SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. AMB,* 2022 NSSC 203

Date: 20220721
Docket: *CRH* No. 501843
Registry: Halifax

Between:

Her Majesty the Queen

v.

AMB

Restriction on Publication of any information that could identify the victim: s. 486.4 *C.C.*

Decision on Bail

Judge:	The Honourable Justice Peter Rosinski
Heard:	July 6 and 7, 2022, in Halifax, Nova Scotia
Final Written:	July 21, 2022
Counsel:	Alicia Kennedy, for the Crown Jonathan Hughes, for Defence

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

Introduction

[1] On June 14, 2022, I orally delivered my verdicts in relation to the four counts (sections 151 and 271 of the *Criminal Code* ["*CC*"]) with which AMB was charged – guilty on all counts.[1]

[2] I also asked counsel to consider whether in light of the guilty verdicts, AMB's bail should be modified or curtailed pending sentencing.

[3] Crown counsel indicated they will recommend a sentence in a federal penitentiary per *R. v. Friesen*, 2020 SCC 20 (in the mid to upper single digits sentence) and initially sought AMB's remand into custody.

[4] However, since both counsel were not prepared to fully address the issue on June 14, that issue was set over for further submissions to the earliest date when the court and counsel could reconvene: July 6, 2022.

[1] I advised counsel that I would provide a written decision in short order and did so on June 15, 2022: 2022 NSSC 169. I set August 29, 2022, for sentencing submissions, and September 2, 2022, for decision.

[5] AMB remained subject to his existing bail conditions until at least July 7, 2022.[2]

[6] This decision addresses what is the authority for the court to modify (i.e. if any authority exists) or curtail AMB's present bail, and whether the court should modify or curtail his bail.[3]

[7] In short, I conclude that, in relation to non-section 469 *CC* offences:

1. I have authority to remand AMB pursuant to section 523(1)(b)(ii) *CC*; and

2. when an accused pleads guilty or is found guilty (in non - s. 518(2) *CC* situations), pursuant to s. 523(1)(b)(ii) *CC*, the only choice a judge has is whether to remand an offender or release them on their existing

[2] Counsel appeared on July 6 and made legal arguments about the proper section of the *Criminal Code* under which this process should proceed. After I concluded that the proper section is 523(1)(b)(ii) *CC*, I solicited from counsel their positions regarding whether AMB's bail ought to be maintained as it is, modified or curtailed entirely until sentencing on August 29, 2022. Crown counsel sought his immediate remand. Defence counsel advocated for his continued release. The matter was adjourned to 2 PM July 7, 2022, for decision, at which time I remanded AMB into custody.

[3] AMB's counsel drew the court's attention to an oral decision rendered earlier this year, in relation to these similar issues (file CRH 490540 – *R. v. F.*, which is subject to a publication ban per s. 486.4 *CC*). My colleague relied on the *Tsega*, 2021 ONSC 1129 and *Green*, (2006) 210 CCC (3d) 543 (Ont. SC) decisions adopted herein by AMB's counsel. Otherwise, except in Judge Ross's reasons in *R. v. Hill*, 2005 NSPC 50, I am unaware of any decisions from this court specifically addressing these discrete issues. I note that there are *obiter dicta* comments by the court in *R. v. BJB*, 2000 NSCA 147, regarding sections 523 (1)(b)(ii) and 523(2) at paragraphs 8 and 13.

bail – there is no right to contest this exercise of discretion. Moreover, the exercise of that discretion is virtually unfettered.[4]

[8] However, while the statutory language does not contemplate a hearing, the judge has no duty to give reasons for that decision, and there is no right of appeal, in my view it is nevertheless important to request both Crown and Defence counsel's position regarding the merits of each option, in the interests of

[4] Judge Peter Ross of our Provincial Court is a very experienced and well-respected jurist. In *Hill*, supra, in relation to s. 523(1)(b)(ii) he stated at paragraph 37: "Section 523(1) begins by defining the time period during which a release order is "in force". For Provincial Court purposes, this is defined in subsection (b) to be until the end of the trial and, when the accused is found guilty but not remanded, until sentences imposed. While one might conceivably read this to say that a trial ends at adjudication of guilt, I do not think the section is meant to define either the beginning or end of the trial. It seems rather to confirm the terms of release continue by operation of law, whether a judge mentions them at an adjournment of the proceedings or not. Further, this section suggests that upon a finding of guilt the presiding judge may remand an accused who was on release up to that time**. If such a drastic change may be made by the judge, it is unreasonable to think that release conditions could not be changed. I consider that they can, consistent with s. 523(2), in that the accused is "being tried" until sentence is imposed."** With the greatest of respect, I disagree with his latter commentary. The Provincial Court is a statutory court which does not have the inherent jurisdiction that a superior court has and is therefore exclusively reliant on the powers provided by legislation, including any inherently necessary attributions of jurisdiction/authority. When drafting the sections of the *Criminal Code*, Parliament must be presumed to have understood this fundamental concept and considered it in choosing its preferred statutory language. Section 523(2) begins with, "Despite subsections (1) to (1.2), (a) the court, judge or justice before which or whom an accused is being tried, at any time,… may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and may make any other order provided for in this Part for the detention or release of the accused until his trial is completed as the court, judge or justice considers to be warranted." The section uses the word "accused". The jurisprudence recognizes this as a reference to a defendant in the pre-conviction phase of their criminal proceedings, including trial, *per se*. Once convicted that person is properly referred to as "the offender". I view s. 523(2) as only applicable until an accused has been found guilty or pleaded guilty (only in s. 518(2) situations). Section 523(1)(b)(ii) also refers to "an accused" – but goes on to note that where a person who has remained on release, that release continues "at his trial, [even if] determined to be guilty of the offence, until a sentence within the meaning of section 673 is imposed on the accused *unless*, at that time the accused is it determined to be guilty, the court, judge or justice *orders that the accused be taken into custody pending sentence*." This statutory language suggests that the sentencing judge who finds an accused guilty only has two options: continue release of the offender on the existing pre-conviction conditions or "orders that the accused be taken into custody pending sentence." This conclusion is consistent with the specific statutory language, as well as other considerations which I list later (e.g. I accept as persuasive the reasons in *R. v. Aheer*, 2020 ABCA 232) including that the time between conviction and sentence should be no longer than "as soon as practicable after" guilt is determined per section 720 *CC*. While I endorsed Judge Ross's reasoning in relation to s. 523(2) in *R. v. Mukpo*, 2012 NSSC 107, I did so on narrow grounds – see paragraphs 24 and 28; which did not require he or I to turn our minds to the precise question at Bar here.

maintaining public confidence in the administration of justice and to permit the court to consider *inter alia*: whether the offender's "detention is necessary in the public interest" – which includes "public safety" and "public confidence in the administration of justice" as referenced in *R. v. Oland*, 2017 SCC 17, including whether the offender will surrender themselves for sentencing if released/commit further offences.

