NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Creelman***, 2006 NSCA 99

Date: 20060804
Docket: CAC 262402
Registry: Halifax

Between:

Paul Kenneth Creelman

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Nancy Bateman in Chambers
Application Heard:	August 3, 2006, in Halifax, Nova Scotia
Held:	Application for release pending appeal dismissed.
Counsel:	Michael Taylor, for the applicant/appellant Susan Y. Bour, for the respondent

Reasons for decision:

[1] Mr. Creelman applied for release pending appeal of his conviction for possession of drugs for the purpose of trafficking. I dismissed his application with reasons to follow. These are my reasons.

[2] The charge of which he was convicted arose in February 2003 when the police, acting under the authority of a search warrant at the Halifax International Airport, found Mr. Creelman's luggage to contain sixty-two pounds of cannabis marihuana. Further warranted searches of his residence produced a significant amount of cash and weighing and packaging paraphernalia.

[3] After six days of trial in the Supreme Court of Nova Scotia in November and December of 2005 concluding on January 13, 2006 Mr. Creelman was convicted of an offence contrary to s.5(2) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, as am., involving a Schedule II substance.

[4] The significant issue in the trial court was the validity of various search warrants and, therefore, the admissibility of the resulting evidence. When, with lengthy and detailed written reasons, Goodfellow, J. dismissed the defence application to quash the warrants as in violation of the **Canadian Charter of Rights and Freedoms** Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, Mr. Creelman entered a guilty plea. The fact that Mr. Creelman entered a guilty plea at that stage is not of relevance to my decision on release. Sentencing did not take place until July 21, 2006. The four and one half year sentence is not on appeal.

[5] According to his affidavit, Mr. Creelman is 42 years old and, until sentence, lived with his common law spouse in his own home in Antrim, Halifax County. He maintains he is self employed in his own business which is engaged in small building, repair and maintenance work. His mother resides with him on weekends. He owns five properties which he is "beginning to have developed for resale purposes". He is actively involved in that process.

[6] The criteria for release pending appeal are set out in s. 679 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46:

> 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
>
> (a) the appeal or application for leave to appeal is not frivolous,
>
> (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.

[7] Applying the very low threshold that appears to be accepted by many appeal courts, the Crown conceded that Mr. Creelman's appeal is not frivolous. Nor does the Crown suggest that he does not meet s. 679(3)(b). The Crown says, however, that Mr. Creelman has not established that his detention is not necessary in the public interest.

[8] In **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32; O.J. No. 2627 (Q.L.) (Ont.C.A.) Arbour, J.A., writing for the Court, noted that the tension at play in any application for release pending appeal is the requirement that judgments be reviewable weighed against the necessity that such judgments be enforced.

[9] While I have accepted the Crown's concession here that the appeal is not frivolous, the strength of the appeal is considered along with many other factors in assessing whether detention is in the public interest. As observed by Culliton, C.J.S. in **R. v. Demyen** (1975), 26 C.C.C. (2d) 324 (Sask. C.A.), what the applicant must demonstrate to meet the public interest requirement will depend upon the circumstances of each case (at p. 326). One such factor is the probability of success on appeal (**R. v. Pabani** (1991), 10 C.R. (4th) 381 (Ont. C.A.), *per* Goodman, J.A. at para. 38).

[10] In **R. v. Trainor (F.E.)**(1996) 138 Nfld. & P.E.I.R. 357 (P.E.I.S.C.A.D. in Chambers) McQuaid, J. addressed the requirement that the applicant satisfy the court that the appeal is not frivolous. I endorse his remarks as equally applicable to the merits as considered under the public interest ground:

> [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 proceedings at trial is not yet available to the parties, this does not relieve the 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** (1974), 20 C.C.C. (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 the 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.
> (Emphasis added)

(See also **R. v. Davison** (1974), 20 C.C.C. (2d) 422 (Ont.C.A.))

[11] Mr. Creelman's trial counsel continues to represent him on the appeal. He advances a single, general ground:

> ... the Learned Trial Judge erred in dismissing the Appellant's application pursuant to the provisions of the **Canadian Charter of Rights and Freedoms** to quash certain search warrants and to exclude from his trial certain evidence obtained as a result of the execution of the said search warrants.

[12] No alleged error is particularized, despite the fact that the judge, some seven months ago, issued lengthy written reasons.

[13] Given the generic nature of the single ground alleged, I have no ability to assess the strength of the appeal. I have read the reasons of the trial judge. His findings of credibility play a significant role in the result reached. While I cannot make any definitive pronouncements on the merits of the appeal, error is not obvious. Arbour, J. wrote in **Farinacci**, **supra** at p. 48:

> Public confidence in the administration of justice requires that judgments be enforced. The public interest may require that a person convicted of a very serious offence, particularly a repeat offender who is advancing grounds of appeal that are arguable but weak, be denied bail. In such a case, the grounds favouring enforceability need not yield to the grounds favouring reviewability.

