NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Polley*, 2013 NSCA 156

Date: 20131219
Docket: CAC 421160
Registry: Halifax

Between:

Stephen Daniel Polley

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	December 19, 2013, in Chambers
Held:	Appellant's motion for bail pending appeal granted.
Written Decision:	December 31, 2013
Counsel:	H. Edward Patterson, for the appellant Jennifer A. MacLellan, for the respondent

Reasons for judgment:

INTRODUCTION

[1] In May 2013, the appellant, Mr. Polley, was convicted of impaired driving, dangerous driving and driving while disqualified (2013 NSPC 38). On September 24, 2013 he was sentenced to a total of five years' incarceration. Ancillary orders for DNA and a further driving prohibition were made (2013 NSPC 95).

[2] Mr. Polley appealed, as of right, his convictions, and seeks leave to appeal sentence.

[3] Mr. Polley filed two motions on December 12, 2013: one for the setting of a hearing date and giving directions for the filing of materials associated with the appeal; the other, for bail pending appeal. I heard these motions on December 19, 2013.

[4] At the outset, I scheduled the appeal for hearing on April 15, 2014 and set dates for filing of facta and the appeal book. At the conclusion of the hearing, I issued an oral ruling that Mr. Polley could be released pending determination of his appeal, subject to strict conditions, including what is the equivalent of house arrest.

[5] The conditions were announced and explained to the appellant and his two named sureties. The conditions were encapsulated in a formal order. I promised written reasons would follow. These are they.

LEGAL PRINCIPLES

[6] There is no dispute between the parties about the test or the principles that inform its application. A judge of a court of appeal is given the power to release an appellant pending determination of his appeal by s. 679 of the *Criminal Code*. For our purposes, the relevant parts of that section are as follows:

> 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;
>
> . . .

> (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;
>
> (*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.

[7] To be eligible for release, the appellant must establish to my satisfaction all three criteria; that is: the appeal is not frivolous; he will surrender himself into custody in due course; and his detention is not necessary in the public interest. The burden is the civil one, the balance of probabilities.

[8] Prior to the evidence unfolding at the hearing, the Crown conceded that the appeal is not frivolous, but opposed Mr. Polley's release due to concerns he would surrender himself into custody, and that his detention is not necessary in the public interest. At the conclusion of the evidentiary portion of the hearing, the Crown's focus was solely on the latter.

[9] The Crown's concessions are appropriate, as is their concern about the public interest. Before turning to my analysis of these criteria, factual context is helpful.

FACTUAL CONTEXT

[10] Mr. Polley is a drywaller by trade. Prior to these court proceedings, he may not have truly recognized reality: he is an alcoholic. Every brush he has had with the law, and there have been many, has been associated with consumption of alcohol. May 29, 2010 was no different.

[11] On that day, he left for work with his brother-in-law, Brian Purdy. The work site was in Moncton. Mr. Purdy was driving the Polley's family vehicle, a van. Mr. Purdy was driving because Mr. Polley was prohibited from driving due to previous *Criminal Code* and *Motor Vehicle Act* convictions.

[12] They finished work at noon. Mr. Purdy testified that they proceeded to drink a copious amount of alcohol. The next thing he said he remembered was standing in a ditch. That ditch was on highway 104, just prior to the Oxford exit. The van had left the highway. There was no direct evidence as to who was the driver.

[13] The trial judge was satisfied that the circumstantial evidence led to only one rational conclusion: the appellant had been the driver.

[14] Crown witnesses described extremely erratic driving of the van at high rates of speed from the Nova Scotia border until the accident. Several called 911 to report their concerns. Traffic was heavy. The van was speeding and swerving in and out of traffic. The driver lost control and the van pitch-poled, and/or flipped, when it left the highway. The trial judge called it miraculous the occupants escaped with minor injuries.

[15] Having found the appellant to be the driver, the trial judge convicted him of dangerous driving, impaired driving, and driving while disqualified.

[16] Sentencing was adjourned to allow for the preparation of a Pre-Sentence Report. His circumstances are as follows: he is 41 years of age with little formal education but a long history of being steadily employed, principally as a drywaller. He has three children, aged 14, 11 and 5 with his common law spouse, Crystal Trenholm. They own a 13-acre property near Pugwash Junction where they live. They have no debt.

[17] Mr. Polley has a criminal record. Some of it is dated, and not terribly germane. Of relevance is his seven prior convictions for alcohol related driving offences (refusal, impaired, or over 80 mg/100 ml) arising out of six separate incidents. He also has seven convictions for driving while disqualified (s. 259(4)). Sentence for these offences ranged from fines to short periods of incarceration. Prior to the present offences, his last offence was in June 2005 when he received a total sentence of seven months.

