IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Pumphrey*, 2006 YKSC 15 Date: 20060228
Docket No.: S.C. No.: 05-1515
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

CHRISTOPHER ALLAN PUMPHREY

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair For the Crown
Malcolm Campbell For the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Crown has applied for judicial review to quash an order of a Territorial Court judge which vacated the respondent accused's pre-trial detention order and released him on new process. The judge did so in response to a successful application by the Crown to adjourn the accused's trial on charges of assault with a weapon, uttering threats and theft. The grounds for the judicial review application are that the Territorial Court judge exceeded her jurisdiction in one, or all, of the following ways:

a) the Territorial Court judge was not sitting as “the justice before whom [the] accused [was] being tried,” as required by s. 523(2)(a) of the *Criminal Code*, R.S. 1985, c. C-46;

b) the Crown did not “consent” to a hearing before the Territorial Court judge for the release of the accused, nor did it consent to the order for release, and consent for both is required under s. 523(2)(c) of the *Criminal Code*; and

c) the Territorial Court judge erred in law by vacating the detention order and issuing a new release order without hearing or considering any particulars of the circumstances underlying the charges or providing the Crown with a reasonable opportunity to adduce such evidence, contrary to s. 523(3), read together with s. 518(1) of the *Criminal Code*.

[2] In the alternative, the Crown applied for a bail review under s. 521 of the *Criminal Code*. The grounds for that application include an allegation that the accused did not show cause before the Territorial Court judge why his detention order should be varied. However, counsel agreed to argue the judicial review application first and, in the event that were to fail, they will return to continue the hearing on the bail review.

[3] Defence counsel argues that the decision of the Territorial Court judge to release the accused was within her jurisdiction and should be upheld. In particular:

a) the Crown consented to the forum of the bail hearing, if not to the disposition. Therefore, the Territorial Court judge was authorized under s. 523(2)(c) of the *Criminal Code* to vacate the previous remand order and release the accused on new process; or

b) in the alternative, the Territorial Court judge was the *justice before whom the accused was being tried* at the time of the bail hearing, in compliance with s. 523(2)(a) of the *Criminal Code*.

[4] Finally, defence counsel submits that, if I am to quash the order of the Territorial Court judge, then I must also quash her order adjourning the trial, as the judge clearly indicated that she would not have granted the adjournment without releasing the accused.

HISTORY OF PROCEEDINGS

[5] A brief history of the proceedings will put the current application in context. The accused was charged on October 24, 2005 with assault with a weapon, namely a hammer, uttering threats to cause bodily harm and theft under $5,000 (the “substantive charges”). He was released by a justice of the peace at a judicial interim release (“bail”) hearing on the same day on a recognizance with conditions and one surety in the amount of $500, no deposit.

[6] The accused then allegedly failed to appear in court on November 2, 2005 and allegedly breached the terms of his release on the same date. He again allegedly violated the terms of his release on November 7 and 14, 2005. He was charged with five counts under s. 145 of the *Criminal Code* (the “process charges”).

[7] On December 26, 2005, the accused was arrested on the new breach of recognizance and fail to appear charges. He was brought before a justice of the peace on January 12, 2006 for a bail hearing on the new charges and was detained on the primary and secondary grounds under s. 515(10) of the *Criminal Code*. His recognizance was revoked.

[8] The accused then returned to court the following day, on January 13, 2006, to seek the earliest possible trial date. With the Crown's reservation that scheduling an early trial was subject to witness availability, the matter was set for trial five days later, on January 18, 2006.

[9] On that day, the Crown sought an adjournment because it had not yet been able to subpoena their main witness, being the complainant on the three substantive charges. The presiding Territorial Court judge granted the adjournment and the matter was rescheduled for trial on January 26, 2006.

[10] On the new trial date, the Crown once again appeared before the same Territorial Court judge, seeking a further adjournment because it had still been unable to subpoena the complainant. The Crown relayed information that the complainant appeared to be reluctant to attend for the trial, and that it was experiencing difficulty serving the subpoena.

