NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Mauger*, 2017 NSCA 94

Date: 20171109
Docket: CAC 468587
Registry: Halifax

Between:

James Russell Mauger

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	Van den Eynden, J.A.
Motion Heard:	November 9, 2017, in Halifax, Nova Scotia in Chambers
Written Decision:	February 9, 2018
Held:	Motion dismissed
Counsel:	Alan Stanwick, for the appellant James A. Gumpert, Q.C., for the respondent

Decision:

Introduction

[1] Mr. Mauger sought judicial interim release pending appeal. His appeal is set for March 14, 2018. Mr. Mauger was charged and convicted of assault (s. 266(a)), assault with a weapon (s. 267(a)), and forcible entry (s. 72(1)). At the time of these offences he was on probation for prior offences; thus, he was charged and convicted for breach of probation (s. 733.1).

[2] Mr. Mauger was sentenced as follows: four and a half years on the s. 267(a); one year concurrent on the s. 72(1); four months concurrent on the s. 266(a); and three months concurrent on the s. 733.1 conviction.

[3] He appealed against both conviction and sentence on the s. 267(a) charge and against sentence only on the s. 72(1). Mr. Mauger did not appeal the conviction or sentence on the ss. 266(a) and 733.1 offences.

[4] Mr. Mauger was not a strong candidate for bail pending appeal. At the conclusion of the hearing on November 9, 2017, I granted Mr. Mauger leave to appeal sentence only respecting the s. 72(1) conviction, but denied his motion for release with reasons to follow. These are my reasons.

Law and analysis

[5] Mr. Mauger bears the burden of proving, on a balance of probabilities, the conditions for his release under ss. 679(3) and (4) (see *R. v. Johnston*, 2014 NSCA 78; *R. v. Barry*, 2004 NSCA 126; *R. v. Oland*, 2017 SCC 17).

[6] The release criteria for an appeal against conviction differ from the release criteria for an appeal against sentence only. Mr. Mauger's appeal against both conviction and sentence (s. 267(a) offence) is governed by ss. 679(1)(a) and 679(3) of the *Criminal Code.* His appeal against sentence only (s. 72(1) offence) is governed by ss. 679(1)(b) and 679(4) of the *Code*. These provisions state:

> s. 679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his 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 section 678;

> b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; [. . .]
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> (3) In the case of an appeal referred to in paragraph (1)(a) …, 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;
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> (b) he will surrender himself into custody in accordance with the terms of the order; and
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> (c) his detention is not necessary in the public interest.
>
> (4) In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
>
> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
>
> (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.

[7] While there is overlap in these release requirements, s. 679(3)(a) requires a finding that the appeal is not frivolous, whereas s. 679(4)(a) requires a finding that the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if detention continued. Further, leave is required to pursue an appeal against sentence only (s. 679(1)(b)). Each provision entails a preliminary merit assessment of the grounds of appeal. Mr. Mauger's motion for release triggers all three merit assessments. As I will set out, the terms used to define each specific threshold vary and there is some overlap of terms between thresholds.

[8] That is not the end of the examination of the grounds of appeal. They figure prominently in the assessment of the public interest criterion under ss. 679(3)(c) and 679(4)(c) when balancing the competing principles of reviewability and enforceability. I will return to the public interest criterion, but first I will address the separate merit thresholds in ss. 679(3)(a), 679(1)(b) and 679(4)(a).

[9] While stated in a variety of ways, courts have generally defined s. 679(3)(a) in a manner that is easy to satisfy. The "not frivolous" criterion in s. 679(3)(a) is widely recognized as being a very low threshold (see *Oland* ¶ 20). Writing for the Court in *Oland*, Justice Moldaver said at ¶ 41, " . . . the 'not frivolous' criterion

operates as an initial hurdle that produces a categorical ‘yes’ or ‘no’ answer, allowing for the immediate rejection of a release order in the face of a baseless appeal.”

[10] Courts have used varying language to describe this low threshold. For example the appellant need only show that the appeal is “arguable,” “viable,” “not doomed to failure,” of “some substance,” “might succeed,” has “a reasonable prospect of success,” or one that “would not necessarily fail” (see Gary T. Trotter (now the Honourable Justice Trotter of the Court of Appeal of Ontario), *The Law of Bail in Canada*, 3rd ed, loose-leaf (Toronto: Thomson Reuters, 2017) at s. 10.2(e)(i) at 10-13 to 10-14).

