SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Nova Scotia (Provincial Court), 2009 NSSC 175

Date: 20090601
Docket: Hfx No.304527
Registry:
Halifax

Between:

Her Majesty the Queen

Applicant

and

THE HONOURABLE WILLIAM DIGBY,
a Judge of the Provincial Court of Nova Scotia

Respondent

and

Joshua Menard Klein

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	April 23, 2009, in Halifax, Nova Scotia
Released:	June 1, 2009
Counsel:	Timothy A. McLaughlin, for the Applicant David S. Green, for the Respondent

By the Court:

INTRODUCTION

[1] On October 31, 2008 the Crown refused to call any evidence at a preliminary inquiry before Judge William Digby. The reason for the refusal arose from the Crown's conclusion that the only live issue identified by the defence was irrelevant to the question of committal. As a result, the Crown called no evidence and Judge Digby discharged the accused. The Crown now seeks orders in the nature of *certiorari* and *mandamus* to quash the decision of Judge Digby and compel him to commit the respondent to stand trial.

LEGAL FRAMEWORK

[2] Not surprisingly, the Crown and defence do not disagree on the basic principles that govern the ability of a superior court to grant relief by way of orders in the nature of prerogative relief. They are well established. Such orders are discretionary. In addition, they are limited to questioning decisions made that deal with jurisdictional concerns; either making decisions that are in violation of the jurisdiction conferred on a tribunal, or a refusal to exercise a jurisdiction it is required to exercise.

[3] The Supreme Court of Canada in *R. v. Russell* 2001 SCC 53, [2001] 2 S.C.R. 804 reiterated the limits for reviewing decisions made by statutory tribunals. McLachlin C.J., in giving judgment for the full court wrote:

> 19 The scope of review on *certiorari* is very limited. While at certain times in its history the writ of *certiorari* afforded more extensive review, today *certiorari* "runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense": *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 99. Thus, review on *certiorari* does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather certiorari permits review "only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction": *Skogman, supra*, at p. 100 (citing *Forsythe v. The Queen*, [1980] 2 S.C.R. 268).

ISSUE

[4] In essence, the Crown poses the issue to be resolved as:

> Was the discharge of the accused a result of the preliminary inquiry judge declining to properly exercise his jurisdiction, given the provisions of the Criminal Code, and the issue or issues identified by the accused for determination at the preliminary inquiry?

ANALYSIS

[5] The Crown contends that the primary function of a preliminary inquiry is to serve as a screening process. The Crown must satisfy the judge or justice conducting the inquiry that there is some evidence on all of the essential elements of the offence such that a reasonable jury, properly instructed could return a verdict of guilty (see *United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424; *R. v. Arcuri* 2001 SCC 54, (2001), 157 C.C.C. (3d) 21). A judge who commits an accused to stand trial in the absence of evidence on any one of the essential

elements of an offence commits a jurisdictional error which may be quashed on judicial review (*R .v. Skogman*, [1984] 2 S.C.R. 93; *R. v. Russell, supra.*).

[6] There is certainly ample authority to support the Crown's contention about the primary function of a preliminary inquiry. In the context of whether a justice conducting a preliminary inquiry has the jurisdiction to consider a violation of an accused's rights to counsel under s.10(b), McLachlin C.J., in *R. v. Hynes* 2001 SCC 82, [2001] 3 S.C.R. 623, for the majority, wrote:

> 30 The primary function of a preliminary inquiry justice is to determine whether the Crown has sufficient evidence to warrant committing the accused to trial: Criminal Code, s. 548(1); *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. The preliminary inquiry is not a trial. It is rather a pre-trial screening procedure aimed at filtering out weak cases that do not merit trial. Its paramount purpose is to "protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process": *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 105. The justice evaluates the admissible evidence to determine whether it is sufficient to justify requiring the accused to stand trial. (The trial judge cannot, with due respect to the contrary suggestion of Gushue and Green JJ.A., simply "choose not to" rely on offered evidence without first making a positive ruling against its admissibility.)

[7] However, a preliminary inquiry does not just have one dimension. As noted by McLachlin C.J. in *R. v. Hynes*:

> 31 Over time, the preliminary inquiry has assumed an ancillary role as a discovery mechanism, providing the accused with an early opportunity to discover the Crown's case against him or her: *Skogman, supra*, at pp. 105-6. Nonetheless, this discovery element remains incidental to the central mandate of the preliminary inquiry as clearly prescribed by the Criminal Code; that is, the determination of whether "there is sufficient evidence to put the accused on trial" (s. 548(1)(a)).

