SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Riley*, 2022 NSSC 227

Date: 20220630
Docket: 502058
Registry: Halifax

Between:

Her Majesty the Queen

v.

Randy Desmond Riley

DECISION ON BAIL VARIATION

Judge: The Honourable Justice Joshua Arnold

Heard: June 28, 2022, in Dartmouth, Nova Scotia

Oral Decision: June 30, 2022

Written Decision: August 10, 2022

Counsel: Peter Craig, Q.C. and Stephen Anstey, for the Crown
Trevor McGuigan and Keiisha-Anne Pillai, for Randy Riley

Overview

[1] Randy Riley is currently subject to a release order while awaiting trial for second-degree murder and unauthorized possession of a firearm. Due to a Crown disclosure issue his trial was adjourned from June 2022 to September 2023. Mr. Riley says the trial delay caused by the Crown is a material change in circumstances and he wants his release conditions varied to remove ankle bracelet monitoring. He also wants his house arrest changed to a curfew. The Crown agrees that there has been a material change in circumstances, and that the ankle bracelet monitoring can be removed from Mr. Riley's release conditions. The Crown opposes any other changes, however, including changing house arrest to a curfew.

Background

[2] Chad Smith was shot and killed while delivering a pizza. Randy Riley and Nathan Johnson were each charged with first-degree murder, pursuant to s. 235 of the *Criminal Code*, and unauthorized possession of a firearm, pursuant to s. 92(1).

[3] Both accused applied successfully for severance (2014 NSSC 462). Mr. Johnson's trial went first. The Crown theory was that Mr. Riley shot Chad Smith and that Mr. Johnson was a party to the murder by helping Mr. Riley plan the murder, luring Mr. Smith to the area where he was shot, and then helping Mr. Riley dispose of the gun and other evidence. Mr. Johnson was convicted by a jury of first-degree murder. His conviction was upheld on appeal (2017 NSCA 64). Mr. Riley was convicted by a jury of second-degree murder and unlawful possession of a firearm. His appeal at the Nova Scotia Court of Appeal was denied (2019 NSCA 94), but he appealed to the Supreme Court of Canada and a re-trial was ordered (2020 SCC 31).

[4] Kaitlin Fuller was Nathan Johnson's girlfriend at the time of the homicide. She knew Mr. Riley and spoke to him after the shooting. Ms. Fuller testified for the Crown at Mr. Johnson's trial and at Mr. Riley's first trial. She has since provided a new statement to the police which includes additional inculpatory evidence against Mr. Riley. Ms. Fuller entered the Witness Protection Program, then left the WPP, and recently returned to it. Full details of Ms. Fuller's participation with the WPP has yet to be disclosed to Mr. Riley and his trial was therefore adjourned from June 2 – 29, 2022, to September 5 – October 25, 2023.

[5] As noted above, Chad Smith was killed in 2010. Mr. Riley was arrested for the murder in 2013. He was remanded, then convicted and sentenced, then remanded again following his successful appeal to the Supreme Court of Canada. He remained remanded in custody until March 12, 2021, when he was released on the conditions he now wishes to vary (2021 NSSC 90).

Jurisdiction

[6] The jurisdiction for a variation of a release order for an individual charged with murder, a s. 469 designated offence, is found at s. 523(2) of the *Criminal Code*, which states:

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

[7] In *R. v. Hardiman*, 2003 NSCA 17, Cromwell J.A. (as he then was) explained for the court that if the Crown agrees then the variation application can be heard at the trial level:

> **11** Section 523 has three important elements for present purposes. First, it provides that a recognizance entered into by an accused such as Ms. Hardiman remains in force subject to its terms until her trial is completed. Second, it sets out in section 523(2), a mechanism to vacate a release order previously made and to make any other order for the detention or release of the accused. Finally, the section specifies when and by whom this may be done. For the purposes of the present case, and subject to the power of review by the Court of Appeal under s. 680, the authority is conferred only on a judge of the Supreme Court and only in two situations. The section confers authority on the court or judge "... before whom an accused is being tried ..." (s. 523(2)(a), emphasis mine) or, on a judge of the Supreme Court without restriction except that the prosecutor must consent to the change: s. 523(2)(c). <u>It follows, therefore, that if, as in Ms. Hardiman's case, the accused is not "being tried" at the time of the application to vary conditions, the application may be made only with the consent of the prosecutor.</u> (There is no dispute that Ms. Hardiman was not "being tried" at the time of her application to vary the conditions and it is therefore not necessary to address the authorities concerned with defining exactly when an accused is "being tried" for the purposes of s. 523.) [Emphasis added.]

