Date: 19991221
Docket: CAC 155817

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Innocente, 1999 NSCA 161]

BETWEEN:		)	
		)	
DANIEL J. INNOCENTE		)	Warren K. Zimmer
		)	for the Applicant
	Applicant	)	
		)	
- and -		)	
		)	
HER MAJESTY THE QUEEN		)	Paula R. Taylor
		)	for the Respondent
	Respondent	)	
		)	
		)	
		)	Application Heard:
		)	December 16, 1999
		)	
		)	
		)	Decision Delivered:
		)	December 21, 1999

BEFORE THE HONOURABLE JUSTICE DAVID R. CHIPMAN
IN CHAMBERS

CHIPMAN, J.A.:

[1] This is an application made to me by Daniel Joseph Innocente for release pending appeal pursuant to s. 679 of the **Criminal Code**.

[2] Mr. Innocente was convicted following a trial before Cacchione, J. of charges of conspiring to traffic in cannabis resin contrary to s. 4(1) of the **Narcotic Control Act** and s. 465(1)(c) of the **Criminal Code**. He was sentenced on June 28, 1999, by Cacchione, J. to seven years incarceration on each count, to run concurrently. He has appealed both conviction and sentence to this Court and the matter has been set down for hearing on January 28, 2000.

[3] In his decision on sentencing, Cacchione, J. noted that during the period of time the offences were committed, between June 1, 1995 and August 30, 1995, the applicant involved one Henneberry making trips to Montreal to bring back the drugs. A Thunderbird motor vehicle registered in the name of another and containing a secret compartment was used.

[4] The quantities of drugs were, as Cacchione, J. observed, difficult to determine. However, he said this:

> . . . There is no question in my mind that the level involved was a large quantity. There were numerous trips taken to Montreal. There were, in light of Corporal Williams' evidence, concerted efforts made to avoid detection. The use of third parties, both to transport the

> drugs, to drive the vehicles, to own the vehicles, the use of phones other than those belonging to Mr. Innocente or registered in his name.

[5] Cacchione, J. described the applicant as a commercial wholesaler.

[6] I have reviewed the pre-sentence report that was before Cacchione, J. The applicant is 40 years of age. He has a grade 12 education. He has no significant previous convictions. He is presently in a common-law relationship. He has a son by a previous marriage.

[7] The applicant was, prior to being incarcerated, living in a common-law relationship with Lisa Harrison and three of her four children. His home is a very substantial waterfront property at Five Island Lake. Estimates of its value range between $300,000 and $385,000. There was evidence that three written offers of $300,000 presented to the applicant were refused. This house is presently under a Restraint Order signed by Goodfellow, J. upon being satisfied that there were reasonable grounds to believe it was the proceeds of crime.

[8] The applicant states in his affidavit in support of the application that he is scheduled to appear before Boudreau, J. of the Supreme Court on February 15, 2000 for a jury trial expected to last approximately ten weeks. In addition, he deposes, he has another matter which may or may not be tried in the Supreme Court “depending on the Crown”.

[9] Section 679 of the **Criminal Code** so far as is material provides:

> 679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
>
> (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
>
> . . .
>
> (3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> (a) the appeal or application for leave to appeal is not frivolous;
>
> (b) he will surrender himself into custody in accordance with the terms of the order; and
>
> (c) his detention is not necessary in the public interest.
>
> . . .

[10] Thus, the burden rests upon the applicant to establish each of the three criteria.

Appeal not frivolous:

[11] The threshold for meeting the requirement that the appeal is not frivolous is, in the Crown's submission, low and the Crown does not oppose the application on this ground.

Surrender of the accused:

[12] The applicant presented himself at court on every occasion that he was required to do so in the years leading up to his conviction and sentencing. Now, however, he is under

a sentence of seven years and the Crown suggests that, as he did not appear to think at the time of sentencing that he would receive such a heavy disposition, the motive to flee might be greater. However, this is no more than a suggestion and the Crown concedes that it is not basing its opposition primarily on that ground.

