IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v Hill, 2005 NSPC 50

Date: 20051011
Docket: 1534961
Registry: Sydney

Between:

The Queen

v.

James Christian Hill

Judge:	The Honourable Judge A.P. Ross
Heard:	September 27, 2005 and October 6, 2005 Sydney, Nova Scotia
Written decision:	November 8, 2005
Subject:	Variation of Release Orders
Counsel:	Shane Russell, for the Crown Donald MacLennan, for the Defence

INTRODUCTION

[1] This is a decision concerning the jurisdiction of a Provincial Court Judge under s.523(2) of the Criminal Code to change previously-ordered terms of release for an accused person.

[2] In a criminal trial the evidence and fact-finding relate to past events which are frozen in time. Decisions taken are final, subject to appeal. In judicial interim release hearings (sometimes called bail hearings) the court is dealing with a dynamic situation. A trial looks to prior conduct. A bail hearing also looks forward to the risks entailed in possible future conduct. Hearings to consider interim release or detention therefore pose unique challenges, not only for counsel and the judge involved in a particular proceeding, but for legislators who must craft provisions to deal, in an appropriate way, with the sometimes conflicting principles of public safety and individual rights.

[3] Section 523 is reproduced in its entirety in Appendix A. Among other things it empowers "the court, judge, or justice before whom an accused is being tried, at any time … on cause being shown (to) vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part" that is warranted. Part XVI of the Code is entitled "Compelling Appearance of Accused before a Justice and Interim Release".

[4] Persons charged with crimes make their first appearance before either a justice of the peace or a provincial court judge, either of which may make an order for release upon conditions until the next

stage of the proceedings (s.469 offences excepted). Occasionally there is a significant change in the circumstances of the accused person after such an order is made, and the person, understandably, wishes to change the terms of his or her release accordingly. Section 523(2) impliedly gives the person the right to apply for a new order which reflects the changed circumstances. There is, however, a catch. Unless the accused "is being tried" by the court, judge or justice before whom such application is made (or in two other narrow situations not applicable to Mr. Hill) a hearing into changing a release order may only be conducted where the prosecutor gives consent.

[5] In the instant case, Mr. Hill was charged in an Information sworn May 9th, 2005 with unlawful entry under s.349(1) and assault with a weapon under s.267(a) of the Criminal Code. According to the endorsements on the Court Appearance Record he first appeared in provincial court that same date, and was remanded by Judge Ryan until the following day for a bail hearing. On May 10th he was released on an undertaking with conditions by Judge Halfpenny-McQuarrie. The record does not say whether this was ordered after a contested hearing or upon agreed conditions, but this does not matter for present purposes. He subsequently appeared before me on August 2nd, 2005 and pled not guilty. His trial was set for May 11, 2006 and is thus pending as of this time.. On September 13th, 2005 he appeared with counsel requesting a hearing to change the release conditions put in place on May 10th. The Crown was not prepared to consent to any changes and argued that I therefore had no jurisdiction to proceed to hear Mr. Hill's application. I heard argument from counsel on the jurisdiction issue on October 6th and after considering the matter indicated orally on October 11th how I would be ruling. I also undertook to provide a set of written reasons. These are such reasons, which I am filing on the present date to bring the matter to a formal conclusion.

[6] For the purposes of this case, and in all cases in the Provincial Court *per se* (i.e. excepting where we act as justices of the peace) the issue becomes whether, at the time the application is made, the accused "is being tried" or "is to be tried". If the former, the court may hear and determine the application whether the prosecutor consents to such a hearing or not. If the latter, consent of the prosecutor is a necessary precondition to the court's jurisdiction. Mr. Hill submits that he falls within the former category. Crown contends that he fits within the latter. In any and all cases, "cause" must be shown. As noted above, cause is generally founded on a significant change in circumstances since the making of the original order.

PRELIMINARY COMMENTS

[7] Accused are motivated by personal interest to ask for relaxation of interim release orders. In theory the Crown may, under s.523, acting in the public interest, apply to change an existing release order to one which is *more* restrictive of the accused's liberty. However, it is unlikely an accused would give consent to this, and I am not aware that prosecutors even attempt to obtain it. It can be seen that the ruling urged upon me by the Crown has something of a double edge, for if I agree with its submissions, then neither will the Crown have a freestanding right to apply to a provincial court judge to change release orders (presumably to make them more restrictive) in the period between plea and trial.

