NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Knockwood, 2009 NSCA 87

Date: 20090730
Docket: CAC 311483
Registry: Halifax

Between:

Stephen John Knockwood

Appellant

and

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Application Heard:	July 30, 2009, in Chambers
Written Decision:	August 28, 2009
Held:	Order for variation of recognizance granted
Counsel:	Ms. Kerri-Ann Robson, for the appellant Mr. Peter P. Rosinski, for the respondent

Decision: (Orally)

[1] On May 28, 2009 the appellant, Stephen John Knockwood was released from custody pending appeal, pursuant to an application under s. 679 of the *Criminal Code*. Concurrent with that application, leave to appeal was granted to the appellant with respect to his appeal from the sentence imposed at trial.

[2] The Crown consented to the application brought by the appellant under s. 679 of the *Code.* As coincidence would have it, I was the judge in chambers who heard that application.

[3] The terms of release were set out in a recognizance with one surety to justify. It would be safe to say that the terms of release are strict. The appellant filed an application returnable today to vary the terms of release, or at least that is how the application or motion is styled. The Crown in its usual fair-handed approach does not oppose the requested variation but consents to it.

[4] I raised with the parties what jurisdiction I have to vary a previous order made under s. 679 of the *Code*. I would add that that query was first generated because it seemed clear or apparent that the Crown was not consenting to the requested variation. Ultimately, the Crown did so consent.

[5] The Crown would consent to an application being heard by me as a single judge of the Court of Appeal, pursuant to s. 680(2). However, the Crown rightly points out that there has been no direction by the Chief Justice of this court or acting Chief Justice that the previous order under s. 679 be reviewed.

[6] In the materials filed is the decision of the Ontario Court of Appeal in *R. v. Daniels* (1997), 119 C.C.C. (3d) 413. The circumstances in that case are quite different than the ones before me. The one thing that is significant is that there had been previous applications under s. 679 and variations made to previous orders under that section. However, in Ontario, the court, exercising its rule making power under s. 482 of the *Criminal Code,* set out in its rules that

> A judge may, on cause being shown, cancel an order previous made under section 679 of the *Code* and may make any order that could have been made under that section.

As Justice Doherty noted, this Rule (34(1) of the *Criminal Appeal Rules* SI/93-1169, 1993 Canada Gazette, Part II) is invoked on an almost daily basis by counsel seeking to vary an existing bail order by amending the conditions of release. It is, of course, accurate to say that rules enacted by a court cannot create a jurisdiction to make an order where none exists in the *Criminal Code*.

[7] The issue then I must address today is whether or not I have jurisdiction under s. 679 of the *Code* to entertain this application. This issue does not appear to have been directly considered before in Nova Scotia.

[8] There is a reference in a decision by Chief Justice Glube in *R. v. Wood*, 1999 NSCA 134 where it appears that Cromwell, J.A., as he then was, granted the appellant release pursuant to s. 679 of the *Criminal Code* on October 20, 1999 but there was an additional order dated October 26, 1999 changing several of the conditions of release. There is no indication that Justice Cromwell turned his attention to the issue of jurisdiction to amend his previous order.

[9] There have been a number of decisions that have supported the jurisdiction of a single judge of a court of appeal to hear successive applications under s. 679 of the *Code*. These include *R. v. D'Agostino* (1998), 127 C.C.C. (3d) 209 (Alta. C.A. in Chambers), *R. v. Baltovich* (2000), 33 C.R. (5th) 188 (Ont. C.A. in Chambers), *R. v. Daniels, supra*, and *R. v. Woods*, 1998 ABCA 202 (in Chambers). All of these cases and others that have arrived at a similar result, make it a precondition for the court having jurisdiction to entertain a further application under s. 679 of the *Code*, rather than require a reference under s. 680 of the *Code*, that there be material change in circumstances.

[10] In addition, in the limited time that I had to consider this issue, there is a decision by Robertson, J.A., in chambers, of the British Columbia Court of Appeal in *R. v. Pappajohn* (1977), 38 C.C.C. (2d) 106, where an order under then s. 608 of the *Code* was made by the Chief Justice of British Columbia containing a condition that the appellant remain within the jurisdiction of the province. The appellant applied for an order deleting this condition. The Chief Justice referred the application to the judge sitting in chambers who was Robertson, J.A.. The Crown was prepared to consent to the application but the learned chamber's judge had doubts as to his jurisdiction to make the order sought and invited counsel to make written submissions.

[11] Justice Robertson said as follows:

> In it [the written submission] he confirms my impression that there is in s. 608 of the *Criminal Code* no specific provision for variations, but he submits that the Court or a Judge in appropriate circumstances has an inherent jurisdiction to vary an order made under s. 608 as long as the order as varied is one which could be made by him in the first instance. In this he is, in my opinion, correct. I make the order sought.

[12] I would note that the *Criminal Code* at that time did not give to a single judge the same jurisdiction as is now set out in s. 680(2) of the *Code* permitting a single judge of that court to hear a reference by the chief justice. It could therefore be credibly argued that there was in fact no specific reference by the Chief Justice of the Province of British Columbia to Justice Robertson under what would have been then s. 608.1 of the *Code* to hear the application.

[13] This result was referred to and approved by the Ontario Court of Appeal in *R. v. Nutbean* (1980), 55 C.C.C. (2d) 235. Associate Chief Justice MacKinnon delivered the judgment of the court. At issue in that case was the validity of variations made by a single judge of the Ontario Court of Appeal in terms of release pending appeal. He wrote:

> The questions raised may be shortly dealt with. Although there is no express procedure authorizing a single judge of the Court of Appeal to vary a judicial interim release order of another judge of the Court of Appeal counsel for the Crown agreed that a single judge does have the inherent power to make such a variance provided that he could have made the order, as varied, initially: *Regina v. Pappajohn* (1977), 38 C.C.C. (2d) 106. Although s. 608 is silent on this point it seems to me that a single judge of the Court of Appeal does have the inherent jurisdiction to vary a judicial interim release order made by one of his colleagues.

[14] There is no doubt that s. 679, nor any other provision of the *Code*, expressly authorizes or precludes an appellant from bringing an application to vary his or her terms of release to the same or another judge of a court of appeal.

[15] It strikes me as an odd and incongruous result that a single judge of the court of appeal has the jurisdiction to entertain a successive application for bail pending appeal under s. 679, but would not have the jurisdiction where the Crown is consenting to the variation being requested to vary a previous order. To insist that an applicant in these circumstances first bring an application to the Chief Justice

for a reference under s. 680 introduces an unnecessary and somewhat artificial procedural step.

[16] There is nothing in the language of s. 679 that would suggest a power does not exist to deal with a consent variation of the terms of release. If nothing else, it strikes me that a consent by the Crown to the requested variation amounts to a material change in circumstances and permits the applicant to bring this application.

[17] I conclude in these circumstances a single judge of this court does have jurisdiction. Given the position of the Crown, I grant the requested variation. In the circumstances, I understand a surety is present and there should be a new recognizance entered into.

Beveridge, J.A.