Citation: *R. v. McGinnis*, 2021 YKTC 16

Date:20210519
Docket: 20-00261
20-00405B
20-00405C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

LEONARD (LEN) KENNETH LAWRENCE MCGINNIS

Appearances:
Sarah Bailey — Counsel for the Crown
Kelly Labine — Counsel for the Defence

RULING ON APPLICATION

[1] Crown counsel has brought an application pursuant to s. 524 to revoke Mr. McGinnis' process and have him before the Court for show cause to determine whether or not he should be released.

History

[2] Mr. McGinnis was arrested and charged with having committed offences contrary to ss. 354(1)(a), 117.01(1) x 2, 88(1), 91(2) and 86(2) of the *Criminal Code*. These matters were first before the Court on July 15, 2020 on Information 20-00261. Mr. McGinnis was released by consent on that date.

[3] Mr. McGinnis was again before the Court on August 28, 2020 on further charges contrary to ss. 117.01(1) x 2, 145(5)(a), 86(1) x 2, 92(2), 94(2) x 3 and 95(b), on Information 20-00405. Information 20-00261 was also before the Court on that date. A s. 524 application was made and the order granted.

[4] Mr. McGinnis was released on consent on September 14, 2020. The surety on Mr. McGinnis' release was Tony Fok.

[5] Mr. McGinnis was again before the Court on October 1, 2020 on a s. 145(3) charge on Information 20-00405A. He was released by consent and his Release Order was varied. A stay of proceedings was entered on this charge on October 28, 2020.

[6] On November 23, 2020, Crown counsel filed a Notice of Application to revoke Mr. McGinnis' Release Order pursuant to s. 524(2)(a). This Application was in respect of Informations 20-00261, 20-00405, 20-00405B and 20-00405C. Mr. McGinnis was not in custody on that date.

[7] The 20-00405C Information alleged the commission on November 4, 2020 of a s. 145(5)(a) breach of the curfew condition of Mr. McGinnis' Release Order.

[8] On November 25, 2020, the Crown indicated their intention to proceed on replacement Information 20-00405B, which replaced Information 20-00405. Information 20-00405 was then withdrawn. Process was transferred to the 20-00405B Information.

[9] On December 3, 2020, at Fix Date Court, the s. 524 application to revoke prior process upon which Mr. McGinnis had been released was set over for hearing to December 14, and December 16, 2020. Judgment was reserved until

December 18, 2020. Oral judgment was rendered on that date with written Reasons to follow.

[10] The Crown's application to cancel prior process was premised on the allegation of breach of curfew on November 4, 2020.

[11] The allegation was that at 4:45 a.m. Cst. Cook observed a car parked on Chilkoot Way in Whitehorse. A person, subsequently identified as being Mr. McGinnis, was noted to be standing outside of this car. The license plate was noted to be tied onto the back of the vehicle with a rope. The license plate was not registered to this car. Mr. McGinnis' surety was not observed to be in the vicinity.

[12] At that time, Mr. McGinnis was bound by a condition on his Release Order that stated:

> You must abide by a curfew by being inside your residence or on the property at 124 Copper Road, Whitehorse, YT, between 10:00 p.m. and 7:00 a.m. daily. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition.

[13] Mr. McGinnis was released on a Promise to Appear by Cst. Cook.

Issue

[14] The issue before me is whether Mr. McGinnis, having been arrested and released by Cst. Cook on November 4, 2020 on an allegation of a breach of his Release Order, can, on a subsequent application by the Crown prosecutor, and without any new charges being brought, be compelled to appear before me for a s. 524(1)(b) hearing.

[15] In other words, does the phrase “the accused has been arrested…” in s. 524(2)(a), require that the accused “has been arrested” and remains in custody pursuant to that arrest, or does it allow for circumstances where an accused “has been arrested” and released.

Positions of Counsel

[16] Crown counsel submits that the decision by Cst. Cook to release Mr. McGinnis on the November 4, 2020 breach charge does not preclude the Crown from subsequently seeking to have Mr. McGinnis’ prior process revoked as a result of that same breach allegation.

[17] If an accused has been arrested and released, he or she still “has been arrested” for the purposes of an application being made under ss. 524(1), (2), (3) and (4).

