Court of Appeal for Ontario

R. v. Farinacci

Date: 19931108

Docket: c10791

c13886

c11372

The judgment of the court was delivered by

ARBOUR J.A.:— This court heard an application by Leonard William Farinacci, pursuant to a direction of the Chief Justice of Ontario under s. 680(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, for review of the decision of Labrosse J.A. denying Farinacci's application for bail pending appeal. Farinacci raised a preliminary issue regarding the constitutionality of s. 679(3)(c) of the *Criminal Code*, which permits the denial of bail pending appeal on the ground of "public interest", in light of recent decisions by the Supreme Court of Canada in *R. v. Morales* (1992), 1992 CanLII 53 (SCC), 77 C.C.C. (3d) 91, [1992] 3 S.C.R. 711, 17 C.R. (4th) 74 (S.C.C.), and *R. v. Pearson* (1992), 1992 CanLII 52 (SCC), 77 C.C.C. (3d) 124, [1992] 3 S.C.R. 665, 17 C.R. (4th) 1 (S.C.C.). The two other applicants, Guy Paul Morin and William Wade, were granted permission to intervene, as was the Attorney-General of Canada. Morin and Wade had applied for bail pending appeal and their applications, which were returnable before a single judge of this court pursuant to s. 679 of the *Criminal Code*, were adjourned pending disposition of the constitutional question. Farinacci's application was dismissed on January 21, 1993, with reasons pertaining to the facts of his application given orally. The reasons on the constitutional issue were reserved.

The constitutional issue arises as a result of the decision of the Supreme Court of Canada in *R. v. Morales*, *supra*. In *Morales* the Supreme Court struck out the words "in the public interest" from s. 515(10)(b) of the *Criminal Code* on the ground that, in the pre-trial context, the expression was too vague to comply with an accused's constitutional right not to be deprived of bail without just cause, as enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*.

The applicants submit that they have a constitutional right to bail pending appeal, based on either s. 11(e) or on ss. 7 or 9 of the *Charter*. They argue further, on the basis of *Morales*, that s. 679(3)(c) is unconstitutionally vague, cannot be saved under s. 1 of the *Charter*, and should be read down to include only the protection and safety of the public. Read in that manner, statutory entitlement to bail pending appeal would be identical to entitlement to pre-trial release, except for the requirement, which the applicants concede is valid, that an applicant show that his appeal is not frivolous, per s. 679(3)(a) of the *Criminal Code*. The applicants took no issue with having the burden to justify their post-conviction release, under the terms of s. 679. All three faced a reverse onus clause in their pre-trial bail application, by virtue of s. 515(6) of the *Code*.

The respondent, supported by the Attorney-General of Canada, submits that there is no constitutional entitlement to bail pending appeal and that *Morales* must be distinguished on that basis. The respondent submits, alternatively, that in the post-conviction context the "public interest" criterion is not unconstitutionally vague and that if it is impermissibly vague, such vagueness is a reasonable limit within s. 1 of the *Charter*.

I. Relevant Criminal Code and Charter provisions

Section 679 of the *Criminal Code* reads, in part as follows:

> 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; or
> >
> > (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.
>
> (3) In the case of an appeal referred to in paragraph (1)(a) or (c), 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
>
> > (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.

The following sections of the *Canadian Charter of Rights and Freedoms* are also relevant:

> 11. Any person charged with an offence has the right
>
> > (e) not to be denied reasonable bail without just cause;
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> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

II. The constitutional right to bail pending appeal

(1) Section 11(e)

