NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Kagan***, 2008 NSCA 20

Date: 20080306
Docket: CAC 292390
Registry: Halifax

Between:

Paul David Kagan

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Thomas Cromwell in Chambers

Application Heard: March 6, 2008, in Halifax, Nova Scotia

Written Decision: March 6, 2008

Held: Bail granted.

Counsel: Elizabeth A. Buckle, for the appellant
Mark Scott, for the respondent

Decision: **(Orally)**

[1] The appellant, Paul David Kagan, applies for release pending his conviction and sentence appeal to this Court. Courts of appeal have generally decided that jurisdiction to order bail pending appeal exists while the appellant is serving a conditional sentence as is Mr. Kagan and the contrary has not been argued before me today.

[2] Our usual practice, which is quite strictly applied, is that a bail application will not be heard unless at the same time the appeal can be set down for hearing. I am persuaded, however, in the unusual circumstances of this case, that I should depart from this rule of practice here. Mr. Kagan was legally aided at trial. I am told that Legal Aid has declined to fund his appeal. That decision of Legal Aid will be appealed but the appeal, I am told, is not likely to be decided until the middle of April. The trial was lengthy so some considerable delay will likely be occasioned by the preparation of the transcript. There is no suggestion whatsoever in any of the material either that Mr. Kagan has been in any way delaying the progress of the appeal or is not advancing it in good faith. In those circumstances, in my view, it would not be fair to Mr. Kagan and it would serve no purpose to adjourn the bail application. There are other means available to me to ensure that the appeal proceeds without delay in the event bail is granted.

[3] For bail to be granted, the appellant must establish: (a) that he has filed a notice of appeal and that the 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: see s. 679(1)(a) and (3) **Criminal Code**.

[4] Before turning to these matters, it will be helpful to set out some small amount of background.

[5] The appellant was charged in December of 2000 with aggravated assault. He was released on an undertaking with conditions. He was convicted. However, he successfully appealed his conviction and a new trial was ordered. Following that conviction and pending appeal, he was released on a recognizance with conditions. Following the order for a new trial which was made in June of 2004, the appellant was again released on his own recognizance with conditions pending the new trial.

[6] The retrial took place over roughly 19 days in May and June of 2007 before The Honourable Justice McDougall in the Supreme Court. A conviction was entered. The appellant remained at large pending sentencing. In January of this year, the appellant was sentenced to a conditional sentence of one year including house arrest for six months. In the course of his sentencing decision, Justice McDougall said the following at paras. 29 and 31 of his reasons:

> 29 I have the added benefit of knowing how the offender - Mr. Kagan - has conducted himself in the past 4 and one half years since his release pending appeal. He has demonstrated a commitment to his studies at University and a better appreciation for the medical condition he lives with. He has sought treatment and counselling and has functioned independently while learning to better adapt socially to his environment. He has progressed in a positive way which hopefully he will continue to do.
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> ...
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> 31 ... By serving the sentence in the community the safety of the community would not be endangered.

[7] Apart from the conviction under appeal, the appellant has no criminal record. As noted, he has been in the community and subject to conditions of release for about seven years. He has not been charged with breaching any of these release orders and there is no evidence before me of any breaches.

[8] I turn to the matters which must be established before release may be ordered.

[9] The first requirement is that Mr. Kagan establish that his appeal is not frivolous: s. 679(3)(a). The notice of appeal sets out four grounds of appeal from the conviction, including that the trial judge failed to correctly apply and state the burden of proof.

[10] To decide whether the appeal is not frivolous, the appellant must satisfy me that he has an arguable point. I am so satisfied.

[11] At paras. 37 and 38 of the trial judge’s reasons, he said as follows:

> [37] ... the numerous inconsistencies in [the accused's] testimony between this trial and the first trial have left me in doubt as to the truthfulness of some of the answers he has given.
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> [38] As a result, when trying to reconcile the differences in the evidence presented by the accused and the complainant, I am more inclined to accept that of the latter where differences exist. The Corroborating evidence of other witnesses is also of great assistance in assessing the truthfulness and reliability of the testimony given by the two main parties to this event.
> (Emphasis added)

[12] The Crown submits that the appellant has failed to demonstrate the appeal is not frivolous. I disagree. The passages which I have quoted raise an arguable issue as to whether the judge misstated or misapplied the burden of proof. Whether that argument will succeed before a panel of this Court is a question for another group of people and another day. There is an arguable point and that is sufficient to satisfy the first requirement for bail pending appeal.

[13] I turn to whether Mr. Kagan has established that he will surrender himself into custody in accordance with the terms of a bail order. The Crown does not suggest that Mr. Kagan has failed to establish this. As I noted earlier, he has been at large pending two trials and a previous appeal without any difficulties that have been brought to my attention. I am satisfied that he will surrender himself in accordance with the terms of a bail order.

[14] I come finally to whether Mr. Kagan has established that his detention is not necessary in the public interest. The Crown submits that even if the appeal is arguable, as I have found, the weakness of the appeal on the merits may be factored into my assessment of public interest. This submission has no merit in the context of this case. The appellant has no criminal record apart from the conviction under appeal. He has been in the community and complying with the terms of release for some seven years. The Crown has not articulated any aspect of the public interest which is engaged in this case that necessitates or justifies a more searching examination at this stage of the merits of his appeal.

[15] I am, therefore, of the view that he ought to be released pending the disposition of his appeal or until further order of a judge of this Court.

[16] The Crown opposes the conditions of release proposed by the appellant. The Crown proposes an alcohol condition and a curfew.

[17] The conditions proposed by the appellant are virtually identical, apart from the amount of the deposit which has not been placed in issue before me, to those imposed when the appellant was released on bail pending appeal in July of 2003. The Crown has filed no evidence nor made any argument on the existing record that persuades me that those conditions, with a few modifications, are inadequate or inappropriate.

[18] I will sign an order which reflects the terms of release set out in the draft order filed by counsel for the appellant including conditions 1 and 2 and 4 through 8. I will continue the alcohol condition but not impose the curfew proposed by the Crown. I will delete proposed condition 3 in the draft order relating to the deposit of Mr. Kagan's passport. I am advised that an out-of-country trip may be necessary for the purposes of a serious family medical issue. There is no realistic risk of flight in the circumstances of this case that has been disclosed by the evidence. And, of course, condition 2 relating to permission to leave the various jurisdictions continues to apply. I impose the following additional conditions instead of conditions 9, 10 and 11 as set out on the draft order submitted:

> 9. That the appellant or counsel on his behalf apply no later than May 1st, 2008, to set the appeal down for hearing. If this does not occur, the appellant will appear before a judge of this Court in chambers on Thursday, May 8th, 2008, at 10:00 a.m. for determination of whether his release should be continued and to review the progress of the appeal.
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> 10. In the event that the appeal is dismissed, quashed or abandoned before it has been heard, he shall surrender into the authority of his conditional sentence supervisor and be governed by the conditions of his conditional sentence within 24 hours of the order dismissing or quashing the appeal or the filing of the notice of abandonment of the appeal as the case may be; and,
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> 11. He will surrender to the authority of his conditional sentence supervisor and be governed by the conditions of his conditional

sentence within 24 hours of being advised that judgment on the appeal is to be released.

Cromwell, J.A.