THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2014 SKCA 60 Date: 2014-05-14

Between: Docket: CACR2374

Her Majesty the Queen

Applicant

- and -

Paul Mary Leroux

Respondent

Between: Docket: CACR2379

Paul Mary Leroux

Applicant

- and -

Her Majesty the Queen

Respondent

Restriction on Publication: An order has been made in accordance with s. 486.4(1) of the *Criminal Code* directing that any information identifying the complainants shall not be published.

Before:
Jackson J.A. (in Chambers)

Counsel (all by conference call):
Mr. Marcel Simonot, for the appellant (release only)
Dean Sinclair, for the respondent (release only)
Paul Leroux, for himself (court appointment only)
Lorna Hargreaves, for Court Services (court appointment only)

Application:

From:	2013 SKQB 438 (re CACR2374) and 2013 SKQB 395 (re CACR2379)
Heard:	May 7, 2014
Disposition:	Applications dismissed

Written Reasons: May 14, 2014
By: The Honourable Madam Justice Jackson

Jackson J.A.

I. Introduction

[1] Paul Mary Leroux was convicted after trial by a judge alone of eight counts of indecent assault and two counts of gross indecency stemming from events that took place between January 1, 1959 and December 31, 1967 at the Beauval Indian Residential School located in northern Saskatchewan (see 2013 SKQB 395 for a recitation of the evidence). Mr. Leroux was acquitted of seven other similar offences. He was sentenced to three years imprisonment (see 2013 SKQB 438). Mr. Leroux has appealed his conviction. The Crown has appealed his sentence.

[2] Mr. Leroux now applies for judicial interim release pursuant to s. 679(3) of the *Criminal Code*, R.S.C., 1985, c. C-46 pending the hearing of the above-mentioned appeals and for the appointment of counsel pursuant to s. 684(1) of the *Criminal Code*.

[3] The two applications must be assessed in light of the grounds of appeal that will eventually be argued by Mr. Leroux and the Crown. For the sake of clarity, Mr. Leroux's grounds of appeal will be summarized with reference to four general categories.

[4] The first category of Mr. Leroux's grounds of appeal is that the trial judge erred when he failed to find a breach of s. 7 and s. 11(d) of the *Canadian Charter of Rights and Freedoms*. Mr. Leroux plans to argue that the passage of time between the incidents in question and the date of trial prevented him

from being fairly tried. According to Mr. Leroux, some potential witnesses had died, some documents had been lost and witnesses' memories had deteriorated by the time of trial. (See 2013 SKQB 336 where the trial judge ruled on this issue.)

[5] The second category of grounds relates to the Crown's decision to charge Mr. Leroux with 17 offences in one indictment. Mr. Leroux will argue that he should have had three or four separate trials, each before a different trier of fact. It appears that Mr. Leroux, who represented himself at trial, did not apply to sever the counts.

[6] The third category relates to the reasonableness of the verdict. Mr. Leroux will argue that: (i) the evidence of the witnesses was unreliable and contradictory; (ii) they were motivated to make false allegations against him by the promise of a settlement from the government as part of the residential school settlement contract; and (iii) they were further motivated to create or embellish the facts by the insistence of the investigating officer who approached them several times before they complained to the police.

[7] In the fourth category, Mr. Leroux submits that the trial judge erred by allowing the Crown's application permitting the use of similar fact evidence to bolster the credibility of the individual complainants (see 2013 SKQB 395 at paras. 35 to 50).

[8] The Crown's notice of appeal contains these grounds: (i) the trial judge failed to consider properly one or more of the relevant sentencing factors; (ii) he imposed a sentence that is not proportionate to the gravity of the offence

and Mr. Leroux's degree of responsibility; (iii) the sentence does not respect the principle of parity; and (iv) the sentence is demonstrably unfit and does not adequately consider Mr. Leroux's criminal record.

[9] Mr. Leroux's applications for release and for the appointment of counsel were argued before me on the same day. Mr. Leroux engaged the services of Mr. Marcel Simonot, a barrister and solicitor practising in Saskatchewan, to argue his application for release. Mr. Leroux represented himself on his application for court appointed counsel.

