

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Gerrard*, 2020 NSCA 85

**Date:** 20201222

**Docket:** CAC 501626

**Registry:** Halifax

**Between:**

Andre Aaron Gerrard

Appellant

v.

Her Majesty the Queen

Respondent

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| <p><b>Restriction on Publication: Pursuant to <i>Civil Procedure Rules 91.02</i><br/>and 85.04(1) and (2)(c)</b></p> |
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**Judge:** Derrick, J.A.

**Motion Heard:** December 22, 2020, in Halifax, Nova Scotia in Chambers

**Written Reasons:** December 23, 2020

**Held:** Motion for bail pending appeal dismissed

**Counsel:** Ian Hutchison, for the appellant  
James A. Gumpert, Q.C., for the respondent

**91.02 Scope of Rule 91**

(1) This Rule is made under subsections 482(1) and (3) of the Code.

(2) The Civil Procedure Rules as a whole and in particular Rule 90 apply to this Rule with any necessary modifications and when not inconsistent with this Rule.

(3) The procedures in Rule 90 for motions made to a judge of the Court of Appeal

and to the Court of Appeal apply to motions made under this Rule.

#### **85.04 Order for confidentiality and interim order**

(1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

...

(c) banning publication of part or all of a proceeding;

...

**Decision:**

*Introduction*

[1] Andre Gerrard has appealed conviction and sentence in relation to offences involving an intimate partner. He applied pursuant to s. 679 of the *Criminal Code* for bail pending his appeal. The Crown opposed his release. After a hearing on December 22, 2020, I denied bail with reasons to follow. These are my reasons.

*Mr. Gerrard's Appeal*

[2] Mr. Gerrard was convicted on November 28, 2019 of thirteen charges following a trial before Judge Jean Whalen of the Nova Scotia Provincial Court. The convictions were for offences between December 31, 2009 and October 1, 2017 that included possession of a weapon for a dangerous purpose to the public peace, common assault, assault causing bodily harm, mischief (damage to property), uttering threats and pointing a firearm without lawful excuse. The complainant was Mr. Gerrard's common-law partner, Lisa Day.

[3] The trial judge acquitted Mr. Gerrard of a charge of forcible confinement of Ms. Day.

[4] On October 1, 2020, Judge Whalen sentenced Mr. Gerrard to thirty months' imprisonment plus two years' probation. On October 5, 2020, she acknowledged the imposition of probation was unlawful and varied Mr. Gerrard's sentence to remove the order. For the charges affected by this amendment, she substituted 30 days' incarceration to be served concurrently.

[5] Mr. Gerrard is appealing on the grounds that: the verdicts are unreasonable and unsupported by the evidence; the trial judge erred in her application of *W.(D.)*; erred in assessing the credibility of Crown and Defence witnesses, and gave insufficient reasons. He seeks leave to appeal sentence on the basis that the trial judge was *functus officio* when she amended his sentence.

[6] Mr. Gerrard's appeal is set to be heard on June 3, 2021.

*The Trial and Sentencing of Mr. Gerrard*

[7] Mr. Gerrard's convictions were for offences committed over a span of years against Ms. Day. According to the trial evidence, Mr. Gerrard and Ms. Day were in a common-law relationship from March 2006 to October 2016, when it finally broke down.

[8] The Crown's case against Mr. Gerrard relied on Ms. Day's testimony. I do not have the trial transcript and have relied on the trial judge's decision for a description of the evidence.

[9] Mr. Gerrard and Ms. Day were involved in an intimate relationship for over ten years and lived together. It was Ms. Day's evidence that Mr. Gerrard had on numerous occasions assaulted her and damaged her personal property and vehicles. She said he pointed a firearm at her, threatened to kill her, and threatened to burn her house down. Ms. Day testified that Mr. Gerrard made threatening statements to her about her son, that he would kill him, knock his teeth out and bury him somewhere nobody would find him. On one occasion in 2017, the couple's six-year old daughter was present when Mr. Gerrard assaulted Ms. Day and threw some of her belongings out the door. Ms. Day described years of being subject to Mr. Gerrard's violence and control and enduring a terrifying and traumatizing relationship.

[10] Mr. Gerrard testified in his own defence and denied all the allegations against him. Theodore Gerrard, Mr. Gerrard's father, also testified, offering evidence intended to contradict Ms. Day's version of incidents, one involving the alleged pointing of a firearm and the other, an allegation of Mr. Gerrard discharging a firearm. A friend testified that she had never seen bruises on Ms. Day. She could not say that Ms. Day never wore long-sleeved shirts as Ms. Day claimed to have done to hide bruises inflicted by Mr. Gerrard.