[11] The Territorial Court judge initially indicated that she was inclined to grant the Crown one further adjournment, but that she was reluctant to do so without releasing the accused from custody. It was at that point in the appearance on January 26, 2006 that the factual and legal issues regarding the jurisdiction of the Territorial Court judge to entertain a bail hearing began to arise.

ANALYSIS

"Consent" under s. 523(2)(c)

[12] Defence counsel's main argument is that the Crown consented to the Territorial Court judge hearing the issue of bail on January 26, 2006 and that this constitutes "consent" as to forum for the purposes of s. 523(2)(c) of the *Criminal Code*. Of course,

that argument presumes that the consent referred to in s. 523(2)(c) does indeed pertain to the forum (i.e. the judge or level of court) and not the disposition (i.e. the particulars of the release order).

[13] As this argument was novel to me, I asked defence counsel whether there was any legal authority in support. None was provided. I find that somewhat surprising, given that one of the authorities cited by the Crown before me, which I have since reviewed in greater detail, was the text, *The Law of Bail in Canada*, 2nd ed. (Toronto: Carswell, 1999) by Gary T. Trotter. At pp. 351 to 354 of that text, Mr. Trotter discusses consent variations under s. 523(2)(c) of the *Criminal Code* and poses the precise question: To what does the condition of consent pertain? He goes on to note that it may pertain to the forum of the proceeding, in which case the consent would contemplate the willingness of both parties to have a contested proceeding adjudicated before one of the judges or courts referred to, while they may disagree upon the result: see, for example, *R.* v. *Buckmeir* [1996] B.C.J. No. 161 (B.C.S.C.), at para. 34. Trotter then refers to the competing view that the requirement of consent means that the parties must be in agreement with respect to the result to be achieved, i.e. consent as to disposition. On that view, subject to cause being demonstrated, the court may grant the release order sought by the parties.

[14] Mr. Trotter suggests that the “consent as to disposition” approach is the better view. He states that it is consonant with the general structure of the review provisions in that Part of the *Criminal Code* and it offers a more convincing rationale for permitting the circumvention of the “traditional” review provisions in ss. 520, 521 and 680 of the *Criminal Code*. He further notes that orders made under s. 523(2)(c) are not subject to

review under ss. 520, 521 or 680. Therefore, it would be incongruous for a party to consent to a contested application under s. 523(2)(c), knowing that the decision may be final.

[15] Finally, Mr. Trotter observes that where an accused is charged with an offence under s. 469 of the *Criminal Code*, the "consent as to forum" approach would mean that, with the consent of the opposing party, a judge of a superior court of criminal jurisdiction could alter the previous decision of a judge of a concurrent jurisdiction. He suggests that a fellow judge should only be called upon to make such an alteration when both sides are in agreement with the result of the application, presumably to avoid inconsistent conclusions from the same level of court.

[16] A similar concern was expressed by Provincial Court Judge A.P. Ross, in *R.* v. *Hill*, 2005 NSPC 50. At para. 10 of that decision, Ross J. noted in his preliminary comments that the decision of a judicial officer on a bail hearing must have some degree of finality and should not be lightly interfered with. In particular, an accused should not be permitted repeated access to the same level of court on the same issue.

[17] In *R.* v. *Wilder*, [1996] B.C.J. No. 2136, at para. 12, Scarth J. agreed with the Crown's submission in that case that the accused could not obtain relief under s. 523(2)(c), notwithstanding that the British Columbia Supreme Court was the court before which the accused "is to be tried", because the Crown did not consent to the order sought and that "such consent is a requirement under that subsection."

