NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Stewart*, 2015 NSCA 70

Date: 20150710
Docket: CAC 419615
Registry: Halifax

Between:

Dennis Garry Stewart

Appellant

v.

Her Majesty the Queen

Respondent

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

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	July 9, 2015, in Halifax, Nova Scotia, in Chambers
Held:	Motion for interim release dismissed
Counsel:	The Appellant on his own behalf James A. Gumpert, Q.C., for the Respondent Scott Millar, for the Federal Public Prosecution Services Stacey Gerrard, for Robert Sutherland and Pavel Boubnov

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Reasons:

[1] Mr. Stewart applies for interim release pending his appeal from conviction and sentence. He applies under s. 679 of the *Criminal Code*.

[2] Judge Atwood's sentencing decision (2013 NSPC 64) set out the facts:

> [2] Dennis Garry Stewart is before the court to be sentenced for an array of charges involving predatory sexual activity against children. This is the sort of case that the late Justice F.B. Woolridge of the Newfoundland and Labrador Supreme Court used to describe as being every parent's worst nightmare.
>
> …
>
> [4] The facts of this case are as uncomplicated as they are alarming. In the summer of 2011, Dennis Garry Stewart began contriving encounters with and grooming a number of under-sixteen-year old males for the purposes of facilitating criminal sexual activity with them. He sought to smooth the way with promises and delivery of tobacco, alcohol and prescription drugs.
>
> [5] Several – specifically J.L., N.F., B.W., – were particularly vulnerable adolescents as they were in the care of the Department of Community Services and lived in a local group home. Mr. Stewart knew this about J.L., N.F., and B.W., because he had them in his car in a parking lot next to the home. On 30 July 2011, he drove them out into the county; the only common-sense inference to be drawn from this is that Mr. Stewart wanted to avoid getting caught. Mr. Stewart gave these children beer to drink while he drove. He offered to perform fellatio on B.W. He fondled J.L.'s crotch area over his clothing. He did the same thing to N.F. Group home staff found out about what had happened soon after the young persons were dropped off by Mr. Stewart; staff called police, and members of the Stellarton Policing Service carried out an investigation. Informations alleging two counts of s. 151 and one count of s. 152 of the *Code* were sworn on 23 September 2011; Mr. Stewart wound up being arrested and was admitted to bail on a judicial undertaking through the Justice of the Peace Centre on the day the charges were laid. One of the bail conditions was that Mr. Stewart "not associate with or be in the company of any person under the age of 16 years".
>
> [6] In late October 2011, Mr. Stewart picked up 15-year-old A.R.J. and drove him to the back of a cemetery lot. Mr. Stewart's vehicle was seen by a member of the public who was visiting the cemetery. Mr. Stewart told A.R.J. to drop his pants as he wanted to "suck" him. A.R.J. refused. Mr. Stewart then tried to undo A.R.J.'s belt. A.R.J. pushed Mr. Stewart away; Mr. Stewart kicked A.R.J. out of his car and A.R.J. walked home. The 23 September 2011 undertaking with the non-association condition remained in effect at that time. Based on a report from the witness in the cemetery, police conducted an investigation and interviewed A.R.J. in early December 2011. Charges of s. 151 and sub-s. 145(3) were laid on

