PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Denny*, 2020 NSPC 14

Date: 2020-04-06
Docket: 8375056
Registry: Pictou

Between:

Her Majesty the Queen

v

Eric Joseph Denny

CORRECTED DECISION TO ADJOURN

[The text of the original decision has been corrected according to the attached erratum dated April 7, 2020].

Judge:	The Honourable Judge Del W Atwood
Heard:	2020: 6 April in Pictou, Nova Scotia
Charge:	Paragraph 267(b) of the *Criminal Code of Canada*
Counsel:	Jody McNeill for the Nova Scotia Public Prosecution Service Jade Pictou for Eric Joseph Denny

By the Court:

[1] This sentencing matter along with a number of other trial, sentencing and arraignment matters are being called today and are being adjourned in accordance with the current directive of the Chief Judge: COVID-19: NOTICE TO COUNSEL AND THE PUBLIC RE: MATTERS IN THE PROVINCIAL COURT ANDYOUTH JUSTICE COURT, accessed online at https://courts.ns.ca/News_of_Courts/documents/NSPC_Consolidated_Directive_COVID19_03_31_20.pdf.

[2] Unless ordered otherwise, all matters called today will be adjourned for scheduling to 15 June 2020: adult matters will be called at 9h30; youth justice matters will be called at 13h30.

[3] None of the persons with matters before the court is present. Most have counsel. Some do not.

[4] For those with counsel (and I would note that we have received § 650.01 designations where required) the jurisdiction of the court over the person is preserved, and nothing further need be done.

[5] For those persons not present, without counsel, but with in-order, confirmed process on record, I decline to issue bench warrants or new process at this time; in due course, a notification will be posted on courts.ns.ca with a list of adjourned dates.

[6] Following up on this last point, I wish to take this opportunity to address two items of electronic correspondence which the court received last week from justice-system participants which raised concerns with directives issued from the court since the declaration of the state of emergency on 22 March 2020 (the declaration may be accessed online at https://novascotia.ca/coronavirus/Declaration-of-Provincial-State-of-Emergency-by-Minister-Porter-Signed-March-22-2020.pdf).

[7] Questions and concerns of this nature should be raised most certainly by justice stakeholders, the public and media over the responses undertaken by the various branches of government to COVID-19. The need for transparency and accountability does not end when a state of emergency begins. In fact, the necessity of accountability is elevated in challenging times such as these, in order to surveil against overreach or other irregularity.

[8] The concerns raised in this case have to do with directives that seek to move cases away from the court over the next two months, until the evolving nature of the public-health risk will have become clearer and the level of risk attenuated.

[9] The directives in question had to get issued quickly, and this necessarily limited the scope of consultation.

[10] It is clear that, in diverting cases from court, it was not the intent of the directives to turn justice centres into antiseptic enclosures. Such a goal would be wholly unattainable.

[11] Rather, the purpose, as set out in the various judicial directives, was primarily to protect public health. This was based on the recognition that:

- the court must adapt its operations to current public-health guidance to limit public gatherings:
- justice centres—much as other government and commercial buildings that are now either closed or excluded from walk-in services—are gathering places for large numbers of members of the public, and so are situated as potential sites for infection transmission, unless strict controls are imposed;

- court-operations policies now in place have reduced the numbers of staff on site at our justice centres, which has made it necessary to regulate daily case loads;

- many Nova Scotians are currently subject to self-isolation and self-quarantine requirements set out in the order of the Medical Officer of Health issued initially 25 March 2020, updated 2 April 2020, accessed online at https://novascotia.ca/coronavirus/COVID-19-Global-Order-2020-04-02.PDF; it would not be possible—and might not be legal—for the court to try to identify those persons, served with compulsory process, who might be subject to the requirements of the order; as such, it is safer and more efficient to divert *all* persons with cases away from court temporarily, except for those deemed essential-to-mission;

- finally, and most significantly, many persons who come before the court are in high-risk-of-infection categories because of underlying conditions; their health and safety must be protected, and that is accomplished best by allowing them to shelter in place to the extent they are able.

[12] This new operational paradigm has placed substantial burdens on all justice-system participants: counsel, policing services, corrections, victim services, witnesses, and persons who face charges.

[13] Particularly affected are our court staffs and sheriff services. We are now working under what has been described as an essential-services model. I would expand that by observing that staff and sheriffs are attaining an exceptional-service level, as they bring innovation, ingenuity, flexibility and resilience in fulfilling their administration-of-justice duties throughout these challenging times.

