Date: 19981022 **Docket**: C.R. 150067

NOVA SCOTIA COURT OF APPEAL
Cite as R. v. Sanchez, 1998 NSCA 6

BETWEEN:

HER MAJESTY THE QUEEN	)	James Gumpert
	)	for the Applicant
Applicant	)	
- and -	)	
	)	Kevin Burke, Q.C.
	)	for the Respondent
JUAN FELIX SANCHEZ	)	
	)	
Respondent	)	Application Heard:
	)	October 22, 1998
	)	
	)	
	)	Decision Delivered:
	)	October 22, 1998
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BEFORE THE HONOURABLE, THE CHIEF JUSTICE, IN CHAMBERS

GLUBE, C.J.N.S.:

This is an application by the Attorney General of Nova Scotia to the Chief Justice of Nova Scotia, Court of Appeal, under the provisions of s. 680 of the **Criminal Code** for an order directing the order of Justice Oland granting bail to Mr. Juan Felix Sanchez on September 11, 1998, be reviewed.

Section 680 of the **Criminal Code** provides that a decision of a judge made under s. 522 “may, on the direction of the chief justice ... of the court of appeal, be reviewed by that court ...”. This involves a two step process. First, the Chief Justice reviews the material to determine whether or not there should be a review by the Court. If a review is ordered, it goes to a panel of the Court.

In this case, the Crown and the Court erroneously believed the date fixed was to hear the initial application by the Chief Justice under s. 680 of the **Code**.

Counsel on behalf of Mr. Sanchez believed he was appearing just to set a date for the parties to present their positions to the Chief Justice as to whether or not the matter should be sent to a panel of the Court of Appeal. After discussion with counsel, I heard the Crown argument and offered defence counsel time to file submissions. Defence counsel only wanted to make a few comments. Most of what he proposed would be made available if a review was ordered. He did not wish further time to file a submission.

At the conclusion of the hearing, I advised counsel I was ordering a review with reasons to follow.

We then discussed a date for the review. The trial is scheduled for September 1999, and the bail review is scheduled for April 15, 1999. The Crown requested earlier dates, which were available in the January/February term, but defence counsel is in a long trial starting in January. The Crown was concerned about the delay as Mr. Sanchez is out on bail. However, as he has numerous conditions as part of his bail, if the Crown believes a breach has occurred, the Crown have their rights under the **Criminal Code**.

Mr. Sanchez is charged with second degree murder. Following a two-day bail hearing, he was granted bail with the following conditions:

to have two sureties in the amount of $25,000.00 each;

to reside at a specific address;

a curfew from 8:00 p.m. to 6:30 a.m.;

no contact with persons before the Court or who have a criminal record;

to actively seek employment;

reporting three times a week;

reporting any change of address to the Police;

not to have or obtain a passport;

not to take any alcohol or non-prescription drugs;

reporting to a probation officer to enroll in an anger management course

as soon as possible; and

to have no contact with thirty-six named witnesses to the alleged offence.

By a letter dated September 14, 1998, the Court was advised by Correctional Services that it has no legal mandate to provide supervision of a person on bail. Although the Probation Officer could not arrange for an anger management course for Mr. Sanchez, he did provide Mr. Sanchez with appropriate information which may allow him to obtain an anger management course on his own. It appears the condition that Mr. Sanchez report to a probation officer to enrol in an anger management course as soon as possible is not enforceable as written.

I have reviewed the affidavits filed with the Notice of Application, as well as the decision of Justice Oland dated September 10 and 11, 1998.

Counsel for the Crown submitted the main reason for this application is to have the Court of Appeal review the decision in **R. v. Pugsley** (1982), 2 C.C.C. (3d) 266 (N.S.S.C.), which case held the onus on the accused found in s. 457.7(2)(f) of the **Criminal Code** (the predecessor of s. 522(2)) was of no force and effect in light of s. 11(e) of the **Canadian Charter of Rights and Freedoms**. Although Justice Oland, in following **Pugsley**, correctly placed the onus on the Crown to show why the accused's detention is justified, the Crown seeks to reverse her decision by reversing the decision in **Pugsley**. If that result occurs, the onus will be on the

accused as set out in s. 522(2), and this might change the outcome in the **Sanchez** decision.

Of course, I must also determine whether or not the review should be granted even without the issue of reverse onus. A review should be ordered unless there is no hope of success on the record. (**R. V. Moore** (1979) 49 C.C.C. (2d) 78 (N.S.S.C.A.D.))

