PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. A.D.M.*, 2017 NSPC 77

Date: 2017-12-21
Docket: 8180369
Registry: Pictou

Between:

Her Majesty the Queen

v.

A.D.M.

DECISION ON VARIATION OF FORM 11.1 BAIL

Restriction on Publication: Any information that might identify the complainant shall not be broadcast or transmitted in any way—s. 486.4 *Criminal Code*

Judge:	The Honourable Judge Del W. Atwood
Heard:	21 December 2017 in Pictou, Nova Scotia
Charge:	Sections 499 and 503, *Criminal Code of Canada*
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service H. Edward Patterson for A.D.M.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 486.4 OF THE CRIMINAL CODE APPLICES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

Order restricting publication—sexual offences

486.4 (1)Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

[1] Much as we are trending toward a digital society, producers of paper can take comfort that many courts still use plenty of it. But what happens when a critical piece of paper is missing? Can the court still function, or must things grind to a halt?

[2] A.D.M. has applied to the court to vary a travel-restriction condition in an undertaking put in place by police, arising from what appears to have been an investigation under s. 271 of the *Criminal Code*. I shall not get into the details of the variation being sought, as the prosecution is consenting to this application. The issue is not whether I ought to vary this bail, but whether I have the jurisdiction to do it. This is because neither the undertaking nor a correlative information has been filed with the court by the policing service that is responsible for looking after getting documentation before the court promptly. The court is left to work with a copy of a Form 11.1 undertaking that police gave to the applicant.

[3] With appropriate thoroughness, counsel have made submissions on the issue whether the court has jurisdiction to hear the application in the absence of a

sworn information. As I have decided previously, the answer is most definitively in the affirmative.

[4] The criminal-justice process begins often with the arrest of a person whom police believe to have committed an offence. Arising from that process are important constitutional rights. The right to be presumed innocent (as guaranteed by para. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11) is one.

[5] But likely more important in the moment to the person in police custody—who has been separated from home and family, is confined to a secure cell, and may have job or other responsibilities looming—is the right not to be denied reasonable bail without just cause, as guaranteed constitutionally in para. 11(e) of the *Charter*.

[6] The legislative history of bail in Canada was described in *R. v. Hall*, 2002 SCC 64 at paras. 13-18. The provisions in the *Code* covering bail—found in Part XVI—might be said to have their genesis in Martin L. Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 177-191, and Canada,

Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections—Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969) at 99-130. Those studies made observations of the potentially harmful impact of bail denial on the presumptively innocent, and on the need to have courts apply consistently a set of uniform criteria for admission to bail which would allow bail denial only in a narrow set of statutorily defined circumstances. When the prototype of our present law came into being—as the *Bail Reform Act*, R.S.C. 1970 (2nd Supp.), c. 2—it had as its basis the recognition that law should abhor any unnecessary deprivation of liberty, and positive steps should be taken to keep detention before trial to a minimum: see *R. v. Zarinchang*, 2010 ONCA 286 at para. 38.

[7] As stated recently in *R. v. Antic*, 2017 SCC 27 at para. 4, Part XVI of the *Criminal Code* describes a graduation, requiring the admission of a charged and detained person to bail under the least onerous terms of release unless the prosecution should show why that ought to not be the case; it begins with unconditional release and moves upward to bail denial. The fundamental constitutional and criminal-justice principles underlined in *Antic* bear repeating:

- Pre-trial custody affects the mental, social, and physical life of the accused and family, and may have also a substantial impact on the result of the trial itself: para. 66;

- The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal-justice system: paras. 1 and 66;

- That right entrenches the effect of the constitutionally protected presumption of innocence: paras. 1 and 67;

- Bail provisions are federal law, and must be applied consistently throughout the country: para. 64;

- Release is favoured at the earliest reasonable opportunity, and on the least onerous grounds: para. 23 (citing, with approval, *R. v. Anoussis*, 2008 QCCQ 8100 at para. 23);

- Para. 11(e) of the *Charter* creates a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise: para. 32 (following *R. v. Pearson*, [1992] 3 S.C.R. 665 at 691);

- "Just cause", as used in para. 11(e), relates to the circumstances in which denying bail is constitutional—an accused has a constitutional entitlement to be granted bail unless there is "just cause" to deny it: para. 33;