[14] One of the proposals that has been made—to attempt to reduce the inevitable catchup effect in a few-months' time, once things will have stabilised—is to have the court issue so-called warrants-to-hold in order to preserve jurisdiction over those persons whose cases are called, but who have stayed home in accordance with the various court directives and public-health orders. This practice has been adopted in a number of judicial centres in Canada.

[15] Regrettably, I am unable to go along with that sort of procedure.

[16] First, I have held in the past that this court, as a statutory court, is unable to issue a bench warrant and then place an administrative or judicial "hold" on it. Section 597 of the *Code*, which provides for the issuance of warrants in default of

appearance, does not admit of holds. Similarly, § 512(2). An order comes into force on the date it is made, unless there is a specific statutory provision otherwise—as in, say, ¶ 732.2(1)(b) & (c). Consider section 719, which states that sentences commence when imposed; this is merely a codification of the common law that applies to all court orders.

[17] Second, although § 511(3) and 597(4) of the *Code* (which, while falling under Part XX of the *Code*, is applicable to summary proceedings in virtue of §795) admit of an issued bench warrant including a condition that it not be executed before a specific date, it is my view that the issuance of any warrant on default of appearance for a person who has been directed—not just induced, but directed officially—not to attend court would be illegal. Recall what was held in *R v Antic*, 2017 SCC 27 at ¶ 39: any statutory provision—even one that might fall outside the compel-appearance provisions of Part XVI of the *Code*—that allows for the pre-trial detention of an accused person triggers the reasonable-bail protections of ¶ 11(e) of the *Charter*. See also *R v Myers*, 2019 SCC 18 at ¶ 67. In my view, the issuance of a default-of-appearance warrant for the arrest of a person who has been directed, officially, not to attend court would not comport with ¶ 11(e) *Charter* values, particularly where the *Code* admits of a non-custodial-process cure in § 485(2):

> (2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

[18] To be sure, by my not issuing "hold" or delayed-enforcement warrants, there will likely be multiple loss-of-jurisdiction-over-person occurrences (as comprehended in *R v Kranenberg*, [1980] 1 SCR 1053) in cases involving persons not represented by counsel, as an adjournment effected without the accused person or counsel or an agent present is not authorized statutorily: see § 803(1) regarding summary-proceedings adjournments; and see § 571, 606(3), 645(1)-(2), 669.1(2), which must be read in light of the requirement that an accused person be present—either in person, or by a statutorily approved alternate means—as things proceed, in accordance with § 650 of the *Code*.

[19] A loss of jurisdiction over the person can be cured by the person attorning to the jurisdiction of the court voluntarily, which might happen after reading an online notice; or it might happen if the person is brought into court in custody on some other matter.

[20] Unfortunately, website or letter mail notices to come to court are not process as recognized in the *Code*.

[21] When jurisdiction over the person is lost, the burden reverts to the state to get it reacquired.

[22] This issuance of new process under § 485(2)—and there is likely to be a surge of these—will place demands on policing services, to be sure. However, I would observe two things.

[23] First, no process need be issued or served now, while the state of emergency remains in effect. I should have made this clear in some of the cases I dealt with a couple weeks ago, and I apologise for this oversight.

[24] Second, no process need be issued or served at all. I say this, having had the opportunity last week to have participated in a conference call among international jurists who are dealing—some, on a much larger scale—with the same challenges the justice system in Nova Scotia is facing now. In many foreign jurisdictions, prosecuting and policing authorities are making hard decisions about which cases must continue and which might, in the public interest, be let go.

[25] Further, this hiatus will allow prosecutors ample time to collaborate with defence counsel to attempt to resolve cases that are building up.

[26] These are police-operations and prosecution-operations discretionary decisions to be made by those executive-branch authorities in the exercise of their lawful discretion.

[27] I hope that this provides some clarity to the directions the court has undertaken over the past three weeks. It has been a steep learning curve, but the guidance of the Chief Judge's office and the executive office of the judiciary has been invaluable, and the cooperation of our justice-system collaborators has been vital.

JPC

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ERRATA SHEET

The text of the original judgment issued on 6 April 2020 is corrected on 7 April 2020 with the following corrections made:

¶ [11], fourth bullet, clause corrected to read: "all persons with cases".

¶ [16] add to the fourth line the sentence: "Similarly § 512(2)".

¶ [17] add to the first line "511(3)" and in the third line to correct "to including" to "including".

¶[17] add to the seventh line the complete citation for *Antic.*

¶ [17] at to tenth line "See also *R v Myers*, 2019 SCC 18 at ¶ 67."