NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Bennett***, 2006 NSCA 86

Date: 20060706
Docket: CAC 267465
Registry: Halifax

Between:

Byron Joseph Bennett

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Jamie W. S. Saunders
Application Heard:	July 6, 2006, in Halifax, Nova Scotia, In Chambers
Written Decision:	July 6, 2006
Held:	Judicial interim release granted upon terms
Counsel:	Joshua M. Arnold & Adrienne Switzer, Articled Clerk, for the appellant Monica McQueen, for the respondent

Decision (Orally):

[1] A prisoner who applies for judicial interim release pending appeal must establish three things. First, that the appeal has sufficient merit such that, in the circumstances, unnecessary hardship would result if the offender remained in custody. Second, that the offender is not a flight risk, but will surrender into custody in accordance with the terms of any order the court might make. Finally, that the detention is not necessary in the public interest. (s. 679(4) **Criminal Code of Canada**)

[2] The burden lies with Mr. Bennett to satisfy me on a balance of probabilities that each of these statutory requirements has been met. **R. v. Moore,** [1979] N.S.J. No. 619 (N.S.S.C. App. Div.) Parliament has assigned the evidentiary burden to the offender because a conviction has been entered. The presumption of innocence no longer protects the appellant. **R. v. Farinacci** (1994), 86 C.C.C. (3d) 32 (Ont. C.A.)

[3] The material facts and arguments supporting Mr. Bennett's application are thoroughly canvassed in Mr. Arnold's impressive memorandum.

[4] On May 26, 2006, Mr. Bennett was sentenced in relation to one count of possession for the purpose of trafficking 271.5 grams of marijuana, one count of possession for the purposes of trafficking 160 grams of hashish, and simple possession of 11 grams of cocaine.

[5] On May 26, 2006, the Honourable Judge Halfpenny-McQuarrie sentenced Mr. Bennett to 18 months' incarceration in relation to the first count on the Information, 18 months' concurrent incarceration on the second count, and 6 months concurrent incarceration of the charge of simple possession.

[6] Mr. Bennett has been incarcerated at the Southwest Nova Scotia Correctional Facility since he was sentenced.

[7] Mr. Bennett's co-accused, Robert Shawn MacKay, also plead guilty to one count of possession for the purposes of trafficking 271.5 grams of marijuana, one count of possession for the purposes of trafficking 160 grams of hashish. On April

5, 2004, Mr. MacKay was sentenced by Judge Stroud and received an 18 month conditional sentence in relation to these matters.

[8] As appears in the appellant's own affidavit sworn June 28, 2006 he is 38 years of age. He has been married 21 years. He and his wife have two children, both attending school. Mr. Bennett and his wife are gainfully employed and own their own home. He and his family have lived continuously at the same address in Sackville for the past 8 years. He also has many relatives living in the surrounding communities. His present incarceration is causing financial hardship to his family.

[9] Mr. Arnold, his present counsel, did not represent him at the sentencing hearing. Mr. Arnold only received the transcript of the sentencing hearing a few days ago. His arguments will be more fulsome at the appeal, should leave to appeal sentence be granted.

[10] Ms. McQueen represents the federal Department of Justice, the respondent in this appeal. In her submissions this morning she advised that the Crown is not contesting Mr. Bennett's release on either the ground enumerated in s. 679(4)(b) - that is that the appellant will surrender himself into custody in accordance with the terms of this court's order; or s. 679(4)(c) - that the appellant's detention is not necessary in the public interest.

[11] As a consequence, and while I must still be satisfied that the appellant has established each of these two requirements, the thrust of today's submissions were directed to whether or not Mr. Bennett's appeal has sufficient merit such that in all the circumstances of his case it would cause him unnecessary hardship if he were to remain in custody.

[12] Therefore the analysis must focus on two particular points: the merits of Mr. Bennett's appeal, together with the circumstances and hardship in which he finds himself.

[13] In his Notice of Appeal dated June 15, 2006 Mr. Bennett advances the following grounds:

1. That the sentence imposed is demonstrably unfit and/or manifestly excessive, given the circumstances of the offence and the appellant's circumstances;

2. That the trial judge erred in applying the proper principles of sentencing;

3. That the trial judge failed to properly consider a conditional sentence;

4. Such further and other grounds that may come to our attention from a review of the transcript.

[14] These assertions are amplified in Mr. Arnold's thorough written memorandum. First, he argues that the learned sentencing judge erroneously classified the appellant as "a wholesaler" when - given the quantity of marijuana and hashish seized - she ought to have classified him as a mere "petty retailer." The appellant alleges that the judge misconstrued and misapplied the leading jurisprudence in such matters. He says the judge's decision as to the appropriate length and type of sentence was clearly influenced by her classification of the appellant as a wholesaler, and as a result of that flawed analysis, she erred in law and imposed a sentence that was demonstrably unfit.

