

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Stewart*, 2003 NSCA 118

Date: 20031107

Docket: CAC 205388

Registry: Halifax

Between:

Dennis Garry Stewart

Applicant/Appellant

v.

Her Majesty the Queen

Respondent

Judge: Bateman, J.A. in Chambers

Application Heard: November 6, 2003, in Halifax, Nova Scotia

Held: Bail granted with conditions.

Counsel: Patrick Atherton, for the applicant/appellant
William Delaney, for the respondent

Reasons for judgment:

- [1] On August 6, 2003 Dennis Garry Stewart was convicted of four counts of breaching a probation order (s. 733.1 **Criminal Code of Canada**, R.S.C. 1985, c. C-46). The probation order, which had followed a conditional sentence of imprisonment, required, among other things, that Mr. Stewart have no contact, directly or indirectly, with his former wife, Ann Elizabeth Stewart. This was the condition that he repeatedly breached. Mr. Stewart was also found guilty of making harassing telephone calls contrary to s. 372(3) of the **Criminal Code**. The victims were his daughter and her husband who live in Ontario. Mr. Stewart entered a guilty plea to an additional s. 733.1 offence and to breaching a recognizance contrary to s. 811 of the **Criminal Code**. On October 8, 2003 he was sentenced to a total term of six months in jail. He seeks bail.
- [2] Before sentence was passed, Mr. Stewart, acting on his own behalf, filed a notice of appeal from conviction. Through the efforts of Nova Scotia Legal Aid he is now represented by counsel. Counsel has only very recently been retained. It was agreed, for the purposes of the bail hearing, that we would proceed on the basis that Mr. Stewart intended to appeal his sentence as well as conviction. Counsel had not had an opportunity to prepare an amended Notice of Appeal. His instructions from Mr. Stewart were to proceed with the bail hearing in any event.
- [3] To succeed on this application, pursuant to s. 679 of the **Code**, Mr. Stewart must establish that:
- (a) the 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.
- [4] Counsel for Mr. Stewart, although he has had limited time to review the file, submits that there are at least two substantial grounds of appeal that are readily present on the record. Mr. Stewart did not have counsel at trial, which trial proceeded very quickly after the charges. The Informations were sworn on July 4, 2003. Mr. Stewart was first brought before the Court on July 14, released pending trial on July 17 with the trial commencing on July 29. I take it to be counsel's submission that the speed with which this proceeded through the court may not have permitted Mr. Stewart adequate time to retain counsel. We did not have the benefit of the trial transcript at the bail hearing. It is not clear, therefore, whether Mr. Stewart requested

counsel or sought an adjournment in order to retain counsel. The second ground which counsel raises is the fact that the trials on the five Informations took place successively before the same judge on the same day. With benefit of counsel, he submits, there might have been a request for a severance so as to avoid the possibility of the accumulation of evidence on one trial tainting the following trials.

- [5] While expressing no opinion on the ultimate merits of these grounds, I am satisfied that they are sufficient to meet the low threshold applied to demonstrate that the appeal is not frivolous.
- [6] There appears to be no concern that Mr. Stewart will not present himself for the appeal.
- [7] The Crown opposes bail primarily on the basis that Mr. Stewart's detention is necessary in the public interest. As the Crown rightly points out, this was not simply a minor or technical breach of the stay away order or the harassment section of the **Code**. Mr. Stewart placed as many as thirty-five calls to his daughter's residence in one month, many containing foul and aggressive language.
- [8] On sentence the judge noted that Mr. Stewart had a history of similar criminal behaviour which had led to the probation order, which was breached. Past suspension of sentence, conditional sentences and probation orders had been ineffective in deterring Mr. Stewart from his criminal and abusive conduct. The judge felt that there was no option left but institutional incarceration.
- [9] In support of the request for release, counsel for Mr. Stewart points out that these are not in the range of the most serious offences and that most of the offences were committed by telephone rather than in person. The harassment was, similarly, by telephone. Counsel submits that, while the offences speak of an inability by Mr Stewart to control his behaviour, it is important that he did not re-offend from the date of conviction on August 6, 2003 to the date of sentencing on October 8, 2003, although he was not detained and still living in the community. Finally, he submits that, should bail not be granted, the appeal, if successful would be of no practical benefit to Mr. Stewart as he would have served his time in custody before the hearing. Counsel advises that Mr. Stewart would be entitled to release after serving two-thirds of his sentence, which would mean release in early February, 2004. The appeal cannot be heard until mid-March.
- [10] It is the public interest which is of most concern to me. Mr. Stewart, by his past behaviour which led to these convictions, has demonstrated either an

inability to control himself or a contempt for the judicial process. On the other hand, the fact that he will have fully served the custodial portion of his sentence before relief militates in favour of bail, if adequate protections can be put in place.

[11] Counsel for Mr. Stewart suggests that strict conditions which effectively impose house arrest pending the hearing of the appeal would be appropriate and should suffice.

[12] On balance, I am satisfied that bail should be granted. Important to this decision is the fact that Mr. Stewart ceased his criminal behaviour while awaiting sentence. It is my hope that the reality of incarceration has brought home to Mr. Stewart the gravity and consequences of his conduct and the need for it to cease absolutely if he is to enjoy his freedom. I am further persuaded to grant bail in view of the fact that Mr. Stewart will have served the custodial portion of his sentence before the appeal is heard. I agree that concern for the public interest and, particularly, for the victims can be adequately addressed through conditions on release.

[13] Accordingly, I would grant bail with the following conditions:

1. Remain within the territorial jurisdiction of the Province of Nova Scotia;
2. Forthwith deposit with the Registrar of the Nova Scotia Court of Appeal any passport he now has or may hereafter acquire;
3. Mr. Stewart is confined to his residence at Diamond Crest Seniors, 714 Porters Lane, Apt. 19, Westville, Nova Scotia twenty-four hours per day subject to the following authorized absences:
 - a. Mr. Stewart may leave his residence for the purposes of attending any necessary medical or legal appointments which must have been scheduled in advance of his leaving his residence;
 - b. Mr. Stewart may on one occasion weekly only and for a period of not more than two hours duration attend a religious service;
 - c. Mr. Stewart may, on not more than two occasions weekly and for a period of not

- more than two hours on each occasion, leave his residence for the purpose of obtaining groceries or personal care items;
- d. Not later than one hour in advance of each occasion, as authorized above, when Mr. Stewart may leave his residence he shall contact the Westville Policing Services in Westville (phone no. 396-2777) and advise them of his intent to leave the residence, his destination and the anticipated duration of his absence;
 - e. Mr. Stewart shall have no contact, directly or indirectly with Ann Elizabeth Stewart and shall not be within a 75 foot radius of her home or place of business;
 - f. Mr. Stewart shall have no contact, directly or indirectly, with Allyson Ruth Moore or Darryl Moore;
 - g. For clarity, Mr. Stewart shall not place telephone calls to the residence or place of business of any of the above named persons nor attempt to contact them by telephone, computer or in writing at any place they may reside or visit nor shall he attempt to communicate with them through third persons or by leaving messages for them;
 - h. Mr. Stewart shall surrender himself to the custody of the Central Nova Scotia Correctional Centre, Burnside, Nova Scotia, before 6 p.m. on March 16, 2004, being the day before the hearing of the within appeal.