[9] At paragraph 26, the court in *Oland*, supra, cites and relies upon the reasoning in *R. v. Farinacci*, (1993) 86 CCC (3d) 32 (Ont. CA), which itself dealt with bail pending appeal, in defining what is included in the phrase "his detention is not necessary in the public interest".

[10] In a prescient decision, relying on *R. v. Farinacci*, McIsaac J. in *R. v. DJM*, [1993] OJ. No. 2992 had asked at paras. 10-11: "What principles should apply to the exercise of the judicial discretion created by s. 523(1)(b)(ii)?" and he answered:

> "The Court of Appeal for Ontario in this very recent judgment which is referred to at p. 1 of The Lawyers Weekly dated December 3, 1993, upheld the "public interest" component of the bail pending appeal provisions of s. 679(3)(c) of the Criminal Code. The decision was delivered by Madam Justice Arbour for a five-member court. I quote from p. 4 of the newspaper article:
>
> > "As a general rule, the rights enumerated in s. 11(e) are given to persons charged with an offence and as such are pre-trial or trial rights which are exhausted by a verdict," wrote Madam Justice Arbour.
> >
> > "The right not to be denied reasonable bail without just cause is rooted in the presumption of innocence, which is substantially spent on conviction.

> "Indeed, the presumption of innocence is spent by the verdict, be it a conviction or an acquittal. A conviction does not create a presumption of guilt. It constitutes a legal, conclusive finding of guilt.
>
> "Like an acquittal, it is enforceable unless and until reversed. After a conviction, there is no presumption left, one way or another. There is an enforceable finding of guilty."

[11] He went on to elaborate regarding the factors he considered relevant to a post-conviction release decision under s. 523(1)(b)(ii):

> 14 Section 523(1)(b)(ii) is silent as to the principles to be applied in relation to a consideration of the continuation of bail once an accused becomes an offender having been found guilty by a court of competent jurisdiction. Since the status of an offender having been found guilty of a criminal offence is the status that he or she suffers when applying for bail pending appeal pursuant to s. 679(3) of the Code, I find that the principles that have been approved for that procedure should be applied, as far as possible, to the determination of the bail revocation procedure envisioned in s. 523(1)(b)(ii).
>
> 15 I find the following circumstances require that the public interest will only be served if the recognizance of the offender is cancelled, and he is remanded into custody pending sentence:
>
> (1)the nature of the offence for which the offender is convicted –
>
> The offender was convicted by me of a serious assault on a vulnerable member of society. The kick that was directed to the elderly victim's groin could have had grave consequences if he did not deflect the blow in the fashion described by his wife.
>
> (2)the criminal record of the offender –
>
> This circumstance is most disturbing as I have already indicated. I find that right-thinking members of the community would be outraged if they were aware that this offender's liberty continued after conviction. He has three previous convictions of personal violence.
>
> (3)the attitude of the offender during the trial –

> I have found that the offender and his witnesses have made an attempt to obstruct justice in the fabrication of their testimony. This fact in isolation suggests immediate incarceration.
>
> (4)other considerations -
>
> It has not been suggested that the eventual disposition of this matter will not involve a lengthy term of imprisonment. The probation report will apparently be available in a short period of time because of his lengthy probationary record. The offender has been sentenced to incarceration on previous dispositions. All of these circumstances, in my opinion, support the cancellation of his release.
>
> 16 I do not intend for this list of considerations to be exhaustive, nor do I intend for them to be taken as cumulatively dictating the disposition herein. Indeed, the criminal record by itself, including the offender's probationary status, was sufficient, in my opinion, to seriously consider revocation.'

[12] Crown counsel confirmed that it sought AMB's remand given the serious nature of the offences and their circumstances, including that a sentence in a federal penitentiary is likely.

[13] AMB seeks an only slightly modified continued release on his existing bail conditions (Release Order with $2500 non-cash bail, 1 surety with modest conditions, including that: he must have no contact with persons under the age of 17 years of age except in the presence of a surety; not attend any public place where persons under the age of 17 years are present or might reasonably be expected to be present; stay away from SM and JM. There is no curfew and no reporting requirement).

[14] While each case ultimately must be determined on its own particular facts, speaking entirely for myself, and generally, cases will present themselves where the maintenance of the pre-conviction release conditions is reasonable after guilt is established (whether by way of guilty plea or trial); however, in my opinion, for offences where significant terms of imprisonment are a realistic prospect, I would expect that it will be only exceptionally the case that (no additional significant restriction to, if the law does permit modifications, which in my view it does not, or) curtailment of an offenders' liberty would not be appropriate.

[15] The more serious the nature and circumstances of the offence(s), and risks of commission of further offences (of a similar and different nature, including of the offender not appearing for sentencing), the more likely the offender will be remanded. This will be particularly so where the circumstances involve serious offences of violence or abuse in relation to vulnerable victims.

[16] In cases where a guilty verdict ensues after trial, the seized judge will be in a uniquely advantageous position to make this determination.

[17] This is such a case, and there are no significant countervailing considerations.

[18] I am satisfied that I should remand AMB pending his sentencing. I will endorse the warrant with a direction that AMB is not to have any contact directly or indirectly with the victim SM and her mother JM.

[19] I will next examine the pivotal issue whether section 523(1)(b)(ii) or 523(2) of the *Criminal Code* provide a basis for my decision whether AMB should remain on release or be remanded?

1-Why I am satisfied that section 523(1)(b)(ii) is the statutory basis for my decision to remand AMB

[20] In summary, AMB argued that to effect a change in the bail status of an accused who has been found guilty, the Crown must make an application pursuant to s. 523(2) *CC* and that the pre-conviction considerations regarding bail in section 515(10) should continue to be assessed in making that decision - see *Tsega*, supra per Gomery, J.

[21] The Crown disagrees, and counters that it does not have to make an application because the operative section is 523(1)(b)(ii), which does not fetter the trial judge’s discretion to remand or continue bail in the existing (or a modified form).

[22] I generally agree with the Crown's position, and will next explain in greater detail why I conclude this.

[23] In my opinion, the statutory language is sufficiently ambiguous to require an examination to resolve the specific issues herein.

[24] In reviewing the legislation, I keep in mind the jurisprudence from the Supreme Court of Canada in particular, including in other cases, but in particular Justice Moldaver's reasons in *R. v. Alex*, 2017 SCC 37:

> 24 The modern approach to statutory interpretation is now well established. It requires that the words of a provision be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.
> …
>
> Plain Meaning Is Not Determinative
>
> 31 This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 43; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48; [page983] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-41. In the words of McLachlin C.J. and Deschamps J. in *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, this is necessary because (para. 10):
>
> > Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.
>
> **32 Ruth Sullivan makes a similar point in *Sullivan on the Construction of Statutes* (6th ed. 2014), at s. 2.9:**

At the end of the day ... the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

[My bolding added]

[25] Let me then examine the words of the relevant section.

[26] Section 523 reads:

523(1) Period for which appearance notice, etc., continues in force

If an accused, in respect of an offence with which they are charged, **has not been taken into custody or has been released from custody under any provision of this Part, the** appearance notice, summons, undertaking or **release order 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, summons, undertaking or release order 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, [if found not guilty – which is the clear implication in my opinion] 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.

