Date: 19971006 Docket: CAC 140140

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Butler, 1997 NSCA 8

BETWEEN:

JOHN ROBERT BUTLER	)	
	)	Appellant in person
Appellant/ Applicant	)	
- and -	)	
	)	Denise C. Smith
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	October 2, 1997
	)	
	)	
	)	Decision Delivered:
	)	October 6, 1997
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BEFORE THE HONOURABLE JUSTICE NANCY BATEMAN IN CHAMBERS

BATEMAN, J.A.: (in Chambers)

This is an application for bail pending appeal pursuant to **s. 679(3)** of the **Criminal Code of Canada,** R.S.C. 1985, c. C-46. The Crown opposes the application for release.

On June 23, 1997, the appellant/applicant, John Robert Butler, who is not now represented by counsel, but was represented at trial, was convicted of breaking and entering contrary to s.348(1)(b) of the **Criminal Code**, uttering threats contrary to s.264(1)(a) of the **Code**; obstructing a peace officer contrary to s.129(a) of the **Code**; breach of recognizance contrary to s.811(b) of the **Code** and escaping from custody contrary to s.145(1)(a) of the **Code**. He has appealed his convictions and his sentence of a period of incarceration of 10 months in a correctional institution. He pled guilty to three of the charges and was convicted after trial on the other two, the break and enter and the uttering threats.

Section **679** of the **Criminal Code** is relevant and reads, in part:

> **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**;
>
> (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
>
> (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

....

(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.

The onus is on the accused to satisfy the requirements of **s.**

679(3).

In **R. v. Branco** (1993), 87 C.C.C. (3d) 71 (B.C.C.A.), Finch, J.A., commented upon the nature of bail pending appeal. He wrote at p. 75:

> . . . the presumption of innocence in favour of the accused before and during trial is extinguished upon conviction by proof beyond reasonable doubt of the accused's guilt. The conviction indicates that the Crown has successfully rebutted the presumption of innocence. While any verdict may be overturned on appeal, a conviction nevertheless replaces the presumption of innocence with the presumption of guilt. There is no reason to regard the appellant's guilt as being held in a state of suspension during the appeal process. In the context of bail pending trial, the accused seeks to preserve the status quo of personal liberty. In the context of bail pending appeal, the appellant seeks to reverse the status quo by obtaining a reprieve from a court order for his detention following conviction.
>
> In my view, the nature of bail pending appeal is fundamentally different from that of bail pending trial. This difference is due to the presumption of innocence having been rebutted by proof beyond reasonable doubt of the accused's guilt.

Grounds of Appeal:

Mr. Butler's Notice of Appeal sets out the following grounds:

> Two of my charges should have a new trial, on grounds that key evidence was not admitted in the trial, because the Judge said it was heresay [sic]. If this evidence had been entered, there would have been a different outcome in the trial, also I believe the sentence was clearly excessive, I am a person who has not been in trouble with the law in 10 years, also I was about to go into my 4th year of university and I had

> a very good pre-sentence report, further more I do not believe my lawyer represented me to the best of his ability.

The Crown opposes bail on the basis of s.679(3)(a),(b) and (c).

The convictions relate to incidents which occurred on April 28 and May 1, 1997. Mr. Butler had a longstanding common-law relationship with Janine Meagher. They have two children. The relationship was troubled for some time and ended over two years ago. Within the year prior to these offences Ms. Meagher had obtained a peace bond prohibiting Mr. Butler from directly contacting her. On April 28, according to Ms. Meagher, Mr. Butler contacted her by telephone, and threatened that he was coming to her residence. She notified the police and he was charged with breach of the peace bond. He was arrested and released on a further recognizance to refrain from contact with Ms. Meagher. In the early morning hours of May 1 he attended at her residence and gained entry by kicking in the door. According to Ms. Meagher's statement he threatened to kill her if she called the police. When the police arrived he physically resisted arrest and threatened violence to the police officers. Upon arraignment on the charges arising, he was permitted time to speak privately with his counsel and

used that opportunity to escape custody. He was apprehended and held in custody pending his trial. During that time he underwent a psychiatric assessment on order of the court.

This account of the circumstances surrounding these offences comes from the remarks of the Crown attorney at the bail hearing. Mr. Butler's recollection of the events occurring on May 1st differs substantially from that which I have recited above

At the time of the bail hearing the judge's conviction and sentencing remarks were not available to me. I did have a copy of the pre-sentence report submitted to the sentencing judge, a copy of the report prepared by the Provincial Forensic Psychiatry Service preparatory to sentencing and copies of the endorsed Informations relating to the five charges.

The principal focus of Mr. Butler's request for relief is his desire to resume his university studies. While the evidence before me in this regard is somewhat conflicting, Mr. Butler advises that he is going into

his fourth year at Saint Mary's University and has nine credits towards a degree in Anthropology and Psychology. He is understandably proud of his achievement in this regard as he has accomplished this with no financial assistance from his family and despite a dysfunctional family background. He wishes to become a productive member of society. Mr. Butler, at the time of these offences was working as a stevedore, trying to save enough money to return to university this fall. If released he plans to return to work and recommence his studies in January. If that does not occur, he advised the Court, his student loan payments will come due at full amount and he will be forced to declare bankruptcy which will, in his view, end any opportunity he has to complete his degree.

