

**NOVA SCOTIA COURT OF APPEAL**

**Citation: *R. v. Hobbs*, 2008 NSCA 106**

**Date:** 20081114

**Docket:** CAC 302995

**Registry:** Halifax

**Between:**

Kevin Patrick Hobbs

Appellant

v.

Her Majesty the Queen

Respondent

**Judge:** The Honourable Justice Jamie W. S. Saunders

**Application Heard:** November 13, 2008, in Halifax, Nova Scotia, in  
Chambers

**Held:** Application for judicial interim release pending appeal  
allowed

**Counsel:** Brian Newton, Q.C., for the appellant  
Glen Scheuer, for the respondent

**Decision:**

[1] Mr. Hobbs applied in Chambers to be released on bail pending the hearing of his appeal, pursuant to Section 679 of the **Criminal Code of Canada**.

[2] Following a lengthy hearing and after considering the evidence and the submissions of counsel I advised the parties that I would allow the application and grant bail, upon strict terms, with reasons to follow. I specified the conditions for Mr. Hobbs' release on the record and those terms will be incorporated in an appropriate order. These are my reasons.

[3] Although the appellant is currently self-represented in pursuing his appeal, he was represented by Mr. Brian Newton, Q.C. in Chambers. Mr. Newton did not act as the appellant's trial counsel.

[4] Mr. Hobbs was charged in a two count indictment:

THAT on or about the 8th day of April, 2005, at or near Halifax Regional Municipality, in the Province of Nova Scotia, he did unlawfully have in his possession property or proceeds of property to wit: \$32,000.00 in Canadian currency, of a value exceeding five thousand dollars knowing that all or part of the property was obtained or derived directly or indirectly from the commission in Canada of an offence punishable by indictment contrary to section 354(1) of the Criminal Code, thereby committing an offence under section 355(a) of the Criminal Code.

AND FURTHER THAT at the aforementioned place and time, he did transport or otherwise deal with property or proceeds of property to wit: \$32,000.00 in Canadian currency with intent to conceal or convert that property or those proceeds knowing or believing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of the commission in Canada of a designated offence contrary to section 462.31(1)(a) of the Criminal Code, thereby committing an offence contrary to section 462.31(2) of the Criminal Code.

[5] Following a nine day trial before Mr. Justice Felix Cacchione of the Nova Scotia Supreme Court the appellant was convicted on both counts. The circumstances surrounding these crimes may be found in the trial judge's detailed decision now reported at 2008 NSSC 226.

[6] For the purposes of today's hearing I can offer a brief summary. The property in question, \$32,000 in Canadian currency, was found wrapped in a heat sealed plastic package in Mr. Hobbs' suitcase just before he was to board a flight to Vancouver, British Columbia. He had been under police surveillance for drug-related matters. Mr. Hobbs retained counsel to be present when the suitcase was opened. The contents of the bag were catalogued and no drugs were found in the suitcase. Mr. Hobbs admitted that the suitcase and the money was his and that he was in possession of that suitcase when it was seized. He testified at trial that he packed the money in his suitcase intending to use it to gamble in British Columbia. Mr. Hobbs professes to be very skilled at poker, whether on-line or at the tables.

[7] The currency was divided into seven separate parcels. Six of these parcels contained \$5,000 each while the seventh parcel had \$2,000. A large majority, 1463 out of 1582 total notes were \$20 bills. Some of the bundles contained notes of different denominations. In convicting the appellant on both counts, Justice Cacchione carefully reviewed the evidence to explain why he rejected the appellant's testimony and why he was not left with any reasonable doubt about his guilt, having regard to the whole of the case.

[8] The appellant appeared for sentencing on October 10, 2008. At the hearing the Crown sought a minimal federal term of incarceration, that being two years' imprisonment. The defence asked for a conditional sentence.

[9] After considering counsels' submissions, the pre-sentence report, and relevant authorities, Cacchione, J. was not persuaded that serving the sentence in the community would not endanger the safety of the community. Expressing concern about the risk of recidivism, Cacchione, J. held that a conditional sentence would not properly address the principles of specific deterrence, general deterrence and denunciation. He sentenced the appellant to a period of nine months' incarceration, to be followed by two years' probation.

