NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Spencer*, 2015 NSCA 108

Date: 20151202
Docket: CAC 444045
Registry: Halifax

Between:

Debra Jane Spencer

Applicant

v.

Her Majesty The Queen

Respondent

Judge:	MacDonald, C.J.N.S.
Motion Heard:	Motion proceeded by way of written submissions
Held:	90.38(3) motion for leave to review dismissal order denied
Counsel:	Nicole Campbell and Trevor McGuigan, for the applicant Kenneth W.F. Fiske, Q.C., for the respondent

Decision:

[1] Justice Fichaud of this Court denied Ms. Debra Spencer's motion to extend the time to appeal her two year sentence for being an accessory after the fact to murder. She now asks me, as Chief Justice, to allow a review of this decision. Typically, I do not provide reasons in response to such requests. Instead, the matter would normally be disposed of by way of a simple order. However, in this case, Ms. Spencer had filed a comprehensive submission that merits a more detailed response. Here, therefore, are my reasons denying this request.

[2] **BACKGROUND**

[3] Justice Fichaud succinctly summarized the events leading to Ms. Spencer's guilty plea and subsequent joint recommendation for the two year sentence.

> [2] In July 1984, Ms. Spencer was born to a single mother in the Caribbean nation of St. Vincent. She was adopted by a Canadian and in 1993 moved to Canada. Since, she has lived in this country. She completed high school in Yarmouth, and settled in Halifax. She has virtually no connection to St. Vincent.
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> [3] On March 9, 2014, Bradford Beals murdered David William Rose in a rooming house on Inglis Street in Halifax. Ms. Spencer was Mr. Beals' girlfriend at the time. She was at the site of the murder. Ms. Spencer was arrested on March 11, 2014, and remained in custody until her sentencing.
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> [4] On May 29, 2014, in the Supreme Court before Justice Cindy A. Bourgeois, Ms. Spencer pleaded guilty to being an accessory after the fact to murder contrary to s. 240 of the *Criminal Code*. She was represented by counsel. Counsel for Ms. Spencer and the Crown jointly recommended a sentence of two years incarceration. Aside from a mention of her place of birth, the sentencing judge was not informed of Ms. Spencer's immigration status.

> [5] On May 29, 2014, Justice Bourgeois made an oral sentencing ruling, followed by a written decision on June 18, 2014 (2014 NSSC 198). The decision said:
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> > [21] … Ms. Spencer in relation to the offence that you did on March 19, 2014 knowing that Bradford Eugene Beals had murdered David William Rose, did enable Bradford Eugene Beals to escape custody, contrary to s. 240 of the *Criminal Code*, I am satisfied what I have heard supports the guilty plea that you have entered in relation to this matter and I find that a sentence of two years in a federal institution is appropriate.
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> [6] Under s. 678(1) of the *Code* and Rule 91.09(1), an appeal should be filed within twenty-five days of the sentence. Ms. Spencer did not appeal within that interval.
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> [7] As a result of her conviction, Ms. Spencer has been ordered deported from Canada. The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 64, as amended by S.C. 2013, c. 16, s. 24, says that a foreign national who has been sentenced to incarceration of six months or more may not appeal a deportation order.
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> [8] On October 5, 2015, Ms. Spencer filed in the Court of Appeal a Notice of Motion to extend the time to appeal her sentence. Her written material that was reiterated by her oral presentation at the chambers hearing says that, during the criminal proceeding, she was unaware of the prospect of deportation and, had she known, she would not have agreed to the joint sentence recommendation. Hence, her motion to extend the time so she can appeal the sentence. If her sentence is reduced to under six months, Ms. Spencer would appeal the deportation order.
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> [9] Section 678(2) of the *Code* permits a judge of this Court to extend the time for filing a notice of appeal. Rule 91.04 gives the chambers judge discretion to extend time periods, before or after the period has expired.

