C.A.C. No. 02968

NOVA SCOTIA COURT OF APPEAL
Cite as R. v. Brown, 1993 NSCA 6

BETWEEN:

JAMES RODNEY BROWN	)	
	)	Don Murray
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Dennis W. Theman
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	December 16, 1993
	)	
	)	
	)	Judgment Delivered:
	)	December 16, 1993
	)	
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BEFORE: The Honourable Mr. Justice Matthews in chambers

MATTHEWS, J.A.:

This is an application for release pending determination of appeal pursuant to s.

679 of the **Code**.

Section 679(3) reads:

> "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."

The application is opposed by the Crown, in particular concerning subsections (a) and (c) of s. 679(3).

The applicant was convicted of sexual assault by Justice Nancy Bateman and sentenced to incarceration for two years. The victim of the sexual assault was at the time of the assault only 13 years of age.

The trial judge made clear findings of fact and credibility.

Sexual assault is a crime of violence.

I have read the grounds of appeal and have heard argument of counsel.

I have some difficulty in determining that there is merit in the appeal, however, the central issue in my opinion is in respect to s. 679(3)(c) - has the applicant convinced me that his detention is not in the public interest.

Prior to, and at the time of trial, the applicant has at all times appeared when required. However, the fact that he has now been found guilty of the offence must be considered. He no longer enjoys the presumption of innocence. Chief Justice Culliton of the Saskatchewan Court of Appeal in **R. v. Demyen** (1975), 26 C.C.C. (2d) 324 considered the question respecting when detention is or is not in the public interest. Demyen had been

sentenced to life imprisonment after his conviction for non-capital murder at trial before a judge and jury. On his application for release from custody pending appeal, the Chief Justice remarked at p. 326:

> "In my opinion, in the determination of what may constitute the public interest Parliament intended to give to the Judge a wide and unfettered discretion. To attempt to define with particularity what constitutes public interest would not only be difficult but would likely result in restricting by judicial pronouncement the unfettered discretion which Parliament intended to confer. The proper application, in my view, is to give to public interest a comprehensive meaning and to decide in the circumstances of each case whether or not the public interest requires the prisoner's detention.
>
> I am convinced that the effective enforcement and administration of the criminal law can only be achieved if the Courts, Judges and police officers, and law enforcement agencies have and maintain the confidence and respect of the public. Any action by the Courts, Judges, police officers, or law enforcement agencies which may detrimentally affect that public confidence and respect would be contrary to the public interest.
>
> I think it can be said that the release of a prisoner convicted of a serious crime involving violence to the person pending the determination of his appeal is a matter of real concern to the public. I think it can be said, as well, that the public does not take the same view to the release of an accused while awaiting trial. This is understandable, as in the latter instance the accused is presumed to be innocent, while in the former he is a convicted criminal. The automatic release from custody of a person convicted of a serious crime such as murder upon being satisfied that the appeal is not frivolous and that the convicted person will surrender himself into custody in accordance with the order that may be made, may undermine the public confidence in and respect for the Court and for the administration and enforcement of the criminal law. Thus, in my opinion, it is incumbent upon the appellant to show something more than the requirements prescribed by paras. (a) and (b) of s. 608(3) to establish that his detention is not necessary in the public interest. What that requirement is will depend upon the circumstances of each particular case."

Demyen has been cited with approval by this Court in **R. v. Moore, supra, R. v. White** (1982) 50 N.S.R. (2d) 113, **R. v. Benson** 101 N.S.R. (2d) 267 and **R. v. F.F. B.** 112 N.S.R. (2d) 423, among others.

It is of course obvious to say, but important to emphasize, that the circumstances of each case differ from others and must be examined to determine whether or not the public interest requires the prisoner's detention, keeping in mind that the burden is upon the applicant to establish that it is not so necessary. The confidence and respect of the public must be maintained if the effective enforcement and administration of the criminal law is to be achieved. See the comments of Justice Tallis in **R. v. Kingwatsiack** (1976), 31 C.C.C. (2d) 213 at pp. 217-8 and those of Justice Wilson, then of the Ontario Court of Appeal, in **R. v. Morenstein** (1977), 40 C.C.C. (2d) 131 at pp. 133-4. "Public interest" includes both the safety of the public and the confidence of the public in the judicial system.

Again, I repeat, the onus rests upon the applicant to justify his release. I have concluded that he has not done so.

J.A.

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- and -	)	R E A S O N S
FOR	)	JUDGMENT
BY:		
HER MAJESTY THE QUEEN	)	
	)	MATTHEWS,
	)	J.A.
Respondent	)	
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