NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Spencer*, 2015 NSCA 99

Date: 20151103
Docket: CAC 444045
Registry: Halifax

Between:

Debra Jane Spencer

Applicant

-and-

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	October 29, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion to extend time to file a notice of appeal denied
Counsel:	The applicant Debra Jane Spencer, on her own behalf Kenneth W. F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Ms. Debra Spencer applies for an extension of time to file a notice of appeal from her sentence. Her motion is under s. 678(2) of the *Criminal Code* and Rule 91.04 of the *Civil Procedure Rules*.

[2] In July 1984, Ms. Spencer was born to a single mother in the Caribbean nation of St. Vincent. She was adopted by a Canadian and in 1993 moved to Canada. Since, she has lived in this country. She completed high school in Yarmouth, and settled in Halifax. She has virtually no connection to St. Vincent.

[3] On March 9, 2014, Bradford Beals murdered David William Rose in a rooming house on Inglis Street in Halifax. Ms. Spencer was Mr. Beals' girlfriend at the time. She was at the site of the murder. Ms. Spencer was arrested on March 11, 2014, and remained in custody until her sentencing.

[4] On May 29, 2014, in the Supreme Court before Justice Cindy A. Bourgeois, Ms. Spencer pleaded guilty to being an accessory after the fact to murder contrary to s. 240 of the *Criminal Code*. She was represented by counsel. Counsel for Ms. Spencer and the Crown jointly recommended a sentence of two years incarceration. Aside from a mention of her place of birth, the sentencing judge was not informed of Ms. Spencer's immigration status.

[5] On May 29, 2014, Justice Bourgeois made an oral sentencing ruling, followed by a written decision on June 18, 2014 (2014 NSSC 198). The decision said:

> [21] … Ms. Spencer in relation to the offence that you did on March 19, 2014 knowing that Bradford Eugene Beals had murdered David William Rose, did enable Bradford Eugene Beals to escape custody, contrary to s. 240 of the *Criminal Code*, I am satisfied what I have heard supports the guilty plea that you have entered in relation to this matter and I find that a sentence of two years in a federal institution is appropriate.

[6] Under s. 678(1) of the *Code* and Rule 91.09(1), an appeal should be filed within twenty-five days of the sentence. Ms. Spencer did not appeal within that interval.

[7] As a result of her conviction, Ms. Spencer has been ordered deported from Canada. The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 64, as

amended by S.C. 2013, c. 16, s. 24, says that a foreign national who has been sentenced to incarceration of six months or more may not appeal a deportation order.

[8] On October 5, 2015, Ms. Spencer filed in the Court of Appeal a Notice of Motion to extend the time to appeal her sentence. Her written material that was reiterated by her oral presentation at the chambers hearing says that, during the criminal proceeding, she was unaware of the prospect of deportation and, had she known, she would not have agreed to the joint sentence recommendation. Hence, her motion to extend the time so she can appeal the sentence. If her sentence is reduced to under six months, Ms. Spencer would appeal the deportation order.

[9] Section 678(2) of the *Code* permits a judge of this Court to extend the time for filing a notice of appeal. Rule 91.04 gives the chambers judge discretion to extend time periods, before or after the period has expired.

[10] In *R. v. R.E.M.*, 2011 NSCA 8 (Chambers), Justice Beveridge described the test for an extension:

> [39] … The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of justice require. (See *R. v. Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 NSCA 48.)

[11] The Crown opposes the motion to extend on only one of these bases – the merits of the proposed appeal.

[12] In *McCulloch v. McInnes, Cooper & Robertson* (2000), 186 N.S.R. (2d) 398, Justice Cromwell described the merits assessment:

> [4] The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal; see Freeman, J.A., in *Coughlan et al v. Westminer Canada Ltd. et al* (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[13] Justice Cromwell described arguable issues for a stay motion. I adopt his description for this motion to extend. See *R.E.M.*, para. 50.

[14] Ms. Spencer makes it clear that the only objective of her appeal is to avoid deportation. She faces s. 64 of the *Immigration and Refugee Protection Act*, as amended in 2013:

> 64(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
>
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).
>
> …

[15] To succeed with her objective, Ms. Spencer would have to persuade a panel of this Court to reduce her sentence from two years to six months.

[16] Ms. Spencer pleaded guilty to being an accessory to murder under s. 240 of the *Code*. This is an indictable offence with a maximum penalty of life imprisonment. Ms. Spencer was represented by counsel. The two year sentence was jointly recommended by the Crown and her counsel. The sentencing judge's decision said:

> [16] I am satisfied based on the caselaw as outlined by Justice Edwards [*R. v. Hynes*, 2014 NSSC 119] in particular, that the range of sentencing in relation to this type of offence is anywhere between 18 months to five to seven years. …
>
> [17] I am satisfied that the characterization of Ms. Spencer's involvement is as described by both counsel, which is at the lower end of the range.
>
> [18] I am satisfied that the joint sentence of two years falls within the range.

[17] In *R. v. Jamieson*, 2011 NSCA 122, the Court reduced a sentence by two days, to preserve the individual's immigration appeal rights. The reduction left the sentence well within the range of appropriate sentences for the offence.

[18] In Ms. Spencer's case, a reduction from two years to six months would drop her sentence far below the range of fit sentences for being an accessory to murder. There is no possibility that a panel of this Court would order that reduction. In my view, her submission is not an arguable ground of appeal.

[19] I dismiss the motion to extend time for filing a notice of appeal.

Fichaud, J.A.