

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Cain*, 2013 NSCA 92

Date: 20130816

Docket: CAC 417338

Registry: Halifax

Between:

Percy Lewis Cain

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Peter M. S. Bryson

Motion Heard: August 8, 2013, in Halifax, Nova Scotia, in Chambers

Held: Motion for release pending appeal dismissed

Counsel: Appellant in person
Mark Scott, for the respondent

Reasons for judgment:

[1] Percy Cain applies for bail pending appeal. He appeals convictions and sentence for break, enter and theft (s. 348(1)(b) of the *Criminal Code*), three ss. 145 breaches of recognizance and a s. 811 breach of recognizance.

[2] The Crown opposes Mr. Cain's motion.

[3] Mr. Cain appeared without counsel. He said Legal Aid has denied him counsel. I asked whether he would prefer to appeal Legal Aid's decision and defer his motion until he might be able to secure counsel. On reflection, Mr. Cain said he wished to proceed now without a lawyer.

[4] Mr. Cain did a commendable job arguing his case. He illustrated his arguments by reference to materials before the court. He was courteous and polite.

The Law:

[5] Section 679(3) of the *Criminal Code* allows a judge of the Court of Appeal to release an appellant who is in custody, pending appeal if:

- (a) the appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order;
- (c) detention of the appellant is not necessary in the public interest.

[6] The onus is on Mr. Cain to establish that he should be afforded interim release. As Justice Saunders recently said:

[10] It is obvious, but bears repeating that Mr. Dow's status changed dramatically upon conviction. Whereas before, he was presumed innocent, he is now a convicted sex offender. That changes everything. Judge Murphy's decision displaced the initial presumption of innocence with the reality of proven guilt. As a consequence, Mr. Dow now has the burden of satisfying me on a balance of probabilities that all three of the requisite statutory conditions for judicial interim release are met in his case. (For example, **R. v. Barry**, 2004 NSCA 126; **R. v. Cox**, 2009 NSCA 15; **R. v. MacIntosh**, 2010 NSCA 77; **R. v. Janes**, 2011 NSCA 10; **R. v. MacDonald**, 2011 NSCA 46; and **R. v. Publicover**, 2011 NSCA 83).

[*R. v. Dow*, 2013 NSCA 50]

[7] Mr. Cain's notice of appeal describes three grounds. First he says that his surety should not have been questioned by the police while she was intoxicated. The second argues that he was not identified. The third alleges misconduct by the Crown. Mr. Cain took some time explaining his grounds of appeal and, in particular, what he felt were deficiencies in the evidence. The Crown acknowledges that Mr. Cain's first ground involves a very low threshold, but opposes bail under s. 679(3)(b) and (c) of the *Code*.

[8] Despite Mr. Cain's diligent arguments on the merits, this motion really turns on the second and third criteria of the s. 679(3) test.

Section 679(3)(b) – Surrender Into Custody:

[9] The Crown argues that Mr. Cain has a significant criminal record which includes numerous breaches of recognizance. The Crown points out that Mr. Cain denied his perjury conviction at his sentencing hearing which the Crown did not then seek to prove. The Crown has now tendered a certified copy of his 1974 conviction for perjury. The Crown says that this conviction was proved at a previous bail hearing before this Court (2007 NSCA 116). Mr. Cain challenges this – but the certificate of conviction really dispels any doubt.

[10] The Crown notes Mr. Cain's 2011 mischief conviction, misleading the police by providing a false name when he was wanted on a parole violation warrant. Mr. Cain did not deny this, but explained that he was upset at the time because his grandmother had recently died.

[11] The Crown also relies on Mr. Cain's own admission at his bail hearing before Judge William Digby that he had breached various recognizances with surety.

[12] The Crown urges that Mr. Cain's criminal record, his past breaches of recognizance and his lack of release plan all militate against him surrendering into custody if released pending appeal. Mr. Cain responds that he hoped to have someone in court presumably as surety, but they were attending a funeral. He said he had family and community support. That may be, but no details were provided and the fact is that no specific surety was offered to the court.

Section 679(3)(c) – Public Interest:

[13] The Crown argues that public interest considerations overlap with the previous argument. Mr. Cain has been at large for very brief periods of time

without re-offending. The Crown says that the grounds of appeal are not strong and can be considered at this stage (*R. v. Gingras*, 2012 BCCA 467). I prefer not to comment on the merits of the appeal.

[14] The sentencing judge characterized Mr. Cain's extensive record:

Mr. Cain has a formidable record dating back many years and including several offences involving break and enter, to [sic] which I understand he has received up to three years of incarceration on individual matters which were before the court over the time.

[15] No doubt Mr. Cain was earnest when he advised the court that he would respect any terms of bail and would appear in court as required by any order. Unfortunately, the record reveals that Mr. Cain's good intentions may not survive temptation. His record shows numerous breaches of recognizance and new offences while under conditional release.

Conclusion:

[16] In the absence of an acceptable surety, possibly with security, there is a real prospect that Mr. Cain will not honour the terms of an interim release. Moreover, release is not in the public interest because his record suggests that Mr. Cain may very well re-offend pending appeal. Despite Mr. Cain's careful and respectful submissions, his motion for interim release is dismissed.

Bryson, J.A.