523(1.1) When new information is received

If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention,

release order, appearance notice, summons or undertaking, section 507 or 508, as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information.

523(1.2) When direct indictment preferred

If an accused is charged with an offence, and an indictment is preferred under section 577 charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment.

523(2) Order vacating previous order for release or detention

Despite subsections (1) to (1.2),

(a)the court, judge or justice before which or 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.

[My bolding added]

523(3) Provisions applicable to proceedings under subsection (2)

> **The provisions of** sections 517, **518** and 519 **apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2),** except that subsection **518(2)** does not apply in respect of an accused who is charged with an offence listed in section 469.
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> Amendment History
> R.S.C. 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233
>
> [My bolding added]

[27] Next, I examine the arguments of the parties.

[28] AMB argues in his brief that the language of s. 523(1)(b)(ii) "demonstrates a presumption that release will continue unless the court orders otherwise" and that "such order must be based on law and given that the [factual matrix] considerations under s. 515(10)… were all known at the time of AMB's release, and AMB has abided by those conditions throughout,… your Lordship dismiss the Crown application, and allow AMB's current release order to remain in place."

[29] His initial argument contained in his brief, was that the statutory authority to determine AMB's continued release or detention arises from s. 523(2), and the presumption arising from s. 523(1) is that his release will continue – therefore it is the Crown's application to revoke bail that is in issue.

[30] He argued, relying on decisions from the Supreme Court of Canada such as - R. *v. Zora*, 2020 SCC 14, *R. v. St. Cloud*, 2015 SCC 27 and *R. v. Antic*, 2017 SCC 27 - that the right to reasonable bail enshrined in section 11(e) of the *Canadian*

Charter of Rights and Freedoms remains relevant in the post-conviction pre-sentencing period. Crown counsel pointed out that each of these decisions concerned "bail" while each of the accuseds in those cases were still presumed innocent- which is a material distinguishing feature from the present case – see Justice Moldaver's reasons in *Oland*, supra:

> 34 ***Greater accessibility to bail pending trial is rooted in the presumption of innocence.*** *Accused persons charged with an offence in Canada are presumed to be innocent, and they remain so unless and until their guilt is proved beyond a reasonable doubt.* With this in mind, **the framers of the *Canadian Charter of Rights and Freedoms* saw fit to include in s. 11(*e*) the right of every person charged with an offence "not to be denied reasonable bail without just cause":** *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309 (S.C.C.), at para. 13.
>
> 35 ***By contrast, once a conviction is entered, the presumption of innocence is displaced and s. 11(e) of the Charter no longer applies.*** This is reflected in the shift in onus which occurs when a person who has been convicted and sentenced applies for bail pending appeal. *Unlike the pre-trial context, where by and large the onus rests on the Crown to establish that an accused should be detained in custody, for appeal purposes, Parliament has seen fit to reverse the onus onto the applicant in all cases.*
>
> [My bolding added]

[31] In oral argument, AMB's counsel changed his position, and agreed that s. 523(1)(b)(ii) does provide me the authority for a modification or curtailment of bail, and he endorsed my preliminary thinking that I must make that decision in a principled manner (i.e. affording an appropriate level of procedural fairness to the parties and considering the proper factors).

[32] I note here that a close reading of s. 523(1)(b)(ii) suggests that upon a finding of guilt the trial judge's choice is limited to maintaining the existing bail "as is" **or** remanding the offender.

[33] Coincidentally, the position of AMB, on the facts of this case, parallels the choice facing me, so that arguably, I need not resolve whether section 523(1)(b)(ii) only provides those two choices, as opposed to permitting modification of existing bail pending sentence. That the legislation does suggest an either/or choice further confirms my position that the discretion of the judge is virtually unfettered pursuant to s. 523(1)(b)(ii).

[34] He urged me nevertheless to continue AMB's existing bail by applying necessary modifications based on the s. 515(10) *CC* factors, in making the s. 523(1)(b)(ii) decision - while relying upon the reasoning in *Green*, supra, per Ducharme J., and *Tsega*, supra, per Gomery J.

[35] The Crown argues that s. 523(2)(a) was not intended to be applicable beyond the end of the "trial" *per se* culminating in the finding of guilt, since s. 523(1)(b)(ii) specifically addresses that scenario.[5]

[5] I recognize that the jurisprudence has in other contexts concluded that the "trial" includes the time interval up until the judge is *functus officio* after sentencing. The mere possibility that the "trial" can be re-opened before the end of the sentencing makes this a real concern - *R. v. MBP*, [1994] 1 S.C.R. 555.

[36] It therefore argues that no formal application is required of the Crown because, upon conviction, the original order will remain effective (s. 523(1)(b)(ii) *CC*) "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".

[37] It relies particularly on the reasoning in *Aheer*, supra. Therein, Justice Peter Martin for the court stated:

> 1 This appeal involves the interpretation of the post-conviction/pre-sentencing bail provisions in section 523 of the *Criminal Code.*
>
> 2 The appellant was convicted of impaired driving following a trial in Provincial Court. He says the trial judged breached sections 7, 9, 11(e) and 12 of the *Charter of Rights and Freedoms* by unlawfully remanding him into custody for a brief ten-minute period after conviction and prior to the imposition of sentence, to consider the propriety of counsels' sentence submissions. The appellant says the trial judge lacked the jurisdiction to revoke his bail and remand him into custody pursuant to s 523(1)(b)(ii) of the *Criminal Code*, without an application by the Crown pursuant to s 523(2), when defence counsel simply sought a brief adjournment to respond to an inquiry raised by the judge during submissions on sentence.
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> 3 The appellant's summary conviction appeal to the Court of Queen's Bench was dismissed. *He was granted leave to appeal to this court on the following issue: Whether the summary conviction appeal judge erred in law in concluding that the appellant's Charter rights were not violated when his bail was revoked in the absence of an application by the Crown, without hearing submissions from either the Crown or defence counsel, and without giving reasons for the bail revocation.*
>
> …
> 12 *There is conflicting Alberta Court of Queen's Bench authority on the interpretation of s 523 of the Criminal Code.* In R. v. Iyer, 2016 ABQB 485 (Alta. Q.B.), the court followed the approach in R. v. Green (2006), 210 C.C.C. (3d) 543, [2006] O.J. No. 3240 (Ont. S.C.J.), where it was concluded, at para 6:
>
> > . . . s. 523(1)(b) makes it clear that, where an accused is found guilty, bail will continue until the imposition of a sentence, unless the court orders otherwise. Thus, the convicted offender need not apply to continue his bail . . . while s.

> 523(1)(b) recognizes the possibility of post-conviction revocation of bail, it does not confer any power on the trial judge to do so.