II. Application for Judicial Interim Release Pending Appeal

[10] Sub-section 679(1) of the *Criminal Code* requires that Mr. Leroux demonstrate that (i) his appeal is not frivolous; (ii) he will surrender himself into custody in accordance with the terms of the order for release; and (iii) his detention is not necessary in the public interest. Crown counsel concedes the first two points, but submits that Mr. Leroux's detention is necessary in the public interest.

[11] For an exposition of the principles at play in assessing whether detention is necessary in the public interest, see Gary T. Trotter, *The Law of Bail in Canada*, loose-leaf, 3rd ed. (Scarborough: Carswell, 2010) at pp. 10-19 to 10-31. For representative decisions from this jurisdiction, see *R. v. Demyen* (1975), 26 C.C.C. (2d) 324 (Sask. C.A.); *R. v. Latimer* (1994), 128 Sask. R. 63; *R. v. Galloway*, 2004 SKCA 53, 184 C.C.C. (3d) 355; *R. v. Agecoutay*, 2008 SKCA 68, 310 Sask. R. 224; *R. v. Toy*, 2009 SKCA 32, 331 Sask. R. 1; and *R. v. D.H.S.*, 2009 SKCA 84, 337 Sask. R. 92.

[12] In discussing the meaning of "detention in the public interest," Culliton C.J.S. said the following in *Demyen*, at p. 326:

> 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 encumbent upon the appellant to show something more than the requirements prescribed by paras. (a) and (b) of s. 608(3) [now s. 679(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 [emphasis added].

[13] While the principles are well-known and frequently applied, their application is seldom easy and never a matter of rote. Each case raises its own concerns and requires a careful balancing of essentially competing interests, notably the tension between, on the one hand, giving immediate effect to the judgment by detaining the accused, and, on the other hand, releasing the accused so as to allow a full panel of the Court of Appeal to assess the reliability of the judgment before the sentence commences or much of it is served. These twin tensions of enforceability and reviewability were first described as such by Arbour J.A. (as she was then) in the leading decision of

R. v. Farinacci (1993), 109 D.L.R. (4th) 97, 67 O.A.C. 197 (Ont. C.A.) at paras. 41 and 42.

[14] As the jurisprudence indicates, some crimes raise special public interest concerns. As McEachern C.J.B.C. in *R. v. K.K.* (1997), 113 C.C.C. (3d) 52 at para. 8, 85 B.C.A.C. 294 states, "sexual assault cases are amongst the most difficult to fit within any rational scheme for the interim release of persons awaiting appeal." One reason for this is the nature and seriousness of the crime of sexual assault and the public's perceptions of it. This, of course, does not mean that a person convicted of sexual assault will not be granted interim release (see, e.g., *R. v. Tcho*, 2011 SKCA 113 where release was granted).

[15] An historic sexual assault presents its own concerns. Often the accused will be elderly, suffering from illness and will be unlikely to reoffend. Thus, in *K.K.*, McEachern C.J.B.C. released the applicant whose four offences, one of which spanned a period of 10 years, had arisen some 25 years earlier and who had thereafter led an exemplary life. He had no other record. Similar reasons compelled the British Columbia Court of Appeal to release the applicant in *R. v. O'Connor* (1997), 89 B.C.A.C. 152 on a review under s. 680 of the *Criminal Code*.

[16] I must, however, contrast these decisions with two other historic sexual assault cases. In *R. v. H.B.*, 2014 ONCA 334, the Chambers judge did not release the elderly accused (80 years old) on the footing that the grounds of appeal were not particularly strong and he had committed "serious crimes against the person" (para. 26), notably three counts of sexual assault against

family members. In *R. v. Webster* (1994), 121 Nfld. & P.E.I.R. 319 (P.E.I.C.A.), the Chambers judge refused to release a former university professor who had been found guilty of seven dated sexual offences against children. The judge referred to the "nature" of the offences having been committed against "some of the most vulnerable members of our society" (para. 2). This decision was affirmed by the Prince Edward Supreme Court, Appeal Division, on a review under s. 680 of the *Criminal Code* (see 132 Nfld. & P.E.I.R. 78).

