

COURT OF APPEAL OF
NEW BRUNSWICK



COUR D'APPEL DU
NOUVEAU-BRUNSWICK

64-19-CA

B E T W E E N :

E N T R E :

FREDERICK ROBICHAUD

FREDERICK ROBICHAUD

APPELLANT

APPELANT

- and -

-et-

HER MAJESTY THE QUEEN

SA MAJESTÉ LA REINE

RESPONDENT

INTIMÉE

Motion heard by:
The Honourable Justice Baird

Motion entendue par :
l'honorable juge Baird

Date of hearing:
October 4, 2019

Date de l'audience :
le 4 octobre 2019

Date of decision:
October 8, 2019

Date de la décision :
le 8 octobre 2019

Counsel at hearing:

Avocats à l'audience :

Frederick Robichaud, on his own behalf

Frederick Robichaud, en son propre nom

For the respondent:
Damien N. B. Lahiton

Pour l'intimée :
Damien N. B. Lahiton

DECISION

I. Introduction

[1] On May 31, 2019, Mr. Robichaud was sentenced to serve a term of twenty-four months for the following offences under the *Criminal Code*, R.S.C. 1985, c. C-46:

- a) Production of cannabis/marijuana: 18 months incarceration (s. 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, Schedule II);
- b) Uttering a death threat to Constable Levesque: four months incarceration consecutive (s. 264.1(1)(a) of the *Code*);
- c) Resisting arrest: two months incarceration consecutive (s. 129(a)(d) of the *Code*);
- d) Careless storage of a firearm: one month incarceration concurrent (s. 86(2) of the *Code*).

[2] In addition, a mandatory prohibition order issued pursuant to s. 109 of the *Code* for a period of ten years, as well as an order pursuant to s. 487.051(3)(b) to provide samples of bodily substances. A forfeiture order issued pursuant to s. 16 of the *Controlled Drugs and Substances Act*, with respect to the following items of personal property:

- i. Loaded shotgun;
- ii. ATV four-wheeler;
- iii. Generator; and
- iv. 250 marijuana plants.

[3] Mr. Robichaud filed a Notice of Appeal on June 18, 2019, in which he asserts the following errors:

- a) “Unlawful search of land no warrant”;

- b) “Unlawful search of car no warrant”;
- c) “Unlawful search of home no warrant”;
- d) “Unlawful search of trail cam no warrant”;
- e) “Sentencing judge never seen video if sentencing judge had seen video maybe he would not have been so harsh on sentencing”;
- f) “Prejudice from start to finish”;
- g) “Fabricating evidence”.

[4] Mr. Robichaud appears before this Court seeking an order for interim judicial release pending the hearing of his appeal. His release date is set for September 29, 2020. I am advised the transcript is anticipated by the end of October 2019. Mr. Robichaud’s motion engages the provisions of ss. 679(1) and (3) of the *Code*, where jurisdiction is granted to an appellate court to release an accused pending his or her appeal against conviction or when an accused has been granted leave to appeal his or her sentence. In this case, Mr. Robichaud seeks leave to appeal his sentence and he appeals his conviction.

II. Background

[5] The circumstances surrounding Mr. Robichaud’s arrest were summarized by the sentencing judge. Additional information was provided by way of affidavit filed by R.C.M.P. officer, Constable Lebeau, the file coordinator responsible for the file management and disclosure in this case, and who was present for the majority of the court appearances.

[6] On August 22, 2016, near Acadieville, Kent County, Constable Lebeau and Corporal Randy Francis were flying in a helicopter to locate outdoor marijuana grow operations, when they located approximately 500 marijuana plants. The plants were dispersed with other crops that inter-connected with trails leading to a small camping trailer. An ATV was situated close to the trailer. An R.C.M.P. team was dispatched to the location. A loaded shotgun and ammunition were found on a bed inside the trailer. A trail

camera was observed, along with a small green house which housed a few mature marijuana plants in buckets.

[7] While the R.C.M.P. were seizing the marijuana plants and equipment, Mr. Robichaud drove into the yard in a vehicle, pointing an object at the R.C.M.P. members, which was later determined to be a cellphone.

[8] In spite of numerous requests to exit his vehicle, and with two R.C.M.P. officers pointing their guns towards him, Mr. Robichaud refused. Following an altercation with the officers, during which the driver's side window was broken and he was pepper sprayed while bracing himself against the door frame of the vehicle, Mr. Robichaud was handcuffed and placed in an R.C.M.P. vehicle and read his *Charter* rights. He was later charged with the offences noted.

[9] In a warned statement, Mr. Robichaud self-identified as a "Free Man of the Land" and advised the police officers if he had witnessed them "cutting" his plants he would have shot them.