[8] The s.523(2) procedure is separate and distinct from s.515.1 which permits variation of an undertaking or recognizance (including one entered into under s.515) "with the written consent of the prosecutor". While it would be necessary (and certainly highly desirable) for any variation to be approved by a court on the public

record, this procedure does not require “cause” to be shown. While silent regarding consent from an accused, the section likely contemplates some sort of application, and thus implied consent, by the accused.

[9] As an aside, if the accused has been released by an “officer in charge” under s.498 or 499 it seems reasonably clear that he or she has an independent right to apply to a justice pursuant to s.499(3) or s.503(2.2) to replace this particular form of undertaking. If the original charges are replaced by a new information any original release conditions are deemed to continue in force pursuant to ss. (1.1), but no consent is required for the court judge or justice to make a new interim release order where this occurs. Worth noting also is the fact that on its face the section applies equally and identically to detention orders.

[10] Despite the dynamic quality of bail proceedings, noted above, the doctrine of issue estoppel still holds some sway. Judicial decision-making must have some degree of finality. People cannot be permitted repeated access to the same level of judicial authority on the same issue. Whether taken before a “presiding justice of the peace” (as it is known in this Province) or a provincial court judge, an accused granted interim release has been subject to a judicial proceeding. This result should not lightly be interfered with. Hence the importance of a change of circumstances to justify overwriting a prior decision. Additionally, where an accused is subject to trial proceedings, trial management considerations and things emerging from evidence may justify changing a decision previously made in the same court on arraignment (or still earlier by a justice of the peace).

[11] This decision has considerable practical significance for accused persons appearing in this court, and for the court itself. Mr. Hill is one

of many who seek such relief. So great is the volume of these applications that designated prosecutors and defense counsel have been retained by the Public Prosecution Service and Legal Aid Commission to deal with them. Most often agreement is achieved on new terms of release and the jurisdiction of the Provincial Court to vacate the previous order and make a new one is not called into question. The parties should still annunciate what it is that constitutes "cause", or formulate it through evidence or submissions, so that the court may properly exercise the discretion it is given under the section. But the prosecutor holds a trump card - its own discretion. If no agreement is achieved on new terms of release, and the prosecutor does not at least consent to the provincial court hearing and considering the matter, the accused is without recourse in this forum. Put simply, if the accused is not "being tried", and the prosecutor does not consent, the only resort is a "review" application taken before a superior court judge pursuant to s.520.

[12] I turn now to the issue of when an accused in provincial court is "being tried".

PREVIOUS DECISIONS - NOVA SCOTIA

[13] On December 5, 2002 in R. v. Evans (unreported) Judge Sherar decided that he did not have jurisdiction to vary an interim release order without the Crown's consent unless he were "in trial". He said that "Once a trial happens and the evidence is being heard, then I would have jurisdiction".

[14] On August 9, 2002 in R. v. Hardiman [2002] N.S.J. No. 383 (Q.L.) Justice Cacchione considered an application in Supreme Court from an accused to vary conditions of release. He noted that "on

April 17, 2002 the accused was released by this Court on a recognizance with conditions" (see Par[1]). While there were features of the case not directly relevant to future decisions in provincial court (it was a s.469 offence - the accused was awaiting a preliminary hearing - he was not sitting as a summary conviction appeal court - it dealt with the inherent jurisdiction of the superior court) the decision does address the meaning of the phrases "is being tried" and "is to be tried" in s.523. In that case, where the accused was awaiting trial by jury and therefore had yet to make her plea, Cacchione, J determined, after consideration of the section and its legislative history, that the accused was not "being tried" and that absent Crown's consent he had no jurisdiction.

[15] Hardiman went on appeal and was heard December 11, 2002. The Court of Appeal agreed that Cacchione, J. "had no jurisdiction to hear the application for change of conditions absent the consent of the Crown" - [2003] N.S.J. No. 27 (Q.L.) at par [10]. The court acknowledged that there were "changed circumstances" but agreed that the accused had no right to apply to a judge of the trial court to vary her conditions of release. Left unanswered, however, was the meaning to be given to the words "being tried" in s.523. The court stated at par[11] "there is no dispute that Ms. Hardiman was not "being tried" at the time of her application to vary the conditions and it is therefore not necessary to address the authorities concerned with defining exactly when an accuses is "being tried" for the purposes of s.523".

