NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Barry, 2004 NSCA 126

Date: 20041015
Docket: CAC 221556
Registry: Halifax

Between:

Shane Douglas Barry

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Justice Joel Fichaud
Application Heard:	October 14, 2004, in Halifax, Nova Scotia, In Chambers
Held:	Application dismissed.
Counsel:	Robert M. Gregan, for the appellant Dan MacRury, for the respondent

Decision: (Orally)

[1] Mr. Barry applies under s. 679(1)(a) of the *Criminal Code* for release pending the determination of his appeal against conviction.

[2] Mr. Barry was serving a sentence for another offence at Springhill Medium Security Institution. An inmate named Chan stabbed another inmate named Williston. Mr. Barry chased Chan with a sharp piece of metal and threatened to kill Chan. Mr. Barry did not cause any physical harm to Chan.

[3] Mr. Barry was convicted of carrying a weapon for a purpose dangerous to the public peace and of uttering a death threat contrary to ss. 88 and 264.1 of the *Criminal Code*. He was sentenced to nine months incarceration consecutive to his existing sentence.

[4] His appeal requests that this Court stay the charges or order a new trial or commute his sentence to time served. Mr. Barry currently is serving 41 months which is due to expire on August 7, 2005 with a statutory release date of March 7, 2005. If the sentence under appeal is eliminated, his statutory release date would have been September 9, 2004.

[5] His appeal is scheduled to be heard by this Court on November 23, 2004.

[6] Section 679(1)(a) of the *Code* states:

> A judge of the Court of Appeal may, in accordance with this section, release an appellant from custody pending the determination of is appeal if,
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> (a) In the case of an appeal to the Court of Appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to s. 678.

[7] Section 679(3) states:

> (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:
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> (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.

[8] Mr. Barry has the onus to establish each of the three conditions stated by s. 679(3). The conviction has substituted his initial presumption of innocence with a *status quo* of guilt. Unlike a pre-trial bail applicant, a convicted appellant "seeks to reverse the status quo by obtaining a reprieve from a court order for his detention following conviction" and, therefore, has the burden to prove the conditions for release pending determination of the appeal: *R. v. Branco* (1993), 87 C.C.C. (3d) 71 (B.C.C.A.), at p. 75 per Finch, J.A.; *R. v. Butler,* 1997 N.S.J. 391 at paras. 4-5; *R. v. Ryan* 2004 NSCA 105 at paras. 2-3.

[9] I need not comment on paras. (a) and (b) of s. 679(3). Mr. Barry has not established that "his detention is not necessary in the public interest" under s. 679(3)(c).

[10] The public interest assessment under s. 679(3)(c) balances divergent criteria in the unique circumstances of each case. In *R. v. Ryan*, 2004 NSCA 105, Justice Cromwell described the approach:

> [21] I agree with former Chief Justice McEachern when he wrote in R. v. Nugyen (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in difference contexts:
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> > In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.
> >
> > (Justice Cromwell's emphasis)

> [22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clamour is used to deny release to otherwise deserving applicants: see Gary Trotter, The Law of Bail in Canada, 2nd ed. (Carswell, 1999) at p. 390.
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> [23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in R. v. Farinacci (1993), 86 C.C.C. (3d) 32 at 48:
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> > Public confidence in the administration of justice requires that judgments be enforced. ... On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.
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> [24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:
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> > Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.
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> [25] This statement was cited with approval by my colleague Chipman, J.A. in R. v. Innocente, supra.

[11] In this case, if Mr. Barry succeeds on his appeal, he will have been incarcerated beyond his statutory release date. The unnecessary incarceration would extend from the date of this decision until either the hearing of his appeal on November 23, 2004 or the later date when the court issues its judgment. Avoidance of unjust incarceration clearly weighs in the public interest to promote the fair administration of justice: e.g., *R. v. Ryan* at para. 26.

[12] On the other hand, unlike the applicant in *R. v. Ryan*, Mr. Barry has a lengthy and continuous criminal record which includes numerous convictions for violent offences, including robbery, assault on a police officer, uttering threats,

and assault with a weapon. His record also includes several convictions for being unlawfully at large and a recent conviction for failing to comply with a probation. He has offended with regularity. The clear inference from his record is that, with the opportunity, he will act again.

[13] Given his onus on this application, and his record, it was important that Mr. Barry's affidavit address the potential for violent recidivism. Mr. Barry's affidavit says nothing about his lengthy record or the inferences I should draw from it to assess the public interest. Avoiding this key point is simply not good enough.

[14] Mr. Barry has not satisfied his onus to establish that "his detention is not necessary in the public interest" under s. 679(3)(c).

[15] I dismiss the application.

Fichaud, J.A.