- "Just cause" describes the statutory grounds that justify bail denial: para. 33;
- The word "bail" in para. 11(e) must be interpreted broadly to include all forms of judicial interim release: para. 36 (following *Pearson* at 690, and *R. v. Morales*, [1992] 3 S.C.R. 711);
- The right under para. 11(e) has two aspects: (1) the right not to be denied bail without just cause, and (2) the right to reasonable bail: para. 36;
- The right not to be denied bail without "just cause" imposes constitutional standards on the grounds under which bail is granted or denied: para. 37;
- "Reasonable bail" concerns the terms and conditions of release authorized by statute: para. 37;
- Any statutory provision that allows for the pre-trial detention or conditional release of an accused will trigger the protection of para. 11(e) of the *Charter*: para. 39;
- There is just cause to deny bail only if the denial (1) shall occur in a "narrow set of circumstances" and (2) "is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose

extraneous to the bail system": para. 40 (following *Pearson* at 693, and *Morales* at 737);

- The right not to be denied reasonable bail without just cause protects accused persons from conditions and forms of release that are unreasonable: para. 41;

- These bail principles should guide contested bail-admission hearings, as well as plans to which the accused and the prosecution have consented: paras. 44 and 68; this underscores the principle that conditional release by consent is not a private contract between the state and the accused—the court retains a supervisory role to ensure that terms of release, including those assented to by the accused, be reasonable;

- Bail reviews and variations are subject to the application of the same principles—a point engaged fully in this case: para. 52;

- Conditions of bail that are authorized statutorily may, if imposed unreasonably, operate unfairly and elevate the risk of an accused person being incarcerated, as in imposing a cash-deposit requirement upon the financially distressed: paras. 58-59.

[8] The Court in *Antic* noted with alarm social-science data which show that remand populations and bail denial have increased dramatically in the *Charter* era, symptomatic of a widespread inconsistency in the application of law of bail: para. 64; but *cf. R. v. Reddick*, 2016 NSSC 228, a case decided prior to *Antic*, which seemed to suggest that such information could not be the subject of judicial notice.

[9] *Antic* focussed on bail imposed judicially; therefore, when the Court stated at para. 42 that "s. 515(2) of the *Code* establishes the only legal forms of pre-trial release", the Court meant obviously that sub-s. 515(2) establishes the only legal forms of *judicial* pre-trial release.

[10] However, the metaphorical ladder created by Part XVI of the *Code* begins a few rungs below the court room.

[11] This is a short summary of how it works.

[12] Except for more serious indictable charges (particularly s. 469 offences, and those not listed in s. 553), police may issue an appearance notice to a charged person without effecting an arrest—s. 496 of the *Code*. Also, except for more serious indictable charges, police may release prior to arraignment those they have arrested:

- unconditionally with the intention of issuing a summons later on—paras. 497(1)(a), 498(1)(a), and 503(1)(c)—or just plain unconditionally if the arrested person got picked up as someone who was about to commit an offence—sub-s. 503(4);

- with an appearance notice or a promise to appear—paras. 497(1)(b), 498(1)(b), 499(1)(a) and 503(1)(c);

- on a recognizance up to $500, without a surety or cash deposit—para. 498(1)(c), 499(1)(b), and 503(1)(c);

- should the detainee not live nearby, on a recognizance without a surety, but with a cash deposit of up to $500—paras. 498(1)(d), 499(1)(c) and 503(1)(c);

[13] Now the important part.

[14] Should police effect a release under sub-s. 499(1) or 503(2) of the *Code*, they may tack on an undertaking—in form 11.1—with a limited array of conditions, listed in paras. 499(2)(a)-(h) and 503(2.1)(a)-(h), similar to conditions imposed frequently in court:

> (a) to remain within a territorial jurisdiction specified in the undertaking;
>
> (b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;

> (c) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;
>
> (d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking;
>
> (e) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm;
>
> (f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;
>
> (g) to abstain from
>
> (i) the consumption of alcohol or other intoxicating substances, or
>
> (ii) the consumption of drugs except in accordance with a medical prescription; or
>
> (h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

[15] Police undertakings were authorized in the *Code* beginning with S.C. 1994, c. 44, ss. 40 and 42, in force 1 April 1995 in virtue of SI/95-20. The original list of conditions police might impose was short: remain within a territorial jurisdiction, notify police of changes in address or employment, abstain from communication with named persons, and deposit one's passport. The list grew gradually to the one we have today, as provided for in S.C. 1997, c. 18, ss. 53 and 55, in force 16 June 1997 in virtue of SI/97-68; and in S.C. 1999, c. 25, ss. 5 and 7, in force 1 December 1999 in virtue of SI/99-135.