[11] There were no witnesses to the offences Ms. Day says Mr. Gerrard committed. The only corroborating evidence presented were two photographs of bruising. There were no witnesses to say the offences could not have happened as described by Ms. Day.

[12] The trial judge considered whether Mr. Gerrard's evidence raised a reasonable doubt and concluded it did not. She went on to assess the whole of the evidence for reasonable doubt and found none. She believed Ms. Day and found her evidence to be reliable.

[13] The trial judge noted that when asked about controlling Ms. Day, Mr. Gerrard said he had not wanted certain of Ms. Day's friends around. He admitted he had accused Ms. Day of infidelity on one occasion while they were together and questioned her about whether she was dating. He acknowledged having a temper and that he had cursed at Ms. Day and called her names. He denied threatening her or her son. He denied the violence and property damage. He confirmed that guns were seized by police, but denied Ms. Day's allegations about chasing her with a firearm or pointing one at her.

[14] Mr. Gerrard's background is described in the pre-sentence report (PSR). He appears to have had a close relationship with his father, but reported no contact with his mother by choice. During the bail hearing, I asked Mr. Gerrard about this, as I will describe later.

[15] The PSR noted that Mr. Gerrard participated in domestic violence counselling (New Start) from November 2017 to October 2018, attending 17 of 20 sessions. A final Clinical Update from the New Start registered counselling therapist was tendered at Mr. Gerrard's sentencing. The therapist described Mr. Gerrard as "engaged in our therapeutic conversations". There was a focus on Mr. Gerrard developing the skills to regulate strong emotions and reactions and de-escalate.

[16] Mr. Gerrard attended Mental Health Services from October 2017 to July 2018. (Another section of the PSR reported that a clinical social worker advised Mr. Gerrard had attended all of his 20 individual therapy appointments from December 2016 to July 2018.)

[17] The report from the clinical social worker noted that in late 2017, Mr. Gerrard was assessed by a psychiatrist who diagnosed him with paranoid personality disorder. A second psychiatric opinion in July 2018 concluded that the original diagnosis had been "warranted" at a time when Mr. Gerrard was "under a considerable amount of stress". The psychiatrist who assessed him in July 2018 found that he no longer met the criteria for paranoid personality disorder, "but most certainly has those traits".

[18] Mr. Gerrard's file with the clinical social worker was closed in July 2018 as his "anxiety and mood symptoms had improved".

*Earlier Convictions and Sentencing*

[19] Mr. Gerrard acknowledged in the PSR that after he and Ms. Day separated he went to her house and confronted her about seeing another man. He also repeatedly called her. He admitted he had overreacted to the breakdown of their relationship.

[20] On November 2, 2017, Mr. Gerrard was charged with damaging property of Ms. Day. He was placed on an Undertaking. The confrontation of Ms. Day and the harassing phone calls occurred between November 5 and 27, 2017. As a consequence, Mr. Gerrard was charged with breaching conditions of his Undertaking not to go to Ms. Day's home and not to communicate with her. He pleaded guilty in 2018 to all these offences – the property damage and the breaches, and was sentenced to a six-month conditional sentence order which he served from November 7, 2018 to May 6, 2019. This was followed by twelve months of probation. The PSR indicated there were no problems with Mr. Gerrard's supervision. His Probation Order expired on May 5, 2020.

*New Charges Against Mr. Gerrard*

[21] On December 14, 2020, Mr. Gerrard was charged with four new offences in relation to Ms. Day, alleged to have occurred on August 29, 2020. In August 2020, Mr. Gerrard was on a Recognizance awaiting sentencing before Judge Whalen.

[22] The conditions of the Recognizance included the requirements that Mr. Gerrard keep the peace and be of good behaviour and have no direct or indirect contact or communication with Ms. Day. He was also subject to a house arrest condition. Mr. Gerrard's father, Theodore Gerrard, was his surety on the Recognizance.

[23] The new charges allege that on August 29, 2020 Mr. Gerrard uttered a threat to Ms. Day to cause bodily harm or death contrary to s. 264.1(1)(a) of the *Criminal Code*; intimidation of Ms. Day, a justice participant, contrary to s. 423.1(1)(b); and two s. 145(5)(a) breaches of his Recognizance conditions to keep the peace and be of good behaviour and to have no direct or indirect contact or communication with Ms. Day.

[24] The offences are alleged to have been committed in [redacted]. Mr. Gerrard is accused of having [redacted].<sup>1</sup>

[25] Mr. Gerrard is presumed innocent unless and until proven guilty of these latest charges beyond a reasonable doubt. I have had to carefully consider how they factor into my analysis.

