C.A.C. No. 111691

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Dempsey, 1995 NSCA 68

BETWEEN:

BRIAN DEMPSEY	)	Nash T. Brogan
	)	for the Applicant/Appellant
Applicant/ Appellant	)	
	)	
- and -	)	
	)	James C. Martin
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Application Heard:
	)	December 29, 1994
	)	
	)	
	)	Decision Delivered:
	)	January 10, 1995
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BEFORE THE HONOURABLE CHIEF JUSTICE LORNE CLARKE, IN CHAMBERS

CLARKE, C.J.N.S.: (in Chambers)

The appellant Brian Dempsey has applied for an order staying his trial in the Nova Scotia Supreme Court pending the disposition of his appeal against his committal to stand trial. He is scheduled to be tried in the Supreme Court on February 1, 1995. His appeal is scheduled to be heard in the Court of Appeal on March 29, 1995.

Mr. Dempsey, together with ten other co-accused, is charged with conspiring to traffic in cocaine contrary to the **Narcotic Control Act** and the **Criminal Code**. On April 6, 1994, after a preliminary hearing, Judge Matheson of the Provincial Court committed all eleven persons to stand trial.

On April 22, 1994, Mr. Dempsey, and the others, applied to the Supreme Court for an order in the nature of **certiorari** to quash the order of committal. The application was heard by Justice Robert MacDonald in October, 1994. On November 9, 1994, Justice MacDonald quashed the committal of three of the applicants: Mr. Dempsey was not one of them. His committal stood.

On December 2, 1994, Mr. Brogan, counsel for Mr. Dempsey, filed a notice of appeal in this Court from the judgment of Justice MacDonald. After the notice of appeal was filed and apparently unknown to Mr. Brogan, the Attorney General for Canada, by the Deputy Attorney General, had earlier issued a direct indictment against Mr. Dempsey and the other co-accused, including the three whose committal was quashed by Justice MacDonald. Mr. Brogan learned of this by a fax communication.

I am informed by counsel of the Crown that the direct indictment was preferred pursuant to s. 577 of the **Criminal Code**. The trial date of February 1, 1995, which had been scheduled some considerable time earlier than these latter events, was continued by the direct indictment.

In mid-December, 1994, upon the application of Mr. Brogan, the appeal from Justice MacDonald's decision and order was set down to be heard on March 29, 1995.

Two issues flow from this application:

1. Does a judge of the Court of Appeal, in chambers, have the jurisdiction to hear the application?
2. If so, should the stay be granted?

The First Issue - Jurisdiction

Mr. Martin, for the Crown, advances two principal arguments. First, he submits there is no provision in the **Criminal Code** which can be read in conjunction with our **Civil Procedure Rules** that confers jurisdiction on me to hear the application. Second, he contends that Justice MacDonald did not issue an order but merely exercised his discretion when he refused an order in the nature of **certiorari** to Mr. Dempsey. As a result, he reasons, there is nothing from which an appeal can be taken from Justice MacDonald.

Respecting the latter, I have difficulty in accepting the submission that in principle no appeal can be taken from Justice MacDonald because he was dealing with discretionary relief and as such did not grant an order. He concluded his decision on the **certiorari** application in the following manner:

> In summary then, the committals of the following are confirmed: ..., Brian Dempsey, ...; and the committal of Barbara Keeping, Cecil James Keeping and Lauchie Campbell are

quashed.

The inescapable conclusion from these words is that Justice MacDonald made a judgment and order in response to the application. By confirming the committal of Mr. Dempsey he ordered that he continue to his trial. By quashing the committal of three of the co-accused he ordered that they not go to trial.

In addition the **Criminal Code** permits an appeal to this Court from a decision granting or refusing prerogative relief sought by way of **certiorari**. Section 784 provides in part:

> (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of **mandamus**, **certiorari** or prohibition.
>
> (2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.