[18] I have been unable to uncover much additional authority on what consent means under s. 523(2)(c) of the *Code*. However, in his text *The Art of Bail – Strategy and*

Practice (Toronto: Butterworths, 1999), Joel I. Katz, seems to presuppose that the consent in s. 523(2)(c) is to disposition. At page 59, he states:

> "Finally, an order for release or detention may be vacated and replaced in two other circumstances, the first being when the prosecution and defence jointly consent to such a variation. This is a provision which can be invoked at any time in the proceedings either before a justice (for offences not covered under s. 469), a judge of the superior court (with respect to s. 469 offences) or the trial court, judge or justice. This is a logical and open-ended provision which allows for a measure of flexibility where defence and prosecution agree that a change is necessary. Counsel should remember the existence of this provision and keep in mind that negotiation can often achieve results that otherwise cannot be litigated. If defence counsel is able to convince the prosecution of the merits of a change, the change can be achieved easily and without the need to bring a formal review in superior court."
>
> (emphasis added)

[19] Similarly, in the text *On Criminal Procedure*, (Cowansville, Qc: Les Éditions Yvon Blais Inc., 1982) by Messrs. Béliveau, Bellemare and Lussier, trans. Josef Muskatel, the authors refer to s. 457.8(2)(c), now s. 523(2)(c), and state at page 272 that "… this jurisdiction is rarely consented to unless the parties have agreed on the nature of the order that should be made" (emphasis added).

[20] Based upon the foregoing authorities, I am persuaded that Parliament intended, in s. 523(2)(c) of the *Criminal Code*, that "the consent of the prosecutor and the accused" pertains to the disposition of the bail hearing and not simply to the forum of that hearing.

[21] Further, on the facts before me, it is clear that the Crown did not consent to the release of the accused by the Territorial Court judge on January 26, 2006. In the transcript of the appearance, after the Territorial Court judge initially raised her concern about the custodial status of the accused in the context of the contemplated

adjournment, the Crown clearly stated at p. 15 that the perceived dilemma could be appropriately balanced by making the next trial date peremptory upon the Crown. And further:

> "In my submission that is all that is required in the circumstances of the case to balance the interests. The Crown opposes Mr. Pumphrey's release from custody."

[22] Notwithstanding that statement of the Crown's position, the Territorial Court judge continued to express her concern about balancing the liberty interest of the accused with the prospect of an adjourned trial. At paras. 5 and 6 of her reasons for judgment, cited as *R.* v. *Pumphrey*, 2006 YKTC 15, she stated as follows:

> "In all of the circumstances, it is my view that the appropriate way to balance the interests in this particular case is to grant the adjournment, but that adjournment is granted on a peremptory basis, and if the Crown is unable to produce Mr. Whipp or unable to subpoena him between now and the next trial date, in my view, it is not appropriate for there to be any further adjournments. However, to balance the concern about Mr. Pumphrey sitting further in custody as a result of the difficulties occasioned in locating Mr. Whipp, in my view, is inappropriate. So to address that interest, I am going to release Mr. Pumphrey on process.
>
> Do counsel want to make submissions as to conditions or type of process? My inclination was simply to re-release him on what he'd been released on before."

[23] With respect, it would appear that the Territorial Court judge made her decision to release the accused notwithstanding the lack of consent by the Crown. Under s. 523(2)(c) of the *Code*, she had no jurisdiction to do so. Therefore, she acted in excess of her assigned statutory jurisdiction, which is grounds for quashing her decision by an order in the nature of *certiorari*: *R.* v. *Russell*, 2001 SCC 53 at para. 19. Further, she lost jurisdiction by failing to observe a mandatory provision of the *Criminal Code*: *R.* v. *Forsythe*, [1980] 2 S.C.R. 268 at p. 4 (QL).

[24] In the event I am wrong in my view of the meaning of consent in s. 523(2)(c), and if it pertains to forum and not disposition, I am nevertheless of the view that, on the facts of this case, there is no evidence that the Crown advertently consented to the Territorial Court judge as the proper forum for this bail hearing. Here, defence counsel says that when the Territorial Court judge initially indicated that she was considering releasing the accused as a condition of granting the adjournment, the Crown should have expressly stated its objection to her jurisdiction, presumably by citing s. 523(2) of the *Code* and the lack of any applicable provision bestowing such jurisdiction.

[25] I find that submission to be somewhat unrealistic and unduly onerous in its expectation of the Crown, given the dynamic circumstances of the exchange between counsel and the Territorial Court judge during the appearance on January 26, 2006. Firstly, I have already referred to the Crown's initial express opposition to the accused's release from custody, which occurred early on in that exchange. Secondly, it appears as though the Territorial Court judge essentially came to her decision to release the accused, notwithstanding the Crown's stated objection to that result. Thirdly, at no point in the entire appearance or in the judge's oral reasons was any section of Part XVI of the *Criminal Code* even mentioned, let alone any specific reference to s. 523.

