NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Pitts*, 2015 NSCA 85

Date: 20150918
Docket: CAC 439939
Registry: Halifax

Between:

Jason Troy Pitts

Applicant

v.

Her Majesty The Queen

Respondent

Restriction on Publication: Pursuant to s. 486 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Cindy A. Bourgeois
Motion Heard:	September 10, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion granted
Counsel:	Jason Troy Pitts, Applicant in Person William Delaney, for the Respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Decision:

[1] On October 27, 2014, Mr. Pitts pled guilty to a number of offences including possession of child pornography, making of child pornography and conspiracy to commit an indictable offense (sexual assault). He was sentenced on February 4, 2015 to a total of seven years. Mr. Pitts wants to appeal the sentence, suggesting it is too harsh and "outside the range of sentence for similar offenders in similar circumstances".

[2] Mr. Pitts did not file his Notice of Appeal within the required period. He has brought a motion to extend the time for filing, and thus allow him to advance his appeal and seek a lower sentence. In support of his motion, Mr. Pitts filed an affidavit, including a proposed Notice of Appeal. The Crown opposes the motion.

The Law

[3] Section 678 of the **Criminal Code** gives me authority to extend the time for filing a Notice of Appeal.

> Notice of appeal
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> **678.** (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.
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> Extension of time
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> (2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

[4] The same authority is reflected in **Civil Procedure Rule** 91.04.

[5] The factors I should consider in exercising the discretion to extend have been described by Beveridge, J.A. in **R. v. R.E.M.**, 2001 NSCA 8, as follows:

> [39] Both in Nova Scotia, and elsewhere, the criteria to be considered in the exercise of this discretion has been generally the same. The Court should consider such issues as whether the applicant has demonstrated he had a *bona fide* intention to appeal within the appeal period, a reasonable excuse for the delay, prejudice arising from the delay, and the merits of the proposed appeal. Ultimately, the discretion must be exercised according to what the interests of

> justice require. (See *R. v Paramasivan* (1996), 155 N.S.R. (2d) 373; *R. v. Pettigrew* (1996), 149 N.S.R. (2d) 303; *R. v. Butler*, 2002 NSCA 55; *R. v. Roberge*, 2005 SCC 48.)

[6] His Lordship further explains that the merits assessment will involve inquiring whether the applicant can demonstrate an arguable ground of appeal. In terms of what constitutes an "arguable issue", Beveridge, J.A. endorses the approach taken in civil matters:

> [50] ... For example, in *MacCulloch v. McInnes, Cooper & Robertson* (2000), 186 N.S.R. (2d) 398, Cromwell J.A., as he then was, wrote:
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> > [4] The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman J.A., in **Coughlan et al v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

These are the principles I will apply to this motion.

Application of the Principles

[7] In his affidavit, Mr. Pitts says he formed an intention to appeal on February 8, 2015 and asked a parole officer at the Burnside Correctional Centre how he should go about appealing. Mr. Pitts says he understood from that discussion that he could request to speak with a lawyer upon his transfer to the Springhill Institution. Mr. Pitts was transferred to Springhill on February 12, 2015 where he was placed on the enhanced supervision range due to being on suicide watch.

[8] Upon being transferred from enhanced supervision, Mr. Pitts made a request the same day to speak with a legal aid lawyer. A second request was sent on March 25, 2015. Mr. Pitts was able to meet with counsel on May 20, 2015. After receiving advice, Mr. Pitts requested through his parole officer forms for filing a Notice of Appeal and the present motion. The forms were received by Mr. Pitts on May 22, 2015, and he subsequently met with his parole officer on May 29, 2015 seeking assistance in having the forms completed. The proposed Notice of Appeal and Notice of Motion were faxed to this Court on June 3, 2015.

[9] In tele-chambers held on July 29, 2015, the Crown advised that it would be opposing the motion to extend and requested time to have the sentencing submissions and oral decision transcribed. The matter was set over to September 10, 2015.

[10] In its written submissions, the Crown advised that it sought to cross-examine Mr. Pitts at the hearing of the motion. However, the Crown chose not to do so, leaving the assertions contained in his affidavit unchallenged.

[11] I find that Mr. Pitts had a *bona fide* intention to appeal within the required time period. Further, I am satisfied that his institutional transfers, delayed attempts to obtain legal advice and mental health concerns, constitute a reasonable explanation for the delay.

