NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Cain, 2007 NSCA 116

Date: 20071203
Docket: CAC 285376
Registry: Halifax

Between:

Lewis Percy Cain

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Elizabeth Roscoe
Application Heard:	November 29, 2007, in Halifax, Nova Scotia, In Chambers
Held:	Application for release pending appeal dismissed
Counsel:	Appellant, in person Mark Scott, for the respondent

Decision:

[1] This is an application for release pending appeal of conviction and sentence, made pursuant to s. 679(1)(a) of the **Criminal Code**. The Crown opposes the application. The appeal is scheduled to be heard on March 25, 2008.

[2] On April 20, 2007, following a trial before Judge Castor H. Williams the appellant was convicted of the offences of break and enter into a residence with intent to commit an indictable offence (s. 348(1)(a)) and two counts of breach of a recognizance (s. 145(3)). The offences were committed on January 23, 2007. The recognizance had been entered into on January 11, 2007 in relation to another offence.

[3] On August 24, 2007, Judge Williams sentenced the appellant to a period of incarceration of four years and gave 14 months credit for seven months served on remand. In his remarks on sentencing, Judge Williams summarized the circumstances of the offence as follows:

> ... Basically, he went to the residence, broke a window, entered the residence in which Ms. Williams was still at home and he left the residence. And in leaving, he took with him a do rag.

[4] In passing sentence Judge Williams noted the appellant's very lengthy criminal record, dating back to 1973 and including 20 previous break-and-enter convictions. Specific and general deterrence were found to be the most relevant sentencing principles.

[5] The grounds of appeal list several errors in fact finding, in effect a complaint of unreasonable verdict. With respect to the sentence appeal, the appellant claims that the judge erred in referring to a victim impact statement that had not been disclosed to him, not allowing him to address the court and by over-emphasizing his prior record.

[6] In order to be released pending appeal, s. 679(3) of the **Criminal Code** requires the appellant to establish that his 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] In his affidavit Mr. Cain provides further argument in support of his grounds of appeal, states that since being incarcerated he has started studying the Bible, that if released he would live with his mother and that he would abide by any conditions of bail. He reiterated these points during his oral evidence. As well he indicated that he has always appeared in court when he has been granted bail in the past.

[8] The Crown is opposed to Mr. Cain's release on all three grounds. Mr. Scott submits that the appeal has no merit. Secondly, there is no evidence presented by Mr. Cain that he will surrender. He has offered no surety and given his history of breaching court orders and a pending trial on another charge, there is a real risk of Mr. Cain absconding. And finally, it is submitted that the appellant has not established that his detention is not necessary in the public interest.

[9] At this stage of the proceeding the appellant no longer has the benefit of the presumption of innocence. He has the burden of persuasion on the application for bail.

[10] It is, of course, difficult at this stage of the appeal to assess the merit of the grounds of appeal since I have not had an opportunity to review the entire transcript of evidence at trial. Mr. Scott did refer to several excerpts of the trial transcript to demonstrate that there was evidence to refute many of Mr. Cain's allegations. However, the threshold is low on this first part of the test. The appellant only has to show that at least one ground of appeal is arguable or has a possibility of success. If, as contended by the appellant, the trial judge did in fact misapprehend material evidence, that would be an arguable ground of appeal with some chance of success, thus establishing that the appeal is not frivolous.

[11] On the second part of the test, that is, whether he will surrender himself into custody, it appears that Mr. Cain has family ties and a place to reside in the area. He also indicated that his nephew will help him obtain employment in a furniture warehouse. However, he has not offered any surety and his nephew has not appeared or filed anything in support of the application.

[12] The biggest factor against the application for release is Mr. Cain's past criminal record, which can be considered both under the second and third parts of the test in s. 679(3). The CPIC record lists 76 offences. Most of the offences are property related, break and enters and thefts. However Mr. Cain testified that the

record is wrong. He contests at least 20 of the charges - all of those between 1973 and 1977 and most of those listed for the period 1980 to 1992. The record lists offences for Percy William Lewis Cain and three aliases police say Mr. Cain uses, Todd Fleet, Percy Medley and Alvin Napper, which could possibly account for errors in the record. Mr. Scott however produced certificates of conviction for seven of the offences that Mr. Cain says were mistakenly shown on his record and all of these were in the name of Percy William Cain, Percy Cain or William Cain. One of these is a conviction for perjury. Coincidently, two of the offences he refused to accept as part of his record were for theft from a woman with the same name as the woman he says is the mother of his child.

[13] Although it is impossible to conclude without further evidence that all 76 offences are properly shown on Mr. Cain's CPIC record, I am able to conclude that he is definitely mistaken in relation to at least seven of those that he contests which leads to the strong suspicion that he is also wrong in his assertion that the others are improperly attributed to him. However, for the purpose of the bail application I am assuming that Mr. Cain's record consists of approximately 60 prior offences, giving him the benefit of doubt in relation to the other 14 - 16 offences that he says are not his. As a result, the record as admitted does not include offences for failure to appear, breach of probation or obstructing justice.

[14] A lengthy prior record is often cited by this court as evidence which undermines a statement by an appellant that he will surrender as ordered. See, for example: **R. v. Andersen**, [1999] N.S.J. No. 41 (QL); **R. v. Johnson**, 2004 NSCA 136; **R. v. Rafuse**, [1997] N.S.J. No. 277(QL); **R. v. Butler**, [1997] N.S.J. No. 391(QL) and **R. v. Barry**, [2004] N.S.J. No. 392 (QL). The fact that Mr. Cain has throughout his adult life shown such disregard for the law as evidenced by his admitted record does not instill confidence in his promise to obey court imposed conditions. As noted by Fichaud, J.A. in **R. v. Barry,** cited above, the clear inference from a record such as Mr. Cain's is that given the opportunity, he will offend again. Mr. Cain has not satisfied me that he would, if released, surrender himself into custody as directed in the release order.

[15] The third factor, that the appellant's detention is not in the public interest, was discussed by Justice Fichaud in **R. v. Barry**:

[10] The public interest assessment under s. 679(3)(c) balances divergent criteria in the unique circumstances of each case. In **R. v. Ryan**, 2004 NSCA 105, Justice Cromwell described the approach:

> [21] I agree with former Chief Justice McEachern when he wrote in **R. v. Nugyen** (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in different contexts:
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> > In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.
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> [22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clamour is used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.
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> [23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 48:
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> > Public confidence in the administration of justice requires that judgments be enforced. ... On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.
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> [24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:

> Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.
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> [25] This statement was cited with approval by my colleague Chipman, J.A. in **R. v. Innocente**, [2004] N.S.J. No. 332, **supra**.

[16] In this case Mr. Cain's appeal is scheduled to be heard within a few months, long before his sentence will expire. Taking into account all of considerations relevant to the public interest as discussed in **Barry**, I am not satisfied that the appellant has met the third requirement for release pending appeal. Given his lengthy criminal record and the nature of these particular offences, I am not satisfied that the appellant has shown that it is in the public interest that he be granted bail. I am of the view, given the evidence before me, that his release would tend to undermine public confidence in the administration of justice.

[17] For these reasons the application for bail pending appeal is dismissed.

Roscoe, J.A.