Likelihood of Surrendering Into Custody:

Mr. Butler has a criminal record. He correctly points out that, apart from these recent offences, he has not been in conflict with the law for 9 years. Some of the past offences do bear, however, on my assessment of the likelihood that Mr. Butler would surrender into custody if released. He has been convicted twice in the past of breach

of probation. Additionally, most of the offences contained in his record were committed while he was on probation. More troubling is the fact that in committing these current crimes, Mr. Butler was in breach of a recognizance and, indeed, in attending at Ms. Meagher's house on May 1, he was breaching not only the original peace bond but also, the one that had been imposed by the court only three days before. Aggravating, as well, is the escape from custody. This history does not instill confidence that Mr. Butler, however good his intentions at this time, will comply with a direction of this Court to appear for the appeal.

The 'Public Interest':

In **R. v. Demyen** (1975), 26 C.C.C. (2d) 324 (Sask. C.A.), Culliton C.J.S., in discussing the meaning of "detention in the public interest", said 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.*
>
> . . . it is incumbent 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. (emphasis added)

Given Mr. Butler's history of ignoring court orders, as set out above, and in the context of the public interest, I am not satisfied that he would comply with any conditions imposed by me should bail be granted. In my view, given his past record and the circumstances of these offences, it would shake public confidence should the court take another chance that Mr. Butler will abide by a court order. In this regard, the psychiatric report that was provided to the sentencing judge and based, in part, upon interviews with Mr. Butler is illuminating. Certain comments cause me particular concern:

> "He stated that he had physically beaten his girlfriend many times in the past and assaulted his father two weeks ago."
>
> . . .
>
> "Mr. Butler has a history of conduct disorder, alcoholism, antisocial personality traits, suicidal gestures and depression . . . He had incomplete treatment in Halifax for alcohol abuse and has been non-compliant with attending Alcoholics Anonymous"

I have taken into account the fact that Mr. Butler denies the accuracy of this report and, in particular, denies that he admitted to

beating his girlfriend in the past and does not agree that the account of his psychiatric profile is accurate.

On the other hand, I have considered that to deny bail at this point may render the appeal nugatory. Mr. Butler commenced serving his 10 month sentence on June 30. He advises that he will be entitled to release sometime in January. It may be that the appeal hearing cannot be scheduled prior to his release date. In **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), at p. 48, Arbour, J.A. wrote for the Court:

> 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. (emphasis added)

Balancing the competing factors, however, Mr. Butler has not met the burden on this ground.

Merits of the Appeal:

It is not for me to prejudge the appeal, however, I am obliged by Statute to satisfy myself that the appeal is not frivolous. Mr. Butler pled guilty to three of the offences. He appeals conviction on only the break and enter and the uttering threats. Even accepting the circumstances of these offences as related by Mr. Butler, the essential elements of a charge of break and enter are met. He denies uttering the threat, however, according to the psychiatric report he stated to the interviewer “That he recalls uttering threats but not the exact words.” Mr. Butler said that what he meant by that admission, was that he recalled uttering threats to the peace officers, but did not admit that he uttered threats to Ms. Meagher. His appeal centers on evidence not received by the court which, he submits, would bear upon Ms. Meagher’s credibility. He says that she will admit on cross examination that she has in the past made false charges about him to the police.

Essentially, Mr. Butler submits that Ms. Meagher lied about the events that occurred when he attended at her home in the early morning of May 1. He does not deny, however, that he was there in breach of two court orders, that he kicked in a door to gain entry into the building where she lives and that he did so after consuming a substantial quantity of alcohol. Mr. Butler appeals, as well, on the basis that he did not receive effective assistance of counsel at trial. To so demonstrate, in the face of the many uncontradicted inculpatory circumstances surrounding the convictions, will be a difficult task for Mr. Butler.

His final ground of appeal relates to sentence. *Prima facie*, and subject, of course to the arguments that Mr. Butler may advance at his appeal, the 10 months incarceration, for these 5 convictions, even taking into account his two months of remand time, is not “manifestly excessive”. Accordingly, Mr. Butler’s appeal appears to have limited chance of success.

Result:

Mr. Butler is an articulate and apparently intelligent man. He

has the potential to become a productive member of society. What was apparent, however, from his remarks at the bail hearing, is that he has little insight into the fact that his incarceration is a direct result of his own behaviour. Nor does he appreciate the seriousness of the three crimes to which he pled guilty, leaving aside those he disputes. I am not satisfied that he has satisfied the burden upon him to meet the requirements of **s. 679(3)** of the **Code**. Accordingly, the application for release is dismissed.

Bateman, J.A.

C.A.C. No. 140140

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JOHN ROBERT BUTLER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

BEFORE THE HONOURABLE JUSTICE BATEMAN IN CHAMBERS