13 And at para 8:

> *It is s. 523(2)(a) of the Criminal Code that confers the power on a trial judge to make the order referred to in s. 523(1)(b). . . . this can only be done where cause has been shown*. In a case of an application to revoke the bail, the Crown must show cause and this can be done by demonstrating that the detention of the accused is necessary for any of the reasons enumerated in s. 515(10) of the Code.

14 ***A different approach was adopted in R v. BTQ****, 2017 ABQB 715 (Alta. Q.B.), where the court concluded that s 523(1)(b)(ii) provides the jurisdiction to revoke or vary bail following conviction, and there is no need to resort to s 523(2) for jurisdiction.* The court said, at para 8:

> A plain language reading of all of s. 523 should be applied in order to avoid ambiguity or confusion. The language of s. 523(1) makes it clear that the original release order of an accused will continue in effect until his or her trial is complete. It goes further, by stating that if the accused is found guilty, the original order will remain effective until they are sentenced unless the trial judge orders otherwise. **To state it plainly, under this provision, Parliament says that bail is to continue through to sentence *unless* I revoke it (s. 523(1)(b)(ii))**.
>
> (emphasis in original)

15 ***The summary conviction appeal judge followed the approach in BTQ. We agree with that approach. In our respectful opinion, a fair reading of s 523 does not support the interpretation given by the courts in Iyer and Green.***

16 The language in s 523(1)(b)(ii) contemplates that bail will continue after conviction and prior to sentencing, *unless the judge orders otherwise*. Section 523(2) opens with the phrase "Despite subsections (1) to (1.2) . . . ". This language suggests that section 523(1)(b)(ii) provides an exception to the rules in s 523(2) that would otherwise apply. In other words, **s 523(2) allows bail to be vacated on cause being shown in the circumstances set out in ss 523(2)(a), (b) and (c). The very specific language in s 523(1)(b)(ii), which continues bail "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", would be redundant if resort were needed to s 523(2) for jurisdiction to revoke bail after conviction and prior to sentencing.**

17 When s 523(1)(b)(ii) is viewed in its overall context, this interpretation reflects the distinction between the pre-conviction and post-conviction bail provisions of the *Criminal Code*, as the accused no longer benefits from the presumption of innocence. **Section 523(2) deals with the revocation of bail during the course of a trial, prior to**

conviction, so the requirement that the Crown show cause is not surprising. However, post-conviction, and prior to sentencing, the trial judge who heard all the evidence and convicted the accused has the unique discretion contemplated in s 523(1)(b)(ii) to revoke bail in an appropriate case, without the Crown having to show cause.

18 **In short, ss 523(1)(b)(ii) and 523(2) address different scenarios.** The former gives a trial judge the discretion to revoke bail upon conviction (after the presumption of innocence has been lost) and before sentence, without cause being shown. The latter allows a judge before whom the accused is being tried to vacate or vary an order of release or detention upon cause being shown "at any time".

19 That said, we do not wish to be seen as endorsing the trial judge's decision to unilaterally revoke the appellant's bail in these circumstances or his statement to the appellant that he may have to remain in custody overnight as a result of his counsel's request for a brief adjournment. We can see no good reason for having done either and none was offered by the trial judge.

20 Our finding is fatal to the appeal. Still, we wish to comment briefly on the appellant's submission, that if his interpretation of s 523 was correct and the trial judge wrongly detained him, then that momentary detention amounted to an "egregious" violation of the appellant's rights under sections 7, 9, 11(e) and 12 of the *Charter*. That extravagant statement is entirely without merit.

21 Turning to the ground of appeal on which leave was granted, we agree with the ultimate conclusion of the summary conviction appeal judge that the appellant's *Charter* rights were not violated in this case.

22 The appeal is dismissed.

[My bolding and italicization added]

[38] I find myself in general agreement with the Crown position, and I endorse the reasoning in *Aheer*, supra.

[39] I recognize that s. 523(1)(b)(i) includes the language in relation to bail: “until his trial is completed, and”; it leads into the language in s. 523(1)(b)(ii)

which reads: “where the accused is, at his trial, determined to be guilty of *the offence*”[charged].

[40] I understand that language on its face to be including situations, firstly: where an accused is found not guilty; and secondly, situations where an accused is after trial, found guilty of the offence charged (or a lesser and included offence).

[41] But what about situations where an accused pleads guilty?

[42] The court in *Aheer*, supra, did not have to do so and therefore did not address s. 523(3), which imports s. 518(2) into s. 523(2).

[43] Section 518(2) is intended to be an exceptional and narrow provision, designed to preserve some semblance of opportunity to seek and obtain bail even after a guilty plea, where beforehand a decision has not been otherwise rendered regarding bail.

[44] That perspective explains why this provision is subsumed under s. 523(2) by virtue of s. 523(3).

[45] I rely upon the wording in s. 523(1)(b)(ii), “at his trial” to *include a guilty plea (to the offence charged or a lesser included offence) and an acceptance thereof*, as well as an offender having been found guilty after trial.

[46] Section 523(3) reads:

> "**The provisions of section 517, 518 and 519 apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2),** except that subsection 518(2) does not apply in respect of an accused who is charged with an offence listed in section 469."

[47] Those three sections each deal with "proceedings under section 515". That is, only while the presumption of innocence remains in place; however, their application in section 523 is "with such modifications as the circumstances require".

[48] Section 518(2) reads:[6]

> (2) Where, before or at any time during the course of any proceedings under section 515, the accused pleads guilty and that plea is accepted, the justice may make any order provided for in this Part for the release of the accused until the accused is sentenced.

[49] If an accused pleads guilty, **other than** (under s. 518(2)) "before or at any time during the course of any proceedings under section 515", such circumstances fall within the purview of section 523(1)(b)(ii).

[50] If AMB had plead guilty under s. 518(2), (which presumes that there has been no hearing or completed hearing regarding the bail of the accused who has

[6] The same language "before or at any time during the course of any proceedings under section 515" appears in s. 516 which permits a remand into custody or adjournment of a bail hearing process for up to "three clear days".

pled guilty) then through the operation of 523(3), I would have the discretionary authority under s. 518(2), to "make any order provided for in this Part for the release of the accused until the accused is sentenced", which I interpret as being infused with the wording in s. 523(2), "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," including remanding AMB after his guilty plea. However, the Crown would have had to make application to have him remanded per s. 523(2).

[51] In conclusion, section 523(1)(b)(ii) is the statutory provision which I rely upon to determine whether to remand AMB (or modify his bail).

[52] In my opinion, on a plain and purposive reading, s. 523(1)(b)(ii) does *not* permit modifications to existing bail.[7]

[53] That being the case, I must go on to consider whether the intention of Parliament was to make a decision under 523(1)(b)(ii) (i.e. to remand or maintain existing bail circumstances) virtually unfettered or not.

[7] I accept that this is a matter upon which reasonable people may disagree, and that it could be argued that s.523(1)(b)(ii) permits modifications such as increasing restrictions by ascending higher on the ladder of bail, such as replacing an undertaking with a recognizance, or making the conditions themselves more restrictive, such as imposing house arrest rather than the existing curfews.

