NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacDonald***, 2011 NSCA 46

Date: 20110516
Docket: CAC 347642
Registry: Halifax

Between:

Erin MacDonald

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Motion Heard:	May 5, 2011, in Chambers
Held:	Motion granted.
Counsel:	Brian Casey, for the appellant Jennifer A. MacLellan, for the respondent

Decision:

[1] On May 5, 2011, Mr. MacDonald applied in Chambers for interim release (bail) pending appeal of his conviction for offences relating to careless use and unlawful possession of a weapon. The Crown opposed release. After hearing Mr. MacDonald cross-examined on his affidavit and submissions from counsel, I advised the parties that release would be granted on the terms set out in paragraph [43] and that written reasons for my decision would follow. These are the reasons.

[2] Mr. MacDonald is a 40 year old professional who works in the oil industry. He resides in Calgary and Halifax where he owns a condominium at 1479 Lower Water Street.

[3] On December 28, 2009 HRM Police responded to a noise complaint regarding loud music at Mr. MacDonald's condominium.

[4] When Mr. MacDonald came to his door, he was holding (but did not display) a loaded 9 mm Beretta handgun. The police could not see the gun but one of the police officers suspected that Mr. MacDonald was concealing something and pushed inside. He then saw the handgun. Mr. MacDonald was handcuffed and arrested. He was charged with seven offences: careless use of a firearm (86(1)); pointing a firearm (87(1)); possession of a weapon for a purpose dangerous to the public (88(1)); possession of a firearm at an unauthorized place (93(1)(a)); possession of a prohibited or restricted firearm with ammunition (95(1)); resisting a police officer (129(a)); assault with a weapon (267(a)).

[5] Mr. MacDonald was acquitted on four of these charges. He was found guilty and sentenced for the ss. 86(1), 88(1), and 95(1) offences. The latter carries a minimum mandatory sentence of three years (s. 95(2)(a)(1) of the *Code)*.

[6] On December 30, 2009, Mr. MacDonald was released upon his own recognizance in the amount of $25,000 without deposit. On December 31, 2009, he surrendered his passport. On June 18, 2010, one of the terms of his recognizance was amended to permit Mr. MacDonald to travel within Canada.

[7] Mr. MacDonald appeals both the findings of guilt and sentence. He alleges the trial judge erred:

(a) In failing to find a breach of the *Charter* when the police entered Mr. MacDonald's condominium and failing to grant a remedy as a result;

(b) In finding that it was unreasonable for Mr. MacDonald to take a loaded handgun to the door in all the circumstances;

(c) In failing to find that the minimum sentence provisions of s. 95(1) are unconstitutional.

[8] The Crown opposes Mr. MacDonald's release primarily on the basis that he is a flight risk; that he has not established that he will surrender himself into custody as required by s. 679(3)(b) of the *Code* and that his proposed release plan is wholly inadequate. The Crown says that the release plan is less onerous than the initial recognizance and argues that following conviction, one does not move "down the bail ladder".

[9] For his part, Mr. MacDonald proposed that he be released essentially on an undertaking to appear. As part of his release proposal, Mr. MacDonald was not offering to surrender his passport, explaining that he had potential to work in Trinidad and Brazil.

[10] Mr. MacDonald has a license to possess the Beretta at his dwelling. He also has authority to transport the Beretta from his residence to shooting ranges within the province of Alberta. However, the trial judge found that Mr. MacDonald was not authorized to bring the Beretta to Nova Scotia and, in particular, that any lawful authority he had to possess the Beretta at his dwelling house did not extend to his Halifax condo. Accordingly, Mr. MacDonald was found guilty of the s. 95(1) charge which carries a minimum three-year imprisonment.

[11] In support of his application, Mr. MacDonald filed an affidavit on which he was cross-examined. His affidavit and the cross-examination establish that he owns undeveloped real estate in Alberta and the condominium in Halifax, although that is listed for sale. The Halifax condominium is assessed at $421,000 and has a mortgage of $283,495.72. He purchased it in 2005. The Alberta property has an estimated value of between $160,000 and $250,000 and a $23,000 mortgage. Mr. MacDonald is also heir to some real property in Alberta, but it is not clear what the

value of his interest in that property may be. Although he also resides in Alberta, Mr. MacDonald does not own that property. He lives in a dwelling house there with his cousin and her son. He possessed a number of weapons in Calgary which were turned over to the Calgary police as part of his initial recognizance.

[12] Mr. MacDonald owns two vehicles registered to his company and some ATVs and tools, located in Calgary. He estimates his total worth at $700,000 and he owes $340,000 (it is not clear whether the $700,000 was a gross or net figure).

