

NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Johnson, 2004 NSCA 136

Date: 20041112

Docket: CAC 233676

Registry: Halifax

Between:

Lawrence Michael Johnson

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Madame Justice Elizabeth Roscoe

Application Heard: November 10, 2004, in Halifax, Nova Scotia, in
Chambers

Held: Application for bail pending appeal is dismissed.

Counsel: Jean C. Morris, for the appellant
James A. Gumpert, Q.C., for the respondent

Decision:

- [1] This is an application for release pending appeal, made pursuant to s. 679(1)(a) of the **Criminal Code**. The Crown opposes the application. The appeal is scheduled to be heard on March 31, 2005, four and one-half months from now.
- [2] On October 19, 2004, following a trial before Justice Robert Wright and a jury the appellant was convicted of the offences of robbery and carrying a weapon for a purpose dangerous to the public peace. The weapons conviction was stayed pursuant to the **Kienapple** rule against multiple convictions.
- [3] On October 27th, 2004, the appellant was sentenced to a period of incarceration of two and one-half years. In his remarks on sentencing, Justice Wright summarized the circumstances of the offence as follows:

[4] . . . The victim Barry Slaunwhite was walking home along North Street sometime between 9:45 and 10:00 p.m. that evening after having bought a bottle of Sherry at the Liquor Commission when he was approached by the offender, who asked him for some cigarettes. Mr. Slaunwhite gave him half a deck of cigarettes and the two of them continued to walk along the sidewalk engaged in small conversation for some 7 to 10 minutes. At that point, the offender turned on Mr. Slaunwhite, demanded all that he had in the way of valuables, and threatened to stick him with a needle if he resisted. Mr. Slaunwhite then handed over a ten dollar bill that he had with him, the rest of his cigarettes, and the bottle of sherry. He refused to hand over his watch and the offender did not push that demand for the watch. The offender then fled the scene and in a matter of minutes was apprehended by the police.
- [4] The grounds of appeal allege several errors in trial process, such as infringement of rights of full cross-examination and refusal to allow re-opening the case for the defence, in addition to errors in the jury instruction.
- [5] In order to be released pending appeal, s. 679(3) of the **Criminal Code** requires that the appellant establish that his appeal is not frivolous, that he will surrender himself into custody in accordance with the terms of the order and that his detention is not necessary in the public interest.
- [6] The Crown concedes that the appeal is not frivolous. However, based on the appellant's extensive criminal record, including six convictions for violating court orders, it is submitted that the appellant has not established that he will

surrender himself into custody when ordered or that his detention is not necessary in the public interest.

- [7] The appellant and his wife, who offers to act as surety, filed affidavits, testified and were cross-examined. Basically the appellant contends that his presence is needed in the home as the primary care giver to three young children while his spouse works shift work, and that he is prepared to obey whatever terms of release are imposed. He says that although he has been convicted of breaching court orders in the past, the breaches were not of a serious nature and did not involve the commission of any additional crimes. Most of the breaches were in the nature of failing to report to a probation officer or failing to abide by a curfew and conditions for house arrest. The appellant maintains that he did not commit the robbery and believes his appeal will be successful. He does not want to evade due process or become re-involved in criminal behaviour.
- [8] At this stage of the proceeding the appellant no longer has the benefit of the presumption of innocence. He has the burden of persuasion on the application for bail.
- [9] I am satisfied that the appeal is not frivolous; the grounds of appeal raise arguable issues. My main concerns are whether, if he is released, the appellant will obey the terms of release and surrender himself into custody as directed and whether his detention is necessary in the public interest. These concerns naturally emerge from the appellant's lengthy criminal record, including his two recent convictions for breaching court orders. His record consists of a total of 14 convictions, including two convictions for failing to attend court, two breaches of probation and two breaches of recognizance. In addition to the convictions, the appellant has twice been found to have breached terms of conditional sentences. While the appellant appears to be sincere in his resolve to comply with conditions for release, unfortunately this record does not instill confidence that he will comply with a direction of this Court to appear for the appeal.
- [10] Whether his release is in the public interest involves consideration of both public safety and public confidence in the administration of justice. I must be concerned with the possibility of whether the appellant might re-offend if released and also whether in light of his record, which includes both drug offences and crimes of violence, informed fair-minded members of the community would think it reasonable to release the appellant at this stage of the criminal process.

- [11] Taking into account all of these considerations, I am not satisfied that the appellant has met the second and third requirements for release pending appeal. Given his repeated disregard of previous court orders, I am not persuaded that he would comply with all conditions imposed by me should bail be granted.
- [12] Furthermore, considering his lengthy record and the nature of this particular offence, I am not satisfied that the appellant has shown that it is in the public interest that he be granted bail. I am of the view, given the evidence before me, that his release would tend to undermine public confidence in the administration of justice.
- [13] For these reasons the application for bail pending appeal is dismissed.

Roscoe, J.A.