2-A statutory interpretation of the procedure that governs the power to potentially modify bail or remand offenders

[54] As I see it there are three general possibilities:

1. that the decision of the convicting judge on the continued bail of an offender is virtually unfettered;

2. that the decision of the convicting judge on the continued bail should be informed by factual representations by counsel and legal argument without a formal hearing;

3. that the decision of the convicting judge on the continued bail should be the result of a more fulsome formal hearing, at which a convicted offender has the opportunity to present his case for the continuation of bail by way of evidence and legal argument.

[55] After careful consideration of the legislation, and based on my more than three decades continuous involvement with the criminal law as a trial and appellate counsel, and most recently as a trial judge, I am satisfied that the decision of the convicting judge regarding the continued bail of an offender is virtually unfettered as described in scenario 1 above.

[56] While I conclude that a judge is *not* required to give reasons, in my view to not give at least a summary of why they conclude an offender should be remanded, may create the impression that they have acted capriciously or arbitrarily, which situation should be scrupulously avoided as a matter of maintaining confidence in the administration of justice.[8]

[57] Bearing in mind that I have determined section 523(1)(b)(ii) is the source of my authority, and that scenario 1 governs, let me further explain this.

[58] Section 720 of the *Criminal Code* mandates:

> "(1) A court shall, *as soon as practicable after an offender has been found guilty*, conduct proceedings to determine the appropriate sentence to be imposed."

[8] See for example the court's reasons in *Aheer*, supra, at paragraphs 2-6 and 19: "The appellant was convicted of impaired driving following a trial in Provincial Court. He says the trial judge breached sections 7, 9, 11(e) and 12 of the Charter… by unlawfully remanding him into custody for a brief 10 minute period…after conviction and prior to the imposition of sentence, to consider the propriety of counsel sentence submissions… After entering the conviction, the trial judge proceeded to hear submissions on sentence.… When it appeared the trial judge might impose a more serious sentence than was sought by the Crown, defence counsel sought a brief adjournment to consult the law. The trial judge advised that he was revoking the appellant's bail and ordering him into custody while the proceedings were adjourned… Despite protests by defence counsel, who indicated he would forgo his adjournment request, the trial judge proceeded with the adjournment and directed that the applicant be taken into custody by the Sheriff.… When the proceedings resumed after a brief adjournment [approximately 10 minutes later] the trial judge advised that he had "thought it was a good to just take a moment to collect [his] thoughts on the matter".… *At no time prior to remanding the appellant in the custody did the trial judge hear submissions from the Crown or Defence counsel with respect to the revocation of bail… We do not wish to be seen as endorsing the trial judge's decision to unilaterally revoke the appellant's bail in the circumstances or his statement to the appellant that he may have to remain in custody overnight as a result of his counsel's request for a brief adjournment. We can see no good reason for having done either and none was offered by the trial judge*." [My italicization added]

[59] What is "as soon as practicable" depends on the circumstances of each case. Whether a presentence report is requested, evidence is to be presented at the sentencing, and when counsel and the court are available, each can impact how long after a guilty plea/finding the court can hear the sentencing submissions.

[60] My experience suggests that if an offender is remanded after a guilty plea or being found guilty, a sentencing should be able to be heard no later than 90 days thereafter, and often much sooner.[9]

[61] The decision to remand pursuant to section 523(1)(b)(ii) arises "*at that time the accused is determined to be guilty*".

[62] Therefore, the statutorily intended interval between a finding of guilt and sentencing is intended to be relatively short.

[63] There are also a number of features of that section that suggest a judge's bail decision after having found AMB guilty after trial is virtually unfettered:

1. this section starts with the premise that, if the trial judge says nothing, the bail pre-existing a guilty finding after trial "*continues in force*" – "unless, *at the time the accused is determined to be guilty*, … *the*

[9] I found AMB guilty on June 14, ordered a presentence report and set his sentencing for August 29 (submissions) and decision on September 2, 2022. Counsel were both of the belief that a sexual offender assessment should also be able to be completed within that time interval.

court … orders that the accused be taken into custody pending such sentence.";

2. there is no express or indirect reference to either party having an "onus", when a judge makes such a decision;

3. there is no reference to any factors a judge should consider when making such a decision (there is no express reference back to s. 515 *CC*);

4. there is no express reference or inference that can be drawn, that a judge has a duty to give reasons;

5. there is no reference to the right of an offender to make a later application to vary his post-conviction "bail" pending sentence (see s. 520 regarding "reviews" of bail, which notably includes s. 523(2)(b) but not s. 523(1); and there is no express "right of appeal" or review from a judge's decision to detain an offender. There is no right to appeal from a s. 520 review – see reasons in *R. v. Smith*, (2003) 171 CCC (3d) 383 (Sask CA), at paragraph 25 which were approved of in *Antic*, supra, at paragraph 18. The jurisdiction is concurrent between Supreme Courts and their Courts of Appeal – *R. v. George*, 2018 ONCA 314 per Brown, JA., at paragraphs 3-4.

[64] These procedural protections which are associated with a pre-conviction bail regime do not exist post-conviction because the presumption of innocence has become irrelevant, and the time interval between acceptance of guilty plea or finding of guilt after trial and sentencing is short.

[65] Another reason why a judge‘s decision to remand or not, should be and is virtually unfettered, arises in cases where they have heard the trial evidence and determined an offender to be guilty. That judge has an extraordinarily advantageous position which uniquely qualifies them to assess and determine whether an offender should be remanded or not.[10]

[66] Each of the statutory language, principles of statutory interpretation, inferential and purposive reasoning, suggest that pursuant to section 523(1)(b)(ii) a judge’s decision to remand or not, is intended to be virtually unfettered.

[67] Nevertheless, I incline to the view that, as a matter of procedural fairness, after finding an offender guilty who has been at liberty on bail, a judge should at least canvas counsel to hear their positions (on the law and any factual

[10] The situation is somewhat so similarly for guilty pleas. Before accepting a guilty plea, a judge will have conducted a s. 606(1.1) inquiry of the person pleading guilty, and “may accept a plea of guilty *only if* it is satisfied that…”. Therefore, in the guilty plea scenario, a judge usually has had some opportunity to elicit the circumstances of the offender and the offence at the time the plea is entered, to be able to determine whether to continue existing bail or remand the offender, in relation to which s. 523(1) uses similar wording: “at the time the accused is determined to be guilty”.

representations they believe are warranted)[11] regarding whether the bail, and in what form, including modifications if they are possible – which I do not believe they are – should continue until sentencing.

[68] While it is always within the discretion of each individual judge to go further and permit a more robust presentation of the parties' positions, potentially with evidence and legal submissions, I would expect that to be a rare situation (especially where the judge has decided guilt after trial), and if so: premised upon a readily articulable reasoning which brings into serious question the appropriateness of the existing bail circumstances, or remand, which cannot be summarily presented, and requires a more robust inquiry.

