Date: 19981223 **Docket**: C.A.C. 150128

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Kane, 1998 NSCA 239

BETWEEN:

JEFFREY STEVEN KANE	)	Peter J. Driscoll
	)	for the Appellant
Applicant/	)	
Appellant	)	
- and -	)	
	)	Susan Bour
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	December 23, 1998
	)	
	)	
	)	Decision Delivered:
	)	December 23, 1998
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BEFORE THE HONOURABLE CHIEF JUSTICE GLUBE, IN CHAMBERS

GLUBE, CJ.N.S.; (In Chambers)

This is an application by Jeffrey Steven Kane pursuant to s. 680 of the **Criminal Code** requesting that I, as Chief Justice of the Court of Appeal, direct the Court of appeal to review the Chambers decision of Justice Roscoe dated November 12, 1998.

On May 1, 1998, following a judge alone trial before Justice Arthur J. LeBlanc, a conviction was entered against Mr. Kane for the offence of unlawfully trafficking in cocaine contrary to s. 4(1) of the **Narcotic Control Act**. The date of the offence was July 31, 1996, the indictment was signed on August 27, 1997, and the trial was held April 1, 1998. Mr. Kane was sentenced to 14 months imprisonment and one year probation on September 1, 1998. He has been incarcerated in the Kings Correctional Centre, Waterville, Nova Scotia, since that date.

Mr. Kane personally filed a notice of appeal on September 11, 1998.

A notice of application for release pending appeal was filed November 5, 1998 and heard and decided by Justice Roscoe on November 12, 1998. At that hearing, discussion took place concerning the original notice of appeal. Counsel was permitted to prepare an amended notice of appeal which was filed on November 19, 1998. The appeal will be heard on January 26, 1999.

Following the hearing before Justice Roscoe, she gave an oral decision which is in writing and dated November 12, 1998. In her decision, Justice Roscoe correctly identifies the circumstances when an appellant may be released. These are set out in s. 679(3), namely, the appellant must establish on a balance of probabilities each of the following grounds:

> (a) that the appeal or application for leave to appeal is not frivolous,
>
> (b) that he will surrender himself into custody in accordance with the terms of the order, and
>
> (c) that his detention is not necessary in the public interest.

Although acknowledging there is difficulty in assessing the merit of grounds for appeal at an application for release pending an appeal without a copy of the transcript or the decision, Justice Roscoe found that at least one ground was arguable or had a possibility of success. Therefore, Mr. Kane met the test that the appeal was not frivolous.

On the second issue, the learned judge acknowledged his ties in the community and that he had appeared in court when required to do so. However, it was Mr. Kane's criminal record which Justice Roscoe considered under 679(3)(b) and (c), which caused her to refuse his application for release pending appeal. Counsel have acknowledged that essentially Justice Roscoe agreed that he had met the terms of subsection (b).

She stated the following:

> The biggest factor against Mr. Kane's application is his past criminal record, which I think can be considered both under the second and third parts of the test in s. 679(3). Mr. Kane's record is lengthy - fourteen prior offences, including offences of violence, two sexual assaults, seven prostitution related offences, and a failure to comply with a probation order. It also appears that most of the offences were committed while Mr. Kane was serving probation orders.
>
> Considering the record and the nature of this particular offence - that of trafficking in cocaine - I am not satisfied that Mr. Kane has shown that it is in the public interest that he be granted bail.

My role as set out in s. 680 is to first decide whether the decision of Justice Roscoe should be reviewed. Counsel for the Crown this morning acknowledges that the threshhold that the appeal has some hope of success has been met. Counsel for Mr. Kane and counsel for the Crown have consented to my acting as the review judge if I find there should be a review pursuant to s. 680(2).

The case law is clear that the review is of the record and not an application *de novo*: (**R. v. Moore** (1979), 49 C.C.C. (2d) 78 (N.S.C.A.)). Also the nature of a review deals with the correctness and not the reasonableness of the decision of Justice Roscoe. (**R. v. Benson** (1992), 14 C.R. (4th) 245, 73 C.C.C. (3d) 303 (N.S.C.A.)).

The **Benson** decision reviews the factors to be considered in determining whether release of a person pending appeal is contrary to the public interest, including

factors such as the nature of the offence, the circumstances surrounding the commission of the offence, and the public attitude to such an offence.