[26] Nevertheless, the judge then went on to ask counsel for submissions on the conditions of the accused's release. At that point, Crown counsel obviously felt uncomfortable, presumably because the Territorial Court judge could eventually sit as the trial judge. He was quoted at para. 14 of the reasons for judgment, cited above, as stating the following:

> "Your Honour, in my submission, the Court finds itself in a difficult position in that the JP who heard the application had the benefit of hearing the

> Crown's allegations and submissions on the seriousness of the offences and the criminal record alleged with respect to this offender. You, sitting as the trial judge — I mean, I'm not in a position to offer any of that information to you unless we're able to sort of deal, you know; I don't know if you consider yourself seized of the matter or whether you want to hear any of the background facts and, in effect, re-argue the bail hearing, and I don't have the other files with me with respect to the breaches to sort of couple those to your consideration. So in my submission, if we're to proceed in this manner at this moment, you won't have the benefit of being fully informed."

[27] To that, the Territorial Court judge replied, at paras. 15 through 17:

> "THE COURT: Mr. Sinclair, bottom line, I'm not prepared to grant the adjournment unless he — if he is still going to be sitting in custody, okay. So I am going to release him as a condition of granting the adjournment, okay?
>
> MR. SINCLAIR: Yes.
>
> THE COURT: So the only question for me at this point is what the appropriate conditions are, if counsel choose to make submissions on them."

[28] In response, Crown counsel noted, at para. 18, that he was in a bit of a "catch-22" situation and later, at para. 28, he questioned the jurisdiction of the Territorial Court judge as follows:

> "I suppose I should note my own confusion, if I can put it that way, as to the source of your jurisdiction to reconsider the bail conditions …"

[29] Reading the transcript and the reasons for judgment as a whole, I am satisfied that the Crown did not at any time consent to holding a bail hearing before the Territorial Court judge under s. 523(2)(c). To the extent he was invited to make submissions on the possibility of the accused's release and the conditions of the release order, the Crown was effectively given a "Hobson's choice", that is, no choice at all.

Was the accused being “tried” under s. 523(2)(a)?

[30] The next issue is whether the Territorial Court judge was acting within her jurisdiction under s. 523(2)(a) of the *Criminal Code*, which would be the case if the accused was “being tried” before her at the time of the bail hearing. This, in turn, requires a consideration of when a trial is deemed to begin, and that issue is further complicated by the different practices and procedures in the territorial/provincial courts versus those in the superior courts of criminal jurisdiction.

[31] This was the central question in *R.* v. *Hill*, cited above. That case noted that in *Basarabas* v. *The Queen*, [1982] 2 S.C.R. 730, a unanimous Supreme Court of Canada held that “trial” may have a different connotation, depending upon the section of the *Criminal Code* being applied. For example, the Court affirmed the general proposition that, when a jury is involved, the trial commences when the accused has been placed in the charge of the jury.

[32] Other cases have posited that a trial begins when an accused enters his or her plea. However, in superior courts of criminal jurisdiction, that plea is not normally entered until the accused is arraigned immediately before or at the commencement of the trial. According to this view, if the accused had a preliminary inquiry in the territorial/provincial court, and was committed to trial in the superior court, then his or her trial would not be considered to have commenced until that arraignment. However, the practice in the territorial/provincial courts is that the plea is entered at a much earlier point in the process, and the actual hearing of evidence may take place several weeks or months after the plea is entered (*Hill*, cited above, at para. 40).

[33] Therefore, if one holds that a trial is deemed to begin when the plea is entered, there would be significant disparity in the rights of accused persons in the two levels of court to show cause why their release orders should be varied under s. 523(2)(a). An accused being tried in the superior courts would have to wait until their arraignment at the outset of the trial. In some jurisdictions, that wait could be for several months, perhaps even a year or more. However, an accused in the territorial/provincial courts could apply under that provision any time after the plea had been entered. The prospect of such unequal treatment is sufficient reason, in my view, to reject that interpretation of when a trial begins.