[16] What became S.C. 1994, c. 44 was introduced originally in the House of Commons as Bill C-42; upon second reading, the policy reason given by executive for enlarging the resort to non-judicial bail was stated as:

> . . . relate[d] to arrest, pretrial release and other matters involving police practices and procedures. For instance, a significant improvement in the use of policing and court resources will be achieved by permitting police to release an arrested person on certain conditions restricting their liberty rather than as is now the case, having only the choice of releasing unconditionally or detaining an accused in custody until a hearing before the justice of the peace could be arranged.
>
> Greater fairness to accused persons will be achieved through reducing unnecessary pretrial custody. Police will be able to spend more time on the beat preventing crime or detecting offenders rather than waiting in the corridors of courtrooms.

See *House of Commons Debates*, 35th Parl., 1st Sess, No. 103 (4 October 1994) at 6520.

[17] The first expansion of that list was comprised in Bill C-17, eventually S.C. 1997, c. 18. This was the executive rationale for it at the second-reading stage:

> A number of proposals in Bill C-17 relate to arrest, pretrial release and other matters involving police practices and procedures. These will enable the police to make better use of our shrinking police and court resources. For instance, we will permit police to release an arrested person on certain conditions relating to firearms, alcohol and drug use and reporting. If the police believe these conditions are needed the accused must be detained in custody until a hearing before the justice of the peace can be arranged. However, there is often agreement between the prosecutor and defence counsel on conditions, and *the justice simply affirms the conditions accepted by the accused.* [Emphasis added.]

> There is another extension of amendments adopted in Bill C-42 which permitted the release of an accused who was prepared to abide by certain other conditions. The earlier changes have reduced unnecessary pretrial custody for many accused persons. Police are able to spend more time on the beat preventing crime or detecting offenders rather than waiting in the corridors of courtrooms or police station lock-ups.

See *House of Commons Debates*, 35th Parl., 2nd Sess, No. 58 (10 June 1996) at 3538.

[18] S.C. 1999, c. 25 started out as Bill C-79. The sole reference to bail made by the minister of justice at second reading was that the proposed amendments to the *Code* were aimed at:

> ensuring that the concerns of victims and witnesses regarding their safety and security are taken into account when determining whether an accused person should be released on bail.

See *House of Commons Debates*, 36th Parl., 1st Sess, No. 211 (20 April 1999) at time marker 1020hrs.

[19] I recognize that resort to legislative debates may be a poor means of interpreting a statute (as it would seem to require "consolidate[ing] individual intentions into a collective, fictitious group intention: Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) at 335-6); however, in this case, the interpretation of the statute is not controversial—the issue is whether the court has jurisdiction to deal with the statute.

[20] From all this, it is clear that the Parliamentary intent of sub-ss. 499(2)/503(2.1) police-imposed undertakings was to allow for the speedy release by police of those arrested persons whose risks might not be low enough to warrant unconditional release, but not high enough to have to await the availability of a judicial officer in order to conduct a bail hearing.

[21] This objective of early, non-judicial, conditional release of detainees might be said to be worthy as an interim, pre-arraignment measure.

[22] However, as enacted, sub-ss. 499(2)/503(2.1) police-imposed undertakings may have long-term effect.

[23] First off, it is significant that one key statutory safeguard of personal liberty engaged ordinarily in cases of release-by-police that is not required in cases of police-imposed undertakings under sub-ss. 499(2) or 503(2.1) is any kind of judicial confirmation. Contrast this to the necessity under para. 508(1)(b) that appearance notices and promises to appear be confirmed judicially, and the requirement under s. 500 that money deposits with police under paras. 498(1)(d) or 499(1)(c) get sent to court. One might question reasonably whether the imposition of restrictive bail conditions by state agents involved in

the laying of charges against those who are to be subject to those conditions would, absent impartial judicial confirmation or oversight, meet the *Antic* constitutional standard.

[24] Second, police-imposed undertakings can live on until the end of a case, should a charge be laid, in virtue of para. 523(1)(b), and so they are lumped in with forms judicial interim release in their longevity.

[25] Third, while breaching police-imposed bail does not give rise necessarily to the reverse-onus provisions of para. 515(6)(c) of the *Code*, a breach is punishable nevertheless under sub-s. 145(5.1) and is subject to the same penalties applicable to breach of a judicial bail order.

[26] Finally, a person believed on reasonable and probable grounds to have breached a police-imposed undertaking is subject to an arrest warrant or to arrest without warrant, just as in the case of a person released judicially: sub-ss. 524(1)-(2).

[27] Many questions arise. For instance, how long do police have to lay an information after releasing a detainee on a sub-ss. 499(2)/503(2.1) undertaking? Although the *Code* does not address this directly, given that police-imposed undertakings are required to be coupled with process that would fall under the

provisions of ss. 496-8 of the *Code*, it would seem that an information must be laid as soon as practicable after release, no later than the arraignment date set out in process, as governed by s. 505.

