NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Newman*, 2019 NSCA 88

Date: 20191113
Docket: CAC 478408 / CAC 484585
Registry: Halifax

Between:

Shawn Newman

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Van den Eynden, J.A.
Motion Heard:	October 10, 2019, in Halifax, Nova Scotia in Chambers
Written Decision:	November 13, 2019
Held:	Motion dismissed
Counsel:	Shawn Newman, appellant in person James A. Gumpert, Q.C., for the respondent

Decision:

Introduction

[1] Mr. Newman requested judicial interim release (bail) pending appeal. The Crown was opposed. Following the hearing, I dismissed his motion with written reasons to follow. These are they.

Background

[2] Justice Jamie Campbell convicted Mr. Newman of robbery and assault with a weapon (ss. 344 and 267(a) of the *Criminal Code*). He was sentenced to 5 years 6 months for the robbery charge. The assault charge was stayed under the *Kienapple* principle because the act of striking with a weapon (wrench) was part of the robbery.

[3] Mr. Newman (self represented) appeals his conviction and sentence. He filed two Notices of Appeal, one for the conviction, the other for his sentence. Both matters will be heard together on December 12, 2019.

[4] This case involves recognition evidence. This evidence, coupled with other circumstantial evidence and the judge's credibility findings, led the judge to conclude guilt beyond a reasonable doubt (2018 NSSC 113). For some insight into the evidence and the inferences drawn by the trial judge, I lift the following paragraphs from his decision:

> [40] Strange things do happen. But the number of strange things required to have happened here to justify an inference other than guilt makes that inference unreasonable. Kye Dorey would have to have been wrong in his identification and there is nothing to suggest that he was. The robber would have to have obtained Shawn Newman's toque in the few days between it being discarded and the robbery. The robber would have to have looked like Shawn Newman. The robber would have to have been wearing dark track pants and a dark zipper necked sweater and had black sunglasses just like Mr. Newman had minutes later when he showed up at a convenience store. That person, looking like Shawn Newman and dressed like Shawn Newman was dressed at that time on that day, would have to have decided to rob a shop that Shawn Newman walked by daily, at a time when Shawn Newman himself was within easy walking distance.
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> [41] The evidence does not permit any reasonable inference other than Mr. Newman's guilt.

[5] The offence date for his conviction under appeal is February 23, 2017. Prior to that Mr. Newman accumulated this criminal history albeit with gaps:

- 2001, break and enter (s. 348 (1)(b) x 3)
- 2001, theft (s. 344(a))
- 2005, breach of undertaking (s. 145(5.1))
- 2006, aggravated assault (s. 268(1))
- 2007, failure to comply with a condition (s. 145(3))
- 2012, theft under $5000 (s. 334(b) x 2)
- 2012, possession of a break-in instrument (s. 351(1))
- 2012, trespassing at night (s. 177 x 2)
- 2014, theft under $5000 (s. 334(b))
- 2014, breach of undertaking (s. 145(5.1))
- 2016, theft under $5000 (s. 334(b))
- 2016, resists/obstructs peace officer (s. 129(a))

[6] Sentence imposed upon Mr. Newman for these various offences ranged from fines, restitution, probation and periods of incarceration.

[7] Of note is that after the date of the offence under appeal, Mr. Newman continued to rack up additional criminal charges and convictions. In fact, on the date I heard his release motion Mr. Newman was on remand for outstanding charges pending trial. Thus, even if I were to have granted him bail pending appeal, he would still have been on remand, at least for some period.

[8] I turn to the specifics of Mr. Newman's ongoing encounters with the criminal justice system while the charges subject to this appeal worked their way through the lower court. Mr. Newman was not entirely forthcoming about his ongoing difficulties, rather, the clearer picture was presented by the Crown and/or drawn out from Mr. Newman under cross-examination.

[9] Mr. Newman while under his own recognizance or judicial release acquired these convictions and outstanding charges:

- Convicted of dangerous operation of a motor vehicle a (s. 249(1)(a)) and resisting arrest (s. 129(a))
- Convicted of theft (s. 334)

- Charged with break and enter (s. 348(1)(b)), possession of break-in instrument (s. 351(1)), failure to comply with recognizance or undertaking (s. 145(3)), and breach of probation (s. 733.1(1)(a)). These matters were awaiting trial dates.
- Various outstanding charges related to two additional break and enters. Mr. Newman's remand noted above is in relation to these charges.

[10] Mr. Newman's proposed surety is his partner Brittany Pearce. She testified on his behalf at trial. As an aside, the trial judge found her to be an unreliable witness. The Crown had concerns, legitimate in my view, respecting Mr. Newman's release plan. I will address this as well as the evidence presented by the parties in my analysis and will supplement any needed additional background.