[10] In his sworn affidavit, Constable Lebeau states that Mr. Robichaud said: "If there would be more Justin Bourque, it would wise us up and wonder how many police will have to die before they smart-up".

[11] Further evidence before me revealed that Mr. Robichaud has had prior interactions with the police. More particularly, in October 2013, during a shale gas protest in Rexton, New Brunswick, Mr. Robichaud ran towards, and tackled an R.C.M.P. officer, holding him by the chest and attempting to grab the officer's firearm. Other reported incidents involving loud, aggressive behavior towards police officers have occurred on September 1, 2017, December 8, 2017, July 14, 2018, and January 14, 2019.

[12] At para. 26(f) of Constable Lebeau's affidavit, he deposes:

Frederick Robichaud stated on many occasions that he was identifying himself as a "Free Man of the Land". He was not considering the Codes and Acts that the police are using. His behaviour with law enforcement officers are belligerent and

confrontational, and pose a risk for police officers if released pending his appeal.

III. Analysis

[13] The circumstances under which an accused may be released pending his or her appeal are found in s. 679(3) of the *Code*. It is the appellant's burden to establish that the:

- a) appeal or application for leave to appeal is not frivolous;
- b) he or she will surrender himself or herself into custody in accordance with the terms of the order; and
- c) his or her detention is not necessary in the public interest.

A. *Is the appeal frivolous?*

[14] Mr. Robichaud advances the following grounds of appeal:

- i) He contends there was an unlawful search of his land, car, home and trail camera because there was no warrant obtained by the R.C.M.P. prior to the search;
- ii) He accuses the police of fabricating evidence and falsifying evidence;
- iii) He submits it was an error for him not to have had the same judge at the sentencing hearing, and that the sentencing judge did not have all of the video footage which recorded his arrest. On this ground, the sentencing judge invoked s. 669.2(1) of the *Code* at the beginning of his reasons.

[15] During the five days of hearings prior to the trial itself, there were an assortment of evidentiary rulings concerning (i) and (ii) above. The Court will have the benefit of the full transcript at the hearing of this appeal, and will decide the merits of the

grounds advanced. In the circumstances, Mr. Robichaud bore the onus to establish why his appeal is not frivolous. He has failed to do so.

B. *Will the appellant surrender himself into custody?*

[16] Turning to whether Mr. Robichaud would surrender himself into custody in accordance with the terms of any order I might make for judicial interim release, the Crown argues that because Mr. Robichaud identifies as a Free Man of the Land “who does not accept, nor does he respect, man made laws, there is no guarantee that he would obey the terms and conditions of that order.” I agree.

C. *Is the appellant’s detention necessary in the public interest?*

[17] In my view, the strongest argument militating against Mr. Robichaud’s release is found in s. 679(3)(c) and is sufficient alone, for me to conclude whether his detention is not necessary in the public interest. This is the public safety component discussed in *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, where the Supreme Court states that s. 679(3)(c) is comprised of two components: “public safety” and “public confidence in the administration of justice” (paras. 23-26). The following facts are considered in my contextual analysis on this issue (*Oland*, at para. 49). They are:

- a) Mr. Robichaud has had several aggressive encounters with the police;
- b) Mr. Robichaud has a criminal record, notably, relating to the incident in 2013, when he physically assaulted an R.C.M.P. officer and tried to grab his firearm and resisted arrest;
- c) Mr. Robichaud uttered a death threat against the R.C.M.P. when he referred to Justin Bourque in his warned statement, as noted;
- d) Mr. Robichaud’s self-professed identification as a “Free Man of the Land” places him at risk for further violations of the law (see *R. v. McCormick*, 2012 NSCA 58, [2012] N.S.J. No. 285 (QL)).

[18] In my view, this is a case where public confidence in the administration of justice would be seriously eroded should Mr. Robichaud be released pending his appeal (*Oland*, at para. 24).

[19] Uttering a death threat against a police officer represents a serious crime. Given the heightened public awareness in New Brunswick, involving recent incidents where police officers have been fatally shot while discharging their duties, the public confidence factor is elevated in this case. In addition, the illegal cultivation of marijuana is a serious crime. It is more so, when it is accompanied by a sophisticated operation which includes a trail camera and trails leading to a trailer in which there is a loaded shotgun with extra ammunition.

[20] The transcript will be available late October 2019, as noted. Mr. Robichaud was sentenced on May 31, 2019. His Notice of Appeal was filed June 18, 2019. His release date is scheduled for September 2020, as noted. In balancing the tension between enforceability and reviewability, as was stated by the Supreme Court in *Oland* (para. 48), any unreasonable delay in this case is outweighed by the other factors considered in these reasons.

IV. Disposition

[21] The motion for judicial interim release is dismissed.

[22] Pursuant to s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, these reasons are released in the English language first with reasons in the other official language to follow.