

NOVA SCOTIA COURT OF APPEAL

Citation: R. v. MacIntyre, 2003 NSCA 68

Date: 20030616

Docket: CAC 193133

Registry: Halifax

Between:

Norman Angus MacIntyre, Jr.

Appellant

v.

Her Majesty The Queen

Respondent

Judges: Justice Elizabeth A. Roscoe

Application Heard: June 12, 2003, in Halifax, Nova Scotia (In Chambers)

Counsel: Norman Angus MacIntyre, In Person
Peter Rosinski, for the respondent

Decision:

[1] This is an application for release pending appeal, made by the appellant Norman MacIntyre, pursuant to s. 679(1)(b) of the **Criminal Code**. Mr. MacIntyre pled guilty to robbery of a convenience store and was sentenced to a period of incarceration for two years less a day, after having received two-for-one credit for the six months he served on remand. The total sentence was, in effect, three years. The sentence imposed by the trial judge, Judge A. Peter Ross, was presented as a joint recommendation for sentence by the Crown and counsel for Mr. MacIntyre. He has been serving the sentence since December 3, 2002.

[2] Mr. MacIntyre has appealed his sentence citing as his grounds of appeal:

When I was charged with this offence on June 18, 2003 my court appearance on June 27, 2003 I was told to agree to a six month remand and I would receive two years less a day. My remand would be taking in consideration, I would receive 12 months when returning to court for sentencing. The Crown ask for three years and my remand time taking in consideration and receive two years less a day. If I had to know that on June 27, 2003 I would of took the three years and possibility been out on parole today.

[3] The appeal is presently scheduled to be heard on September 26, 2003, three months from now. In its appeal factum the Crown summarizes the circumstances of the offence as follows:

6. The agreed to facts, indicate that Mr. MacIntyre was present at Sam's Dairy, along with a clerk, Nadine Hall, on June 18, 2002. He had participated in the robbery in the sense that he planned it with the actual robber and purposefully played the role of victim when the robber entered the store and put a knife to Mr. MacIntyre's throat exclaiming "if you move, you're dead". The robber demanded money from the clerk which he received and fled the scene.

7. Although Ms. Hall and Mr. MacIntyre contacted the police, and Mr. MacIntyre claimed he did not know who the robber was, investigation revealed that he had in fact been with the robber immediately prior to the incident, at a residence where the robber was seeking to get panty-hose to cover his face.

[4] Mr. MacIntyre has a criminal record which includes two prior robberies, uttering a forged document, two thefts and an assault with a weapon. Mr. Rosinski, for the Crown, has acknowledged that there is an error in the Crown's factum in

relation to the number and type of Mr. MacIntyre's prior offences and has agreed to file a replacement factum with the correct information.

[5] Judge Ross, in the sentencing decision said:

THE COURT: Alright, thank you, Mr. Rizzetto. Mr. MacIntyre, stand up, then, please. Mr. MacIntyre, anyone who encourages or assists in the commission of an offence is a party to it, and I think your plea of guilt to the offence of robbery is an appropriate plea. It was, your involvement was not merely as a passive bystander, but there was some involvement. You were an actor, perhaps in more than one sense of the word, in this crime. As to the appropriate sentence, counsel have obviously given this some consideration and I'm going to accept the joint recommendation given the fact that you've spent six months in custody already, which would elevate the total effect of the sentence to something in the three year range, which brings it within the range of an acceptable sentence for a robbery such as this one. Consequently, your sentence today is the one recommended by both Crown and Defence, and that is two years less one day, which would be served in a provincial correctional facility. I'm also going to be making an order under 657.051 of the Criminal Code that you will be required to supply a sample for the DNA data bank. OK, is there anything else?

[6] On a sentence appeal, leave to appeal has to be granted before any consideration of release pending appeal (s. 679 (1)(b)). In order to grant leave to appeal, I must be satisfied that the grounds of appeal are not frivolous and that they raise arguable issues.

[7] As well, section 679(4) provides that the appellant may be released pending appeal if he establishes the three conditions: (a) that the appeal has sufficient merit and that in the circumstances it would cause unnecessary hardship if he were detained in custody; (b) that he will surrender himself into custody in accordance with the release order; and (c) that his detention is not necessary in the public interest.

[8] Where it is a sentence appeal alone and the conviction is not appealed, I should consider whether, if the appeal is successful, the Court would likely reduce the sentence to something less than the time that will have been served before the hearing of the appeal - in this case, a period of 10 months. (see **R. v. Farinacci** (1993), 86 CCC (3d) 32 (Ont. C.A.) per Arbour, J. A. , as she then was, at page 48 and **R. v. Butler**, [1997] N.S.J. No. 391, per Bateman, J.A.)

[9] I am satisfied, given that this was the appellant's third robbery charge, coupled with the fact that he was on parole at the time of its commission, that it is not likely that a panel of this court, even if it allowed the appeal, would reduce the sentence to one of less than 10 months. Therefore this is not one of those cases where if bail is not granted, the appeal will be rendered nugatory.

[10] In his affidavit the appellant indicates that he is anxious to get out of jail so that he can take the programs he needs and take steps to have the tattoos removed from his face. In his oral submission, he stressed that he was not given an opportunity to speak at his sentencing hearing and that he understood that the deal that had been made was for a total sentence of two years, not three years.

[11] Although there may be a sufficiently arguable issue to allow the granting of leave to appeal, and I would do so for the purpose of moving to the next step of the analysis, after considering all the circumstances, I am not persuaded that bail pending appeal should be granted. As noted during the hearing and acknowledged by Mr. MacIntyre, even if his sentence appeal is successful, he will still have some time to serve in addition to the time served up to the date of the hearing of the appeal. Therefore in my view, there will be no "unnecessary hardship" if he is detained in custody pending the appeal.

[12] The application for release pending appeal is therefore denied.

Roscoe, J.A.