[69] Generally speaking, before acceding to a more robust opportunity for a convicted person to present evidence and make arguments about their continued liberty pending sentencing, the Court should first hear from the Crown regarding their position, and if it is that there should be a complete curtailment of liberty, then the court should hear from the convicted person regarding why their existing release plan still should prevail, what evidence they would propose to present in support of its continuation, and when would they be in a position to do so.

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[11] Namely made in a "good faith basis" – *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at paragraph 94.

[70] In some cases, it will be plainly evident that the existing release plan is simply inappropriate in the circumstances.

[71] AMB no longer has the benefit of the presumption of innocence. That is a fundamental change in circumstances. He is facing a significant sentence of imprisonment.

3- What general considerations should be considered when determining whether or not to maintain or curtail the convicted person's bail?

[72] As a starting point, I agree wholeheartedly that a judge should make the determination of whether to maintain or curtail a convicted person's bail in a reasoned and just manner, including a sufficient level of procedural fairness. On the other hand, the trial judge is uniquely positioned, to make such decisions as a result of having heard the trial, and upon due consideration to the likely range of sentence options.

[73] Thus arises the question of what general considerations should factor into the judge's reasoning?

[74] Bail pending appeal is the closest statutory equivalent language to be of assistance in relation to the post-conviction circumstances of an accused who has been on bail, found guilty and is pending sentencing.

[75] That being the case, Justice Moldaver's reasons in *Oland*, supra, constitute a good starting point.

[76] Justice Moldaver stated:

> 1 This appeal provides the Court with an opportunity to consider and clarify the statutory regime in the *Criminal Code*, R.S.C. 1985, c. C-46, which governs bail pending appeal. In particular, we are concerned with the principles and policy considerations by which appellate courts should be guided in deciding whether a person, like the appellant Dennis James Oland, who has been convicted of a serious crime and sentenced to a lengthy term of imprisonment, should be released on bail pending the determination of his appeal against conviction.
>
> 2 The debate in this appeal focuses on the interpretation and application of two relatively brief provisions of the *Code — s. 679(3)* and *s. 680(1).* …
>
> …
>
> ***B. Bail Pending Appeal Under Section 679(3) of the Criminal Code***
>
> *(1) The Three Statutory Criteria*
>
> 19 The three statutory criteria for bail pending appeal are found in s. 679(3) of the *Code*:
>
> > (3) In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
> >
> > (a) the appeal ... is not frivolous;
> >
> > (b) he will surrender himself into custody in accordance with the terms of the order; and
> >
> > (c) his detention is not necessary in the public interest.
>
> The applicant seeking bail bears the burden of establishing that each criterion is met on a balance of probabilities: *R. v. Ponak*, [1972] 4 W.W.R. 316 (B.C. C.A.), at pp. 317-18; *R. v. Iyer*, 2016 ABCA 407 (Alta. C.A.), at para. 7 (CanLII); *R. v. D'Amico*, 2016 QCCA 183 (C.A. Que.), at para. 10 (CanLII); *R. v. Gill*, 2015 SKCA 96, 465 Sask. R. 253 (Sask. C.A.), at para. 14.

20 The first criterion requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not "not frivolous" (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the "not frivolous" test is widely recognized as being a very low bar: see *R. v. Xanthoudakis*, 2016 QCCA 1809 (C.A. Que.), at paras. 4-7 (CanLII); *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132 (Ont. C.A.), at para. 38; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444 (Alta. C.A. [In Chambers]), at paras. 6-8; G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 10-13 to 10-15.

21 The second criterion requires the applicant to show that "he will surrender himself into custody in accordance with the terms of the [release] order" (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.

22 The third criterion requires the applicant to establish that "his detention is not necessary in the public interest" (s. 679(3)(c)). It is upon this criterion that Mr. Oland's bid for bail pending appeal failed — and it is on this criterion that guidance from the Court is sought. In particular, the parties ask this Court for guidance on how the strength of the grounds of appeal from a conviction should be considered in determining whether detention is necessary in the public interest.

(2) The Farinacci Approach to the Public Interest Criterion

23 *In R. v. Farinacci (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), Arbour J.A. (as she then was) considered the meaning of the words "public interest" in the context of s. 679(3)(c). In the course of her careful analysis, she determined that the public interest criterion consisted of two components: public safety and public confidence in the administration of justice (pp. 47-48).*

24 *Justice Arbour did not delve into the public safety component. She found that it related to the protection and safety of the public and essentially tracked the familiar requirements of the so-called "secondary ground" governing an accused's release pending trial* (pp. 45 and 47-48). *The public confidence component*, on the other hand, was more nuanced and required elaboration. *It involved the weighing of two competing interests: enforceability and reviewability.*

25 According to Arbour J.A., the enforceability interest reflected the need to respect the general rule of the immediate enforceability of judgments. Reviewability, on the other hand, reflected society's acknowledgement that our justice system is not infallible and that persons who challenge the legality of their convictions should be entitled to a meaningful review process — one which did not require them to serve all or a significant part of a custodial sentence only to find out on appeal that the conviction upon which it was based was unlawful (pp. 47-49).

26 Almost a quarter of a century has passed since *Farinacci* was decided. The public interest framework which it established has withstood the test of time. It has been universally endorsed by appellate courts across the country: see, e.g., *R. v. Matteo*, 2016 QCCA 2046 (C.A. Que.), at para. 20 (CanLII); *R. v. Sidhu*, 2015 ABCA 308, 607 A.R. 395 (Alta. C.A.), at paras. 5-6; *R. v. Gingras*, 2012 BCCA 467, 293 C.C.C. (3d) 100 (B.C. C.A.) [hereinafter Porisky], at paras. 8 and 14-15; *R. v. Parsons* (1994), 117 Nfld. & P.E.I.R. 69 (Nfld. C.A.), at paras. 30-34. Moreover, all of the parties and interveners in this appeal are content with the *Farinacci* framework. None has spoken against it; none has asked us to revisit it — and *I see no reason to do so. Farinacci remains good law in my view.*

27 In so concluding, **I should not be taken to mean** — nor do I understand *Farinacci* to have said — **that the public safety component and the public confidence component are to be treated as silos**. To be sure, there will be cases where public safety considerations alone are sufficient to warrant a detention order in the public interest. However, as I will explain, **where the public safety threshold has been met by an applicant seeking bail pending appeal, residual public safety concerns or the absence of any public safety concerns remain relevant and should be considered in the public confidence analysis**.

…

(3) **Section 515(10)(c) of the Criminal Code Identifies Factors That Inform the Public Confidence Analysis**

(a) The Rationales for Considering Section 515(10)(c)

31 **In s. 679(3)(c) of the *Code*, Parliament has not provided appellate judges with any direction as to how a release pending appeal order is likely to affect public confidence in the administration of justice. Fortunately, it has done so in the admittedly different but related context of bail pending trial. Under s. 515(10)(c), Parliament has identified four factors that judges may consider in assessing whether a detention order is necessary to maintain public confidence in the administration of justice:**

515 . . .

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

. . . . .