I. Reverse Onus

> 522. (2) Idem - Where an accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10). [emphasis added]

On the issue of reverse onus, the following cases have either not followed or not considered the finding in **Pugsley**.

1. **R. v. Bray** (1983), 2 C.C.C. (3d) 325 (Ont C.A.), Martin, J.A. dealing with s. 457.7(2) (now 522.(2)), held the reverse onus provision ... " is a reasonable limitation even if, *prima facie*, it conflicts with s. 11(e); and we think that it does not." (p. 329). He went on to find the reverse onus only requires the accused to "satisfy the judge on a balance of probabilities that

his detention is not justified on either the primary or secondary ground, a burden which it is rationally in his power to discharge. There is no burden cast upon the accused to disprove the offence or his implication in it, the onus is on the Crown ...” (p. 329). Earlier at p. 329, Martin, J.A. stated:

> In our view, the reverse onus provision in s. 457.7(2)(f) does not contravene the provisions of s. 11(e) of the **Charter**. Section 11(e) provides that a person charged with a criminal offence shall not be denied bail without ‘just cause’. The primary and secondary grounds specified in s. 457(7) [now 515(10)] clearly constitute ‘just cause’. Section 11(e) does not address the issue of onus and says nothing about onus.

2. **R. v. Dubois (No. 2)** (1983) 8 C.C.C. (3d) 344 (Que. S.C.) followed **Bray** and several other cases which deal with a reverse onus in a different section, namely, 457(5.1).

3. In **R. v. Siemens** (1991), 70 Man. R. (2d) 319 (Man. C.A.), Chief Justice Scott referred to both **Pugsley** and **Bray**, but determined it was unnecessary to choose between them as in his case, the conclusion would be the same regardless of who had the onus.

4. In **R. v. Pittman**, 1991 Nfld. & P.E.I.R. 357 (Nfld. C.A.), Goodridge, C.J.N., held the onus was on the accused to establish by a preponderance of evidence the requirements of s. 515(10). He did not refer to either **Bray** or

Pugsley.

5. In **R. v. R.V.B.** (Alberta Court of Appeal), [1992] A.J. No. 665, 131 A.R. 175, Stratton, J.A. dealt mainly with the issue of whether or not to order a review but refers, in passing, to s. 522(2) and the onus on the accused. Again, there is no reference to **Bray** or **Pugsley**.

6. **R. v. Sutherland** (Sask. C.A.), [1994] S.J. No. 242, in dealing with a s. 679 application, Sherstobitoff, J.A. states at para. 19:

> It should be noted that there are conflicting decisions in respect of the constitutional validity of the 'reverse onus' provision in s. 522 of the **Criminal Code**: **Pugsley v. R.** (1982), 31 C.R. (3d) 217, 2 C.C.C. (3d) 266 (N.S.C.A.); **Bray v. R.** (1983), 32 C.R**.** (3d) 316, 2 C.C.C. (3d) 325 (Ont. C.A.). Since no one challenged the provision in this case, it was taken to be of full force and effect.

7. In **R. v. Beamish**, [1995] P.E.I.J. No. 107 (P.E.I.S.C.T.D.), Jenkins, J., after referring to **Pugsley**, **R. v. Pearson** (1992), 77 C.C.C. (3d) 124, **Bray** and several other Nova Scotia cases which follow **Pugsley**, chose to follow **Bray**. He found the onus is reasonable and requires the accused to provide information on the factors in s. 515(10) that the accused is most capable of providing. He held "s. 522(2) of the **Criminal Code** as it relates to a s. 235 offence of murder does not violate s. 11(e) of the **Charter**". (Last page of decision.)

8. **R. v. Lamothe** (1990), 58 C.C.C. (3d) 530 (Que. C.A.) refers to s. 11(e) as requiring that the accused must not be denied reasonable bail without just cause. The case makes no reference to the issue of reverse onus.

9. **R. v. Rondeau** (1996), 108 C.C.C. (3d) 474 (Que. C.A.), and

10. **R. v. L.(D.C.)**, [1991] B.C.J. No. 387 (B.C.C.A.), both apply the reverse onus without discussion of its validity.

11. **R. v. D.B.L.** (1994), 155 A.R. and 73 W.A.C. (Alberta C.A.), found the Provincial Court judge wrong when he put the onus on the Crown under s. 522(2).

12. **R. v. McCreery** (1996), 110. C.C.C. (3d) 561(B.C.S.C.) held the onus is on the accused.

