

SUPREME COURT OF NOVA SCOTIA

Citation: R v. Harnish, 2011 NSSC 183

Date: 20110511

Docket: Bwt. No. 347913

Registry: Halifax

Between:

Larry Albert Harnish

Appellant

v.

Her Majesty The Queen

Respondent

Judge: The Honourable Justice Peter P. Rosinski.

Heard: May 10, 2011, in Bridgewater, Nova Scotia

Counsel: Alan G. Ferrier, Q.C. for the Appellant
Joshua Bryson, for the Respondent

By the Court:

Introduction

[1] This is a matter regarding a motion by Larry Albert Harnish in which he noted in his summary conviction Notice of Appeal filed May 2, 2011, that he intended to make a motion for a stay with respect to that part of the sentence that is the suspension of his fishing license.

[2] Mr. Harnish in his Notice of Appeal states that he was convicted and sentenced in relation to an offence contrary to s. 62(1) of the *Atlantic Fishery Regulations* and thereby committed an offence under s. 78 of the *Fisheries Act* RSC 1985 c. F-14 as amended.

Facts

[3] On April 8, 2011, Provincial Court Judge Richard MacKinnon sentenced Mr. Harnish to a \$4000 fine and suspended his lobster license for three weeks commencing May 11, 2011. In support of the application for a stay of that portion

of the sentence respecting the suspension of license, I have before me the affidavit of Mr. Harnish sworn on May 2, 2011.

[4] In that affidavit he indicates that he is a lobster fisherman, self-employed, 53 years of age who has no other source of income. He is divorced and financially responsible for two children and indicates a high level personal debt has “caused financial hardship” for him. He notes in his affidavit that the consequences of his suspension of his lobster fishing license as of May 11, 2011, would be dramatic and significant because: Firstly, his boat gear and traps are already in the water in lobster fishing area number 33; secondly, he says he believes as a result he will be unable to support his children and meet his liabilities as they become due if he does not have the income from fishing at that point in time; and thirdly, he believes that his family and he will suffer irreparable financial harm in the event that the conviction or sentence is reversed on appeal ultimately.

Jurisdiction to stay a suspension of a commercial fisheries license

[5] I might note that in my view, a sentence must be stayed entirely, or not at all. In my view, the sentence is not severable insofar as a stay application is concerned.

However not having done research on the matter, I am inclined to find that, should I determine that the fishing license suspension should be stayed, my including the fine in that will not affect the outcome here today.

[6] I note that the appeal here will be heard on September 22, 2011.

Consequently, Mr. Harnish will not know before then at the earliest, what the outcome of his conviction and sentence appeal will be. It is for this reason that I provide the parties this decision now rather than delay it any further as the suspension of fishing license is to take place tomorrow.

[7] There is some uncertainty about the jurisdiction of the Court to consider and impose a stay of the sentence as imposed. The Crown and Defence do agree here, and I concur, that there appears to be jurisdiction based on a chain of points of authority starting with s. 683(5) and s. 482 of the *Criminal Code of Canada*, then linked to *Civil Procedure Rule 63* governing summary conviction appeals, which includes or incorporates *Civil Procedure Rule 91*, which also incorporates *Civil Procedure Rule 90* regarding civil appeals. This leads to Rule 90.41.

[8] Rule 90.41(1) reads:

90.41 (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.

(2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[9] I have also had the benefit of considering a number of cases respecting this area of law. *R v. Keating* (1991) 106 NSR (2d) 63 and *R v. Dempsey* (1995) 168 NSR (2d) 110, both decisions of our Court of Appeal. I also had regard to *R v. Gallant* (2006) 255 Nfld and PEIR 231, a decision of the PEI Supreme Court Appeal Division.

The 2 part test to be used in deciding whether to stay a sentence

[10] It appears that the parties here agree that there is jurisdiction in the Court, and they are also satisfied that the appropriate test to be considered is essentially the test in *Purdy v. Fulton Insurance Agency Limited* (1990) 100 NSR (2d) 341, a decision of our Court of Appeal. In that decision, Hallett, JA in Chambers at para. 28 stated:

In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the Appellant can either

(1) satisfy the Court on each of the following: (i) that there is an **arguable issue** raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the Appellant will have suffered **irreparable harm** that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages, but also whether if the successful party at trial has executed on the Appellant's property, whether or not the Appellant if successful on appeal will be able to collect, and (iii) that the Appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called **balance of convenience**.

OR

(2) failing to meet the primary test, satisfy the Court that there are **exceptional circumstances** that would make it fit and just that the stay be granted in the case. [My emphasis]

[11] While that test is cited in a civil law case, in my view, its principles are applicable to criminal matters, and are reflected in my view, in the cases of *Keating* and *Dempsey*.

Application of that test to the facts in this case

[12] In relation to that test, the Defence position here is that there are “arguable issues”. I do not have the benefit of a transcript, or of the decisions regarding conviction and sentence by the trial judge. This meant I relied upon counsels’ submissions, which understandably, had somewhat different perspectives on the topic of “arguable issues”. The Defence position here is that its conviction appeal is based on four specific grounds as follows;

1. The learned trial judge failed to consider and weigh evidence before him that was relevant to the Appellant’s theory of the defence that the two tagged lobsters found in the Appellant’s catch were placed in the Appellant’s trap by a third party, possibly the complainant, Vincent Boutilier.
2. The learned trial judge erred in assessing the credibility of the Appellant when he concluded that it was inappropriate for the Appellant to be so negative towards the complainant, Vincent Boutilier, when that position was completely consistent with the theory of the defence.

3. The learned trial judge erred in assessing the credibility of the complainant, Vincent Boutilier, when the learned trial judge failed to refer to evidence that contradicted the complainant's accusations made to fisheries officers in the days before the alleged date of the offence, which were directed specifically at the Appellant.

