IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Cite as: R. v. Upshaw, 2012 NSPC 112

Between

Her Majesty the Queen and T.(B.)

IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST JERRICHO UPSHAW

Date: September 20, 2012

Docket: 2388561-2388565

Registry: Halifax

DECISION ON PROCEDURE FOR CONTEMPT OF COURT

JUDGE:	The Honourable Anne S. Derrick
HEARD:	September 20, 2012
ORAL DECISION:	September 20, 2012
COUNSEL:	Brian Church, Q.C., and Ian Gray, articling clerk, for Jerricho Upshaw
	Ronald Lacey and Kimberly McOnie, for the Crown
	Luke Craggs, for T.(B.)

By the Court:

[1] I first of all want to thank counsel very much, Ms. McOnie and Mr. Grey and Mr. Church, and I'm sure, Mr. Lacey, in there somewhere as well , for providing me with some assistance in the form of cases over the extended lunch hour. The cases you've sent me proved to be very helpful and I was able to read through them fairly quickly. I will say that they have had a calming effect on the sense of urgency that may have seemed apparent, and I think understandable, this morning and I have concluded that a more measured approach has to be taken than the one that I was inclined toward, which was a more summary approach with respect to the matter of Mr. Upshaw's refusal to answer questions. What I am going to do, counsel, is I am going to give you my thoughts on where this situation takes us. I will take a few minutes to do that. I may ultimately conclude that I am going to write a decision which would be in the nature of more amplified reasons. I would be doing that, primarily, because it possibly might be of some assistance to somebody else who finds themselves – particularly in Nova Scotia, in this situation. I will obviously invite your comments, but I think it is probably most constructive if I set out where I think we are and you'll be fully at liberty to disagree with me and we will see where we go from there.

[2] So, first of all, I will say, this is not a situation where we are dealing with a witness who has refused to be sworn or affirmed. We're dealing with a situation where Mr. Upshaw has been affirmed but is refusing to answer questions. I am also not dealing with *Criminal Code* charges. For instance, under s. 139(2), referring to obstructing, perverting or defeating the course of justice and s. 127, as I think I've already indicated, disobeying a court order, don't apply, in my view.

And I did look at *R. v. Abdulla and Amyote, 2010, M.J. No. 270,* from the Manitoba Court of Appeal and in that case Mr. Abdulla and Mr. Amyote refused to be sworn or affirmed and I felt the case was distinguishable. So, Mr. Upshaw is not before me charged with any offence as a result of his refusal to testify. I am dealing with contempt in the face of the court under the common law and I would make reference to s. 9 of the *Criminal Code*, which says:

> Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
>
> (a) of an offence at common law,
>
> (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain or Ireland, or
>
> (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province in Canada,
>
> but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

[3] Now, the language that appears to have judicial approval from the Supreme Court of Canada is the language of citing in contempt and I read from paragraph 11 of the decision of *R. v. B.K. 1995 4 S.C.R. 1986,* kindly provided by Mr. Grey and Mr. Church, from the Supreme Court of Canada in which a majority of the court – a very substantial majority of the court say:

> In order to simplify matters it is my opinion that we should use the notion of citing in contempt not as an expression of a finding of contempt, but instead as a method of providing the accused with notice that he or she has been contemptuous and will be required to show cause why they should not be held in contempt.

[4] I am satisfied, based on various authorities, *B.K.* being one of them, that Mr. Upshaw is entitled to show cause as to why he is not in contempt. I will read from paragraphs 15 and 16 of *B.K.* where the Supreme Court of Canada, then Chief Justice Lamer, said:

> There is no doubt in my mind that he was amply justified in initiating the summary contempt procedures. I, however, find no justification for foregoing the usual steps, required by natural justice, of putting the witness on notice that he or she must show cause why they would not be found in contempt of court, followed by an adjournment which need be no longer than that required to offer the witness an opportunity to be advised by counsel and, if he or she chooses, to be represented by counsel. In addition, upon a finding of contempt there should be an opportunity to have representations made as to what would be an appropriate sentence. This was not done and there was no need to forego all of these steps.
>
> Having concluded that the instanter procedure was not justified in the circumstances of this case, it is my further opinion that there may be some exceptional cases, involving misbehaviour in court, where the failure to take one or all of the steps I have outlined above will be

> justified subject to whatever qualifications might be warranted in the context of a Charter challenge to instanter proceedings.

[5] I will note that misbehaviour in court is not an issue I am dealing with here. Mr. Upshaw is not misbehaving. He is refusing to answer questions.

