Date: 20011207
Docket: CAC 174441

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Desmond, 2001 NSCA 180]

BETWEEN:

ROBERT HENRY DESMOND

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

D E C I S I O N

Counsel: Appellant in person
Kenneth W.F. Fiske, Q.C. and Edward Gores for the respondent

Application Heard: December 6, 2001

Decision Delivered: December 7, 2001

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.: (in Chambers)

[1] In October, 2001 the appellant pled guilty to assaulting his girlfriend, Ms. Gaines. He was sentenced to 90 days incarceration, consecutive to time already being served for another separate offence of assault against the same Ms. Gaines.

[2] The appellant, unrepresented by counsel, is appealing both his conviction and sentence. He has made application for the appointment of counsel to conduct his appeal, and for his release from custody pending the hearing of his appeal.

[3] There are facts which are relevant to both of the appellant's applications. I will review those facts, then deal with each application separately.

[4] The assault which is the subject of this appeal actually took place in January, 1999. There were numerous appearances in Provincial Court with respect to the matter including several adjournments, a guilty plea followed by a withdrawal of that plea before sentence. Initially the appellant was represented by two different Legal Aid lawyers. When the matter finally came on for trial before Judge Williams, on October 2, 2001, the appellant was not represented by counsel.

[5] The following is from the transcript of the hearing before Judge Williams:

> MR. DESMOND Good morning, Your Honour.
>
> CROWN Your Honour, Mr. Desmond is here today for a trial on 266(a) of the Criminal Code
>
> THE COURT Uh-huh.
>
> CROWN He is charged that on Saturday, December 26th, at approximately 10:30 he assaulted –
>
> THE COURT I know what he's charged with, but is it for trial?
>
> CROWN Yes, it's set for trial. I don't believe he has counsel today.
>
> MR. DESMOND I don't see the witnesses, Your Honour. I'm ready to go to trial. If there are no witnesses here, I ask for the case to be dismissed.
>
> CROWN Actually –
>
> MR. DESMOND This has been going on now for three years now.

CROWN - - the witness that's here today is Ms. Sorenson. The victim is uncooperative, Ms. Gaines, and she would not show up. She will not cooperate. She's been uncooperative in the past. They have a history and she will not be testifying today.

THE COURT So what are you going to do?

CROWN Actually the event was witnessed by another witness, Ms. Sandra Sorenson, who saw the whole event unfold and the –

THE COURT But can that witness speak to the evidence?

CROWN Yes, she saw the whole thing.

THE COURT Seen it, but that doesn't necessarily mean she can speak to the evidence, but I'll leave it up to you.

CROWN The evidence she observed I think will show that she can prove the elements of the offence, Your Honour.

THE COURT So you're ready to go to trial?

CROWN Yes.

THE COURT All right. They're ready to proceed. Are you ready?

MR. DESMOND Well, if I had known that then, Your Honour, I'd ask for an adjournment till I get a lawyer because I've been in Cape Breton now since August.

[6] Because the matter had been outstanding for such a lengthy period of time, and the fact that the appellant had ample opportunity to retain counsel, Judge Williams refused to adjourn the matter. Following Judge Williams' decision in that regard the following exchange took place?

MR. DESMOND Maybe we can come to some agreement and save the Court's time and tax money.

CROWN I'd like to speak with him.

MR. DESMOND It will only take five minutes.

[7] Following a short recess the following exchange took place before the court:

CROWN Your Honour, I think the accused wishes to change his plea.

THE COURT All right. Mr. Desmond, please stand. What do you wish to say on this matter?

MR. DESMOND I'll change my plea of not guilty to guilty, Your Honour.

THE COURT All right. Do you understand the consequences of pleading guilty?

MR. DESMOND With due prejudice, though.

THE COURT Say again?

MR. DESMOND With due prejudice, though I might add.

THE COURT I don't know – understand what you mean by "with due prejudice." It's either guilty or not guilty.

MR. DESMOND Well, I'm guilty, Your Honour.

THE COURT There's nothing attached to it.

MR. DESMOND Yes.

THE COURT All right. You understand the consequences of pleading guilty. All right. The guilty plea is accepted. Let's hear the circumstances. Have a seat now, sir.

[8] Crown counsel and the appellant had reached an agreement that there would be a joint recommendation on sentencing, and that the Crown would recommend that the appellant be sentenced to 90 days concurrent with the sentence which he was presently serving.

[9] After hearing the extent of the appellant's criminal record, and expressing his opinion that this was not a proper case for concurrent sentence, the trial judge clearly indicated that he was not prepared to agree to a concurrent sentence. The following exchange then took place?

THE COURT Okay. Mr. Desmond, do you wish to say anything before I sentence you, sir?

MR. DESMOND I concur with the Crown, Your Honour.

THE COURT Say again?

MR. DESMOND I concur with the Crown's recommendation. I just want to get this all straightened out so I can move back to Toronto and balance my life and get out of the criminal system and the justice system.