[8] In *R. v. Patterson*, 1985 ABCA 73, Kerans J.A., for the court, explained the jurisdictional considerations for a review of a release condition on a murder charge following a change in circumstances. Justice Kerans said:

> **13** In sum, the combined effect of s. 457.7 and s. 457.8 C.C.C. is to forbid bail-shopping. But s. 457.7(2.2) and s. 608.1 preserve review by appeal in a case where error is alleged and s. 458.8(2) C.C.C. preserves review by a new application in a case where new circumstances are alleged.
>
> ...
>
> **15** We are told that some say that I would put too broad a meaning on the words "court, judge or justice before whom the accused ... is to be tried". It is said that these words describe only the very judge who will preside over the trial of the accused. That interpretation, with respect, runs counter to the sense of the full wording of s. 457.8(2)(a) C.C.C., which speaks of "the court, judge or justice before whom an accused is being or is to be tried". This covers both between the judge presiding at the actual trial and any judge of a court who might so preside.
>
> ...
>
> **17** One problem remains. Section 457.8 (2)(a) might not apply, in a case to which s. 457.7 applies, until an indictment is preferred. Indeed, in some cases it would be impossible to determine which court is the court before whom the accused "is to be tried" until at least the election by the accused and until the Crown has decided in which court it will prefer the indictment. On the other hand, in a case of murder there is no question but that the accused, if he is to be tried at all, will be tried in a superior court. Depending on the nature of the charge,

> therefore, the powers under s. 457.8(2) might exist from the day of committal or from the day that the indictment is preferred.
>
> **18** The problem is that this leaves a gap. At the very least, no new application could be made until after the committal for trial. Two procedures cover this gap. The first is to do what was done here, which is not satisfactory because it deprives the parties of a review by appeal. The second is for the Crown to consent to a hearing before a superior court judge on invocation of s. 457.8(2)(c) C.C.C. That subsection triggers a power of re-hearing to any judge "presiding in a superior court", in the case of those offenses enumerated in s. 457.7, provided that both the Crown and accused consent. I would expect that the Crown would not unreasonably withhold such consent, because the only effect of so doing would be to force the accused to appear before the Chief Justice. To withhold consent without reason would open the Crown itself to the criticism of forum-shopping.

[9] In the instant case the Crown consents to my hearing Mr. Riley's variation application on the basis that there has been a material change in circumstances.

Facts on the variation application

[10] Mr. Riley called one witness on the variation application, Dr. OmiSoore Dryden, a professor at Dalhousie University. The Crown called no evidence. Dr. Dryden testified at the original release hearing. Her testimony from that court appearance is summarized in the original release decision.

[11] Dr. Dryden provided a letter in support of the current variation application, which states:

> Dear Trevor McGuigan,
>
> For the past year Mr. Randy Riley has been working as my research assistant, and due to the success of his work and our productive working relationship, I have extended his contract for another year. However, we have some challenges with Mr. Riley's limited mobility, specifically, his inability to travel to campus without his surety.
>
> I am writing in support of relaxing Mr. Riley's ability to travel. Specifically, I am requesting that Randy receive permission for increased his personal mobility so that he is able to work on the Dalhousie campus.
>
> I've established a working group for all my research assistants which meets on campus bi-weekly. This working group provides peer support amongst research assistants as they engage and progress with their various research projects. I meet

