NOVA SCOTIA COURT OF APPEAL
Citation: R. v. MacIntosh, 2010 NSCA 68

Date: 20100813
Docket: CAC 333361
Registry: Halifax

Between:

Ernest Fenwick MacIntosh

Appellant/Applicant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486 of the *Criminal Code*

Judge: The Honourable Justice David P. S. Farrar

Application Heard: August 12, 2010, in Chambers

Written Decision: August 13, 2010

Held: Motion for release pending appeal is dismissed.

Counsel: Brian Casey, for the appellant/applicant
Mark Scott, for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Decision: (Orally)

[1] The appellant applies for a release pending appeal, pursuant to *Rule* 91.24 of the *Civil Procedure Rules* and s. 679 of the *Criminal Code*.

[2] On July 20, 2010, following a trial before Justice Simon MacDonald in Port Hawkesbury, Nova Scotia, the appellant was convicted of 13 counts of sexual abuse. [**R. v. MacIntosh**, 2010 NSSC 300]

[3] He had been released on bail prior to his trial and conviction. Following his conviction, counsel for the appellant sought his release pending the sentencing. After hearing argument the trial judge refused the appellant's request and remanded him pending sentence.

[4] Sentencing is scheduled for September 14, 2010, a little more than one month from now.

[5] This motion is unusual, but not unprecedented, in that the appellant is applying for release from custody, on an appeal from conviction, notwithstanding he has not yet been sentenced. In situations where the appellant has not been sentenced for the offences, the jurisdiction to release him should only be exercised in unusual and limited circumstances.

[6] In **R. v. W.A.H.**. [1998] N.S.J. No. 313, Justice Flinn of this court cited with approval the decision of the Ontario Court of Appeal in **Re Morris v. the Queen** (1985), 21 C.C.C. (3d) 242 at p. 244, where the court held:

> It has been decided that a judge of this Court has jurisdiction under this provision to release an appellant after conviction but before sentence: *R. v. Bencardino and De Carlo* (1973), 11 C.C.C. (2d) 549; *R. v. Smale* (1979), 51 C.C.C. (2d) 126. In *Smale* it was said that this "jurisdiction should only, it appears to us, be exercised in unusual and limited circumstances but it does exist".

[7] It was also noted in **Morris**, *supra*, the power of interim judicial release only relates to the release of the appellant from the custody to which he is presently subject. It cannot be a release from some future custody which may not be imposed [p. 245].

[8] The question, for me, on this motion, is whether the appellant has established that his circumstances are such that I should exercise my jurisdiction to release him pending sentencing. I have concluded they are not.

[9] The information provided in the affidavit evidence of Mr. MacIntosh and his counsel, do not establish any "unusual" circumstance that would warrant my interference with the exercise of the trial judge's discretion at this stage of the proceeding. Gary T. Trotter in his text *The Law of Bail in Canada*, 2nd ed. (Toronto: Carswell, 1999) reviews the authorities and suggests some circumstances that may satisfy the test including: overwhelming hardship in being detained; it is clear the appeal will be successful, or a lengthy delay between conviction and sentencing (p. 373). Although this is not an exhaustive list, none of those factors are present in this case. Nor has any other unusual circumstance been established.

[10] Counsel for the appellant argued the unusual circumstance in this case is the 13 months Mr. MacIntosh spent in custody prior to his release pending trial and it would be unfair for him to spend any more time in custody pending sentencing. A similar argument was made before the trial judge after the conviction when it was decided whether to remand Mr. MacIntosh.

[11] I am not satisfied that the pre-conviction custody amounts to an unusual circumstance. The decision to remand Mr. MacIntosh in custody for the 13 months prior to conviction was a decision based on the circumstances existing at that time, as was the decision to release him on bail following the 13-month period of incarceration.

[12] It is not for me to question the previous decisions. My role is to determine whether unusual circumstances exist at present, that is after conviction and before sentencing, which would justify my considering the appellant's release. The pre-conviction custody mandated by the provincial court judge does not, in this case, amount to an unusual circumstance. It was properly imposed and, in my view, is not a consideration for me at this stage of the proceedings.

[13] Further, as stated previously, the same argument was made before the trial judge, after presiding over a lengthy trial and hearing all of the evidence. He concluded, after hearing from counsel on the issue, detention was necessary to ensure public confidence in the administration of justice. [Unreported decision

dated July 20, 2010, at p. 344.] There was nothing presented at this hearing to persuade me that I ought to interfere with his exercise of discretion.

[14] The appellant has referred me to the decision of this court in **R. v. N.N.A.**, [1995] N.S.J. No. 448. To the extent the test applied in **N.N.A.**, *supra*, is contradictory to the more recent statement of the law in **W.A.H.** and the authorities cited by Flinn J.A., **W.A.H.** is to be preferred.

[15] I am, therefore, dismissing the appellant's application for interim release. The appellant has not demonstrated unusual circumstances which would warrant my interfering with the discretion exercised by the trial judge.

[16] This determination is without prejudice to the appellant making a fresh application after he has been sentenced, under the provisions of s. 679 of the *Criminal Code*.

[17] I will make no comment on the other submissions made by counsel so as not to give the appearance of prejudging any future application which may be made following sentencing (**W.A.H.**, *supra*, ¶ 13).

[18] The motion is dismissed.

Farrar, J.A.