

CANADA / JUDGMENT

R. v. Saunders

2001 BCSC 1363

COURT

Supreme Court of British Columbia

DECIDED

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Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN
PETITIONER

AND:

RONALD RYAN SAUNDERS
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE McKINNON

Counsel for the Crown: V. Toselli

Counsel for the respondent: P. Ryan

Date and Place of Hearing: September 21, 2001

New Westminster, BC

- [1] The accused contends that certain provisions of s. 515 of the Criminal Code of Canada, R.S.C., 1985, c. 3-46 (Judicial Interim Release) are unconstitutional. He filed and served a "Notice of Intention To Question Constitutional Validity Pursuant To Constitutional Question Act [RSCBC 1996] Chapter 68."

- [2] Counsel for the Crown conceded proper service and agreed the matter could proceed notwithstanding that he had relatively little preparation time, commenting only that he wished to reserve the right to argue s. 1 of the Canadian Charter of Rights and Freedoms should the matter proceed to appeal. The Crown acknowledged that where the liberty of a person is in issue, every effort should be made to proceed expeditiously.

Background

- [3] Mr. Saunders is charged in an Information with three counts of criminal misconduct alleged to have occurred during a "home invasion" on July 19, 2001 at Surrey, British Columbia. He is jointly charged with another who faces additional counts relating to the possession of a weapon.
- [4] On August 21, 2001 a judicial interim release hearing took place before Lemiski P.C.J. The Crown sought Mr. Saunders' detention but an order for his release was made on his recognizance with one surety plus a number of conditions. This was pursuant to s. 515(2)(c) of the Criminal Code. The accused could not meet the conditions and remains in custody.
- [5] On September 6, 2001, the Crown filed an application in this court under s. 521(1) for an order under s. 521(8). This procedure permits a review of the release conditions imposed in the provincial court and, if the prosecutor shows cause, also permits this court to make whatever order is appropriate in the circumstances. It is the Crown's position that Mr. Saunders ought to be detained.
- [6] Given the relatively wide latitude available to this review process, the defence served notice that it would argue for cash bail, since the accused could not obtain a surety. Counsel for the defence indicated that the accused had \$700 available to him and he would be seeking consideration of this amount as appropriate in the circumstances.
- [7] The issue is joined by the provisions of s. 515(2)(d) which requires consent of the prosecutor before the court can release a person on cash bail without surety. The Crown refuses consent. Both counsel agreed that before this court could consider the substantive issue of release the constitutional validity of s. 515(2)(d) had to be resolved, at least insofar as the words. "with the consent of the prosecutor" are concerned.

The Issue

- [8] Does s. 515(2)(d) of the Criminal Code infringe Mr. Saunders rights under s. 11(e) of the Canadian Charter of Rights and Freedoms?
- [9] The relevant provisions of the Criminal Code include:
515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a

reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

- (2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released
- (a) on his giving an undertaking with such conditions as the justice directs;
 - (b) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
 - (c) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
 - (d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or
 - (e) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

...

- (3) The justice shall not make an order under any of paragraphs (2)(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made.

...

- (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:
- (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

- (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
- (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

[emphasis added]

...

[10] The relevant portion of the Charter is s. 11(e):

11. Any person charged with an offence has the right...

(e) not to be denied reasonable bail without just cause;

[11] The provision in issue was introduced as an amendment to the Code in 1977 as s. 457(2)(c.1): Criminal Law Amendment Act, S.C. 1974-75-76 c. 93, s. 47(2).

[12] I will hereafter refer to certain terms in abbreviated form and for the purpose of clarity define these as follows:

- (a) "cash bail" describes entering into a recognizance before a justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs;
- (b) "local" describes a person whose ordinary place of residence is within the province and within two hundred kilometers of the place in which he or she is in custody; and
- (c) "outsider" describes a person whose ordinary place of residence is outside the province or not within two hundred kilometers of the place in which he or she is in custody.

The respondent's position

[13] Mr. Saunders contends that the words "with the consent of the prosecutor" in s. 515(2)(d) violate his s. 11(e) Charter right not to be denied reasonable bail without just cause.

[14] The thrust of Mr. Saunders' argument is that a justice may find that reasonable bail for an accused is cash bail, however, the prosecutor can prevent the release of the accused from custody by refusing consent and without showing just cause.

[15] Mr. Saunders submits that the word "bail" in s. 11(e) of the Charter must be defined broadly and includes all forms of judicial interim release. The right not to be denied reasonable bail without just cause entrenches the effect of the presumption of innocence at the bail stage of

the criminal process just as s. 11(d) entrenches that same right at the trial stage. As a result, Mr. Saunders contends that a person charged with an offence has a right both to obtain judicial interim release and that any restrictions imposed upon his liberty be reasonable. In support of his argument, Mr. Saunders extensively cites the reasons of Lamer C.J.C. in *R. v. Pearson* (1992), 77 C.C.C. (3d) 134 (S.C.C.).