[16] On March 10, 2005 in R. v. Smith [2003] N.S.J. No. 109 (Q.L.) The accused submitted that the words "is being tried" ought to be "liberally interpreted to include the time measured from the date when plea is tendered to the end of the trial" - see par [6]. Judge Gibson acknowledged that he had previously interpreted the section in that

way, and expressed sympathy with the concerns raised by the Defence (the necessity of appearing before two courts - limited access to Legal Aid for such applications - the difficulties faced by self-represented accused - the potentially arbitrary and unstated reasons of the prosecutor for refusing consent). Nonetheless, he concluded that "recent case law supports a more restrictive interpretation of the words "is being tried" found in s. 532(2)". He decided that s.532(2)(a) only applied to applications "brought in the course of the trial"(see par[7]).

[17] On November 27, 2003 in R. v. Greener [2003] N.S.J. No. 486 (Q.L.) MacDonald, J. came to the opposite conclusion. He did not equate "being tried" with a judge being "seized" with a case. Stating that "a defendant is in jeopardy when a plea has been entered", he noted that a trial court has ongoing responsibilities to an accused awaiting trial - to manage its docket, to ensure a timely conclusion, and to protect the defendant's Charter right not to be denied reasonable bail without just cause. He raised the concern that an accused in police custody taken before a justice of the peace may consent to conditions while under a form of duress. He was concerned that if he followed Evans and Smith (supra) many unrepresented people whose circumstances had changed would simply refuse to comply with the condition, rather that face an "unduly complex" appearance before Supreme Court under s.520. He said the risk that the original hearing would not be taken seriously (if the conditions could be changed a short time later by a provincial court judge) could be managed by enforcing a standard for making a change in bail conditions. He concluded that "the process of being tried in the provincial court as contemplated by s.523 begins *upon arraignment* in the provincial court on a summary conviction charge, or on a charge within the absolute jurisdiction of the provincial court, and *upon election* when the election is to have a trial in the provincial

court" (see par [17]).

[18] On August 26, 2004 in R. v. Kell [2004] N.S.J. No. 401 Judge Embree decided that the approach in Greener was to be preferred, with a slight modification. At par[15] he stated "I consider that the *entry of plea* is a logical and easily definable position in the process for it to be concluded, for the purposes of s.523(2) that a defendant or accused "is being tried"... The entry of plea gives the court the jurisdiction and ability to deal with a series of issues related to the trial and the trial process." Caselaw from the Supreme Court was cited to support the view that "trial" may have different meanings in different provisions of the Criminal Code and that "is being tried" should be taken to refer to "more that just that portion of a trial where evidence is presented or where a judge engages in some conduct or process which seizes that judge with jurisdiction" - see par. [11].

[19] This is the extent of the case law in Nova Scotia so far as I am aware.

CASES IN OTHER PROVINCES

[20] In R. v. Wilder [1996] B.C.J. No.2136 a Supreme Court justice held that he did not have jurisdiction to vacate a release order even though he had been designated by the Chief Justice to preside over the trial, because, at the time of the application, a jury had not been empaneled, and the accused had not entered plea. As such, the accused was not "being tried" under s.523(2)(a).

[21] In R. v. McCreery (1996) 110 C.C.C. (3d) 561 a similar result was achieved. Rejecting the interpretation given in Ontario in R. v. Sood [1992] O.J. No. 2842 the B.C. Supreme Court concluded that

an accused could only rely on s.523(2)(a) once a trial had actually commenced, which does not start "until the accused is given in charge to the jury, which stage is, of course, not reached until the plea has been taken.. " (see par [19]).

[22] In R. v. Gesselman [2005] A.J. No. 1137 (Q.L.) a superior court dealt with an alleged breach of conditional sentence. Dealing with a preliminary issue, the court states "once a judge has taken over as the trial judge...that judge's responsibility relative to judicial interim release ... takes over any previous orders of judicial interim release..."(see par [14]).

[23] The foregoing cases, and the cases cited as authority in them, all concern criminal jury trials in Supreme Court. Given the differences is procedure, they are less persuasive than they might otherwise be in defining when a trial begins in provincial court.

