C. A. C. No. 02891

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Fadelle, 1993 NSCA 136

BETWEEN:

STEPHEN FADELLE	
Appellant	Donald C. Murray for the Appellant
- and -	
HER MAJESTY THE QUEEN	Robert C. Hagell for the Respondent
Respondent	Application Heard: June 24, 1993
	Application Dismissed: June 30, 1993

BEFORE: The Honourable Mr. Justice M.C. Jones, in chambers.

JONES, J.A.:

This is an application for bail pursuant to s. 679(1)(a) of the **Code** pending appeal. The appellant was convicted of second degree murder following a trial without a jury

before Mr. Justice Hall. The death involved the appellant's three month old child. The bail application was opposed by the Crown.

Section 679(3) of the **Code** provides as follows:

> "679(3) 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 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."

The appellant is 28 years of age and residing in Digby with his mother. He was released from custody during the trial and conformed with the conditions of his release. Following conviction he was sentenced to life imprisonment with 15 years to be served before being eligible for parole. There was no pre-sentence report. In 1985 the appellant was convicted for sexual assault and sentenced to a term of 60 days to be served intermittently. In 1989 he was convicted of creating a disturbance and fined $25.00. In 1990 he was convicted for break and entry and sentenced to 60 days intermittent plus two years probation. The appellant has been employed with an uncle in the fish processing business. His employment apparently has been casual.

The grounds of appeal are as follows:

> "1. The learned Trial Judge erred in law in that he failed to apply the appropriate burden of proof to the Crown in the circumstances of the case, as a result of which an unreasonable verdict was rendered.
>
> 2. The learned Trial Judge erred in law in that he intervened in the presentation of the evidence such

> that the appearance and fact of a fair trial was compromised.
>
> 3. The learned Judge erred in law in that in increasing the period of parole ineligibility because of the accused's failure to confess to the crime at the earliest opportunity."

Mr. Murray, as counsel for the appellant filed an affidavit in which he stated:

> "4. The case as presented by the Crown was based on circumstantial evidence. It is the submission of the Defence that in light of the evidence of Dr. Holness, the evidence supports a reasonable interpretation consistent with the fatal injuries being inflicted to the child at a time other than when Stephen Darrell Fadelle had exclusive opportunity. For this reason, it is submitted on the Appeal has merit and that an acquittal may result if the appeal is allowed."

Since the hearing I have now had an opportunity to read Mr. Justice Hall's decision. The child's mother testified on the trial that she had not caused any injury to the child. The trial judge accepted her evidence. The issue on the trial was whether the fatal injuries were caused by the mother or the appellant. The Crown contended that the appellant had taken the child into the washroom at 2 a.m. on December 6, 1991. It was at that point that the appellant administered fatal blows to the child's head. The trial judge drew the following conclusions:

> "Having regard to all of the circumstances in addition to those discussed above, it is my view that they lead inexorably to the conclusion that the fatal injury to this child occurred at approximately 2 o'clock in the morning of December 6th, 1991. It seems to me that in these circumstances there is only one rational conclusion that I can come to, and that is that the fatal blow occurred in the bathroom of the couple's residence at approximately 2 o'clock in the morning of December 6th, 1991; that the blow occurred as a result of Mr. Fadelle taking the child and causing its head to be violently struck on at least one, but probably two occasions on the vanity in that bathroom. It is also apparent that the force was so substantial that in a three month old baby with a

> physical maturity of only two months it had to have been delivered with such deliberation that the perpetrator had to have intended to cause bodily harm; that he had to have known that it was likely to cause such and was reckless whether death ensued or not. Accordingly, I am satisfied beyond a reasonable doubt that the charge against the accused has been proved and I therefore find him guilty of second degree murder in the death of Christopher Fadelle contrary to section 235(1) of the **Criminal Code**".

The appellant must established that he has satisfied the conditions set out in s. 679(3) of the **Code**. While the grounds of appeal are not frivolous they certainly do not disclose any obvious error on the part of the trial judge. The likelihood of success is a factor bearing on the other grounds set out in s. 679(3). After reviewing the evidence and the decision I am not satisfied that the appellant will surrender himself in accordance with an order for his release. He has a record which, while not substantial, must be viewed in the light of his present conviction for a very serious offence. The record does show a disregard for the law. His employment record does not show strong attachments to his community. Having regard to those same factors I am satisfied that it is necessary in the public interest in terms of protecting the public, to detain the appellant in custody until the appeal is heard. The application is dismissed.

J.A.

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	)	BAIL
	)	APPLICATION
HER MAJESTY THE QUEEN	)	
	)	JONES,
	)	J.A.
Respondent	)	
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