In my opinion, the applicants cannot bring themselves within the ambit of s. 11(e) of the *Charter*. As a general rule, the rights enumerated in s. 11 are given to persons "charged with an offence", and, as such, are pre-trial or trial rights which are exhausted by a verdict: *R. v. Potvin*, *R. v. Gallagher*, *R. v. Frazer*, S.C.C. August 12, 1993 [since reported 1993 CanLII 113 (SCC), 83 C.C.C. (3d) 97, 105 D.L.R. (4th) 214, [1993] 2 S.C.R. 880; 1993 CanLII 110 (SCC), 83 C.C.C. (3d) 122, [1993]. 2 S.C.R. 861, 16 C.R.R. (2d) 287; 1993 CanLII 111 (SCC), 83 C.C.C. (3d) 126, [1993] 2 S.C.R. 866, 16 C.R.R. (2d) 283, respectively]. This certainly is the case of s. 11(e). Sopinka J. remarked in *Potvin*, *supra*, at p. 12 [p. 107 C.C.C., p. 224 D.L.R.] of his reasons, that s. 11(e) of the *Charter* could not apply to a person who has been acquitted and is a respondent in a Crown appeal. The applicants argue that after a conviction there is a residual presumption of innocence sufficient to support the application of s. 11(e). I disagree.

The right not to be denied reasonable bail without just cause is rooted in the presumption of innocence, which is substantially spent by the conviction. Indeed, the presumption of innocence is spent by the verdict, be it a conviction or an acquittal. A conviction does not create a presumption of guilt. It constitutes a legal, conclusive finding of guilt. Like an acquittal, it is enforceable unless and until reversed. After a conviction, there is no presump-tion left, one way or the other. There is an enforceable finding of guilt.

The applicants seek support for their contention that the presumption of innocence is not exhausted by the conviction in the following passage from R*. v. Pearson*, *supra*, at p. 137, by Chief Justice Lamer:

> The interaction of ss. 7 and 11(d) is also nicely illustrated at the sentencing stage of the criminal process. The presumption of innocence as set out in s. 11(d) arguably has no application at the sentencing stage of the trial. However, it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt: *R. v. Gardiner* (1982), 1982 CanLII 30 (SCC), 68 C.C.C. (2d) 477, 140 D.L.R. (3d) 612, [1982] 2 S.C.R. 368. The court in *Gardiner* cited with approval at p. 515 the following passage from J.A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 121: " `... because the sentencing process poses the ultimate jeopardy to an individual ... in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process' ".
>
> Although, of course, *Gardiner* was not a *Charter* case, the problem it confronted can readily be restated in terms of ss. 7 and 11(d) of the *Charter*. While the presumption of innocence as specifically articulated in s. 11(d) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would. The specific application of the right would take account of the serious consequences adverted to in the passage from Olah, cited by the court in *Gardiner*.

I do not think that this passage suggests that there is a presumption that the accused is innocent of the very offence for which he or she has been convicted, which survives the conviction. In its due process embodiment, the presumption of innocence is a direction to state officials to proceed as though guilt were an open question. It directs the process by which factual guilt may be transformed into a legal

finding of guilt (see Packer, Herbert L., *The Limits of the Criminal Sanction*, California: Stanford Uni-versity Press, 1968, pp. 161-3). When the inquiry into guilt, i.e., the trial, has been completed, there is no meaningful presumption of innocence left with respect to that offence. The appellate process, which contains its own due process requirements, is not required to treat guilt as an open question.

The legislative history of s. 679(3)(c) of the *Criminal Code* does not suggest that this provision is based on the presumption of innocence as that concept became embodied in the *Charter*. There is no doubt that the *Bail Reform Act*, S.C. 1970-71-72, c. 37, liberalized access to bail both at the pre-trial stage and pending appeal. The Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections, 1969 (Roger Ouimet, Chairman), stated, at p. 126:

> It is clear to the Committee that bail pending appeal is more liberally granted in some provinces than in others. Fully recognizing that some variation in practice in different provinces may be warranted by particular local conditions, at particular times, the adoption of different *principles* with respect to the granting of bail pending appeal is not desirable. In the opinion of the Committee, the principle that bail will only be granted pending appeal in *exceptional* circumstances is too restrictive, having regard to the more liberal policy with respect to bail which the Committee has recommended should be adopted prior to the trial of the accused. Moreover, the rule of exceptional circumstances does not provide sufficiently precise guidance for the judge to whom the application is made.
>
> The Committee has taken the view that an accused who is not yet proved guilty should not be kept in custody unless it is necessary for the protection of the public, or to ensure his appearance at his trial. The Committee has taken the position that the onus should rest upon the prosecution to justify pre-trial detention, and not upon the accused to justify his release.
>
> *It would seem, however, that after the conviction the onus should rest upon the applicant to justify release on bail pending appeal. While he is no longer entitled to be presumed to be innocent, he may nevertheless not be guilty. If he is denied bail and is acquitted by the court of appeal, an injustice has resulted.*

(Emphasis added.)