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) **the gravity of the offence**,

(iii) **the circumstances surrounding the commission of the offence**, including whether a firearm was used, and

(iv) **the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or**, in the case of an offence that involves, or whose subject-matter is, a firearm, **a minimum punishment** of imprisonment for a term of three years or more.

32 **While these factors are tailored to the pre-trial context, a corollary form of the interest underlying each exists in the appellate context. In my view, these same factors — with appropriate modifications to reflect the post-conviction context — should be accounted for in considering how, if at all, a release pending appeal order is likely to affect public confidence in the administration of justice.**

33 **Approaching the matter this way advances an important policy consideration. It has the virtue of promoting consistency and harmony between the trial and appellate contexts so that, together, they may be seen as providing a cohesive and comprehensive statement of the law governing bail in Canada. Importantly, it accords with the basic principle that, in general, bail should not be more readily accessible for someone who has been convicted of a crime than for someone who is awaiting trial and is presumed innocent**. Approaching the two contexts in that fashion can only serve to foster the goals of fairness and coherence and enhance society's confidence in the administration of justice.

34 Greater accessibility to bail pending trial is rooted in the presumption of innocence. Accused persons charged with an offence in Canada are presumed to be innocent, and they remain so unless and until their guilt is proved beyond a reasonable doubt. With this in mind, the framers of the *Canadian Charter of Rights and Freedoms* saw fit to include in s. 11(*e*) the right of every person charged with an offence "not to be denied reasonable bail without just cause": *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309 (S.C.C.), at para. 13.

35 By contrast, **once a conviction is entered, the presumption of innocence is displaced and s. 11(*e*) of the *Charter* no longer applies.** This is reflected in the shift in onus which occurs when a person who has been convicted and sentenced applies for bail pending appeal. Unlike the pre-trial context, where by and large the onus rests on the Crown to establish that an accused should be detained in custody, for appeal purposes, Parliament has seen fit to reverse the onus onto the applicant in all cases.

[My bolding and italicization added]

[77] Regarding the "public interest" factor, I should include therein a consideration of concerns including the public safety and public confidence in the administration of justice generally, as well as consideration of the concerns of and in relation to, the victim and others, including, possibly counsel, family or witnesses involved in this prosecution.

[78] It is important to consider the perspectives of victims in such cases – see also the *Canadian Victims Bill of Rights*, SC 2015, c.13, s. 2; sections 9, 14, 15 and 19(1) - which on sentencings are also statutorily confirmed, as "victim impact statements" in s. 722 of the *Criminal Code*.

4- An application of these principles to the circumstances of AMB

[79] Should I maintain or curtail AMB's present bail?[12]

[80] As the court's reasons suggested in *Friesen,* supra, an appropriate consideration for me is the ongoing concern arising from the likelihood of potential significant ongoing harm to the victims, SM and JM:

[12] Presuming that I had the authority to modify bail as opposed to merely choosing between AMB's existing bail and remanding him. I would still decide to remand him. I bear in mind that in *Oland,* although it is the closest statutory equivalent to the circumstances of AMB, *the relevance of s. 515 CC factors in that scenario also expressly arise but only from the statutory language in s. 679(7.1) CC* (bail pending appeal) - which assigns to a judge of the Court of Appeal *after a conclusion of an appeal ordering a new trial* that that judge apply the law pursuant to section 515 or 522 "as though that person were charged with the offence for the first time,". I point out that Parliament had an opportunity to make similar references to s. 515 factors in s. 523(1), as they did in s. 523(2), but it did not.

55 These developments are connected to a larger shift, as society has come to understand that the focus of the sexual offences scheme is not on sexual propriety but rather on wrongful interference with sexual integrity. As Professor Elaine Craig notes, "**This shift** from focusing on sexual propriety **to sexual integrity enables greater emphasis** on **violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem** rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)" (*Troubling Sex: Towards a Legal Theory of Sexual Integrity* (2012), at p. 68).

56 **This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm** that, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, "may often be more pervasive and permanent in its effect than any physical harm" (p. 81).

57 **A number of this Court's decisions provide insight into these forms of harm**. In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, L'Heureux-Dubé J. emphasized the emotional trauma that the nine-year old complainant experienced from sexual violence (pp. 439-42). Similarly, in *McDonnell*, McLachlin J. (as she then was) stressed the emotional harm of "the violation of the child victim's integrity and sense of self-worth and control over her body" that the child victim experienced as a result of being sexually assaulted while sleeping (para. 111). The likely result of the sexual assault would be "shame, embarrassment, unresolved anger, a reduced ability to trust others and fear that ... people could and would abuse her and her body" (para. 113).

58 **These forms of harm are particularly pronounced for children**. Sexual violence can interfere with children's self-fulfillment and healthy and autonomous development to adulthood precisely because children are still developing and learning the skills and qualities to overcome adversity (*Sharpe*, at paras. 158, 184-85 and 188, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; G. Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at s. 12.64). **For this reason, even a single instance of sexual violence can "permanently alter the course of a child's life**" (*Stuckless (2019)*, at para. 136, per Pepall J.A.). As Otis J.A. explained in *L. (J.-J.)*, at p. 250:

> …
>
> (ii)Relational Harm: Damage to Children's Relationships With Their Families and Communities
>
> 60 Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers. Because much sexual violence against children is committed by a family member, the violence is often accompanied by breach of a trust relationship (*R. v. D.R.W.*, 2012 BCCA 454, 330 B.C.A.C. 18, at para. 41). …

> 61 The ripple effects can cause children to experience damage to their other social relationships. Children may lose trust in the communities and people they know. They may be reluctant to join new communities, meet new people, make friends in school, or participate in school activities …
>
> (iii)Harm to Families, Communities, and Society
>
> 62 The *Criminal Code* recognizes that the harm flowing from an offence is not limited to the direct victim against whom the offence was committed. Instead, the *Criminal Code* provides that parents, caregivers, and family members of a sexually victimized child may be victims "in their own right" who are entitled to present a victim impact statement (B. Perrin, *Victim Law: The Law of Victims of Crime in Canada* (2017), at p. 55; see also *Criminal Code*, ss. 2 ("victim") and 722).
>
> 63 The ripple effects of sexual violence against children can make the child's parents, caregivers, and family members secondary victims who also suffer profound harm as a result of the offence. Sexual violence can destroy parents and caregivers' trust in friends, family, and social institutions and leave them feeling powerless and guilty (*R. v. C. (S.)*, 2019 ONCA 199, 145 O.R. (3d) 711, at para. 6; *Rayo*, at para. 39; *D. (D.)*, at para. 13). The harm to parents' relationship with their children can also be profound. …
>
> …
>
> (v)Disproportionate Impact on Girls and Link to Violence Against Women
>
> 68 Sexual violence also has a disproportionate impact on girls and young women. Like the sexual assault of adults, sexual violence against children is highly gendered (*Goldfinch*, at para. 37). …

[81] I also consider that, by my reasons on conviction, I have in effect concluded beyond a reasonable doubt that AMB was not truthful when he testified. This factor will not influence the sentencing, but is relevant to the issue of continued bail.

