Date: 20000714
Docket: CR164579

PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: R. v. Bevin, 2000 NSSC 59

HER MAJESTY THE QUEEN

v.

PATRICK JOHN BEVIN

DECISION ON BAIL APPLICATION
Sections 521 & 522 Criminal Code

HEARD:	at Halifax, Nova Scotia, before the Honourable Justice A. David MacAdam
DATE HEARD:	July 14, 2000
DECISION:	July 14, 2000
WRITTEN RELEASE OF ORAL:	August 11, 2000
COUNSEL:	Mr. Craig R. Botterill, Solicitor for the Crown Mr. Warren K. Zimmer, Solicitor for the Defense

MACADAM , J. : **(Orally)**

[1] This is an application for Judicial Review in the matter of *Her Majesty the Queen and Patrick John Bevin.*

[2] The evidence presented indicates the accused, Patrick John Bevin, is 25years of age and currently unemployed. He resides with his girlfriend, Suzanne Silver, in an apartment complex at 275 Windmill Road, apartment # 111, Dartmouth, Nova Scotia. The victim, Ronald Weeks, occupied apartment # 129 at the same location.

[3] The matter comes before me as a Judicial Review, pursuant to *Section 521* of the *Criminal Code*, following a notice of application for Bail Review filed by the Crown Attorney, and dated June 24, 2000, and which has also been properly served upon the accused.

[4] The accused and others, stand charged with six criminal offences, two arising out of an alleged single incident on May 22, 2000, and the remainder during and following his arrest on May 24, 2000. The offences charged involve attempted murder contrary to *Section 239* of the *Criminal Code* and unlawfully wounding, maiming, disfiguring or endangering life, thereby committing an aggravated assault contrary to *Section 268(1)* of the *Criminal Code*. These are alleged to have occurred on May 22, 2000. The remaining charges are possession of a weapon for a purpose dangerous to the public peace, contrary to *Section 88*, of the *Criminal*

Code, possession of a loaded restricted or prohibited weapon contrary to *Section 95(a)* of the *Criminal Code*, another offence of possession of a loaded restricted or prohibited weapon contrary to *Section 95(a)* of the *Criminal Code*, and possession of firearms while prohibited from doing so by reason of an order made pursuant to *Section 100(1)*, contrary to *Section 100(12)* of the *Criminal Code*.

[5] A bail hearing was held in Provincial Court and the accused released on a number of conditions and $12,000 cash bail. Unfortunately, the tapes of that bail hearing have been lost and no transcript is available on this application for review. In addition, it appears that contrary to *Section 515(2)(d)*, the Crown had not consented to the release of the accused on the cash bail. In light of *Sub-Section (a)*, the requirement for Crown consent only arises where *"money or other valuable security is deposited"*. See *R. v. Tolliver* (1999), C.R. 160867; *R. v. Melo*, [1996], O.J. No. 2235; *R. v. Boechler*, [1995] A.J. No. 988. The order for release on the basis of a cash deposit is therefore vacated. However, the Provincial Court Judge otherwise had jurisdiction to grant the bail, providing it did not include the depositing of *"money or other valuable security"* where the accused was ordinarily resident in the Province. Although the rationale for requiring Crown consent was speculated on in *R. v. Boechler, supra* and *R.v. Cooke,* (1973), 10 C.C.C. (2d) 111, the validity of this limitation is not before this court.

[6] The Crown, in its written submission, refers to the decision and reasons of Saunders J. in *R. v. Tolliver, supra*, at paras 4 & 5:

> The Crown points to *Section 515, Sub-Section 2(d),* which is the sub-section that expressly requires the consent of the Crown Attorney. The Crown says that such consent was neither given nor solicited, thus the Crown argues that there was reversible error, which requires and enables me to review the situation once again.

[7] On this preliminary point, I agree with the Crown. The record before me discloses no consent ever given by the Crown Attorney. Therefore, as noted, the Judge in this instance could not have effected the Judicial Interim Release as he did.

