NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Young***, 2014 NSCA 48

Date: 20140515
Docket: CAC 424684
Registry: Halifax

Between:

Francis Mark Young

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Peter M.S. Bryson
Motion Heard:	May 9, 2014, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed.
Counsel:	Nicholaus Fitch, for the appellant Mark Scott, for the respondent

Decision:

[1] This is a motion by Francis Mark Young for interim release pending appeal. On February 19, 2014, he was convicted by the Honourable Associate Chief Judge Alan T. Tufts of possession of stolen property from vehicles in Kentville, Nova Scotia. On February 26, 2014, he was sentenced to nine months' imprisonment less remand time, plus probation.

[2] The thefts occurred late on the evening of January 20th and early in the morning of January 21st, 2014. Mr. Young's very extensive and varied criminal record was a material factor in the sentence which he received.

[3] Mr. Young has appealed conviction and sentence. He says that the Crown's case against him was dependent upon testimony from an unreliable co-accused who initially distanced herself from a statement previously given to police. But during cross-examination on her statement, the co-accused confirmed that Mr. Young said: "Let's go out and hit some cars". She adopted much of her earlier statement to police. The trial judge found: "In the end, she conceded and testified that Mr. Hartley, herself and Mr. Young were going about town entering vehicles and the like. Mr. Hartley was essentially collecting the items that were brought to him by herself and Mr. Young."

[4] Mr. Young's appeal will be heard September 12, 2014.

[5] Section 679(1) of the *Criminal Code* authorizes a judge of the Court of Appeal to grant a release where an appellant in custody has filed a Notice of Appeal. Section 679(3) describes the onus on the appellant in these circumstances:

> **679.** (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;
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> (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.

[6] The onus is on Mr. Young to establish all three conditions in s. 679(3) (*R. v. Barry*, 2004 NSCA 126 at ¶8). Unlike release pending trial, Mr. Young no longer enjoys the presumption of innocence. That changes everything (*Dow v. R.*, 2013 NSCA 50 at ¶10).

Evidence Before the Court:

[7] Mr. Young filed an affidavit in support of his motion. His motion was also supported by his brother-in-law, Paul Joseph Jenereaux, of Dartmouth ,who has agreed to act as Mr. Young's surety. Mr. Jenereaux is the common-law husband of Mr. Young's sister, Mary Young. They have been together for 15 years and have two children, one of whom is a teenager residing at home. Mr. Jenereaux and Ms. Young own a mobile home in which Mr. Jenereaux estimates they have net equity of $20,000. He confirms that Ms. Young supports his suretyship. They are prepared to have Mr. Young live with them while he is on release. Mr. Jenereaux has agreed to "put up my home as security for" Mr. Young. Mr. Jenereaux is employed at a local car dealership and Ms. Young works at the Elizabeth Fry Society. Mr. Jenereaux usually works six days a week, sometimes finishing after 5:00 pm, and Ms. Young works from 7:00 am until 2:00 pm, five days a week. She gets home in time for the arrival of their son from school.

[8] Mr. Young says he can work at his aunt's dog grooming business in Kentville. She has not provided confirmation of this. Since he is not permitted to drive and will be living with his sister and brother-in-law in Dartmouth, he claims "family members" will drive him to work. It is obvious that neither his sister nor brother-in-law is available to supervise Mr. Young during the day.

[9] Mr. Young originally proposed that he would be staying with his current partner, Miranda McGill and his "step-daughter" in Middleton, Nova Scotia, upon his release. She is currently enrolled at the Nova Scotia Community College, Middleton campus and has a work placement at Greenwood. Ms. McGill could not be available in the court for the release motion and at the last minute Mr. Jenereaux stepped in and agreed to act as surety.

[10] Mr. Young swears that he is not a flight risk and says he would immediately return to custody if he were not successful on appeal. He named three recent prior addresses in his affidavit. In fact there were two others he omitted. He also has shown considerable instability in his domestic circumstances, having changed partners and addresses with some regularity over the last 4 or 5 years. He is not presently employed.

[11] In his affidavit, Mr. Young expresses concern that if he is not given interim release he is likely to have to serve his entire sentence before his appeal is heard. He points to an earlier example of where this occurred where this Court reduced a 12 month sentence to 6 months (*R. v. Young*, 2014 NSCA 16).

[12] Mr. Young was extensively cross-examined on his affidavit to which further reference will be made below.

Merits of the Appeal:

[13] The Crown rightly concedes that this threshold test is low, but argues that an experienced trial judge accepted the evidence of a co-accused which fairly grounded the convictions here. Mr. Young says his co-accused's evidence was unreliable and that therefore the convictions are unsound.

[14] I refrain from commenting on the merits except to say that they are not frivolous.

Surrender Into Custody:

[15] Mr. Young has numerous convictions for breaches of probation or recognizance, which continue into the recent past. A perusal of the Public Prosecution Services Bail Report (JEIN) records at least 18 such convictions, including several in the last two years. He has convictions in 2006, 2007 and 2009 for being at large and failing to attend court (ss. 145(1)(b) and (2)(b) of the *Code*). Mr. Young obviously surrenders himself into custody regularly, but not invariably.