[11] The release criteria on a sentence appeal only is stricter. On this point, Trotter, *The Law of Bail* (s. 10.3(a)-(b)(ii)) at 10-35 to 10-36) provides:

> Bail pending the appeal of sentence alone raises some different concerns from appeals in which conviction is still in issue. As with conviction appeals, the presumption of innocence is inoperative at this stage of the proceedings. However, unlike conviction appeals, there is no apprehension that the applicant stands wrongly convicted. This important difference is reflected in more stringent criteria for release. …
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> …The Supreme Court of Canada has narrowed the scope of appellate review for sentencing decisions. Stretching back to *R. v. Shropshire*, the Court has held that an appellate court ought not to interfere with a sentence unless the sentencing judge committed an error of law, or unless the sentence imposed was manifestly unjust or clearly unreasonable. Consequently, “deference” is the watchword on sentence appeals. Applications for bail pending appeal of sentence ought to be approached with this reality in mind. [citations omitted]

[12] These stricter requirements are reflected in s. 679 of the *Code*. First, leave is required under s. 679(1)(b). In addition, Nova Scotia *Civil Procedure Rule* 91.24(1) compels an applicant to bring a motion for leave to appeal sentence alongside a motion for interim release pending appeal:

> 91.24 (1) An appellant who appeals against sentence only, is in custody, and wishes to be released pending appeal must make a motion to a judge of the Court of Appeal for leave to appeal, which motion may be heard together with a motion for an order for release under section 679 of the Code and be determined before or at the same time as the motion for release is determined.

[13] It has been said that obtaining leave is more so a condition precedent to release pending appeal than a criterion for release (see Trotter, *The Law of Bail*,

s.10-3(b)(i) at 10-37). At the leave stage, Mr. Mauger must establish that his grounds of appeal raise some arguable point that his sentence is unfit, or as often put another way, his grounds are not frivolous. Although not a high threshold, Mr. Mauger must do more than simply state his grounds of appeal; he must also point to something in the record capable of supporting them (see *Johnston*).

[14] During submissions on this motion, this query arose—is the leave threshold under s. 679(1)(b) the same or comparable to the "not frivolous" threshold in s. 679(3)(a)? In *Johnston* Justice Bryson said:

> [10] At least in Nova Scotia, the test for leave requires that the grounds of appeal raise "arguable issues" or are "not frivolous"; see for example: *R. v. Smith*, 2005 NSCA 45 at para. 10; *R. v. MacIntyre*, 2003 NSCA 68 at para. 6; *R. v. J.E.S.*, 2009 NSCA 91 at para. 6; *R. v. Bennett*, 2006 NSCA 86 at para. 23.

[15] I did not locate a clear authority that states whether, and if so how, the thresholds under s. 679(3)(a) and s. 679(1)(b) might differ. Simply based upon the overlap in the terms used to describe the two thresholds, at first blush, they might appear more comparable than distinct. The first highlighted excerpt in ¶ 17 below from Trotter, *The Law of Bail*, seems to imply a parallel; however, on the other hand, the second highlighted excerpt in ¶17 seems to imply they are different. I note that sentence appeals are more difficult to disturb on appeal. The standard of review is deferential and an appeal court will not intervene short of an error in law or unless the sentence is manifestly unjust. This would seem to support a higher threshold on leave than the low threshold in s. 679(3)(a). Whether that is the case and how that might best be defined is beyond the scope of what I need to decide in this matter, as I was satisfied that an arguable point could be raised (see ¶ 62).

[16] However, the "leave" standard in s. 679(1)(b) is clearly different than the "sufficient merit" standard in s. 679(4)(a). In principle, the standard of "sufficient merit" is higher than the standard applied for leave to appeal. Section 679(4)(a) mandates the appeal have "sufficient merit" such that, in the circumstances, "it would cause unnecessary hardship" if detention was continued pending appeal.

[17] As noted in Trotter, *The Law of Bail* (s.10.3(b)(i) - (ii) at 10-37 to 10-38):

> The concept of leave to appeal plays an important function in terms of the administration of appellate justice; however, it fits rather awkwardly into the overall framework for determining bail pending appeal. As the ensuing discussion reveals, the viability of the appeal also comes into question in the assessment of the "unnecessary hardship" criterion**.** Thus, working on the assumption that Parliament did not intend to

> create a redundancy of concepts, the standards of leave to appeal and unnecessary hardship ought to operate independently of each other. **In this context, the standard of leave to appeal provides a good parallel to the expression of "not frivolous,"** discussed previously. As such, the applicant must establish that it is at least "arguable" that the sentence is unfit.
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> . . .
>
> Section 679(4)(*a*) of the *Criminal Code* requires the applicant to demonstrate that the appeal has sufficient merit such that the detention in custody pending the appeal would cause "unnecessary hardship."
>
> . . .
>
> **Thus, the standard established in s. 679(4)(*a*) is meant to be more stringent than the test for leave to appeal and much more stringent than the standard required to be released on bail with respect of an appeal against conviction alone.** There is good reason for this elevated standard, for as Jackson J.A. wrote in *R. v. Leis* (2008): "This is so because the person does not deny the conviction, but questions the nature, length or terms of punishment only."
>
> [Emphasis added]

[18] Also, in *R. v. Shaw*, 2007 NSCA 91, ¶ 8, Fichaud, J.A. held that the requirement that the appeal has sufficient merit such that a denial of bail would cause unnecessary hardship under s. 679(4)(a) was "a higher threshold than the standard required for leave to appeal."

