

2010 CarswellOnt 8109

R. v. Allen

Her Majesty the Queen against Andre Allen

Ontario Court of Justice

M. Then J.P.

Heard: October 19, 2010

Judgment: October 19, 2010

Docket: None given.

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Counsel: J. Armstrong, for Crown

S. Pieters, for Accused

Subject: Criminal

Criminal law.

***M. Then J.P., (Orally):***

1

THE COURT: With respect to Andre Allen, he appears before this court and he is charged with one count of assault with weapon, one count of unlawful entry, and a further count of assault. The accused apparently is a 20-year-old who resides with his mother and grandmother at 7 Winstanley Court. The information before this court is that he was in a relationship with the complainant in this matter, and I am not sure if I ever got the name properly. Is it Shelika or Shenika Allan?

MS. ALLEN: Shelika.

THE COURT: Shelika Allan.

MS. ARMSTRONG: That's Shelika, spelled S-H-E-L-I-K-A, and the last name is Manley-Allan.

THE COURT: All right, Shelika Manley-Allan, a relationship that, at least the information

before this court, indicates ended some two months ago. We also have heard that there does not appear to be a substantial employment history for this individual. There was some information that he worked as, I guess, a detailer for a mechanic at some time, and there was some information before the court that he has not finished high school but was either in or exploring continuing or enrolling in a GED program, apparently at St. Christopher's House at approximately the time of his arrest for the charges before the court.

2 The accused certainly has criminal antecedents. We have a youth history that starts in 2005 and continues through to 2008, and there are a number of charges. There are fail to comply with recognizance, obstruct peace officer, possession of property obtained by crime under. There are thefts, fail to stop at the scene of an accident, dangerous operation of a motor vehicle. There is an assault with intent to resist arrest and fail to comply with conditions of an undertaking. Another obstruct peace officer in 2008, still in youth court. Escape lawful custody, fail to comply, obstruct peace officer, fail to comply.

3 And in 2009 the accused had reached adulthood and was convicted of a charge of robbery, for which he received a suspended sentence and probation for three years on each charge concurrent with a mandatory prohibition order. There is also a 2009 conviction for assault causing bodily harm, and counsel has made submissions and provided the Court with what appears to be the transcript of the sentencing proceedings before The Honourable Madam Justice Marin, and that occurred, apparently, on February 17<sup>th</sup> of this year at Scarborough Court.

4 It is alleged, from the synopsis that the Crown read into the record, that the most recent charges before the court involved the accused attending at the victim's premises and waking her up at approximately five o'clock in the morning, attempting to gain entry into the premises, and this is on the 3<sup>rd</sup> of October, at 1615 Dundas Street East, and when he was refused entry he ultimately forced himself in through the door. The door apparently, allegedly, split the lower lip of the complainant. Eventually the police were called and the charges before the court were laid.

5 In this case the onus is on the Crown to show on a balance of probabilities why his detention is justified. The Crown seeks the detention of the accused on primary and secondary grounds; therefore, I am obliged to consider whether the accused is a flight risk and might not attend court if granted bail, and I am obliged to consider whether there is a substantial likelihood that the accused would, if released from custody, commit a criminal offence or interfere with the administration of justice such that the safety of the public would be in danger.

6 Before looking at the evidence pertaining to Mr. Allen's case, I think it is useful and relevant in this case to set out the governing principles in pre-trial release or detention as set out in legislation and discussed in case law; therefore, I am mindful that no matter how serious the charge or charges, this accused, like all accused, is presumed to be innocent until proven otherwise following a trial. This, of course, does not prevent this Court from weighing the strength of the Crown's case or, indeed, abolishing the presumption of innocence in the course of the proceedings themselves.

7 With respect to the strength of the Crown's case, certainly I agree with Madam Crown

that there appears to be a strong Crown case; there allegedly is a witness to the altercation with both complainants in this matter, and also there is a statement from the complainant herself with respect to what allegedly occurred on that day. From that evidence it would appear that there is a nexus between the accused before the court and the charges that he faces.

8 However, with respect to the strength of the Crown's case there may be triable issues there and certainly they are for a different forum; this Court is not the trier of fact, but this Court is well aware that even the strongest of Crown cases can collapse at trial, and we do have information from the complainant herself. She states that she is not fearful of the accused in spite of what happened, allegedly, on the 3<sup>rd</sup> of October, and how that situation will eventually be resolved at trial remains to be seen.

