C.A.C. No. 148518

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Hart, 1998 NSCA 17

BETWEEN:

WILLIAM ALEXANDER HART	)	Arthur J. Mollon, Q.C.
	)	for the applicant/appellant
Applicant/	)	
Appellant	)	
	)	
- and -	)	
	)	
	)	
HER MAJESTY THE QUEEN	)	Denise C. Smith
	)	for the respondent
	)	
Respondent	)	
	)	Application Heard:
	)	July 30, 1998
	)	
	)	Decision Delivered:
	)	July 30, 1998
	)	
	)	

BEFORE THE HONOURABLE JUSTICE E.J. FLINN,
IN CHAMBERS

FLINN, J.A.:

This is an application for interim judicial release.

The appellant is a homosexual pedophile. On May 28th, 1998, following a trial before Justice Michael MacDonald, and a jury, in Sydney, Nova Scotia, he was convicted of two counts of sexual assault and one count of sexual touching contrary to the provisions of s. 271 of the **Criminal Code** and s. 151(a) of the **Criminal Code**, respectively.

I have no record before me of the proceedings before Justice MacDonald following the appellant's convictions. Counsel have advised me that, while the appellant had been released on bail prior to his trial, Justice MacDonald refused to release the appellant following his conviction. Because of his prior record, and the seriousness of the offences for which he had been convicted, Justice MacDonald remanded the appellant into custody pending his sentencing hearing which will take place on September 15, 1998, about six weeks from now. The Crown has indicated that at the sentencing hearing an application will be made to have the appellant declared a "dangerous offender".

The appellant's record of sexual offences consists of:

1. Two charges of indecent assault in 1983 for which he was sentenced to three months on each charge.

2. One charge of sexual assault in 1984 for which he was sentenced to three years consecutive to time imposed for offences of possession of a weapon, breach of probation and mischief to private property.
3. One charge of sexual assault in 1988 for which he was sentenced to seven years imprisonment.

In addition to the above there are four instances where the appellant violated conditions of statutory release. The appellant has appealed his convictions in this matter, and has applied for interim release under the provisions of s. 679 of the **Criminal Code**.

This application is unusual because the appellant is applying for release from custody, on an appeal from conviction, notwithstanding that sentence has not yet been imposed upon him.

Since the appellant has not been sentenced for the offences for which he was convicted, there are limitations on my jurisdiction to release him, at this stage, under s. 679 of the **Criminal Code**. In **Re: Morris and The Queen** (1985), 21 C.C.C. (3d) 242 the Ontario Court of Appeal made the following comments about the powers of a judge of the Court of Appeal to release an appellant following conviction but before sentencing. Firstly, at p. 244, Justice Morden, writing for a unanimous Court, said the following:

> It has been decided that a judge of this Court has jurisdiction under this provision to release an appellant after conviction but before sentence: *R. v. Bencardino and de Carlo* (1973), 11 C.C.C. (2d) 549; *R. v. Smale* (1979), 51 C.C.C. (2d) 126. In *Smale* it was said [at p. 128] that this "jurisdiction should only, it appears to us, be exercised in unusual and limited circumstances but it does exist".

And further at p. 245:

> In view of the foregoing it is my view that the rare case where a judge of the Court of Appeal grants release before sentence is imposed the judge is required to provide that the order expires at the time of sentencing or the disposition of the appeal, whichever is earlier, and normally should provide that the appellant surrender into custody the day before either of these events.

The latter point is made by the Court because the power of interim judicial release relates only to the release of the appellant from the custody to which he is then subject, and not to some future custody which may, or may not, be subsequently imposed.

Counsel for the appellant has not provided me with any information from which I could conclude that the appellant's circumstances are "unusual". For that reason alone, I am not prepared to exercise my discretion by releasing the appellant for the six week period between now and the date set for his sentencing hearing. Although I have not been provided with the trial judge's precise reasons, he saw fit, following the trial, to refuse to release the appellant pending his sentencing hearing. There is nothing before me which warrants my interfering with that exercise of discretion at this stage.

The words of Brooke, J.A. in **Regina v. Bencardino and de Carlo** (1973), 11 C.C.C. (2d) 549 at p. 551 are particularly appropriate here:

> While the sentence imposed does not affect jurisdiction, nevertheless, there is a serious question in each case as to whether or not release should be granted before the sentence is imposed. In the case at bar, clearly, the trial judge did not think that the applicants should be at liberty at this time and he cancelled their conditional release and ordered that they be held in custody pending sentence. I have not had the benefit of his reasons which prompted him to take this step. However, he has presided over a lengthy trial, heard all of the evidence, formed opinions as to these two men; and I have no doubt having regard to considerations, including the likelihood of their appearance for sentence and the public interest, he concluded that detention was necessary.

I am, therefore, dismissing the appellant's application for interim release, prior to his sentencing on the sole ground that the appellant has not demonstrated unusual circumstances which would warrant my interfering with the discretion exercised by the trial judge - in refusing to continue the appellant's bail pending the sentencing hearing - and granting his interim release at this stage.

This is without prejudice to the appellant making a fresh application after he has been sentenced, under the provisions of s. 679(4) of the **Criminal Code**.

The Crown made extensive submissions before me that the appellant should not be released, in any event, because of his failure to satisfy the conditions of s. 679(4) of the **Criminal Code**. I will make no comment on those submissions so as not to give the appearance of prejudging any future application that the appellant may make after he is sentenced.

The application is dismissed.

Flinn, J.A.