NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Calder***, 2011 NSCA 62

Date: 20110627
Docket: CAC 348354
Registry: Halifax

Between:

Anne Calder

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Motion Heard:	June 22, 2011, in Halifax, Nova Scotia, in Chambers
Held:	Motion granted.
Counsel:	Craig Garson, Q.C., for the applicant/appellant Paul Adams, for the respondent

Reasons for judgment:

[1] On June 22nd, 2011, Ms. Calder applied in Chambers for interim release (bail) pending appeal on her convictions for trafficking in a controlled substance. The Crown opposed her release. After hearing submissions from counsel, I advised the parties that release would be granted on the terms set out in paragraph 33 herein and I would file written reasons in due course. These are my reasons.

Legal Principles

[2] This motion was brought pursuant to s. 679(1)(a) of the **Criminal Code** and Nova Scotia **Civil Procedure Rule** 91.24. The relevant statutory provisions are:

> 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,
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> (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;
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> ...
>
> (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.
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> ...
>
> (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
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> (a) the appeal or application for leave to appeal is not frivolous;
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> (b) he will surrender himself into custody in accordance with the terms of the order; and
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> (c) his detention is not necessary in the public interest.

[3] The onus is on Ms. Calder to satisfy each of these criteria on the balance of probabilities. Before turning to consideration of the criteria, I will briefly outline the circumstances that led to this motion.

[4] Ms. Calder is 58 years of age. On July 14, 2009, Ms. Calder was a practising member of the Nova Scotia Barristers' Society, practising primarily as a criminal defence lawyer. On that date, Ms. Calder, while visiting a client at the Central Nova Scotia Correctional Facility, was observed passing a package to her client in what was described as "suspicious" circumstances. An investigation was initiated. It was found that the package contained loose tobacco, rolling papers, a pill capsule and a granular substance. Subsequent analysis established that the granular substance was Hydromorphone, often referred to as Dilaudid.

[5] A subsequent search of Ms. Calder's office turned up two similar packages; one containing Hydromorphone and the other marihuana.

[6] Ms. Calder was charged with one count under s. 5(1) of the **Controlled Drugs and Substances Act**, S.C. 1995, c. 19, as am. (**CDSA**) (trafficking in a controlled substance) and two counts under s. 5(2) of the **CDSA** (possession for the purpose of trafficking). By decision of the Honourable Justice Kevin Coady dated March 11, 2011 (now reported as 2011 NSSC 96) she was convicted of all three charges.

[7] On June 19, 2011, she was sentenced to 30 months on each of the charges to be served concurrently.

[8] After being arrested on July 14, 2009, Ms. Calder was released from custody on a promise to appear and undertaking. She attended each court appearance as required.

[9] The Crown did not seek to remand Ms. Calder following conviction and pending sentence.

[10] By Notice of Appeal dated April 20, 2011, Ms. Calder appeals her convictions.

[11] It is with this background that I will now turn to the three criteria on which I must be satisfied:

(a) Appeal is not frivolous

[12] The Crown argues that it was incumbent upon the applicant to show that the appeal is not frivolous which requires more than a recitation of the grounds of appeal, which it characterizes as "general". It also argues that, even if I am satisfied that the grounds of appeal raise an arguable point, the strength or weakness of those grounds remain fundamentally relevant in assessing whether Ms. Calder has established that detention is not necessary in the public interest. I will address the Crown's latter argument later under the public interest criteria.