> 9 February 2012. By that time, Mr. Stewart was in custody on charges from 8 January 2012.
>
> [7] The charges from 8 January are, by far, the most serious. But for the prompt action of members of the New Glasgow Police Service, a 14-year-old boy would have been victimized further by a cunning sexual predator. On that date, police were contacted by the mother of T.Q.. She reported that she was intercepting on her smart phone a record of alarming, real-time social-networking messages between her 14-year-old-son and an adult male; she did not know where her son was, and she was undoubtedly terrified of what might happen to him. These messages included graphic descriptions of an earlier sexual encounter involving the adult performing fellatio on the youth and wrapped up with a late-breaking invitation by the adult to meet secretly with the youth and one of his friends at a motel just off the highway in New Glasgow. This was accompanied by an offer by the adult to arrange a taxi ride for the youths, along with lures of alcohol, tobacco, clonazepam and promises of more oral sex. Police acted quickly, and tracked down the motel, where, with the help of staff, they found Dennis Garry Stewart, T.Q. and his 14-year-old friend J.M. in a room that had been reserved by Mr. Stewart. Inside the room, police found a quantity of prescription medication in a bag, including clonazepam, which is a Schedule IV benzodiazepine drug under the *Controlled Drugs and Substances Act*. T.Q. told police that they had heard the police knocking at the motel-room door, but Mr. Stewart had said to ignore them. The September 2011 undertaking was still running. It is clear from the circumstances leading up to the arrest that something very bad was about to happen. The police got there just in time.

[3] Mr. Stewart was charged with: invitation to sexual touching of B.W. under s. 152 of the *Criminal Code*, touching of J.L. for a sexual purpose under s. 151, touching of N.F. for a sexual purpose under s. 151, touching of A.R.J. for a sexual purpose under s. 151, two counts of breach of undertaking under s. 145(3), computer luring of T.Q. under s. 172.1(1)(b), invitation to sexual touching of T.Q. under s. 152, and trafficking in clonazepam contrary to s. 5(1) of the *Controlled Drugs and Substances Act*.

[4] In the Provincial Court, Mr. Stewart pleaded guilty to the charges. He was represented by counsel. Judge Atwood's sentencing decision says:

> [9] … Defence counsel canvassed very carefully and thoroughly with Mr. Stewart in open court the requirements of sub-s. 606(1.1) of the *Code* affirming Mr. Stewart's guilty pleas and his acknowledgement of the accuracy of the facts read into the record, with some minor clarifications.

[5] Judge Atwood sentenced Mr. Stewart to a total of five years imprisonment for all the offences.

[6] Mr. Stewart appealed to the Court of Appeal. His initial Notice of Appeal appealed against conviction and sentence. Then he retained counsel with Nova Scotia Legal Aid, and the grounds were amended to appeal sentence only. Then Mr. Stewart discharged his counsel, and he reiterated his appeal against conviction and sentence. Then he again changed his grounds to appeal sentence only. Shortly before this application, Mr. Stewart notified the Court that he appeals both conviction and sentence. His grounds of appeal include ineffective representation by trial counsel, for which Mr. Stewart intends to offer fresh evidence, and that he received no credit for remand time on his sentence.

[7] Before discussing Mr. Stewart's motion for interim release, I will confirm some procedural directions that I gave in chambers on July 9, 2015:

1. By July 16, 2015, Mr. Stewart is to file any further fresh evidence that he may wish to offer to the panel on the issue of alleged ineffective assistance by trial counsel. I informed Mr. Stewart that the facts upon which he intends to rely for his appeal must be in the record – *i.e.* the appeal books, or transcripts to be prepared for inclusion in a supplementary appeal book, or in the affidavits, including exhibits, that are offered as fresh evidence, or in any cross-examination on those affidavits.
2. By September 30, 2015, the Crown is to file a supplementary appeal book, that will include: (1) any transcripts pertinent to the appeal that are not included in the Appeal Books filed to date, (2) copies of Mr. Stewart's filings on the fresh evidence motion that have been either served on the Crown or filed by Mr. Stewart with the Court, and relayed by the Court to the Crown, and (3) any affidavits submitted by the Crown in response to Mr. Stewart's fresh evidence motion. From counsel for the Crown, I understand that the transcripts should be prepared in time to accommodate this filing date.
3. By October 23, 2015, Mr. Stewart is to file with the Court and serve the Crown with his factum, or written argument that will address: (1) his motion to adduce fresh evidence and (2) the merits of his appeal from both conviction and sentence.
4. By November 20, 2015, the Crown is to file and serve its factum.
5. The Court will hear the appeal on January 20, 2016 at 10:00 a.m..