> with the working group monthly in my office and then they meet on their own in either the Killam Library or the Kellogg Health Sciences Library.
>
> In addition to these bi-weekly hourly meetings, it is expected that Mr. Riley will be on campus, up to three times a week working in the libraries and connecting with research librarians. Mr. Riley's contract outlines he is to work up to 15 hours per week, and it is expected he will spend between 5-10 hours per week on campus.
>
> I hope that this change will granted and look forward to learning about next steps.
>
> Best,
>
> Dr. OmiSoore Dryden
>
> [As appears in original]

[12] Despite the contents of that letter, it became clear during Dr. Dryden's testimony that:

- The monthly meetings she referenced in her March 28, 2022, letter, did not take place;
- In the 18 months Mr. Riley has been on release conditions, he has never attended at Dalhousie University, even though he was permitted to do so in the company of his surety;
- The one in-person meeting he scheduled with Dr. Dryden at Dalhousie was cancelled by Mr. Riley due to the unavailability of the surety to travel with him, and Dr. Dryden had to eventually attend at Mr. Riley's residence to conduct the meeting;
- All of Mr. Riley's work to date has been virtual;
- Following COVID interruptions, academia is now moving back toward in-person research, meetings, work and education;
- Dr. Dryden says that being exposed to peer review, community-based research and group meetings would improve the quality of Mr. Riley's research;
- There is a nominal amount of Mr. Riley's actual research work that needs to be conducted in person. Nonetheless, it would be beneficial for Mr. Riley to work at Dalhousie in-person in order to be able to communicate with library staff, archival staff, and collaborate with

other researchers and Dr. Dryden, since conducting the research is constrained if done virtually;

- The buildings Mr. Riley would need access to for employment purposes include: Collaborative Health Education Building (CHEB) (5793 University Avenue, Halifax); Kellogg Library (5850 College Street, Halifax); Killam Library (6225 University Avenue, Halifax); Nova Scotia Archives (6016 University Avenue, Halifax); and Tupper Building (5850 College Street, Halifax)

[13] Dalhousie University and Dalhousie University Security are aware that Mr. Riley may be attending the campus as part of his employment, and are agreeable to Mr. Riley attending campus for that purpose. The Crown told the court that they had contacted Dalhousie University and Dalhousie University Security and both of those entities confirmed their awareness of Mr. Riley as an employee of Dalhousie and confirmed that they have no objection to his attending the specifically identified buildings on campus for work purposes, if ordered by the court.

Analysis

[14] Between his remand for arrest in 2013, his custodial sentence following conviction in April 2018, and remand again in November 2020 following his successful appeal, Mr. Riley was in custody between 2013 and 2021. Since his release on house arrest in March 2021, a period of some 15 months, there have been no breaches of his release order.

[15] Crown and defence agree that Mr. Riley has a job as a researcher working for Dr. Dryden, and that Dalhousie University and Dalhousie University Security are content with Mr. Riley exclusively attending the specific buildings where his research will be conducted, or attending meetings with the research team and/or Dr. Dryden. Dr. Dryden identified the designated buildings in her testimony.

[16] At the original show cause hearing, the secondary and tertiary grounds were of significance, but could be satisfied with strict release conditions. The same factors relating to the secondary and tertiary grounds exist now as did at the time of the original show cause hearing. However, the trial has been delayed for 15 months as the result of non-disclosure directly attributable to the Crown. In the meantime, Mr. Riley has been abiding by the strict release conditions for 15 months. He has employment that lends itself to his attending at Dalhousie University in-person at designated hours and locations. He has not been able to

attend to personal needs without traveling in the company of his surety since his release in March 2021.

[17] Mr. Riley proposed GPS ankle bracelet monitoring at his original bail hearing. During submissions, Mr. McGuigan confirmed that if the court was not comfortable allowing Mr. Riley out of his home without a surety and without GPS ankle bracelet monitoring, he would amend his position and agree to maintain ankle bracelet monitoring. He said that Mr. Riley would be content to maintain GPS ankle bracelet monitoring if he was allowed to attend his employment at Dalhousie and to leave his home for personal needs without having to rely on his sureties to accompany him.