[13] Mr. MacDonald has travelled widely for his work in the oil industry. In the last number of years he has worked in Halifax, Saint John's, Calgary, Trinidad, Saudi Arabia, United Arab Emirates, Bahrain, Iraq, and Quatar. Mr. MacDonald does business through a company solely owned by him. His company has no permanent office or other employees.

[14] Although it appears that Mr. MacDonald has experience as a pilot, he has not flown for almost 10 years. It is not clear whether he has a current license and what licenses he may previously have held.

[15] Apparently, when he was recently taken into custody, Mr. MacDonald was carrying $2,800 in cash. He explained that he often carries large sums of cash when he travels. Although he uses credit cards, he has had problems with them "working" in some jurisdictions. Moreover, he has suffered credit card fraud as a result of using them elsewhere.

[16] Mr. MacDonald files income tax returns in Alberta, not in Nova Scotia. He was not proposing any sureties in connection with his release terms as he does not know anyone in this jurisdiction who can act as his surety. He acknowledged during cross-examination that it was not his intention to remain in Nova Scotia but only return here for work purposes.

[17] Section 679 of the *Criminal Code* authorizes release of an appellant from custody pending determination of his appeal if (subject to notice of appeal requirements):

> (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.

[18] The law requires Mr. MacDonald to satisfy each of these criteria, on a balance of probabilities.

(a) Appeal not Frivolous

[19] The grounds of appeal are set out in paragraph 7, above. Counsel filed an "Affidavit of Merits" in which he sets out the circumstances of the police entry into Mr. MacDonald's condominium, his use (or non-use) of the Beretta, the particulars of his ownership and licensing of firearms and Mr. MacDonald's belief, to which he testified at trial, that he had complied with the law relating to firearms licensing. Counsel also summarized the sentencing court's concerns regarding general deterrence, contrasting them with the circumstances of these offences and this offender.

[20] While arguing that the grounds of appeal are weak, the Crown does not allege that they are frivolous. I agree they are not frivolous. It is otherwise preferable that no more be said at this stage concerning the merits of the appeal.

(b) Will Mr. MacDonald surrender himself into custody

[21] This is the issue on which the parties primarily join battle. Mr. MacDonald submits that he has no criminal record, substantial assets, a favourable pre-sentence report and has been on bail for 16 months without incident. Mr. MacDonald points out that although he was found guilty in August 2010, the Crown consented to his release pending sentencing and then consented to an amended recognizance which allowed him to travel throughout Canada. Mr. MacDonald submits that he has complied with the terms of his release in the eight months since he was found guilty. Moreover, he argues that he has known since the finding of guilt that the Crown would be looking for the three-year minimum sentencing with respect to the s. 95(1) charge, so his compliance with bail terms has been with full knowledge of his potential jeopardy.

[22] Mr. MacDonald proposed that the Court could release him on more generous terms than before conviction because the Court now knows why he possessed a gun on December 28, 2009. Mr. MacDonald testified in his own defence at his trial, and counsel submits that the Court accepted a lot of his evidence. Counsel argues that the concerns surrounding Mr. MacDonald's initial recognizance have largely been addressed – Mr. MacDonald has been acquitted of the majority of charges and the circumstances leading to his convictions are known.

[23] In response, the Crown says that as a result of the cross-examination, it has even greater concerns that Mr. MacDonald is a flight risk. Things have changed dramatically since the original recognizance. Mr. MacDonald has now been convicted of three charges and, significantly, faces a mandatory three-year prison term. In response to the argument that Mr. MacDonald's compliance with the terms of release was with the knowledge that he faced a three-year prison term, counsel points to the presentence report which indicates that Mr. MacDonald has "limited insight" into the seriousness of the offences he faces. She argues that the seriousness of what confronts Mr. MacDonald has not sunk in. She notes that at sentencing his own counsel was looking for a discharge and that Mr. MacDonald may have had an inappropriately optimistic view of the prospects of penalty.

[24] Crown counsel urges that the past is not a reliable indicator of the future because the *status quo* has changed as a result of Mr. MacDonald's convictions. He faces a bleak reality as a result of the minimum sentencing provision attaching to the s. 95(1) conviction.

[25] The Crown also argues that Mr. MacDonald has a tenuous connection to the jurisdiction. Mr. MacDonald is unmarried and does not have family and so his ability to move freely is unimpeded by these types of relationships. He travels widely in connection with his work and his condo is presently for sale. The terms of his proposed release are totally inadequate and do nothing to "bind his conscience".