[13] The grounds of appeal as set forth in the Notice of Appeal are as follows:

> 1. The trial Judge misapprehended the evidence in that he failed to consider evidence relevant to a material issue at trial which misapprehension was substantial, material and played an essential part in his decision to convict.
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> 2. The trial Judge misapprehended the evidence of Dr. Rosenberg in that he was mistaken as to the substance of the evidence at trial which misapprehension was substantial, material and played an essential part in his decision to convict.
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> 3. The trial Judge misapprehended the evidence in that he failed to give proper effect to the evidence at trial which misapprehension was substantial. material and played an essential part in his decision to convict.
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> 4. The trial Judge erred in mixed law and fact in that, having accepted the expert evidence of Dr. Rosenberg that the Appellant was not fit to practice law "in 2009", he used the fact that the Appellant was a practicing criminal lawyer as a significant factor to support his conclusion that "it is inconceivable that (the Appellant) would not be on the alert to the very real likelihood that the package contained drugs as well as tobacco" (para. 59).
>
> 5. The trial Judge erred in finding the Crown had proven the Appellant possessed the packages found in her home as "possession" as defined in Section 2 of the **Controlled Drugs and Substances Act**.

[14] Although the Crown is correct in stating that the applicant, in her brief, simply sets out the grounds of appeal and reaches a conclusion that the appeal is not frivolous, I do not agree with the Crown's characterizations of the grounds of appeal as being "general". Although there is generality to some of the grounds of appeal, the fourth ground of appeal, in particular, is very specific and, when read against the trial judge's decision, provides the circumstances which give rise to that ground of appeal.

[15] Even if I were to accept that the grounds of appeal were general, I am satisfied that counsel for Ms. Calder, in oral argument, gave sufficient particulars of the circumstances of the grounds of appeal to allow me to assess the merits of the grounds of appeal. In particular, reference was made to grounds #2, #4 and #5 as set out above. Counsel reviewed the grounds of appeal and referred to both the appeal book and the trial judge's decision to show the substance of the applicant's arguments on these grounds of appeal.

[16] With respect to ground #2, the misapprehension of the evidence of Dr. Rosenberg, Mr. Garson referred to the trial judge's decision where he held:

> ... Dr. Rosenberg admitted that he accepted the information provided to him by Ms. Calder and that if she is not truthful, then his opinion goes away. Consequently the weight of Dr. Rosenberg's opinion is dependent on Ms. Calder's credibility. (¶ 45)

[17] Mr. Garson then referred me to the expert testimony of Dr. Rosenberg in the trial transcript to argue that the trial judge misapprehended Dr. Rosenberg's testimony. He says there is no such acknowledgement in his evidence.

[18] Mr. Garson argued that his misapprehension of Dr. Rosenberg's evidence was material as illustrated by ¶ 45, supra, and played an essential part in the decision to convict.

[19] Although I am in no way expressing an opinion on the ultimate merits of this ground of appeal, I am satisfied that it is not frivolous. The ultimate success of this ground of appeal, as well as all of the other grounds, will be left to the panel hearing the appeal.

[20] With respect to ground #4, the circumstances giving rise to that ground of appeal are self-evident from the wording of it. The applicant is arguing that the trial judge erred in accepting the expert evidence of Dr. Rosenberg in finding she was not fit to practise law and, then, using the fact that she was a practising criminal lawyer to conclude that it was inconceivable that she would not be alert to the fact that the packages contained drugs as well as tobacco. Again, I am satisfied that this ground of appeal is not frivolous.

[21] Finally, with respect to ground #5, the applicant argues that the trial judge erred in finding that the Crown had proven that the applicant possessed the packaged found in her home as possession is defined in s. 2 of the **CDSA**. Reference was made to the trial judge's decision where he found:

> [73] I find that Ms. Calder possessed these packages as possession is defined by section 2 of the **Controlled Drugs Substance Act** and section 4(3) of the **Criminal Code**. They were delivered to her home and brought to her attention. Ms. Calder's reactions to those deliveries and the evidence as a whole satisfies me that she knew the packages contained drugs or was wilfully blind to that likelihood.

[22] The applicant argues the trial judge failed to do the requisite analysis to determine whether Ms. Calder had "possession" as that term is defined in s. 4(3) of the **Criminal Code**. The Crown says that this ground of appeal is frivolous and I must read the decision as a whole to determine the basis upon which the conviction for possession for the purposes of trafficking is grounded.

[23] As noted earlier, my role is not to opine on the ultimate success of the appeal. My role is to examine the grounds of appeal and determine whether they are frivolous. Once again, I have concluded that this ground of appeal is not frivolous.