[18] The sentence hearing was on September 24, 2013. The trial judge found many aggravating circumstances in the commission of the offences, and none that mitigated. He concluded a significant custodial sentence was called for and imposed a total of five years' incarceration. Mr. Polley has been in custody since.

[19] Where appropriate, I will add additional detail when I discuss the statutory criteria.

The appeal is not frivolous

[20] The Notice of Appeal sets out a number of grounds of appeal. Some overlap. In a general way, the grounds contend that: the verdict is unreasonable

and cannot be supported by the evidence; the judge relied on inadmissible opinion evidence; misapprehended some of the evidence; and did not give sufficient reasons. The Notice also claims the sentence is excessive, and hence unfit.

[21] This requirement is usually not very onerous. The trial transcript is not yet available. The Crown concedes that the appeal has not been launched for any improper purpose, and the articulated grounds demonstrate that the appeal is not frivolous. This means that a panel of this court could be persuaded to allow the appeal.

Will the appellant surrender into custody

[22] The appellant has a job that permits mobility. He has worked in other provinces. The Crown initially raised concerns that the appellant might not surrender himself into custody. This changed on hearing the evidence at the bail hearing.

[23] The evidence demonstrated that the appellant had only worked for relatively brief periods elsewhere. He has significant family ties to Nova Scotia, and sureties, as well as his own assets to guarantee, if necessary, his due surrender into custody.

[24] As noted earlier, he has a wife, three young children, and he owns property here in Nova Scotia. He also has a firm employment offer on a two-year project. His father testified. He is retired from Windsor Salt. He owns two properties, in close proximity to the appellant's. Only one of those properties is encumbered with a modest mortgage. He had no hesitation in offering to post, if necessary, all of the equity in his real property to guarantee surrender and compliance with known terms of release.

[25] I am satisfied that the appellant will surrender himself into custody if and when required. It is the third requirement that I now turn to.

Detention is not necessary in the public interest

[26] This aspect of the statutory test is by far the most complicated. There are competing interests in play. The appellant has been convicted of serious offences and, if that conviction and sentence appeal are not successful, has been condemned to serve a substantial period of incarceration in a federal institution. If he is not released and is successful on his appeal, he will have been forced to serve many

months in jail; time that cannot be given back. But if he is released, there may well be a risk that he will commit a further offence. Release has the potential to cause properly informed members of the public to question the repute of the administration of justice.

[27] Both parties rely on the summary of these concerns set out in *R. v. McCormick*, 2012 NSCA 58 (¶ 33); and the factors to be considered (at ¶ 36). The latter paragraph reads as follows:

> [36] In my opinion, the factors that should be considered in carrying out this analysis 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 and the apparent strength of the grounds of appeal and hence the risk of possibly unwarranted deprivation of liberty should release not be granted.

[28] There can be no doubt that the offences the appellant was convicted of are serious. No one can but agree with the amazement expressed by the trial judge that someone was not seriously hurt, or worse. Driving while impaired and dangerous driving are serious criminal offences, ones that can, and do, regularly cause horrific consequences.

[29] The Crown argued that given the appellant's history of drinking and driving offences, and unaddressed issues with alcohol, there is a significant risk he will commit further offences if released. The concern is justified. The appellant has attended one seven-day program to address his consumption of alcohol.

[30] The trial judge commented on this in the course of his reasons:

> The accused reported a history of regular binge drinking, which he characterizes in his pre-sentence report as typical. Despite that, and despite his record and the obvious effect that would have on his life and that of his family, Mr. Polley denied a history of serious alcohol abuse. At sentencing, Mr. Polley indicated that he had virtually stopped drinking. In his pre-sentence report he indicates he drinks occasionally. This can only indicate to the court that Mr. Polley has not come to recognize the extreme difficulties that his interaction with alcohol has on both himself, his family and the community.
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> (2013 NSPC 95, ¶ 15)

[31] The appellant testified at the bail hearing that he had indeed stopped drinking prior to the originally scheduled sentencing hearing. He was somewhat vague as to the exact date. His affidavit asserts that he has continuous full time

employment arranged, and would earn approximately $56,000 per year; he has arranged for reliable transportation to and from work; and that detention would cause severe hardship to his family.

[32] His two proposed sureties also testified. Ms. Trenholm has seasonal full time employment, and is presently off work. I was impressed with her sincerity and commitment to her obligations as a surety. She does not drink alcohol. Mr. Roy Polley has not had a drink in over 10 years. He has a close relationship with the appellant.

[33] The original proposal for bail pending appeal was to have the appellant enter into a recognizance in the amount of $5,000 with two sureties, with the usual conditions in these circumstances and for the appellant to abide by a curfew. In these circumstances, this would have been insufficient. However, during the hearing, the appellant offered to abide by house arrest, and to post considerably more significant assets to ensure compliance with terms of release.