[8] I will turn to Mr. Stewart's motion for interim release. Given that he appeals conviction, Mr. Stewart's motion engages ss. 679(1)(a) and 679(3) of the *Code*:

> 679. (1) Release pending determination of appeal – A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
>
> > (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
> >
> > …
>
> (3) Circumstances in which appellant may be released – In the case of an appeal referred to in paragraph (1)*(a)* or *(c)*, the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> > (a) the appeal or application for leave to appeal is not frivolous,
> >
> > (b) he will surrender himself into custody in accordance with the terms of the order, and
> >
> > (c) his detention is not necessary in the public interest.

[9] Mr. Stewart has the onus to establish each of the three conditions. His convictions have replaced the initial presumption of innocence with a status quo of guilt, that he has the burden to oust by proving the statutory conditions for his interim release. *R. v. MacIntosh*, 2010 NSCA 77, para. 6 and authorities there cited; *R. v. MacLean*, 2013 NSCA 108, para. 7.

[10] **Not frivolous:** The applicant for interim release must show that there is a rational ground which evokes the possibility that the appeal may be allowed: *R. v. J.P.*, 2013 ONCA 505, para. 5 and authorities there cited; *R. v. MacLean*, para. 8.

[11] Mr. Stewart's grounds include an allegation of ineffective representation by counsel. Mr. Stewart proposes to submit fresh evidence to the panel for the appeal hearing. For this motion, I do not have substantive particulars of alleged ineffective representation. So it is difficult to assess that ground.

[12] Mr. Stewart says that his sentence gave no, or insufficient credit for his remand time. There is a rational possibility that this ground may succeed. In this respect, Mr. Stewart has satisfied s. 679(3)(a).

[13] **Surrender into custody:** Mr. Stewart's earliest date of release from the penitentiary would be December 8, 2016. He has at least seventeen months to

serve. Mr. Stewart says that, if he is allowed interim release, he would reside with his son. There is nothing from his son. There no further release plan. He offers no surety. He names nobody who would ensure, or have a stake to ensure that Mr. Stewart abides by his conditions of release and surrenders himself into custody at the required time.

[14] Mr. Stewart's criminal record includes numerous offences for failing to comply with conditions of a recognizance or undertaking, making false statements, breach of probation, uttering forged documents, fraud, escape and being at large. He has presented nothing to satisfy me that, left to his own devices, he would act more responsibly today.

[15] I am not persuaded that Mr. Stewart would surrender himself into custody as required under s. 679(3)(b).

[16] **Detention not necessary in public interest:** Section 679(3)(c) provides that Mr. Stewart must establish that his "detention is not necessary in the public interest". In the often quoted passage from *R. v. Ryan*, 2004 NSCA 105, Justice Cromwell discussed the balancing test under s. 679(3)(c):

> [23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in **R. v. Farinacci** (1993), 85 C.C.C. (3d) 32 at 48:
>
> > Public confidence in the administration of justice requires that judgments be enforced. … On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.
>
> [24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:
>
> > Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.

[17] In Mr. Stewart's case, one cannot shake the concern about harm being done in the interval. Judge Atwood's recitation is withering. In September 2011, Mr. Stewart was released on bail with his undertaking to have no contact with anyone under the age of 16. There followed, over the next 15 weeks, an oblivious and apparently obsessive sexual predation of boys. Nothing presented on this motion satisfies me that Mr. Stewart would respect his release conditions, or resist his temptations any better today than he did then. At the hearing of this motion, Mr. Stewart candidly acknowledged that he hasn't changed yet, and doesn't expect to change before the day he dies.

[18] Mr. Stewart has not established the condition in s. 679(3)(c).

[19] I dismiss Mr. Stewart's application for interim release.

Fichaud, J.A.