

NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Shaw, 2007 NSCA 91

Date: 20070831

Docket: CAC 284793

Registry: Halifax

Between:

Bernard Allen Shaw

Appellant

v.

Her Majesty the Queen

Respondent

Judge:

The Honourable Justice Joel E. Fichaud

Application Heard:

August 30, 2007, in Halifax, Nova Scotia, In Chambers

Held:

Leave to appeal is granted and the application for release pending appeal is dismissed.

Counsel:

Stephen Mattson, Q.C., for the appellant
Monica McQueen, for the respondent

Decision:

[1] Mr. Shaw was convicted of two counts of trafficking in cannabis marihuana and one count of trafficking in cocaine, contrary to s. 5(1) of the *Controlled Drugs and Substances Act*, the offences occurring on February 21 and February 23, 2006. He was also convicted of an alcohol related breach of undertaking contrary to s. 145(5.1) of the *Criminal Code*. According to the sentencing remarks of the trial judge, Judge Claudine MacDonald:

And just to summarize in a very concise and a very short way, what happened was that the undercover officer went to Mr. Shaw's home and he purchased 10 grams of marihuana from Mr. Shaw. At that time there were a number of people in the residence, including young people. A couple of days later the undercover officer, again, goes to Mr. Shaw's home, and this time buys six grams of marihuana from Mr. Shaw, and Mr. Shaw telling the undercover officer that he'd have more later when he'd be making a run.

The officer then told Mr. Shaw that one of his co-workers was looking to buy some crack cocaine, and Mr. Shaw replied to the effect, Oh, yes, I can get you some. I'm out right now but I'm going to make a run.

The undercover and Mr. Shaw then attended at a residence in the Kingston area where the undercover officer paid \$100 up front for the gram of cocaine and Mr. Shaw returned, gave the crack cocaine to the undercover officer and as the two returned to Mr. Shaw's residence, Mr. Shaw told the officer that now he had more weed and he offered to sell that to the undercover officer but the undercover officer declined.

Mr. Shaw was arrested, he was searched, found to be in possession of some marihuana, as well as .3 grams of crack cocaine. His home was searched and the results of that search were set out in the brief, as I mentioned, as was provided by Mr. Greener.

I note, as well, according to the brief, there were five young persons who were in the residence when the search team entered. The accused was interviewed by the police and he admitted to his involvement in the commission of the drug offences.

[2] Judge MacDonald ordered a sentence of three months each on the two counts of marihuana trafficking, two years for the charge of trafficking in crack cocaine

and 15 days for breach of undertaking. The sentences were concurrent, meaning two years in a federal institution.

[3] Mr. Shaw has appealed his sentence, not his convictions. His appeal notice says his sentence was disproportionate to the gravity of the offence and should have been conditional.

[4] Mr. Shaw applies, under s. 679(4) of the *Code*, for release pending his appeal.

[5] Section 679(1)(b) of the *Code* says:

(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,

...

(b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal . . .

Section 679(4) says:

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.

[6] Further to s. 679(1)(b), and *Civil Procedure Rule* 65.18(1), it is necessary that leave to appeal be granted before release pending appeal. To grant leave, I should be satisfied that the grounds are not frivolous and that they raise arguable issues: *R.v. MacIntyre*, 2003 NSCA 68 at ¶ 6; *R. v. Smith*, 2005 NSCA 45, at ¶ 10. I am

satisfied that the grounds of appeal are not frivolous and are arguable, and I grant leave to appeal.

[7] Section 679(4) assigns to Mr. Shaw the onus to establish each of the three conditions. The convictions have replaced his initial presumption of innocence with a status quo of guilt. Unlike a pre-trial bail applicant, a convicted appellant who seeks bail must prove the conditions for release: *R. v. Smith*, at ¶ 11; *R. v. Barry*, 2004 NSCA 126, at ¶ 8 and cases there cited.

[8] The first condition in s. 679(4) (a) is that the appeal has sufficient merit that a denial of bail would cause unnecessary hardship. This is a higher threshold than the standard required for leave to appeal. Counsel for the Crown points out that, under s. 742.1 of the *Code*, a conditional sentence is unavailable for a sentence of two years' incarceration. But, if the Court of Appeal agrees with the appellant's submission and reduces that sentence even minimally, a conditional sentence would be an option. I am satisfied that Mr. Shaw has established this condition. I will not say more about the merits of the appeal.

[9] The Crown acknowledges the establishment of the second condition, that Mr. Shaw would surrender in accordance with the terms of the order.

[10] The real issue on this application is the third condition, under s. 679(4)(c), whether Mr. Shaw's continued detention is or is not necessary in the public interest. The public interest balances divergent criteria in the unique circumstances of each case: *R. v. Barry* at ¶ 10; *R. v. Smith* at ¶ 16. In *R. v. Ryan*, 2004 NSCA 105, at ¶ 23, Justice Cromwell said:

23 Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest.

In my view, Mr. Shaw has not satisfied his onus respecting the public interest condition.

[11] Mr. Shaw's affidavit recites his good intention:

9. THAT I am drug and alcohol free and will remain so if released by this Honourable Court.

[12] My concern is that, in the past, Mr. Shaw's conduct has betrayed his good intention. The following commentary from the pre-sentence report is sourced with Mr. Shaw's family home support worker, Glenn Stewart, of Family and Children's Services:

He commented that the subject has positive values and means well, but seems to be unable to follow through on his good intentions. He described the household as a local "hang out" with various teens and adults coming at all hours of the day and night. Mr. Stewart stated that Mr. Shaw seems incapable of being able to say "no" or to exercise any control over what goes on in his own living environment. As a result, there are people often present under the influence of drugs and/or alcohol and possibly, at times, even using these substances in Mr. Shaw's family home. He stated that he believes Mr. Shaw means well, that he loves his boys and wants to parent his boys, but lacks the strong sense of personal boundaries to enable him to follow through with his good intentions.

Mr. Shaw's conviction for breach of undertaking, in the proceeding under appeal, is another example.

[13] There is no evidence on this application to alleviate my concern. Mr. Shaw's past inability to execute his expressions and undertaking dilutes the cogency of his statement of intent in the affidavit for this bail application. I am not satisfied that Mr. Shaw would refrain from the same activity that has occurred before. A repetition of that narcotics related activity would offend the public interest.

[14] Counsel for Mr. Shaw says that Mr. Shaw could be monitored and any offensive behaviour would result in a speedy arrest. This does not change my view. That he may be arrested for breach of a bail condition does not satisfy his onus respecting the public interest condition in s. 679(4)(c).

[15] I dismiss the application for release pending appeal.

Fichaud, J.A.