- [16] Mr. Saunders further submits that s. 515(10) exhaustively describes the "just cause" grounds upon which an accused can be denied judicial interim release.
- [17] *R. v. Horvat* (1972), 9 C.C.C. (2d) 1 (B.C.S.C.), is cited for the proposition that there must be a "show cause" progression from s. 515(2)(a) through to s. 515(2)(d). Mr. Saunders argues that s. 515(3) requires the prosecutor to show cause why an order under the immediately preceding paragraph should not be made. It is argued that this progression is inconsistent with the words "with the consent of the prosecutor" because a decision to withhold consent relieves the prosecutor of the duty to "show cause." The decision in *Horvat*, however, pre-dates the introduction of s. 515(2)(d) [formerly s.457(2)(c.1)] in 1977.
- [18] Mr. Saunders further argues that the administrative choice of a place of custody can determine whether the accused falls within s. 515(2)(d) or s. 515(2)(e). If an accused is an outsider, a justice may determine that reasonable bail is cash bail under s. 515(2)(e). If, however, an accused is a local, a justice may not make such a determination without the consent of the prosecutor. Without suggesting any impropriety on the part of the Crown, the implication is that the applicability of ss. 515(2)(d) or (e) may be manipulated in certain circumstances merely by the administrative decision of shifting an accused's place of custody at the time of the Judicial Interim Release hearing.

The Crown's Position

- [19] The Crown contends that Mr. Saunders has not proved on a balance of probabilities that s. 11(e) of the Charter creates a substantive right to cash bail for locals and that as a consequence s. 515(2)(d) of the Criminal Code does not breach s. 11(e).
- [20] The Crown replies that the right to reasonable bail is satisfied by the original scheme of the Bail Reform Act, 1971 S.C. c. 37, preserved in ss. 515(a), (b), (c) and (e) of the Criminal Code. The Crown argues that this view is supported by a reading of *R. v. Pearson* (1992), 77 C.C.C. (3d) 134 (S.C.C.), distinguishing that case from the case at bar. Most important are Lamer C.J.C.'s comments at p. 141:

Most of the current bail provisions in the Criminal Code were enacted in the Bail Reform Act, S.C. 1970-71-72, c. 37. The Bail Reform Act established a basic entitlement to bail. Bail must be granted unless pre-trial detention is justified by the prosecution. In *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.), at p. 328, Martin J.A. described the Bail Reform Act as "a liberal and enlightened system of pre-trial release". In my view, s. 11(e) transforms the basic entitlement of this liberal and enlightened system into a constitutional right. Section 11(e) creates a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise.

- [21] The Bail Reform Act did not allow for cash bail for locals under any circumstances. Further, the Crown argues that Lamer C.J.C.'s findings with respect to a broad interpretation of "bail" were directed towards the reverse onus provisions under s. 515(6)(d) not the provision at issue in the case at bar. The Crown contends that His Lordship's definition of reasonable bail does not include cash bail for locals.
- [22] The Crown's position at bar suggests that cash bail per se is not required to be an option for the "reasonable bail" requirement in s. 11(e) of the Charter. This is based on a reading of Pearson that restricts the findings in that case regarding reasonable bail to the provisions included in the "liberal and enlightened system of pre-trial release" found in the Bail Reform Act.
- [23] The Crown further argues that Parliament has never intended that locals have access to cash bail without the consent of the prosecutor. Locals have never had unqualified access to cash bail. Prior to the 1977 amendments, the Criminal Code did not contain an equivalent to s. 515(2)(d) allowing cash bail for locals. The fact that outsiders have been given the benefit of s. 515(2)(e) is argued to exist because the inability of outsiders to obtain a surety may have more to do with the fact that they do not know people in the local community rather than act as a reflection of their lack of support in the local community. The inference is that locals ordinarily do not encounter similar difficulties.
- [24] The Crown contended that if a local could not obtain a surety then that suggested his or her unsuitability for release generally. If no one in the community was prepared to act as the "community gaoler", then but for exceptional circumstances which might only be known by a local Crown counsel, cash bail would be unsuitable. The suggestion or inference was that Parliament perhaps considered that Crown counsel would be best placed to assess factors unavailable to the court.
- [25] In this regard, Crown counsel commented that as an example, consent might be withheld where the accused's money or "other valuable security" was derived from illegal activities or where an accused cannot be trusted on his or her own.
- [26] Surely the answer to that submission is that if such concerns arise, then some proof should be offered and tested in the usual way before a Justice. That would preclude any temptation on the part of a Crown counsel to act in a capricious manner, knowing his or her decision could not be assailed.
- [27] It seems to me as well that one might move from one area to another in this country and thus become a member of a new community, be arrested on some allegation and then be unable to locate a surety, simply because of his or her recent arrival. That person has not had the opportunity to cultivate friendships and/or make his or her character known. Notwithstanding, it is open to Crown to refuse consent to cash bail and it may be simply because Crown has no information about the person.