[8] In addition to the recognition by McLachlin C.J., in *R.v Hynes*, the discovery role of the preliminary inquiry has also been recognized in a number of other cases. (See for example, *R. v. Rankin*, [1995] O.J. No. 1381 (C.A.); *R. v. B.(E.)*, [2002] O.J. No. 75; *R. v. McGrath* 2007 NSSC 255, (2007), 258 N.S.R. (2d) 11). I have little doubt that the discovery aspect may also be valuable for the Crown as well.

[9] The Crown suggests that the relatively recent amendments to the *Criminal Code* with respect to preliminary inquiries serve to expedite the preliminary inquiry. Amongst other provisions it refers to ss. 536.3, 536.4 and 536.5, which provide:

> 536.3 **Statement of issues and witnesses** – If a request for a preliminary inquiry is made, the prosecutor or, if the request was made by the accused, counsel for the accused shall, within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, provide the court and the other party with a statement that identifies
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> (a) the issues on which the requesting party wants evidence to be given at the inquiry; and
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> (b) the witnesses that the requesting party wants to hear at the inquiry.
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> 536.4(1) **Order for hearing** – The justice before whom a preliminary inquiry is to be held may order, on application of the prosecutor or the accused or on the justice's own motion, that a hearing be held, within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, to
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> (a) assist the parties to identify the issues on which evidence will be given at the inquiry;

> (b) assist the parties to identify the witnesses to be heard at the inquiry, taking into account the witnesses' needs and circumstances; and
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> (c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.
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> 536.5 **Agreement to limit scope of preliminary inquiry** – Whether or not a hearing is held under section 536.4 in respect of a preliminary inquiry, the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under subsection 536.4(2), as the case may be.

[10] The reason the Crown says Judge Digby erred in discharging the accused is based on its assertion that there had been "a determination" there were no issues upon which it needed to call evidence. It says it had been determined that the only issue was the evidence about the search or seizure of a parcel said to have been addressed to the accused; and this issue was irrelevant to any of the essential elements of the offence.

[11] With all due respect to the Crown, neither the record nor the materials submitted on this application substantiate that there was any determination the defence had agreed or communicated in any way the only issue was the search and seizure of the parcel.

[12] The background facts are unremarkable and not in dispute. Apparently, on October 26, 2007 a package was inspected by the RCMP at the Halifax International Airport. It was subject to a dog search, which was negative. The RCMP left. Nonetheless, Inspectors with Canada Post opened the package and

identified what they believed to be cannabis marihuana. The RCMP returned and made some sort of delivery of the package to the respondent.

[13] The accused was then charged that he possessed, for the purposes of trafficking, cannabis marihuana in excess of three kilograms. He elected trial by judge and jury and requested a preliminary inquiry. The inquiry was originally scheduled for the afternoons of March 12 and 13, 2008. By an exchange of correspondence, and in-person discussion, the defence advised the Crown that the circumstances surrounding the mail search and the residential entry and search were in issue at the preliminary inquiry; and otherwise, "committal was in issue".

[14] The defence admitted that for the purposes of the inquiry, the Crown need not call evidence addressing the issue of whether the alleged possession was for the purpose of trafficking. The Crown confirmed in writing with the respondent that it would be calling six witnesses, but reserved the right to call additional witnesses if needed to supplement the evidence on elements of the offence or narrative. One of the identified witnesses, Henri Fortier, a postal inspector involved in opening the package addressed to the respondent, was not available on the scheduled dates for the preliminary inquiry but would be heard at a later date, convenient to the Court and counsel. The respondent requested disclosure of notes and other documents pertaining to the opening of the package by Canada Post personnel. The Crown refused.

[15] For other reasons the preliminary inquiry was adjourned to October 31, 2008. A "focus hearing" was set for August 23, 2008. The focus hearing was

rescheduled to September 15, 2008. The Crown that the respondent had been dealing with, and who would eventually handle the preliminary inquiry, was not present at the focus hearing. The respondent identified the refusal of the Crown to disclose information from Canada Post as a primary issue at the preliminary inquiry.

[16] The Crown took the position that Canada Post was not a government department, but a Crown Corporation. If the defence wanted documents from Canada Post, it would need to make an "*O'Connor* type application" for third party records. The respondent announced an intention to subpoena various people from Canada Post requiring them to bring documents to the preliminary inquiry. The Crown responded that if the subpoena was merely to bring documents, it would object and if necessary, request an adjournment of the inquiry to deal with its objection. Judge Digby made the comment to the defence that if it was to issue any subpoenas, to do so early.

[17] The Crown raised the point that no list of witnesses had been filed by the defence, and enquired about admissions on such issues as continuity of exhibits and if expert evidence would be required. The defence acknowledged it had not filed a list of witnesses, but thought that he, and the Crown actually handling the preliminary inquiry, had discussed the topic. The defence said they would give written notice to the Crown of the witnesses they wanted to hear. Aside from the discussions and exchange of correspondence from March 2008, this was not done.

