Date: 19980507 Docket: C.A.C. 145643

NOVA SCOTIA COURT OF APPEAL
Cite as R. v. Gratto, 1998 NSCA 15

BETWEEN:

ALVIN CLARK GRATTO	)	Stephen M. Robertson
	)	for the Appellant/Applicant
Appellant/ Applicant	)	
	)	
- and -	)	
	)	James A. Gumpert,Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	May 7th, 1998
	)	
	)	
	)	Decision Delivered:
	)	May 7th, 1998
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BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)(Orally)

The appellant-applicant, Alvin Clark Gratto, was convicted by a Supreme Court judge and jury of causing the death, by criminal negligence, of John Roderick Fraser, by shooting him and was sentenced to 5 1/2 years in penitentiary. He was also convicted of improper storage of a firearm and obstructing a peace officer in the execution of his duty for which he received 3 month concurrent sentences. He has filed an appeal from his conviction on the criminal negligence causing death charge. He applies today for release pending determination of his appeal which has been set down for hearing on October 5th, 1998.

Pursuant to s. 679(3) I may make an order that the appellant 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. As was pointed out during submissions, release pending appeal is significantly different than release pending trial. After trial, the accused's guilt has been established beyond a reasonable doubt by the trial court. The presumption of innocence has, therefore, been rebutted. Release pending appeal, however, brings into play a number of considerations, including the desirability of enforcing court orders after trial balanced against the right to review the trial decision on appeal.

The circumstances of the offence were summarized by the trial judge as follows:

> The evidence presented to the Jury was basically that the accused and the victim, Mr. Fraser, who were friends, were drinking at the accused's trailer along with some other people. There was some discussion about rifles, and the accused went to his bedroom and took a rifle on two occasions out of the bedroom to the kitchen where the victim was standing by the sink. When the accused took the second rifle out, he put a magazine into the rifle and cocked a shell into the chamber. There followed some discussion between the people there about him putting the rifle away, and another individual reached to grab the rifle from him, at which point, it discharged with the bullet striking the victim, Mr. Fraser, who died a short time later in hospital.
>
> After the shooting, the accused called 911 for help, but at that time, made up a false story about someone coming to the door of the trailer and shooting the victim. The police later discovered that this story was false when they interviewed the man who had grabbed the rifle from the accused.
>
> At the time that this terrible incident happened, the accused and the victim were friends. There is no evidence before me that there was any bad blood between them. There is absolutely no evidence that the victim, Mr. Fraser, did anything to cause the accused to point a rifle at him. He is completely blameless in this situation. It appears to me that he was simply in the wrong place at the wrong time.
>
> I am also satisfied that there is no evidence that the accused intended to fire the rifle. His criminal activity was creating a dangerous situation by loading the rifle in a room which contained a number of people, and thereby making it possible for the gun to discharge and kill Mr. Fraser. There is no explanation why the accused did what he did. The friendly drinking session with friends in that trailer was turned into an explosive situation with the introduction of a loaded rifle. The result was the tragic loss of life of Mr. Fraser.
>
> . . . . .

> The facts of this case are a good example of the problem of mixing guns with alcohol. They simply don't mix in the same manner that drinking and driving don't mix. Here, as in so many cases of drinking and driving, it is the innocent people who suffer.

The appellant has filed an affidavit and advanced supporting submissions. In essence, his position is this. The indictment alleged that death was caused by the appellant shooting the victim. The appellant will submit on appeal that this an essential averment which the Crown had to prove beyond a reasonable doubt. It will further be argued, as I understand it, that the evidence as to who actually pulled the trigger was equivocal and accordingly the conviction ought to be set aside on appeal. As for whether the appellant will surrender himself into custody and whether his detention is necessary in the public interest, the appellant argues that although he has a long criminal record, he has only one prior conviction for an offence of violence and he has never violated a court order, including probation and judicial interim release orders. He was released on a recognizance with a surety pending trial with the result that he was at large on conditions from early October 1997 until his conviction in late January, 1998, at which point he was remanded into custody. There is no evidence of any failure on the appellant's part to abide by the terms of his release pending trial.