[26] Despite the able submissions of Crown counsel, I am persuaded that Mr. MacDonald has met the onus on him. The circumstances that the Crown suggest make Mr. MacDonald a "flight risk" have nothing to do with the charges he has faced or the convictions that have resulted. Rather, they result from Mr. MacDonald's professional obligations. There is no indication that Mr. MacDonald

has done anything differently as a result of facing these charges or as a result of the convictions.

[27] During cross-examination Mr. MacDonald candidly acknowledged that his condominium was for sale. He answered Crown counsel's questions spontaneously and directly. He acknowledged estrangement from most of his family. He admitted that his immediate plans were to work outside Nova Scotia or Canada. His only hesitation understandably arose when a personal medical question was asked of him.

[28] The Crown agrees that Mr. MacDonald has no prior criminal record and that he has complied with the terms of his recognizance and amended recognizance since December 2009. His presentence report is favourable. If Mr. MacDonald had wished to flee, he certainly could have done so in the last eight months – although how effective his flight would be without a passport is questionable.

[29] The cases on which the Crown relies where bail has been refused are all distinguishable on the facts. In *R. v. Creelman*, 2006 NSCA 99, release was contrary to the public interest because there was a risk of continuing criminal conduct. Five hundred thousand dollars worth of drugs had been seized from the accused whose conduct involved substantial planning and pre-meditation. He also had a prior conviction for possession of proceeds of crime. Creelman had pled guilty after *Charter* arguments at trial had failed. The crime of which Mr. Creelman had been convicted was so serious that the usual pre-trial onus is statutorily reversed and the accused was required to show cause why he should be granted bail prior to trial (*Criminal Code*, s. 515(6)(d)).

[30] As the court pointed out in *Creelman*, public interest concerns not only protection of the public, but also the public's confidence in the administration of justice. The seriousness of the charges, drug abuse, and the drug trade generally all heighten public interest and perception where drug trafficking is concerned. As the court said:

> [22] ... A reasonably informed member of the public would be rightly perplexed by the release of a convicted, high level drug trafficker on a mere allegation that the trial judge has erred in some unspecified way.

[31] Without in any way diminishing the seriousness of the convictions in this case, they bear no resemblance to *Creelman*. Nor are Mr. MacDonald's personal circumstances in any way comparable to those of Mr Creelman.

[32] The Crown also relies on *R. v. Patterson*, 135 O.A.C. 324, where release pending appeal was denied. The appellant had been convicted of kidnapping, uttering threats, obstruction of justice and extortion. He was sentenced to seven years imprisonment. Mr. Patterson was connected with the Toronto area, had previously complied with bail and was prepared to post a $50,000 deposit in support of his release. However, he was facing a second trial in Ontario on a second set of pimping charges and there was an outstanding bench warrant for his arrest in Nevada on similar charges because he had failed to attend his trial in that jurisdiction. When arrested in Nevada, he was found in possession of false identification. The court dismissed Mr. Patterson's application citing a history of deceit concerning his identity, failure to appear, and obstruction of justice. The seven-year sentence and the prospect of additional incarceration for other serious charges persuaded the court that flight was a real possibility. From the point of view of the public interest, the offences were very serious. Again, with respect, simply to recite the foregoing facts is to significantly distinguish *Patterson* from Mr. MacDonald's circumstances.

[33] Finally, the Crown relies upon *R. v. Tattrie*, 2007 NSCA 41. Mr. Tattrie was convicted of assault with a weapon, possession of a weapon for a dangerous purpose and breach of probation. When arrested, Mr. Tattrie was serving a conditional sentence and he was in breach of that order. Moreover, the circumstances of the crime were telling: Mr. Tattrie had beaten his victim in a fist fight and then pursued him and assaulted him with a weapon. Although he had complied with the terms of release pending trial, he had a criminal record, including several convictions for breaches of court orders, undertakings and probation. He had other convictions involving property offences and violence and threats. There is no comparison between the circumstances of Mr. Tattrie and those of Mr. MacDonald.

[34] I am satisfied on a balance of probabilities that Mr. MacDonald is not a flight risk.

(c) The Public Interest

[35] The jurisprudence addresses public interest in at least two general ways: First, there is a practical and concrete concern about public safety if an appellant is released; and second, the public's confidence in the administration of justice must be considered in the context of whether an appellant is released or retained in custody.

