Date: September 6th, 2002
Docket: CR 178640

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as : R. v. Hardiman, 2002 NSSC 208]

BETWEEN:

Her Majesty the Queen

v.

Charlotte Lilly Hardiman

DECISION ON VARIATION OF RELEASE CONDITIONS

HEARD: at Halifax, Nova Scotia before the Honourable Justice Felix A. Cacchione

DATE: August 9th, 2002

WRITTEN RELEASE OF DECISION: September 5th, 2002

COUNSEL: Dan MacRury, for the Crown
Josh Arnold, for the Defendant

CACCHIONE, J.:

[1] The accused is charged pursuant to s. 240 of the **Criminal Code** with an offence listed in s.469, that is being an accessory after the fact to murder, and pursuant to s.139 with obstruction of justice. On April 17, 2002 the accused was released by this Court on a recognizance with conditions. The conditions included requirements that she remain within Nova Scotia and abstain from all direct or indirect contact and/or communication with Dana Melkert. The conditions of the accused's release were agreed upon by counsel for the Crown and Defence prior to the commencement of the bail hearing. On August 1st, 2002 the accused applied to vary the two above noted conditions. However, the Crown objected to this Court's jurisdiction to hear this application.

[2] This decision will address the issue of jurisdiction.

[3] On August 9th, 2002 I ruled orally that I did not have jurisdiction and indicated that I would provide written reasons because of the importance of the issue particularly when the variation sought is a minor one. As an aside it should be noted that on August 15th, 2002 the conditions relating to the accused remaining in Nova Scotia was varied with the consent of the Crown.

[4] This matter involves the interplay of several provisions of the **Criminal Code**, starting with s-ss. 522(1) and (2), which provide:

> (1) Where an accused is charged with an offence listed in section 469, no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.
>
> (2) 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).

[5] If the accused is released pursuant to s-s. 522(2), the court may order the accused to give an undertaking or enter a recognizance pursuant to s-s. 522(3) "with such conditions described in s-ss. 515(4), (4.1) and (4.2) as the judge considers desirable."

[6] Subsection 522(4) provides that an “order made under this section is not subject to review, except as provided in s. 680". According to that provision, a decision made under s. 522

> ...may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,
>
> (a) vary the decision; or
>
> (b) substitute such other decision as, in its opinion, should have been made.

[7] Pursuant to s-s. 680(2) a single judge of the Court of Appeal may exercise the power granted to s.680(1), with the consent of the parties. Subsection 680(3) provides that a decision that is varied or substituted by the Court of Appeal “shall have effect and may be enforced in all respects as though it were the decision originally made.”

[8] The trial court can revisit the original order and vacate it under certain circumstances pursuant to s. 523. That section states, in part:

> (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

***

> (2) Notwithstanding [subsections (1) and (1.1)],
>
> (a) the court, judge or justice before 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
>
> (i) 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.

[9] Subsection 523(1.1) applies in certain situations where an accused is not in custody and a new information charging the same or an included offence is received. That is not the case here.

Arguments

[10] The Crown argues that the effect of ss. 522, 523 and 680 is to exclude the jurisdiction of this Court to revisit the release order and conditions without Crown consent. Counsel for the accused argues that this Court can revisit the order when there has been a change in circumstances since the original order was made.

[11] The Respondent Crown says the only statutory review mechanisms for a release order made under s. 522 are provided in ss. 523 and 680. The weight of the case law holds that s. 680 may only be invoked where the correctness of the original order is challenged. If the basis for a review is a change in circumstances since the order was made, as is the case here, the review mechanism is provided by s. 523. In most cases, including this one, a hearing under that section is only possible with Crown consent. Hence there is no rehearing as of right in the present circumstances.

[12] The Applicant accused says that where the basis for a review is a change in circumstances, the court that made the order must have jurisdiction to hear an application to vary under s-s. 522(1), or, in the alternative, under s-s. 523(2) or arising from the Court's inherent jurisdiction.

[13] The foundation of the Applicant's argument is **R. v. Patterson** (1985), 19 C.C.C. (3d) 149 (Alta. C.A.) at 150, where Kerans, J.A., wrote, with reference to the requirement of s. 680:

> ...It seems absurd that the parties should be required to appear before the Chief Justice and then a quorum of this court in a case where the original order was rightly made but new circumstances have arisen that may warrant a variation of it.

[14] Accordingly, s. 457(2.2), the equivalent of the present s.522(4),

> ...forbids any review other than by way of appeal in any case where error is alleged, but it does not forbid a new hearing in a case where no error is alleged and new circumstances are relied upon.

