Docket: CAC 163451
CAC 163452
Date: 20000511

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Shacklock, 2000 NSCA 68]

BETWEEN:

GREGORY PETER SHACKLOCK

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

BRIAN WAYNE MUNDLE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

DECISION

Counsel: Kevin A. Burke, Q.C. for the appellant
James C. Martin and Lori-ann Veinotte for the respondent

Application Heard: May 11, 2000

Decision Delivered: May 11, 2000

BEFORE THE HONOURABLE JUSTICE ROSCOE IN CHAMBERS

ROSCOE, J.A.: (in chambers) (Orally)

[1] The appellants Brian Wayne Mundle and Gregory Peter Shacklock pleaded guilty to unlawfully having in their possession for the purpose of trafficking in excess of 3 kilograms of cannabis marihuana contrary to s. 5(2) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19 and on April 27th, 2000, Justice Scanlan of the Supreme Court sentenced Mr. Mundle and Mr. Shacklock to 18 months incarceration.

[2] Mr. Mundle and Mr. Shacklock have now applied for leave to appeal and ask to be released from custody pending the determination of their appeal pursuant to ss. 679(1)(b) and 679(4) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[3] The grounds of appeal are as follows:

1. That the Learned Sentencing Judge did not adequately consider the proper principles of sentencing as set out in ss. 718 - 718.2 and, in particular, the goals of restorative justice as set forth in paragraph (d), (e) and (f) of s. 718 of the **Criminal Code**.

2. That the Learned Sentencing Judge placed undue emphasis on the principle of general deterrence and denunciation in imposing a sentence of 18 months imprisonment.

3. That the sentence imposed by the Learned Sentencing Judge was excessive having regard to the facts of the case and the circumstances of the accused.

[4] In order to grant leave to appeal, I must be satisfied that the grounds of appeal are not frivolous and that they raise arguable issues. On this point, the appellants say, basically, that the sentencing judge erred in over-emphasizing denunciation and general deterrence and did not give any serious consideration to the possibility that a conditional sentence could adequately meet those sentencing

principles. Mr. Burke submits that Justice Scanlan appears to have concluded that the decision of this Court in **R. v. Collette** (1999), 177 N.S.R. (2d) 386 requires him to incarcerate the appellants. As well, he says he failed to consider the effect of the Supreme Court of Canada's decision in **R. v. Proulx**, [2000] S.C.J. No. 6 (Q.L.); (2000), 250 N.R. 201, on the continuing validity of **R. v. Collette**.

[5] Mr. Martin, for the Crown, on the other hand, argues that this Court has consistently shown great deference to trial courts when considering sentence appeals and that it is unlikely that this Court will interfere with the sentencing judge's exercise of discretion in this case. Mr. Martin also emphasizes the circumstances of the offences which the trial judge characterized as being motivated by greed.

[6] In consideration of the comments of Chief Justice Lamer in **R. v. Proulx**, particularly at § 90 and 107, which Mr. Burke emphasized, I am satisfied that the appellants have established that they raise at least an arguable issue that the sentencing judge erred and, therefore, I will grant leave to appeal.

[7] Next I have to consider s. 679(4) of the **Criminal Code** which provides that the appellants may be released pending appeal if they establish the three conditions there: (a) that the appeal has sufficient merit and that in the circumstances it would cause unnecessary hardship if they were detained in custody; (b) which is conceded by the Crown, that is, that they will surrender themselves into custody in accordance with the release order; and (c) that their detention is not necessary in the public interest.

[8] In this case, the appeals from sentence will likely be scheduled to be heard in October, five months from now. If the appellants remain in custody they would likely be able to apply for parole after one-third of their sentence, that is by the end of October, 2000. I have reviewed Justice Scanlan's sentencing remarks and the pre-sentence reports that were filed before him and there is some information contained in the pre-sentence reports which I should include in this decision. Mr. Mundle, the appellant is 32 years old. His only previous conviction was for impaired driving in 1992. He has an excellent pre-sentence report which shows him to be in a stable marital relationship and that he is the father of two children. He has a good employment record and his employer indicates that his work is still available if he is released. With respect to Mr. Shacklock, he is 28 years old. He also has one previous conviction for mischief. His pre-sentence report is also excellent. He is also in a stable marital relationship and his common law wife is employed as a registered nurse. His employer, as well, has filed a very positive letter on his behalf indicating that his job is still available for him.

[9] The appellants have both accepted responsibility for their offences and shown remorse. Despite these positive pre-sentence reports for both appellants, the trial judge concluded that it was necessary to have "substantial denunciation" and "substantial general deterrence" in this case. He, therefore, exercised his discretion not to impose a conditional sentence. Whether the trial judge erred in that respect will be a matter for this Court to deal with on the appeal.

[10] At this time, however, I am impressed with the very positive pre-sentence reports and I am satisfied that, as conceded by the Crown, that the appellants will

surrender themselves into custody prior to the hearing of this appeal and I am also satisfied that their detention in the meantime is not necessary in the public interest.

[11] With respect to the first criterion, that is unnecessary hardship, it is my view that the appeals from sentence are not frivolous in the sense that they do have some chance of success and by the time that these appeals can be heard, they would have served almost six months and would be approaching the time for parole or conditional release. If the sentence is reduced on appeal to less than the six months or modified in accordance with other sentencing options such as a conditional sentence, they may have served more time in prison than justice requires. In my view, that would be unnecessary hardship. I will, therefore, grant bail pending the appeal.

Roscoe, J.A.