[15] Further, the appellant claims the trial judge erred in finding that he was not a good candidate for a conditional sentence because the judge was not satisfied that the appellant could safely serve his sentence in the community. Mr. Bennett submits that in making this determination the judge seriously erred in her analysis and in ultimately rejecting a conditional sentence in his case. Specific examples of mistakes allegedly made include the assertion that the judge made palpable and overriding errors in certain factual findings; failed to consider or misapplied the legal principles relating to conditional sentences from **R. v. Proulx**, [2000] S.C.J. No. 6, and other leading authorities; overemphasized certain "aggravating" features while ignoring other important factors including the 18 month conditional sentence that Mr. Bennett's co-accused had received, thus failing to consider the doctrine of parity; and failing to properly account for the appellant's guilty pleas in mitigation.

[16] In **R. v. J.D.**, (1996) N.S.J. No. 176, Flinn, J.A. for this court discussed the threshold for establishing under s. 679(4)(a) whether an appeal is sufficiently meritorious that a failure to allow bail pending appeal would cause unnecessary hardship. He quoted from ***The Law of Bail in Canada***, (Gary T. Trotter, Toronto:

Carswell, 1992), and agreed that the onus on an appellant under s. 679(4)(a) of the **Criminal Code** is "much more stringent" than for an appeal against conviction. He also implicitly accepted the following statement from that text at ¶ 23:

> The applicant must demonstrate that the appeal is sufficiently meritorious such that, if the accused is not released from custody, he or she will have already served the sentence as imposed, or what would have been a fit sentence, prior to the hearing of the appeal. It prevents the applicant from serving more time in custody than that which is subsequently determined to be appropriate in the sense, there is unavoidable speculative dimension of this criterion.

[17] In **J.D.**, supra, the accused was convicted of having intercourse with a female under 16 years of age and was sentenced to 30 months in a federal institution. This court dismissed the accused's application for bail pending appeal, finding that considering the circumstances of the accused's case he would continue to be incarcerated regardless of success on appeal. Therefore any detention pending appeal would not result in the accused having served more time than the sentence that might have eventually been imposed. **J.D.** could not demonstrate that unnecessary hardship would be caused by his continued incarceration pending appeal.

[18] A similar approach was taken by the Alberta Court of Appeal in **R. v. Ewanchuk**, [2000] A.J. No. 1319, 200 ABCA, where it defined unnecessary hardship as described in 679(4)(a) in a manner consistent with that of this court at ¶ 8:

> However, in the face of an arguable sentence appeal of sufficient merit, the appellate remedy could (depending on the length of the sentence) be rendered nugatory if judicial interim release were denied. In such circumstances, the resulting prejudice and harm is patent.

[19] In **Ewanchuk**, supra, Berger, J.A. of the Alberta Court of Appeal held, at ¶ 6 - 8 that "sufficient merit" in s. 679(4) means "arguable merit." Berger, J.A. adopted a statement from **R. v. Cooper** (2000), 138 C.C.C. (3d) 292 as describing the threshold for sufficient merit (at ¶ 5):

> On the other hand, a case adjudged to have arguable merit will obviously be thought to have some hope or prospect of success. . . . It follows that the

> arguable merit is at the heart of the matter and is the critical consideration that governs the decision whether or not to order a review.

[20] The approach of describing "sufficient merit" as "arguable merit" was also accepted by O'Leary, J.A. in **R. v. Colville**, [2004] A.J. No. 1202, 2004 ABCA 342.

[21] In **R. v. Shacklock** [2000] N.S.J. No. 155, Justice Roscoe considered the case of two accused who were sentenced to 18 months' imprisonment for trafficking marijuana. One accused was 32 years old, married, steadily employed, with no current or related criminal record. The other was 28 years old, and had one prior conviction, a stable relationship and employment. They appealed their sentence on the grounds that the sentencing judge did not adequately consider principles of sentencing under s. 718, that the sentencing judge placed undue emphasis on general deterrence and denunciation, and that the sentence was excessive.

[22] Roscoe, J.A. determined that the accuseds' appeal would be heard in approximately five months time, at which point in an 18 month sentence they would have completed one-third of their sentence and would therefore be eligible to apply for parole. Such a situation would be cause for unnecessary hardship.

> With respect to the first criterion, that is unnecessary hardship, it is my view that the appeals from sentence are not frivolous in the sense that they do have some chance of success and by the time that the appeals can be heard they would have served almost six months and would be approaching the time for parole or conditional release. If the sentence is reduced on appeal to less than six months or modified in accordance with other sentencing options such as conditional sentence, they may have served more time in prison than justice requires. In my view, that would be unnecessary hardship. (¶ 11)

[23] In **R. v. Smith**, [2005] N.S.J. No. 100 (N.S.C.A.) Justice Fichaud referred at ¶ 12 to the standard required by s. 679(4)(a) as "a higher threshold" than that required for leave to appeal. In **Smith**, supra, the appellant did not seek to challenge the period of incarceration but rather the location where the incarceration would be completed. The court dismissed her application noting that a denial of bail would not cause her undue hardship as she would be serving her sentence in prison regardless and that being in a less preferable prison location did not constitute unnecessary hardship.