These comments do not suggest to me that bail pending appeal is perceived as resting on the presumption of innocence, even though the possibility that the appeal may ultimately lead to an acquittal, either directly or after a new trial, is a prerequisite to any logical entitlement to bail.

Justice does not require prescience. Before trial, if there was just cause to deny bail, even though the accused is acquitted at trial, there has been no violation of the principles of fundamental justice. In the same way, if a conviction is overturned on appeal and the appellant was denied bail pending appeal, there would have been an injustice only if bail was unjustly denied. The granting of bail only in "exceptional circumstances", which, according to the Ouimet Report, was the standard before the major reform of the law of bail in the early seventies, may have led to such injustices.

But it does not follow that the criterion for granting bail before trial and after conviction must be the same.

The contrast between bail resting on the presumption of innocence, prior to trial, and bail pending appeal is illustrated in *R. v. Baltovitch* (1992), 1992 CanLII 7538 (ON CA), 10 O.R. (3d) 737, 59 O.A.C. 72, 17 W.C.B. (2d) 361 (Ont. C.A.). Baltovitch was convicted of second degree murder and applied for bail pending appeal. Before considering whether his detention was necessary in the public interest, Goodman J.A. said, at pp. 738-9:

> On the basis of the material filed and submissions made, it is apparent that the appeal is not frivolous. The grounds relied on contain matters of substance and are clearly arguable.
>
> I am not persuaded, however, that he has satisfied the burden of establishing that he will surrender himself into custody in accordance with the terms of any order made. I do not overlook the fact that the applicant was released by order of this court pending his trial, and that the court was satisfied that he would surrender himself for trial (see *R. v. Baltovitch* (1991), 1991 CanLII 7308 (ON CA), 6 O.R. (3d) 11, 68 C.C.C. (3d) 362 (C.A.)), At that time, the court was reviewing a decision of Trainor J. who refused an interim judicial release order on the secondary ground. In granting a release order, Doherty J.A. said at p. 13 O.R., pp. 364-65 C.C.C., in delivering judgment for the court:
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> > "In our view, the evidence as revealed to this point does not permit any firm conclusion as to the probability of conviction. In so holding we do not usurp the role of the jury, nor do we express any conclusion or opinion as to the applicant's guilt. Rather, we hold that the evidence is not so cogent as to provide a satisfactory basis for the continued pre-trial detention of the applicant."
>
> The position of the applicant has changed drastically since that order was made. At that time, he enjoyed the presumption of innocence. Evidence at trial indicated that he had expressed the opinion prior to trial that he would be acquitted and that there was no chance that anyone would find the body. He was a well-educated young man without any prior criminal record and a member of a respected family, the members of which were prepared to be his sureties. In those circumstances, it would be a reasonable inference from the facts that he would appear for his trial. The burden of establishing that he would surrender himself is somewhat easier to satisfy in those circumstances than it is after a conviction.
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> His present situation is now greatly different. The case for the prosecution has been shown to be sufficiently strong that a jury has convicted him of murder. He no longer is presumed to be innocent. He has been sentenced to life imprisonment without eligibility for parole for a period of seventeen years, a prospect which might reasonably be expected to have a negative affect on a decision to surrender into custody. His position has changed from one of a young unattached male with a reasonable hope or expectation of being acquitted of the charges of murder to that of a young unattached male facing a lengthy term of imprisonment subject to a very real uncertainty with respect to the success of his appeal.

These reasons demonstrate the fallacy of the applicants' contention that their entitlement to bail pending appeal should be the same as their entitlement to bail before trial, provided only that they show that their appeals are not frivolous.

(2) *Section 9*

I can find no basis upon which to conclude that s. 679(3)(c) of the *Code* infringes upon the applicants' right not to be arbitrarily detained, provided for in s. 9 of the *Charter*, other than the arguments based on the doctrine of vagueness. I will address these arguments more fully below.