13. **R. v. Pearson** (1992), 77 C.C.C. (3d) 124 (S.C.C.) dealing with the reverse onus in s. 515(6)(d), which is similar to s. 522(2), refers to several sections of the **Charter**, including 11(e). Section 11(e) was found to create a basic entitlement for granting reasonable bail unless there is just cause to do otherwise and says the accused is in the best position to

demonstrate at a bail hearing his position vis a vis the offence. **R. v. Morales** (1992), 77 C.C.C. (3d) 91, also dealing with s. 515(6), held there is “just cause” within s. 11(e) of the **Charter** if the denial of bail can only occur in a narrow set of circumstances and if the denial is necessary to promote the proper functioning of the bail system. The Supreme Court of Canada did not deal with other sections which contain a reverse onus.

14. **R. v. Webster**, [1995] P.E.I.J. No. 100. (P.E.I.S.C.A.D.) deals with s. 679(3) and finds the burden is on ”the accused to satisfy the three criteria set out in 679(3)”. This deals with seeking release following conviction pending appeal.

15. Finally, there are a number of Nova Scotia cases which follow the ruling in **Pugsley** including **R. v. Simmonds** (I.B.) (1993), 123 N.S.R. (2d) and 340 A.P.R. 162 (N.S.S.C.T.D.), a decision of MacAdam, J. There is one which does not. In **R. v. MacNeil**, a decision of the Supreme Court of Nova Scotia on September 11, 1996, during argument on who had the onus of proof, Nunn, J. stated at p. 3 of the transcript:

> THE COURT: Well, if the Supreme Court of Canada has upheld the reverse onus and says it is not contrary to the Constitution, then I think I would prefer to follow the Supreme Court of Canada and indicate that the burden is on the Accused.

And on p. 4:

> THE COURT: I mean, I appreciate what the **Simmons** case says and then certainly **Pugsley** and that they have been followed, but I don't want to get into a constitutional, a great constitutional argument here, and if subsequent to those cases the Supreme Court has not found the reverse onus since 1992 in **Morales** and **Pearson** is 1992 also, they haven't found the reverse onus to be unconstitutional, then I am not going to find it either.
>
> ....
>
> THE COURT: But in that reverse, in that reverse onus, other than in a general way I would anticipate that it would be the Crown that would reveal the facts of the matter, more than the Accused. That's just a thought that's in my mind that, I mean if the Accused is not expected to reveal his defence or any of those aspects, so in order for me to know something about it the Crown would have to tell me about it.

At p. 57, in his decision he stated:

> Now, I have already held that the reverse onus provisions of this section are still in effect and not unconstitutional, and despite the Nova Scotia cases which have held otherwise, I am satisfied that since those provisions are not unconstitutional which was the ground that Mr. Justice Pace used in the **R. v. Pugsley**, which is cited at 55 NSR (2d) at page 163, I have held here that the onus is on the Accused to satisfy the burden of proof.

Without suggesting the above list of cases is exhaustive, that is, that all the case law on this issue has been found, it does show that six other provinces in Canada have either found s. 522(2) constitutional when referred to s. 11(e) of the

Charter, or there has been no **Charter** argument made and the reverse onus has been used.

Therefore, it appears appropriate for the Court of Appeal of Nova Scotia to review the reverse onus position and to decide whether the decision in **Pugsley** is still the law in Nova Scotia.

II Should a review be granted under s. 680 of the Criminal Code?

Whether or not a review should be granted requires an examination of the decision of Justice Oland in relation to the provisions of s. 515(10):

> **Justification for detention in custody** - For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> > (a) where the detention is necessary to ensure his or attendance in court in order to be dealt with according to law;
> >
> > (b) where the detention is necessary for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
> >
> > (c) on any other just cause being shown and without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including

> the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Justice Oland found she was not persuaded the Crown had met the burden under s. 515(10)(a). She discussed the facts, that the offence was serious and Mr. Sanchez was seen with a knife and was apprehended at the scene. She found Mr. Sanchez lives with his mother and sister, is not employed and has few financial resources, but she does not believe he is inclined to abscond. She refers to his previous record and dismal compliance with previous court orders, but concludes there is no failure to appear in court.

The Crown submits because of the potential for lengthy incarceration, this is a good reason for him to leave. Also, Mr. Sanchez failed to comply with a recognizance in 1993 and committed a crime while on an undertaking in 1992. The Crown suggests Justice Oland failed to put proper emphasis on this aspect.

