

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Stuart*, 2019 NSCA 34

Date: 20190502

Docket: CAC 485657

Registry: Halifax

Between:

Jonathan Marshall Stuart

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4(1) of the Criminal Code

Judge: Van den Eynden, J.A.

Motion Heard: May 2, 2019, in Halifax, Nova Scotia in Chambers

Decision: Delivered orally May 2, 2019
Written release May 7, 2019

Held: Motion granted

Counsel: Jonathan Stuart, appellant in person
Glenn A. Hubbard, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
- (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

- (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
- (b) on application made by the victim, the prosecutor or any such witness, make the order.

Decision (Orally):

[1] I will render an oral decision today on Mr. Stuart’s motion to extend time to file his Notice of Appeal. He seeks to appeal from conviction.

[2] To succeed on his motion, Mr. Stuart must satisfy me that it’s appropriate to extend time. I must exercise my discretion in accordance with the interests of justice. That analysis requires me to consider several factors such as:

1. Did Mr. Stuart have a genuine intention to appeal?
2. Does he have a reasonable excuse for the delay?
3. Will any prejudice arise?
4. Does his proposed appeal have merit?

[3] The framework for my analysis is well established and recently reviewed by my colleague, Justice Derrick, in *R. v. MacLean*, 2018 NSCA 1.

[4] The Crown concedes a genuine intention to appeal, but questions whether there was a reasonable excuse for the delay. The Crown’s concession on genuine intention is proper, and I am also satisfied there is a reasonable excuse for the delay. In these circumstances, the “genuine intention” and “reasonable excuse” are connected.

[5] Mr. Stuart was in prison when he set about to file his appeal. He took prompt steps to meet with his parole officer to get the appeal form. He completed and signed his Notice of Appeal. He gave it back to his parole officer to forward on his behalf. He was dependent upon correctional staff to help him forward his completed Notice of Appeal to this Court. He was told by his parole officer that his appeal was filed.

[6] Although correctional staff maintain the Notice of Appeal was filed by fax in July of 2018, it appears that the parole officer may have only sent it to Nova Scotia Legal Aid—not this Court.

[7] In the fall of 2018, Mr. Stuart was moved from Springhill Institution to Dorchester and brought his appeal to the attention of his new parole officer. He was told the appeal process takes time; however, in January of 2019 his new parole officer informed him that no appeal had been filed. This was contrary to the advice of his prior parole officer. These circumstances were set out in Mr. Stuart’s

affidavit filed in support of his motion and Crown counsel advised he confirmed these details with the correctional staff involved.

[8] In February 2019, Mr. Stuart filed his Notice of Motion to Extend Time. The Crown questions whether there was a reasonable excuse from July 2018 to February 2019, and in its written submissions suggested Mr. Stuart did not provide any explanation for not diligently pursuing his appeal. However, during oral submissions the Crown acknowledges that the prison context provides some explanation.

[9] In my view, Mr. Stuart has explained why the delay occurred, and I do not fault him in these circumstances. He was assured his appeal was filed. And to repeat, when the topic was raised with his new parole officer he was told things take time, and he might not hear back from this Court for some months. When he was finally informed that no appeal was filed, he acted in a reasonably timely fashion to seek an extension.

[10] Turning to the issue of prejudice, the Crown does not advance any strong argument of prejudice other than delay can degrade memories should a new trial be ordered. In these circumstances, I do not see any real concern with prejudice, at least not to the level it would detract from Mr. Stuart's motion, should all the other factors be satisfied.

[11] Turning to the last point in my analysis—does Mr. Stuart's appeal have merit? The Crown says it does not. Mr. Stuart's draft Notice of Appeal proposes four grounds. He alleges the verdict was unreasonable and not supported by the evidence, uneven scrutiny was applied to his evidence compared to that of the complainant and the final two grounds addressed a lack of sufficient reasons.

[12] Having reviewed the decision on conviction and considering the submissions, I am satisfied the appeal is not frivolous. Based on the limited record before me, I am satisfied Mr. Stuart has raised at least one or more arguable issues—issues that appear realistic and appear of enough substance. Whether Mr. Stuart's appeal against conviction is ultimately successful will be determined by a panel having the benefit of the full record and full submissions. (For a discussion on the merit assessment analysis for the purpose of this motion see *R. v. R.E.M.*, 2011 NSCA 8.)

[13] Motion granted. Notice of Appeal to be filed by May 10, 2019.

Van den Eynden, J.A.