[24] R. v. Pires [1999] B.C.J. No. 3187 is a provincial court decision. The court alluded to s. 669.1(1) of the Criminal Code and cited other procedural considerations in concluding that "It seems clear that an accused is not being tried until and unless there is some evidence, no matter how minor, which will cause the trial judge to exercise his function of hearing evidence and considering the merits of the case" (see par [17]).

[25] In R. v. Taylor [2005] O.J. No. 1789 the accused was released from pre-trial detention. The issue was framed as follows - "At issue in this case is the jurisdiction of a judge of the Ontario Court of Justice, undeniably lacking the inherent jurisdiction on which a superior court judge can rely, to set aside a judicial interim release order...in circumstances where the Crown refuses to consent to a bail variation..." (see par [1]). In the final result the court granted a

release order as a Charter remedy, reasoning from a failure to provide prompt disclosure. More instructive for my present purposes is the finding that the court had no authority to vacate the previous detention order under s.523(2). Referring to Professor Trotter's The Law of Bail in Canada (1999) the court stated that the legislative history of the section "made it clear that only a trial judge during the course of a trial is empowered to vacate an earlier order concerning detention or release. The review of a release order is undoubtedly within the exclusive jurisdiction of the superior court under s.520..." (see par [12]).

[26] In R. v. Michaud]2000] S.J. No. 846 (Q.L.) the accused had months earlier pled not guilty in provincial court and was awaiting trial some months hence. He applied to vary the conditions of a recognizance. The Crown did not consent. Referring to the legislative history of s.532, Deshaye P.C.J noted at par[37] that "by the amendment...jurisdiction of a court, judge or justice before whom an accused is 'to be tried' was transferred from paragraph (a) to the newly created sub-paragraph (iii) of paragraph ©)". The result, he found, was that unless the Crown consented, it was only "during the trial", when the judge was "actually trying the accused" that he had jurisdiction to act under s.532(2)(a).

OTHER CRIMINAL CODE PROVISIONS

[27] While The Supreme Court of Canada in R. v. Barrow [1987] 2 S.C.R. 694 commented that "trial" may have different connotations or meanings depending on which section of the Criminal Code is being applied, I have nevertheless looked at some other sections which deal with jurisdiction and trial procedure, or which are also contained in Part XVI. I will refer to some and comment where I think they may be instructive on the question of when a trial begins. Other provisions

more closely connected to the issue will be considered in the ensuing discussion.

[28] S.645 states that a trial shall proceed continuously subject to adjournment by the court. If trial commences at plea, then adjournments are the rule rather than the exception in provincial court, and the practice seems to offend the basic direction that trials should be continuous. An adjournment during the evidentiary phase of the trial normally requires some justification or reason. Nobody ever questions the need for an adjournment of some duration immediately upon a plea being entered.

[29] S.669.1(1) says that where a judge, court or provincial court judge by whom a plea was taken has not commenced to hear evidence, any judge, court or provincial court judge may try the accused and has jurisdiction for the purpose of the hearing and adjudication. The court in R. v. Pires at Par[12] cited this section in support of the idea that a trial was not underway simply because a plea had been entered.

[30] S.669.2(1) addresses the particular situation "where an accused... is being tried". It permits continuation of proceedings before another (provincial court) judge should the presiding judge for some reason be unable to continue. The section then spells out what the newly-presiding judge must do in certain situations which are particular instances of the more general proposition "is being tried". Read together with the preceding section, it appears that the statute ties the idea of a "trial" to that of "evidence". The headings, while not to be read as part of the provisions *per se,* reflect an obvious distinction between an "adjournment" *for* trial after plea is entered and a "continuance" *of* a trial once evidence has been led (and thereafter at the punishment stage).

[31] S.801 says that where a defendant "appears for the trial" a plea shall be taken, and where the plea is not guilty the court "shall proceed with the trial". This may be seen to support the notion that a trial commences with a plea. S.803 goes on to say that the court may "before or during the trial, adjourn the trial". However subsections (2) and (3) posit a distinction between "the time and place appointed for the trial" and "the resumption of a trial that has been adjourned". Did Parliament, perhaps taking instruction from the common law, envisage that in all criminal proceedings a plea be entered when an accused appears for trial? If so, the question which ought to be asked on arraignment is not "how do you plead?" but "how do you intend to plead?". Then, if the person expresses an intention to plead not guilty, the court would, at the time and place appointed for trial, receive a formal plea from the accused/defendant just before embarking upon the hearing phase. In other words one might ask whether provincial court should follow a practice more akin to that in superior court. I have not even attempted to probe the historical roots of our criminal procedure, but can say that at present it is the universal practice in provincial court in Nova Scotia, and quite likely elsewhere, to take a plea at an early appearance and then set a future trial date. The hiatus between plea and trial is commonly some number of months. S.523 has been amended in recent years, when such a practice was well-established and surely within the cognizance to Parliament. One might toy with the idea of asking accused persons at arraignment "how do you intend to plead?". While this might serve to do an end run around s.523(2)(a), I doubt that many would think it appropriate to change the long-established practice to taking a definite plea at an early stage and adjourning for trial to a later date.