[4] In denying the motion, Justice Fichaud acknowledged that Ms. Spencer's sole motivation for attempting reopen of this matter (after some 17 months) was to avoid deportation. However, her circumstances failed to raise an arguable issue that would justify an appeal:

> [14] Ms. Spencer makes it clear that the only objective of her appeal is to avoid deportation. She faces s. 64 of the *Immigration and Refugee Protection Act*, as amended in 2013:

> 64(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
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> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).
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> …

[15] To succeed with her objective, Ms. Spencer would have to persuade a panel of this Court to reduce her sentence from two years to six months.

[16] Ms. Spencer pleaded guilty to being an accessory to murder under s. 240 of the *Code*. This is an indictable offence with a maximum penalty of life imprisonment. Ms. Spencer was represented by counsel. The two year sentence was jointly recommended by the Crown and her counsel. The sentencing judge's decision said:

> [16] I am satisfied based on the caselaw as outlined by Justice Edwards [*R. v. Hynes*, 2014 NSSC 119] in particular, that the range of sentencing in relation to this type of offence is anywhere between 18 months to five to seven years. …
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> [17] I am satisfied that the characterization of Ms. Spencer's involvement is as described by both counsel, which is at the lower end of the range.
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> [18] I am satisfied that the joint sentence of two years falls within the range.

[17] In *R. v. Jamieson*, 2011 NSCA 122, the Court reduced a sentence by two days, to preserve the individual's immigration appeal rights. The reduction left the sentence well within the range of appropriate sentences for the offence.

[18] In Ms. Spencer's case, a reduction from two years to six months would drop her sentence far below the range of fit sentences for being an accessory to murder. There is no possibility that a panel of this Court would order that reduction. In my view, her submission is not an arguable ground of appeal.

ANALYSIS

[5] A decision of a single judge of the Court terminating an appeal can, as a final safeguard, be reviewed by a panel of the Court. However this requires leave from the Chief Justice [*Civil Procedure Rule* 90.38 (3)].

[6] Considering the fact that Justice Fichaud has already carefully considered this matter, it would take highly compelling reasons for me to allow a review. For example, in Marshall v. Truro (Town) 2009 NSCA 89, I explained:

> **10** It occurs to me that to warrant a review by a panel of this court, an aggrieved party must present a highly compelling case. In other words ,the potential for injustice must be clear and significant. Furthermore, one must presume that any potential injustice would have been obvious to the judge who granted the order under review. Therefore, I would expect to grant such relief only in very exceptional circumstances. Otherwise, this provision might be simply viewed as an opportunity for a rehearing; a consequence that would be clearly unintended and unnecessary. In fact, it would be ill advised to allow such a provision to serve as an opportunity for a rehearing. Indeed, courts in similar contexts have discouraged such approaches.
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> **11** For example, in **Chandos Construction Ltd. v. Alberta (Minister of Alberta Infrastructure)**, 2008 ABCA 14 (CanLII), the Alberta Court of Appeal noted:
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> > [5] This Court has, on numerous occasions, emphasized that exceptional circumstances are required before an application for re-argument will be granted, and that re-hearings are to be discouraged: **Strichen v. Stewart**, 2005 ABCA 201 (CanLII), 367 A.R. 188; **Portage Credit Union Ltd. v. D.E.R. Auctions Ltd. (#2)** (1994), 1994 ABCA 50 (CanLII), 18 Alta L.R. (3d) 185.
> >
> > [6] Hunt, J.A., summarized the governing principles in **Luscar Ltd. v. Smoky River Coal Limited**, 1999 ABCA 252 (CanLII), 244 A.R. 196 at para. 4:
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> > > Those authorities make it clear that leave should not be granted lightly. There must be a reason for the re-argument: **Nova, An Alberta Corporation v. Guelph Engineering Co. and Daniel Valve Co. et al.** (1989), 1989 ABCA 311 (CanLII), 102 A.R. 350 at 351 (C.A.). Among the factors to be taken into account are whether there is a risk of a miscarriage of justice (**Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.** [1999] A.J. No. 444 (Q.L.) at para. 6 (C.A.)); whether the new arguments would affect the outcome (**Arrowhead Auto & Truck Parts Ltd. v. Calgary (City**) (1997), 196 A.R. and 141 W.A.C. 57 (C.A.) at 57-58)); and

> whether the parties had the opportunity to address the issue in the original hearing (**Nova**, supra, at 352).