[36] In *R. v. Ryan*, 2004 NSCA 105, Cromwell J.A. (as the then was) set out the considerations:

> [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:
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> > 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.
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> [24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:
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> > 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.
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> [25] This statement was cited with approval by my colleague Chipman, J.A. in **R. v. Innocente, supra**.

[37] More recently, in *R. v. Janes*, 2011 NSCA 10, Justice Beveridge noted:

> [31] Factors that should be considered are the circumstances of the offence, as far as they are known, the circumstances of the offender, the seriousness of the

> offence, and the degree to which the public can feel protected by appropriate terms of release.

[38] In its written submissions, the Crown cites the seriousness of gun crime as exemplified by s. 95(1) – and presumably the mandatory sentence attaching; the findings of the sentencing judge regarding the problem of firearm use in the community; and, Mr. MacDonald's conduct on the night in question endangering the lives of the police officers and others in the building.

[39] With respect, Mr. MacDonald's actions on the night in question bear no resemblance to the known problem of indiscriminate firearm use in HRM. If everyone using firearms in furtherance of other illegal activities in HRM obligingly licensed their weapons like Mr. MacDonald, life would be much easier for the police and the community at large. Without in any way diminishing the seriousness of the convictions here, Mr. MacDonald did not display, brandish, threaten or assault anyone (with or without a weapon), in any manner whatsoever.

[40] Unlike many of the perpetrators who liberally spray Halifax neighbourhoods with bullets on a regular basis, Mr. MacDonald is a 40-year old professional and gun hobbyist with no criminal record. If the events complained of by the Crown had occurred at Mr. MacDonald's Calgary residence instead of his Halifax residence, he could not have been convicted of the s. 95(1) offence and would not be facing a three-year minimum period of incarceration.

[41] There is nothing in the circumstances of the offender or the offences which suggest that the public would be unsafe if Mr. MacDonald is released. In my view, the "ordinary, reasonable, fair-minded member of society" would not believe that detention is necessary here to maintain public confidence in the administration of justice, (*R. v. Nguyen* (1997), 119 C.C.C. (3d) 269 (B.C.C.A.) , at para. 18, per McEachern, C.J.).

[42] I am satisfied on a balance of probabilities that detention of Mr. MacDonald pending appeal is not necessary in the public interest.

DISPOSITION

[43] Notwithstanding the foregoing findings, I agree with the Crown that Mr. MacDonald's proposed terms of release are inadequate. Accordingly, I am prepared to order Mr. MacDonald's release upon him entering into a recognizance in the amount of $25,000 with the following conditions:

(a) that he keep the peace and be of good behaviour.

(b) that he shall attend court as and when directed

(c) that he confirm his address and telephone number, in Halifax and in Calgary, with the Court Administration office and notify the Court Administration Office of any change in that address or telephone number within two business days after the change. (Phone: 424-6187)

(d) that he reside within Canada

(e) that he have no direct or indirect contact or communication with Shelly Pierce and Steve Sears or other crown witnesses except through a lawyer

(f) that he not have in his possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance

(g) that he not possess, use or consume any alcoholic beverages, and not possess, use or consume a controlled substance as defined by the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription or a legal authorization

(h) that he report in person when in Halifax to Halifax Regional Police Headquarters at 1975 Gottingen Street, once a week starting Friday, May 6, 2011 and each Friday thereafter, and when residing outside of Halifax, report by telephone to the Halifax Regional Police Headquarters at 1975 Gottingen Street at a telephone number provided by that office

(i) that he maintain his passport with Court Administration Office

(j) that he not play music at his premises at 207 - 1479 Lower Water Street, Halifax, NS, daily after 9:00 pm and at no time at a volume audible outside of his condominium

(k) That he surrender into the custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, in the Halifax Regional Municipality, by one o'clock p.m. of the day preceding the day on which the appeal will be heard. He will be advised at least 24 hours before the time by which he must surrender into custody, in the event the appeal is sooner dismissed, quashed, or abandoned.

(l) That he shall surrender into custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth in the Halifax Regional Municipality within 24 hours of the filing with the Registrar of the Court the order dismissing or quashing the appeal or the notice of abandonment of the appeal, as the case may be.

(m) That he surrender into the custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, in the Halifax Regional Municipality, by one o'clock p.m. of the day preceding the day on which the appeal decision will be released

(n) That his release be conditional upon the appeal proceeding on the date scheduled for the hearing, and if the date is to be changed for any reason, this order for release shall be reviewed in chambers on a date fixed by the court.

[44] I am satisfied on a balance of probabilities that Mr. MacDonald has established that he will comply with the foregoing terms of release.

Bryson, J.A.