[24] In **R. v. Dibbs**, [2006] Y.J. No. 37 the Yukon Court of Appeal adopted the test for sufficient merit required by s. 679(4) as described in **Ewanchuk, Smith** and **J.D.**, supra, concluding that the accused would suffer unnecessary hardship if he were held in custody pending his appeal:

> The appellant has been in custody since his sentencing on January 17, 2006 and expects to argue this appeal in Whitehorse the week of May 29, 2006. Obviously, if his appeal is successful and he is sentenced to either a curative discharge or a conditional sentence, then he will be released from custody behind bars. If he is detained until the appeal hearing, he will have served in excess of four months in prison. Thus, if the sentence is varied on appeal as sought, he will have served more time in prison than justice requires. In my view, that would cause him unnecessary hardship. (¶ 24)

[25] Finally, the same approach was taken by this court in **R. v. Gorrill**, [1994] N.S.J. No. 463, where the accused was convicted of infanticide and sentenced to nine months imprisonment. In finding that the accused had met the criteria set out in s. 679, Pugsley, J.A. observed that if the appellant were ultimately able to reduce the length of her sentence, the success of her appeal would be largely meaningless.

Disposition

[26] After considering the submissions of counsel and the record before me I am satisfied that Mr. Bennett has established all three essential statutory requirements. There was never any serious suggestion that he would not surrender himself into custody when ordered to do so, or that his release would not be in the public interest. I am satisfied that Mr. Bennett has answered both of those concerns.

[27] Finally, with respect to the primary argument in this hearing, I am satisfied that Mr. Bennett has raised arguable grounds for seeking leave to appeal his sentence. His claims are of sufficient merit to support his request for judicial interim release.

[28] Mr. Bennett's affidavit speaks to the financial hardship his current incarceration has caused his family and himself. In addition, he will suffer from unnecessary hardship if he is not granted judicial interim release pending appeal

and his appeal to this court is later successful. On an 18 month sentence an accused becomes eligible to apply for parole after serving approximately six months. If Mr. Bennett were successful in this appeal, his success will be rendered illusory since by the time the sentence is varied on appeal as requested, he will have served more time in prison than justice requires. Thus, his continued incarceration will have caused him unnecessary hardship.

[29] For all of these reasons I would grant leave to appeal and order the judicial interim release of Mr. Bennett from the custody of the Keeper of the Central Nova Scotia Correctional Facility at Dartmouth, in the Halifax Regional Municipality, pursuant to section 679(1)(b) of the Criminal Code of Canada, upon his entering into a Recognizance in Form 32 before a Justice or Judge in the amount of Five thousand Dollars ($5,000.00), and upon the following conditions, namely:

1. That he keep the peace and be of good behaviour;

2. That he remain within the territorial jurisdiction of the Province of Nova Scotia;

3. That he forthwith surrender to the Registrar of this court any passport he now has or may hereafter acquire;

4. That immediately upon his release from custody hereunder he inform the Lower Sackville Detachment of the Royal Canadian Mounted Police of his place of residence and his place of employment (if any) and, furthermore he inform the Royal Canadian Mounted Police of any change in his address or employment within twenty-four (24) hours;

5. That he report in person once weekly on Fridays between the hours of nine o'clock in the morning and four o' clock in the afternoon to the officer-in-charge, or his delegate, at the Detachment of the Royal Canadian Mounted Police at 711 Old Sackville Road, Lower Sackville, Nova Scotia, by landline or in person, such reporting to commence the first Friday, following his release from custody hereunder, namely on Friday, July 7, 2006;

6. That he abide by a curfew and remain within his place of residence at 175 Smoky Drive, Lower Sackville, Nova Scotia, between the hours of 9:00 p.m. and 6:00 a.m. daily;

7. That he abstain from the possession and consumption of alcoholic beverages;

8. That he abstain from the possession or consumption of any controlled substance as defined by the Controlled Drugs and Substances Act (Canada) except in accordance with a physician's prescription for him or a legal authorization;

9. That he not have in his possession any weapons, ammunition or explosive substances;

10. That he prove compliance with the alcohol prohibition and curfew conditions by presenting himself at the entrance of his residence in the event a peace officer attends to determine compliance with the conditions; and

11. That he surrender into custody of the Keeper of the Central Nova Scotia Correctional Facility at Dartmouth, in the Halifax Regional Municipality, within twenty-four (24) hours of being advised the appeal decision will be released; in the event the appeal is sooner dismissed, quashed or abandoned, he shall surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility at Dartmouth, in the Halifax Regional Municipality within twenty-four (24) hours of the filing with the Registrar of this Court of the order dismissing or quashing the appeal or the notice of abandonment of the appeal, as the case may be.

AND IT IS FURTHER ORDERED that should the appellant not abide by the foregoing conditions, the said Recognizance shall be void, otherwise it shall stand in full force and effect.