[14] While I agree with the applicant that Mr. Creelman's circumstances bear some similarity to those of the offender in this Court's decision in **R. v. Ryan** (2004), 226 N.S.R. (2d) 247 where release was granted, Cromwell J.A., in assessing the strength of the appeal, had the benefit of the argument on the issues as contained in the appellant's factum. I have nothing before me to assist in gauging, to the extent appropriate, the merits of Mr. Creelman's appeal, nor can I determine what specific points are in issue.

[15] The strength of the appeal is but one factor bearing on the public interest. In **R. v. F.F.B.** (1992), 112 N.S.R. (2d) 4234; N.S.J. No. 226 (Q.L.) (C.A.) Clarke, C.J.N.S., writing for the Court, cited with approval the remarks of Tallis, C.A. in **Regina v. Kingwatsiak** (1976), 31 C.C.C. (2d) 213 at pp. 217-218 (N.W.T.C.A) to the effect that the concept of "public interest" should be given a comprehensive meaning in the circumstances of each case with the judge having a wide, unfettered discretion to determine its content.

[16] A relevant factor is the time lapse before the appeal hearing measured against the length of the sentence. This appeal will be heard in six months. The sentence is four and one-half years. This is not a situation where the appeal will be rendered nugatory should bail not be granted.

[17] The crime of which Mr. Creelman has been convicted is a serious one. Sufficiently so that when bail is sought before trial it is one of the very few offences where, notwithstanding the pre-trial presumption of innocence, the onus is reversed and the accused is required to show cause that his detention is not necessary (**Criminal Code**, s. 515(6)(d)). In **R. v. Pearson**, [1992] 3 S.C.R. 665, Lamer, C.J.C., for the majority, wrote of the unique nature of trafficking offences which justified this reverse onus at the first instance at p. 695:

> The unique characteristics of the offences subject to s. 515(6)(*d*) suggest that those offences are committed in a very different context than most other crimes. Most offences are not committed systematically. By contrast, trafficking in

> narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. In these circumstances, the normal process of arrest and bail will normally not be effective in bringing an end to criminal behaviour. Special bail rules are required in order to establish a bail system which maintains the accused's right to pre-trial release while discouraging continuing criminal activity.

[18] Thus, there is a recognized risk of continuing criminal conduct while on release. I have considered, as well, the scale of Mr. Creelman's criminal conduct. This was not a minor trafficking operation. The quantity of drug seized has a street value of around half a million dollars. That Mr. Creelman could readily obtain the drug in such quantity speaks of a substantial connection to the trade.

[19] Looking at the circumstances of the offence, as the Crown points out, this was not an impulsive act but involved substantial planning and premeditation. It was not a crime of simple opportunity nor one arising from a random set of circumstances. Indeed the transporting of this quantity of cannabis through air travel in these days of heightened security demonstrates a remarkable level of hubris. The money and packaging set-up found at Mr. Creelman's home as well as the quantity of drug speaks of an ongoing operation.

[20] I have considered, as well, the fact that one of Mr. Creelman's prior convictions is for the possession of proceeds of crime contrary to s. 19.1 of the **Narcotic Control Act**. On that occasion he was fined $15,000. This would suggest some association with the drug trade at that time.

[21] Counsel for Mr. Creelman points out that he has been on release virtually since charges were laid over three years ago, and without apparent incident. His bail conditions were modest. This, he submits, counters any suggestion that there is an ongoing risk of continued criminal conduct and militates in favour of release until the appeal is heard. I am not persuaded that this fact is sufficient to overcome the factors weighing against release.

[22] The "public interest" concerns not just public protection and the prevention of further criminal acts but also public perception and confidence in the administration of justice (**R. v. Pabani, supra** at para. 8). Public perception is assessed through the lens of a reasonably informed member of the public. Most members of our communities are deeply concerned about drug abuse and the

seemingly ready availability of illegal substances. This is a particular danger for our youth. Cannabis is often a "gateway" drug leading to other substance abuse. I would note, as well, that many of the crimes we see in the courts are fuelled by addiction. A reasonably informed member of the public would be rightly perplexed by the release of a convicted, high level drug trafficker on a mere allegation that the trial judge has erred in some unspecified way. In my view, a revolving door from conviction to release in such circumstances would tarnish the public confidence in the administration of justice.

[23] Weighing all of the above factors, I am not persuaded on a balance of probabilities that Mr. Creelman has demonstrated his detention is not necessary in the public interest. This is not a case where the delay leading up to the hearing of the appeal will render the appeal fruitless if successful, nor is it one where I am able to say the strength of the issues raised on appeal militate in favour of release. The crime itself is a serious one and Mr. Creelman's level of engagement is high. Given the nature of the illegal activity, there is a real risk that Mr. Creelman would resume operations in some form should he be released. Finally, I am satisfied that his release would impair public confidence in the administration of justice.

[24] For these reasons, I have dismissed the application.

Bateman, J.A.