NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Metzler*, 2007 NSCA 88

Date: 20070803
Docket: CAC 283591
Registry: Halifax

Between:

Dean Metzler

Applicant/Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Linda Lee Oland
Application Heard:	August 2, 2007, in Halifax, Nova Scotia, In Chambers
Revised Decision:	The text of the original judgement has been corrected incorporating the text of the erratum dated August 3, 2007.
Held:	Application for release pending appeal granted.
Counsel:	Kevin A. Burke and S. Adele England, Articled Clerk, for the applicant/appellant Mark Scott, for the respondent

Decision:

[1] The appellant, Dean Metzler, applies under s. 679 of the *Criminal Code* for release pending the determination of his appeal against conviction and sentence.

[2] On April 20, 2007 the appellant was convicted of assault causing bodily harm (s. 267(b) of the *Code*). He also plead guilty to failing to comply with the conditions of an undertaking (s. 145(5.1)), this breach having occurred while the assault causing bodily harm charge was pending. On June 27, 2007 he was sentenced to 21 weeks imprisonment for the assault and one week consecutive for the breach, for a total of 22 weeks imprisonment, followed by 12 months probation.

[3] His appeal against conviction and sentence has been set down for hearing on December 4, 2007, some four months hence.

[4] According to the sentencing decision, the appellant was one of three men, all described as under the influence of alcohol or some other form of intoxicant who, at three in the morning, approached four retail store employees taking a break outside their workplace. One of the men struck an employee twice on the right side of his face with his fist. The appellant delivered a third punch to the employee's face, using his closed fist. The aggression was unprovoked. The employee did not know his attackers, and he did not touch either of them. The employee's jaw was broken in two places, he required dental reconstruction, and he was unable to work for two months. The trial judge stated that while there was not proof beyond reasonable doubt that the appellant actually caused bodily harm by the blow he struck, he was guilty of the assault causing bodily harm because he joined in the assault, and in that way, became a party to the offence of assault causing bodily harm.

[5] The Crown had recommended a period of imprisonment to be served in the community, that is a conditional sentence, for a period of six months with conditions including a curfew, followed by 18 months probation. The defence sought a conditional discharge, with the appellant subject to community supervision for a period of up to three years. The trial judge concluded that the offence was one which required imprisonment in order to meet the fundamental purposes and principles of sentencing, and ordered a term of incarceration.

[6] The appellant bears the onus of establishing that each of the criteria set out in s. 679(3) of the *Code* have been satisfied: see *R. v. Barry*, [2004] N.S.J. No. 392 (NSCA in Chambers). He must demonstrate that his appeal or application for leave to appeal is not frivolous; that he will surrender himself into custody in accordance with the terms of any order authorizing his release; and that his detention is not necessary in the public interest.

[7] I have reviewed the sentencing decision, the presentence report, the notice of appeal, the affidavit of the appellant filed in support of his application, and the written submissions of his counsel. His counsel also made oral submissions in Chambers, as did the Crown which, in respect to the appeal against conviction, consented to the granting of the application.

[8] The 20 year old appellant had no prior criminal record. After finishing high school, he completed some training in Newfoundland as a firefighter. He was employed with a local contracting company prior to his conviction. According to the presentence report, he admitted that he drank heavily, accepts responsibility, regrets what happened, and fears that his future employment opportunities will be jeopardized. His affidavit in support of his application indicates that during the three years prior to his conviction, except for some four months away at school, he resided at home with his parents. If he were released pending the disposition of his appeal, his parents have offered to stand as surety, and he would seek and maintain employment for that period.

[9] Counsel for the appellant on his appeal did not represent him at either the trial or on sentencing. The transcript for the trial and sentencing hearing being as yet unavailable, he was unable to review that material in order to present his argument on the first criteria, namely that the appeal is not frivolous. In *R. v. Creelman*, [2006] NSJ No. 324 (CA) at ¶ 10, Bateman J.A. cited with approval McQuaid J. A. in *R. v. Trainor (F.E.)*, (1996) 17, 138 Nfld. & P.E.I.R. 357, (P.E.I.C.A. in Chambers) on that requirement:

> [4] The appellant must satisfy the Court that the grounds upon which he presents his appeal to the Court are not, on a balance of probabilities, frivolous. To satisfy this ground, the appellant must establish there is at least some arguable point to be made with respect to at least one of his grounds of appeal. While many applications for release under s. 679 come when a transcript of the proceeding at trial is not yet available to the parties, this does not relieve th appellant of the obligation of putting before the court some information which would assist the

> Court in determining whether he has an arguable point as to one or all of his grounds of appeal. It is not enough to rely on the grounds of appeal as set forth in the Notice of Appeal and then simply state, by way of affidavit, that they have merit. See: **R. v. Davison and Derosie** (1974), 20 CCC (2d) 422 (Ont. S.C.) The appellant should place before the Court an outline of his argument on each ground of appeal, supported by legal authority and his version of the evidence at trial which will provide factual underpinnings for his legal argument, if indeed, such factual underpinnings are necessary or relevant to his arguments on the law. Only then will a Court be in a position to determine whether, on a balance of probabilities, the appeal is not frivolous.

[10] In his submissions, counsel for the appellant recounted his lengthy discussions with the counsel who had represented the Crown at trial regarding the evidence and the legal issues. He summarized the factual and legal bases for the ground of appeal based on the trial judge's finding, pursuant to s. 21 of the *Code*, that the appellant was a party to an offence or had aided or abetted a person in committing an offence. Crown counsel indicated that he had conferred with the same Crown counsel, and conceded that the appeal against conviction raises an arguable issue. Counsel for the appellant also addressed the grounds of appeal against sentence. In doing so, he observed that were the application not granted, the appellant would have served his sentence before the appeal was heard.

[11] I am satisfied that the appeals against conviction and sentence are not frivolous and that the first criterion of s. 679(3) has been met. Moreover, the appellant's personal circumstances and history persuade me that he would surrender himself into custody were he released pending the determination of his appeal. I am also satisfied that the safety of the public and the confidence of the public in the judicial system would not require his detention during that period.

[12] I would grant the application for release pending determination of the appeal, and order the appellant's release upon the entering of a recognizance of $10,000. with one surety to justify that amount, without the deposit of cash or other valuable security, and upon the following conditions:

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

2. That he remain in the territorial jurisdiction of the Province of Nova Scotia and reside at 18 Karoline Drive, Lower Sackville, Nova Scotia with his parents;

3. THAT he have no contact, direct or indirect, or communication with Stephen Hendsbee except through a lawyer;

4. That he not be on or near the premises known as Atlantic Superstore, 745 Sackville Drive, Sackville, Nova Scotia;

5. THAT he deposit with the Registrar of the Court of Appeal any passport he may have or hereafter acquire;

6. THAT he shall abide by a curfew and remain within his place of residence between the hours of 11:00 p.m. and 6:00 a.m. daily;

7. THAT he shall not possess or consume alcohol or non-prescription drugs;

8. THAT he will report in person or by telephone each Friday between 8:00 a.m. and 4:30 p.m. to the officer in charge or his delegate at the Sackville Detachment of the RCMP, such reporting to commence on August 11, 2007;

9. THAT he not have in his possession at any time any firearm, ammunition, explosive substance or other offensive weapon;

10. THAT he will not associate with anyone known to him to have a criminal record, or known to him to have criminal charges pending, except as may be necessarily incidental to the course of his employment;

11. THAT he surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia within twenty-four (24) hours of being notified that the judgment of this Court is to be released; in the event the appeal is sooner dismissed, quashed or abandoned, he surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility 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.

Oland, J.A.