- [28] It is also argued that the "just cause" analysis as mandated by s. 515(3) of the Criminal Code is simply not engaged if consent to release under s. 515(2)(d) is refused by the prosecutor. This argument is founded upon a functional reading of s. 515(3) and the fact that the decision in *Horvat* (1972), 9 C.C.C. (2d) 1 (B.C.S.C.) pre-dates the 1977 introduction of s. 515(2)(d) [formerly s. 457(2)(c.1)].
- [29] Insofar as the geographic concerns raised by Mr. Saunders, that the administrative choice of a place of custody can determine whether the accused falls within s. 515(2)(d) or s. 515(2)(e), the Crown responds that any change to an accused's place of custody would put the accused in a better position as a move by Corrections can make an outsider a local or a local an outsider. A move closer will put the accused in closer proximity to his community, in theory enhancing his or her chance of providing a surety. A move away from his or her place of residence would allow for the consideration of cash bail under s. 515(2)(e).
- [30] In my view this supports Mr. Saunders' contention that such administrative manoeuvres are arbitrary in nature. The Crown's position presupposes that all such manoeuvres are done in the best interests of the accused, a leap of faith that many defence counsel would be reluctant to accept.
- [31] Neither counsel were able to find case law directly addressing the constitutionality of s. 515(2)(d). A search of the case law reveals that since the introduction of the Charter, the provision at hand has been challenged only once. The only consideration of s. 515(2)(d) was in *R. v. Melo* (1996), 49 C.R. (4th) 184 (Ont. Gen. Div.). Logan J. held:

The submission by Mr. Bloomenfeld for a declaration under Section 52 of The Constitutional Act, 1982 that Section 515(2)(d) of the Criminal Code, which requires the consent of the prosecutor as a condition precedent to a cash deposit, has merit in certain circumstances. "With the consent of the prosecutor ..." appears to put a deposit type release under the control of the Crown.

- [32] However, His Lordship did not deal with the constitutional argument as he had already found that the provincial court judge had erred in law by ordering a release with surety and deposit terms not permitted by s. 515 (2)(c) the Criminal Code.
- [33] The provision was considered, though not on Charter grounds, in *R. v. Boechler* (1995), 177 A.R. 13 (Q.B.). In that case, Veit J. held that the Provincial Court Judge at the bail hearing had given inadequate consideration to other possible methods of release when the prosecution did not consent to cash bail. Her Ladyship noted, at para. 19:

It is somewhat difficult to discern, without historical research for which (I) do not have the time on this motion, why Parliament decided that a judge cannot impose cash bail without the consent of the Crown.

- [34] The Crown pointed to commentary on s. 515(2)(d) that admittedly casts little light upon the purpose of the words "with the consent of the prosecutor". In G.T. Trotter, *The Law of Bail in Canada* (Scarborough: Carswell, 1992), Professor Trotter notes, at p. 164:

The requirement that the prosecutor must consent before the accused may secure his or her release in the manner contemplated by this paragraph is anomalous.

[35] The Melo case is discussed by Professor Trotter in the more recent edition of his text *The Law of Bail in Canada*, 2d ed. (Scarborough: Carswell, 1999). He comments, at p. 248:

It is unclear why Parliament attached this condition to the availability of cash deposits in this paragraph. The availability of this form of release should remain solely in the discretion of the justice or judge considering release. Contrast the position under s. 679(5), in which there is no limitation on combining a surety with a deposit and no requirement of the Crown's consent.

[36] Professor Trotter does note, at 38ff, that the amendment that created the current s. 515(2)(d) was supported by members of the Criminal Lawyers Association who testified before the Standing Committee on Justice and Legal Affairs on December 4, 1975.

[37] In *R. v. Pearson* (above), Lamer C.J.C. characterized the scope of the right contained in s. 11(e) of the Charter. This case represents the first occasion on which the Court had been called upon to define the scope of the right contained in s. 11(e) of the Charter. With respect to His Lordship's comments on the scope of the right, the Court was unanimous, disagreeing on the finding that s. 515(6)(d) of the Code does not violate s. 11(e) of the Charter. Both counsel have cited *Pearson*, at pp. 137-141, in their arguments:

Section 11(e) entrenches the effect of the presumption of innocence at the bail stage of the criminal process. Section 11(d) does the same at the trial stage. Sections 11(d) and 11(e) define the procedural content of the presumption of innocence at the bail and trial stages of the criminal process, and constitute both the extent and the limit of that presumption at those stages. The substantive right in s. 7 to be presumed innocent is operative at both the bail and trial stages, in the sense that it creates a legal rule that the accused is presumed legally innocent until proven guilty, but it does not contain any procedural content beyond that contained in ss. 11(d) and 11(e). Thus s. 515(6)(d) does not violate s. 7 unless it fails to meet the procedural requirements of s. 11(e).