[24] Therefore, I am satisfied that Ms. Calder has met her burden in establishing the appeal is not frivolous.

(b) She will surrender herself into custody.

[25] The Crown did not contest the motion on this criteria. There was no suggestion, argument nor evidence presented that Ms. Calder would not surrender

into custody in accordance with the terms of an interim release order. She has satisfied her burden on this criteria.

(c) Detention is not necessary in the public interest

[26] In **R. v. Ryan**, 2004 NSCA 105, Justice Cromwell (as he was then) described the balancing approach:

> 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:
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> > 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. (Emphasis added)
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> 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 clammer 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.
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> 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.
>
> 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.

[27] This approach has been relied upon in numerous cases, most recently by Bryson, J.A. in **R. v. MacDonald**, 2011 NSCA 46. 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.

[28] The Crown argues that even if it is found that the appeal is not frivolous, the strength or weakness of the grounds of appeal remains fundamentally relevant to assessing whether the applicant has established that detention is not necessary in the public interest. It correctly points out that the public interest necessarily involves a consideration of public perception and confidence in the administration of justice.

[29] The "public interest" concerns not just public protection and the prevention of further criminal acts but also public perception and confidence in the administration of justice. (**R. v. Creelman**, 2006 NSCA 99, ¶ 22)

[30] Justice Bateman in **Creelman**, **supra**, assessed the strength of the appeal. In that case, only one ground of appeal had been pled, no alleged error was particularized and, it was difficult for the court to assess the strength of the appeal. However, Justice Bateman made it clear that the strength of the appeal was but one factor bearing on the public interest (¶ 15). She then went on to consider a number of other factors, including Mr. Creelman's prior convictions, the nature of the offence (it involved a sophisticated drug trafficking operation) and the concern of an ongoing risk of criminal conduct in denying him bail. (**Creelman, supra**, ¶ 19, 20, 21). None of the other factors are present in this case.

[31] I have already addressed the strengths of the appeal under the first criteria. I am not prepared to accept the Crown's submission that the grounds of appeal, although not frivolous, are so weak that the public confidence in the administration of justice would be shaken if I were to grant bail.

[32] Ms. Calder has shown arguable grounds of appeal. She is 58 years of age, has no prior criminal record, she is not a threat to re-offend, and every indication is she would comply with the conditions of release. In my view, the "ordinary, reasonable, fair-minded member of society" would not believe that detention is necessary to maintain public confidence in the administration of justice. (**R. v. Nguyen** (1997), 119 C.C.C. (3d) 269, B.C.C.A. in Chambers, ¶ 18). I am satisfied that the detention of Ms. Calder pending appeal is not necessary in the public interest.

Conclusion

[33] Accordingly, I ordered Ms. Calder's release upon her and her surety entering into a Recognizance in the amount of $5,000.00 with the following conditions:

> Keep the peace and be of good behaviour.
>
> Remain within the territorial jurisdiction of the Province of Nova Scotia.
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> Reside at 7077 Quinpool Road, Halifax, Halifax Regional Municipality, Nova Scotia or at Apartment 14, 390 March Street, New Glasgow, Nova Scotia.
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> To surrender any passport with the clerk of the court.
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> To not possess or consume any alcohol or non-prescription drugs.
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> Abide by a curfew and remain within her residence or the residence of her mother (Betty Calder) at Apartment 14, 390 March Street, New Glasgow, Nova Scotia between the hours of 12:00 o'clock midnight and 6:00 a.m. daily.

Surrender herself into the custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia by 1:00 p.m. of the day preceding the day on which the appeal decision will be released. The appellant will be advised at least twenty-four (24) hours before the time by which she must surrender into custody. In the event that the appeal is sooner dismissed, quashed or abandoned she shall surrender into custody to the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia within twenty-four (24) hours of the filing with the Registrar of this Court the order dismissing or quashing the appeal or the Notice of Abandonment of the appeal, as the case may be.

Farrar, J.A.