[18] Counsel for Mr. McGinnis submits that once Cst. Cook released Mr. McGinnis as a result of the November 4, 2020 breach allegation, a s. 524(1)(a) application cannot be made in the absence of a new arrest for an unrelated matter, or new circumstances where it would appear that Mr. McGinnis was about to contravene the process he was bound by, or by further arrest of Mr. McGinnis on a public interest warrant.

Legislation

[19] Section 524(1), (2) and (3) of the *Code* read:

> (1) When an accused is taken before a justice in any of the circumstances described in subsection (2), the justice shall
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> > (a) if the accused was released from custody under an order made under subsection 522(3) by a judge of the superior

> court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court so that the judge may hear the matter; or
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> (b) in any other case, hear the matter.
>
> (2) The circumstances referred to in subsection (1) are the following:
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> (a) the accused has been arrested for the contravention of or having been about to contravene, a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section; or
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> (b) the accused has been arrested for having committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section.
>
> (3) The judge or justice who hears the matter shall cancel a summons, appearance notice, undertaking or release order in respect of the accused if the judge or justice finds that
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> (a) the accused has contravened or had been about to contravene the summons, appearance notice, undertaking or release order; or
>
> (b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to the summons, appearance notice, undertaking or release order.

Analysis

[20] At the outset, the Crown elected to proceed by summary conviction, therefore subsection 2(b) and 3(b) do not apply.

[21] There is considerable commentary and case law under the previous legislation that seems to indicate or imply that an accused has to be detained in custody in order for a s. 524 application to be brought.

[22] I note that Koturbash J. in *A Guide to Conducting Bail Hearings in Canada*, (Canada: LexisNexis Canada, 2020) states at §14.36:

> As noted earlier, a formal arrest pursuant to section 524 is not required. All that is needed is that the accused be in custody pursuant to an arrest, and that the accused has adequate notice of the Crown's application.

[23] In ***R.*** v. ***Yarema*** (1989), 52 C.C.C. (3d) 242 (Ont. H Ct. J.) Watt J. stated in paras. 41 and 42:

> 41 …The review mechanism of the section cannot become engaged otherwise than by the appearance of the accused being compelled by his or her warranted or non-warranted arrest under s-ss. (1) or (2), as the case may be, for alleged misconduct whilst at liberty on judicial interim release. Where the basis upon which the accused appears before a justice is otherwise than as just described, the review procedure of s. 524 cannot be invoked.
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> 42 Section 524 does not appear applicable where the alleged misconduct of an accused has been made the subject of a discrete charge, whether of a failure to comply with a release form or a substantive offence, and the prosecutor seeks detention or the accused release with respect thereto. The purpose of s. 524, as it would appear to me, is to permit and provide a mechanism for re-examination of judicial interim release status of an accused in light of allegations of misconduct, not necessarily amounting to an offence, said to have occurred whilst the accused was on judicial interim release in respect of an earlier offence. Where cause is shown, it is the original release form which is cancelled or varied upon review. Any new order relates to the charge upon which the accused was originally released. Where no finding of misconduct is made, s-ss. (7) or (11), whichever is applicable, require the judge or justice to order the accused released from custody. The fact that no form of release is indicated (specified) as applicable in the circumstances just described, in my respectful view, provides further support for the view that s. 524 hearings are limited to cases in which the arrest of an accused under a s-s. (1) warrant or without warrant under s-s. (2) does not result in or is not accompanied by the laying of an Information charging discrete criminal offences said to arise from such misconduct.

[24] In a case under the previous version of s. 524, ***R.*** v. ***Judd***, 2016 ONCJ 781, Nakatsuru J., stated at paras. 19 and 24 that a "re-arrest" was not required to engage s. 524, so long as the accused was properly before the Court, and further said in para. 24:

> …Indeed, a s. 524 application could be brought when the accused is out of custody. For example, such may be the case where the accused has already been released on his new charges or if his new charges have already been disposed of. …

[25] Nakatsuru J. noted in paras. 21 and 22 that the Court of Appeal in ***R.*** v. ***Yarema*** (1991), 53 O.A.C. 387, somewhat limited the scope of Watt J.'s reasoning.