[19] Just how much higher is the standard? It too has been articulated in different ways, including, for example, "substantial grounds" (see *R. v D.(J.)*, 1996 NSCA 14); "arguable grounds" (see *R. v. Barnes*, 1998 NSCA 16 and *R. v. Bennett*, 2006 NSCA 86); "strongly suggests an error" (see *R. v. Johnston*, 2014 NSCA 78); "arguable merit" (*R. v. Figiel*, 2015 ABCA 19); even "not frivolous" (see *R. v. Shacklock*, 2000 NSCA 68).

[20] Regardless of how the term "sufficient merit" is articulated, it is clear that it has no independent life from its twin requirement under s. 679(4)(a) for proof of unnecessary hardship. An analysis of sufficient merit takes into consideration whether the time an appellant will spend in jail pending a sentence appeal is greater than the time spent in jail under a fit sentence. This analysis will involve weighing the likelihood a sentence will be reduced against the fact that if it is reduced, but interim release is denied, an appellant will have spent an unnecessary amount of time in jail. The following excerpt from Trotter, *The Law of Bail*, (s.10.3(b)(ii) at 10-38-10-39) is helpful to illustrate this point:

> Section 679(4)(*a*) of the *Criminal Code* requires the applicant to demonstrate that the appeal has sufficient merit such that the detention in custody pending the appeal would cause "unnecessary hardship."
>
> [. . .]
>
> Whatever the merits might be of substituting one expression for another, the "sufficient merit" standard has no independent life. The link between sufficient merit and unnecessary hardship is inextricable. It must be remembered that the determination under s. 679(4) takes place once it is determined that leave should be granted. Thus, s. 679(4) requires more. In simple terms, the thrust of this criterion is to preserve the integrity of the appellate process by attempting to prevent sentence appeals from becoming moot with the passage of time. The applicant must demonstrate that the appeal is sufficiently meritorious such that, if the accused is not released from custody, he/she will have already served the sentence imposed, or what would have been a fit sentence, prior to the hearing of the appeal. It prevents the applicant from serving more time in custody than what is subsequently determined to be appropriate. If this threshold cannot be reached, then release is not justified under s. 679(4)(*a)* for as Bryson J.A. said in *R. v. Johnston* (2014): "there is no unnecessary hardship in serving an appropriate sentence." In this sense, there is an unavoidable speculative dimension involved in the application of this criterion.

[21] Before leaving how "sufficient merit" has been described, I will refer to an *obiter* footnote to ¶ 41 in *Oland*. For context, Mr. Oland applied for bail pending appeal following his second degree murder conviction. His application was denied under the public interest criterion (s. 679(3)(c)). By the time of the hearing before the Supreme Court of Canada, the New Brunswick Court of Appeal allowed Mr. Oland's appeal from conviction and ordered a new trial. He was granted bail pending his re-trial. However, the parties and intervenors argued guidance was still needed from the Supreme Court of Canada to resolve inconsistent approaches to bail taken by appellate courts across the country respecting how the strength of the grounds of appeal from a conviction should be considered in determining whether detention is necessary in the public interest. The SCC found the appeal met the criteria established in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and proceeded to hear the appeal on its merits.

[22] Although s. 679(4) was not before the SCC in *Oland*, this *obiter* statement was made in footnote 2:

> **While it is not before us, a similar function may be fulfilled by the "sufficient merit" requirement for bail pending a sentence appeal under s. 679(4)(a) of the *Code*.** That provision reads:

> 679 . . .
>
> (4) In the case of an appeal [from sentence], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
>
> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
>
> [Emphasis added]

[23] I mention the footnote because it is attached to this paragraph in *Oland:*

> [41] In my view, allowing a more pointed consideration of the strength of an appeal for purposes of assessing the reviewability interest does not render the "not frivolous" criterion in s. 679(3)(a) meaningless. On the contrary, the "not frivolous" criterion operates as an initial hurdle that produces a categorical "yes" or "no" answer, allowing for the immediate rejection of a release order in the face of a baseless appeal.[2]

[24] With respect, it is not clear just how much can be inferred from the minor point reflected in the above footnote in *Oland*. Does it suggest "sufficient merit" in s. 679(4)(a) is also subject to the frivolous or non-baseless threshold? If so, that reasoning does not address the "unnecessary hardship" component of s. 679(4)(a), which delineates it from the leave requirement in s. 679(1)(b). More likely, it might simply imply that whatever the threshold is, if answered in the negative, this too allows for the immediate rejection of a release order. And, if answered in the positive, nothing stops a judge from further considering the strength of the grounds when weighing the twin principles of reviewability and enforceability under the public interest assessment.

