience store. Someone trying to make a living. It was late in the evening and she was about to close up when a masked and armed man entered the store. That person grabbed her by the shoulder, put a gun to her back, moved her around the counter to the area of the cash register and told her to open the office. She refused. She opened the cash register. The perpetrator removed approximately sixty dollars and started to leave. Ms. Hogan, for whatever reason, probably because she was in a state of shock, decided to go and lock the door thinking that the perpetrator had left. That was not the case. The perpetrator was still in the business establishment. He pointed the gun at her. As I recall the evidence it was initially pointed at her head or upper chest and then lowered. The gun was discharged. Ms. Hogan was injured, permanently disabled as a result of her ankle being shattered.

[8] Justice Cacchione continued:

> Mr. Barrett's record and Mr. Barrett is 23 years of age, his record is not impressive but it is not the worst that I have ever seen. He has offences of being unlawfully in a dwelling house, an attempt of some sort, I am not sure what, causing a disturbance, failure to comply with Youth Court disposition, mischief, theft under, theft over, possession of a weapon which I understand was a pocket knife, public mischief, and with respect to another possession of a weapon. I have been advised that it seems that there is only one of those and not two although the Crown has not responded to that contention. There have also been other charges of mischief and failure to comply with undertakings. What is noteworthy is that in the case of Mr. Barrett the offence was committed 51 days after his statutory release date. So he was on parole at the time.
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> . . .
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> In looking at the aggravating factors in the particular case, I find that it was a planned and premeditated robbery as is indicated by the evidence which showed that Mr. Campbell, well before the date of the robbery approached Mr. Drake and got from him a pistol. A further aggravating factor is that there is the use of a firearm, not only the possession and pointing of the firearm but the actual discharge of a firearm. A firearm that, as I pointed out, was not prone to accidental discharge.
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> . . .
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> This offence was one that was extremely dangerous. It was a violent offence. Someone was hurt permanently and in my view it was senseless and cowardly.

[9] Justice Cacchione noted that Mr. Barrett had the support of family, and that he had an occupation that he could return to. Justice Cacchione refused to accept the Crown's submission that he order each of the accused to serve at least half of their sentence before being eligible for parole.

[10] His final remarks are germane:

> In my view both of you, on the evidence presented, were involved in this robbery. I know definitely that Mr. Campbell, you are not the one who went into that store. I am not so sure about Mr. Barrett not being the one who went into that store irrespective of the jury's verdict on the Section 351 count. It was a most dangerous thing to do. It was a very serious offence and it calls for a serious punishment. I am sentencing both of you to a period of ten years in the federal institution.

[11] Mr. Barrett's affidavit has been filed in support of his application. He deposes in part:

> 5. Although I do not have any new evidence to present at this time, I maintain that I am not guilty of the robbery for which I have been convicted.
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> . . .
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> 7. I understand my parents are prepared to put up bail for me and I would not run out on them.
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> 8. If I was released I could live with my parents. . .
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> . . .
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> 16. During this period [i.e. July, 1997 until November, 1998] I was fishing with my father and brother who are both fishermen. . . .
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> . . .
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> 23. I used to have problems with alcohol but I have stopped drinking and alcohol is not a problem for me now.
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> . . .
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> 25. I have a good relationship with my parents. I am much more mature and responsible than I used to be when I was younger. I appreciate the support my parents have shown me and I listen to their advice. I also have a good relationship with my three sisters and my brother.
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> 26. If I was released I would live with my parents, abide by their house rules and bail conditions, work, and help support my girlfriend and our two daughters. I would have work fishing. I have experience as a fisherman and am willing to work hard at it.

[12] An affidavit from Mr. Barrett's mother has also been filed in support of the application. She deposes, in part, that her son has demonstrated a change in attitude over the last few years, that he has turned his life around, and has the support of his family.

[13] The pre-sentence report prepared on January 21, 1999, notes that Mr. Barrett has a very good relationship with his parents and siblings, that he had no serious problems during his formative years, that he completed his Grade 8 adjusted level in June, 1991 at high school in Glace Bay, that from an early age he has worked in the fishery, that many

of his past difficulties arose from the use of alcohol but that he has not used alcohol for the past eighteen months.

[14] Correctional Services of Canada had Mr. Barrett under their supervision for a period of twenty-five months commencing April 16, 1996. The records from that institution reveal that after being released on full parole, on December 28, 1995 "a suspension warrant was issued which indicated he did not respond well to community based supervision by their service".

[15] Crown counsel agrees that Mr. Barrett has met the first criteria of s. 679(3), namely that the appeal is not frivolous. While he has concerns that Mr. Barrett would surrender himself into custody in accordance with the terms of any release order, the primary ground of objection to the application is that Mr. Barrett has not established that his detention is not necessary in the public interest.

[16] The burden of proof rests on Mr. Barrett to establish the grounds set out in s. 679(3) for release pending the determination of his appeal. The proof that is required is on a preponderance of the evidence or on the balance of probabilities.

[17] With respect to s. 679(3)(c), the Court is concerned with not only the safety of the community, but also the public’s perception of, and confidence in, the administration of justice. The circumstances surrounding the commission of the crime is, therefore, a relevant factor in dealing with the application.

[18] Chief Justice McEachern remarked in **R. v. Nguyen** (1997), 119 C.C.C. (3d) 269, that in most applications for release pending appeal, there will be "special circumstances" arising from the events surrounding the crime, as well as the circumstances of the offender, which will serve as indicators as to whether an appellant should or should not be released.

[19] While it is clear that the gravity of the offence is not conclusive, it is a significant factor that should be given due weight.

[20] I agree with the comments of Gary Trotter, expressed in *The Law of Bail in Canada*, 2nd Ed., Carswell, 1999, at p. 390, where he states:

> ...the focal point of the analysis remains the same - ensuring public respect for the administration of criminal justice. A number of courts have expressed concern that this criterion for release not be a means by which public hostility or clamour is used to deny release to otherwise deserving applicants. As with the application of s. 24(2) of the *Charter*, the focus is on the views and perceptions of well-informed and reasonable members of the public.

[21] I am particularly influenced by Justice Cacchione's conclusion that:

> Both accused were fully involved in the commission of the offence, either as principal offender or as aider and abettor.

[22] While the dismissal of the s. 351 charge means "the Crown did not prove to the jury's satisfaction that it was Mr. Barrett who entered the store wearing a mask and committed the robbery", nevertheless Justice Cacchione was satisfied that Mr. Barrett was intimately involved with the planning leading up to the commission of the offence. Those plans involved a masked man robbing a small convenience store in a rural area of

Cape Breton just before closing, at night, and using a loaded gun to assist in the commission of that crime. Mr. Barrett must be taken to appreciate that such a scenario could result in serious injury or death.

[23] The length of sentence imposed by Justice Cacchione clearly indicates the seriousness with which he viewed the offence.

[24] I am mindful of the apparent change in Mr. Barrett's lifestyle and the support he receives from his family, but I am of the view, in light of Mr. Barrett's participation in this serious offence, that a reasonable, well informed citizen, who represents community values, would not conclude that Mr. Barrett had satisfied the public interest component of s. 679(3).

[25] I would, accordingly, dismiss the application for release.

Pugsley, J.A.