NOVA SCOTIA COURT OF APPEAL
Citation: R. v. MacIntosh, 2010 NSCA 77

Date: 20101008
Docket: CAC 333361
Registry: Halifax

Between:

Ernest Fenwick MacIntosh

Applicant

v.

Her Majesty the Queen

Respondent

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

Judge:	The Honourable Justice Joel Fichaud
Motion Heard:	October 7, 2010, in Chambers
Held:	Interim release is granted with conditions.
Counsel:	Brian Casey, for the appellant 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

[1] In July 2010 Mr. MacIntosh was convicted of 13 counts of sexual abuse under the *Criminal Code*. The decision of Justice Simon MacDonald (2010 NSSC 300) recites the facts that I will not repeat here.

[2] Mr. MacIntosh appealed to this court, and applied to the chambers justice of the Court of Appeal under s. 679 of the *Code* for interim release pending appeal. On August 13, Justice Farrar dismissed that application as premature because Mr. MacIntosh had not yet been sentenced. The dismissal was "without prejudice to the appellant making a fresh application after he has been sentenced". (2010 NSCA 68, ¶ 16).

[3] On September 28, Justice MacDonald sentenced Mr. MacIntosh to a total of 4 years incarceration, with credit for pre-sentence custody, and with DNA and weapons orders. The judge exempted Mr. MacIntosh from registration on the sex offender registry and denied the Crown's request for a prohibition order under s. 161 of the *Code*.

[4] Mr. MacIntosh then re-applied for interim release pending his appeal. I heard the application in chambers on October 7. After the hearing, still on October 7, I ruled orally that Mr. MacIntosh would be granted interim release pending the appeal, subject to conditions including house arrest that I explained at the hearing. I said my written reasons would follow. These are the reasons.

[5] Mr. MacIntosh applied under s. 679(1)(a) of the *Code*:

> 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;

Section 679(3) states the three prerequisites for release under s. 679(1)(a):

> Circumstances in which appellant may be released

> (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

[6] Mr. MacIntosh bears the onus to establish each of the three prerequisites of s. 679(3). As stated in *R. v. Cox*, 2009 NSCA 15, at ¶ 7

> [h]is conviction has replaced his initial presumption of innocence with a status quo of guilt, and it is his burden to oust the status quo by proving the statutory conditions for interim release. *R. v. Barry*, 2004 NSCA 126 at ¶ 8 and cases there cited.

First Prerequisite - Not Frivolous

[7] The Crown acknowledges that Mr. MacIntosh's appeal is not frivolous. From the limited material available on this application, I agree. This satisfies s. 679(3)(a).

Second Prerequisite - Surrender

[8] Under s. 679(3)(b), Mr. MacIntosh must satisfy me that he will surrender into custody in accordance with the terms of an interim release order.

[9] The Crown says he is a flight risk. The Crown points to the facts that Mr MacIntosh had to be extradited from India for his trial, that he has few remaining connections to Nova Scotia and that he does not want to be incarcerated.

[10] Mr. MacIntosh's residence in India and the events leading to his extradition were canvassed in Chief Justice Kennedy's decision of March 19, 2010 respecting Mr. MacIntosh's application for a stay (2010 NSSC 105). Counsel have agreed that, on this application, I may refer to the findings in the Chief Justice's decision. From ¶ 12-15 and 123 of that decision, it is clear that Mr. MacIntosh left Canada

for employment or business reasons, there were no charges, police complaints or allegations lodged against him at the time of his departure, and he did not leave the country as a fugitive. In August 1996, while he was in India, he learned of a Canadian police investigation. He did not return to Canada. A formal request for extradition was first sent to the Government of India in July 2006. Mr. MacIntosh contested the extradition through the legal process, as was his right. In April 2007, an Indian Court recommended extradition, to which the Indian Government agreed in May 2007. Mr. MacIntosh was extradited and, on June 8, 2007, he first appeared at the Provincial Court in Port Hawksbury to answer the sexual assault charges.

[11] In June 2007, after a hearing, Mr. MacIntosh was denied bail. After a year in custody and another bail hearing before a judge of the Supreme Court of Nova Scotia, Mr. MacIntosh was released by a recognizance approved on March 26, 2008. The conditions of that recognizance included that he: remain in his residence from 8 PM to 7 AM, present himself to the Police Station twice weekly, present himself at the door of his residence within 5 minutes of a knock by the police between 8 PM and 10 PM, remain in Halifax/Dartmouth, transfer $60,000 to the court as security, allow his bank account to be frozen, not possess a passport and stay away from persons under age 14.

[12] According to the uncontested evidence before me, Mr. MacIntosh abided by those conditions.

[13] In July 2009, with the Crown's consent, the conditions of recognizance were relaxed to permit Mr. MacIntosh to travel in Nova Scotia, eliminate the nightly curfew and discontinue the requirement that he respond within 5 minutes to police knocks on his door.

[14] According to the uncontradicted evidence before me, Mr. MacIntosh complied with the conditions as amended. He has appeared as required at his court proceedings. He has never failed to appear or to abide by his release conditions since he was first released on bail in June 2007.