[25] I do not see Justice Moldaver's brief *obiter* comment in *Oland* respecting the threshold in s. 679(4)(a) to uproot the authorities which establish that the "sufficient merit" test requires a more stringent threshold than s. 679(1)(b) (leave) and s. 679(3)(a) (not frivolous). I applied the more stringent threshold as set out in ¶ 20 to Mr. Mauger's appeal from sentence only.

[26] Turning to the second and third criterion under both ss. 679(3) and (4), there is direct overlap in their application (see *R. v. Watts*, 2016 ABCA 139). These sections provide:

> (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.

[27] The second criterion (b) requires the applicant to establish that they will surrender into custody in accordance with the terms of the release order. Relevant considerations include risk of flight and compliance with court orders.

[28] The third criterion (c) requires the applicant to establish that "detention is not necessary in the public interest." As I said earlier, the strength of the grounds of appeal also factors into the public interest assessment.

[29] In *Oland*, the SCC affirmed the well-known approach to the public interest criterion in *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.). In *Farinacci*, Arbour, J.A. (as she then was) considered the meaning of the words "public interest" in s. 679(3)(c). She said the public interest criterion consisted of two components, public safety and public confidence in the administration of justice. The public confidence component is more nuanced. It involves the weighing of two competing interests, enforceability and reviewability.

[30] These principles tend to conflict and must be balanced in the public interest. Public confidence in the administration of justice requires that judgments be enforced. Yet, public confidence in the administration of justice also requires that judgments be reviewed and errors be corrected.

[31] In *Oland*, the SCC elaborated (see ¶ 36 - 51) on the competing interests of enforceability and reviewability identified in *Farinacci* with particular focus on how the strength of the grounds of appeal factor in. I highlight these paragraphs, keeping in mind that in *Oland* the Court's focus was on s. 679(3) and its particular threshold requirement:

> [40] . . . in assessing the reviewability interest, the strength of an appeal plays a central role. I say this mindful of the fact that some authorities have expressed concerns about assessing the merits of an appeal beyond the s. 679(3)(a) "not frivolous" criterion: [citations omitted]. With respect, I do not see this as a problem.
>
> [. . .]
>
> [44] In conducting a more pointed assessment of the strength of an appeal, appellate judges will examine the grounds identified in the notice of appeal with an eye to their general legal plausibility and their foundation in the record. For purposes of this assessment, they will look to see if the grounds of appeal clearly surpass the minimal standard required to meet the "not frivolous" criterion. In my view, categories and grading schemes should be avoided. Phrases such as "a

> prospect of success", "a moderate prospect of success", or "a realistic prospect of success" are generally not helpful. Often, they amount to little more than wordsmithing. Worse yet, they are liable to devolve into a set of complex rules that appellate judges will be obliged to apply in assessing the category into which a particular appeal falls.
>
> [45] In the end, appellate judges can be counted on to form their own "preliminary assessment" of the strength of an appeal based upon their knowledge and experience. This assessment, it should be emphasized, is not a matter of guesswork. It will generally be based on material that counsel have provided, including aspects of the record that are pertinent to the grounds of appeal raised, along with relevant authorities. In undertaking this exercise, appellate judges will of course remain mindful that our justice system is not infallible and that a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual's interest in any given case.
>
> [. . .]
>
> [48] In balancing the tension between enforceability and reviewability, appellate judges should also be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence: *R. v. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), at paras. 41-42. Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful. In such circumstances, however, where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s. 679(10) of the *Code*. While this may not be a perfect solution, it provides a means of preserving the reviewability interest at least to some extent.
>
> [49] In the final analysis, there is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual assessment is required. . . .

[32] In concluding my review of the bail framework, I note that the bail process for a sentence appeal only is somewhat of a cumbersome exercise. This observation was captured in Trotter, *The Law of Bail*, (s. 10.3(b) at 10-36-10-37):

> …there is a good deal of overlap. The apparent merit of the appeal is obviously the sole consideration in s. 679(1)(b). However, it arises again in the balancing required in paragraph s. 679(4)(a) (sufficient merit and unnecessary hardship), and, after *Farinacci*, in the analysis required under the "public interest.' This whole subset of bail pending appeal could be much more straightforward. … the elements of s. 679(4)(a) are sufficiently accommodated by the "public interest" in paragraph 4(c). Parliament might consider removing paragraph (4)(a) from the *Code.*

[33] Although this is an interesting observation, I must apply the existing provisions of the *Code*. I will return to these principles and apply them to Mr. Mauger's circumstances after I set out the relevant background.