(3) *Section 7*

The presumption of innocence

Although the applicants cannot successfully rely on a residual presumption of innocence contained in s. 7 of the *Charter*, there may be other ways in which s. 7 can provide them with a basis upon which to anchor a constitutional entitlement to bail pending appeal. I am prepared to assume that such is the case, for the sole purpose of this application, and to assess the constitutionality of 679(3)(c) accordingly.

(b) Residual liberty interest

I cannot accept the respondent's contention that there can be no resort to s. 7 of the *Charter* in this case because s. 679(3) of the *Criminal Code* is not a provision which "authorizes" imprisonment but rather a provision which enhances liberty. There is, in my view, a sufficient residual liberty interest at stake in the post-conviction appellate process to engage s. 7 in some form. In *R. v. Gamble* (1988), 1988 CanLII 15 (SCC), 45 C.C.C. (3d) 204, [1988] 2 S.C.R. 595, 66 C.R. (3d) 193 (S.C.C.), the Supreme Court held that non-eligibility for parole encompassed enough of a residual liberty interest to come within the ambit of s. 7.

The contention that bail pending appeal is a privilege rather than a right and, as such, escapes the reach of s. 7, is unacceptable in the *Charter* context. The proper approach was set out by Wilson J. in *Singh v. Canada (Minister of Employment and Immigration)* (1985), 1985 CanLII 65 (SCC), 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177, 14 C.R.R. 13 (S.C.C.), where she endorsed the dissenting comments of Laskin C.J.C. in *R. v. Mitchell* (1975), 1975 CanLII 167 (SCC), 24 C.C.C. (2d) 241, 61 D.L.R. (3d) 77, [1976] 2 S.C.R. 570 (S.C.C.), to the effect that procedural fairness is required in the revocation of parole even though a parolee has no absolute right to be released on parole in the first place. The respondent's submission that s. 7 does not apply to bail pending appeal because, after conviction and sentence to a term of imprisonment, bail operates to enhance rather than to restrict liberty, proceeds from the same formalistic and narrow analytical approach which has no place in the interpretation of constitutionally protected rights. In so far as the state purports to act to enhance life, liberty or security of the person, it incurs the responsibility to act in a non-arbitrary, non-discriminatory fashion and cannot deprive some persons of the benefits of the enhancement without complying with the principles of fundamental justice.

I find it unnecessary, however, to express an opinion as to the exact foundation or scope of any right to bail pending appeal which may be contained in s. 7. It is sufficient, for the purpose of this application, to canvass two alternative sources advanced by the applicants, under which they claim that their entitlement to constitutional protection against vagueness within the ambit of s. 7.

(c) Reviewability as a principle of fundamental justice

The principles of fundamental justice are not enumerated in s. 7 of the *Charter*. In order to determine whether a statutory right or a principle of law is elevated to that constitutional status, one must examine the nature of the right or principle, its source, rationale and the essential role that the right or

principle has come to play in the evolution of our legal system (*Reference re: s. 94(2) of Motor Vehicle Act* (1985), 1985 CanLII 81 (SCC), 23 C.C.C. (3d) 289 at p. 310, 24 D.L.R. (4th) 536 at p. 558, [1985] 2 S.C.R. 486 (S.C.C.).