12 As well, the Manitoba Court of Appeal in **Willman v. Ducks Unlimited (Canada)**, 2005 MBCA 13 (CanLII), recently observed:

> [3] The principles regarding rehearings, or reconsiderations, as they were sometimes called, were expressed by Twaddle J.A. in **Abraham v. Wingate Properties Limited** (1985), 37 Man.R. (2d) 267 (C.A.) (at para. 1):
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> > … this court will not in the ordinary course grant an application for reconsideration unless there is a patent error on the face of the reasons delivered or a point for argument not raised at the hearing of the appeal and which arises out of the judgment delivered, which point could not reasonably have been foreseen and dealt with at the original hearing.
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> ...
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> [9] The facts of any particular situation must be carefully and, I suggest, critically examined in order to determine if the circumstances are so exceptional as to warrant a rehearing. The focus should be on ascertaining whether, for example, the court has made a patent error on a central point, or the appeal was decided on a legal issue which counsel truly had no opportunity to address, or there has been, on a material aspect, a demonstrable oversight of fact or law by the court, such as an error in calculation, or reliance on a repealed statute. Bearing in mind the public interest in finality of litigation, I respectfully agree with the rigorous approach articulated by the Privy Council in **In re Payment of Compensation to Civil Servants under Art. 10 of Agreement for a Treaty Between Great Britain and Ireland**, [1929] A.C. 242 (H.L.), "such an indulgence [rehearing] will be granted in very exceptional circumstances only. It is of the nature of an extraordinarium remedium" (at p. 252). In my view, the threshold which an applicant must cross should be high, not only to avoid the risk of rehearing requests being made following an appeal judgment, almost as a matter of course, but, more importantly, to ensure that rehearings are granted only in exceptional circumstances, where the interests of justice manifestly compel such a course of action.
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> [10] Circumstances beyond those discussed herein may be identified that in other cases might be so exceptional as to warrant a rehearing. Confining this summary of factors to those that might be relevant here, on the present state of the law, any of the following

> circumstances should be recognized as exceptional, thus warranting a rehearing (assuming the certificate of decision has not yet been filed):
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> > 1) there is a patent error on a material point on the face of the reasons;
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> > 2) the appeal was decided on a point of law that counsel had no opportunity to address, and which point could not have reasonably been foreseen and dealt with at the hearing; or
> >
> > 3) the court has clearly overlooked or misapprehended the evidence or the law in a significant respect and there is a consequential serious risk of miscarriage of justice.

[7] I agree with Justice Fichaud that Ms. Spencer's proposed appeal would be a complete non-starter. A sentence of six months less one day in these circumstances would be inordinately low and not supported by the case law. It would represent a more than 75% reduction of the original disposition. This is beside the fact that Ms. Spencer, by the joint recommendation, acknowledged that two years was appropriate. She would be hard pressed now to convince an appeal court that this same disposition is now excessive.

[8] In other words, while the spectre of deportation is a legitimate consideration for a sentencing judge, it cannot be used to justify an otherwise unfit sentence. In *R. v. Pham* 2013 SCC 15, the Supreme Court of Canada explained:

> **14** The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed

is proportionate to the gravity of the offence and the degree of responsibility of the offender.