Circumstances of offences

[34] Around 3:30 a.m. on November 13, 2016, Mr. Mauger got out of bed. His wife (the proposed surety) and their children were sleeping at the time. According to Mr. Mauger's version of events, he was going out to buy drugs for a friend. It just happened to be at a building where the victim, Mr. Morrison, had an apartment.

[35] Mr. Mauger was on probation at the time. Yet, he took his wife's vehicle and headed over to the apartment building. The evidence was that Mr. Mauger had a gripe with Mr. Morrison, reportedly because Mr. Morrison had been calling Mr. Mauger "a rat" in the community.

[36] Although he downplayed the force, Mr. Mauger acknowledged kicking Mr. Morrison's apartment door. Mr. Morrison and his girlfriend were in bed asleep. Mr. Mauger entered the apartment and assaulted Mr. Morrison in his bedroom.

[37] After the altercation inside the bedroom, Mr. Morrison and Mr. Mauger ended up outside. The fighting continued until Mr. Mauger got back into his wife's vehicle. Mr. Morrison then broke the vehicle windshield with a lawn chair.

[38] Next, Mr. Mauger pinned Mr. Morrison against a nearby house with the vehicle. The trial judge accepted that Mr. Morrison told Mr. Mauger he was breaking his back and then Mr. Mauger stepped on the gas. Mr. Morrison suffered some serious internal injuries, including 18 fractures to his pelvis. Mr. Mauger claimed it was an accident and that he did not mean to pin Mr. Morrison against the wall.

[39] The trial judge, Judge Alain Bégin, rendered an oral decision on June 29, 2017. He accepted the evidence of the Crown witnesses (including that of Mr. Morrison and his girlfriend). He rejected the evidence of Mr. Mauger and explained why. He found that Mr. Mauger forced entry into Mr. Morrison's apartment, assaulted Mr. Morrison, and intentionally used the motor vehicle as a

weapon against Mr. Morrison. After hearing submissions on sentencing, Judge Bégin rendered an oral decision on September 11, 2017.

[40] On November 9, 2017, I set Mr. Mauger's appeal down for March 14, 2018. As the appeal book was nearing completion, I offered earlier appeal dates to Mr. Mauger. They were declined.

Mr. Mauger's criminal record

[41] Mr. Mauger was thirty years old at the time of the charges now under appeal. For a relatively young man, he has racked up a fairly lengthy criminal record. His JEIN and CPIC reports disclosed 22 prior criminal convictions between January 2005 to September 2014. In addition, his JEIN report showed twenty motor vehicle related convictions between July 2004 and December 2015.

[42] His criminal record is summarized below and includes the 2016 convictions not appealed:

> **2016** - Assault s.266(a); Forcible entry s.72(1); Breach of probation s.733.1
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> **2014** - Possession of substance (two counts) CDSA s.4(1)
>
> **2013** - Obstruct peace officer s.129(a); Failure to comply with recognizances s.145(3); Identity fraud (three counts) s.403(1)(a) (charges laid in 2011)
>
> **2007** - Possession for the purpose of trafficking CDSA s.5(2); Possession CDSA s.4(1); Obstruct peace officer (three counts) s.129(A); Failure to attend Court s.145(2)(a); Dangerous operation of a motor vehicle s.249(1); Personation with intent s.403(a); Possession of property obtained by crime over $5000 (two counts) s.355(a); Flight while pursued by peace officer s.249.1(1); Escape lawful custody s.145(1)(a)
>
> **2005** - Theft s.334(b)
>
> **2004** - Possession of stolen property s.354(1)(b)
>
> **2004** - Taking motor vehicle without consent s.335(1)

[43] Mr. Mauger was incarcerated for some of the above offences. At the time of the offences now under appeal, he was on probation for the 2014 drug possession offences.

Evidence/submissions at the motion hearing

[44] In the motion materials filed on Mr. Mauger's behalf, his counsel did not address s. 679(1)(b) and (4), which govern the release motion on his appeal against

sentence only. The record filed was limited. Although the sentence decision and submissions were provided, the trial judge's decision was not. Also, the proposed surety did not file an affidavit.

[45] I organized a telechambers call with counsel to discuss these matters and to offer a brief adjournment so Mr. Mauger's counsel could file a supplemental brief on the omitted submissions under s. 679(1)(b) and (4), provide additional aspects of the record (at least the trial decision) and provide time for the proposed surety to file an affidavit. The offer for adjournment was declined. Counsel for Mr. Mauger asked for permission to make only oral submissions respecting the release requirements for the appeal against sentence only and have the surety provide her direct evidence *viva voce*. The Crown did not object. I permitted the hearing to proceed as requested. Counsel did provide a transcript of the trial judge's oral decision.