9 Nevertheless, this Court also has to keep in mind, regardless of the strength of the Crown's case, that no individual can be denied the right to a reasonable bail without just cause. There is no class of offender or offences for which bail is not a reasonable possibility, and this Court does not function as a forum for preventative detention no matter how desirable or convenient it might be in a case such as this; this Court is strictly here to determine whether there is a substantial likelihood of re-offence during bail and whether that would compromise the administration of justice or the safety of the public.

10 Having said that, obviously the decision to grant bail must be made on a case-by-case basis. With respect to the primary grounds, I note, as defence counsel has stated on the record, that there is no evidence with respect to him failing to attend court. I concur with Madam Crown that certainly there are a number of fail to comply with recognizance, and it is clear that this accused has some difficulty, or perhaps unwillingness, to fully comply with court orders. However, I also have to note that most of that occurred while he was under the *Youth Criminal Justice Act*. He is now an adult and he will be treated as such.

11 For the primary grounds, whether he is a flight risk, I must also consider how he is located within our society; does he have a stable environment.

12 Obviously the evidence is that his mother, his grandmother, his aunt, really all the significant people in his life, are located in Toronto. He has had a lifelong relationship with them. There is some evidence of employment. There is some evidence of education. I, having considered all of the factors with respect to the primary grounds, do not find there is sufficient evidence to warrant his detention on primary grounds. I am confident he would attend court if and when required.

13 With respect to the secondary grounds, I must certainly concur with Madam Crown. The prior criminal antecedents, the prior assault bodily harm conviction, the fact that both of the proposed sureties have been sureties in the past, albeit when he was considerably younger and not yet an adult, do argue for a detention order on secondary grounds. Arguing for release, defence counsel has produced before this court two witnesses - the accused's mother and the accused's grandmother - who gave oral testimony with respect to a plan of supervision that is proposed to reasonably manage the concerns that Madam Crown has posed with respect to the secondary grounds, and really that is what this Court must decide; does the proposed plan of

supervision manage the risk posed by this accused.

14 We have heard that, and Madam Crown was quite correct in pointing this out, that he has been under the supervision of both of the proposed sureties before, and while it is not entirely clear, it appears he may have breached once on the watch of his mother. The grandmother who testified was quite adamant in her recollection that he never breached on her watch. If that is the case the Court has to take that into account. When the Court qualifies sureties, and in this case if there is to be a bail, the sureties must be thoroughly qualified.

15 The Court considers two factors; firstly, is there a quantum sufficient to thoroughly engage the proposed sureties in the supervision of the accused. With respect to quantum, I have heard that the mother is prepared to post her savings, \$2,000, as a token of her trust that the accused would comply. I have also heard that the grandmother is prepared initially to post \$2,000 but would post whatever she has as a token of her trust that the accused would comply.

16 The reason given by both proposed sureties is that although the accused has had difficulty complying with the requirements of the criminal justice system and the courts in the past, he has, at least in the last eight months, taken steps that indicate to them that he wishes to, as I think they put it, straighten out his life, and perhaps step off the 'sorry-go-round' of crime and incarceration and perhaps step into the mainstream of more productive citizenship.

17 What do they say indeed that the accused has done to do that? They say that he has attempted to complete his high school education. It is not clear whether he in fact has enrolled, but it appears to be clear that he is interested in enrolling and has made some steps in either asking for an application or applying' to complete his high school. He seems to be aware that the proposed surety, his mother, has a registered education savings plan that has sufficient funds that would at least start him in college, and he has indicated interest in furthering his education. As well, in the alternative, at least the accused has testified that he would be prepared to work. This apparently is the basis of the trust that the proposed sureties have that the accused would comply.

18 However, this Court must also consider whether he poses a danger to the public. Is there a substantial likelihood he would re-offend? Madam Crown has argued ably that the past is prologue and past behaviour is perhaps a good or reliable indication of future behaviour. In that regard there may be, and I agree with Madam Crown, a substantial likelihood of re-offence. Certainly he has had a past that has been marked by violence, and it has been marked by not complying with court orders.

19 Does the plan of supervision adequately manage that substantial likelihood? In coming to a decision I have to consider that in bail the presumption is for release and against detention. I certainly find that in this case it would be desirable and convenient to incarcerate the accused on a detention order until trial. It would certainly prevent him from Committing any kind of indictable offence out in the community.