[26] This was further supported by Fregeau J. in ***R.*** v. ***Ramage***, 2011 ONSC 3092 at para. 49, where he stated:

> 49 The Ontario Court of Appeal agreed with Watt J. that, in these specific circumstances, given the absence of any intention on the part of the Crown to invoke the procedure set out in s. 524, the justice of the peace had the requisite jurisdiction under s. 515 of the *Code* to conduct a show cause hearing in respect of the charges under s.145 of the *Code*. The Court of Appeal further held, at para. 21:
>
> > ... that the exercise of jurisdiction by the justice of the peace in conducting a judicial interim release hearing with respect to the discrete charge laid against an accused released by order of a judge of a superior court of criminal jurisdiction does not thereafter preclude resort to s. 524 and a review by a judge of that court of the antecedent judicial interim release.
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> *Yarema* is authority for the proposition that sections 515 and 524 of the *Code* are not mutually exclusive. I conclude *Yarema* is not authority for the proposition that an arrest under either s. 524(1) or (2) is a condition precedent to the bail revocation procedure of s. 524(8).

[27] The principle of restraint when it comes to the issue of whether an accused individual should be released or detained, whether by a peace officer or a judge or justice, has been codified in s. 493.1:

> In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

[28] In ***R.*** v. ***Zora***, 2020 SCC 14, this principle of restraint was expounded upon at length throughout the decision.

Application to this Case

[29] Mr. McGinnis has been provided notice of the Crown's intention to apply for a s. 524 revocation of prior process. He has not been arrested and brought into custody, but is before the Court on the Notice of Application.

[30] As such, he has been allowed to prepare for the revocation hearing, and potential show cause hearing, while out of custody. Thus the infringement upon Mr. McGinnis' liberty interest has been less intrusive than it otherwise would have been had he been arrested and detained for the purpose of the s. 524 revocation hearing.

[31] If counsel for Mr. McGinnis' submission is acceded to, and s. 524(2) requires that an accused be detained in custody at the time that the s. 524 application is brought, I can envisage that police officers may well be more reluctant to release individuals at the time of their detention and arrest than would otherwise be the case were the Crown

prosecutor to have the ability to bring a s. 524 application after the individual's initial release by the police officer.

[32] Police officers making a decision while operating in real time on the street are not generally afforded the same luxury of time and information that the Crown prosecutor has at his or her disposal when the Crown prosecutor reviews the totality of the file or files in respect of an individual. The police officer is making the best decision that they deem appropriate in the circumstances with the information available, or readily accessible by the police officer. This decision is to be made with the principle of restraint in mind.

[33] Were a police officer to know that this is the one and only chance to get it right, it may well be that, in the interests of erring on the side of caution, more individuals would be detained in custody and brought before the Court than would otherwise be the case. This would not be in accord with the requirement to exercise restraint when deciding to detain an individual in custody.

[34] In my opinion, such tactics must be discouraged in order to give meaningful effect to the principle of restraint in s. 493.1, and as required by the Supreme Court of Canada, when considering whether it is necessary or appropriate to detain an individual in custody or to release that individual.

[35] Alternatively, the Crown could have sought an arrest warrant to compel Mr. McGinnis to be held in custody for an appearance on the s. 524 application. This course of action would be somewhat analogous to the "artificial" arrest that has been

considered to be a superfluous and unnecessary means of bringing an accused individual already in custody before the court, according to prior jurisprudence.

[36] Section 524(a) could have stated “has been arrested and is detained in custody…”, or, alternatively, “has been arrested and whether detained in custody or not…”. It does neither. The interpretation that best accords with the purpose of the legislation and intention of Parliament is the one that should be utilized when interpreting and applying s. 524.

[37] It is Mr. McGinnis’ underlying Release Order that is the focus of the s. 524 application.

[38] I find that s. 524(2)(a) does not require that an individual under process compelling his or her appearance in court be arrested and in custody at the time that the s. 524 application is brought. While that may sometimes be the case, it is sufficient that the individual has been arrested at any point in time following the issuance of the earlier process upon which the individual had been released.

[39] This is the only interpretation of s. 524(2)(a) that makes sense if the principle of restraint is to be meaningfully exercised when the liberty interest of an individual accused of committing an offense is at stake.

[40] I am therefore satisfied that the Crown has jurisdiction to bring the s. 524 application before me.

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COZENS C.J.T.C.