C.A.C. No. 121435

NOVA SCOTIA COURT OF APPEAL
Cite as R. v. McAuley, 1996 NSCA 7

BETWEEN:

ALEXANDER PETER MCAULEY	)	the appellant appeared in person
Appellant	)	
- and -	)	
	)	David M. Meadows for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	Application Heard: January 25, 1996
	)	Decision Delivered: January 25, 1996

BEFORE: The Honourable Nancy J. Bateman, in chambers.

BATEMAN, J.A.:

This is an application for bail pending appeal pursuant to **s. 679(3)** of the **Criminal Code**. The hearing of his appeal from conviction and sentence is scheduled for February 6, 1996. The Crown opposes the application for release.

On April 26, 1995 Mr. McAulay was convicted of cultivating cannibus marijuana contrary to **s. 6(1)** of the **Narcotic Control Act**. On October 6, 1995 he was sentenced to imprisonment for 31/2 years.

Section **679** of the **Criminal Code** 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., commenting upon the nature of bail pending appeal, 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.

Mr. McAulay submits that he needs to be released so that he can prepare for his appeal. He has been denied Legal Aid funding. He plans, upon his interim release, to obtain a job and earn enough money to retain a lawyer. In addition, he intends to get psychiatric help. Given Mr. McAulay's history, particularly when not incarcerated, it is unlikely that he will be able to obtain employment and secure sufficient funding to hire counsel, even should the appeal be adjourned for a reasonable time. In addition, on the basis of the

material submitted by Mr. McAulay, it is fair to conclude that should he be released and obtain psychiatric help, this will not present a short term solution to his difficulties.

The remarks of the sentencing judge are enlightening and relevant. He says:

> Mr. McAuley was convicted after trial on August 20th...on April 26th. He failed to show up for his sentence and as a result a warrant was issued. He was released pending sentence and failed to show. As a result a warrant was issued. On August 23rd he did not appear. No lawyer was present. On August 25th the matter was put over to give him an opportunity to appear. It was indicated that he was on his way to Court at that time from Toronto or some place somewhat distant. His lawyer appeared expecting Mr. McAuley to be present. He was not present. Mr. Hood on behalf of the Crown appeared. The matter was adjourned to September 8th with the warrant continued for his arrest requiring him to be brought before the Court. (You can sit down Mr. McAuley.) Uhmm... on September 8th he was still not available. He was ultimately arrested, I gather, in Halifax and was brought here for his sentence today.
>
> There is before the Court a pre-sentence report and there are of course the circumstances as established at the time of trial with respect to this particular offence. The pre-sentence report is about as bad as a pre-sentence report can be. Mr. McAuley according to the writer is entrenched in the criminal subculture and has been since...a very early age. His criminal record extends back over a period to 1977. As an adult the probation report indicates that he was involved in crime when he was 14 or 15 years old and it is clear that for 20 of his 35 years he has spent most of his life in one form of correction facility or another. . .
>
> As Crown counsel has indicated the only time in the last fifteen years that he has remained out of trouble for any substantial period of time was after his sentence in 1989 which kept him in jail for a period of time, presumably until 1992, some three and a half years later. Mr. McAuley himself says he has been out of trouble since he was released on statutory release on the 14th of December, 1994. That...that theory would obviously have more impact if it weren't for the fact that he...that these charges arose in May

> of 1994 just five months after his release when he's cultivating...a substantial amount of marihuana. . .
>
> It appears from the evidence at the trial, the circumstances in which a... he was a...this...this offence was discovered, the criminal record that's before the Court, it appears from all those things that the only way to protect the public from further crime at the hands of Mr. McAuley is to keep him in jail.

Grounds of Appeal:

Mr. McAulay's grounds of appeal relate primarily to the manner in which his counsel conducted his defence. He appeals, as well on the basis that he was not represented by counsel at his sentencing. The grounds of appeal appear weak.

Likelihood of Surrendering Into Custody:

Given the history of Mr. McAulay repeatedly failing to appear for sentencing, as outlined in the remarks of the sentencing judge, I am not satisfied that he will surrender himself into custody if released.

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.*
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> *. . . 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)

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)

Mr. McAulay's appeal will be heard within two weeks. He has served less than four months of a three and one half year sentence on a serious offence. Denial of bail would not render the appeal nugatory.

Result:

I empathize with Mr. McAulay's difficulties in preparing for this appeal without counsel. Taking into account, however, the seriousness of the offence, the length of the sentence, the time within which the appeal will be heard, the failure of Mr. McAulay to present himself to the court in the past when required, and his extensive record, I am not satisfied that Mr. McAulay's detention is not necessary in the public interest, nor that he will surrender himself into custody.

Accordingly, bail is denied. As there has been, as yet, no application by Mr. McAulay to adjourn the appeal, it will be heard as scheduled on February 6, 1996 at 2 p.m., subject to any any further order of the Court.

J.A.

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	)	CHAMBERS
HER MAJESTY THE QUEEN	)	
	)	
respondent	)	