[28] But what happens if an information is never laid? I had to deal with just such a problem a couple-years' back. A detainee had gotten set free on a police-imposed undertaking with extensive conditions, but without process requiring him to appear in court. As it turned out, police decided not to lay a charge, but failed relay their judgment call to the person on whom they had laden all sorts of conditions. After the passage of several months, this unfortunate person came to court seeking clarification of his bail status. The prosecution was able to exhume a copy of the undertaking from the investigator's closed file, and I terminated the undertaking. It is something that should not have happened; this is because bail is an interim, time-limited measure: it has a start date and an end date. It is not a form of indeterminate restriction on people's liberty.

[29] Other problems have arisen. One is the automatic inclusion by police of conditions preventing an accused from leaving the province. This continues to show up in police-imposed undertakings in cases when there is absolutely no evidence of the bound person being a flight risk. As decided in *Antic* at paras.

1, 67, 37, 58-9, the automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence: see also *R. v. Doncaster*, 2013 NSSC 328 at para. 17; *R. v. Thompson*, 2013 NSPC 124 at para. 9; and *R. v. Denny*, 2015 NSPC 49 at para. 14.

[30] There has been one instance in this judicial centre of police imposing a condition of bail not authorized by statute: namely, *R. v. I.M.L.*, 2015 NSPC 60 at para. 18.. Regardless of the putative soundness of the rationale police felt they had in imposing the condition they did in that case, they had no authority to put it in an undertaking as the statute did not authorize it; therefore, it was illegal: *Antic*, para. 37.

[31] With all this in mind, I would observe that, although police-imposed bail under sub-ss. 499(2)/503(2.1) started out with laudable aims, it is not clear that, in its application, it is meeting the high constitutional standards required of *Charter*-protected bail.

[32] Allow me to suggest that this is not surprising.

[33] First of all, the releasing authorities—police officers who are likely involved in the investigation and the charging of the persons they have arrested—are not impartial judicial officers.

[34] Second, the persons who are being presented with the prospect of conditional release may or may not have had access to counsel; even if having talked to a lawyer, the detainee may not have had a fulsome discussion of the legal consequences of conditional release.

[35] Finally, the detainee is precisely that: detained. That person's decision to sign a form 11.1 release document will hardly have been free and voluntary, given that the decision not to sign will result in prolonged detention.

[36] Once again, one might wonder—as an academic exercise in this case, given that the prosecution is consenting very fairly to the bail variation sought by M.—how non-judicial, non-judicially confirmed, police-imposed bail under sub-ss. 499(2)/503(2.1) might comport with the constitutional requirements set out in *Antic*? Perhaps the answer is that, even if the legislative regime or individual applications of it were found to violate para. 11(e) of the *Charter*, police-imposed bail would get saved under s. 1 of the *Charter* as it is easily varied.

[37] There remains the procedural issue live in this case: can this court vary police-imposed bail when an information charging an offence is not before the court? I intend to answer that question.

[38] Persons who are alleged to have committed offences and who have been arrested have the right to reasonable bail. This applies to police-imposed bail under sub-ss. 499(2)/503(2.1) of the *Code*, because, as I noted in my review of *Antic*, any statutory provision that allows for the pre-trial detention or conditional release of an accused triggers the protection of para. 11(e) of the *Charter*.

[39] What happens if police-imposed bail winds up imposing conditions that, as in this case, are unreasonable and not *Charter* compliant?

[40] The old maxim is *ubi jus*, *ibi remedium*—where there is a right, there is a remedy: *Ashby v. White* (1703) 92 E.R. 126 at 137-9.

[41] It follows that, where there is a right, there must be a forum where a remedy might be sought.

[42] However, when the proposed forum is a statutory court, the jurisdiction for the court must be found in statute: *R. v. Farler*, 2005 NSCA 105 at para. 21; *R.*

v. Benson, 2017 NSPC 37 at para. 17. Fortunately, sub-ss. 499(3)-(4) and 503(2.2)-(2.3) create the remedy and the jurisdiction:

> A person who has entered into an undertaking [under sub-ss. 499(2)/503(2.1)] may, at any time before or at his or her appearance pursuant to a promise to appear or recognizance, apply to a justice for an order under subsection 515(1) to replace his or her undertaking, and section 515 applies, with such modifications as the circumstances require, to such a person.