The Crown opposes release pending appeal. While not conceding that the appellant's onus has been discharged on any of the three factors, the

Crown bases its position mainly in relation to the third factor, submitting that the appellant's release will put public safety at risk and would tend to erode public confidence in the administration of justice.

The material and submissions which I have reviewed satisfy me 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.

The public interest, while a broad and multi-faceted concept, has often been considered under two branches, that is, public safety and public confidence in the administration of justice.

With respect to public safety, the crime of which the appellant was convicted and which he now appeals is an offence of violence involving a weapon and which resulted in the death of the victim. The offence involves alcohol abuse on the part of the appellant. As the trial judge put it:

> The friendly drinking session with friends in that trailer was turned into an explosive situation with the introduction of a loaded rifle.

The offence involved a lethal combination of excessive drinking and firearms. As noted in the pre-sentence report, alcohol is a factor in many of the

charges over the years involving this appellant. Further, in the pre-sentence report, it is indicated that the appellant has sought help with his drinking in the past but obviously up to the time of the offence he had not yet come to terms with this problem:

> The accused stated that he can recall drinking from (sic) the first time at age 13 or 14. He recalls having difficulties with the law enforcement agencies over the years, normally when he drank to excess. He recalls being on probation as well, at one period of time and was seeing Baxter Steeves and maintained that he had five months sobriety at that particular time. He stated that he has stopped drinking at different times over the years on his own. Six months seems to be the longest period of time that he can recall remaining alcohol free. He can also remember going through the Detox at various times in his life, taking programs that applied to him.

The appellant has a lengthy criminal record including four drinking and driving offences and numerous convictions for offences against property including theft and break and enter. Also troubling is the fact that the appellant's record includes offences involving weapons, particularly a conviction for carrying a concealed weapon in 1982 and assault with a weapon in 1990. Of course, the 1998 conviction for improper storage of a firearm is not under appeal.

The appellant has provided me with his own evidence that he will abide by any conditions imposed in an order releasing him, that he has not had an alcoholic drink since his arrest and that he will resume regular meetings at the North Shore Detox for drug and alcohol counselling. He intends to reside with

his mother if released as he did during his release pending trial. However, there is no evidence filed from his mother as to whether these arrangements are satisfactory to her or, more significantly, as to the nature of those living arrangements. There is also no evidence filed from prospective sureties who would be willing to vouch for the appellant's compliance with the conditions which might be imposed if he were to be released. There is no evidence filed with respect to the support, counselling and supervision that would be available to him if he were released aside from his indication that he will resume his contact with the North Shore Detox.

With respect to the second broad category, that is, public confidence in the administration of justice, I agree with Chief Justice MacEachern in **R. v. Nguyen** (1997), 119 C.C.C. (3d) 269, that this should be assessed from the point of view of ordinary, reasonable, fair-minded members of the community, but members of the community who are informed about the philosophy of the legislative provisions, **Charter** values including, of course, the right of persons charged with offences not to be denied reasonable bail without just cause and fully informed about the actual circumstances of the offence.

Taking into account all of these considerations, I am not satisfied that the appellant's detention is not necessary in the public interest. The evidence does not satisfy me that adequate supports and safeguards are in place to

address the obvious public safety concerns arising from the danger posed by the lethal combination of alcohol and firearms. I am also of the view, given the appellant's record, the nature and circumstances of the offence under appeal, his serious drinking problem and his numerous past unsuccessful attempts to come to terms with it, that his release, on the evidence before me, would tend to undermine public confidence in the administration of justice.

For these reasons the application is dismissed.

Cromwell, J.A.

C.A.C No.145613

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ALVIN CLARK GRATTO

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

HEARD BEFORE THE HONOURABLE JUSTICE CROMWELL, J.A. (in Chambers)