[8] In respect to the missing tapes and lack of a transcript, the Crown, in its written submission notes, given the unusual situation of the missing record in the instant case, a reference to *R. v. Carrier* (1979), 51 C.C.C. (2d) 307 (Man. C.A.), in *Tremeerar's 2000 Criminal Code*, at (sic) 758:

> A review under section 521 should not be categorized as an ordinary appeal, nor is it similar to an appeal by way of trial *de novo*. Parliament intended the review to be conducted with due consideration for the initial order but, depending on the circumstances, with an independent discretion to be exercised by the review court. While it is necessary for the review court to establish rules of practice, an inflexible rule requiring transcripts in all cases might defeat the intent of the legislation to encourage expeditious disposition. Where no evidence was called at the original hearing and the judge's reasons were not extensive, and where a transcript cannot be obtained in a reasonable time, neither the transcript nor an agreed statement of facts is necessary for a review hearing.

[9] Also, *Section 521 (8)*, in outlining the evidence the judge may consider on a review, clearly recognizes in *Sub-Section (a)* that the transcript of the original hearing is not a necessity on such a review.

[10] On this application, I have received the affidavit of Cheryl E. Byard, the Crown Attorney on the application heard in Provincial Court, to which she attaches a *"Background on Current Charges"*; a copy of the accused's *"Criminal Record"*; a copy of his *"Court History"*, and, a listing of suggested *"Aggravating Conditions"* in respect to the submission that the accused's detention was justified on all three grounds outlined in *Section 515(10)* of the *Criminal Code* and which she deposes was read into the record on the hearing in June 2000. I have also had the written and oral submissions of counsel for the Crown and for the accused on this application.

[11] Justice Saunders, in respect to the burden on an applicant and the powers of

a Judge on a bail review, in *R. v. Tolliver, supra*, at paras. 6 and 7 said:

> My powers of review on an application such as this are well known. Counsel have thoroughly addressed them. They are set forth in *Section 521, Sub-Section 8.* The test or the requirements for detention are also well known and those are set out in *Section 515*, Sub-Section *10*. Essentially, before any person can be deprived of her or his liberty, the Court must consider the alternatives cited in the *Criminal Code*, short of jail. I have done that in this case...
>
> Now, in light of the sections that I have quoted, it is my job, I am required by law to ask myself whether Mr. Tolliver's detention is justified under any one of the circumstances described in *Section 515, Sub-Section 10(a) - (c).* It is only if the Crown persuades me that Mr. Tolliver's detention is necessary under any one or more of those sub-sections, that the accused could be deprived of his liberty. In other words, (a), (b) and (c) are the only criteria; there is no residual authority given to a Judge by Parliament beyond those.

[12] Here, unlike in *R. v. Tolliver, supra*, the Crown is relying on all three grounds. In respect to whether the accused's detention is justified, the Crown, in its submission to the Provincial Court Judge, recited a number of factors suggested as justifying detention until trial. They were also placed in evidence by the Crown, as part of the evidence on this application. These aggravating facts are:

Aggravating Factors:

(a) – At time of present charges accused was subjection to a *Section 100* and *Section 109* order;

– At time of present order accused was subject to an 18 mo. probation order;

– Three previous convictions for failing to appear in court and one conviction for escaping lawful custody;

– At time of present charges accused had pending o/s matters of *s. 267(a)* and *s. 129* in Vancouver and released on $1000 recognizance;

(b) - Accused has a lengthy criminal record;

– Accused has several convictions for breach of court orders;

(c) - Three previous convictions for obstruction/resisting of a peace officer;

– Previous conviction for trafficking a narcotic;

– Previous conviction of unauthorized possession of a firearm.