While the caselaw which has considered the sections of the **Code** as they relate to the application of prerogative relief following committals appears to have considerably narrowed the scope of review to the exercise of jurisdiction by the judge at the preliminary inquiry, it does not suggest that no right of appeal exists for jurisdictional error. **Patterson v. The Queen** (1970), 2 C.C.C. (2d) 227 (S.C.C.); **Re Martin, Simard and Desjardins and The Queen Re Nichols and The Queen** (1977) 41 C.C.C. (2d) 308 (Ont. C.A.); **Dubois v. The Queen** (1986) 25 C.C.C. (3d) 221 (S.C.C.).

Consistent with the caselaw and the **Code**, the decision rendered by Justice MacDonald reveals that he was concerned with Judge Matheson's exercise of jurisdiction.

Accordingly Justice MacDonald rendered a judgment which is capable

of being appealed to this Court. The merits of the appeal are for a panel of this Court to decide and not the chambers judge.

The first submission made by Mr. Martin is extremely interesting. He refers to several decisions given by courts in other jurisdictions which suggest the power to grant a stay must be firmly rooted, by express language, in the **Criminal Code**. Some of these were considered and reviewed by Justice Freeman, of this Court, in chambers, in **R. v. Keating** (1991), 106 N.S.R. (2d) 63. **Keating** is the most recent and authoritative decision out of this Court on this subject. Mr. Keating had been found guilty of assault. He was given a conditional discharge accompanied by an order of probation with conditions. He appealed his finding of guilt. Prior to his appeal being heard by this Court he applied for a stay of the performance of the conditions which were imposed upon him as part of the probation order. One of these was that he was obliged to build a skateboard facility. In the case of Mr. Keating, if a stay were not granted pending appeal, the appeal would have been frustrated. So also in this case, if a stay is not granted it would appear that Mr. Dempsey's appeal will be frustrated and rendered moot.

An argument similar to that which Mr. Martin makes was advanced to Justice Freeman. That is to say that Justice Freeman, in chambers, had no jurisdiction to grant a stay pending appeal because it was not specifically authorized by the enabling statute, being the **Criminal Code of Canada**.

In determining otherwise and granting the stay, Justice Freeman wrote at pp. 66-67 (106) N.S.R. (2d):

> [21] Section 482(1) of the **Criminal Code** provides:
>
> > (1) Every superior court of criminal jurisdiction and every court of appeal, respectively, may, with the concurrence

> of a majority of the judges thereof present at a meeting held for the purpose, make rules of court not inconsistent with this **Act** or any other **Act** of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court instituted in relation to any matter of a criminal nature or arising from or incidental to any such provision, proceeding, action or appeal.

[22] In my opinion that language is broad enough to encompass staying the operation of probation orders pending appeals.

[23] Rule 65 of the Nova Scotia **Civil Procedure Rules** was made under s. 482 of the **Criminal Code** to govern criminal appeals in this province. Rule 65.03 states:

> The Civil Procedure Rules and Related Rules and practice of the Supreme Court shall apply with any necessary modifications to this Rule in all matters not herein provided for and when not inconsistent with this Rule.
>
> > (2) Without restricting the generality of rule 65.03, Rule 62 when not inconsistent with this Rule shall apply to this Rule and all appeals and applications thereunder.

[24] Civil Procedure Rule 62.10(2) states:

> (2) A judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from ...

[25] In my opinion the **Rules** are not inconsistent with one another nor with the **Criminal Code**, nor, certainly, with the objective of doing justice. There are numerous illustrations in the **Criminal Code** of the intention of Parliament to avoid unjust results from the enforcement of sentences prior to

> appeal: see: e.g., s. 683(5), s. 689, s. 261, s. 684(2), and s. 679(3). No contrary intent can be divined from the absence of a specific provision to stay the operation of probation orders, which are generally less onerous than imprisonment, fines, forfeitures or driving prohibitions. Section 482 is broad enough to provide the underlying authority to extend the use of stays to situations not specifically enunciated by Parliament, and the **Rules** give it effect. This is true of the **Rules** even if it is seen necessary to buttress s. 482 with the inherent jurisdiction or ancillary powers of appeal courts to prevent the frustration of appeals. Again, the **Rules** are sufficient to convey the power to stay probation orders to a single judge, as Zuber, J.A., contemplated in the **Church of Scientology** case.
>
> [26] The power is discretionary, but I am satisfied it is a proper use of discretion to exercise it when, as here, the appellant has an arguable case which would be frustrated if he were required to fulfill the terms of the order before it is heard.