[43] Accordingly, a person subject to police-imposed bail may apply to "a justice"—defined in s. 2 of the *Code* as a justice of the peace or a provincial court judge—to have that bail provision replaced with a judicial order. Thus, there is in statute both remedy and jurisdiction.

[44] On the jurisdictional point, it was held in R. *v. Petrovic*, [2006] O.J. No. 726 at para. 3 (S.C.) that only a justice of the peace or provincial court judge—but not a judge of a superior court—may review police-imposed bail.

[45] Sub-ss. 499(3)-(4) and 503(2.2)-(2.3) address the issue of timing: an application to have police-imposed bail reviewed can be heard at any time "before or at" the compulsory-appearance date set out in process. In *R. v. J.S.* [2007] O.J. No. 4049 at para. 18 (S.C.) the court stated that this comprehended even "next-day review". Review after arraignment is permissible also: *R. v. Paul*, 2007 ONCJ 615 at para. 20.

[46] Practically, however, very little will get done by police the next day in those cases when an arrested person is not held for court. Informations and processes will not trickle into the court registry until a few days before arraignment dates.

[47] What then for the person subject to unreasonable police-imposed bail whose arraignment might be many weeks away? Must that person wait until the paperwork get filed with the court by police before having a bail review? Or, to put it succinctly, no information, no review?

[48] Some cases have suggested that such a legal limbo might exist: *R. v. Ramsaroop* 2009 ONCJ 406 at para. 63; see also *R. v. Black and McDonald Ltd.* 2016 ONCJ 345 at para. 10.

[49] To the contrary, I find that an application to vary police-imposed bail may be heard by the court prior to an information being lodged with the court. What confers on a provincial court the jurisdiction to hear an application under sub-ss. 499(3)-(4) or 503(2.2)-(2.3) is the releasing of a person on a form 11.1 undertaking, not the filing with the court of an information or a copy of the undertaking.

[50] There is nothing ground breaking in this, as it is well settled that a court can deal with a charge even without an information before it: *R. v. Sawarzky*, [1996]

M.J. No. 273 at para. 134 (Prov.C.); *R. v. Baert*, (1981) 28 A.R. 313 (C.A.); *Perrault v. Saskatchewan (Attorney General)* (1982), 15 Sask. R. 341 (C.A.); and *Re Wolf* (1982), 65 C.C.C. (2d) 331 (A.Q.B.).

[51] Accordingly, I have jurisdiction to deal with this application now, even without an information before the court. As the application is being consented to by the prosecution, I do not intend to get into the details of the variation being sought. An information might not get laid. There are many privacy interests at stake here, and I do not wish to divulge too much at this early stage.

[52] This decision will necessitate a number of changes to court-administration practices and policies.

[53] First, staff must process all rules-compliant applications to vary bail, even when there is no information or undertaking on file with the court.

[54] Second, such applications must be docketed with a case number. This is because, even if the publication-ban provisions of s. 517 were to apply to applications under sub-ss. 499(3)-(4) or 503(2.2)-(2.3), they remain *inter partes* hearings conducted in open court. Matters heard in court must be docketed with a traceable case number to fulfill the open-courts principle. As I understand it, the JEIN system has difficulty generating a case number without

an information. If that is so, then it is the JEIN system that must change, as a case without an information will remain a case, and a case number will have to be assigned to it.

[55] Matters of public interest evolve into statutory policy only very slowly. This is because issues that come to the attention of the public or the academy will not carry the same valence as in legislatures and courts: the legislative process advances gradually, in constitutionally defined, deliberative, time-consuming stages; principles of jurisdiction, standing, notice and orality mean that a court can know and act on only that information which the parties choose to put before it.

[56] Those who study the workings of bail have concluded that much needs fixing, and public-interest groups have taken notice of this: see, *e.g.*, Martin L. Friedland, "The Bail Reform Act Revisited" (2012), 16:3 Can. Crim. L. Rev. 315; Cheryl Marie Webster, "Broken Bail in Canada: How We Might Go About Fixing It" (June 2015) online: https://www.scribd.com/document/307198427/Broken-Bail-in-Canada-How-We-Might-Go-About-Fixing-It; Canadian Civil Liberties and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (2014). When one examines the problems identified in *Antic,* one might wonder with

some justification how far Canadian criminal justice has progressed since the *Ouimet Report*, and whether our system of bail is working as well as it could. Significant law reform might be needed. The best this court can do right now is take the small step which has been agreed upon by counsel to help this one person in this one case. The application is granted and this form 11.1 undertaking is varied as consented to by counsel.

[57] I commend counsel for their thorough submissions and the prosecution for the very fair-minded approach that was taken in this case.

JPC