[46] In his affidavit, Mr. Mauger proposed to be released on his own recognizance or, alternatively, have his wife, Amanda Bach, serve as a surety and post security of $5,000 by way of her motor vehicle. Ms. Bach acted in this capacity from November 16, 2016 until Mr. Mauger was sentenced on September 11, 2017. No incidences/breaches were reported during this time.

[47] Ms. Bach and Mr. Mauger have three young children (twins, age five, and a child, age three). Ms. Bach is employed, and Mr. Mauger stated he has good prospects of employment if released. The couple have been together since 2010.

[48] Both Mr. Mauger and Ms. Bach were cross-examined by the Crown. Mr. Mauger was dismissive of any relevance his prior criminal record might have. As well, aspects of his evidence were at odds with Ms. Bach's. For example, he suggested that they did not live together at the time he committed the 2011 offences, which he was convicted of in 2013. Whereas, in her evidence, Ms. Bach confirmed they were residing together, though Mr. Mauger did not disclose these offences to her. She only became aware when the police showed up at their door in 2013 looking for Mr. Mauger.

[49] Under cross-examination, Ms. Bach testified she was aware Mr. Mauger was under a probation order when he committed these current offences. She was also aware of his ongoing illegal drug use, which was contrary to the express terms of his probation order.

Position of the parties

[50] On the release request under s. 679(3), the Crown took this position: 1) it acknowledged the low "not frivolous" threshold under s. 679(3)(a) and in the absence of a more complete record it could not say the appeal was frivolous; 2) given Mr. Mauger's criminal record (which included charges for failing to attend court, escape from lawful custody, failure to comply with recognizance and beaching probation) and noting that he committed these most current offences while on probation, suggested that if released, Mr. Mauger may not respect an order to surrender as required; and, 3) Mr. Mauger's release was not in the public interest.

[51] In support of this last criterion (not in the public interest), the Crown identified these specific concerns:

1. Public safety and the protection of the victim if Mr. Mauger was released was of concern to the Crown. It submitted that when Mr. Mauger learned that the victim had labeled him a rat, he showed no restraint. Rather he broke into the victim's home in the middle of the night and attacked him—all while under a probation order. Further, his PSR noted static and dynamic factors which put Mr. Mauger at a high risk to re-offend. These factors include his criminal record, history of substance abuse and impulsivity. Also, Mr. Mauger's use of a motor vehicle as a weapon shows an increased danger, particularly in light of a prior conviction for dangerous driving. His 20 summary motor vehicle convictions speak to a disregard for complying with laws relating to motor vehicles. Taken together, the Crown argued these factors create a public safety concern.

2. Mr. Mauger does not have a strong release plan. The proposed surety, although well-intended, is unlikely to be able to effectively exercise a degree of control or supervision over Mr. Mauger. In the past, she has not been able to restrain him from committing offences even when he was under a probation order.

3. Additionally, although the grounds of appeal met the low "not frivolous" threshold, they are not otherwise particularly strong and the

> principle of enforceability of the judgment should prevail over reviewability considering the overall context.

[52] On the issue of leave, s. 679(1)(b) and the release request under s. 679(4), the Crown took this position:

> 1. Leave should be denied as Mr. Mauger has failed to raise any arguable issue. He failed to identify any authority that indicates the sentence of one year imposed for forcible entry is manifestly excessive or in contravention of any sentencing principles.
>
> 2. Should leave be granted, the grounds of appeal do not meet the "sufficient merit" threshold. And there is nothing to suggest the sentence is not a fit and proper sentence.
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> 3. Respecting the criterion in s. 679(4)(b) and (c) the submissions were in-line with those under s. 679(3)(b) and (c).

[53] On his release motion, Mr. Mauger's focus was on the more serious assault with a weapon charge (s. 267(a)), which attracted a sentence of four and a half years. As noted, his written submissions failed to address leave under s. 679(1)(b), and the relevant release criteria under s. 679(4) respecting his appeal against sentence only.

[54] As to all the grounds of appeal, apart from claiming they had merit and were not frivolous, nothing really substantive was offered in support. Respecting his obligation to surrender as ordered, Mr. Mauger noted his compliance with his release conditions during the period between being charged and his sentence date. He argued that was more relevant than his history of breaches/and non-compliance with court orders. Mr. Mauger submitted his detention was not necessary in the public interest and more specifically, the reviewability principle overshadowed that of enforceability.

Grounds of appeal

[55] Although the Crown effectively conceded that the grounds of appeal respecting the s. 267(a) charge met the low "not frivolous" threshold required under s. 679(3)(a), that does not end my requirement to consider their merits under (c).