The Public Interest:

[16] In *R. v. Ryan*, 2004 NSCA 105, Justice Cromwell commented on public interest:

> [20] However, the issue for me is whether it would tend to erode public confidence in the administration of justice if Mr. Ryan were not required to begin serving his sentencing until the legal validity of his conviction has been reviewed by this Court, a review which will take place before the end of this month. In considering this question, I should attempt to put myself in the place of a reasonable, fair-minded member of society who is knowledgeable about the philosophy behind the bail provisions and the actual circumstances of the case.
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> [21] I agree with former Chief Justice McEachern when he wrote in **R. v. Nugyen** (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in difference contexts:
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>> In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the <u>denial of bail is not a means of</u>

> punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.
>
> (Emphasis added)

[22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clammer is used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.

[23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 48:

> 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 errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.

[24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:

> 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 to be considered in the determination of entitlement to bail pending appeal.

[17] These are the kinds of factors that can be considered under the "public interest" test:

1. Nature of the offence under appeal;
2. The applicant's criminal record, if any;
3. The nature of the criminal record;
4. Whether the criminal record is recent or dated;
5. The applicant's past employment;
6. Mental disorder or substance abuse problems which the applicant may suffer from;

7. Length of the sentence imposed.

[18] As earlier discussed, Mr. Young possesses a formidable and varied criminal record which includes acts of violence. He has frequently offended while on probation or under recognizance.

[19] Through cross-examination of Mr. Young and review of his criminal record, the Crown established the continuity and recency of Mr. Young's offending behaviour, including breaches of recognizance. In the Fall of 2012, Mr. Young entered into a recognizance not to contact Florence Kirk whom he was accused of assaulting. He breached that recognizance the very day that he signed it. He was then living with his employer who was also acting as a surety. His employer withdrew as a surety owing to Mr. Young's breaches of recognizance.

[20] Similarly, in the Fall of 2013, Mr. Young's mother, Pamela Young, acted as surety for him with respect to charges of assault and breach of probation. After breaches of his recognizance, Ms. Young withdrew as her son's surety. Finally, in December of 2013, Mr. Young's friend, Michelle Williams, agreed to act as Mr. Young's surety. She withdrew as his surety within weeks owing to a breach of recognizance. Mr. Young claims he was not aware that Ms. Williams had withdrawn as surety until he was arrested early in 2014 for the offences currently under appeal. In other words, he was knowingly placing her suretyship at risk while he committed further offences.

[21] Cross-examination of Mr. Young also established that in addition to his conviction for possession of stolen property which is the subject-matter of the current appeal, Mr. Young was arrested in January of this year in Kentville in possession of a stolen vehicle. As recently as March 10, 2014, Mr. Young was sentenced for assaulting a corrections officer.

[22] Mr. Jenereaux was cross-examined on his affidavit. He did not demonstrate a detailed knowledge of Mr. Young's personal life – he had no idea what his employment prospects were. Mr. Jenereaux acknowledged that there was no plan for Mr. Young's activity during the day while living with him. He conceded that Mr. Young has a temper and can be impulsive.

[23] While generally aware of Mr. Young's criminal record and periods of incarceration, Mr. Jenereaux was not aware of the details of his criminal activity or the number of times he had breached recognizance and had sureties withdraw as a result. Mr. Jenereaux did say that he had acted as a surety for Mr. Young some years ago and, in fact, withdrew as surety and reported him for a breach in that

case. Reporting a breach of recognizance and/or a desire to withdraw as surety does not relieve a surety of his obligations until the offender is rendered into custody. Until then, the surety remains at risk: *Romania v. Iusein*, 2014 ONSC 623 at ¶22.

[24] It was obvious from the cross-examination that Mr. Jenereaux did not appreciate the significant risks to himself and his family by his agreement to act as a surety for Mr. Young. Based on Mr. Young's past behaviour, there is a substantial risk that Mr. Jenereaux may lose his family home if Mr. Young breaches the terms of his release. While Mr. Jenereaux is to be commended for coming forward, it may not be in his best interests to undertake such a commitment for Mr. Young.

[25] The Crown refers me to *R. v.Young*, 2013 NSCA 87, where recently this Court refused Mr. Young interim release. While conceding that this earlier refusal of interim release is not determinative, the Crown asks rhetorically: "What has changed since July 18, 2013?" The answer appears to be that nothing has changed – indeed things may be getting worse.

[26] While it is of concern to the Court that Mr. Young may well serve his sentence before his appeal is heard so that if the appeal is successful, he will have been unfairly punished, that is not the end of the analysis. One has to weigh as well the public interest in at least two aspects. First, is Mr. Young likely to re-offend while under interim release? In light of Mr. Young's record, there is a significant risk that he will. Second, would the grant of interim release compromise the administration of justice in the eyes of a reasonable, fair-minded and informed member of the public?

[27] I have no hesitation in saying that a reasonable, informed member of the public would find it completely inappropriate that Mr. Young be released pending appeal. Mr. Young has been given his freedom on numerous occasions with an opportunity to demonstrate his willingness to abide by the terms of his release. He has continued to disappoint both the judicial system and his supporters. Sadly, he does not appear to have any regard for the interests of those who place themselves at risk on his behalf, whether they be family or friends.

[28] The motion for interim judicial release is dismissed.

Bryson, J.A.