There is no constitutionally entrenched right of appeal, in the sense that s. 24 of the *Charter* does not create an appellate structure of courts to review decisions allowing or dismissing a *Charte*r claim. Thus an appeal from a *Charter* ruling, interlocutory to a criminal trial, cannot be launched prior to the conclusion of the trial, unless a statutory avenue for such an appeal exists: see *R. v. Morgentaler* (1984), 16 C.C.C. (3d) l, 1984 CanLII 55 (ON CA), 14 D.L.R. (4th) 184, 48 O.R. (2d) 519 (Ont. C.A.); *R. v. Adamson* (1991), 1991 CanLII 11726 (ON CA), 65 C.C.C. (3d) 159 at pp. 161-2, 5 C.R.R. 369, 3 O.R. (3d) 272 (Ont. C.A.); *R. v. Mills* (1986), 1986 CanLII 17 (SCC), 26 C.C.C. (3d) 481 at pp. 495-6, 29 D.L.R. (4th) 161 at pp. 175-6, [1986] 1 S.C.R. 863 (S.C.C.); *R. v. Meltzer* (1989), 1989 CanLII 68 (SCC), 49 C.C.C. (3d) 453 at pp. 460-l, [1989] 1 S.C.R. 1764, 70 C.R. (3d) 383; *Knox Contracting Ltd. v. Canada* (1990), 1990 CanLII 71 (SCC), 58 C.C.C. (3d) 65, 73 D.L.R. (4th) 110, [1990] 2 S.C.R. 338 (S.C.C.); *Kourtessis v. M.N.R.* (1993), 1993 CanLII 137 (SCC), 81 C.C.C. (3d) 286, 102 D.L.R. (4th) 456, [1993] 2 S.C.R. 53 (S.C.C.).

At issue here, however, is not whether and, if so, when and in what forum *Charter* decisions are appealable, but whether the *Charter* compels review of convictions for serious crimes, accompanied by lengthy terms of imprisonment. The issue has not been settled in Canada against the applicants' interest, although the validity of the applicants' position was questioned in *R. v. Robinson* (1989), 1989 ABCA 267 (CanLII), 51 C.C.C. (3d) 452, 63 D.L.R. (4th) 289, 100 A.R. 26 (Alta. C.A.).

Reviewability of convictions for indictable offences has been an integral part of our criminal law system at least since the enactment of the *Criminal Code* 100 years ago. Although a right of appeal is said to be statutory rather than inherent, in contrast to review by way of prerogative writs, the right of appeal against conviction for an indictable offence has long been part of our statutory law. It is arguable, but it does not fall to be decided in this case, that the principles of fundamental justice in Canada, as they had evolved at the time the *Charter* was enacted, provide an entitlement to some form of review of convictions resulting in imprisonment. Review may take one of a number of forms, as it has historically; it could be by way of prerogative writ or by way of appeal. It could have threshold leave requirements and its scope could range from the limited review of jurisdictional errors to the broader scrutiny of errors of law, or it could encompass a full review of the facts. All that matters in this case, and solely for the purpose of stating the applicants' case at its highest, is to accept the principle of reviewability. At the very least, I think it doubtful that Parliament could prevent review of the constitutionality of provisions under which a person was convicted. If Parliament repealed all appeals from conviction for indictable offences under the *Criminal Code*, for example, there would be no statutory forum in which to argue that the trial was unfair in the constitutional sense. In such a case, the words of La Forest J. in *Kourtessis v. M.N.R.*, *supra*, at p. 310 C.C.C., p. 480 D.L.R., although pronounced in a different context, would be apposite:

> Even before the advent of the *Charter*, this court had asserted some constitutional limits to the power of legislative bodies to insulate from judicial review decision-makers performing certain functions under statute: see *Crevier v A.-G. Que.* (1981), 1981 CanLII 30 (SCC), 127 D.L.R. (3d) 1, [1981] 2 S.C.R. 220, 38 N.R. 541, and *Canada (Labour Relations Board) v. Paul L'Anglais Inc.* (1983), 1983 CanLII 121 (SCC), 146 D.L.R. (3d) 202, [1983] 1 S.C.R. 147, 83 C.L.L.C. 1114,033. In these *Charter* days, this may call for a consideration of the extent to which proceedings that

> involve the liberty and security of the individual can be insulated from prompt and effective review for constitutionality by the device of assigning to a superior court judge functions which for centuries have been performed by inferior court judges subject to judicial review and which, even today, are still performed by inferior court judges in the case of the most serious criminal offences. As I earlier mentioned, the judge issuing the warrant is not really in a position to review for constitutionality at an *ex parte* hearing, and assuming that judge is competent to review the warrant and the empowering legislation for constitutionality later, the effect, since the judge's decision is unreviewable, is to deprive the individual of that full measure of constitutional protection which is afforded in a prosecution under the *Criminal Code* to even the vilest criminal.

