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NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Wood, 1999 NSCA 124]

BETWEEN:

JOHN DOUGLAS WOOD Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Appellant in person Kenneth W.F. Fiske, Q.C. for the respondent Application heard: October 7th, 1999 Decision delivered: October 19, 1999

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

[1] The appellant applies for release pending the determination of his appeal pursuant to s. 679 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The only issue raised by the Crown in opposition to the application is that I have no jurisdiction to make the order sought by the appellant.

[2] After a jury trial, convictions were entered against the appellant on nine counts of theft. On September 1, 1998, he was sentenced to a total period of five years imprisonment. By Notice of Appeal dated September 29th, 1998, the appellant appealed his convictions and sought leave to appeal his sentence.

[3] The hearing of the appeal has been twice adjourned due to difficulties in producing the transcript of the trial. The appeal is currently set to be heard on January 26th, 2000, roughly one year and five months after the sentences were imposed. The appellant is not represented by counsel and, therefore, it being a prisoner's appeal, it is the responsibility of the Crown to prepare the appeal book for use of the Court.

[4] After sentencing in September of 1998, the appellant was incarcerated at Springhill Institution and then at Westmorland Institution. He was granted day parole conditional release by the National Parole Board on July 2, 1999. He currently resides at a community-based residential facility known as St. Leonard's House on Brunswick Street in Halifax. On day parole, the appellant is at liberty during the day, but is subject to curfew and must return to the community-based residential facility in the evening and

remain there overnight. The **Corrections and Conditional Release Act**, S.C. 1992, c. 20, s. 99 defines day parole as:

> ... authority granted to an offender by the Board or a provincial parole board to be at large during the offender's sentence in order to prepare the offender for full parole or statutory release, the conditions of which require the offender to return to a penitentiary, a community-based residential facility or a provincial correctional facility each night, unless otherwise authorized in writing. [emphasis added]

[5] Persons on day parole continue to serve their sentence of imprisonment: see **Corrections and Conditional Release Act**, s. 128.

[6] Section 679 of the **Criminal Code** provides that a judge of the Court of Appeal may release an appellant from custody pending the determination of his or her appeal. In order to be released, the appellant must demonstrate, in the circumstances of this case, that (i) the appeal is not frivolous; (ii) the appellant will surrender into custody in accordance with the terms of the order; and (iii) the appellant's detention is not necessary in the public interest.

[7] With his usual forthrightness, Mr. Fiske concedes that, in light of the fact that the appellant was at large on his undertaking prior to and during his trial and of the decision of the National Parole Board to grant the appellant day parole, the appellant has met conditions (ii) and (iii) just mentioned. In other words, the appellant has met the onus of showing that he will surrender into custody as ordered and that his detention is not necessary in the public interest. Mr. Fiske also very fairly concedes that the appeal is not frivolous for the purposes of a release application under s. 679 so that the

first of the three conditions for release has also been met. I conclude, therefore, that the appellant has met the burden upon him to establish the three conditions which permit me to order his release pending the determination of his appeal.

[8] As mentioned, the only basis for the Crown's opposition to the application is that I have no jurisdiction to grant a release order pursuant to s. 679 because the appellant, being on day parole, is not "in custody". Section 679(1) of the **Criminal Code** provides that a judge of the court of appeal may release an appellant **from custody** pending the determination of his appeal. The Crown submits that the word "custody" in s. 679 means detained in a penal institution and that a person on day parole is not in custody within the meaning of s. 679.

[9] The Crown points to numerous places in the **Criminal Code** where the context makes it clear that "custody" means confined to a penal institution. The Crown also refers to the decision of the Quebec Court of Appeal in **R. v. Folchito** (1986), 26 C.C.C. (3d) 253 which held that a person who failed to return to a penal institution, after having been granted a temporary absence permit, could be guilty of the offence of being unlawfully at large but not the offence of escaping lawful custody. The Crown notes that, pursuant to s. 99(1) of the **Corrections and Conditional Release Act**, day parole is defined to mean "the authority granted to an offender by the Board ... **to be at large** during the offender's sentence. ...." The Crown also refers to a number of other provisions of that statute which, in the Crown's submission, differentiate between

release on parole and remaining in closed custody.

[10] In addition, the Crown submits that the appellant's application is, in effect, a request that the Court amend the conditions of his release on day parole by deleting the statutory requirement to reside in a community-based residential facility. The Crown refers specifically to s. 107 of the **Corrections and Conditional Release Act** which states that subject to that **Act**, the **Prisons and Reformatories Act**, R.S.C. 1985, c. P-20; **The Transfer of Offenders Act**, R.S.C. 1985, c. T-15 and the **Criminal Code**, the Parole Board has exclusive jurisdiction to grant, terminate or revoke parole.

[11] The appellant submits that day parole imposes significant restraints on his liberty, including curfew and the requirement to reside in and return each evening to the community-based residential facility. While on day parole, he is deemed to be serving his sentence of imprisonment. He also notes that, should he be granted interim release pending his appeal, his time on interim release will not count towards his sentence the remainder of which will have to be served in full if his appeal is dismissed: **Criminal Code**, s. 719(2).