4. The learned trial judge erred when he made no comment on the inappropriateness of the investigation conducted by fisheries officers and specifically the inappropriate involvement of the complainant, Vincent Boutilier, in the investigation particularly as it affected the continuity of evidence.

[13] Lastly, Mr. Harnish argues that there may be other appeal grounds "as may appear from the transcript".

[14] In relation to the sentence appeal, that ground is captured in the Notice of Appeal as follows:

The suspension of the Appellant's fishing license for the last three weeks of the 2010 - 2011 season was arbitrary and without foundation and did not consider either the Crown's or Appellant's positions regarding suspension in the 2011 -

2012 fishing season and did not consider that all of the Appellant's fishing gear was in the water on the date of the sentence.

[15] In essence therefore, on conviction, the Appellant argues the matter as an unreasonable verdict - See *R v. Nickerson* [1999] NSJ No. 21 (CA). As to the sentence appeal the test regarding review on appeal is well known, and it does appear that the sentence appeal ground fits within several of the factors set out in that test. That test has been repeatedly restated, but is in effect:

Absent an error in principle, failure to consider a relevant factor or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. - *R v. C.A.M.* [1996] 1 SCR 500

[16] In the case at Bar, fitness of sentence is not an issue. Is the test for a stay of sentence met here then? As indicated, I am satisfied that I have jurisdiction to consider the imposition of a stay of sentence. My view is that the entire sentence should be stayed, if at all.

[17] In relation to this matter, which is a summary conviction appeal, Rule 91 of our *Civil Procedure Rules* applies to the extent that it is not inconsistent with the summary conviction appeal process. I note that Rule 91.24(3) regarding release

pending appeal for persons who are in custody, and have appealed sentence only, requires them to provide evidence in relation to the sentencing and conviction, and that specifically an Appellant must, unless otherwise directed by a judge, file with their Notice of Motion:

- a) the decision of the sentencing judge;
- b) the submissions made at the sentencing hearing;
- c) a copy of any pre-sentence report;
- d) a copy of the Appellant's criminal record if any;
- e) a proposed form of order for release pending appeal.

[18] In my view, as I've discovered today, it is a somewhat difficult assessment, regarding whether there are "arguable issues" here; that is to make such an assessment on the basis of a Notice of Appeal and the representations of counsel only. I consider it necessary on an appeal from conviction and sentence, where the Appellant is requesting the Court to stay the sentence which is based upon the conviction, that the trial judge's conviction decision **and** sentence decision should **both** be filed, unless the Court permits otherwise.

[19] Just filing a Notice of Appeal does not “stay”, of course, the conviction or sentence. The onus to satisfy the Court of the merits of its position is on the party requesting the stay. The conviction and sentence decisions are the basis of the appeal in this case. I note that the appeal here is not based on interlocutory decisions such as admissibility decisions.

[20] That those decisions are not available makes the assessment by me of the following bases for a motion for “stay” of the sentence verge on speculation.

1. Does the appeal raise “arguable issues”?

2. Are there exceptional circumstances here that would otherwise justify a stay of sentence where the primary test in *Purdy v. Fulton Insurance Agency Ltd.* is not met?

[21] Having said that, I accept in this case that the Appellant would suffer irreparable harm if his fishing license remains suspended for three weeks after May 11, 2011 and before his appeal is heard on September 22, 2011.

[22] Moreover, I am satisfied that a suspension of this nature of the fishing license can be reimposed after the appeal, if the appeal is dismissed, in spite of s. 822(6) which limits the power of the Court to “dismiss the appeal” - see the decision of the PEI Supreme Court Appeal Division *R v. Gallant* 2006 255 Nfld and PEIR 231.

[23] I also accept that the balance of convenience favours the Appellant in this case. Insofar as the primary test is concerned however, I do **not** find that the mere filing of the Notice of Appeal, without any supporting affidavits, or the conviction and sentence decisions provides any basis on which I can assess whether there are “arguable issues” raised in this appeal concerning the conviction and sentence.

[24] Even the Appellant’s written brief reveals no precise identification of the alleged errors. While some representations were made by counsel to elaborate upon the basis of the appeal, these understandably are the subject of dispute as between counsel. I do note as well, that the order suspending the license is not on file yet either, but has been requested. That in itself is certainly no impediment to my consideration of whether the stay of sentence should be imposed here as I do have the affidavit evidence of Mr. Harnish to establish facts upon which I can act.

Conclusion

[25] I would otherwise, on the primary ground, dismiss this motion to stay the sentence as ordered. However, I find that there are “exceptional circumstances” to grant the motion under the secondary ground. I grant the motion exceptionally because 1) there is evidence of irreparable harm; 2) the balance of convenience does favour the Appellant and; 3) although there is nothing upon which I can assess the “arguable issues” factor, in these exceptional circumstances I note as well:

- a) the sentence was ordered April 8, 2011 and the fishery license suspension takes effect tomorrow, May 11, 2011;
- b) There has been limited time to obtain the conviction and sentence decisions, and the existing case law has not previously clearly identified these obligations upon Appellants as I see them;
- c) It is only one day hence when the decision I must make will have effect and fairness favours a stay of the fishery license suspension since the Appellant, to the extent he could even have done so, could

have made alternate plans were it not such a short period before the suspension takes effect.

[26] Therefore, I do order, as I am satisfied that it is in the interest of justice here, that the sentence imposed by Judge Richard MacKinnon on April 8, 2011 of a \$4000 fine and a suspension of fishing license for three weeks commencing May 11, 2011, be and is hereby stayed pending the outcome of the appeal.

J.