

CANADA / JUDGMENT

R. v. Nabi

2026 ONCA 46

COURT

Court of Appeal for Ontario

DECIDED

21 January 2026

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R. v. Nabi Collection Decisions of the Court of Appeal Date 2026-01-21 Neutral citation 2026 ONCA 46 Docket numbers COA-25-CR-1500, M56491 Judges Roberts, Lois B. Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. Nabi, 2026 ONCA 46 DATE: 20260121 DOCKET: M56491 (COA-25-CR-1500) Roberts J.A. (Motion Judge) BETWEEN His Majesty the King Respondent/Responding Party and Bekas Nabi Applicant/Appellant Stephen Whitzman, for the applicant/appellant Chris Kalantzis, for the respondent Crown Heard: December 3, 2025 REASONS FOR DECISION

- [1] On December 3, 2025, I allowed Mr. Nabi's application for judicial interim release pending appeal (which was opposed by the Crown), with reasons to follow. These are those promised reasons.
- [2] The underlying appeal on this application concerns the offence of importing opium into Canada, for which Mr. Nabi was convicted on June 25, 2024. Prior to this conviction, Mr. Nabi did not have a criminal record. The seriousness of this offence is reflected in the sentence of five years and 85 days that was imposed on December 3, 2025. Mr. Nabi's evidence at his first trial, which ended in a mistrial, is that he, a professional delivery person, was asked by a third party to pick up a large cylinder from the airport. The Canadian Border Service agents opened the cylinder and discovered it contained a substantial amount of opium. Mr. Nabi was arrested when he appeared to pick up the jack.
- [3] The Crown opposed the application on the grounds that Mr. Nabi did not meet the criteria in s. 679(3)(a) or (c). I conclude that Mr. Nabi meets the criteria for release under s. 679(3) of the Criminal Code: (a) his appeal is not frivolous; (b) it is common ground that Mr. Nabi poses neither a flight risk nor a risk to public safety; and (c) his detention is unnecessary in the public interest.
- [4] Mr. Nabi appeals on the ground of ineffective assistance of counsel. I acknowledge that the test for establishing ineffective assistance of counsel is a strict one, and that it is an often challenging ground of appeal to prove because of the deferential standard of review for trial counsel's representation and the strong presumption of counsel competency: R. v. R.Y.M., 2022 ABCA 148, at para. 21. That said, while the appeal may prove difficult to make out, I am persuaded that it is not frivolous. Moreover, I am of the view that it clearly surpasses the not

frivolous standard. Mr. Nabi alleges that his trial counsel (not Mr. Whitzman) effectively took away his decision about whether to testify at his trial. He alleges that, at the last minute and without discussion, when he was put to his election as to whether to call evidence, his trial counsel told him he was not testifying and placed a waiver before him which he signed. He alleges further that his decision about testifying was not informed by any advice from his trial counsel.

- [5] There is no question that an accused person's right to determine whether or not he should testify at his trial is a fundamental defence decision that must be made by the accused person, assisted by the advice of their trial counsel. As this court explained it in *R. v. K.K.M.*, 2020 ONCA 736, at para. 62: Part of counsel's duty is to advise an accused whether to testify. Counsel must ensure the accused understands it is the accused who must make that decision: *R. v. Stark*, [2017 ONCA 148], at para. 17. Counsel must, however, arm the accused with the information needed to make an informed decision. That information includes counsel's advice about testifying and the reasons behind that advice.
- [6] Trial fairness may be undermined, resulting in a miscarriage of justice requiring a new trial, where an appellant has been denied the right to decide whether to testify on his own behalf. This will occur when trial counsel has made the decision or has provided no advice or advice so deficient that the appellant is effectively precluded from making an informed choice: *K.K.M.*, at para. 91; *R. v. Stark*, 2017 ONCA 148, 347 C.C.C. (3d) 73, at para. 20; *R. v. Mehl*, 2021 BCCA 264, at para. 145; *R. v. J.N.N.*, 2025 YKCA 11, at para. 61.
- [7] I appreciate that I am assessing this ground of appeal on the basis of a relatively thin record. I do not have the trial transcripts nor trial counsel's response to the allegations. I have Mr. Nabi's affidavit evidence in support of his ground of appeal, as well as the waiver he signed. On its face, the waiver somewhat undermines Mr. Nabi's evidence because it states that, on the basis of his trial counsel's advice, Mr. Nabi decided on his own not to testify. However, the waiver is not determinative.
- [8] In support of Mr. Nabi's ground of appeal, I also have the fact that he testified at his first trial, which ended in a hung jury and a mistrial. A commonsense inference flowing from the outcome of the first trial is that Mr. Nabi's evidence was likely accepted by or at least raised a reasonable doubt in the mind of at least one member of the jury. Why, then, would Mr. Nabi not testify at his second trial, particularly as his evidence concerning his lack of knowledge of what the hydraulic jack contained was essential to his defence? This question at present is unanswered. Moreover, the timing of the signing of the waiver appears to accord with Mr. Nabi's version of events. I am well aware of the possibility that trial counsel may provide a different account.
- [9] It is not my task to definitively determine these issues but to make a preliminary, but pointed, assessment of them: *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 45. It suffices that I am persuaded that this ground of appeal clearly surpasses the non-frivolous threshold and, absent public safety or flight risks, that the public interest in reviewability at

this point outweighs the public interest in enforceability, even in the case of this very serious offence: Oland, at para. 51. As the Supreme Court of Canada instructed in Oland, at para. 29, where there are no public safety or flight risks, “[r]arely does [the public interest] component play a role, much less a central role, in the decision to grant or deny bail pending appeal”: see also R. v. Ahmed, 2020 ONCA 572, at para. 7. I am convinced that public confidence in the administration of justice, as measured through the eyes of a reasonable member of the public, would not be diminished by Mr. Nabi’s release pending appeal, especially as it allows him to continue to productively work and support his family.

[10] For these reasons, I granted the application in the form of the agreed-upon draft order submitted by the parties. “L.B. Roberts J.A.”

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