[17] Like the applicants in the above decisions, Mr. Leroux is presently 74 years old and is unlikely to reoffend. In recent years he held a significant position with a federal government agency. He suffers from rheumatoid arthritis. According to his submissions, the prison authorities are unable to regulate his medications adequately and the stress of the penitentiary environment exacerbates his condition.

[18] Unlike the above-mentioned applicants, however, Mr. Leroux was previously convicted in 1998 of nine counts of gross indecency, three counts of indecent assault, one count of attempted indecent assault, and one count of attempted buggery arising out of events that took place from 1967 to 1979 in Inuvik. During that period, Mr. Leroux was the senior boys' supervisor at Grollier Hall, a residence for students brought to Inuvik to attend school. He was employed to supervise the daily activities of the students, to provide guidance and counselling, and to maintain discipline. All of these offences involved male students between the ages of 13 and 19. Mr. Leroux pled guilty to nine of the offences and was convicted after trial of the five remaining

charges: see *R. v. Leroux*, [1998] N.W.T.J. No. 138 (N.W.T.S.C) at para. 2. He was sentenced to ten years imprisonment on that occasion (see *R. v. Leroux*, [1998] N.W.T.J. No. 141 (N.W.T.S.C.)).

[19] When considering whether it is in the public interest to detain Mr. Leroux, his previous convictions are a dominant factor. Mr. Leroux has now been convicted a second time with respect to sexual abuse occurring within the residential school system. The public's concern with offences of this nature is great. I recognize that the present offences occurred earlier in time than his previous convictions, but on both occasions Mr. Leroux was found guilty of committing a number of sexual offences against a number of victims. Mr. Leroux is entitled to have the reliability of his convictions reviewed by the Court of Appeal, but his grounds of appeal are not so strong as to overcome my concern that the administration of justice would be brought into disrepute if Mr. Leroux were to be released on this occasion. Thus, I have concluded that it is not in the public interest to release Mr. Leroux.

[20] I am also entitled to take a pragmatic approach to the consideration of these issues. I have no reason to believe that these appeals cannot be heard quickly. The transcripts have been prepared for some months. Mr. Leroux can control the timing of his appeal. He is not required to file a factum, but he may file a written argument if he chooses to do so. The Crown in this jurisdiction always responds promptly with its materials, once it knows that the appellant is ready to proceed.

III. Application for the Appointment of Counsel

[21] Sub-section 684(1) of the *Criminal Code* permits a Court of Appeal or a judge of that court to appoint counsel where it appears: (i) desirable in the interests of justice that the accused should have legal assistance; and (ii) the accused has not sufficient means to obtain that assistance. In formal terms, s. 684(1) reads as follows:

> **Legal assistance for appellant**
> **684.**(1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[22] According to Mr. Leroux's affidavit sworn shortly after he was incarcerated, he has the following assets: (i) an apartment in Vancouver; and (ii) investments and savings of approximately $160,000, "depending on stock markets" (see affidavit of Mr. Leroux dated January 24, 2014 at para. 6). He also swears that he owes his partner $120,000. Mr. Leroux did not attest to the value of his apartment in his affidavit, but upon being questioned on this point he indicates that is it is worth approximately $400,000. I have accepted all of this evidence at face value.

[23] Prior to Mr. Leroux's incarceration, he was receiving monthly income of $3000, derived from investments and pensions, including old age security. Since being incarcerated, his old age security benefits have been suspended according to s. 5(3) of the *Old Age Security Act*, R.S.C., 1985, c. O-9 as

amended by the *Eliminating Entitlements for Prisoners Act*, S.C. 2010, c. 22, thus reducing his monthly income to approximately $2,500 per month.