If reviewability, even in some minimum form, of convictions leading to imprisonment does constitute a principle of fundamental justice, then some ancillary right to bail pending review would have to follow, if only to prevent the review from being nugatory.

When the right of appeal exists by statute, as in this case, then access to bail or to some equivalent relief has been held ancillary to the right of appeal, even when bail entitlement was not provided by statute.

The issue arose in many cases under the *National Defence Act*, R.S.C. 1970, c. N-4, which granted a right of appeal from conviction for an offence punishable under the Act, but no right to apply for bail pending appeal. In *R. v. Hicks* (1981), 1981 ABCA 225 (CanLII), 63 C.C.C. (2d) 547, 129 D.L.R. (3d) 146, 17 Alta. L.R. (2d) 1 (Alta. C.A.), the appellant, whose appeal from conviction under the *National Defence Act* was pending before the Court Martial Appeal Court, unsuccessfully applied for *habeas corpus* in the Alberta Court of Queen's Bench to secure his release pending appeal. A majority of the Alberta Court of Appeal, *per* Kerans J.A., allowed the appeal and held that *habeas corpus* may be used to obtain release pending appeal when no other form of bail is available, because *habeas corpus* is designed to free those who are unreasonably detained. In *Hicks*, the time was approaching when the appellant would have served his entire one-year sentence prior to his appeal from conviction being heard.

In *R. v. Gingras* (1982), 1982 CanLII 5109 (CMAC), 70 C.C.C. (2d) 27 (C.M.A.C.), a majority of the court (Marceau J. dissenting) allowed an appellant convicted under the *National Defence Act* to have the execution of his sentence stayed pending appeal.

In *R. v. Hinds* (1983), 1983 CanLII 324 (BC SC), 4 C.C.C. (3d) 322, 147 D.L.R. (3d) 730, 9 W.C.B. 261 (B.C.S.C), an appellant in court martial proceedings obtained bail pending appeal by bringing an application to that effect under s. 24 of the *Charter*.

Although there are decisions denying the availability of each of the procedures employed in these cases, the desirability, in non-constitutional terms, for the existence of a right to bail pending appeal is undeniable if a statutory right of appeal is not to be rendered nugatory by inevitable appellate delays. Similarly, if reviewability, in broad terms, is a principle of fundamental justice, then access to bail pending review would have to be incorporated into an effective right of review. As indicated earlier, I am prepared to assume that such a constitutional right exists, and to assess the constitutionality of s. 679(3)(c) of the *Criminal Code* accordingly.

(d) *The right to a constitutionally adequate statute*

The applicants argue that even if there is no right to bail pending appeal provided for in the Constitution, the statutory right to bail contained in the *Criminal Code* must conform to Parliament's constitutional obligation to legislate in a manner consistent with the principles of fundamental justice and equality. Having chosen to provide for bail pending appeal in the present form, as part of legislative reform in the early seventies, Parliament has assumed a constitutional obligation to avoid the pitfalls of the doctrine of vagueness. The doctrine, and the breadth of its application, were stated by Gonthier J., speaking for the court in *R. v. Nova Scotia Pharmaceutical Society* (1992), 1992 CanLII 72 (SCC), 74 C.C.C. (3d) 289 at pp. 313-4, 93 D.L.R. (4th) 36 at pp. 59-60, [1992] 2 S.C.R. 606 (S.C.C.):

> Finally, I also wish to point out that the standard have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the state abide by constitutional standards of precision whenever it enacts legal dispositions. In the criminal field, it may be thought that the terms of the legal debate should be outlined with special care by the state. In my opinion, however, once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.
>
> The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

In this branch of their argument, the applicants are not alleging that there is a constitutional right to bail pending appeal but that there is a right to a constitutionally adequate statutory bail entitlement. Assuming both hypotheses, as I am prepared to do for the purpose of this application, it is readily apparent that the root of the right, its nature, scope and its ultimate limit are fundamentally different from the right to pre-trial bail which formed the basis of the Supreme Court's analysis in *Morales*. Whether Parliament's recourse to the criterion of "public interest" as a reason for denying bail pending appeal is unconstitutional or unconstitutionally vague falls to be decided in this new constitutional context. In other words, the constitutionality of the expression "public interest" in s. 679 of the *Code* does not depend on whether that expression is consistent with the constitutional right not to be deprived of pre-trial bail without just cause and with the presumption of innocence. Rather, the constitutionality of that expression in the post-conviction context depends on whether it is sufficiently precise to comply with the need to have convictions effectively and fairly reviewed.