This Court has never before been called upon to define the scope of the right contained in s. 11(e). As a result, some preliminary remarks about s. 11(e) are in order.

Section 11(e) guarantees the right of any person charged with an offence "not to be denied reasonable bail without just cause". In my opinion, s. 11(e) contains two distinct elements, namely the right to "reasonable bail" and the right not to be denied bail without "just cause". The French version of s. 11(e) makes this distinction clearer than does the English version. The French version guarantees the right "de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable". This wording demonstrates that two separate rights are operative, namely the right "de ne pas être privé sans juste cause d'une mise en liberté" ("not to be denied release without just cause") and the right to have that release "assortie d'un cautionnement raisonnable" ("subject to reasonable bail").

"Reasonable bail" refers to the terms of bail. Thus the quantum of bail and the restrictions imposed on the accused's liberty while on bail must be "reasonable". "Just cause" refers to the right to obtain bail. Thus bail must not be denied unless there is "just cause" to do so. The "just cause" aspect of s. 11(e) imposes constitutional standards on the grounds under which bail is granted or denied.

The dual aspect of s. 11(e) can be contrasted with the comparable provision in the United States. In the United States, the excessive bail clause of the Eighth Amendment provides only that "[e]xcessive bail shall not be required". While this wording clearly refers to the terms of bail, there has been considerable debate about whether it also creates a right to obtain bail: see *Stack v. Boyle*, 342 U.S. 1 (1951), at p. 4; *Carlson v. Landon*, 342 U.S. 524 (1952), at p. 545; *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), at pp. 1325-26 and 1329-30, certiorari denied 455 U.S. 1022 (1982); *United States v. Salerno*, 481 U.S. 739 (1987), at pp. 752-55, and D. B. Verrilli Jr., "The Eighth Amendment and the Right to Bail: Historical Perspectives" (1982), 82 Colum. L. Rev. 328. In Canada, there can no such doubt about the scope of s. 11(e). Section 11(e) creates a broad right guaranteeing both the right to obtain bail and the right to have that bail set on reasonable terms.

The dual aspect of s. 11(e) mandates a broad interpretation of the word "bail" in s. 11(e). If s. 11(e) guarantees the right to obtain "bail" on terms which are reasonable, then "bail" must refer to all forms of what is formally known under the Criminal Code as "judicial interim release". In common parlance, "bail" sometimes refers to the money or other valuable security which the accused is required to deposit with the court as a condition of release. Restricting "bail" to this meaning would render s. 11(e) nugatory because most accused are released on less onerous terms. In order to be an effective guarantee, the meaning of "bail" in s. 11(e) must include all forms of judicial interim release.

My conclusion about the meaning of "bail" in s. 11(e) leads me to a comment about terminology. Throughout these reasons, use of the word "bail" reflects the meaning of the word as it is used in s. 11(e). Thus a reference in these reasons to "bail" should be read as a reference to judicial interim release in general and not as a reference to any particular form of interim release.

Most of the current bail provisions in the Criminal Code were enacted in the Bail Reform Act, S.C. 1970-71-72, c. 37. The Bail Reform Act established a basic entitlement to bail. Bail must be granted unless pre-trial detention is justified by the prosecution. In *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.), at p. 328, Martin J.A. described the Bail Reform Act as "a liberal and enlightened system of pre-trial release". In my view, s. 11(e) transforms the basic entitlement of this liberal and enlightened system into a constitutional right. Section 11(e) creates a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise.

[38] It is the Crown's position that these words can have no application to the 1977 amendment creating the words, "with the prosecutor's consent". The Crown says they apply only to the 1972 Bail Reform Act since that was the reference given by the Supreme Court of Canada. I am not persuaded.

- [39] I am unable to accept the Crown's position that the words in issue serve any proper judicial function. It seems an anomaly to give complete judicial interim release authority to a justice from whom an appeal can be taken, but hive off one aspect for the sole discretion of a prosecutor from which no appeal can be taken.
- [40] It is my view that the words, "with the consent of the prosecutor" contained in sec. 515(2)(d) offend sec. 11(e) in that they permit a denial of reasonable bail without just cause. Accordingly I direct that s. 515(2)(d) be read down to exclude those words.
- [41] I did not hear any submissions respecting the substantive issue of release therefore nothing in these reasons should be construed as reflecting any view or opinion respecting Mr. Saunders' continued detention or release. I advised counsel that I was not seized of that issue. The matter may be brought before any justice having jurisdiction.
- [42] Judgment accordingly.

"R.A. McKinnon, J."

The Honourable Mr. Justice R.A. McKinnon

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