*Mr. Gerrard's Proposed Release Plan*

[26] Mr. Gerrard proposed being released on bail with two sureties: his father and his mother. Mr. Gerrard and his parents live on the same road, within visual distance of each other. Mr. Gerrard pledged \$40,000 justified by personal property. His parents were each prepared to pledge \$20,000 secured against their home which is otherwise unencumbered.

[27] In addition to the standard conditions to keep the peace, attend court as required, remain in Nova Scotia, and surrender himself into custody in advance of his appeal, Mr. Gerrard proposed being subject to house arrest at his home with exceptions that would have included lobster fishing during his April to June season and absences for attending to personal needs, medical appointments, court appearances, and access visits with his daughter. Other conditions proposed were weekly reporting to the police, no direct or indirect contact with Ms. Day, except through a lawyer or as allowed by the Family Court, not to be within 100 meters of Ms. Day's residence, not to possess a cell phone, pager or smart phone, and not to possess firearms or weapons. (Mr. Gerrard testified he had handed all his firearms over to the RCMP under the terms of his Recognizance.)

*Analysis*

[28] This was a difficult case. In a number of respects, Mr. Gerrard was a good candidate for bail. I ultimately decided he failed to persuade me he should be released. In coming to this conclusion I focused on whether it was necessary in the public interest to continue Mr. Gerrard's detention, this being the central issue before me. The following explains why I came to the view that bail should be denied in the public interest.

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<sup>1</sup> There is a publication ban imposed pursuant to Civil Procedure Rules 91.02 and 85.04(1) and (2)(c) on the details concerning the alleged incident in August 2020.

[29] Bail on appeal is materially different from bail pre-trial (known as judicial interim release). Mr. Gerrard no longer enjoys the presumption of innocence that applied at the time of his trial. The entitlement to reasonable bail pre-trial guaranteed by s. 11(e) of the *Canadian Charter of Rights and Freedoms* does not apply in the context of a motion for bail pending appeal. Mr. Gerrard came before the Appeal Court bearing the burden of establishing, on a balance of probabilities, that he met each of the s. 679(3) criteria. (*R. v. Oland*, 2017 SCC 17, at para. 19).

[30] Bail pending appeal is dealt with in accordance with section 679 of the *Criminal Code*. Section 679(3) of the *Code* sets out the three statutory criteria:

(3) In the case of an appeal [against conviction], 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 ... 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.

[31] The Crown conceded Mr. Gerrard had satisfied the first two criteria. No argument was advanced that Mr. Gerrard's appeal is frivolous. This is widely acknowledged to be a very low threshold. (*Oland*, at para. 20). The Crown stated it was satisfied Mr. Gerrard's appeal cleared that low hurdle.

[32] The Crown did not oppose Mr. Gerrard's release because of any concern that he is a flight risk and would abscond before his appeal. The Crown said it was satisfied Mr. Gerrard would surrender himself into custody ahead of his appeal. His home, work and community are here in Nova Scotia. He pledged \$40,000 in personal property for his release. His parents came forward prepared to act as sureties, putting up a total of \$40,000 secured by their home. The Crown also noted that, realistically, given current pandemic-related travel restrictions, Mr. Gerrard would be hard-pressed to get out of Nova Scotia undetected.

[33] I saw nothing in the motion materials or the evidence to suggest there was any reason to question the Crown's view that Mr. Gerrard satisfied the requirements of s. 679(3)(a) and (b). I was equally satisfied these criteria were met in Mr. Gerrard's case.

[34] The Crown rested its opposition to Mr. Gerrard's bail on the ground that his continued detention in custody was necessary in the public interest, specifically to



ensure Ms. Day's safety. I focused on that, and also took into account the other aspect of the public interest criteria, public confidence in the administration of justice. The determination by Justice Arbour of the Ontario Court of Appeal in *R. v. Farinacci*, (1993) 86 C.C.C. (3d) 32 that the "public interest" is comprised of these two considerations remains "good law". (*Oland*, at para. 26)

[35] I will first discuss the public safety issue, in the context of the release plan proposed by Mr. Gerrard, the breaches of his 2017 Undertaking and the new charges.

[36] In the Crown's submission, Mr. Gerrard cannot be trusted to abide by a bail order. The risk created by him disobeying release conditions is the risk of harm to Ms. Day. In support of this concern, the Crown pointed to Mr. Gerrard's breaches of his Undertaking in November 2017 and the most recent charges arising from an incident alleged to have occurred at the end of August 2020. The Crown said the breaches and the new charges have special significance because they relate to Ms. Day.