[56] The grounds of appeal are as follows:

1. That the trial judge erred in failing to address and consider the inconsistency and contradiction between the evidence of the Complainant at trial on the location and movement of the Appellant's vehicle when he put the chair through the windshield of the vehicle and the evidence of the Complainant on this same point contained in his sworn statement given to the police.

2. That if the trial judge had assessed and analyzed the inconsistent and contradictory evidence of the Complainant on this material fact, he could have or should have concluded that the evidence of the Complainant was unreliable to raise a reasonable doubt.

3. That the trial judge erred when he excluded the equally probable scenario that the Appellant acted negligently when he did not look behind when he was backing his vehicle out of the driveway.

4. That had the trial judge not excluded the equally probable scenario referred to in Paragraph 3, he could have or should have concluded that the Appellant could have put up his arms in defence of the broken glass as the Appellant testified to.

5. That had the trial judge not excluded the equally probable scenario referred to in Paragraph 3 herein, he could have and should have concluded that the Appellant could have lost control of his vehicle when he put up his arms in defence of the broken glass and backed into the house.

6. That the judge erred in finding that Photographs 170, 171, 172, 173, 174, 175 and 180 provided conclusive evidence that there was very little glass in the van.

7. That the trial judge erred in rejecting the Appellant's evidence on how the Complainant was accidently pinned to the house by simply concluding "The physics as to how Mr. Morrison would have been pinned accidently against the house by the van don't make sense".

8. That the trial judge erred in failing to provide a factual foundation and/or evidentiary foundation to support his rejection of the Appellant's evidence based upon "physics".

9. That the trial judge erred in not excluding the evidence of the witness, Katelyn Rosy, when this witness was present in the courtroom when the Complainant was giving evidence.

10. That the trial judge erred in placing too much emphasis on the principles of denunciation and deterrence and not enough emphasis on rehabilitation in passing sentence on the convictions for assault and assault with a weapon.

11. That the trial judge erred in not conducting a proper analysis of mitigating factors balanced against aggravating factors.

12. That the trial judge erred in placing too much emphasis on aggravating factors and too little emphasis on mitigating factors in passing sentence on the convictions for forcible entry and assault with a weapon.

13. That the sentence of 1 year in custody concurrent on the forcible entry conviction was manifestly unfair, unjust and excessive in all the circumstances.

14. That the sentence of 4.5 years in custody on the assault with a weapon conviction was manifestly unfair, unjust and excessive in all the circumstances.

[57] Grounds 1-11 and 14 pertain to the s. 267(a) conviction and sentence. Grounds 12 and 13 and perhaps 11 address the appeal against sentence only on the s. 72(1) conviction.

[58] I questioned Mr. Mauger's counsel on the grounds of appeal and whether he could point me to something in the limited record to support his complaint of error. Dealing with the grounds of appeal on sentence only, the main complaint was that there was no comprehensive analysis. Mr. Mauger questioned why he only received four months on the assault charge and twelve on the forcible entry – particularly when the maximum penalty for assault was greater. He submitted the offences might be equally egregious, thus the varied sentences are inconsistent. Apart from these broad statements, Mr. Mauger did not point to any specific contravention of sentencing principles in the record, nor did he put forth any authority to suggest the one year sentence for forcible entry was manifestly excessive.

[59] Regarding the balance of the grounds of appeal, as noted, apart from reciting them, not much more was offered up by way of support. Also, grounds 1-8, on their face, appear to complain about how the judge treated the evidence in arriving at his findings of fact and assessment of credibility. The trial judge is tasked with fact-finding and assessing credibility, which was a central issue in this case. Deference is afforded on appellate review.

[60] Ground 9 complains about the trial judge not excluding a witness from the courtroom. I asked Mr. Mauger's counsel (who was also trial counsel) whether he made a motion to exclude this or any witness. He did not. He acknowledged that perhaps this was not one of his strongest grounds of appeal, yet still maintained the trial judge erred.

[61] Having set out the applicable legal principles and relevant background, I will now explain why I rejected Mr. Mauger's motion for release pending appeal.

Release under s. 679(4) – sentence appeal

[62] I will start with the release request on the sentence appeal only. I reluctantly granted leave to appeal under s. 679(1)(b). A refusal of leave would end this aspect of Mr. Mauger's appeal. Although the grounds appear problematic, I have a limited record before me. Furthermore, there is intermingling with grounds 11 and 12 respecting the appeal against sentence only and the appeal against both conviction and sentence. And, as noted, the Crown conceded that the grounds of appeal were "not frivolous" for the purpose of the appeal against both conviction and sentence (s. 267(a) charge) under s. 679(3)(a). In these circumstances, I was not prepared to foreclose his sentence appeal on the s. 72(1) conviction, as I accepted there might be an arguable point. A panel will ultimately determine whether the grounds have merit.