[18] Considering the secondary and tertiary grounds, if Mr. Riley's house arrest conditions are going to be amended to allow him to travel to work without a surety for four hours, twice per week, and to travel for personal needs without a surety once per week for four hours, the deterrent and security of a GPS ankle bracelet is still required.

Conclusion

[19] Mr. Riley's release order will be slightly amended to reflect his ability to leave his home for employment and personal needs. He will still be subject to all of the original conditions, including GPS ankle bracelet monitoring, notifying the police of his intention to leave his house in advance of leaving, and advising them where and when he is going, and to otherwise remain on house arrest, unless in the company of his sureties, subject to the other very limited exceptions. His new release order will be as follows:

1. Keep the peace and be of good behaviour.
2. Attend court as and when directed.
3. Reside with your surety, Elizabeth Riley-Drummond, at 239 Montague Road, Lake Loon.
4. Remain within the province of Nova Scotia.
5. Have no direct or indirect contact or communication with Paul Smith, Kaitlin Fuller, Nathan Johnson, Louise Smith, Mason Borden, Garth McIntosh, Donald Manning, David Bryant, and Kevin Cresswell, except through a lawyer.
6. Do not possess, use or consume any alcoholic beverages, and do not possess, use or consume a controlled substance as defined by the *Controlled*

Drugs and Substances Act, except in accordance with a physician's prescription for you or legal authorization.

7. Not to have in your possession any firearm, cross-bow, prohibited weapon, restriction weapon, prohibited device, ammunition or explosive substance.

8. Reside under house arrest, confined to the property at 239 Montague Road, Lake Loon, with the following exceptions:

(a) When dealing with a medical emergency or attending a medical appointment involving you or a member of your household, and travelling to and from by a direct route;

(b) When attending a scheduled appointment with your legal counsel and travelling to and from the appointment by a direct route;

(c) When attending court at a scheduled appearance or under subpoena, and travelling to and from court by a direct route;

(d) When in the immediate company of one of your sureties.

(e) You do not need to be in the company of your sureties between the hours of 11:30 a.m. and 4:30 p.m. on Tuesday and Thursday each week, for the purpose of traveling to, working at, and returning from the following locations, all travel via the most direct route:

- Collaborative Health Education Building (CHEB) (5793 University Avenue, Halifax)
- Kellogg Library (5850 College Street, Halifax)
- Killam Library (6225 University Avenue, Halifax)
- Nova Scotia Archives (6016 University Avenue, Halifax)
- Tupper Building (5850 College Street, Halifax)

(f) You do not need to be in the company of your sureties between the hours of 12:00 p.m. and 4:00 p.m. on Saturday each week, for the purpose of attending to personal needs.

9. Notify the Halifax Regional Police at 902-490-5016 when leaving the property for any of the identified house arrest exceptions.

10. Prove compliance with the house arrest condition by presenting yourself at the entrance of your residence should a peace officer attend there to check compliance.

11. You shall, at your own expense, be subject to GPS monitoring by Recovery Science Corporation (RSC), which shall include:

(a) Entering into RSC's Participant Agreement and complying with those terms;

(b) Wearing RSC's GPS monitoring device at all times;

(c) Permitting RSC to install supplementary equipment and to inspect, replace, and maintain equipment as it deems necessary;

(d) Complying with RSC leave notification and battery charging requirements; and

(e) Cooperating fully with RSC staff.

12. Notwithstanding any order terminating or varying these terms, you shall continue to abide by the house arrest terms until RSC confirms that it has received notice of the termination or variation of Condition 11 directly from the Crown, police, or court staff.

13. RSC shall create login credentials for the Halifax Regional Police to enable them to view your current and historical GPS location information directly at any time.

14. Report by telephone every Wednesday, between 9 a.m. and 5 p.m., to the Halifax Regional Police at (902) 233-6628.

15. Surrender your passport, if you have one, with the Supreme Court of Nova Scotia located at 1815 Upper Water Street, Halifax, NS, and do not apply for a passport while on bail.

Arnold, J.