

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Delorey*, 2012 NSCA 5

Date: 20120118

Docket: CAC 352181

Registry: Halifax

Between:

Kyle Anthony Delorey

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Revised decision: The text of the original decision has been corrected according to the erratum dated March 23 , 2012. The text of the erratum is appended to this decision.

Judge: The Honourable Justice David P.S. Farrar

Motion Heard: January 12, 2012, in Halifax, Nova Scotia, in Chambers

Held: Motion to substitute surety dismissed and motion for release pending determination of appeal dismissed.

Counsel: Mitchell Eliasson, for the applicant/appellant
Mark Scott, for the respondent

Decision:

Background

[1] On June 13, 2011, Kyle Anthony Delorey was convicted of two offences stemming from a motor vehicle accident which occurred on June 4, 2008, on Highway #337 near the Town of Antigonish, Nova Scotia. Mr. Delorey was convicted of operating a motor vehicle on a highway in a manner that was dangerous to the public and thereby causing bodily injury to Robert Michael MacEachern, contrary to s. 249(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 and for operating a motor vehicle on a highway in a manner that was dangerous to the public interest and thereby causing death to Patrick Derrick MacEachern contrary to s. 249(4) of the **Code**.

[2] Mr. Delorey has appealed his conviction, and the hearing is scheduled for January 18, 2012.

[3] On September 1st, 2011, Justice M. Jill Hamilton issued an Order for Release of Mr. Delorey pending the determination of his appeal. The Order required that he enter into a recognizance with a surety. His mother, Argyle MacDonald agreed to act as his surety in the amount of \$5,000.

[4] However, Ms. MacDonald decided she did not wish to continue as a surety for her son and on November 3rd, 2011, she successfully made a motion to Render Surety to this Court pursuant to s. 766(1) of the **Code**. This led to a Warrant for Committal for the arrest of Mr. Delorey to be issued by Justice Jamie W.S. Saunders on the same day. Mr. Delorey became aware of the Warrant and left his mother's home on November 4th, 2011, and resided in the Halifax/Dartmouth area until January 12th, 2012, when he attended at court and was arrested pursuant to the Warrant.

[5] Between November 3, 2011 and January 12, 2012, Mr. Delorey was in breach of the conditions of his Recognizance:

- (1) he failed to reside with his mother; and
- (2) failed to report to the RCMP in Antigonish, on a weekly basis.

He also failed to surrender himself into custody on becoming aware of issuance of the Warrant.

[6] By Notice of Motion dated January 5th, 2012, Mr. Delorey seeks to either substitute a surety pursuant to s. 767.1(1) of the **Code** or, alternatively, for a new order of release pending determination of the appeal pursuant to s. 679(1)(a) of the **Code**. The matter was heard on January 12th, 2012, and after hearing the cross-examination of Mr. Delorey and Ms. MacDonald on their Affidavits filed in support of the Motion, and, after hearing arguments of counsel, I dismissed the motions and advised counsel that I would provide additional written reasons for my decision. These are those reasons.

[7] At the commencement of the Motion I advised counsel that I did not consider that this was a motion to substitute a surety pursuant to s. 767.1(1) of the **Criminal Code**. On Mr. Delorey being arrested under the Warrant, Ms. MacDonald was discharged as a surety and the Recognizance was at an end. The matter was considered as a fresh motion brought pursuant to s. 679(1)(a) of the **Code** for bail pending appeal.

[8] Section 679 provides:

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;

...

(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.

[9] The onus is on Mr. Delorey to satisfy each of these criteria on the balance of probabilities. I will now turn to the three criteria upon which I must be satisfied.

(a) the appeal is not frivolous;

[10] Mr. Delorey was granted bail pending appeal September 1st, 2011. At that time Justice Hamilton found, and the Crown acknowledged, that the appeal by Mr. Delorey had arguable merit. Similarly, on the motion before me, the Crown acknowledged that the appeal was not frivolous. I am satisfied that the appeal is not frivolous and in these circumstances it is not necessary to say anything more about the grounds of appeal.

[11] It is with respect to the second and third criteria that the Crown says Mr. Delorey cannot meet his burden.

(b) he will surrender himself into custody

[12] Mr. Delorey, the day following being informed of his mother having applied to remove herself as surety (November 4, 2011), left her Antigonish residence and moved to the Halifax/Dartmouth area where he remained until taken into custody on the morning of January 12, 2012, when he attended court for this motion. As noted earlier, his failure to reside with his mother and to report to the RCMP weekly were breaches of his Recognizance. His explanation for these breaches was that he felt Antigonish to be an unsafe place for him to live and that he did not trust the police. This, despite the fact that he had been living in Antigonish and reporting to the police up to November 3rd, 2011.

[13] I interpret his actions and his subsequent failure to report to police as an attempt to avoid arrest which he was able to do until his appearance in court for this motion. His lack of compliance with the Recognizance causes me considerable concern. Mr. Delorey has made it very clear that he does not wish to return to jail. He has blatantly ignored the provisions of his Recognizance and moved from Antigonish to avoid being arrested. He has failed to satisfy me that, if released, he would surrender himself into custody if his appeal is dismissed.

(c) his detention is not necessary in the public interest

[14] Mr. Delorey also fails on this aspect of the test.

[15] On November 3, 2011, Ms. MacDonald, Mr. Delorey's mother and proposed surety on this motion, appeared before Justice Saunders on a motion to Render by Surety. At that time she told the Court that her reason for rendering was she was concerned for her own safety and couldn't control her home because of Mr. Delorey's actions. She said since September, 2011, Mr. Delorey was not "expressing his anger in a calm manner" and was "lashing out and upset". She did not resile from her characterization of the situation, as it existed in November, in giving her evidence on this motion. Mr. Delorey himself acknowledges that he has issues with anger management. Nothing has changed since November 3rd, 2011 and despite Ms. MacDonald's good intentions, I am not satisfied that it would be appropriate to allow Mr. Delorey to go back into her home. In my view, Mr. Delorey's inability to control his anger poses a danger to himself and to others and it is not in the public interest that he be released.

[16] Further, the proposed terms of release are identical to the original Recognizance which would have Mr. Delorey living with his mother and reporting to the RCMP, an arrangement which was unworkable in the past. It would require Mr. Delorey to live in a community which he says is unsafe and reporting to the RCMP, an agency he does not trust.

[17] I am not satisfied that Mr. Delorey, if released, would comply with the proposed terms of release.

[18] Finally, Mr. Delorey's detention is necessary to maintain confidence in the administration of justice. This Court exercised its discretion in originally

releasing Mr. Delorey pending his appeal. His release was on certain conditions and it was incumbent upon Mr. Delorey to abide by those conditions. Once his mother rendered her surety he was aware that he was arrestable. Instead of surrendering to authorities he took steps to avoid arrest and knowingly breached the conditions of his release. Although Mr. Delorey says he has complied with most of his conditions of release, it is not his place to determine which conditions he will comply with and which can be ignored.

[19] The failure to comply with the terms of the Recognizance and then seek the Court's indulgence to be released on the same conditions pending the hearing of his appeal, in the face of those breaches, in my view would undermine public confidence in the administration of justice.

[20] For these reasons the motion for bail pending appeal is dismissed.

Farrar, J.A.

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Page 5, Paragraph [15], first line change "October 3, 2011" to read "November 3, 2011".