IN THE SUPREME COURT OF NOVA SCOTIA
**Citation:** R. v. Lalo, 2002 NSSC 268

**Date:** 20020909
**Docket:** CR 154808;
CR 154814;
CR 154817;
CR 154820;
CR 154822;
CR 154824

**Registry:** Halifax

**Between:**

Her Majesty The Queen

v.

Cesar Lalo

**Restriction on publication:** Publication Ban under Section 486 CC
Sexual Assault

**Judge:** The Honourable Chief Justice Joseph Kennedy

**Heard:** September 4, 2002, in Halifax, Nova Scotia

**Written Decision:** January 3, 2003 (Oral Decision September 9, 2002)

**Counsel:** Catherine Cogswell and Robert Fetterly, for the Crown
Maurice Smith and Cindy Murray, for the defence

**By the Court:**

[1] This is the oral decision with respect to the *Charter* application brought by Mr. Lalo in this matter.

[2] By decision dated June 3rd, 2002, Justice Heather Robertson of this Court, in response to a Crown application seeking determination of the status of this incarcerated defendant, in relation to a judicial interim release hearing, specific to the charges upon which he is awaiting trial, ordered that both a bail review hearing in relation to one charge, and a show cause hearing *abinitio*, in relation to the additional charges, would be held before a judge of this Court. Both to be heard she directed, commencing September 4, 2002. I will refer to the combination hearing simply as the bail hearing. As a result of that decision, the defendant, Mr. Lalo has brought this application, which is a *Charter* challenge to that hearing being held.

[3] It is the submission of the defendant that, if the hearing proceeds in this Court, as Justice Robertson directed, there will be no mechanism available to the defendant for a review from a decision arising out of that hearing and that therefore his rights pursuant to s. 7 and s. 11(e) of the *Charter* will be infringed should the hearing proceed as directed.

[4] The defendant's further submission is, that the proper remedy pursuant to s. 24(1) of the *Charter,* is the immediate release of the defendant.

[5] A brief explanation as to why a s. 515(1) *abinitio* bail hearing would be ordered to be heard by a judge of this Court, rather than by a judge of the Provincial Court as the section contemplates, is in order.

[6] The defendant, Mr. Lalo is facing trial on some sixty-seven criminal charges of sexual assault. When Mr. Lalo appeared before the Provincial Court at various times to be arraigned on the charges, the Crown indicated that it wished to show cause, however the bail hearings were adjourned because the defendant was serving a nine year federal custodial sentence in relation to other charges. That sentence was fully accomplished as of August 18, 2002. Justice Robertson decided that the defendant had consented to those adjournments and therefore the Crown could now proceed with the bail proceeding in this Court. Justice Robertson found that a judge of this Court has the inherent jurisdiction to conduct such a hearing *abinitio,* sitting as a justice. I agree with that finding.

[7] Mr. Lalo was before this Court because he waived his right to a preliminary hearing and was ordered to stand trial in the Supreme Court, and that is why

Justice Robertson decided it should be a judge of this Court who hears the s. 515 hearing.

[8] The defendant, applicant bears the legal burden of proving the *Charter* violation alleged on the balance of probabilities.

[9] As stated, the applicant's *Charter* argument is founded on the submission that the defendant, as a matter of right, must have available to him, a review of a decision on bail made by a judge of this Court and that no such review from this Court will be possible. For this Court to proceed with the bail hearing, knowing that there will be no review available to the defendant, would, the defendant argues, constitute the breach of the *Charter of Rights*. I agree with that suggestion, that a review is an integral and essential part of the Canadian bail process and it is probable that a denial of access to review would be a violation of the defendant's *Charter* rights as suggested. I do not agree with the submission that there is no review available from a bail decision of the judge of this Court. I find, rather, there is such a review available.

[10] Section 520(1) of the Code reads:

> If a justice makes ... an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

[11] If a justice makes that order, the accused may apply to a judge for a review of the order. This section allows for a review of the initial bail hearing by a judge.

[12] Section 493 of the *Criminal Code* defines judge as follows:

> "judge" means
>
> 493(d) in the Provinces of Nova Scotia, New Brunswick, Manitoba British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland, a judge of the superior court of criminal jurisdiction of the Province.