[15] Justice Kerans concluded that the object of the provision is to prevent "bail-shopping". In situations where Crown consent is required for a rehearing, Justice Kerans wrote (at 153):

> ...I would expect that the Crown would not unreasonably withhold such consent, because the only effect of so doing would be to force the accused to appear before the Chief Justice. To withhold consent without reason would open the Crown itself to the criticism of forum-shopping.

[16] The wording of the current provision differs from that under consideration in **Patterson**. Paragraph 457.8(2)(a)- the equivalent of the present paragraph 532(2)(a) - referred to the "court judge or justice before whom an accused is being tried <u>or is to be tried</u>". The present wording is limited to "is being tried" as the result of a later amendment. The Crown says this amendment is fatal to the applicant's argument. The words "is to be tried" now appear in

subparagraph 523(2)(c)(iii), which requires Crown consent for a second hearing to vacate an existing order.

[17] In **R. v. Turner**, [1999] N.J. No. 46 (C.A.) the issue was whether the Court of Appeal had jurisdiction under s.680 to hear an application for review by a person charged with an offence listed in s.469 when the application arose from a change in circumstances and did not challenge the correctness of the decision of the judge on the original application. The court concluded that the trial court had jurisdiction to hear an application based on a change in circumstances before the beginning of the trial. Wells, C.J.N. wrote (at para. 23) that s.522(4) "forbids review other than by way of appeal in any case where error is alleged, but it does not forbid a new hearing in a case where no error is alleged and new circumstances are relied upon." The hearing would be under s. 523. Cameron, J.A. agreed with this result but for different reasons (at paras. 67-68):

> The nature of the judicial interim release is that it is permitted in certain circumstances and those circumstances are not necessarily static during the whole of the period between arrest and trial. As new evidence becomes available, the complexion of the evidence relating to the factors which must be considered on an application for release may change. If those charged with s. 469 offences are limited to the three occasions specified in the Code, the potential for injustice is obvious. In the absence of an express denial of a right to make a new application based on change in circumstances I cannot conclude that was the intention of Parliament. I would acknowledge that section 522(4) limits the opportunities for "review" when there is a challenge to the correctness of a prior decision of a superior court judge but in the context of this case where the application is based entirely on change of circumstances, practical considerations as well as justice demands that the right for a further application be afforded the accused. That right must be exercised before a judge of the Trial Division pursuant to s.522(1)

[18] Justice Cameron decided that jurisdiction for a second hearing could be found in s-s. 522(1). The third judge on the panel, O'Neil, J.A., concurred in the result but did not indicate whose reasoning he agreed with.

[19] In **R. v. Dempsey**, [2001] B.C.J. No. 561 (B.C.C.A.) the applicant's murder trial ended in a mistrial. The defence applied under s. 680 for a review of the detention order. Lambert, J.A. concluded (at para. 18) that, rather than a review as contemplated by s. 680, the court was faced with a "completely new application for interim release based on entirely new materials and in circumstances where the original order was conceded to have been properly made and correctly made, at the time it was made". In these circumstances,

s. 680 did not confer jurisdiction to hear the application. The court gave no direction as to who did have jurisdiction.

[20] In **R. v. L.I.H.** [2001] M.J. No257 (Man. C.A.) an accused young offender applied, pursuant to the **Criminal Code** provisions, for review of the refusal of bail under the **Young Offenders Act**. The "essence of the case" before the Chief Justice was that there had been a material change in circumstances (Para. 4). In sending the matter back to youth court for a rehearing based on changed circumstances, the Chief Justice commented (at paras. 6 and 9):

> ...If the young person was an adult, the proper recourse would be for counsel to return to the judge at first instance to consider afresh the application for judicial interim release in light of the changed circumstances. Such an application is authorized by sec. 523(2) of the Code...
>
> ...
>
> In my opinion, sec. 8(8) of the Young Offenders Act, in providing for release of the young person under sec. 522 of the Code, incorporates the procedures set forth in sec. 522 of the Code. This use of procedure under sec. 523(2)...enables the youth court judge to deal under sec. 522 with a fresh application for judicial interim release based not on errors made at the time of the earlier application, but on new evidence of a material and substantial change in circumstances.

[21] Thus the court in **L.I.H.**, like Justice Wells, suggests that the rehearing is pursuant to the procedure set out in s. 523 rather than a fresh hearing under s. 522.

[22] The Crown suggests that if a second application is possible under s.522, as suggested by Cameron, J.A.'s reasoning in **Turner**, it should only be available where the accused was denied bail in the first instance. This was the situation in **Turner, L.I.H.** and **Dempsey**. The Crown suggest that Cameron, J.A.'s reasoning in **Turner**

> could fairly be interpreted to extend section 522 only to the limit of affording the accused an opportunity to show cause why his continued detention in custody is not justified within the meaning of subsection (2), where there are changed circumstances.