DISCUSSION

[32] I will hereafter discuss various aspects of the issue before me and

consider the implications arising from the position of each party

Widening the scope of one form of relief restricts the scope of another

[33] S. 520 provides for a review mechanism whereby an accused may apply to a superior court judge to review the decision of the justice or provincial court judge taken under s.515 or s.523. This right may be exercised at any time "before the trial of the charge". The reviewing judge may consider the transcript of the original hearing and additional evidence, and may then vacate the previous order and make another. There is caselaw to support the idea that such a review hearing is more than an appeal of the original decision. That is to say the reviewing judge may substitute his or her own discretion after what is, in effect, a *de novo* hearing. Judge Gibson's comments to this effect in Smith (at par [10]) reflect similar views expressed in superior courts in other provinces.

[34] As noted elsewhere in these reasons, a provincial court judge ought not simply revisit an earlier decision made at the same level of judicial authority (which here means a previous release order of a justice of the peace or provincial court judge) unless there is demonstrated cause. While I would not want to suggest here that there is only one possible "cause" for this, it seems to me that in the vast majority (if not all) cases such "cause" will be found in a significant change of circumstances since the original order was made. R. v. Braithwaite (1980) 45 N.S.R. (2d) 1 (C.A.) lends some support for this proposition.

[35] There is thus a difference in the scope of a s.523(2) hearing and a s.520 hearing. An accused in a superior court on a review hearing has a wider basis in law to seek a change than he would before a

provincial court judge on a s.523(2) hearing. If the approach in Greener and Kell is followed, and one considers that a trial in provincial court begins when plea is entered, this narrows quite markedly the time period wherein an accused may apply to a superior court for a review. In other words, while these decisions permit quite generous access to a provincial court judge for a s.523(2) hearing, they necessarily constrict access to superior court for a review, since s.520 says that an accused may apply for a review "at any time before the trial of the charge". While the meaning of "trial" may change somewhat from section to section, it would be difficult to reconcile such different meanings within sections so closely related.

How narrow are the purposes of s.523(2)(a)?

[36] Countering the Crown's position that "is being tried" begins when evidence is called, counsel for Mr. Hill asks - why frame the jurisdiction of the "court, judge or justice" so narrowly as to extend only from the time the Crown opens its case to the finding of guilty or not guilty? What purpose does this serve? Why would such a power be needed? Defence counsel contends that if one defines a trial to begin at plea, this seeming absurdity disappears.

[37] S.523(1) begins by defining the time period during which a release order is "in force". For provincial court purposes this is defined in ss.(b) to be until the end of the trial and, when the accused is found guilty but not remanded, until sentence is imposed. While one might conceivably read this to say that a trial ends at adjudication of guilt, I do not think the section is meant to define either the beginning or end of a trial. It seems rather to confirm that terms of release continue by operation of law, whether a judge mentions them at an adjournment of the proceedings or not. Further, this section suggests that upon a finding of guilt the presiding judge may remand

an accused who was on release up to that time. If such a drastic change may be made by the judge, it is unreasonable to think that release conditions could not be changed. I consider that they can, consistent with s.523(2), in that the accused is "being tried" until sentence is imposed.

[38] Consequently I think that s.523 was drafted partly in contemplation of the interval (as so often there is) between the finding of guilt and imposition of sentence. Here an accused is still "being tried" and Parliament has determined that the court or judge should have full and unfettered jurisdiction to order a change of detention or release status.

"Court, judge or justice . . ."