(e) *Is the term "public interest" in s. 679(3)(c) of the Code void for vagueness?*

In *Morales*, the Supreme Court found the term "public interest" to be unconstitutionally vague because it failed to provide ascertainable boundaries for legal debate. Such wording was said to permit a standardless sweep rather than a properly circumscribed discretion. This was defined by reference to two factors which are absent in the present case. First, and more importantly, in *Morales*, s. 11(e) of the *Charter* was engaged. Secondly, a substantial component of the notion of public interest, indeed, its largest component in the criminal law context, was carved out of the possible meaning of "public interest" by the fact that s. 515 of the *Criminal Code* contemplated the denial of bail "for the protection

and safety or the public or in the public interest". The contrast between public safety and public interest left insufficient intelligible content to the term "public interest" to satisfy the constitutional requirement of statutory precision.

Constitutional rights must be understood and interpreted in a contextual manner. Even the requirements of fundamental justice may vary depending on the context and the constitutional right they are designed to protect: see *R. v. Lyons* (1987), 1987 CanLII 25 (SCC), 37 C.C.C. (3d) 1 at p. 45, 44 D.L.R. (4th) 193 at p. 237, [1987] 2 S.C.R. 309 (S.C.C.), per La Forest J. There may be a superficial appeal to the idea that the term "public interest" cannot have a different meaning in the pre-trial and in the post-conviction context. Such a conclusion cannot, in my view, survive recognition of the inapplicability of s. 11(e) of the *Charter*.

If a constitutional right to bail pending appeal exists in the form alluded to above, the alleged vagueness of the term "public interest" must be measured against the components of that right and not against the dictates of the presumption of innocence reflected in s. 11(e) of the *Charter*, in a statutory context in which the safety of the public has already been taken into account.

One must then re-examine the case-law, including some of the cases referred to by Lamer C.J.C. in *Morales*, to determine whether, in this new and different context, Canadian jurisprudence has failed to infuse sufficient meaning into the expression "public interest" in s. 679(3)(c) of the *Criminal Code* so as to bring it into the fold of constitutionally acceptable statutory language.

The applicants submit that Chief Justice Lamer in *Morales* has already concluded that the term "public interest" in s. 679(3)(c) of the *Code* is unconstitutionally vague because he considered cases decided both under ss. 515 and 679 of the *Code* without drawing a distinction between them. I cannot agree with that submission. The Supreme Court in *Morales* concluded that trial and appellate courts across Canada had failed to give sufficiently precise meaning to the term "public interest" to satisfy the constitutional requirement that pre-trial bail not be denied without just cause. I can find nothing suggesting that "public interest" will be unconstitutionally vague every time it appears in a statute conferring discretion, nor can I find anything to suggest that "public interest" has no workable meaning in the constitutional context governing s. 679 of the *Criminal Code*.

In *R. v. Pabani* (1991), 10 C.R. (4th) 381 (Ont. C.A.), Goodman J.A. denied bail pending appeal to a man convicted of the second degree murder of his wife. Although he was satisfied that the appeal was not frivolous and that the appellant would surrender into custody for the hearing of his appeal, Goodman J.A. concluded that the appellant's detention was necessary in the public interest. He came to that conclusion despite the fact that it was unlikely the appellant would re-offend. He said (at pp. 383-4):