[37] Crown counsel's cross-examination of Mr. Gerrard's parents revealed that they were unaware of his guilty pleas to the mischief and breach charges from 2017 and the conditional sentence he received. The Crown said Theodore Gerrard's responses to questions about this disclosed expressions of concern. The Crown also said the senior Gerrards' ignorance of these convictions was indicative of Mr. Gerrard hiding this from his parents and failing to be forthright with them, which should be regarded as a red flag.

[38] I was not persuaded by the Crown's submissions on these points. Theodore Gerrard did not say the information that his son had pleaded guilty to offences in 2017 caused him to reconsider his willingness to be a surety. He did say that had he been Andre Gerrard's surety at the time, it would have concerned him. But he was not: the breaches in 2017 were of an Undertaking Mr. Gerrard was placed on as a result of the mischief charges of November 2.

[39] Indeed, Mr. Gerrard's parents were steadfast in maintaining that they trusted their son. They each emphasized that by pledging their home they were putting a lot on the line, the roof over their heads and their principle asset.

[40] Mr. Gerrard's mother, Kathy, was particularly clear in her reaction to the information about the breaches in 2017. She said it did not concern her because Mr. Gerrard had subsequently spent three years on house arrest and been compliant

throughout. Ms. Gerrard said she trusted her son, “If I didn’t, I wouldn’t be sitting here”. She also said if she did not trust him she would not be pledging their home. Kathy Gerrard testified the earlier breach convictions had “no impact” on her 100 percent trust in her son.

[41] Mr. Gerrard’s parents each expressed the view that were their son to be released on house arrest conditions he should be accompanied whenever he was away from home. Their concern was not that Mr. Gerrard might breach his conditions. They felt he should have the benefit of a witness in the event he was accused of something. The parents plainly question the new charges: Kathy Gerrard wondered why the alleged breaches were not reported immediately?

[42] Mr. Gerrard’s parents each said if their son was released they would be prepared to accompany him when he left his house. They would not be able to do so while he was out fishing.

[43] Mr. Gerrard’s parents impressed me as sincere and responsible. Theodore Gerrard has already been a surety for his son and both parents clearly understood the obligations associated with the role. I was not persuaded by the Crown’s submission Mr. Gerrard’s parents would be unable to discharge their responsibilities.

[44] I did feel some concern in relation to one issue. That is the relationship between Mr. Gerrard and his mother. I noted in the PSR, prepared March 5, 2020, Mr. Gerrard had reported having no contact with his mother “which is a choice he has made”. When I asked Mr. Gerrard about this statement, he confirmed it was accurate. He testified that he fell out with his mother when he saw in the disclosure related to his charges that she had been “keeping tabs” on him and informing Lisa Day of his comings and goings. It does not sound as though there has been a reconciliation although mother and son are not entirely estranged and there is peace between them. Nevertheless, it did not leave me entirely reassured that Kathy Gerrard’s role as a surety would be uncomplicated.

[45] I will say that Kathy Gerrard’s testimony indicated a wholly supportive attitude toward her son.

[46] The Crown placed heavy emphasis on Mr. Gerrard’s earlier breach convictions and their significance to the issue of Ms. Day’s safety. Although the Crown argued that past behaviour is the best predictor of future conduct, I noted that Mr. Gerrard subsequently completed three years of strict release conditions

without incident. Those conditions included house arrest with exceptions that permitted Mr. Gerrard to be in the community for certain purposes. Other than the charges just laid on December 14, 2020, there were no issues with his compliance.

[47] The new charges are a concern. I asked counsel how they were to be factored into my analysis. The Crown pointed out they relate to Ms. Day, the victim in the case on appeal. Mr. Hutchison questioned the timing. In his submission, if Mr. Gerrard posed a risk to Ms. Day, why wasn't the alleged incident in August reported right away? And if Ms. Day did report it immediately, why did the RCMP not lay charges until just before this bail hearing?

[48] Those are legitimate questions. There is nothing before me that provides any answers. Mr. Gerrard is entitled to the presumption of innocence. Mr. Hutchison advised that Mr. Gerrard intends to enter not guilty pleas. However, I cannot simply ignore these allegations, especially as they relate to Ms. Day. The charges have to weigh against Mr. Gerrard's release.

[49] The breaches committed in 2017 are of less significance, although not irrelevant. It is appropriate to note that since he committed these offences, Mr. Gerrard attended and completed counselling and abided by strict conditions under a Recognizance.

[50] However, a significant factor that weighs against Mr. Gerrard's release is the seriousness of his convictions, relating as they do to domestic violence.

