C.A.C. No. 121422

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. N.A.A., 1995 NSCA 230

BETWEEN:

N. A. A. Applicant/ Appellant	)	M. Joseph Rizzetto for the appellant
	)	Kenneth W.F. Fiske, Q.C. for the respondent
HER MAJESTY THE QUEEN Respondent	)	Application Heard: December 6, 1995
	)	Decision Delivered: December 7, 1995

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY, IN CHAMBERS

PUGSLEY, J.A.:

N. A. applies, pursuant to s. 679(3) of the **Criminal Code**, to be released from custody pending the determination of his appeal from conviction to be heard on March 20, 1996.

Mr. A., presently 33, was convicted by a jury on October 13, 1995, of two counts of sexual assault against his nieces, S.L., born December [...], 1978, and A.L., born January [...], 1980.

In her evidence S.L. described twelve specific instances of sexual abuse commencing when she was approximately six or seven years old and ending when she was fifteen. The assaults ranged from incidents where Mr. A. held her hand while she masturbated him, to an incident where he forced her to perform oral sex on him.

The incidents concerning A.L. occurred when she was between the ages of eleven and fourteen, and on most occasions involved Mr. A. fondling A.L.'s breasts.

As her uncle, Mr. A. occupied a position of trust in relation to each of the victims.

He was sentenced on December 4, 1995 to two years in a federal institution respecting the sexual assault on S.L., and six months consecutive, respecting the sexual assault on A.L.

Mr. A. has a Grade 7 education. He resides with his wife and three sons aged 5, 9 and 11. He has lived most of his life in the Sydney area. He is employed with his father in the lobster and mackerel fishing business. He has no previous criminal record.

Under the provisions of s. 679(3) of the **Code**, the burden is on Mr. A. to satisfy the Court on a balance of probabilities that:

a) his appeal is not frivolous;

b) he will surrender himself into custody in accordance with the terms of the order;

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

The grounds against conviction may be summarized as follows:

1. The trial judge erred in law in failing to permit the testimony of a school teacher, who had been falsely accused by S.L. of making sexual comments to her.

2. The trial judge erred in refusing to permit cross-examination of A.L., on an earlier contradictory statement on audio/video cassette, without having heard the contradictory statement.

After conviction on October 13, 1995, the trial judge remanded Mr. A. in custody until sentencing which was scheduled for December 4, 1995.

Counsel on behalf of Mr. A. made an application on October 20, 1995, to Roscoe, J.A. of this Court, sitting in Chambers, for an order releasing Mr. A. from custody until the night before his sentencing date.

Justice Roscoe in a reasoned decision concluded, notwithstanding the Crown's opposition to the application, that Mr. A. had satisfied the burden imposed under s. 679(3), and accordingly released him on certain conditions.

On the present application, the Crown is not opposed to Mr. A.'s release from custody subject to certain terms being incorporated into the release order.

With respect to subsections (a) and (b) of s. 679(3), I am satisfied that the grounds of appeal are not frivolous and I, as well, conclude that there

is little risk that Mr. A. will not surrender himself into custody in accordance with the terms of any order that is made.

The real issue in my opinion, as it was before Justice Roscoe, is the question of the public interest.

The release, pending the hearing of an appeal, of a prisoner who has committed serious crimes of violence over an extended period of time against two youthful victims with whom he occupied a position of trust, could in many cases detrimentally affect the public's confidence in the criminal justice system, and thus be critical in the assessment of the public interest.

The circumstances of this case which persuade me to grant the application for release, in spite of the reprehensible nature of the crimes of which Mr. A. has being found guilty, are the following:

1. Crown counsel advised he was familiar with the evidence placed before the jury and had no objection to the release being granted. This agreement does not relieve Mr. A. from satisfying the burden imposed by s. 679(3) of the **Code**, but it is a factor to be considered. The Crown's position, while not determinative of the public interest, can be considered as an aid to assist in determining that interest.

2. There is no evidence to suggest the public will be at risk if Mr. A. is released. He has no previous criminal record. He was released from custody after conviction pending sentence and has fully complied with the order imposing conditions on his movements. He resides with his wife and three children in a community where he has been employed six months a year in his father's fishing business.

3. The appeal has been set for hearing on March 20, 1996. Counsel advise that under the terms of his present sentence he will be eligible to be considered for day parole early in May. If he is successful on appeal, it can be argued that a significant part of such success would be illusory.

The words of Arbour, J.A. on behalf of a panel of five judges of the Ontario Court of Appeal in **R. v. Farinacci** (1994), 86 C.C.C. (3d) 32 at p. 48 are pertinent:

> Public confidence in the administration of justice requires that judgments be enforced. . . .
>
> On the other hand, public confidence in the administration of justice requires that judgments be reviewed and that errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake. . . .
>
> In both civil and criminal cases, appellate court judges are often required to balance two competing principles of justice: reviewability and enforceability. Ideally, judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the

> anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires be considered in the determination of entitlement to bail pending appeal.

For the above reasons, the application is granted.

I would ask counsel to prepare an order similar in terms to that granted by Justice Roscoe but also, as requested by the Crown, to include a restriction on Mr. A. from attending at the victims' place of residence and place of schooling.

J.A.