[39] S.523(2)(a) states that the "court, judge or justice before whom an accused is being tried" may change release conditions at any time, without needing any consents. This wording appears to support the applicant's position. He argues that if a trial commences when the prosecutor is called upon to present evidence, by which time a particular judge is seized with jurisdiction, there is no reason to include the word "court" here. The inclusion of "court" seems to support the idea that a trial commences at plea, as the judge taking the plea is often not the trial judge, and (so the argument goes) an accused ought to be able to go to any judge of the court for this form of relief, not just the particular judge presiding at the hearing. However, it is possible that the legislators had in mind the possibility that a trial, which starts with the hearing of evidence, may be continued before a another judge of the court under s.669.2, and thought it necessary to include the more general term "court" in s.523(2)(a) for this reason.

Differences in trial procedure - jury vs. provincial court

[40] S.606 deals with pleas, but within Part XX entitled "Procedure in Jury Trials". These sections apply to trials by summary conviction, with any necessary modifications, except as they may be inconsistent (see s.795). Part XIX entitled "Trial Without Jury" does not contain a section dealing specifically with pleas or the making of a plea. S.606(3) permits the court to adjourn a trial where, among other things, the accused needs more time to make a plea. While this may suggest that plea and trial are intertwined, it seems to me that this is so only where there is trial by jury. In a jury trial the trier of fact is selected from a panel of citizens. The accused makes his or her plea before those who will try him. This means that the procedure of jury selection, plea and presentation of evidence on the indictment will occur within one court session, and within a relatively short time frame. R. v. Barrow holds that screening of jurors under s.632 is part of the trial, despite the fact the section speaks of this occurring "before the commencement of the trial". However, I do not find in this decision, nor in any of the sections in Part XIX drafted with jury trial procedure in mind, any strong support for the argument that a trial in provincial court commences at plea. In provincial court, the actual hearing will generally be months after plea is entered. In a jury trial the accused has a vital interest, and involvement in, the selection of the trier of fact. He or she has no similar interest or say in which provincial court judge will hear the case. One may choose a jury, but not a judge. In a criminal trial in superior court, the jurors should hear the plea and then proceed to try the indictment. It does not follow that something similar must occur in provincial court, and indeed, it does not.

[41] One implication of the rulings in Kell and Greener is to give accused awaiting trial in provincial court (where plea is entered at an

early stage) a much greater opportunity than an accused who awaits trial by jury in superior court (where plea is made just prior to trial, at the time of jury selection) to apply to the trial court for a change of release conditions. The resultant disparity is something which, I think, favors the interpretation given in Smith and Evans.

Concern re exercise of crown's discretion

[42] In some case reports concern is expressed about whether prosecutors would bring an objective and consistent approach to requests by accused for Crown consent to s.523 applications. It is worth remembering that the Crown is required to exercise discretion at many junctures in the criminal justice system, many of which have at least as much impact on the administration of justice and the fate of accused persons as the decisions it is required to take under s.523. It is also worth remembering that no matter how one interprets "is being tried" - whether this commences at arraignment, or plea, or trial - there will always be those situations spelled out in subsection (c) where "the consent of the prosecutor" is required before a court or judge can proceed to hear an application to vacate a previous recognizance. There is no getting away from this entirely.

[43] In the Sydney justice center the provincial court requires that accused give written notice of s.523 applications to the Crown office, detailing the existing release order and what new terms are requested. With this advance notice and the opportunity it gives to consult with police, complainants, defence counsel and others, prosecutors frequently consent to s.523 applications by accused, and frequently agree that there is cause to change the conditions without need for a hearing. As to the possibility of oblique motives, one should assume that prosecutors will perform their proper role to see that justice is done and the public interest served. Whether prosecutors ought to

place reasons on record for refusing consent (seemingly a good practice), whether the decision by one prosecutor to refuse consent ought to be respected by another who takes over the case subsequently, and similar questions may be addressed within the prosecution service and appropriate policy or criteria developed. Prosecutorial practices can presumably be reviewed by managers in the Public Prosecution Service. Finally, aggrieved accused will always have resort to Supreme Court for a judicial review under s.520.

