Date: 19980925 Docket: C.A.C. 02885

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Johnson, 1998 NSCA 14

BETWEEN:

CLAYTON NORMAN JOHNSON

Applicant/Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Malcom S. Jeffcock
James Lockyer
Philip Campbell
for the Appellant

Robert Hagell; James Burrill
for the Respondent

Application Heard:
September 24-25, 1998

Decision Delivered:
September 25, 1998

BEFORE THE HONOURABLE JUSTICE FREEMAN IN CHAMBERS

FREEMAN, J.A.: (In Chambers)

This application for judicial release is before me pursuant to a reference from the Minister of Justice under **s. 690** of the **Criminal Code** that this court consider the admissibility of fresh evidence on behalf of the applicant, Clayton Johnson, and, if admissible, hear an appeal of his conviction in 1993 for first degree murder of his wife, at Shelburne, Nova Scotia.

Release pending determination of an appeal is governed by **s. 679** of the **Criminal Code**. **Section 679(7)** provides:

> Where, with respect to any person, the Minister of Justice gives a direction or makes a reference under **s. 690**, this section applies to the release or detention of that person pending the hearing and determination of the reference as though that person were an appellant in an appeal described in paragraph (1)(a).

The reference to paragraph (1)(a) is to a conviction appeal. Factors which must be considered is set forth in **s. 679(3)** as follows:

> 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 this 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 is not necessary in the public interest.

In the present circumstances, the appeal would not be frivolous if it can be reasonably argued that the fresh evidence meets the test set out by McIntyre J., writing for the Supreme Court of Canada in **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193; (1979), 30 N.R. 181, (S.C.C.):

That test provides:

> 1. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in a civil case...
>
> 2. the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> 3. the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> 4. It must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The determination of whether that evidence meets the test of **Palmer and Palmer, supra** will be made on another day by a panel of this court.

The crown has conceded that the appeal is not frivolous and that there is no concern that Mr. Johnson would not surrender himself into custody. Argument has focused on whether the public interest would be served by his release pending the further proceedings. The crown has rightfully emphasized the respect due to the decision of a jury which has been upheld on appeal to his court and on an application for leave to the Supreme Court of Canada. Mr. Johnson has been convicted of a most serious offense and it is uncommon in this province for a person under conviction for murder to be released on bail. The public has a clear interest in the continued incarceration of persons sentenced to long terms of imprisonment. That must be balanced against the public interest in ensuring that no one is unjustly punished.

In matters such as this, therefore, the nature of the evidence brought forward on behalf of the convicted person has relevance, not only to whether the appeal is frivolous, but that threshold having been crossed, to helping to ascertain the public interest. In considering the public interest, I have noted a number of affidavits from people in the Shelburne area where Mr. Johnson would reside, supporting his release and I understand the large number of spectators here today are mainly Mr. Johnson's supporters. That is simply by the way, it is not the governing consideration.

To deal very briefly with the facts, Janice Johnson, the victim, was found lying at the foot of her basement steps with severe head injuries from which she died. Witnesses fixed relevant times with remarkable accuracy as to when she had been on the telephone chatting with a friend, when her body had been found and when and where Mr.

Johnson had been seen on his way to work. An extremely short opportunity existed for a homicidal attack. This was a subject of great deal of evidence at the trial and the jury clearly considered it. However, forensic experts were unanimous at that time that Mrs. Johnson's injuries were consistent with an assault, but not with an accident. I understand the issue of accidental death was before the jury, but there was no evidence on which the jury could have reasonably found Mrs. Johnson's death was accidental. They had little choice on the evidence not to consider it a proven homicide and the only real question they had to answer was who did it. Mr. Johnson was the only plausible suspect.

Mr. Johnson's case has now been taken up by the Association in Defence of the Wrongly Convicted, which made the application to the Minister under **s. 690**. The fresh evidence for which admittance will be sought consists of opinion evidence from eminent pathologists which concludes that Mrs. Johnson's injuries were consistent with a fall backwards down the basement steps in which her head became momentarily wedged between the steps and the concrete wall. That is, her death resulted from an accident, not a homicide. Some experts who testified at the trial have revised their opinions to agree with the theory of an accidental backwards fall. The crown has vigorously expressed concern as to the reliability of this evidence and in fairness, its time for rebutting it has been limited, but admissibility and credibility are for another day.

For present purposes, I am satisfied that that evidence, if found to be admissible, and if believed, could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The jury would have had a

further option for resolving the narrow opportunity issue.

The new expert reports, if admitted by the panel, would be cogent evidence in support of AIDWYC's contention that Mr. Johnson is "factually innocent", as he has maintained from the outset. It would be unrealistic to deny, that at the end of the day, there is at least a reasonable possibility that he has been wrongly convicted.

If that should be the final outcome, neither justice nor the public interest can be served by requiring him to remain in prison until the process has worked itself through what appears to be two separate hearings in this court and possibly a new trial. As his counsel point out, the months unjustly taken from him, if he is innocent, can never be restored to him, but if at the end of the day he is still found to be guilty, they can be added to the time he must serve. I find that Mr. Johnson's detention is not necessary in the public interest.

I allow the application for interim release subject to conditions which will be reflected in the order.

Freeman, J.A.

C.A. No. 02885

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