THE COURT So it will be 90 days consecutive to time being served. No victim crime surcharge. That is all.

[10] The appellant has an extensive criminal record dating back to 1987. The record includes convictions for assault, possession of a weapon, possession of property obtained by crime, and uttering threats. In addition, the appellant has been convicted of 13 separate offences involving breach of undertaking, breach of probation and breach of recognizance.

[11] Four of these offences have occurred since November, 2000. The most recent of these convictions arose out of an incident which occurred on July 17, 2001, when the appellant was involved in another confrontation with Ms. Gaines. In this latest incident, which occurred while the appellant was awaiting trial with respect to the 1999 assault on Ms. Gaines, the appellant struck Ms. Gaines and kicked her while she was on the ground. For this, and other charges of breach of recognizance, possession of a weapon and uttering threats, the appellant was sentenced to a total of six months incarceration followed by two years probation and a lifetime firearm ban. The appellant was serving this sentence at the time he appeared before Judge Williams on the matter which is the subject of this appeal.

[12] The appellant's sentencing record is replete with sentences of a concurrent and consecutive nature.

[13] The appellant's grounds of appeal, which he prepared himself with the assistance of a fellow in-mate, are as follows:

1. The appellant was unrepresented by counsel at trial and was denied an adjournment to obtain proper legal representation. This prevented the appellant from obtaining informed legal advice and thus denied him his s. 7 and s. 11(d) Charter right to full answer and defence, and to a fair trial.

2. The trial judge erred in law by not dismissing the case when the complainant failed to attend for trial. Nor did he consider in the alternative, granting an adjournment to locate the complainant.

> 3. (Against sentence) the appellant under the circumstances identified in the previous grounds only agreed to plea guilty on the proviso of a Joint Recommendation with the Crown. Had the appellant known the Judge would not follow this recommendation he would have not pled guilty.

THE APPOINTMENT OF COUNSEL:

[14] The appellant's application for the appointment of counsel is governed by the provisions of s. 684(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 which provides as follows:

> **684.** (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[15] The appellant applied for Legal Aid in the conduct of this appeal. His application was denied, as was an appeal from that denial. The denial was on the basis of "case merit".

[16] I am unable to conclude, on the basis of the appellant's application - including his representations before me - that it appears desirable in the interests of justice that I should assign counsel to act on his behalf on this appeal. The appellant's grounds of appeal, under the circumstances, are of dubious merit. I did pay particular attention to his third ground of appeal. However, on reflection, the appellant has an extensive history with the courts in this Province, and according to his record, has extensive experience with consecutive and concurrent sentences. It is apparent, from the transcript to which I have made reference earlier in these reasons, that the appellant knew Judge Williams was not amenable to a 90 day concurrent sentence, and insisted that any sentence would have to be consecutive. When the appellant was asked if he had any comments before sentencing was passed, he simply replied to the trial judge that he agreed with the position of the Crown.

[17] Further, whatever the merit of the appellant's appeal, the issues of fact and law involved in this appeal are not complex. The appellant, from my assessment of his application, and his appearance before me, is quite capable of articulating the issues to the panel who will hear his appeal.

[18] The appellant's application for the appointment of counsel is, therefore, dismissed.

RELEASE FROM CUSTODY PENDING APPEAL:

[19] Under the provisions of s. 679 of the **Criminal Code** I have the discretion to order that the appellant be released from custody pending the determination of his appeal if the appellant establishes that:

1. his appeal is not frivolous;
2. he will surrender himself into custody in accordance with the terms of any order which I issue; and
3. his detention is not necessary in the public interest.

[20] I have already indicated that in my view the appellant's appeal has dubious merit. I am aware that if I deny the appellant's application for release pending the hearing of the appeal that he will have served his sentence by the time his appeal is heard. If the merit of the appellant's appeal was the only matter which I had to take into account on this application I would be reluctant to deny the appellant release pending appeal.

[21] It is the second and third matters, which the appellant must establish to my satisfaction, which give me the most difficulty with this application. The appellant's record indicates that, since 1987, he has been convicted of 13 separate offences involving breach of undertaking, breach of probation and breach of recognizance. There is a history, here, of confrontation between the appellant and Ms. Gaines. If I were to order his release pending the hearing of his appeal, it would be under condition that he have no contact with Ms. Gaines. The appellant's history demonstrates a total disregard for court orders, and I would have no confidence whatsoever that he would abide by that condition.

[22] With the appellant's history of disregard for court orders, as well as the ongoing confrontations with Ms. Gaines, the appellant has not persuaded me that his detention is not necessary in the public interest.

[23] In the case of **R. v. E.R.H.** (1999), 174 N.S.R. (2d) 298 (N.S.C.A.), Justice Pugsley said the following concerning the public interest:

> Public interest includes both the safety of the public and the confidence of the public in the judicial system. Any action that may detrimentally affect public confidence and respect is contrary to the public interest.

[24] The appellant’s application for release pending the hearing of his appeal is dismissed.

Flinn, J.A.