[51] The seriousness of the convictions is relevant to the other aspect of the public interest criteria under s. 679(3), public confidence in the administration of justice. The public confidence component involves "the weighing of two competing interests: enforceability and reviewability". (*Oland*, at para. 24) The enforceability component reflects "the need to respect the general rule of the immediate enforceability of judgments". (*Oland*, at para. 25) In other words, it is expected Mr. Gerrard will be held to account by continuing to serve the sentence imposed on him. The reviewability component reflects a recognition that our criminal justice system is not fail-safe and that appellants challenging the legality of their convictions "should be entitled to a meaningful review process..." (*Oland*, at para. 25)

[52] I have indicated that Mr. Gerrard's release plan was quite robust. It went some distance to addressing the public safety concerns raised by the Crown. That said, residual safety concerns, raised by the new charges and tendencies Mr.

Gerrard admitted to at trial, are relevant to the public confidence analysis. (*Oland*, at para. 27)

[53] In *Oland*, the Supreme Court of Canada directed appellate judges considering motions for bail to apply the factors relevant to the public confidence criteria in pre-trial release. These factors are: the apparent strength of the Crown's case; the gravity of the offence; the circumstances surrounding the commission of the offence, including whether a firearm was used; and the potential length of imprisonment. (at paras. 31-32)

[54] This brings me back to seriousness of the charges for which Mr. Gerrard was convicted. I previously outlined the trial evidence of protracted violence and abuse perpetrated by Mr. Gerrard against his intimate partner, Ms. Day. He received a significant sentence, 30 months in the penitentiary.

[55] The Crown noted that Ms. Day's Victim Impact Statement discloses the impact the violence has had on her and her children. She described still living in fear of Mr. Gerrard and experiencing anxiety, depression and worries about her safety. She said: "I feel like I will be looking over my shoulder for the rest of my life".

[56] Domestic violence is a particularly egregious form of violence. It is a repudiation of a trust relationship. The Alberta Court of Appeal in *R. v. Prevost*, 2019 ABCA 144, held that spousal abuse "is one of the worst types of violence violating the victim's sense of safety and entitlement to security here in her own home". (at para. 11)

[57] Domestic violence is an extremely serious societal issue. Its gravity, prevalence and "horrific impact on women from all walks of life" has long been recognized as a pernicious societal problem. (*R. v. Lavallee*, [1990] 1 S.C.R. 852, at para. 32) This amplifies the influence of the enforceability interest that favours denying bail. As Justice Trotter, now of the Ontario Court of Appeal, has said in third edition of *The Law of Bail in Canada*, the offence of domestic violence is considered "capable of stimulating significant concern in the community" (Toronto: Thompson Reuters Canada Limited, 2017) (loose-leaf updated 2020, release 2) ch. 10 at 1.

[58] The reviewability interest is assessed in relation to the strength of the appeal (*Oland*, at para. 40). My examination of this component of the public confidence aspect of the public interest has been limited to a review of the trial judge's reasons

and Mr. Gerrard's Notice of Appeal. The trial transcript is not yet available. That restricts somewhat the "preliminary assessment" to be made of the strength of Mr. Gerrard's appeal. (*Oland*, at para. 45) I do not feel able to say more than Mr. Gerrard's appeal is not frivolous and raises some arguable issues.

[59] There is a final balancing to be done of the enforceability and reviewability factors. The Supreme Court of Canada in *Oland* discussed the approach to be taken, which I have followed:

(d) The Final Balancing

[47] Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.

[60] Reasonable, informed members of the public have "a tremendous interest in and a concern about domestic violence, a crime which is being reported more and more frequently". (*R. v. Taschuk*, [1992] B.C.J. No. 277 (C.A.))

[61] The public confidence factor weighed heavily in my final assessment of whether Mr. Gerrard had met his onus for release on bail pending appeal. Despite his release plan and the testimony from him and his proposed sureties, I was left with a residual concern about Ms. Day's safety. I saw some limitations in the ability of the proposed sureties to manage the risk. Significantly, however, the seriousness of Mr. Gerrard's convictions, and the nature of them – protracted, significant domestic violence, including charges involving firearms – weighted the balance against release.

[62] In *Oland*, the Supreme Court of Canada said where the applicant has been convicted of a "very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety... concerns..." (at para. 50) The Court noted these considerations can drive the result even where there has not been a determination that the grounds of appeal are weak.

[63] In the final analysis, the balance tipped against Mr. Gerrard's release.

*Conclusion*

[64] Mr. Gerrard's motion for bail pending appeal is denied.

Derrick, J.A.