NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Rahman***, 2013 NSCA 125

Date: 20131104
Docket: CAC 406301
Registry: Halifax

Between: Ashiqur Rahman

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Motion Heard: October 31, 2013, in Halifax, Nova Scotia, in Chambers

Held: Appellant's motion for interim release dismissed.

Counsel: Appellant in person
Mark Scott for the Respondent

Reasons:

[1] In June 2012, after a trial, Supreme Court Justice Cacchione convicted Mr. Rahman of manslaughter and aggravated assault. The victim was Mr. Rahman's seven week old daughter. In August 2012, the judge sentenced Mr. Rahman to six years and six months incarceration, less credit for remand time, leaving a prospective 51 months' incarceration.

[2] Mr. Rahman appealed his conviction. On October 8, 2013, a panel of this Court heard Mr. Rahman's motion to adduce fresh evidence. The hearing of Mr. Rahman's appeal has not been scheduled.

[3] On August 8, 2013, Mr. Rahman applied for interim release, pending the determination of his appeal. Justice Bryson of this Court denied the motion. His decision (2013 NSCA 93) said that Mr. Rahman had not established either of the conditions in subsections (b) or (c) of s. 679(3) of the *Criminal Code*. Subsection 679(3)(b) requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the order" for interim release. Subsection 679(3)(c) requires that the applicant show that "his detention is not necessary in the public interest".

[4] Mr. Rahman then applied, under s. 680 of the *Code*, for a review of Justice Bryson's denial of the motion. Section 680(1) states that this Court's Chief Justice may direct that the decision to deny interim release be reviewed by a panel of the Court. Mr. Rahman's motion proceeded by written submission. On September 9, 2013, Chief Justice MacDonald dismissed Mr. Rahman's request to direct a review by the Court (2013 NSCA 100). The Chief Justice concluded (para 8) that "Justice Bryson's complete analysis, in my view, leaves nothing to question" and "[a] review would therefore be futile".

[5] On October 11, 2013, Mr. Rahman filed a second motion for interim release, pending appeal, under s. 679 of the *Code*. I heard that motion on October 31, 2013, and reserved.

[6] My reasons follow.

[7] I accept that I have the authority to consider a second motion for interim release, despite that an earlier motion has been dismissed by another judge. As a preliminary matter, before considering the second motion, the second judge should be satisfied it is in the interests of justice that he hear it instead of referring the motion to the judge who dealt with the first motion. Then, on the second motion's merits, the applicant should establish that there has been a material change of circumstances from those presented on his earlier motion. That standard would require evidence of a pivotal circumstance that, in Mr. Rahman's case, either was not before Justice Bryson, or was not considered and which, upon consideration, would fundamentally alter the analysis of one of the factors under s. 679(3). Subject to those considerations, the mere submission of embellished evidence or refined argument is not a material change of circumstance, and the earlier decision is taken as correct. *R. v. Knockwood*, 2009 NSCA 87 (chambers) per Beveridge, J.A.. *R. v. Daniels* (1997), 119 C.C.C. (3d) 413 (O.C.A.), per Doherty, J.A. for the Court. *R. v. Baltovich* (2000), 131 O.A.C. 29 (chambers) per Rosenberg, J.A.. *United States of America v. Ibrahim*, 2013 BCCA 165 (chambers) per Garson, J.A.. *United States of America v. Ibrahim*, 2013 BCCA 360 (chambers) per Levine, J.A..

[8] In the interests of time, and because Justice Bryson's reasons are clearly stated and understandable, I am satisfied it is appropriate that I hear the motion, rather than re-schedule it before Justice Bryson.

[9] I am not satisfied that Mr. Rahman has offered any material change of circumstance.

[10] Mr. Rahman first submits that the earlier decision of Justice Bryson under s. 679(3), and its reiteration by the Chief Justice under s. 680, are just wrong in law on a stand-alone basis. That is an attempted appeal, outside my authority, and isn't a submission of material change of circumstance. For what it's worth, I agree with the reasons in those decisions.

[11] Mr. Rahman's suggested material change of circumstance is this. He has presented his Correctional Plan, dated with a signature by his Parole Officer, Ms. Marise Leger, on September 18, 2013. The Plan states that his "FPE", or full parole eligibility date, is January 6, 2014. The Plan states:

> … At the present time, there is an active Deportation Order in this case. Mr. RAHMAN does not have any release plans in Canada as he does want to be deported to his own country of Bangladesh.

[12] From this, Mr. Rahman's asserts that the Federal Government wants to release him on January 6, 2014 and "send me home" – *i.e.* to Bangladesh - which is fine with Mr. Rahman. Mr. Rahman submits that, if this will happen anyway in two months, there is no point to his continued incarceration in the meantime.

[13] The first difficulty with Mr. Rahman's submission is his assumption that he will be paroled in January 2014. Whether Mr. Rahman is paroled is a matter for the Parole Board of Canada, based on the appropriate factors derived from the Board's governing legislation. I have no basis to project what the Parole Board will decide for Mr. Rahman. Neither can I assume that, if Mr. Rahman received interim release under s. 679 in November 2013, his full parole eligibility date would remain as January 6, 2014.

[14] More pointedly, interim release pending appeal under s. 679 is not a preview of a parole ruling. Different criteria apply to s. 679 than to parole. An appellant against conviction has the onus to show the existence of each of the three criteria in s. 679(3). His conviction has replaced his initial presumption of innocence with a status quo of guilt, that he has the burden to oust by establishing the statutory conditions for interim release. *R. v. MacIntosh*, 2010 NSCA 77, para 6, and cases there cited.

[15] One such condition, in s. 679(3)(b), is that Mr. Rahman "will surrender himself into custody in accordance with the terms of the order" for interim release. A standard condition of an interim release order is that the individual, who enjoys interim release, will surrender at the time of the appeal hearing to ensure that, if his appeal fails, he will complete his term of incarceration. Justice Bryson was not satisfied that Mr. Rahman would so surrender.

[16] The material submitted by Mr. Rahman for the current motion, if anything, confirms Justice Bryson's concern. Clearly Mr. Rahman would prefer to be in Bangladesh than in Canada. The Correctional Plan says "he does want to be deported to his own country of Bangladesh", a sentiment that was apparent at the hearing of this motion. I have no confidence that, after an interim release, Mr. Rahman would contest any deportation order so that he could surrender at the time

of his appeal hearing in this Court. To the contrary, it appears more likely that Mr. Rahman would welcome his deportation, before any scheduled hearing of this appeal. In that event, the interim release would have served as a mechanism for Mr. Rahman to avoid completing the incarceration required before he reaches any full parole eligibility date.

[17] I dismiss Mr. Rahman's motion for interim release.

Fichaud, J.A.