[15] Given Mr MacIntosh's compliance to date, I am satisfied that he will surrender into custody under s. 679(3)(b). To further secure that consequence and in deference to the Crown's concern, I would:

(1) make his interim release pending the outcome of this appeal conditional on the stringent terms of the March 2008 recognizance, without the relaxed terms to which the Crown consented in July 2009; and then

(2) tighten the terms of the March 2008 recognizance by:

(a) replacing the condition of the 8 PM to 7 AM curfew with full house arrest, except for 3 hours per week for personal requirements to include medical and legal appointments, court appearances and attendances at the Police Station, with Mr. MacIntosh to notify the Police by phone before he leaves his residence; and

(b) adding that Mr. MacIntosh provide, as further security for the performance of his conditions of release pending appeal, a mortgage on his property in Port Hawksbury that he disclosed in cross examination at the hearing before me; and

(c) adding the standard clause in Court of Appeal interim release conditions that Mr. MacIntosh surrender at least 24 hours before the release of the Court of Appeal's decision, after being notified that the decision would be released and, in any case, surrender if his appeal is dismissed.

[16] With these conditions, I am satisfied that Mr. MacIntosh will surrender as required by s. 679(3)(b) of the *Code*.

Third Prerequisite - Public Interest

[17] The remaining prerequisite is that Mr. MacIntosh's detention, pending his appeal against conviction, not be "necessary in the public interest" under s. 679(3)(c).

[18] In *R. v Ryan*, 2004 NSCA 105, Justice Cromwell described the balancing approach under s. 679(3)(c):

[21] I agree with former Chief Justice McEachern when he wrote in **R. v. Nugyen** (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in difference contexts:

> In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.

[22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clamour is used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.

[23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 48:

> Public confidence in the administration of justice requires that judgments be enforced. ... On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.

[24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:

> Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.This statement was cited with approval by my colleague Chipman, J.A. in **R. v. Innocente, supra**.

To the same effect: *R. v. Barry*, ¶ 10; *R. v. Cox*, ¶ 11.

[19] The application of s. 679(3)(c) often involves the concern that the person released will reoffend during his interim release. The Crown does not seriously raise that concern here. Justice MacDonald's sentencing decision exempted Mr. MacIntosh from registration on the sex offender registry and declined to order a prohibition under s. 161, dispositions that the Crown has not appealed to date. Justice MacDonald's reasons were that the events happened over 30 years ago, Mr. MacIntosh has received treatment, and there is no evidence of any more recent repetition of the conduct. At the hearing before me, the Crown acknowledged that, given these comments by the sentencing judge, it would be difficult to infer a real risk of repetition during interim release. The conditions of interim release I have cited earlier, including house arrest, would alleviate any remaining concern of reoffence during interim release.

[20] The Crown's submission under s. 679(3)(c) has another focus. The Crown says, correctly, that Mr. MacIntosh's offences were reprehensible. The Crown deduces that, to afford an interim release to someone who committed such offences would "shake the confidence of a reasonable person, properly informed, in the administration of justice".

[21] I respectfully disagree. An interim release, pending a conviction appeal, is not a moral judgment that absolves, condones or mitigates the judicial reaction to the reprehensible conduct for which the individual was convicted. Neither is an interim release a reduction of the sentence. If, after a conviction appeal is heard and determined, the Court of Appeal overturns the conviction, then the individual is freed, as any innocent person should be freed, and his imprisonment thankfully will have been reduced by his earlier interim release. If, on the other hand, the Court of Appeal dismisses Mr. MacIntosh's appeal, then the conviction and sentence will stand, and he will serve that full sentence without any reduction for the additional seven months house arrest that I will order here. Should his appeal fail, the house arrest under this ruling will add to his total period of lost freedom from the incarceration ordered by the sentencing judge.

[22] The Crown suggests that Mr. MacIntosh’s appeal will fail anyway and, from that premise, submits that we should just get on with his incarceration in the public interest. Again I disagree. Until the hearing of his appeal, scheduled for May 10, 2011, nobody, neither the Crown, Mr. MacIntosh, me, the media, nor any member

of the public, knows whether his appeal will succeed or fail. That is why we have an appeal hearing. As mentioned earlier, the appeal is not frivolous. I have no record for a detailed consideration of grounds of appeal, and I cannot just assume those grounds will fail on the Crown's *sotto voce* intimation.

[23] Section 679(3) enacts the policy that someone with an arguable appeal, and who will respect the rules by surrendering if required and not use his interim liberty for harm, will have his appeal determined before his sentence is served anyway, rendering his right of appeal pointless. As Justice Cromwell said in *R. v. Ryan*, ¶ 22, the provision's purpose is not "a means by which public hostility or clamor is used to deny release to otherwise deserving applicants". In my view, a reasonable person, informed of this policy, would suffer no shaken confidence in the administration of justice. I would be more troubled by a system that continues incarceration, blithely oblivious to whether the basis for that incarceration is later overturned by a currently filed and arguable appeal.

[24] My role is to decide whether Mr. MacIntosh has satisfied his onus to establish, on the balance of probabilities, the three prerequisites stated in s. 679(3). He has done so, given the conditions of release that I set out earlier. I will grant his interim release with those conditions. At the hearing, I asked counsel to attempt an agreement as to form of the conditions of release, consistent with the directions in this decision. If counsel are unable to do so, I will draft the wording. Mr. MacIntosh is to remain in custody until the order, recognizance and mortgage are executed and filed.

Fichaud, J.A.