[34] MacEachern C.J. B.C. in *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, who after reviewing a number of authorities, wrote of the appropriate approach to the issue of bail pending appeal:

> [18] ...The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause "ordinary reasonable, fair-minded members of society" (*per O'Grady* at 4), or persons informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case (*per R. v. K.K.*, at 54), to believe that detention is necessary to maintain public confidence in the administration of justice.

[35] I am also mindful of the eloquent comments by my colleague, Justice Fichaud in *R. v. MacIntosh*, 2010 NSCA 77, about release pending appeal:

> [21] I respectfully disagree. An interim release, pending a conviction appeal, is not a moral judgment that absolves, condones or mitigates the judicial reaction to the reprehensible conduct for which the individual was convicted. Neither is an interim release a reduction of the sentence. If, after a conviction appeal is heard and determined, the Court of Appeal overturns the conviction, then the individual is freed, as any innocent person should be freed, and his imprisonment thankfully will have been reduced by his earlier interim release. If, on the other hand, the Court of Appeal dismisses Mr. MacIntosh's appeal, then the conviction and sentence will stand, and he will serve that full sentence without any reduction for the additional seven months house arrest that I will order here. Should his appeal

> fail, the house arrest under this ruling will add to his total period of lost freedom from the incarceration ordered by the sentencing judge.

[36] Although the record for drinking and driving offences by the appellant is dismal, he has demonstrated the ability to be law abiding. Not only is there a five-year gap between his previous offences and the ones under appeal, it has been over three and one-half years since he was charged with the present offences. There is no suggestion of any unlawful conduct during that time.

[37] I was therefore satisfied that strict terms of release, guaranteed by two reliable sureties in a meaningful amount, would offer sufficient reassurance to the public that the appellant will not commit an offence pending pursuit of his right to challenge the legality of his convictions.

[38] Detention is not necessary in the public interest. The conditions that I set were as follows:

> 1) The appellant shall be released from the custody of the Keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia, upon entering into a Recognizance in Form 32 before a Justice or Judge in the amount of twenty-five thousand dollars ($25,000) with sureties.
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> 2) The release of the appellant shall be upon the following conditions the fulfillment of which he is bound to the Court of Appeal in the penal sum of twenty-five thousand dollars ($25,000) which conditions are as follows:
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> a. That he shall keep the peace and be of good behavior;
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> b. That he report to the Court when required to do so;
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> c. That he will reside at 2010 Crowley Road, Pugwash Junction, Nova Scotia and notify the Court in writing of any changes of address except as otherwise ordered;
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> d. That he remain with the territorial jurisdiction of the Province of Nova Scotia;
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> e. That he surrender any passport to the Clerk of the Court;
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> f. That he not drive or have care or control of a motor vehicle;
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> g. That he not take or consume alcohol or have in his possession any alcohol or any intoxicating substances or any drug other than pursuant to a valid medical prescription;
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> h. That he advise the court of any change of address or employment;
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> i. That he be at his residence at all times except for:

i. when at his regularly scheduled employment with Pinaud Drywall Services, and to be transported to and from that employment either by Aaron Spencer or either of the named sureties; and

ii. one four hour period per week, to attend to personal errands, and only then in the company of either one or both of his named sureties.

j. That he shall present himself at the front door of his residence at 2010 Crowley Road, Pugwash Junction, Nova Scotia, or by telephone, if required to do so by any peace officer or person in authority.

k. That there shall be absolutely no alcohol or any other intoxicating substances, or any drug other than pursuant to a valid medical prescription, anywhere at or on the premises known as 2010 Crowley Road;

l. That he shall absolutely never be in any establishment that serves alcohol, or be in the presence of any person consuming alcohol or any other intoxicating substance;

m. That he shall surrender into the custody of the Keeper of the Central Nova Scotia correctional Facility at Dartmouth, Nova Scotia by one o'clock in the afternoon 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 he must surrender into custody. In the event the appeal is sooner dismissed, quashed or abandoned, he must surrender into the custody of 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 dismissing or quashing the appeal or the notice of abandonment of the appeal, as the case may be.

3) The named sureties suitable to the Court are Crystal Gail Trenholm and Roy Daniel Polley;

4) Should the appellant abide by the forgoing conditions the Recognizance shall be void, otherwise it shall remain in full force and effect.

5) The release of the appellant by this order is conditional upon the appeal proceeding on the date scheduled for hearing and if the date is to be changed for any reason this order for release shall be reviewed in Chambers on a date to be fixed by the Court.

[39] After announcing the proposed terms of release, I invited input from the Crown and appellant. They had no suggestions or concerns. The order for release was duly issued.

Beveridge, J.A.