20 However, my question is, is it necessary. When I hear the evidence of the complainant in this matter, she states she has no fear of the accused. She seems to be, at this point, in my opinion, the only member of the public that is at substantial risk, and the plan of supervision is

that he would be in the constant presence of a surety in a house arrest situation except if' and when he is accepted in an education program and while he is at counselling for some obvious issues that he has and that were clearly expressed to this Court. On the plus side there is no evidence that he has drug or alcohol issues. The major issues that seem to be before this court are anger management issues, possibly relationship or mental health issues. All of those can be dealt with outside of a detention order. Clearly he has to be supervised at all times, given his record.

21 Having considered all of the circumstances, the plan presented, which with some modification I find reasonably, adequately manages the risk he poses. I find he is releasable on bail. I will find that the Crown has not met its onus. There will not be a detention order on secondary grounds. There will be a bail fashioned, and I will certainly accept the Crown's full submissions with respect to terms of bail.

22 I would start with the following: house arrest, seven days a week. To reside with the named surety, that would be his mother, Stephanie Jack, and I believe the address is at 7 Winstanley Court, and the second named surety apparently also resides there, and that is Albertha Grant. The quantum will be \$2,000 for Stephanie Jack, \$3,000 for Albertha Grant. A total of \$5,000 quantum. He is to reside in a house arrest seven days a week unless he is in the direct presence of either named surety or an adult named in writing by the sureties, and that is for the purposes of education and counselling, medical emergencies or attendance at court. As of yet there is no indication that he goes to school. Should that come to fruition then a variation of the bail can be sought, but at present those are the exceptions.

MR. PIETERS: Your Honour, can I ask for one further exception for when he meets with counsel?

THE COURT: Of course, meeting with counsel to prepare a defence, that is always an exception. Otherwise, he is in the constant presence of a named surety or an adult designated in writing. He is not to have any contact or communication with the complainant, Shelika Manley-Allan. Not to be within 500 metres of where she resides, where she is known by him to be, where she works or goes to school, or anywhere else. If you meet her by accident, sir, you turn around and you walk the other way.

THE ACCUSED: Yes, sir.

THE COURT: And that is no contact or communication directly or indirectly with her and 500-metre geographic prohibition. You are to seek and maintain counselling for anger management, personal relationship issues, and you are to be supervised by your sureties, and you are to sign whatever releases and authorizations that are necessary so that your named sureties can ensure your attendance and monitor your progress. You are not to possess any weapons as defined by the *Criminal Code*. You are not to apply for a firearms acquisition permit or a gun licence.

Now you may have had some further submissions, Madam Crown, to make sure that the proposed sureties have total control of his behaviour.

MS. ARMSTRONG: Yes, thank you, Your Worship. Firstly, just....

THE COURT: I think there is another complainant but I did not get the name.

MS. ARMSTRONG: There is. I was actually going to ask that Ms. Christine Allan also be added in terms of no contact, and to be 500 metres away from anywhere that person lives, works or is known to him to be, Christine Allan. In addition, Your Worship, I have some concerns about the exception to the house arrest allowing him out of the home with an individual named by the sureties. We haven't heard from anybody else. We know that Mr. Allen may have some connections that are perhaps not the best influences, not the most savoury. I think that that could be a dangerous condition.

THE COURT: Well, what I am thinking is, is that, you know, it would not be in the interest of justice to deprive him of the opportunity to, you know, at least go to counselling. Somebody has to take Him there and get him back, you know. Also, in the eventuality that he gets admitted with respect to education, I am not satisfied that he should at this time be permitted to and from and while; I think somebody has to be with him to take him there and take him back. Obviously nobody should be present while he is discussing his defence with counsel, but in terms of taking him to and from court, taking him to and from counsel's office, to and from counselling; it has to be a named surety and a responsible adult that does not have a criminal record.

MS. ARMSTRONG: Okay, perhaps we can just tighten up that condition then, Your Worship.

THE COURT: Yes. Obviously I would not go there if I did not have some confidence that the mother and the grandmother, who I think, while obviously they have much on their plate, they obviously indicate to this Court that they are prepared to supervise him as thoroughly as is necessary so that the need of calling the police will not arise. And obviously I think from what I heard from this accused, he is not going to put their \$5,000 into the hands of this court, because he is not going to re-offend, because he knows that there is no more bail, the slightest breach, sir, and you are back in that box before the court facing new charges and your chances of bail are zero. He knows that, and I am confident that he will not put his grandmother and his mother into financial ruin by his behaviour. This is what you are facing now, sir, all right.