Public Interest:

[13] In the context of this application, the term "public interest", embraces matters broader than mere protection of the public. It also involves the public perception of and confidence in the administration of justice: **R. v. Pabani** (1991), 10 C.R. (4th) 381 (Ont. C.A.).

[14] It is to be kept in mind that unlike bail before trial when the accused enjoys the benefit of the presumption of innocence, the applicant here, being convicted, enjoys no such benefit.

[15] In **Pabani, supra**, the applicant for bail had been convicted of second degree murder of his wife. Goodman, J.A. denied bail. Although he was satisfied that the appeal was not frivolous, and that the applicant would surrender himself into custody if necessary, he was not satisfied that the detention was not necessary in the public interest. He referred, with approval, to the following passage from the decision of Culliton, C.J.S. in **R. v. Demyen** (1975), 26 C.C.C. (2d) 324 (Sask. C.A.) at p. 326:

> I am convinced that the effective enforcement and administration of the criminal law can only be achieved if the Courts, Judges and police officers, and law enforcement agencies have and maintain the confidence and respect of the public. Any action by the Courts, Judges, police officers, or law enforcement agencies which may detrimentally affect that public confidence and respect would be contrary to the public interest.
>
> I think it can be said that the release of a prisoner convicted of a serious crime involving violence to the person pending the determination of his appeal is a matter of real concern to the public. 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. The automatic release from custody of a person convicted of a serious crime such as murder upon being satisfied that the appeal is not frivolous and that the convicted person will surrender himself into custody in accordance with the order that may be made, may undermine the public confidence in and respect for the Court and for the administration and enforcement of the criminal law. Thus, in my opinion, it is encumbent upon the appellant to show something more than the requirements prescribed by paras. (a) and (b) of s. 608(3) to establish that his detention is not necessary in the public interest. What that requirement is will depend upon the circumstances of each particular case.

I agree with that statement. In the present case the applicant has been convicted of a brutal slaying of his wife, after a lengthy trial. Spousal abuse is a matter of great public concern. The abuse in the present case ended in death. In my opinion it would be contrary to the public interest to release the applicant who has been convicted after a lengthy trial by judge and jury, pending appeal. *There will no doubt be cases where the hearing of an appeal will be so long delayed and the probability of success on the appeal so strong that it would be contrary to the public interest to refuse a release and a fortiori an applicant's detention would not be necessary in the public interest. A strong probability of success on the appeal may be sufficient grounds in itself to establish that an appellant's detention is not necessary in the public interest.*

Although the grounds of appeal in the present case are far from frivolous, I am not persuaded that they are so strong as to establish that the applicant's detention is not necessary in the public interest.

[16] In **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), Arbour, J. for the court, said at p. 47:

> This statement of Goodman J.A. represents the standard that has been consistently applied by appellate court judges in deciding whether bail pending appeal should be granted. It reflects the post-conviction conditions which are fundamentally different from pre-trial considerations. It is a standard that reflects the tensions between enforceability and reviewability and it is similar to the principles which govern other instances where relief is sought while an appeal is pending. This standard is identifiable but, like other legal norms,

> it is not self-applied. Although its application is often not free from difficulty, and although judges may differ in its application, it is a standard against which the correctness of individual decisions can be assessed. In contrast, a standardless sweep would preclude any debate regarding the correctness of a decision made under its authority as it would authorize judges to pursue their own personal predilections.