[18] At the outset of the preliminary inquiry on October 31,2008 there was no indication that the proceedings were about to go off the rails. There was a brief discussion about a procedural issue. The defence had caused subpoenas to be issued. The Crown filed an application for an order in the nature of *certiorari* to quash the subpoenas. The Crown noted that it had witnesses present and they would be able to proceed, but due to the subpoena issue, and the absence of another witness due to illness, it did not believe the inquiry would finish that day.

[19] After discussion of the procedural concerns raised by the pending *certiorari* application to quash the subpoenas, the Court and the parties were satisfied that the preliminary inquiry could proceed. Crown counsel then sought to confirm what had been agreed to by the defence. The two issues that were specifically admitted for the purposes of the preliminary inquiry were continuity of exhibits and the alleged possession by the respondent was "for the purpose" of trafficking. The Crown then asked the defence to identify what were the issues or principal issues for the inquiry. The response was:

> MR. GREEN: Well, Your Honour, to be perfectly frank, the essential issue in this case is the search and/or seizure of a parcel addressed to Joshua Menard Klein. I know from the disclosure the police attended a certain address, delivered and so on. And you may need to hear a little bit of that evidence, but I'm not going to spend a lot of time on that.

[20] This led to the Crown advising the Court that he has no evidence on "that point" and would be calling no evidence on it. Judge Digby invited the Crown to call the evidence it did have. The Crown insisted that it would not as "all the other issues had been dispensed with". Judge Digby advised the Crown:

> THE COURT: Well, all I can tell you is at the moment, despite the admissions that are on the record, there is, at the moment, insufficient evidence to commit for trial.

[21] The Crown disagreed. During the ensuing discussion the respondent referred to the exchange of correspondence with the Crown in February and March 2008. Mr. Green spoke of his letter of February 21, 2008 seeking disclosure and identifying the issues and Mr. McLaughlin's letter of March 7, 2008 confirming the six witnesses it would be calling at the preliminary inquiry. The Crown did not dispute the correspondence, but took the view that the issues then were not as clearly defined as now, and he would not be calling any evidence on what he perceived to be the only issue, the search of the parcel by Canada Post. Judge Digby then concluded he had heard enough; there was insufficient evidence for committal, and the accused was discharged.

[22] The Crown's complaint of jurisdictional error by Judge Digby boils down to one simple premise: it concluded that the defence only wanted to hear evidence on the issue surrounding the search of the package by Canada Post inspectors, and by doing so, the defence had, in effect, consented to committal. With all due respect to the Crown, the defence at no time identified that the search by Canada Post employees was the **only** issue. Disclosure of information relevant to the search was identified at the focus hearing as " a primary issue". On October 31, 2008, in response to the Crown's request to identify what were the "principal issues", the defence did refer to the search and/or seizure as the "essential issue", but it also commented on the likely need to hear evidence on the police delivery of the package.

[23] Absent clear admissions or concessions by the accused or explicit consent to committal, the Crown is required to adduce some evidence on all of the essential elements of the offence, such that a properly instructed jury, acting judicially, could convict. There was obviously no express consent to committal by the respondent. There was no agreement filed with the Court or recorded by the judge pursuant to s. 536.5. The only agreements or admissions were on the continuity of exhibits and that the possession was for the purpose of trafficking.

[24] There was no evidence at all with respect to possession and the identity of the accused, nor any admission as to these elements. It is well established that to constitute possession the Crown must establish beyond a reasonable doubt knowledge, consent and control. (See *R. v. Terrence* (1983), 4 C.C.C. (3d) 193 (S.C.C.); *R. v. Hess (No. 1)* (1948), 94 C.C.C. 48 (B.C.C.A.); *Beaver v. The Queen* (1957), 118 C.C.C. 129 (S.C.C.)). As noted by Oppal J.A., in *R. v. York* 2005 BCCA 74:

> [11**]** Thus, the offence of possession is made out where there is the manual handling of an object co-existing with the knowledge of what the object is, and both these elements must co-exist with some act of control...

[25] The respondent argued in its brief and orally that at no time did he admit possession. The Crown could point to no evidence before Judge Digby, or otherwise, to dispute this position. Since there was no admission nor any evidence on this essential element of the offence, it must necessarily follow that Judge Digby committed no error, jurisdictional or otherwise, in discharging the accused. In fact, if he had committed the accused to stand trial in the absence of evidence on

one of the essential elements of the offence, he would have committed jurisdictional error.

[26] The application for an order in the nature of *certiorari* is dismissed. It follows that the application for an order in the nature of *mandamus* is also dismissed as the Judge did not improperly refuse to exercise his jurisdiction. There will be no order as to costs.

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Beveridge, J.