MS. ARMSTRONG: So perhaps, Your Worship, I could suggest wording that condition that he be under house arrest except while in the direct presence of one of his two sureties or for the purposes of travelling to and from and while attending his place of education and counselling appointments while in the direct presence of an adult approved in writing by one of the sureties with the school schedule or medical appointment to be confirmed in writing to the surety. Is that sufficient?

THE COURT: Yes, that covers it. That is as tight as we can make it.

MS. ARMSTRONG: Thank you, Your Worship. And I think Your Worship did cover all of the other conditions except to present himself at the door of his residence within five

minutes of a police request to do so at any time that he is required to be in his residence. That would enable the police to effectively enforce Your Worship's house arrest condition.

MR. PIETERS: Well, no, I have some submissions to make on that because it may be a case where, I mean there's a certain reasonableness. The police didn't show up at someone's home at three o'clock in the morning and expect them to be at the door in five minutes. And we know in these cases sometimes the police can overreach, and so it seems unreasonable to require him to be at the door in five minutes.

MS. ARMSTRONG: I have not known the bail compliance unit to be knocking on anybody's door at four o'clock in the morning for no reason.

MR. PIETERS: Well, you'd be surprised what the police does in Toronto. Get real.

THE COURT: I concur with Madam Crown. The reputation of the police enforcement unit is very good; however, there is in this case a circumstance that, you know, I can understand counsel's argument. I mean, he has been convicted for assault bodily harm with respect to a police officer. That would never be held against him by the police with respect to bail enforcement. However, the point is he has to be in his place of residence at all times except while he is at one of the, or in the process of any of those exceptions. Obviously if the police arrive at his door at any time; I do not care if it is ten o'clock at night or four o'clock in the morning, he will either be there or he will be with a named surety or a responsible adult. And under those circumstances — the five minutes can be difficult, it can be difficult under certain circumstances. I think at this point the situation is tight enough. I mean, if he breaches he will not be getting any more bails and he will be putting in four months until trial. I think he knows what the plan is, and if he breaches any section of this plan, any factor of this plan, sir, you are back in jail, so you are not going to do it. Understood?

THE ACCUSED: Yes, sir.

THE COURT: All right. But I am not going to do the five minutes for — I think the bail enforcement unit, they will act responsibly, and you are either there and nothing happens; you are not there, there is a warrant for your arrest. Got it?

THE ACCUSED: Yes.

THE COURT: All right.

MS. ARMSTRONG: The only problem, Your Worship, and I don't want to belabour the point, is that the police have no way of knowing whether he is there or not if that condition or something like it isn't in place.

MR. PIETERS: No, well, he'll produce himself.

THE COURT: I will put it this way; he must cooperate with the bail enforcement unit. Let them decide if he is cooperating or not.

MS. ARMSTRONG: Okay. I'm just wondering if the Clerk has got that condition.

THE COURT: You are obliged to cooperate with the police bail enforcement unit.

THE ACCUSED: Okay.

THE COURT: That means if they knock on the door you have to come down. Five minutes is not necessary but you have to come down or somebody has to say where you are, and if they check it out you have to be there.

THE ACCUSED: Okay.

THE COURT: And you know where you can be; you can only be either at home or it is counselling, court, counsel's office and if and when you are accepted in school.

MS. ARMSTRONG: All right. And I think that does cover the conditions. Thank you, Your Worship.

THE COURT: All right. That covers it all?

MS. ARMSTRONG: With respect to a return date, this is a domestic matter; it should come back on a Friday.

THE COURT: How about November 19<sup>th</sup>? Is that a good date for you, counsel?

MR. PIETERS: No, actually I'm doing a preliminary inquiry that week.

THE COURT: How about November 26<sup>th</sup> or the 12<sup>th</sup>?

MR. PIETERS: That sounds — well....

THE COURT: The 26<sup>th</sup>?

MR. PIETERS: The 26<sup>th</sup> is fine.

THE COURT: 26<sup>th</sup> of November, 505 court, ten a.m.

MR. PIETERS: Thank you very much.

CLERK OP THE COURT: What's the date, I'm sorry?

THE COURT: 26 November, 505, ten a.m.

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