[82] The Supreme Court of Canada's reasons in *Friesen* are relevant to this sentencing. It is unusual to receive such explicit sentencing direction from that court.

[83] A reliable summary of the court’s reasons regarding such sentencings follows:

> **A national starting point or sentencing range for sexual offences against children should not be created by the Court.** The appropriate length and the setting of sentencing ranges or starting points are best left to provincial appellate courts. **Nonetheless, to ensure that sentences for sexual offences against children correspond to Parliament's legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes, guidance on three specific points is required.**
>
> **First**, upward departure from prior precedents and sentencing ranges should occur for sexual offences against children because Parliament increased the maximum sentences for these offences and because society's understanding of the gravity and harmfulness of these offences has deepened. Courts are justified in departing from dated precedents that do not reflect society's current awareness of the impact of sexual violence on children in imposing a fit sentence. There is concern about sentencing ranges based on precedents that appear to restrict sentencing judges' discretion by imposing caps on sentences that can only be exceeded in exceptional circumstances. Sexual offences against children can cover a wide variety of circumstances and appellate guidance should make clear that sentencing judges can respond to this reality by imposing sentences that reflect increases in the gravity of the offence and the degree of responsibility of the offender. Imposing proportionate sentences will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. **Mid-single digit penitentiary terms for sexual offences against children are normal and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances.** A maximum sentence should be imposed whenever the circumstances warrant it.
>
> **Second**, sexual offences against children should generally be punished more severely than sexual offences against adults, as Parliament has determined by clear indication in the Criminal Code. Accordingly, provincial appellate courts are directed to revise and rationalize sentencing ranges and starting points where they have treated sexual violence against children and sexual violence against adults similarly.
>
> **Third**, treating the offence of sexual interference with a child as less serious than that of sexual assault of a person under the age of 16 is an error of law. Parliament has established the same maximum sentences for both offences. The elements of the offences are also similar, and a conviction for sexual assault of a child and for sexual interference with a child can frequently be supported on the same factual foundation.
>
> **In order to promote the uniform application of the law of sentencing, the following non-exhaustive significant factors to determine a fit sentence for sexual offences against children must be considered. First**, the higher the offender's risk to reoffend, the

> more the court needs to emphasize the sentencing objective of separating the offender from society to protect vulnerable children from wrongful exploitation and harm. **Second**, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child. Any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence, and it also increases the offender's degree of responsibility. **Third**, sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime and the offender's increased degree of responsibility. **Fourth**, the age of the victim is also a significant aggravating factor because children who are particularly young are even more vulnerable to sexual violence. The moral blameworthiness of the offender is enhanced in such cases. **Fifth**, defining a sentencing range based on the specific type of sexual activity at issue poses several dangers. In particular, courts must be careful to avoid the following errors: attributing intrinsic significance to the occurrence or non-occurrence of sexual acts based on traditional notions of sexual propriety; assuming that there is correlation between the type of physical act and the harm to the child; failing to recognize the wrongfulness of sexual violence in cases where the degree of physical interference is less pronounced; and understanding the degree of physical interference factor in terms of a type of hierarchy of physical acts. **Sixth**, a child's participation is not a mitigating factor, nor should it be a legally relevant consideration at sentencing. In particular, a child's non-resistance should not be equated to "de facto consent"; a victim's participation should not distract the court from the harm that the victim suffers as a result of sexual violence; a breach of trust or grooming that led to the victim's participation is an aggravating factor; and adults always have a responsibility to refrain from engaging in sexual violence towards children.

[84] This summary reasonably leads me to conclude that AMB is facing a possible sentence in the range of “mid – single digit to upper single digit penitentiary terms”. The Crown is seeking a sentence in that range.

[85] AMB’s sentencing is scheduled for August 29, 2022. I note he is entitled to presentence custody credit per s. 719(3) and (3.1); see *R. v. Carvery*, 2014 SCC 27 and *R. v. Summers*, 2014 SCC 26.

[86] The Crown requests AMB be remanded.

[87] AMB's plan for continued bail was to make only a modest modification to clause (e) of his Release Order which reads:

> Do not have any contact or communication, directly or indirectly, with, nor be in the presence of, any person you know to be, will who reasonably appears to be, under the age of 17 years of age, except:
>
> - in the immediate physical presence of your surety, [NB]
> - through legal counsel; or
> - incidental contact while in attendance at court.

[88] AMB's counsel noted that the Department of Community Services has also itself placed restrictions on his interactions with young persons.

[89] I keep in mind that AMB has been on conditions since January 15, 2020, without incident – although there are allegations outstanding of breaches of clause (e) on three occasions, which I understand arose approximately one year earlier, but only recently came to the attention of the authorities. They are not alleged to have involved SM or JM.

[90] I note that the victim SM is young and was vulnerable.

[91] She testified, and I infer, that she was afraid of AMB at the time the offences were occurring (July 2018 – January 2020), at the time she gave her statement to police (January 2020), and at the time she testified (May 2022). I infer she remains afraid of AMB.

[92] AMB does not have a prior criminal record, however this is not a significant mitigating sentencing factor in a relation to specific deterrence, for sentencings of offences such as these, as general deterrence is the focus-at paragraph 10, *R. v. GOH*, 148 NSR (2d) (341) (CA), [1996] NSJ No. 61.

[93] The nature and circumstances of the offences are both serious, as detailed in my conviction decision - 2022 NSSC 169.

[94] There was no information presented to the Court about what have been his personal circumstances since January 2020, which might support a continuation of his existing bail.

[95] After conviction, he is now knowingly facing a significant sentence of imprisonment: see *Friesen* (and *R. v. SJM*, 2021 NSSC 235 at paras 53-91, albeit a different factual matrix).

[96] While AMB attended all court appearances and did not commit any further offences before he was found guilty on June 14, 2022, I am now less confident that he will continue to abide by his conditions of release, including appearing for his sentencing.

[97] Regarding the “public interest”, notionally including the sub-headings of “public safety” and “public confidence in the administration of justice”:

1. I consider that AMB's offences were ongoing for approximately two years (2018-2020), and as step-parent since she was 2 years old, to the young victim (9-10 years old), who was in his care, and they constituted a gross violation of the trust of the victim and her mother. I infer that they will feel significantly safer pending sentence with AMB in custody;

2. I conclude that a reasonable and informed public observer would accept as reasonable, and it would therefore confirm their confidence in the administration of justice, if I curtail his liberty entirely, pending his sentencing.

[98] As stated earlier, in my view I only have a choice between continuing his existing bail or remanding AMB.

[99] Even if I had the view that I could modify his bail and make it more restrictive, in these circumstances, I would still have remanded AMB.[13]

Conclusion

[13] I also keep in mind that AMB indicated verbally in court on July 6, 2022, that he was prepared to undergo a sex-offender assessment which is to be made available for his sentencing on August 29, 2022.

[100] AMB is remanded into custody pending his sentencing, with the direction that he have no contact directly or indirectly with SM or JM.

Rosinski, J.