[6] I am satisfied on the authorities that I have read that Mr. Upshaw is entitled to show cause as to why he is not in contempt. He is not entitled to a trial by jury. In the circumstances I am satisfied that a contempt show cause hearing can be conducted by me and I refer to paragraph – a portion of paragraph 24 of the *R. v. Ayres* decision, (*[1984] O.J. No. 135*) which Ms. McOnie provided from the Ontario Court of Appeal. In that decision the Court said – I think it was a reference to the *Cohen* case, which was referred to in the *Ayres* case:

> In that case, as in the case at bar, the refusal to be sworn and testify was done in a respectful manner without insult or insolence towards the presiding Judge and accordingly it could not be said that he might be biased or not be impartial as a result of such behaviour, nor could it be said that there would be a reasonable apprehension of bias on the part of the contemnor. *(The person who is showing cause.)*

[7] So I am satisfied that there is to be a contempt show cause hearing and it can be heard before me. I am also satisfied from reading the authorities that it would have to be conducted in accordance with the principles of fundamental justice. That Mr. Upshaw enjoys the presumption of innocence until he was found guilty of contempt beyond a reasonable doubt. That the defence is entitled to have

sufficient time to prepare and call witnesses and that Mr. Upshaw would be entitled to raise the defence of duress. This is discussed, and I won't read the provisions this afternoon, but paragraph 34 of the *R. v. B. (C.M.)* case from the Manitoba Court of Appeal (*[2010] M.J. No. 366*) refers to the use of the defence of duress as does the *Ayres* case at paragraph 39.

[8] I will note as well that the authorities talk about duress also being relevant on sentencing if contempt is made out beyond a reasonable doubt. Paragraph 39 of *Ayres* makes that point.

[9] This takes me to the issue, in my review of the material that I looked at over the adjournment, of the timing of the contempt show cause. I am going to reading, although it's a little lengthy, paragraph 35 from *Ayres*, because I think it useful:

> In the case at bar, the trial judge chose to cite the appellant for contempt to listen to argument and to impose punishment after the prosecution had called all available evidence. He considered this procedure to be a reasonable limitation upon the appellant's rights under s. 7 and 11 of the *Charter* for the proper administration of justice. In my view, it has not been shown that the procedure adopted can be demonstrably justified as a reasonable limitation on the rights guaranteed by the *Charter*. The major inducement to a recalcitrant witness to give evidence is the knowledge that his actions may constitute contempt of court and if found in contempt, he may be sentenced to a substantial term of imprisonment. In those cases where a witness refuses to be sworn or to testify, the trial judge is always in a

> position to threaten that he will cite the proposed witness for contempt and to warn him that if he is found in contempt he may be sentenced to imprisonment. If the witness persists in his refusal after such warning, the trial judge may order him to be brought back from time to time before the case for the prosecution is closed, if he is a witness for the prosecution, or prior to the conclusion of the evidence at trial, if he is a defence witness. The trial judge may actually cite the witness for contempt and order the witness to be brought back from time to time to see if he has reconsidered his position in light of the warning he has received. If after repeated appearances and repeated warnings, he still refuses to testify, it is most unlikely that a finding by the trial judge of contempt will induce such witness to testify where he has refused to do so after the previous warnings. Once he is sentenced, there is no longer any effective inducement, as the court cannot vary a fixed sentence once it is imposed.

[10] I'll just go back and comment as an aside on the statement in this paragraph of *Ayres*. "The trial judge may actually cite the witness for contempt and order the witness to be brought back from time to time to see if he has reconsidered his position in light of the warning he has received." I think that must contemplate that there is still the potential for a show cause. I believe some of the cases may refer to purging the consent, but in fact I have just looked up and seen paragraph 34 (of *Ayers*). *Ayres* does speak about the question of there being some doubt as to whether a person can purge his contempt in the case of criminal contempt. I think there is some question around that but I don't take that to be what paragraph 35 in *Ayres* is referring to.

[11] So, all that is by way of indicating what I believe to be the law that governs the circumstances we find ourselves in. And it also suggests to me that Mr. Upshaw, if he wishes to show cause that is not something that has to be dealt with immediately. In one of the cases, I believe, the contempt show cause was conducted after the person was tried on the substantive charge that they were facing. So, I had said just before we broke – I think Mr. Upshaw asked me the question, basically, when is this all going to happen - and I said, oh, well, this afternoon. But I've now reconsidered that and I am of the view that, subject to what I hear from counsel, that it is not necessary, and perhaps not even possible to conduct a contempt show cause this afternoon, and it is further my view that the proceedings in relation to contempt as they relate to Mr. Upshaw don't have a bearing on how [T.(B.)]'s trial would now proceed. I have before me a witness who is refusing to testify and unless that changes that's the position of this witness and just as I conclude, I will just say to Mr. Upshaw, you've had a break of a couple of hours, Mr. Upshaw, did you take a different view over that break of your position with respect to answering questions?

Mr. Upshaw: No, I didn't.

The Court: No. Okay. Well, I'm not surprised to hear that based on the firmness of your position previously, but I did want to give you a further chance to indicate whether you wished now to have your evidence heard and you don't.

[12] So, counsel, what does anybody wish to say in relation to what I've just indicated, either by way of disagreement or amplification or concurrence.

Note: All counsel agreed with the procedure identified in this oral decision. Mr. Upshaw advised through his counsel on September 21 that he wished to show cause and his contempt show cause was set for November 23, 2012. On November 23, Mr. Upshaw elected not to show cause and a finding of contempt was made. Sentencing submissions are scheduled for December 19, 2012.