[12] In my view, this application cannot be resolved simply by parsing the meaning of the word "custody" divorced from the particular context in which the word is used. Custody is a word capable of having a wide variety of meanings, depending on the context. A parent has custody of a child. A prisoner may be in custody while attending

a medical appointment at a hospital, or while sitting in a court room. The word takes its meaning from the particular context in which it is used and so it is necessary to examine the context here.

[13] What is at issue on this application is the jurisdiction of the Court to address the risk that an appeal may have no practical effect because of the time required to hear and determine it. For example, if all, or most, of a sentence has been served by the time an appeal is heard, the sentence cannot be undone if the appeal is successful. On the other hand, the general rule must be that court orders, including sentences imposed for crimes, are enforceable when made unless and until the orders are varied on appeal.

[14] As Arbour, J.A. (as she then was) said in **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at p. 48, public confidence in the administration of justice requires that judgments be enforced, but also that judgments be reviewed and errors, if any, corrected. It is unjust that a person serve a sentence which is subsequently found to have been wrongly imposed.

[15] Recognizing this, the **Criminal Code** gives the Court of Appeal (or a judge thereof) broad powers to, in effect, suspend the operation of a sentence pending the hearing of an appeal where it is in the interests of justice in the particular case and not contrary to the broader public interest to do so. I have already referred to s. 679

relating to release from custody pending appeal. I also note s. 683(5) which gives the court or a judge the authority to suspend, pending appeal, the enforcement of an order to pay a fine, an order for forfeiture, an order to make restitution, an order to pay a victim fine surcharge and to suspend the conditions prescribed in a probation order.

[16] It has been held that the Rules of Court supplement the powers specifically granted by the **Criminal Code** to help ensure that an appeal does not become pointless as a result of the passage of time. Freeman, J.A. of this Court held in **Re Keating and The Queen** (1991), 66 C.C.C. (3d) 530 (N.S.C.A., Chambers) that a judge of the Court of Appeal, in addition to the power conferred by the **Criminal Code**, has discretion pursuant to the Rules of Court to stay (i.e., temporarily halt) the enforcement of any order being appealed: at 535. The specific provisions in the **Criminal Code** and the authority conferred by the Rules of Court have the same objective: to prevent the risk that injustice may result from the enforcement of a sentence before an appeal can be heard.

[17] I note also that both the Quebec and Ontario Courts of Appeal have held that there is jurisdiction to grant bail or suspend the running of a conditional sentence of imprisonment pending appeal: **R. v. Cantin**, [1999] J.Q. No. 2610 (Que. C.A.) (Q.L.); **R. v. Vallance**, [1998] O.J. 1616 (Ont. C.A. Chambers) (Q.L.). A person serving a conditional sentence, while deemed to be serving a sentence of imprisonment, may in fact be subject to less restrictive conditions than those applying to day parole.

[18] It would seem to me to be very odd that the Court of Appeal (or a judge of the Court) has the authority to suspend virtually every aspect of a punishment imposed pursuant to a criminal conviction pending appeal, and yet not have the authority to release an appellant from day parole pending an appeal. But that would be the result if I were to accept the Crown's argument.

[19] In my view, looking at the overall scheme of the **Criminal Code** and the Rules of Court, I have jurisdiction under s. 679 of the **Code** to grant the order sought by the appellant. The statutory conditions of day parole require the parolee to return to a penitentiary, a community-based residential facility or a provincial correctional facility each night. The parolee is deemed to be serving the sentence of imprisonment while on day parole; that constitutes being in custody for the purposes of section 679 of the **Criminal Code**.

[20] The practical effect of making a release order is to suspend the running of the sentence imposed on the appellant until his appeal has been dealt with by the Court. This does not, in my view, constitute interference with the exclusive jurisdiction of the National Parole Board to grant or refuse parole. It simply suspends the operation of the court-ordered sentence which is the foundation of the Parole Board's jurisdiction.

[21] I emphasize that on this application, the only ground of opposition by the Crown to release was that the Court has no jurisdiction to make the order. In other

cases, there may be sound reasons why release should not be ordered when the appellant is on day parole. None has been drawn to my attention in this case. I also emphasize that granting release to the appellant does not shorten the sentence imposed at trial. The release order simply suspends its operation until the appeal is heard. If the appeal does not succeed, the sentence will recommence and the appellant will serve it in full according to law.

[22] I will, therefore, sign an order releasing the appellant on an undertaking with the conditions proposed by the Crown, except that the condition requiring the appellant to remain in Nova Scotia will be subject to his parole officer having authority to permit, in advance, travel outside Nova Scotia but within Canada and the condition respecting no contact with Crown witnesses will be subject to Corporal David Manthorne, R.C.M.P., having the authority to permit, in advance, contact with the appellant's relatives who were Crown witnesses.

[23] I would ask Mr. Fiske to prepare an order and a form of Undertaking to implement my decision.

Cromwell, J.A.