Legal principles and their application

[11] Mr. Newman appeals against both conviction and sentence, thus s. 679(3) of the *Criminal Code* applies. It permits me to grant release pending appeal if Mr. Newman can establish, on a balance of probabilities, 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.

[12] As Mr. Newman has been convicted, his conviction substitutes his initial presumption of innocence with that of guilt. So distinct from a pre-trial bail applicant, as a convicted appellant Mr. Newman "seeks to reverse the status quo by obtaining a reprieve from a court order for his detention following conviction" and, therefore, carries the burden of proof (see *R. v. Barry*, 2004 NSCA 126).

Is the appeal frivolous?

[13] The "not frivolous" criterion in s. 679(3)(a) is widely recognized as being a very low threshold (see *R. v. Oland*, 2017 SCC 17 at para. 20).

[14] The grounds of appeal, with respect, are not clearly articulated. It appears Mr. Newman's main complaint is that the judge erred (in law and fact) by concluding he was the robber. Mr. Newman says he was set up, framed and wrongfully convicted. Mr. Newman abandoned his plan to amend his Notices of Appeal to include allegations of ineffective assistance of counsel.

[15] Although the Crown raised concerns with the alleged grounds of appeal, the Crown's primary objections to Mr. Newman's release were based on concerns with his willingness to surrender into custody and the public interest component.

[16] I am satisfied the low threshold has been met, but will return to discuss the merit issue under s. 679(3) (c)—the public interest component.

Will Mr. Newman surrender himself into custody?

[17] Mr. Newman must establish that he will surrender into custody in accordance with the terms of the release order. Relevant considerations include risk of flight and compliance with court orders.

[18] Mr. Newman indicated he would surrender, and I should not be concerned with his commitment to do so. The Crown urged that I view his assurances with extreme caution. The Crown pointed to his historic failures to appear and other breaches of Court orders. Mr. Newman proposed to live in Springhill with his partner and their child and the Crown noted its concern with the ease of trans-provincial travel without detection. Ms. Pearce, being the proposed surety, was also of concern. I will address this latter point in more detail under the public interest requirement.

[19] I accept there are legitimate concerns with Mr. Newman's surrender. For me, they relate primarily to his criminal history and with the proposed surety, particularly given an overall weak release plan. However, it is clear to me that it is not in the public interest to release Mr. Newman.

The public interest

[20] Section 679(3)(a) requires Mr. Newman to establish that his "detention is not necessary in the public interest."

[21] Under this requirement I have considered the twin principles of enforceability and reviewability. There is tension between these principles, and they must be balanced in the public interest. Public confidence in the administration of justice requires that judgments be enforced. Yet public confidence in the administration of justice also requires that judgments be reviewed and errors be corrected (see *R. v. Rahman,* 2013 NSCA 93 at para. 32), and as indicated earlier, the strength of the grounds of appeal also factors into the public interest assessment (see *Oland*, paras. 44 and 45).

[22] Mr. Newman did not establish as required under s. 679(3)(c) that his detention is not necessary in the public interest. In Mr. Newman's circumstances, enforceability overwhelms reviewability. These following factors led me to this conclusion.

[23] The grounds of appeal which were expanded upon by Mr. Newman in his supporting materials for this motion read more like an attempt to relitigate, as opposed to clearly articulated errors by the trial judge. That said, it is these remaining factors which were the most significant.

[24] There is an element of concern for public safety. The offence under appeal was serious and violent. The victim was struck in the face and head with a wrench. Also, Mr. Newman has a lengthy criminal record, and rather than being on his best behavior following his arrest for the charges subject to his appeal, he has been convicted of further offences and faces a trial for pending charges. That raises the added concern that his behaviour may not have improved and may have possibly worsened.

[25] The release plan is very weak. The matter under appeal, as well as his subsequent convictions/charges occurred while Mr. Newman was residing with his partner and proposed surety Ms. Pearce. As well, there were important aspects of their respective testimony that lacked candor. For example, Mr. Newman was not as forthcoming as he should have with his ongoing criminal activity, and both minimized their relapse in abusing substances and conflict in their relationship.

[26] After having the benefit of reading the written materials filed by Mr. Newman and Ms. Pearce and hearing their testimony, I do not have any confidence in Ms. Pearce's ability to supervise or exercise any degree of control over Mr. Newman. Good intentions are not enough on their own.

[27] Taken together, these factors would cause ordinary and reasonable fair-minded members of society (informed of legislative provisions and *Charter* values) to believe that detention is necessary to maintain public confidence in the administration of justice.

Conclusion

[28] The motion for release is dismissed.

Van den Eynden, J.A.