[34] In his text, cited above, Mr. Trotter noted the legislative history behind s. 523(2)(a) of the *Criminal Code*, at pp. 343-345. Originally enacted as s. 457.8(2) of the *Bail Reform Act*, the section provided:

> "Notwithstanding subsection (1), the court, judge or justice before whom an accused is being tried may, upon cause being shown, at any time during the trial, vacate any order previously made … and make any other order provided for in this Part …"
>
> (emphasis added)

[35] The section was then amended by the *Criminal Law Amendment Act*, 1975, to read:

> "Notwithstanding subsection (1)
>
> (a), the court, judge or justice before whom an accused is being tried or is to be tried …"
>
> (emphasis added)

[36] The current version of this provision, as amended in 1985, dropped the words "or is to be tried" and now states:

> "Notwithstanding subsections (1) and (1.1)
>
> (a), the court, judge or justice before whom an accused is being tried, at any time,
>
> …
>
> may, on cause being shown, vacate any order previously made under this Part …"
>
> (emphasis added)

[37] Trotter concludes from these amendments that to obtain relief under the current provision, the accused and the Crown "must wait until the trial has actually begun." However, with respect, he does not go on to specifically address when a trial can be said to have "actually begun".

[38] In *Hill*, cited above, at para. 48, Ross J. concludes from his thorough review of the case law and the relevant *Criminal Code* provisions that, in the provincial (and territorial) courts, an accused can be said to have "embarked on an actual trial" at "the stage where evidence is called."

[39] Parliament has chosen not to legislate when a plea must be entered in a proceeding (see, for example, s. 606 of the *Criminal Code*). Rather, it has implicitly left that procedural decision in the hands of the courts. Presumably, Parliament may be said to be aware that different courts adopt different procedures with respect to the entry of pleas and that practices may differ from jurisdiction to jurisdiction. However, I think it can be conversely presumed that Parliament did not intend that s. 523(2)(a) should be interpreted as meaning that the trial commences at the point when the plea is entered, since such an interpretation could result in a significant disparity in the rights of accused persons, depending upon which court they are being tried in, as I discussed above.

[40] In the result, I conclude that a trial at the territorial/provincial court level begins when the Crown opens its case and evidence is called. However, there may be

instances where the Crown opens its case with one or more motions on the admissibility of evidence, which could necessitate one or more *voir dires.* In some of those cases, depending on the nature of the motions and/or the evidence called on the *voir dires*, the trial may be deemed to have commenced and the judge would be seized of the matter.

[41] Defence counsel argues that the Territorial Court judge was the assigned trial judge on January 26, 2006 and that, at the outset of the appearance on that day, the matter was being tried. I am unable to accept that proposition. Section 803(1) of the *Criminal Code* states that the "… court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed …" (emphasis added). As I read the transcript of the appearance on January 26, 2006, notwithstanding the opening statement by defence counsel that the matter was "set for trial" and that he was "prepared to proceed", the first statement from the Crown was that it was making "an application to adjourn the trial". From that point on, the Court heard the Crown's submissions on the adjournment application, which in turn led the judge to consider the accused's custodial status, as I have already indicated. No evidence was called prior to the adjournment application; nor were there any other applications or *voir dires* at that appearance.

[42] Thus, I cannot characterize the January 26th appearance as one where the adjournment was sought "during the trial", as phrased in s. 803(1). If it was, then in order to be considered as an adjournment "before the trial", the logical extension of the defence argument is that such an application would always have to be made on an earlier date than the assigned trial date. That, to me, seems an unnecessarily strict approach and one which does not accord with the daily routine of trial courts.

Commonly, counsel may have to wait until the day assigned for trial to see if their witnesses attend and to determine if they are ready to proceed. Further, judges adjourning such matters, prior to any evidence being called, are certainly not considered seized.