[10] In the handwritten notice of appeal filed by Mr. Hobbs on October 23, 2008 he appeals his conviction, and seeks leave to appeal his sentence. To his notice of appeal Mr. Hobbs appended two typed pages setting out his grounds of appeal.

[11] In the circumstances of this case Section 679(1)(a) and (3) apply. For bail to be granted, the appellant has the burden of persuading me 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.

[12] Failure to satisfy all three conditions will result in bail being denied and necessitate Mr. Hobbs' continued detention in custody.

[13] In support of his application for release the appellant filed his affidavit sworn November 11, 2008; his pre-sentence report; a transcript of Justice Cacchione's decision on sentence, together with his decision on an earlier *voir dire*, and on conviction, all three of which are under appeal; and a JEIN printout confirming that he does not have a criminal record although he does have charges pending.

[14] A certificate with respect to the preparation of the appeal book has not yet been filed. In Chambers the appellant's counsel explained this departure from our standard practice:

Because this matter was started as a prisoner's appeal, Mr. Hobbs is not in a position to file a Certificate Respecting the Preparation of the Appeal Book. Obviously, if Mr. Hobbs is released from custody he will be in a better position to assemble his appeal book. If he is not released from custody, then the Respondent would normally file the appeal book.

[15] The Crown opposed Mr. Hobbs' release. It challenged the appellant's assertions concerning each of the three conditional requirements set by Parliament in s. 679.

[16] Mr. Hobbs testified at the hearing in Chambers. The Crown did not object to Mr. Newton expanding upon the content of the appellant's affidavit through direct examination. Then Mr. Hobbs was subjected to a lengthy, detailed cross-examination. I also questioned Mr. Hobbs. The appellant's proposed surety, Mr. Philip Harris, also testified. Following the *vive voce* evidence both counsel made comprehensive oral submissions.

[17] After considering the record, the evidence introduced by the appellant, the jurisprudence and other material placed before me by counsel, together with their submissions, I concluded that Mr. Hobbs ought to be granted judicial interim release, upon very strict terms.

**(a) The appeal or application for leave to appeal is not frivolous**

[18] I need not refer to all of the alleged errors set out in the appellant's lengthy notice of appeal. He and his counsel confirmed at the hearing that his principal complaint concerns the trial judge's use of post-offence conduct. Broadly speaking this conduct relates to two events. On July 28, 2005 Mr. Hobbs was arrested in a hotel in New York City. Cacchione, J. described this incident at ¶ 20 of his (conviction) decision:

[20] . . . He was found in the hotel room with two other individuals; one, a resident of Vancouver, British Columbia and the other a resident of New York State. Also found in the hotel room was approximately 100 pounds of marijuana and \$178,000.00 U.S. currency together with \$2,305.00 Canadian. All of the property was seized and forfeited. On December 20, 2006 Hobbs pled guilty to a felony conviction for possession of marijuana relating to his arrest on July 28, 2005 and he received a sentence of one-year in jail with credit for remand time served.

[19] The second incident concerns charges facing the appellant under the **Controlled Drugs and Substances Act**, relating to the seizure of marijuana plants from a grow-op at a residence in Halifax linked to the appellant. These offences are alleged to have occurred on August 5, 2005.

[20] The charges brought pursuant to the **CDSA** have not yet been prosecuted. In argument counsel referred to the JEIN indicating that Mr. Hobbs' trial on these offences is scheduled to begin in the Supreme Court on January 26, 2009.

[21] In the present appeal Mr. Hobbs complained that the trial judge erred in admitting this evidence of post-offence conduct and that notwithstanding the trial judge's self-instruction he erred in law by failing to conduct the proper legal analysis when determining the admissibility of such evidence, and then used the evidence to both improperly impute guilt, and as a basis for refusing to impose a conditional sentence. Counsel for Mr. Hobbs referred me to several passages in the trial judge's (conviction and sentencing) decisions which referenced the impugned post-offence conduct.