Although the matter before Justice Freeman related to staying conditions in a probation order, I am persuaded that his reasoning also applies to the instant application that "Section 482 is broad enough to provide the underlying authority to extend the use of stays to situations not specifically enunciated by Parliament, and the **Rules** give it effect."

Among the cases to which Mr. Martin has made reference is a decision of Chief Justice Goodridge of the Newfoundland Court of Appeal, in chambers. It is **R. v. Bugden** (1992), 99 Nfld. & P.E.I. R. 102. The Chief Justice dismissed an application to stay a trial pending appeal on the basis that the Court of Appeal had no jurisdiction to grant a stay under the provisions of the **Criminal Code**. He considered **Keating** and concluded the Rules in Newfoundland and Labrador were not similar to those in Nova Scotia. For this latter reason **R. v. Bugden** can be distinguished from **Keating**.

Although the Quebec Court of Appeal in **R. v. Boutin** (1990), 58 C.C.C. (3d) 237 did not grant the stay of a murder trial pending appeal, it appears to have considered that it had the authority to do so. It confirmed that a stay is not mandatory simply because the **Code** permits a right of appeal from a **certiorari** application. However, it states the grounds to be taken into consideration in determining whether a stay should be granted. (The editors of Tremeear's record that an application to appeal **Boutin** was refused by the Supreme Court of Canada.)

For the reasons given and especially the persuasive authority and analysis in **Keating**, I conclude that a chambers judge in the Nova Scotia Court of Appeal has the jurisdiction to hear and determine the present application. This is to say that when s. 482(1) of the **Criminal Code** is read in conjunction with **Civil Procedure Rules** 65.03 and 62.10(2), the Court of Appeal has the jurisdiction to deal with this application. As a consequence I have the discretion in chambers to determine whether a stay will be granted.

The Second Issue: Should a stay be granted?

The issues raised on appeal by Mr. Brogan on behalf of Mr. Dempsey are described as follows:

> (a) the failure of Judge Matheson to allow defence counsel to cross-examine, Cpl. Douglas McQueen, in relation to his sworn affidavit that was filed to obtain authorization for a wire tape, after receiving a Supreme Court Order from Justice Frank Edwards to release said affidavits;
>
> (b) the test used to commit an accused to stand trial;
>
> (c) the issue of judicial bias at preliminary inquiry;

> (d) the conduct of a Provincial Court Judge at preliminary inquiry constituting a denial of natural justice.

On their face some of these, at minimum, appear to be arguable issues. I take it that the Crown concedes that to be the case as well, although the Crown will argue they have no merit. However it is not for me to test the issues at this stage but rather to assume that they are seriously raised. If that be so, then they are arguable.

There can be little doubt that if Mr. Dempsey is to be put to his trial, if arising from an improper committal, he will suffer irreparable harm.

The balance of convenience is a matter of concern. However, Mr. Martin informs me that while important, it is not of the greatest significance to the Crown because he says that this being a case involving co-conspirators, a severed trial does not create an impossible situation.

I am persuaded that there are arguable issues; that to proceed with the trial before the appeal is heard will not only frustrate the appeal but cause Mr. Dempsey irreparable harm, and finally, that the balance of convenience favours the grant of a stay. For these reasons I will grant the application and order the stay of the trial of Mr. Dempsey pending the disposition of his appeal from the judgment of Justice MacDonald.

There is, however, one other matter and that relates to the direct indictment preferred under the hand of the Deputy Attorney General of Canada pursuant to s. 577 of the **Criminal Code**. Mr. Martin says the direct indictment renders moot the entire issue before me. I must make it clear that whatever implications arise from the direct indictment are not before me. They have not been fully argued before me and I do not profess in this decision to address them. The issue before me arises out of Mr. Dempsey's committal to trial by

Judge Matheson and later confirmed by the judgment of Justice MacDonald. It is to that set of circumstances alone that the order to stay Mr. Dempsey's trial scheduled for February 1, 1995, which I now grant, is directed.

C.J.N.S.

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