[17] The concerns for public interest relate both to the protection and safety of the public and to the need to maintain a balance between competing dictates of enforceability and reviewability. Arbour, J. continued at p. 48:

> Public confidence in the administration of justice requires that judgments be enforced. The public interest may require that a person convicted of a very serious offence, particularly a repeat offender who is advancing grounds of appeal that are arguable but weak, be denied bail. In such a case, the grounds favouring enforceability need not yield to the grounds favouring reviewability.
>
> On the other hand, public confidence in the administration of justice requires that judgments be reviewed and that errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake. Public confidence would be shaken, in my view, if a youthful first offender, sentenced to a few months' imprisonment for a property offence, was compelled to serve his or her entire sentence before having an opportunity to challenge the conviction on appeal. Assuming that the requirements of s. 679(3)(a) and (b) of the **Criminal Code** are met, entitlement to bail is strongest when denial of bail would render the appeal nugatory, for all practical purposes. This same principle animates the civil law dealing with stays of judgments and orders pending appeal. It is a principle which vindicates the value of reviewability.

[18] In **R. v. F.F.B.** (1992), 112 N.S.R. (2d) 423 (N.S.C.A.), Clarke, C.J.N.S. for the Court reviewed the authorities relating to the element of the public interest in an application for release pending appeal. At the conclusion of his review, he said at p. 430:

> It is evident from these authorities that while a judge has a "wide and unfettered discretion" in determining what the public interest is, that discretion does not extend to exclude the public interest as a criterion of equal weight and importance with the first two. Chief Justice Culliton in **Demyen**, supra, at pp. 326-327 sets forth a useful list of factors to be considered: "... the nature of the offence, the age of the victim, the circumstances surrounding the commission of the offence, and the public attitude to such an offence...". It is relevant to consider these against the circumstances that relate to this application.

[19] With these principles in mind, I address the application before me. The applicant filed an affidavit and was cross-examined thereon by counsel for the Crown. He was also cross-examined with respect to matters raised in an affidavit of Constable Mark Gorbet, R.C.M.P. Drug Section, which was tendered by the Crown. In that affidavit, Constable Gorbet interviewed Mitchell Shepard, who had been sentenced as a courier of narcotics for the applicant to a term of house arrest for two years less a day. Appended as an exhibit to Constable Gorbet's affidavit was a statement of Shepard's to the effect that shortly before the applicant was incarcerated, he approached Shepard demanding money and impliedly threatening him if he did not pay. In cross-examination before me, the applicant placed an entirely different interpretation on the conversation consistent with a not improper request by him for financial assistance. Having heard the applicant, and not having the benefit of Shepard's testimony, I am not able to draw any conclusions adverse to the applicant from this material.

[20] Other items upon which the applicant was cross-examined, that is whether he was dishonest with respect to his income tax returns, were explained by him at least to the extent that I am not prepared to draw an adverse inference respecting him sufficient to bear on the issue of public interest in the context of this application.

[21] The Crown has considered that the applicant's appeal is not frivolous from which I am prepared to assume that he has an arguable case - even a strongly arguable case. However, the fact is that the applicant now stands convicted of a very serious crime. He

has been sentenced to a long term of incarceration. The drug trade is a very serious public concern. Conspiracy to traffic in narcotics of necessity involves association with criminal persons. As a commercial wholesaler, the applicant must be taken, on the basis of his conviction, to have associated directly or indirectly with people high up in the drug trade at one end of his dealings, as well as with retailers lower down in the scale on the other.

[22] The applicant has only served about five months of his long sentence. His appeal will be heard by this Court in just over a month's time.

[23] Adverting to the four factors reviewed by Clarke, C.J.N.S., in **R. F.F.B., supra**, I have commented on the nature of the offence. As to the age of the victim, victims of the drug trade come in all ages and are to be found everywhere. The impact of illegal drug use has cost countless lives and spawned countless crimes. As to the circumstances of this offence, I have referred to them and they are anything but extenuating. I have also referred to the public attitude toward major drug traffickers. It would not readily favour early interim release in such cases.

[24] In balancing the competing factors of enforceability and reviewability of this conviction, the former is, in my opinion, heavily favoured. Public confidence in the administration of justice would suffer should a person convicted of such a serious crime involving dealings with other criminals in the nefarious drug trade, be released pending an appeal to be heard so soon. The applicant has not satisfied me that his detention is not necessary in the public interest.

[25] The application is dismissed.

Chipman, J.A.