[13] So, under s. 493, a judge means a judge of the superior court of criminal jurisdiction for the Province. Section 2 of the *Code* defines superior court of criminal jurisdiction as follows:

> In this Act, 'superior court of criminal jurisdiction' means in the Provinces of Nova Scotia, British Columbia and Newfoundland, the Supreme Court or the Court of Appeal.

[14] It includes the Court of Appeal as a superior court of criminal jurisdiction. It is clear then, that pursuant to the provisions of the *Criminal Code* a judge of the Court of Appeal, as well as a judge of the Supreme Court, the trial court in Nova Scotia, can hear a review of a show cause hearing.

[15] It is argued by the defendant, that a review of a bail hearing in the Supreme Court cannot be conducted under s. 520(1), as a "justice" is not making the initial order. I repeat that in this case I am using my inherent jurisdiction to act as a "justice" to hear the show cause *abinitio,* pursuant to Part 16 of the *Code* and particularly, sections 515 through 519.

[16] I make reference to a decision of Mr. Justice Doherty, who is now Justice of the Ontario Court of Appeal, in *Queen v. Saracino* (1989), 47 C.C.C. (3d) 185, given when Justice Doherty was a judge of the Ontario High Court of Justice. In that decision, he held that while the section does refer to a review of an order by a "justice", that the accused may also apply for review of an order of a "judge" that has been made pursuant to s. 520 or 521. In *Saracino,* an accused had been ordered detained, pending his trial by a justice of the peace, pursuant to s. 515 of the *Code,* however that detention order was vacated pursuant to s. 520. The Crown then sought to review that decision pursuant to s. 521. The accused argued that the judge hearing the subsequent review under s. 521 had no jurisdiction to proceed, as he was not reviewing the order of a "justice" made pursuant to s. 515. The court in *Saracino* rejected that argument and states at pg. 187:

> The scope of ss. 520 and 521 considered in combination with other sections which permit a review of the accused's status prior to trial (ss. 523, 525) indicate to me Parliament's intention that decisions with respect to bail should be subject to review as the process is ongoing. These sections favour flexibility and re-evaluation of an accused's bail status over finality of any particular order made affecting that status.

[17] Further at pg. 191:

> There is no good policy reason for insulating a decision of a judge from review when she makes an order changing the bail status of an accused, while at the same time providing for a review where her order maintains the status quo. Either order can be in error, and either order can have serious ramifications for an accused and for the community. A right of review (subject to the requirement of leave if the earlier review was held within 30 days) is more consistent with our bail system which emphasizes flexibility and the ready availability of the means to reassess or review an accused's bail status while the charges against him are working their way through our system of criminal justice.

[18] The review sought in *Saracino* was a subsequent review. I agree with the applicant's submission that *Saracino* was not the *abinitio* s. 515 bail hearing that we have before a judge in this specific. However, I am satisfied that the common sense reasoning of Justice Doherty is applicable to this matter.

[19] As is indicated, I agree with Justice Robertson's determination that a judge of this Superior Court has the jurisdiction to sit as a justice, pursuant to s. 515 of the Code. I am satisfied that in this unusual situation, in which a bail process that ordinarily would have been carried out in the Provincial Court remains to be accomplished after the accused is before this Court, it is proper that the hearing be conducted in this Court.

[20] I find that, based on the reasoning of Justice Doherty in *Saracino* for purposes of this proceeding, the term “justice”, as set out in s. 515, should be read to mean, a judge of this Superior Court sitting as a “justice”. That being the case, I am satisfied the Court of Appeal has the power of review relative to such hearing, and I believe that it would exercise that power in these circumstances if called upon. Coming to that conclusion, I therefore find that the applicant has not satisfied me on the balance of probabilities that this hearing will infringe his *Charter* rights as submitted and the hearing will proceed. The decision of this Court, I am satisfied, will be reviewable by the Court of Appeal of this Province. Indeed it may otherwise be reviewable, by another judge of this Court.

[21] I do not find on the balance of probabilities, that there has been a *Charter* breach as argued by the applicant and I am determining that this bail proceeding in this Court will proceed.

Chief Justice Kennedy

Halifax, Nova Scotia