15 The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

16 These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

17 In *R. v. Badhwar*, 2011 ONCA 266 (CanLII), 9 M.V.R. (6th) 163, the offender was convicted of criminal negligence causing death while street racing and failure to stop at the scene of an accident. He was sentenced to 30 months (less 5 months for pre-trial custody) on the first count and 12 months consecutive on the second. On appeal, he did not seek a reduction of his global sentence of 37 months; rather, he asked the court to adjust his sentence to 23 months and 19 months consecutive in order to avoid the collateral consequences of a sentence of 24 months or more, namely the loss of his immigration appeal rights. I agree with Moldaver J.A. (as he then was), who, in refusing to grant the adjustment, wrote the following, at paras. 42-45:

> In seeking to have his sentence adjusted, the appellant does not suggest that the trial judge erred in imposing a penitentiary sentence on the charge of criminal negligence causing death — nor could he. This court . . . upheld a 30 month sentence for [the offence of criminal negligence causing death while street racing] in respect of Mr. Multani (2010), 261 O.A.C. 107 (Ont. C.A.).
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> Significantly, in Multani's case, the court refused to give effect to Mr. Multani's submission that the sentence of 30 months should be reduced to 23 months for reasons relating to his immigration status. At para. 3 of the decision, the court noted that "while the deportation consequences of the sentence may be a proper factor to consider in determining the appropriate sentence in certain cases, immigration consequences cannot take a sentence out of the appropriate range."
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> That principle applies equally to the appellant. In his case, somewhat ironically, he seeks to benefit from the fact that he was convicted of two offences and therefore can seek the adjustments he is requesting without interfering with the overall length of his sentence — something Mr. Multani could not do given that he was only convicted of the single offence of criminal negligence causing death.
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> No matter how one chooses to come at the issue, the bottom line remains the same. Courts ought not to be imposing inadequate or artificial

> sentences at all, let alone for the purpose of circumventing Parliament's will on matters of immigration.
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> **18** It follows that where a sentence is varied to avoid collateral consequences, the further the varied sentence is from the range of otherwise appropriate sentences, the less likely it is that it will remain proportionate to the gravity of the offence and the responsibility of the offender. Conversely, the closer the varied sentence is to the range of otherwise appropriate sentences, the more probable it is that the reduced sentence will remain proportionate, and thus reasonable and appropriate.

[9] The Supreme Court, in *Pham* applied the same logic to appeal courts:

> **24** An appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue. In such circumstances, the court's intervention is justified because the sentencing judge decided on the fitness of the sentence without considering a relevant factor: *M. (C.A.)*, at para. 90. As I explained above, however, the aim of such an intervention is to determine the appropriate sentence in light of the facts of the particular case while taking all the relevant factors into account. Although there will be cases in which it is appropriate to reduce the sentence to ensure that it does not have adverse consequences for the offender's immigration status, there will be other cases in which it is not appropriate to do so.

[10] Ms. Spencer also highlights the fact that the principal to this offence ended up being convicted not of murder but to the lesser offence of manslaughter. This she submits should inform the merits of her proposed sentence appeal. She explains it this way in her motion to me:

> **11** It is respectfully submitted that the ultimate manslaughter conviction of Bradford Beals, the principal charged with murder in this matter, also warrants consideration when assessing the merit of the proposed sentence appeal: **R. v. Beals** 2015 NSSC 129. At the time the applicant was sentenced, Mr. Beals' had not been dealt with by the courts. Mr. Beals' plea to the lesser charge of manslaughter was not considered at the motion to extend time.

> **12** The applicant will file an appeal against conviction. Based on Mr. Beals' conviction for manslaughter, the applicant will argue that her guilty plea should be set aside as a result of a miscarriage of justice. Should the applicant's conviction be substituted for a conviction of accessory to manslaughter, the sentence may be reduced to reflect reduced moral culpability.

[11] Respectfully, this does not assist Ms. Spencer. In the context of a s. 90.38(3) leave request, I simply cannot speculate on something that was not even before the motions judge.

[12] Respectfully, Ms. Spencer has failed to present a compelling case to interfere with a matter that has already been fully adjudicated by a judge of this Court.

DISPOSITION

[13] The motion for leave to review Justice Fichaud's decision is denied.

MacDonald, C.J.N.S.