Interim detention orders

[44] In theory, as one reads s.523, the accused may apply to vacate a previous detention order and replace it with an order for interim release. This is rarely, if ever, attempted. There may be an assumption among local counsel that where an accused is denied bail the only recourse, absent Crown consent, is to a review by a superior court judge. Perhaps when an accused is denied bail, his or her circumstances become so static that a change in them is exceedingly unlikely (which is not to say conceptually impossible). I have released accused persons who were previously denied bail with Crown consent in circumstances where an additional and lengthy trial adjournment was required for some reason. Be that as it may, there was nothing in submissions before me, nor in any cases I read, which addressed this point directly. I am left to say simply that the decision taken here - requiring that an accused awaiting trial on an interim release order seek changes in superior court - is at least consistent with the existing practice and supposition in regard to interim detention orders.

Legislative history

[45] I have not looked into the legislative history of the relevant provisions, except to the extent that it is discussed in caselaw such as Hardiman, Michaud and Taylor above. I note simply that I agree with those who say that it provides strong support for the position of the Crown.

No restriction in the scope of consent once given

[46] In anticipation of a possible question I add this comment. I do not think that the Crown can give consent to hear an application and in the same breath limit the conditions that the court may consider. Once consent is given, and jurisdiction assumed, it seems to me that the court may change release conditions by means of a new release order wherever cause is shown on the evidence. In other words, the prosecutor cannot put limits or provisos on its consent to a s.523 hearing. It cannot, for instance, confine the court's deliberations to only one of the existing conditions. It may, of course, consent to a variation of particular conditions under s.515.1. In practice, the accused will have given notice of the requested change and any hearing will tend to focus upon the subject matter in the notice. If it strays beyond, principles of natural justice may require an adjournment so the Crown is not caught by surprise.

Inconsistent interpretation

[47] There is divided opinion within the provincial court in Nova Scotia which this decision will do nothing to resolve. Clearly it would be preferable if accused persons had the same access to the court regardless of where in the Province their charges originate. One can only hope that an appellate court will be given the opportunity to impose one interpretation of the section or another. For the time

being, one hopes that police will be circumspect in not suggesting to persons in their custody, taken before a Justice of the Peace so that they may be released under s.515, that they will be able to take up the subject of their conditions with the judge when they get to court.

SUMMARY

[48] As I interpret the scheme set out by Parliament in s.523 these are the situations where a provincial court judge does *not* require Crown consent before proceeding to hear an accused's application to change release conditions previously imposed under s.515:

(1) where the accused has embarked on an actual trial (the stage where evidence is called);
(2) where the judge, acting as a preliminary inquiry justice (with the power to commit on included or cognate offences) has finished hearing evidence;
(3) where a new information has been laid, charging the same or included offences.

[49] In the first of these, the rationale may be found in the fact that the judge will often have heard evidence, or even determined guilt. The second also appears to be founded on the opportunity the judge has had to hear and evaluate evidence. In the third the need arises from either the diminishment of the objective gravity of the offence, or any new or amended description of the original charge - either of which may change the underpinnings of the original release order.

[50] In the case before me here, I cannot consider Mr. Hill's application on its merits unless the Crown consents to a hearing. It has not, and I therefore have no jurisdiction to proceed further.

Dated at Sydney, this 8th day of November 2005.

JUDGE A.P. ROSS

APPENDIX A

1. **523.** (1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or has been released from custody under or by virtue of any provision of this Part, the appearance notice, promise to appear, summons, undertaking or recognizance issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, promise to appear, summons, undertaking or recognizance was issued, given or entered

into,

(*a*) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3), until his trial is completed; or

(*b*) in any other case,

(I) until his trial is completed, and

(ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

(1.1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or is being detained or has been released from custody under or by virtue of any provision of this Part and after the order for interim release or detention has been made, or the appearance notice, promise to appear, summons, undertaking or recognizance has been issued, given or entered into, a new information, charging the same offence or an included offence, is received, section 507 or 508, as the case may be, does not apply in respect of the new information

and the order for interim release or detention of the accused and the appearance notice, promise to appear, summons, undertaking or recognizance, if any, applies in respect of the new information.

(2) Notwithstanding subsections (1) and (1.1),

(*a*) the court, judge or justice before which or whom an accused is being tried, at any time,

(*b*) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469, or

(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time

(l) where the accused is charged with an offence other than an offence listed in section 469, the justice by whom an order was made under this Part or any other

justice,

(ii) where the 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, or

(iii) the court, judge or justice before which or whom an accused is to be tried,

may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

(3) The provisions of sections 517, 518 and 519 apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2), except that subsection 518(2) does not apply in respect of an accused who is charged with an offence listed in

section 469.

R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89.