[24] Counsel for the Attorney General resists Mr. Leroux's application on the basis that he "has sufficient means" to obtain legal assistance within the meaning of s. 684(1). Mr. Leroux's position is that he should not be required to become indigent to defend himself against what he claims are fraudulent and dishonest claims. While as a matter of principle this may be so, it has not yet been determined that the claims can be characterized as such. More importantly, state-funded counsel is only provided within the limited circumstances permitted by s. 684(1).

[25] Little jurisprudence exists as to how a court assesses what constitutes "sufficient means." Indeed, I was able to find one appellate decision only, where the Court was satisfied that it had been provided with sufficient evidence as to the applicant's means, and refused to appoint counsel because of the amount of those means. (See *R. v. Wilson*, 2001 NSCA 156, 198 N.S.R (2d) 152 where the Court denied the applicant legal representation after it was determined that he had approximately $66,000 in assets, including real property, bank accounts and vehicles.)

[26] Notwithstanding the limited authority, I am confident that Mr. Leroux's assets pass any reasonable threshold, and clearly surpass that established in *Wilson*.

[27] I am reluctant, however, to leave the matter there. I would not want to leave the impression that I have concluded that Mr. Leroux has met the onus on him to demonstrate it is in the interests of justice that he receive legal

assistance—being the first requirement under s. 684(1)—but then deny the relief on the basis that he has sufficient means.

[28] The determination of whether someone is entitled to state-appointed counsel requires the Court to consider more than whether someone could benefit from the assistance of counsel. Clearly, like anyone convicted of a serious crime, Mr. Leroux could benefit from the assistance of counsel, but that is not the test.

[29] The determination as to whether it is in the interests of justice for an accused to have counsel requires the Court to consider (i) whether the appeal is arguable; (ii) whether the appeal can be presented effectively without legal assistance; and (iii) whether the court will be able to decide the appeal properly, without the assistance of counsel. In this regard, see E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, loose-leaf, 2nd ed., vol. 3 (Aurora: Canada Law Book, 2014) at s. 23:3035; *R. v. Bernardo* (1997), 105 O.A.C. 244, 121 C.C.C. (3d) 123 (Ont. C.A.); and *R. v. Chan*, 2001 BCCA 138 at para. 7. (The above-stated references were also considered in *R. v. Ermine*, 2010 SKCA 73 at para. 8.)

[30] Whether an appeal can be presented effectively by an appellant and whether the court will be able to decide the appeal properly, without the assistance of counsel, engage similar concerns. Both factors depend to a certain extent on the applicant's level of education and the complexity of the issues (see *R. v. Butler*, 2006 BCCA 476, 231 B.C.A.C. 303; *R. v. Madrusan*, 2004 BCCA 194; *R. v. Pendergast*, 2003 NLCA 66, 233 Nfld. & P.E.I.R. 13; *R.*

v. Moghaddam, 2003 BCCA 552, 188 B.C.A.C. 74; *R. v. Assoun*, 2002 NSCA 119, 208 N.S.R. (2d) 340; and *R. v. Mattice*, 2001 BCCA 616). The seriousness of the offence and the penalty are also factors to be considered (see *Butler*).

[31] In this case, as I have determined in relation to his application for judicial interim release, the grounds of appeal are arguable. Mr. Leroux, however, is able to represent himself on appeal. He acted for himself throughout this matter. As the transcript and the various written decisions in relation to pre-trial rulings, conviction and sentence demonstrate, he is fully cognizant of the issues and writes and expresses himself very well. That is not to say that the appeal is not complex nor that it will not be challenging for him to prepare, but I have no reason to believe that it is beyond his capabilities.

[32] There is one final matter. Mr. Leroux has explained that he is in solitary confinement in the segregation unit. I recognize that these conditions will make it more difficult than usual for a self-represented litigant to prepare for a complex appeal. In so far as it is possible and practical, I would request that the penitentiary services provide Mr. Leroux with the space and time to prepare his appeal.

[33] For these reasons, then, Mr. Leroux's application for count-appointed counsel is dismissed.

DATED at the City of Regina, in the Province of Saskatchewan, this 14th day of May, A.D. 2014.

"Jackson J.A."

Jackson J.A.