[22] Mr. Scheuer for the Crown properly acknowledged that this first statutory condition is a low threshold to meet. Based on the elaboration provided by the appellant during his testimony and by Mr. Newton in argument, I cannot say that this proposed ground of appeal is, on a balance of probabilities, frivolous.

**(b) He will surrender himself into custody in accordance with the terms of the order**

[23] In the year preceding his incarceration ordered by Cacchione, J. on October 10, 2008, Mr. Hobbs has lived at a residence in Bedford owned by his close friend Mr. Philip Harris. During this time the appellant has worked as a day trader, first with Pinnacle Equity Management Group, based in Vancouver and then at its "sister" facility Swift Trade in Halifax. Sometime this summer (the precise date was not established) Mr. Hobbs was hired by Investors Group in Halifax through which he intended to continue his studies in the Canadian Securities course as well as obtain his Mutual Funds designation.

[24] While the evidence concerning Mr. Hobbs' employment over the last year as a day trader or investment advisor was not as clear as one might have expected, it did seem to me that Mr. Hobbs' intention to resume such work with his previous employers in Bedford and Halifax, and to continue his studies in the field, was serious and genuine. Obviously it is in his best interests to do so, and then be able to retain counsel to act for him in this appeal.

[25] The appellant proposed Mr. Philip Harris as a surety. He was examined and cross-examined in my presence. I was impressed by Mr. Harris. He struck me as a sensible, mature and responsible individual. He has known the appellant since they were boyhood pals growing up in Dartmouth. Mr. Harris has had lengthy, full time employment as a server at a popular restaurant in the city. He just recently

completed his B.Sc. in kinesiology from Dalhousie University. He owns and lives in a three storey home in Bedford. He offered a basement apartment to the appellant last October and Mr. Hobbs has lived there until his recent incarceration in this case. Mr. Harris' hours at the restaurant are not such that he won't be able to provide careful monitoring of Mr. Hobbs' curfew. I believe that Mr. Harris will act as a close sentinel and will not hesitate to report Mr. Hobbs to the police if he observes the slightest failure on the part of the appellant to comply with the terms of his bail. Agreeing to post cash bail of \$1,000 for his friend was no small feat for Mr. Harris. He said he was willing to place his own savings at risk on account of his friendship for, and trust in, Mr. Hobbs. But Mr. Harris said he would not hesitate to call the police if his friend "betrayed my trust." I have confidence in Mr. Harris' promise.

[26] The Crown acknowledged that to this point the appellant has never breached the requirements or conditions of any court order imposed in Canada. I was told that he has never missed a court appearance, or a reporting obligation to local police. Accordingly, based on the record before me, I am satisfied on a balance of probabilities that Mr. Hobbs will surrender himself into custody in accordance with the terms of my order.

**(c) His detention is not necessary in the public interest**

[27] Mr. Hobbs is five courses short of a university degree. He testified that he was making serious attempts to change his life around since this cluster of alleged offences arose in the summer of 2005.

[28] None of Mr. Hobbs' previous convictions, or outstanding charges, involves crimes of violence. Counsel confirmed that the appellant returned to the United States as required to be sentenced on the matters relating to his arrest in New York City in July 2005. After returning to Canada and working for a time in British Columbia where his mother resides, Mr. Hobbs moved back to Nova Scotia in order to deal with the charges for which he was tried and sentenced by Justice Cacchione. On every occasion he complied with the terms of his release, and dutifully reported to the R.C.M. Police when and as required.

[29] Based on the information presented I do not believe that Mr. Hobbs' release pending this appeal would detrimentally affect public confidence in and respect for

the administration of justice. Mr. Hobbs has established, on a balance of probabilities, that his detention is not necessary in the public interest.

[30] I therefore allow his application for judicial interim release pending appeal subject to the strict terms set forth in my order.

[31] I conclude these reasons by setting the following dates:

Appeal Book:	January 16, 2009
Appellant's Factum:	February 27, 2009
Respondent's Factum:	March 31, 2009
Appeal Hearing:	Wednesday, May 20, 2009, 10:00 a.m.

Saunders, J.A.