[43] I would add, once again, that by not legislating when a plea must be entered, Parliament presumably intended to allow courts to determine for themselves the timing of certain steps in criminal proceedings and to organize those proceedings as they see fit. Consonant with that intention would be an interpretation of s. 803(1) where “during the trial” means at some point after the Crown opens its case and calls evidence, as such an interpretation would allow the courts greater latitude in determining how cases will proceed.

[44] I conclude the accused was not “being tried” before the Territorial Court judge during the appearance on January 26, 2006 and, accordingly, she had no jurisdiction under s. 523(2)(a) of the *Code* to vacate his detention order and release him on new process. Therefore, I similarly quash her decision to do so by an order in the nature of c*ertiorari*.

[45] While it may be unnecessary to do so, I would also note that the Crown’s application for judicial review purported to deal separately with the three-count Information on the substantive charges and the four collateral Informations on the related process charges. It was those latter five charges which resulted in the detention of the accused by the justice of the peace on January 12, 2006 and the revocation of his original recognizance. They were set for trial on February 7, 2006. As it turns out, I am advised that on that date the process charges were resolved by a plea bargain and,

therefore, are now technically moot. However, on January 26, 2006, they were clearly not before the Territorial Court judge and the accused was not then “being tried” on them. Nor did the Crown consent to the judge dealing with the process charges at that time or to the detention order being revoked and the accused being released. Therefore, the Territorial Court judge had no jurisdiction to proceed as she did with respect to the process charges either.

Quashing the adjournment

[46] Defence counsel also argued that I should treat the decision of the Territorial Court judge to adjourn the trial as inextricably linked to her decision to release the accused. Therefore, if I were to quash her decision to release, then I should also quash her decision to adjourn. I reject this argument for essentially two reasons.

[47] Firstly, while I acknowledge that the Territorial Court judge felt the adjournment had to be balanced by releasing the accused, since I have found that she had no jurisdiction to release the accused, her approach to the perceived dilemma was misguided from the outset.

[48] Secondly, the orders are separate orders. The release order has been properly challenged by the Crown as being in excess of the judge’s jurisdiction. The adjournment order has not been challenged by the defence. I presume the Crown had no formal notice prior to the hearing of this matter before me that the defence would be seeking to challenge the judge’s decision on the adjournment (at least, none was alluded to by defence counsel). Therefore, it would be improper and unfair for me to reverse that decision as part of my response to the Crown’s application for judicial review. Indeed, I

don’t see how I have any jurisdiction to even consider such a submission at this stage, since it is tantamount to an appeal of the adjournment.

CONCLUSION

[49] I find that the Territorial Court judge had no jurisdiction to reconsider the accused’s bail status at the appearance on January 26, 2006, and I quash her order vacating the detention order made by the justice of the peace on January 12, 2006 and releasing the accused on a further recognizance. The result of these reasons is that the said detention order remains in force and effect and, since the accused is now at large, I order that he surrender himself to the R.C.M. Police pursuant to s. 145(2) of the *Criminal Code* as soon as is practicable. Should he fail to do so, a warrant may be issued for his arrest. I am advised that his trial on the substantive charges is set to take place on March 27, 2006.

[50] Given my conclusion, it is unnecessary for me to address the remaining issue on the judicial review application or the Crown’s alternative application for a bail review under s. 521 of the *Criminal Code*. However, I would simply observe here that by proceeding as she did, the Territorial Court judge also failed to clearly address the question of onus. On an application under s. 523 of the *Code*, the applicant (which could be the Crown or the accused) should logically bear the onus. Yet in this case, there was no clearly defined “applicant”, as the judge was effectively acting on her own motion. Given that it was the accused who bore the onus at his bail hearing on January 12, 2006 (when he was ordered detained) and given that it was he who stood to benefit by the reconsideration of his custodial status, the accused should have borne the onus before the Territorial Court judge and been clearly required to “show cause” why he should be

released. Most likely, the reason this point was not specifically addressed, and I say this with respect and recognizing the dynamics of the situation, is that the Territorial Court judge proceeded without notice to the Crown and without giving the Crown a full and fair opportunity to respond. Had she done so, I expect the Crown would have given greater consideration to both the reverse onus issue and the issue of jurisdiction.

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GOWER J.