> The fact that the tragic circumstances of this case are not likely to repeat themselves (which is probably true in most cases of spousal killings) is not a conclusive factor under s. 679(3). (See *R. v. Souliere*, unreported, heard April 4, 1986, per Cory J.A.)
>
> In *R. v. Demyen* (1975), 1975 CanLII 1338 (SK CA), 26 C.C.C. (2d) 324 (Sask. C.A.), Culliton C.J.S., in discussing the meaning of "detention in the public interest", said 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) 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."
>
> I agree with that statement. In the present ease the applicant has been convicted of a brutal slaying of his wife, after a lengthy trial. Spousal abuse is a matter of great public concern. The abuse in the present case ended in death. In my opinion it would be contrary to the public interest to release the applicant who has been convicted after a lengthy trial by judge and jury, pending appeal. *There will no doubt be cases where the hearing of an appeal will be so long delayed and the probability of success on the appeal so strong that it would be contrary to the public interest to refuse a release and a fortiori, an applicant's detention would not be necessary in the public interest. A strong probability of success on the appeal may be sufficient grounds in itself to establish that an appellant's detention is not necessary in the public interest.*
>
> Although the grounds of appeal in the present case are far from frivolous, I am not persuaded that they are so strong as to establish that the applicant's detention is not necessary in the public interest.

(Emphasis added.)

Goodman J.A. referred to these same guiding principles in denying bail pending appeal in *R. v. Baltovitch*, *supra*, at p. 740.

This statement of Goodman J.A. represents the standard that has been consistently applied by appellate court judges in deciding whether bail pending appeal should be granted. It reflects the post-conviction conditions which are fundamentally different from pre-trial considerations. It is a standard that reflects the tensions between enforceability and reviewability and it is similar to the principles which govern other instances where relief is sought while an appeal is pending. This standard is identifiable but, like other legal norms, it is not self-applied. Although its application is often not free from difficulty, and although judges may differ in its application, it is a standard against which the correctness of individual decisions can be assessed. In contrast, a standardless sweep would preclude any debate regarding the correctness of a decision made under its authority as it would authorize judges to pursue their own personal predilections.

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, judg-ments 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. Any difference of opinion as to whether an individual applicant should or should not be granted bail merely reflects a different judgment in the application of the legal standard to the facts. It does not suggest that there is no discernable standard to be applied.

The fact that judicial discretion established by statute is worded broadly does not, by itself, suggest that it is unconstitutionally vague. Section 24(2) of the *Charter*, for example, uses broad language to confer authority upon the courts to exclude evidence and refers to a concept as imprecise as that of public interest. Yet courts have circumscribed the meaning of this provision and the boundaries of legal debate regarding its application are now well defined.

Section 24(l) of the *Charter* is also broadly worded. In *R. v. Mills* (1986), 1986 CanLII 17 (SCC), 26 C.C.C. (3d) 481 at p. 501, 29 D.L.R. (4th) 161 at p. 181, [1986] 1 S.C.R. 863 (S.C.C.), McIntyre J. said:

> What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion. No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay would be the appropriate remedy, the circumstances will-be infinitely variable from case to case and the remedy will vary with the circumstances.

The constitution itself provides a useful model of an acceptable statutory standard to overcome vagueness. Vagueness is avoided if discretion is guided by principle and the principles are capable of judicial definition. In my opinion, this statutory standard has been met with respect to the application of the criterion of "public interest" in s. 679(3)(c) of the *Criminal Code*.

Section 679(3) provides a clear yet flexible standard. Even if an applicant otherwise meets the statutory criteria enunciated in s. 679(3) of the *Code*, the public interest may be better served by denying bail but ordering that the hearing of the appeal be expedited. This is often the case, particularly when a relatively short sentence would be interrupted by bail for a considerable period of time only to resume months or years later should the appeal be unsuccessful. The objectives of sentencing may be irremediably defeated by an interruption of the sentence and the best way to do justice to both the applicant and the public is often to simply provide for an early appeal date. Although this solution is not always available in practice, it is, in my view, available in law according to the terms of s. 679(3) of the *Code*.

Finally, I would note that although s. 679(3) applies to applications for bail pending retrial (by virtue of s. 679(7) of the *Criminal Code*), my views regarding the constitutional adequacy of 679(3) are restricted to circumstances governing applications for bail pending appeal.

As indicated at the outset, the reasons for dismissing Farinacci's application for review were delivered orally at the hearing, with reasons to follow on the constitutional issues. These are my reasons for upholding the constitutional validity of the expression "public interest" in s. 679(3)(c) of the *Criminal Code*.

Judgment accordingly.