[63] Moving to s. 679(4)(a), Mr. Mauger has failed to satisfy me, on a balance of probabilities, that the appeal has sufficient merit that in the circumstances it would cause unnecessary hardship if he were detained in custody.

[64] This criterion preserves the integrity of the appellate process by attempting to prevent sentence appeals from becoming moot with the passage of time. It guards against an appellant serving more time in custody than they should. Mr. Mauger had to demonstrate that his sentence appeal was sufficiently meritorious such that, if he was not released from custody, he will have served the sentence imposed, instead of what would have been a fit sentence, prior to the appeal hearing. He did not meet this threshold; thus, his release is not justified under s. 679(4)(a).

[65] This was a serious offence. In the middle of the night, Mr. Mauger forced entry into the victim's private home and assaulted him in his bedroom in the presence of his girlfriend. Mr. Mauger did not appeal the s. 72(1) conviction, nor assault conviction. They stand. Given the circumstances of the offence, having reviewed the sentencing submissions and applicable principles considered by the trial judge, and considering the frail grounds of appeal, it is doubtful that his one year concurrent sentence for forcible entry would be lowered on appeal.

[66] At the time this motion was heard, Mr. Mauger was still serving out his four month sentence on the assault charge, and his statutory release date for the s. 72(1) conviction is May 12, 2018. The appeal hearing is set for March 14, 2017. To repeat what Justice Bryson said in *Johnston,* "there is no unnecessary hardship in serving an appropriate sentence."

[67] Having failed to meet the requirement of s. 679(4)(a), I need not deal with (b), the obligation to surrender as ordered, or (c), the public interest assessment. That said, I will, for the benefit of Mr. Mauger.

[68] Respecting the obligation to surrender as ordered, although there is concern given Mr. Mauger's violation of previous court orders that he will not surrender, I do not see this as a substantial risk.

[69] The public interest is another matter. Mr. Mauger failed to satisfy me, on a balance of probabilities, that his detention is not necessary in the public interest. That determination is based upon the following factors:

> 1. Frail grounds of appeal. Further, it is difficult to disturb sentencing decisions on appeal because deference is accorded to them by appeal courts (see *Johnston* and *R. v. E.M.W.*, 2011 NSCA 87).
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> 2. I have explained, based on the review of the materials before me, it is unlikely Mr. Mauger's one year sentence for his s. 72(1) conviction would be disturbed. Given the appeal date, there is no apparent issue of anticipated delay in deciding an appeal, relative to the length of the sentence.
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> 3. The offence was serious and violent. Mr. Mauger's criminal record is of concern. His PSR noted static and dynamic factors which suggest a high risk to re-offend. These factors include his criminal record, history of substance abuse and impulsivity. There is an element of concern for public safety.
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> 4. Although, I found there was not a substantial risk that Mr. Mauger would fail to surrender as required, nevertheless there are lingering concerns whether he will comply. That is because of his previous non-compliance and breaches of orders. Lingering concerns that fall short of a substantial risk are still relevant (see *Oland* ¶ 39).
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> 5. The release plan is not strong. The proposed surety is no doubt well-meaning; however, it is unlikely she will be able to effectively exercise a degree of control or supervision over Mr. Mauger. In the past, she has not been able to restrain him from committing offences, even when he was under a probation order.

[70] In balancing the tension between enforceability and reviewability, I am mindful that public confidence is measured through the eyes of a reasonable member of the public, meaning a person who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values.

[71] In my view, a reasonable member of the public would believe that, in these circumstances, Mr. Mauger's detention is necessary to maintain public confidence in the administration of justice.

Release under s. 679(3) – appeal against both conviction and sentence

[72] Given my findings regarding Mr. Mauger's motion for release under s. 679(4), I need not address his motion for release under s. 679(3); however, again for Mr. Mauger's benefit, I will briefly address why his motion for release also failed under s. 679(3)(c).

[73] As noted, the Crown conceded Mr. Mauger met the threshold under s. 679(3)(a), which is not an unreasonable concession given the low threshold and limited record. My assessment of the obligation to surrender under s. 679(3)(b) is the same as ¶ 68.

[74] Respecting the public interest assessment under s. 679(3)(c), Mr. Mauger similarly failed to satisfy me, on a balance of probabilities, that his detention is not necessary in the public interest. My reasons are the same as set out in ¶ 69 with one refinement – that being a specific mention of the strength of the grounds of appeal that relate to the appeal from his s. 267(a) conviction and related sentence. Although the grounds passed the low bar in s. 679(3)(a), they do not appear to be strong. And further, they seem to complain about findings that appear to be in the deferential domain of the trial judge. Again, in these overall circumstances, enforceability must prevail over reviewability.

Conclusion

[75] Motion for release dismissed.

Van den Eynden, J.A.