[23] I conclude that ss. 522, 523 and 680 provide a complete review procedure for release orders made under s-s. 522(2). Subsection 522(4) restricts appeals to the Court of Appeal. The section provides for no other review

mechanism. This conclusion is fortified by the fact that s. 523 does provide a comprehensive review procedure.

[24] In the event that there is jurisdiction for a second hearing under s. 522, such a hearing appears to be limited to the circumstances suggested by the Crown, namely, cases where bail was denied in the first instance. The Applicant was not denied bail, but is seeking variation of her release conditions.

[25] In either case I find that I do not have jurisdiction to conduct a variation hearing under s. 522.

[26] Subsection 523(2) allows the court to vacate an existing release order and to make a new one. Paragraph 523(2)(c) applies to the instance case. This is not a case where a new information charging the same or an included offence has been received (s. 523(1.1) so consent of the Crown would be required for this Court to vacate the existing order and make a new one. The Crown has not given its consent. The applicant cannot rely on s. 523.

[27] As a second alternative, the applicant argues that this Court has an inherent jurisdiction to rehear this matter. In **Turner**, Cameron, J.A. wrote, at para. 68, that "practical considerations as well as justice" required that the accused have the right to make a further application under s-s. 522(1). This statement appears to be the applicant's basis for arguing that this Court has an inherent jurisdiction to hear an application to vary a release condition. However, Ewaschuk, in **Criminal Pleadings**, vol. II, at para. 6:1410, suggests that a court, "even a superior court, has no inherent jurisdiction to vary a bail order pending trial."

[28] **R. v. Pappajohn** (1977), 38 C.C.C. (2d) 106 (B.C.C.A.) and **R. v. Nutbean** (1980), 55 C.C.C. (2d) 235 (Ont. C.A.) (at 237) confirm that, although s. 608 (now section 680) does not expressly authorize a Court of Appeal judge to vary an interim release order made by a judge of the Court of Appeal, there is an inherent power to do so provided that the second judge could have made the order as varied. See also **R. v. Perry**, [1977] N.J. No. 146 (Nfld. C.A.) at para. 2 and **R. v. Huang**, [1996] O.J. No. 4052 (Ont. C.A.) at para. 5. The Crown suggests these decisions overstep the inherent jurisdiction of the Court of Appeal as a statutory court.

[29] The decision by Hollingworth, J., of the Ontario High Court of Justice in **R. v. Yanover** (1982), 37 O.R. (2d) 647 suggests that the decisions in **Pappajohn** and **Nutbean** may not be restricted to Courts of Appeal and may apply to superior courts of criminal jurisdiction in some circumstances. In the **Yanover** case the applicant was seeking a variation of an order made by

another judge of the High Court. The crucial point was whether the application requested a mere variation or a full review, in which case the provisions of s. 608 (i.e. s.680) would be invoked. If the latter, it appeared that an inherent jurisdiction would exist, pursuant to the two appellate cases. What was crucial was the nature of the variation requested. Those in **Pappajohn** and **Nutbean** were minor (a change to a requirement that the appellant remain within the province and a variation in the place of report, respectively). To alter the financial terms, however, "would in effect be substituting my opinion...for DuPont J.'s opinion." Thus there was no jurisdiction.

[30] **Yanover** was cited in **R. v. Wilder**, [1996] B.C.H. NO. 2136 (B.C.S.C.) at paras. 42-44. Scarth, J., held that the British Columbia Supreme Court did not have jurisdiction to review an order, but could reconsider the release order if there was a change in circumstances.

> The difficulty lies in determining the extent of the Court's inherent jurisdiction to reconsider the terms of the accused's release where changed circumstances are shown. If such a jurisdiction exists, and I hold it does, the exercise of the jurisdiction can be and has been limited by Parliament... Within the confines of the Court's inherent jurisdiction...I am satisfied I have jurisdiction to reconsider the original release order if a change in circumstances is shown.

[31] However, as the Crown points out, in **Wilder** the court directed the parties to address the extent of the inherent jurisdiction, and the results do not appear in the decision.

[32] I am unable to conclude that this Court's inherent jurisdiction provides authority to conduct the hearing requested by the applicant. If such an inherent jurisdiction exists, and I am not convinced by the authorities that it does in these circumstances, it should be exercised only where Parliament has not spoken on the issue. Subsection 523(1) was amended to omit the words "is to be tried". Paragraph 523(2) requires Crown consent for a hearing before the court where the accused "is to be tried". Section 522, 523 and 680 provide a review and appeal mechanism for release orders. In these circumstances I am not convinced that an inherent jurisdiction exists that would allow me to go beyond those provisions to conduct a second hearing.

Disposition

[33] I conclude that this Court does not have jurisdiction to hear the application. Accordingly, the application is denied.

Cacchione, J.

Halifax, Nova Scotia