In examining the public interest, the Court held that the judge hearing the application has wide and unfettered discretion. As stated in **Benson** at pp. 309-310, quoting from **R. v. Demyen** (1975), 26 C.C.C. (2d) 324 at 326:

> ... to attempt to define with particularity what constitutes public interest would not only be difficult but would likely result in restricting by judicial pronouncement the unfettered discretion which Parliament intended to confer. *The proper application, in my view, is to give to public interest a comprehensive meaning and to decide in the circumstances of each case whether or not the public interest requires the prisoner's detention.*

And further at p. 310:

> I think it can be said, as well, that the public does not take the same view to the release of an accused while awaiting trial. This is understandable, as in the latter instance, the accused is presumed to be innocent, while in the former, he is a convicted criminal.

Looking at the circumstances of the case before the Court and of the offender, although this was a single purchase of a relatively small quantity of cocaine, the selling of cocaine is clearly contrary to the public interest. Selling drugs of the addictive nature of cocaine can endanger members of the public.

Again in **Benson** at p. 311, quoting from **R. v. Kingwatsiak** (1976), 31 C.C.C. (2d) 213 at 218:

> In my opinion the release of a prisoner convicted of a criminal offence involving a person who has a number of previous criminal convictions is a matter of real concern to the public. The public does not take the same view with respect to the release of a convicted person as compared to the release of an accused who is awaiting trial. In the latter case the accused is presumed to be innocent while in the former he is a convicted criminal.

Another decision is that of **R. v. Quinton** (1993), 24 C.R. (4th) 242, which is written in French, and which I have not attempted to translate. However, the head note relates that Mr. Quinton was convicted of four counts of theft, break and enter, possession of a break-in instrument and conspiracy for theft. He was sentenced to two years. On an application under s. 680, consideration was given to the fact that the accused was not released pending his trial; he was on parole when he committed the crimes; and, he had a lengthy criminal record. The decision relates that on review, the Court of Appeal is to make its own determination of the facts. There does not have to be a finding that the single judge committed a manifest error or made an unreasonable decision in order to vary that judge's decision. In examining whether detention is not necessary in the public interest, the Court is to look at the type of crime, the personal situation of the accused, and the confidence of the public in the criminal justice system. **Quinton** was found to have a serious criminal record and had re-offended almost immediately from his previous offence. It was held the third criteria was not met.

Although the CPIC record of Mr. Kane's previous convictions, as attached to his affidavit, is incomplete, the complete record was provided to Justice Roscoe at the

Bail application heard on November 12, 1998. Mr. Kane has a previous record of 14 offences. He was on probation for sexual assault when, in 1992, he committed two new offences of resisting arrest and mischief, and then a further offence of uttering threats. He was also on probation in February 1993 when he committed eight prostitution related offences. He was released from prison in June of 1995 for those latter offences and his sentence expired in August of 1996. However, he reoffended (the current offence) on July 31, 1996.

The appellant acknowledges the offence under appeal is a very serious one, although submitting it is certainly not a violent one and that there is only a small quantity involved. I do not consider the quantity as the important factor, rather it is the type of drug involved, namely, cocaine.

Mr. Kane's appeal is to be heard on January 26th, 1999. Although it is submitted he will have almost served his jail time by then, that of course is dependant on the Parole Board and he still would have a year on probation to follow his release. Thus the denial of bail, in my opinion, would not render the appeal nugatory. **(R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at p. 48 (Ont. C.A.)).

Whether or not Mr. Kane is successful in his appeal will be determined based on the hearing on January 26. Until then, he is guilty of trafficking in cocaine. Although I have considered his personal circumstances in relation to the expected birth of his child, as well

as the facts of the case in the decision of Justice LeBlanc, I find that I cannot overlook his past involvement with the law which in many cases was violent. As I stated, he was released from a lengthy prison sentence and within the year committed a very serious offence which does carry a term of life imprisonment.

Having considered the nature of the offence, the circumstances surrounding its commission and the public attitude to such an offence, as well as his personal situation, I find Mr. Kane has not satisfied the burden on him that his detention is not necessary in the public interest. I find that detention is necessary to maintain public confidence in the administration of justice. (**R. v. Nguyen** (1997), 119 C.C.C. (3d) 269.)

The application for review is granted but, upon review, the decision of Justice Roscoe made on November 12, 1998 denying Mr. Kane his release pending determination of his appeal is confirmed.

Glube, C.J.N.S.