On the second ground, protection and safety of the public and whether there is a substantial danger Mr. Sanchez will re-offend, Justice Oland discussed the events of the offence and his lengthy record, which includes several assaults in 1993 and 1995. She suggests he has been clean in the last three years. From Mr. Sanchez' record, as set out in Constable Coakley's affidavit, it appears this latter statement is incorrect. In 1996, Mr. Sanchez had a conviction for causing a

disturbance, which put him on probation for one year. In September 1996, he was convicted of an assault causing bodily harm and he received six months incarceration and two years probation. Thus, when the current offence took place in May of 1998, he was on probation for the 1996 offence.

The Crown says even if there is an explanation for some of Mr. Sanchez' offences, which commenced when he was only 14 or 15 years old, he is now 22 with 24 different convictions, including two assaults causing bodily harm and two other assaults. On these facts, the Crown submits the learned judge put insufficient emphasis on the issue of protection of the public.

On the issue of substantial likelihood he will commit an offence or interfere with the administration of justice if released, Justice Oland saw a man with a temper that flares up and who gets into fights; he is somewhat at loose ends. She says there is a danger but not a substantial likelihood and says, "Not based on his recent record, being that of the last 3 or 4 years." She found the Crown did not meet that burden. It appears the same misunderstanding of the evidence exists on this issue.

The Crown submits the decision failed to adequately maintain confidence in the administration of Justice.

Finally, Justice Oland looked at whether the Court could "be satisfied with a release of Mr. Sanchez which will protect the public." She was satisfied that could

be accomplished with the numerous conditions and the surety as set out earlier in this decision.

Counsel for Mr. Sanchez submitted there was evidence at the bail hearing explaining why Mr. Sanchez pled guilty to some charges, namely, Mr. Sanchez pled guilty on the advice of another counsel to get off remand. Further, one of the assault charges related to slapping his sister and it was submitted evidence was led about the nature of that offence and there were other explanations about some of the other charges. I advised counsel this evidence would be before the panel if a review was ordered but it was unnecessary for me to have at this preliminary stage. It is not the function of the Chief Justice at this stage to conduct a "review" of the decision to release Mr. Sanchez. Rather, to decide whether a review by the Court is appropriate.

The case of **R. v. Moore** (1979), 49 C.C.C. (2d) 78 (N.S.S.C.A.D.) deals with whether or not to order a review. MacKeigan, C.J.N.S. stated the basis for his decision as follows:

> I conceive that I should direct a review under s. 608.1 [now 680] if, in my view, the appeal Court, properly applying the law, could possibly conclude that the application for release should have been allowed. I should, on the other hand, probably refuse review only if the applicant would have no hope of success on a review of the record. [p. 79]

Thus a review should be ordered unless the accused or the Crown has no

hope of success on the record.

After quoting from **Moore**, Stratton, J.A. in **R. v. R.V.B.** (Alta C.A.), [1992] A.J. No. 665; 131 A.R. 175, put his test for review as follows::

> Counsel for the Crown contends that a more appropriate statement of the test is that I should not direct a **review** unless it can be said that there is a reasonable prospect that the appeal itself will be successful. I agree.

I am unable to agree with the test in **R. v. R.V.B.** and prefer the test in **Moore**.

A review is an appeal, not a trial *de novo* (**R. v. West** (1972), 20 C.R.N.S. 15, 9 C.C.C. (2d) 369 (Ont. C.A.)). The Appeal Court makes its own determination of the facts (**R. c. Quinton** (1993), 24 C.R. (4th) 242 (Que. C.A.). The nature of the review is the correctness, not the reasonableness of the decision at first instance (**R. v. Benson** (1992), 14 C.R. (4th) 245, 73 C.C.C. (3d) 303 (N.S.C.A.).

I find the possible misapprehension of when Mr. Sanchez committed his last offence before the current charge of murder, his lengthy record and his previous disobedience of court orders leads to the conclusion the Appeal Court could possibly conclude he should not have been placed on bail. These and all other areas of evidence heard during the original bail application may be considered by the panel when conducting its review. I find the test in **Moore** has been met and a review

should be undertaken. Also the possible change in the current position of the Court relating to the reverse onus could alter the decision of a panel as to whether or not bail should have been granted to Mr. Sanchez.

A review is ordered. The date for the review is April 15, 1999.

Counsel for the Crown listed a number of items to be included in the Appeal Book. I would add to that list the Recognizance dated September 11, 1998, and attachments.

Glube, C.J.N.S.