Date: 19970326
Docket: CA V022299
Registry: Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

Before:

THE HONOURABLE MR. JUSTICE CARROTHERS — March 26, 1997
THE HONOURABLE MR. JUSTICE MACFARLANE
THE HONOURABLE MR. JUSTICE GOLDIE — Victoria, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

HUBERT PATRICK O'CONNOR

APPELLANT

Christopher M. Considine — appearing for the Appellant
Harold J. Rusk and Andrea Miller — appearing for the Respondent

[1] **MACFARLANE, J.A.:** This is a review under s. 680 of the ***Criminal Code*** of an order of a justice sitting in Chambers refusing to release the appellant pending determination of his appeal against a conviction for rape and for indecent assault.

[2] Section 680 provides:

> 680. (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or

> 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,
>
> (a) vary the decision; or
> (b) substitute such other decision as, in its opinion, should have been made.
>
> (2) On consent of the parties, the powers of the court of appeal under subsection (1) may be exercised by a judge of that court.
>
> (3) A decision as varied or substituted under this section shall have effect and may be enforced in all respects as though it were the decision originally made. R.S., c. 2 (2nd Supp.), s. 12; 1974-75-76, c. 93, s. 73; R.S.C. 1985, c. 27 (1st Supp.), s. 142; 1994, c. 44, s. 68.

[3] On 12 December 1996 the Chief Justice directed a review of the order made in this case.

[4] On the 25th day of July 1996 the appellant was convicted of one count of rape and one count of indecent assault upon a female. The incidents in question occurred over 30 years ago.

[5] The appellant denied the indecent assault but his defence to the charge of rape was consent.

[6] On the 13th day of September 1996 the appellant was sentenced to two and one-half years of imprisonment on the charge of rape and three months upon the charge of indecent assault, to be served concurrently.

[7] The appellant has been in custody since September 13, 1996. Thus, he has already served over six months. It is a probability, amounting virtually to a certainty, that he will be eligible for parole before his appeal can be prepared, heard and determined.

[8] The appellant is 68 years of age and is in need of regular medical treatment.

[9] The main grounds of appeal may be summarized in this way.

1. The appellant was deprived of fundamental justice and was denied a fair trial because:

   (a) Due to the passage of about 30 years between the date of the alleged offences and the date charges were laid important witnesses died or became disabled to the extent that they could not testify.

   (b) Due to the lapse of time the recollection of witnesses faded.

   (c) Prosecutorial misconduct caused a further delay in the proceedings from 1992 until 1995. During that period appeals were taken to both this Court and the Supreme Court of Canada on the

question of whether a stay of proceedings ought to have been granted.

2. Gross inconsistencies in the evidence of the complainants rendered the verdicts unreasonable.

[10] Section 679(3) provides that the appellant may be released pending the determination of his appeal if he 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.

[11] The Chambers judge found that the appeal was not frivolous, and that the appellant would surrender himself into custody in accordance with the terms of any release order that might be made. That satisfies paragraphs (a) and (b).

[12] The Chambers judge found that the appellant had failed to establish that his detention is not necessary in the public interest, that is paragraph (c). The position of the Crown before the Chambers judge and before this Court is that the appeal is arguable but so weak that the public interest demands that the sentence be enforced immediately.

[13] That argument is based primarily on what was said by Madam Justice Arbour in ***R. v. Farinacci*** 86 C.C.C. (3d) 32 at 47-48 which reads:

> Section 679(3)(c) of the *Criminal Code* provides, in my opinion, a clear standard against which the correctness of any decision granting or denying bail pending appeal can be reviewed. The concerns reflecting public interest, as expressed in the case-law, relate both to the protection and safety of the public and to the need to maintain a balance between the competing dictates of enforceability and reviewability. It is the need to maintain that balance which is expressed by reference to the public image of the criminal law, or the public confidence in the administration of justice. The "public interest" criterion in s. 679(3)(c) of the *Code* requires a judicial assessment of the need to review the conviction leading to imprisonment, in which case execution of the sentence may have to be temporarily suspended, and the need to respect the general rule of immediate enforceability of judgments.
>
> 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.
>
> On the other hand, public confidence in the administration of justice requires that judgments be reviewed and that errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake. Public confidence would be shaken, in my view, if a youthful first offender, sentenced to a few months' imprisonment for a property offence, was compelled to serve his or her entire sentence before having an opportunity to challenge the conviction on appeal. Assuming that the requirements of s. 679(3)(a) and (b) of the *Criminal Code* are met, entitlement to bail is strongest when denial of bail would render the appeal nugatory, for all practical purposes. This same principle animates the civil law dealing with stays of judgments and orders pending appeal. It is a principle which vindicates the value of reviewability.
>
> There may have been a time when appellate delays were so short that bail pending appeal could safely be denied, save in exceptional circumstances, without

> rendering the appeal illusory. Such is no longer the case. In both civil and criminal cases, appellate court judges are often required to balance two competing principles of justice: reviewability and enforceability. 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 be considered in the determination of entitlement to bail pending appeal. This is what appellate judges do, sitting alone or on a review panel; this is what appellate judges have always understood their mandate to be.

[14] Madam Justice Arbour was writing her opinion in the context of a constitutional challenge to the validity of s. 679(3)(c). The question she was addressing in the foregoing passage was whether the words, "public interest" were so vague as to create a standardless sweep. She held that s. 679(3)(c) provides a clear, yet flexible standard. She did not decide that weak grounds of appeal, by themselves, was a basis for refusing release.

[15] What is in the public interest in a particular case depends upon the circumstances.

[16] In this case the detention of the appellant is not required for the protection and safety of the public. The appellant is no longer a risk to the community. All agreed that he is unlikely to re-offend. His behaviour over the last

30 years has been blameless. He is over 68 years of age and ill. He has no criminal record.

[17] Madam Justice Arbour said, "Assuming that the requirements of s. 679(3)(a) and (b) of the *Criminal Code* are met, entitlement to bail is strongest when denial of bail would render the appeal nugatory for all practical purposes." That is the situation in this case. The appellant will probably be eligible for parole before the appeal in this case is heard and determined.

[18] In conclusion this is a case where detention is not required for the protection and safety of the public and it is a case in which execution of the sentence needs to be temporarily suspended so that the appellant will have an opportunity to challenge the conviction on appeal. I am not persuaded that this is a case where the grounds of appeal are arguable but so weak that the appellant must be denied bail.

[19] I would release the appellant pending determination of his appeal upon the following terms and conditions:

1. That he enter into a recognizance in the sum of $1,000;

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

3. That he report to a probation officer upon his release and thereafter as directed and not less than once a month;

4. That he have no contact with either complainant in this case;

5. That he surrender himself into custody at 9:30 a.m. on the morning scheduled for the hearing of his appeal.

[20] **CARROTHERS, J.A.:** I agree.

[21] **GOLDIE, J.A.:** I agree.

[22] **CARROTHERS, J.A.:** It is ordered accordingly.

"The Honourable Mr. Justice Macfarlane"