[12] It remains to be addressed whether the proposed Notice of Appeal raises an arguable issue. The Crown argued forcefully that given the vile nature of these offences, that the sentencing judge reached a proper determination and that Mr. Pitts has no hope of successfully challenging the sentence imposed.

[13] It cannot be questioned that the offences to which Mr. Pitts acknowledged guilt are repugnant. Mr. Pitts was participating in live web streaming where he communicated with women in the Philippines and watched them or others engage in the sexual abuse of children; including directing particular acts be undertaken for his viewing. It is from these activities that the charge of conspiracy to commit an indictable offence arose, and it is the sentence in relation thereto which is most relevant on this motion.

[14] As noted earlier, Mr. Pitts says his sentence is excessive and outside an appropriate range. In my view, whether the sentence falls within an acceptable range gives rise to an arguable issue. In reaching this conclusion, I have found particularly helpful the comments of Fichaud, J.A. in **R. v. Miller**, 2015 NSCA 19. Although in the context of a motion for state-funded counsel, that matter also involved an allegation that a sentence imposed following a guilty plea was excessive, and that such gave rise to an "arguable issue" on appeal. Fichaud, J.A. wrote:

> [18] I will apply the "arguable issue" standard. But I don't interpret "arguable" to mean merely a notch above frivolous. It is also important to consider the nature of the ground of appeal. When the facts are basically agreed, as in Mr.

> Miller's sentencing, a ground that turns on a balancing of legal principles usually is arguable.
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> [19] The appropriate period of incarceration derives from a balance of various sentencing principles. Before the sentencing judge, the submitted range spanned the goalposts of an 8 year high suggested by the defence to a 12 year low requested by the Crown. The Court of Appeal's perspective would focus on whether the actual sentence occupies "the range". But the range's ambit will turn on the application of the circumstances of this offence and offender to a balance of the sentencing principles that are stated in the *Code*.
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> [20] There are cases where nothing anyone might say would alter the inexorable conclusion that the sentence occupies the range. I am not convinced this is one of them. The Attorney General's submissions, that Mr. Miller's appeal lacks merit, are better suited to the appeal proper than to a s. 684 motion. In my view, the appeal is arguable

[15] In the present case, on sentencing, the Crown argued that seven years was a fit disposition. Mr. Pitts' counsel suggested three years. What is clear from the transcript is that the Crown in preparing for sentencing had difficulty in identifying an established range of sentence for the conspiracy charge. Counsel had this to say:

> I'm unaware of any incident like this in Nova Scotia, most definitely, and, potentially, anywhere in Canada, more widely. We are in a sense a bit at a loss to properly calibrate sentences in relation to the, essentially, participation in an international black market predicated on the exploitation of children.
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> ...
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> In trying to craft a sentence, it's difficult without any exact precedent, but what I've attempted to do with my own review of the case law is to isolate the key elements of this offence and attempted to find somewhat similar cases that help calibrate us on the exact range that would be appropriate for this offence.

[16] The sentencing judge similarly acknowledged a lack of precedent in his sentencing decision:

> Mr. Singleton has argued, very ably, I might say, on Mr. Pitts's behalf, indicating that a sentence of seven years is too severe, that it's too harsh. He has compared it with ... well, I guess the Crown has compared ... used sentences that involve persons in authority over young persons as a comparator to this case, and Mr. Singleton argues that that is an inappropriate comparator.
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> The difficulty is that there's simply no other cases that are similar to this that I could locate. Most of the cases involving abuse of children, either through pornography or through sexual assaults, are instances where the offender has

> actually touched the individuals or exploited them in some way by the making of child pornography, and they are often involved with persons in authority. Having said that, to some extent, there is an abuse of authority here, because Ms. JS had some authority over the eight-year-old and Mr. Pitts was part and parcel of that by his buying the services from JS and conspiring or agreeing with her to exploit somebody that was clearly under her authority – the eight-year-old was being directed by her. So there is a measure of abuse of authority here, but I take Mr. Singleton's point.

[17] Notwithstanding the able submissions of the Crown, I am unable to agree that Mr. Pitts' appeal is clearly devoid of merit. He has raised an arguable issue as it relates to the appropriateness of the sentence imposed. I am satisfied that it is in the interests of justice that Mr. Pitts' appeal should proceed and his motion is granted.

[18] Mr. Pitts shall be entitled to file his Notice of Appeal no later than October 21, 2015.

Bourgeois, J.A.