[13] Notwithstanding the error in awarding bail on deposit of cash or valuable security, without Crown consent, the burden under *Section 521*, remains on the Crown, *Section 521(8)(e).*

[14] In *R. v. M.W.S.* (1995), 140 N.S.R. (2d) 367, Justice Cacchione noted the

comments of Chief Justice Lamer in *R. v. Morales* (1992), 77 C.C.C. (3d) 91, S.C.C.. He observed the Youth Court Judge had erred in failing to consider the applicability of the presumption of innocence at the bail hearing stage. He referred at para. 21 to the Bail Reform Legislation, and the intent that the *" liberty of the subject is a paramount consideration."* In this regard, he noted the application of a progression from outright release to an undertaking without conditions, to a recognizance with conditions.

[15] In respect to the role of the reviewing court, the three grounds outlined by J. L. Gibson, *Criminal Law, Evidence, Practice and Procedure,* (Toronto: Carswell, 1988), at p. 11-13, are:

> Review by a Superior Court Judge - *S. 520* and *S. 521*
>
> (b) The grounds for review:
>
> (i) that the judge misconceived the facts or was guilty of an error in law,
>
> (ii) that there has been a material change in circumstances since the bail hearing,
>
> (iii) if cause is shown, the reviewing court can substitute its own discretion.

[16] In *R. v. Gobeil*, [1997], N.S.J. No. 592, para. 5, Justice Cacchione described the bail review hearing:

> ...bail review hearings are what can be considered hybrid hearings. They are neither an appeal by way of a de novo hearing, nor are they strictly appeals from the detention order or the release order, but a combination of both. The court can consider the evidence led at the initial hearing, consider any of the new submissions or any new evidence led at the review hearing, and in essence exercise its discretion anew and I think that the case of the *Queen v. Carrier* (1979), 51 C.C.C. (2d) essentially says that. Parliament intended the review to be conducted with due consideration for the initial order but, depending on the circumstances, with an independent discretion to be exercised by a review court.

[17] In *R. v. Gobeil*, *supra*, the accused's record shows offences committed while on probation and prior convictions for the same offence. Justice Cacchione granted bail that included a surety.

[18] In *R. v. Cooke* (1973), 10 C.C.C. (2d) 111, Justice Barry, conducted a bail review hearing, at the request of the accused, where there were twelve prior offences, including three of escaping from custody. Justice Barry found the earlier bail set by the Provincial Court Judge was so high as to effectively have amounted to a refusal to grant bail. In his reasons, Justice Barry stated that had the Provincial

Court Judge denied bail on the basis of *Section 515*, and with any reasonable evidence in support, he would not have interfered. In other words, his reasons are a recognition of the *"due consideration"* cited by Justice Cacchione. He, however, decided to release the accused by amending the earlier bail to bail with two sureties.

[19] In *R. v. Boechler*, *supra*, where the Provincial Court Judge denied bail, the reviewing court granted bail with conditions, notwithstanding the accused's record, which included two failures to appear, a failure to attend court and an obstruction of justice.

[20] I have considered the accused's lengthy record, together with the comments of his counsel regarding the dating of the offences involving violence, the circumstances relating to these offences, both the two alleged on May 22, 2000 and the four on May 24, 2000, the history of failures to appear as ordered both to the court and to various probation services, and I am not satisfied the Provincial Court Judge was in error in granting bail. Applying the reasoning of Justice Barry in *R. v. Cooke, supra*, I would have little difficulty in upholding a refusal of bail, based on the accused's record, his failures to abide by court orders or undertakings to

appear and the circumstances of these offences. However, the *Criminal Code* clearly places the burden on the Crown to show the Provincial Court Judge erred in deciding to grant bail, not simply erred in granting bail for a *"deposit of cash*". Recognizing this Court's jurisdiction to refuse bail, notwithstanding the absence of any error in law by the Provincial Court Judge, I am not satisfied this is one of the occasion in which to make such a determination. Both in *R. v. Boechler*, *supra* and *R. v. Cooke, supra,* the reviewing court amended the order to impose conditions, including a recognizance with securities. In this instance, I am prepared to follow the same course.

[21] I am therefore not satisfied Mr. Bevin's detention is justified on any of the grounds in *Section 515(10)* of the *Criminal Code.*

J.